Federal Court  Cour fédérale

Date: 20220607

Docket: T-154-21

Citation: 2022 FC 844

Ottawa, Ontario, June 7, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

GERALD FELIX MCDONALD AND MARK PACQUETTE, IN THEIR CAPACITIES AS CANDIDATES AND ELECTORS

Applicants

and

FOND DU LAC DENESULINE FIRST NATION, AS REPRESENTED BY FORMER CHIEF LOUIE MERCREDI, AND COUNCILLORS WILLIE JOHN LAURENT, JAKE MERCREDI, RONNIE AUGIER, ANDREW ISADORE AND FREDERICK MARTIN; AND, DEREK MCDONALD, IN HIS CAPACITY AS CHIEF ELECTORAL OFFICER, JULES LIDGUERRE, IN HIS CAPACITY AS DEPUTY ELECTORAL OFFICER

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Gerald Felix McDonald [Applicant McDonald] and Mark Pacquette [Applicant Pacquette, together, the Applicants] seek judicial review pursuant to sections 18, 18.1, and 26 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] concerning the April 26, 2021 decisions of the Fond du Lac Denesuline First Nation appeal board [Appeal Board] removing them as candidates in the general election [General Election] held on March 26, 2021 [Appeal Decisions].

[2] The Respondents are Fond du Lac Denesuline First Nation [FLDFN], as represented by former Chief and Council. Former Councillor, Susanne "Sabrina" Fern, resigned prior to the General Election. The other Respondents include the FLDFN election officials.

[3] The application for judicial review is allowed. The Appeal Board was not properly constituted and the Applicants were denied procedural fairness.

II. Background

[4] The FLDFN is a signatory to Treaty 8 and a Band within the meaning of the *Indian Act*, RSC 1985, c I-5. The FLDFN elects their Chief and Council pursuant to their customary election code, the *Fond du Lac Denesuline Election Act* [*Election Act*].

[5] Pursuant to Treaty 8, the FLDFN received agricultural settlement funds from Canada that are held in trust [Trust]. An independent board of trustees [Board of Trustees] manages and

invests these funds for the benefit of the FLDFN membership [Membership]. Chief and Council do not have control over these funds. The Trust's involvement in the General Election is discussed below.

A. *Judicial Review of the 2017 Election*

[6] In an earlier challenge to the FLDFN 2017 election [Mercredi Application], I found that the Appeal Board was not properly constituted (*Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 at paras 45-48 [*Mercredi FC*]). I ordered that the appeal of the 2017 election be remitted "to a newly and properly formed Appeal Board to be appointed in accordance with the process set out in s 3.3 of the *Election Act*" (at para 55).

[7] The respondents appealed the order in *Mercredi FC*. On March 9, 2020, the Federal Court of Appeal [FCA] upheld the findings in *Mercredi FC* (*Fond du Lac First Nation v Mercredi*, 2020 FCA 59 at para 3 [*Mercredi FCA*]). The FCA also emphasized that the next FLDFN election must be "followed to the letter" (*Mercredi FCA* at para 9).

B. *Postponements of the 2020 General Election*

[8] The parties agree that the General Election should have been held in September 2020. Instead, it was postponed at least three times and ultimately not held until March 26, 2021.

(1) Events prior to First Postponement

[9] In August 2020, steps were taken to appoint a Chief Electoral Officer [CEO] for the September 2020 General Election. On August 18, 2020, at a special Band meeting, members of the FLDFN nominated candidates for CEO. An election for CEO was held on August 24, 2020. Linda McNabb [Ms. McNabb] received the majority of the votes and Derek McDonald was the runner-up. Derek McDonald was selected as the Deputy Electoral Officer [DEO]. Ms. McNabb subsequently resigned sometime in late August or early September 2020. On August 28, 2020, a notice was posted in the names of Ms. McNabb and Derek McDonald that the General Election would be held on October 16, 2020. On September 3, 2020, former Chief and Council passed a Band Council Resolution [BCR] formally appointing Ms. McNabb as CEO.

[10] After Ms. McNabb's resignation as CEO, a special Band meeting was held on September 15, 2020 where Derek McDonald [CEO McDonald] was selected to replace Ms. McNabb as CEO. The handwritten minutes of this meeting indicate that "Everyone accepts [CEO McDonald] to select [Appeal Board] members." The same minutes state "[CEO McDonald] selected 4 [Appeal Board] members – the fifth [Appeal Board] member will be selected." At this meeting, CEO McDonald also selected Jules Lidguerre as the DEO [DEO Lidguerre]. At some point after this meeting, CEO McDonald solicited Dean Classen as the non-Band member of the Appeal Board.

(2) First Postponement

[11] On September 15, 2020, former Chief and Council passed a BCR postponing the September General Election to November 18, 2020 [First Postponement]. That BCR also extended their terms of office to November 4, 2020 and contemplated further extensions if

necessary. The September 15, 2020 BCR cites the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases),* SOR/2020-84 [*Federal Regulations*]. This Court found section 4 of the *Federal Regulations* invalid and *ultra vires* the federal government on April 1, 2021 (*Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 [*Bertrand*]).

[12] On September 22, 2020, former Chief and Council passed a BCR formally appointing CEO McDonald and setting November 19, 2020 as the date for the General Election.

[13] On November 4, 2020 and November 5, 2020, CEO McDonald and DEO Lidguerre received two emails, one from the Board of Trustees and one from the Chair of the Board of Trustees. These emails alleged that certain candidates, including Applicant McDonald, had improperly promised electors per capita payments from the Trust. Shortly after, every candidate received a memo warning against corrupt election practices.

(3) Second Postponement

[14] On or about November 9, 2020, the Respondents received a letter from Athabasca Health Authority instructing the FLDFN to refrain from holding any community events in the next several weeks to prevent the spread of COVID-19. That same day, the FLDFN Elders Council issued a notice directing that the General Election be postponed due to COVID-19 for “up to 6 months and until safe” [Second Postponement]. This notice referred to the *Federal Regulations* and indicated that the situation would be reviewed every 30 days.

[15] On November 11, 2020, former Chief and Council passed a BCR extending their terms to April 1, 2021. This BCR is not in the record, but a November 12, 2020 letter from Indigenous Services Canada [ISC] states that ISC received a copy of "BCR 886" dated November 11, 2020. ISC and Indigenous and Northern Affairs Canada updated their records to reflect this change in the term of office.

[16] On January 5, 2021, former Chief and Council passed a BCR scheduling the General Election for January 29, 2021. Around the same time, CEO McDonald asked the Appeal Board members selected at the September 15, 2020 meeting to sign their Oath of Office and Declaration. Subsequent to his request, two members of the Appeal Board stepped down.

[17] On January 8, 2021, the Applicants sent a letter to DEO Lidguerre expressing concerns that the *Election Act* was not being followed. On or about January 15, 2021, DEO Lidguerre notified the community that the General Election would be held on January 29, 2021.

(4) Third Postponement & Motion for Interim Injunction

[18] On January 21, 2021, CEO McDonald and DEO Lidguerre wrote a letter that postponed the General Election due to "irregularities beyond our control" and because of complaints from candidates, community members, and the Board of Trustees [Third Postponement]. This letter was postmarked January 26, 2021. In the letter, they explained that the complaints related to alcohol (the FLDFN reserve is dry) and promises to make per capita payouts from the Trust. The letter warned that candidates promising per capita payouts would be removed from the ballot if they did not retract their statements.

[19] On January 22, 2021, the Applicants sought an interim injunction to postpone the General Election pending the final disposition of this application. This Court dismissed the Applicants' motion for an interim injunction on January 29, 2021 (*McDonald v Fond du Lac Denesuline First Nation*, 2021 FC 96 [*McDonald Injunction*]).

[20] On January 5, 2021 a BCR was passed rescheduling the General Election for March 26, 2021. On February 3, 2021, the Chair of the Board of Trustees emailed legal counsel for the Respondents alleging that both Applicants have made "illegal and corrupt election promises of monies to every member from the [Trust]." The Chair of the Board of Trustees stated that the Applicants' "messages are all over social media stating that they will give each member $29,500… We expect the Election Officers to fulfill their fiduciary duties and immediately remove these two candidates from the ballot." The email attached a screen shot of an undated Facebook post allegedly made by Applicant McDonald that states "each individuals should have got what's lifted of [the Trust] which is $2950000" [*sic*].

[21] In early March 2021, CEO McDonald posted a Call for Appeal Board members with an application deadline of March 12, 2021. The poster explains that expressions of interests are being collected because the pandemic made it impossible to hold a special Band meeting. On March 11, 2021, the former Chief and Council passed a BCR appointing five Appeal Board members.

III. The General Election & Appeal Decisions

[22] On March 18 and March 22, 2021, advanced polls opened. At some point before this, CEO McDonald removed the Applicants' names from the ballots. In CEO McDonald's affidavit dated July 30, 2021, he explains that he removed Applicant Pacquette's name because: (1) he is a co-applicant to an unresolved legal action against FLDFN and its former government; and (2) he contravened the *Election Act* by filing the *McDonald Injunction* in this Court instead of pursuing the appropriate appeal routes contemplated in the *Election Act*. CEO McDonald removed Applicant McDonald's name for the same reasons and because: (1) he promised per capita distribution of the remaining monies in the Trust, contrary to a June 2018 BCR titled "Avoiding Treaty 8 Promises" and section 3 of his Declaration of Intent; and (2) he persists to sell, barter, supply, and possess alcohol on the FLDFN reserve, contrary to section 4 of his Declaration of Intent.

[23] CEO McDonald never informed the Applicants of these reasons. The Applicants first realized their names were not on the ballot when they voted on March 26, 2021 on the FLDFN reserve.

[24] Pursuant to the *Election Act*, the appeal period for the General Election runs from March 27, 2021 to April 9, 2021. The parties disagree as to whether the Applicants filed their appeals within this deadline.

[25] The newly elected Chief and Council passed two BCRs appointing two different appeal boards on March 29, 2021 and April 14, 2021. In the end, the Appeal Board consisted of Lucy

Mercredi, David Sanger, Karen Mercredi, Linda Sanger, and Dean Classen. The parties do not dispute that these individuals constitute the Appeal Board.

[26] On or about April 26, 2021, the Appeal Board denied the Applicants' appeals in separate reasons. The Appeal Board stated that the appeals were denied because the appeal materials were not filed within the 14-day appeal period. The Appeal Board also denied Applicant Pacquette's appeal because he allegedly failed to disclose that he was in possession of Band property in his Declaration of Intent.

IV. Issues

[27] After considering the parties' submissions, the issues for determination are:

1. Was the Appeal Board properly constituted?
2. Did CEO McDonald and/or the Appeal Board breach the Applicants' rights to procedural fairness?
3. Did the General Election comply with the *Election Act*?
4. What is the appropriate remedy?

V. Standard of Review

[28] I find that the first and second issues are reviewable on the standard of correctness (*Mercredi FC* at para 35; *Twinn v Sawridge First Nation*, 2017 FC 407 at para 22; *Beardy v Beardy*, 2016 FC 383 at para 45; *Morin v Enoch Cree First Nation*, 2020 FC 696 at para 21 [*Morin*]). On a correctness review, no deference is owed to the decision-maker and the reviewing

court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v Canada (AG)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57). However, as noted in (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*], "the duty of procedural fairness in administrative law is 'eminently variable', inherently flexible and context-specific" (at para 77).

[29] The third issue is reviewable on the standard of reasonableness. This issue encompasses multiple decisions taken by CEO McDonald and DEO Lidguerre, former Chief and Council, and current Chief and Council. Band Councils and First Nation appeal boards are federal boards for the purposes of the *Federal Courts Act* (*Felix Sr v Sturgeon Lake First Nation*, 2011 FC 1139 at para 15). Accordingly, the decisions made by those bodies and electoral officers are subject to this Court's supervisory jurisdiction (*Ratt v Matchewan*, 2010 FC 160 at para 106). Absent one of the exceptions identified in *Vavilov*, this Court applies the standard of reasonableness when reviewing the decisions of administrative decision-makers, including their interpretation of their home statute – in this case, the *Election Act* (*Vavilov* at paras 16-17, 23-25). Therefore, whether the decisions of CEO McDonald, former Chief and Council, and current Chief and Council complied with the *Election Act* is reviewable on the standard of reasonableness. However, for the reasons discussed below, it is not necessary for this Court to analyze the third issue.

VI. Preliminary Issues

A. *What version of the Election Act is in force?*

[30] The parties disagree about what version of the *Election Act* is in force.

[31] The Respondents submit that the *Election Act* attached to CEO McDonald's affidavit, which includes various schedules that have been periodically added since 2004, is the version that is in force. Notable schedules include candidates' Declarations of Intent; a BCR dated July 21, 2020 titled "Avoiding Treaty 8 Promises"; and a BCR dated August 14, 2020 titled "Avoiding Corrupt Practice During Election."

[32] The Applicants state that they are in possession of three versions of the *Election Act*: the version relied on in the Mercredi Application; an uncertified version sent to Applicants' counsel on July 23, 2021; and the version attached to CEO McDonald's Affidavit. The latter two are identical. The Applicants submit that this Court should rely on the version used in the Mercredi Application.

[33] I agree with the Applicants. Clause 16 of the *Election Act* sets out a detailed process governing amendments to the *Election Act*. The text of that clause is the same in all versions relied on by the parties in the present matter. It states:

> Any changes or additions to this Act will require written notice of the proposed changes to be mailed or hand-delivered to ***all*** households on the First Nation Reserve three (3) months prior to their adoption. Anyone having reason to challenge those changes must do so in writing to the First Nation, Attention: Chief and Council within the three (3) month time period. Upon expiry of the three (3) month period, a duly called meeting of the First Nation Electors must be held and a vote must be taken to determine whether a simple majority of those present agree to the change(s) or addition(s).
>
> If the amendments are adopted by a simple majority of those present, Chief and Council shall sign a Band Council Resolution [BCR] to this effect and file the same with Indian Affairs.
>
> [Emphasis in original.]

[34] The parties agree that amendments to the *Election Act* were made on May 4, 2017. However, the versions relied on by the parties state that different amendments were made on that day. The version of the *Election Act* relied on in the Mercredi Application states that at "a duly convened meeting" on May 4, 2017, clauses 2.11(b), 3.2, 3.6, 8.6 and 14.4 were amended. In comparison, the version attached to CEO McDonald's Affidavit notes that on May 4, 2017 clauses 2.11(b), 3.2, 3.4(b) & (e), 3.6, 8.4, 8.6 and 14.4 were amended. It also states that clause 8.5 was added and eliminated. I also note that there are differences between clauses 3.4(d), 3.6, and 14.2.

[35] After reviewing the record, I find that there is no evidence that the changes to clauses 3.4(b), 3.4(d), 3.4(e), 3.6, 8.4, and 14.2 and the removal of clause 8.5 followed the process set out in clause 16. Therefore, I accept that the version of the *Election Act* relied on in the Mercredi Application is, on the balance of probabilities, the version that is in force. From here on, I will simply refer to this version as the "*Election Act*."

[36] I also find that any schedules that purport to change the substance of the *Election Act* are similarly improper amendments. For example, the BCR dated July 21, 2020 titled "Avoiding Treaty 8 Promises" purports to make substantive changes to the *Election Act* regarding candidates' eligibility. Accordingly, it is an improper amendment. It is therefore unnecessary to assess the contents of the BCR. To the extent that Chief and Council wish to amend the clauses of the *Election Act* dealing with candidates' eligibility or add schedules that do the same, the amendment process outlined in clause 16 must be followed.

[37] In comparison, the August 14, 2020 BCR titled "Avoiding Corrupt Practice During Election" does not attempt to change the substance of the *Election Act*. It clearly prohibits certain corrupt practices that are limited to Chief and Council. This is consistent with the definition of "corrupt practice" included in the *Election Act*. Likewise, clause 2.8 of the *Election Act* defines "Declaration of Intent" and the corresponding schedule is consistent with this definition. Therefore, the August 14, 2020 BCR and the Declaration of Intent are proper schedules.

B. *Should CEO McDonald's Affidavit be struck?*

[38] The Applicants object to CEO McDonald's affidavit. The Applicants submit that it violates the July 26, 2021 Direction of this Court, which directs that the contents of CEO McDonald's Affidavit may only be in reply to the supplementary affidavit of Applicant McDonald dated June 25, 2021. The Applicants submit that Rule 307 confers a procedural right on a respondent to serve its evidence in response to an applicant (*Eli Lilly Can v Novopharm Ltd*, 2008 FC 875).

[39] On August 3, 2021, the Applicants wrote a letter to the Court objecting to CEO McDonald's affidavit. They wrote a follow up letter on August 12, 2021 to the same effect. On September 2, 2021, Prothonotary Molgat informed them that the appropriate recourse is to "approach the Court by way of a motion."

[40] The Respondents state that the Applicants have not followed the process outlined by Prothonotary Molgat and, therefore, the Applicants may not object to CEO McDonald's Affidavit now because they did not bring a motion earlier. In principle, I do not agree. An

applicants is free to bring a motion as a preliminary matter within their written submissions or during the hearing. However, for the following reasons, I would still decline to strike CEO McDonald's Affidavit.

[41] The Respondents failed to comply with Prothonotary Molgat's July 26, 2021 oral Direction and Rule 307. Pursuant to Rule 56, "[n]on-compliance with any of these Rules does not render a proceeding, a step in a proceeding or an order void, but instead constitutes an irregularity, which may be addressed under rules 58 to 60." Rule 58(1), titled "Motion to attack irregularity", states, "[a] party may by motion challenge any step taken by another party for non-compliance with these Rules." However, that motion "shall be bought as soon as practicable after the moving party obtains knowledge of the irregularity" (Rule 58(2)). Furthermore, a motion to strike an affidavit in the context of a judicial review application should be allowed only rarely, when it is in the interest of justice to do so, where a party will be materially prejudiced, or where not striking would impair the orderly hearing of the application (*Armstrong v Canada (AG)*, 2005 FC 1013 at para 40).

[42] The Applicants have not made submissions on why they would be materially prejudiced if CEO McDonald's Affidavit was admitted. Additionally, the Applicants did not attack the irregularities within a timely manner as contemplated by Rule 58(2). The Applicants had knowledge of the irregularity as early as August 2021. Accordingly, I decline to strike CEO McDonald's Affidavit.

C. *Is the Applicants' failure to name current Chief and Council as respondents fatal?*

[43] For the first time, in oral argument, counsel for the Respondents submitted that, pursuant to Rule 303(1), the Applicants should have named current Chief and Council as respondents and, since they failed to do so, no relief should be made against them.

[44] In reply, the Applicants submitted that they have no issues with the current Chief and Council.

[45] I find that nothing turns on the Respondents' submission. Rule 303(1)(a) requires that an applicant shall name as a respondent every person "directly affected by the order sought in the application." The Applicant has not raised any issues in relation to the conduct of an individual Chief or Councillor, past or present. The relief ordered in this Judgment and Reasons only affects the FLDFN.

VII. Analysis

A. *Was the Appeal Board properly constituted?*

(1) Applicants' Position

[46] Like *Mercredi FC*, the Appeal Board was not properly constituted because members of the Appeal Board were selected by CEOs instead of being selected at a special Band meeting. Likewise, no BCR was passed appointing the Appeal Board members. The first CEO, Ms. McNabb, was selected on August 24, 2020 and the evidence suggests that she appointed the original Appeal Board. The September 3, 2020 BCR appointing Ms. McNabb does not contain

all the required information under the *Election Act*, including the powers given to the CEO and the Appeal Board or their rates of remuneration.

[47] After Ms. McNabb resigned, a second special Band meeting was held on September 15, 2020. The minutes of the September 15, 2020 meeting state that CEO McDonald was selected as the CEO and that CEO McDonald selected four Appeal Board members. This Court found this process improper (*Mercredi FC* at para 45). Those minutes also state, "[t]omorrow's BCR's will be signed." A BCR was not passed on September 16, 2020. Likewise, the BCRs of September 15, 2020 and September 22, 2020 do not appoint Appeal Board members.

[48] After the Third Postponement, CEO McDonald posted a Call for Appeal Board members with an application deadline of March 12, 2021. On March 11, 2021, former Chief and Council passed the first BCR appointing members of the Appeal Board. Contrary to CEO McDonald's statements in his affidavit, the COVID-19 pandemic is not an adequate justification. Two special Band meetings were held earlier to select the CEO during the pandemic.

(2) Respondents' Position

[49] The Respondents concede that Appeal Board members were not selected at the same meeting that Ms. McNabb was selected as the CEO. However, a duly constituted Appeal Board was in place by September 2020.

[50] Contrary to the Applicants' position, CEO McDonald did not unilaterally appoint the Appeal Board. The minutes from the September 15, 2020 special Band meeting state that John

Pacquette, Tina Mercredi, Lucy Mercredi, and David Sanger either volunteered or accepted their nomination to the Appeal Board. It was left to the CEO to select the remaining independent member of the Appeal Board in accordance with clause 11.1 of the *Election Act*. CEO McDonald solicited Dean Classen, the Mayor of Uranium City, to fulfill this position.

[51] In early January, CEO McDonald contacted all of the Appeal Board members to sign their Oath of Office and Declaration. Two Appeal Board members subsequently withdrew. Given the state of the pandemic, it was not possible to convene another special Band meeting to fill the vacancies, so CEO McDonald posted a call for Appeal Board members with a March 12, 2021 deadline. He personally contacted some individuals recommended by the Membership. Before April 1, 2021, when their extended term ended, former Chief and Council passed the March 11, 2021 BCR appointing the new members of the Appeal Board.

[52] After the General Election, the Appeal Board received five notices of appeal within the appeal deadline. For various reasons, three members of the Appeal Board were unable to serve. Therefore, CEO McDonald asked the newly elected Chief and Council to sign a BCR naming Appeal Board members. The members of the Appeal Board were suggested by CEO McDonald and there was no input from Chief and Council. CEO McDonald also requested that alternates be named in the event that more members had to step down.

[53] In the end, the Appeal Board members were Lucy Mercredi, David Sanger, Karen Mercredi, Linda Sanger, and Dean Classen. Lucy Mercredi and David Sanger were originally selected at the September 15, 2021 special Band meeting. Dean Classen is the non-Band member

that CEO McDonald was instructed to engage at the same meeting. Karen Mercredi was appointed by the outgoing Council via the March 29, 2021 BCR. Linda Sanger was one of the alternates named by the new Chief and Council.

[54] It is outside the control of the Respondents that Appeal Board members had to resign. All serving Appeal Board members met and continue to meet the qualifications in clauses 2.5 and 11.1 of the *Election Act*.

(3) Conclusion

[55] I find that the Appeal Board was never properly constituted. In my view, it remains a question as to whether Ms. McNabb was ever properly selected as CEO pursuant to clause 3.1 of the *Election Act*. The *Election Act* does not contemplate a poll for CEO. It simply provides that the CEO shall be selected by members of the Band at a special Band meeting (*Mercredi FC* at para 45).

[56] Even if Linda McNabb was properly selected as CEO at the August 18, 2020 special Band meeting, clause 3.1 was still violated because an Appeal Board was not selected that same day. I agree with the Applicants that the COVID-19 pandemic is not an adequate justification for the failure to appoint the Appeal Board on that same day. Instead, a call for Appeal Board members was posted in Ms. McNabb's name. The *Election Act* does not permit a paper based application system where someone or some group other than the Membership selects Appeal Board members. Accordingly, I find that the Appeal Board was not properly constituted on August 18, 2020.

[57] The *Election Act* does not outline the process to be followed if a CEO resigns prior to a general election. However, clause 3.2 of the *Election Act* states that when a CEO is unable or unwilling to oversee a by-election, a special Band meeting shall be convened to appoint a replacement. After CEO McNabb resigned, a special Band meeting was held where Derek McDonald was selected as CEO. I find the present circumstance analogous to the situation contemplated in clause 3.2. Therefore, I have no concerns as to whether CEO McDonald was properly appointed at the September 15, 2020 special Band meeting. In any event, I find that the Appeal Board was not properly constituted at that meeting because CEO McDonald appointed the Appeal Board members himself. This is confirmed by the September 15, 2021 meeting minutes.

[58] Likewise, the Respondents acknowledge that CEO McDonald solicited Dean Classen to fill the fifth position on the Appeal Board. The September 15, 2021 meeting minutes do not indicate that those present selected Dean Classen to fulfil the fifth role. On the contrary, the minutes merely state, “the fifth member will be selected.” Accordingly, I find that the Appeal Board selected by CEO McDonald on September 15, 2020 was not properly constituted (*Mercredi* at para 45).

[59] It is immaterial that everyone present at the September 15, 2021 meeting allegedly agreed that CEO McDonald could choose the Appeal Board members. Clauses 3.1-3.3 of the *Election Act*, when read together, provide that the Membership (or in certain circumstances, Chief and Council) must appoint the Appeal Board. This was the custom adopted by the Membership when

the *Election Act* was most recently amended in 2017 and affirmed in *Mercredi FC* (at para 45). Nowhere does the *Election Act* state that the CEO may select Appeal Board members.

[60] I also find that the Appeal Board purportedly appointed on September 15, 2020 was not properly constituted because a BCR formally appointing that Appeal Board was never passed. It was not until seven months later, on March 11, 2021, that former Chief and Council passed a BCR appointing different Appeal Board members.

[61] The Respondents submit that CEO McDonald had to select new Appeal Board members because those selected on September 15, 2020 stepped down or had to resign. They submit that another special Band meeting could not be held because of the state of the pandemic. It is unnecessary to consider whether subsequent Appeal Boards were properly constituted because the process followed on September 15, 2020 was itself flawed. The Respondents may not use COVID-19 as a justification now when they had an opportunity to properly appoint an Appeal Board on August 18, 2020 and September 15, 2020.

[62] For all of these reasons, I find that the Applicants' right to a fair assessment of their appeals was violated due to the manner in which the various Appeal Boards were formed (*Mercredi FC* at para 46). The *Election Act* was not followed to the letter (*Mercredi FCA* at para 9). Accordingly, I find that the Appeal Decisions are void.

[63] This is enough to dispose of the matter. However, considering the remedy that will be ordered, it is necessary to address the parties' submissions regarding procedural fairness.

B. *Did CEO McDonald and/or the Appeal Board breach the Applicants' rights to procedural fairness?*

(1) Applicants' Position

[64] CEO McDonald and the Appeal Board breached the Applicants' rights to procedural fairness multiple times. Contrary to the Appeal Board's findings, the Applicants did submit their appeal materials within the 14-day deadline running from March 27, 2021 to April 9, 2021. The Applicants sent their appeal materials to CEO McDonald on April 8, 2021 and Canada Post left a notice card with CEO McDonald on that same date. CEO McDonald claims that he only received the notices on April 19, 2021. This is clearly contradicted by Canada Post's own records.

[65] Counsel for the Applicants emailed CEO McDonald at approximately 12:30 p.m. on April 19, 2021 to confirm that he gave the Applicants' appeal materials to the Appeal Board. Canada Post records indicate that CEO McDonald picked up the Applicants' appeal materials at 3:50 p.m. the same day. In the Appeal Decisions, the Appeal Board notes that the envelope containing Mark Pacquette's appeal materials is dated April 21, 2021. This is demonstrably false given that CEO McDonald signed for the Appeal Materials on April 19, 2021.

[66] The Applicants followed the appeal process and CEO McDonald admits that he was aware that the Applicants were filing appeals. It does not matter whether CEO McDonald knew how the appeals were going to be delivered.

[67] CEO McDonald also violated the Applicants' rights to procedural fairness when he removed their names from the ballot. Contrary to what CEO McDonald says now, the Applicants' names were not removed from the ballots because they allegedly promised per capita payments. The same allegations were made against another candidate, Marco Theriault, whose name remained on the ballot despite not meeting the residency requirements set out in the *Election Act*. As CEO McDonald admits, the Applicants' names were removed as retribution for starting this application. Nothing in the *Election Act* disqualifies the Applicants on this basis. It is also notable that Marco Theriault started an application in this court on or about March 19, 2021 contesting the General Election and his name remained on the ballot. CEO McDonald treated the Applicants differently than other candidates and arbitrarily removed their names.

[68] CEO McDonald also failed to explain why he removed the Applicants' names from the ballot. CEO McDonald did not give reasons until he filed his affidavit as part of this application. Likewise, Applicant McDonald did not have knowledge of and was not given the opportunity to respond to the allegation made against him pertaining to alcohol.

[69] Finally, CEO McDonald states he removed Applicant Pacquette from the ballot because he possessed Band property. However, CEO McDonald admits to only learning about this accusation after he removed Mark Pacquette's name from the ballot. Relying on information he learned "after the fact" is a complete abdication of fairness.

[70] The Appeal Board similarly violated Applicant Pacquette's rights to procedural fairness because an Appeal Board member provided evidence against him. This raises a reasonable

apprehension of bias. On March 30, 2021, Lucy Mercredi wrote a letter to the Respondents' legal counsel alleging that Applicant Pacquette had Band property without authorization. The Appeal Board ultimately denied Applicant Pacquette's appeal citing his "admission" that he "had Band property in his possession and he failed to declare the same on his declaration of intent." In actuality, Applicant Pacquette explicitly denied having possession of Band property in his appeal materials.

(2) Respondents' Position

[71] CEO McDonald did not violate the Applicants' rights to procedural fairness. Clause 12.3 of the *Election Act* states that a Notice of Appeal shall be forwarded by registered mail or hand delivered to the CEO outlining the grounds for the appeal and must be made within 14 days of the General Election. CEO McDonald was advised during the appeal period that the Applicants intended to file appeals but not how (i.e., by hand or registered mail). Other appellants delivered their appeals by hand to CEO McDonald's home or the Band office. CEO McDonald did not receive the Applicants' notices of registered mail or the email from Applicants' counsel until April 19, 2021. Regardless, CEO McDonald signed for the packages and sent them to the Appeal Board.

[72] The Appeal Board similarly did not violate the Applicants' rights to procedural fairness. The Appeal Board was told that CEO McDonald did not receive the appeal materials within the appeal period and it was reasonable for the Appeal Board to rely on his information. The Appeal Board reviewed the Applicants' appeal materials and appropriately dismissed the appeals in light

of the information they had. The Appeal Board was simply following the deadlines set out in the *Election Act*.

[73] CEO McDonald and the Appeal Board articulated how and why they arrived at their decisions. CEO McDonald gave the Applicants several opportunities to address the allegations of "corrupt practice" made against them. Both Applicants persisted in forbidden activities.

(3) Conclusion

[74] I find that CEO McDonald breached the Applicants' rights to procedural fairness by failing to check his mail and by telling the Appeal Board that he received the Appeal Materials outside of the appeal period. If an applicant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, 174 DLR (4th) 193 [*Baker*]).

[75] The procedure for initiating appeals is set out in the *Election Act*. It states that appellants may send their Appeal Material via registered mail or hand deliver their Appeal Materials to the CEO's home or the Band office. The Applicants followed this procedure as confirmed by the Canada Post records submitted by the Applicants. These records show that the Applicants' Appeal Materials arrived via registered mail at CEO McDonald's house on April 8, 2021. It was CEO McDonald's responsibility to be alert to the procedure set out in the *Election Act* and to ensure that the Applicants' had the opportunity "to put forward their views and evidence fully and have them considered by the decision-maker" (*Baker* at para 22). The opportunity to be

heard and have ones submissions considered must be afforded even when the content of the duty of fairness falls on the low end of the spectrum (*Frank v Blood Tribe*, 2018 FC 1016 at para 88 [*Frank*]; *Orr v Fort McKay First Nation*, 2011 FC 37 at para 12 [*Orr*]). CEO McDonald essentially denied the Applicants this opportunity when he told the Appeal Board that he received the Appeal Materials outside of the appeal period.

[76] Another procedural fairness right guaranteed at the low end of the spectrum includes notice of the decision (*Frank* at para 88;*Orr* at para 12). I have already found the July 2020 BCR prohibiting per capita distributions to be a veiled amendment to the *Election Act* and therefore improper. However, even if I am wrong, CEO McDonald still violated the Applicants' rights to procedural fairness by failing to provide adequate notice of his decision to remove their names from the ballot. The Respondents submit that the Applicants had multiple opportunities to respond to the allegations of "corrupt practice" and that both Applicants persisted in forbidden activities. In my opinion, this allegation is not made out in the record. Before this Court, there is only one undated screen shot of a Facebook post promising per capita distributions that was allegedly posted by Applicant McDonald. Admittedly, CEO McDonald did tell candidates that they had to recant any promises about per capita distributions or else he would remove their name from the ballot. The Applicants issued a letter to the Membership acknowledging that Chief and Council do not control the Trust but that the Membership is entitled to have conversations about how Trust money is used. In my opinion, if CEO McDonald did not find this letter to be an adequate recantation, he had an obligation to inform the Applicants. Given the nature of the democratic rights at stake, CEO McDonald's decision to remove the Applicants'

names from the ballots without further notice violated the Applicants' rights to procedural fairness.

[77] CEO McDonald similarly failed to give notice of his decision to remove Applicant McDonald's name from the ballot because of allegations related to alcohol. The Federal Court of Appeal has stated that, "[n]o matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 56). In my opinion, CEO McDonald breached Applicant McDonald's rights to procedural fairness by failing to give him the opportunity to address these allegations. This is a basic tenet of procedural fairness that cannot be ignored if the applicant "is directly and personally affected by the outcome of the appeal" (*Morin* at para 35 citing *Orr* at paras 10-13).

[78] I also agree with the Applicants that a reasonable apprehension of bias arises with respect to the Appeal Board. I am cognizant that the test for bias must be applied in a manner that is sensitive to the institutional context in which the decision is being made (*Baker* at para 22). In the context of a small First Nation struggling to retain Appeal Board members, some flexibility is required.

[79] Lucy Mercredi, a member of the Appeal Board, has served as the Finance Officer for the FLDFN since 2001. In a March 30, 2021 letter, Lucy Mercredi provided the Respondents' legal counsel with evidence against Applicant Pacquette. She certified (in her capacity as Finance

Officer) that the only Band members in possession of Band property are former Chief Louie Mercredi and Applicant Pacquette. She stated that the Band loaned Applicant Pacquette a sawmill and he never returned it. The Appeal Board subsequently relied on that information.

[80] The fact that a decision-maker was involved in the preparation of the "prosecution's case" has been found to give rise to a reasonable apprehension of bias (*Such v Alberta (Minister of Forestry, Lands & Wildlife)* (1991), 6 Admin LR 174, 30 ACWS (3d) 782 (Alta CA) at para 5). In my view, "an informed person, viewing the matter realistically and practically and having thought the matter through" would find that the March 30, 2021 letter gives rise to a reasonable apprehension of bias (*Baker* at para 46 citing *Liberty v National Energy Board*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716).

C. *Did the General Election comply with the Election Act?*

[81] Having found that the Appeal Board was not properly constituted and that the Applicants' rights to procedural fairness were violated by both CEO McDonald and the Appeal Board, it is unnecessary to consider whether the General Election otherwise complied with the *Election Act* (*Mercredi FC* at para 47).

D. *What is the appropriate remedy?*

(1) Applicants' Position

[82] The Applicants seek Orders quashing the Appeal Decisions; vitiating the results of the General Election and vacating the offices of Chief and Council; a writ of *mandamus* requiring a

new general election in strict compliance with the *Election Act*; and an Order prohibiting the FLDFN Treaty 8 Board of Trustees from interfering in the General Election. The Applicants also request this Court's oversight of the new general election and the composition, constitution, and process, if any, of the Appeal Board. The Applicants state that a new election must be held in strict compliance with the *Election Act* (*Mercredi FCA* at para 9).

[83] The Applicants do not make submissions on why this Court should grant the extraordinary remedies they seek, such as a writ of *mandamus* and, presumably, a writ of *quo warranto*.

(2) Respondents' Position

[84] This Court should not order or oversee a new election. The successful candidate for Chief, Kevin Bruce Mercredi, received over 50% of the votes. Likewise, following the General Election, a by-election was held to fill a vacancy on Council, which was not appealed.

[85] To the extent that provincial health regulations and local responses to the pandemic would allow, the General Election was held in compliance with the *Election Act*. Given the exceptional circumstances, the CEO and Appeal Board acted reasonably. There is no reason to order a new election.

[86] The Respondents' submit that the Court should take a non-intrusive approach and remit the Applicants' appeals back to the Appeal Board (*Mercredi FC* at para at para 56). The

Respondents state that this would be consistent with paragraph 17 of the *McDonald Injunction*, where this Court advised the Applicants to make use of the Appeal Board.

(3) Conclusion

[87] This Court "has acknowledged on several occasions that it would prefer to find the least intrusive manner in which to oversee election matters out of respect for the efforts the First Nation and its membership have taken to enact rules governing their election processes" (*Mercredi FC* at para 56). However, in my view, the facts of this case and the history of FLDFN elections call for a slightly more interventionist approach. In this regard, I agree with Justice Grammond's statements at paragraph 19 of the *McDonald Injunction*:

> [A non-interventionist approach] is conditional upon the community's commitment to follow its own process. The recent postponement of the election raises doubts in this regard. If this happens again, the Court may consider the more intrusive measures suggested by the Federal Court of Appeal in *Mercredi* [*FCA*]. As I mentioned in *Thomas v One Arrow First Nation*, 2019 FC 1663, at paragraphs 15–16 and 21, where a First Nation's appeal process becomes ineffective, this Court will intervene.

[88] Given that the Appeal Board was not properly constituted and in light of the denial of procedural fairness to the Applicants, it is appropriate to grant the remedy of *certiorari* to set aside the Appeal Decisions. For the reasons articulated in *Mercredi FC*, I am remitting the Applicants' appeals to a newly and properly formed Appeal Board appointed in accordance with the process set out in clause 3.3 of the *Election Act*. However, I am ordering that the appointment of the Appeal Board and the conduct of the Applicants' appeals be addressed within clear timelines (*Mercredi FCA* at para 5; *Carry the Kettle First Nation v Kennedy*, 2021 FC 462 para 71 and Judgment). I will also retain jurisdiction to oversee the implementation of this remedy

(*Mercredi FCA* at para 5). Such an approach balances this Court's supervisory role and the FLDFN's right to self-government. It also respects the procedures set out in the *Election Act*.

VIII. Costs

[89] More information is required regarding the parties' legal fees. I am directing the parties to make further submissions (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119 at para 1; *Bertrand* sat para 104).

IX. Conclusion

[90] For all the above reasons, the application for judicial review is allowed.

JUDGMENT in T-154-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The Appeal Decisions are quashed.
2. The Respondent FLDFN, as represented by the Band Council as defined in subsection 2.2 of the *Election Act*, is ordered to hold a special Band meeting in order to appoint the Appeal Board in accordance with section 3.3 of the *Election Act*. This special Band meeting is to be convened within 14 days of this Order.
3. Within 14 days of their appointment, the Appeal Board will address the Applicants' appeals in accordance with the *Election Act*.
4. I retain jurisdiction over this matter to oversee the implementation of Orders 2 and 3 and to address any issues that may arise from this Judgment and Reasons.
5. The parties are directed to provide costs submissions within 30 days of the date of this Order.
6. The style of cause is amended to reflect the proper spelling of CEO McDonald's surname.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-154-21
STYLE OF CAUSE:	GERALD FELIX MCDONALD AND MARK PACQUETTE, IN THEIR CAPACITIES AS CANDIDATES AND ELECTORS v FOND DU LAC DENESULINE FIRST NATION, AS REPRESENTED BY FORMER CHIEF LOUIE MERCREDI, AND COUNCILLORS WILLIE JOHN LAURENT, JAKE MERCREDI, RONNIE AUGIER, ANDREW ISADORE AND FREDERICK MARTIN; AND, DEREK MCDONALD, IN HIS CAPACITY AS CHIEF ELECTORAL OFFICER, JULES LIDGUERRE, IN HIS CAPACITY AS DEPUTY ELECTORAL OFFICER
PLACE OF HEARING:	SASKATOON, SASKATCHEWAN
DATE OF HEARING:	FEBRUARY 15, 2022
JUDGMENT AND REASONS:	J. FAVEL
DATED:	JUNE 7, 2022

APPEARANCES:

Alisa R Lombard	FOR THE APPLICANTS
Victoria Elliott-Erickson	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Semaganis Worme Lombard Saskatoon, Saskatchewan	FOR THE APPLICANTS
veritas Law Office Prince Albert, Saskatchewan	FOR THE RESPONDENTS