Federal Court  Cour fédérale

Date: 20161115

Dockets: T-1335-16
T-1442-16

Citation: 2016 FC 1270

Ottawa, Ontario, November 15, 2016

PRESENT: The Honourable Mr. Justice Russell

Docket: T-1335-16

BETWEEN:

MARCEL COLOMB FIRST NATION, AS REPRESENTED BY CHIEF CHRISTOPHER COLOMB, COUNCILLOR SUZANNE HART, COUNCILLOR DOUGLAS HART AND COUNCILLOR GORDON COLOMB

Applicants

and

ELISE COLOMB, CRYSTAL MICHELLE AND EUSTACHE SINCLAIR

Respondents

Docket: T-1442-16

AND BETWEEN:

ELISE COLOMB, CRYSTAL MICHELLE, AND EUSTACHE SINCLAIR, IN THEIR PERSONAL CAPACITY AND IN THEIR CAPACITY AS THE MARCEL COLOMB ELECTION COMMITTEE

Applicants

and

CHRISTOPHER COLOMB, SUZANNE HART, DOUGLAS HART, GORDON COLOMB, PRISCILLA COLOMB, EVELYN SINCLAIR, ANGEL CASTEL, SARAH COPAPAY, URGEL LINKLATER, JOSEPH COLOMB, SOLOMON BIGHETTY, MARK D'AMATO AND TERRY LALIBERTY

Respondents

JUDGMENT AND REASONS

I. THE APPLICATIONS

[1] In T-1442-16, the Applicants are seeking the following relief:

1. An order that the Application be heard on an expedited and urgent basis;

2. A declaration that on or about March 16, 2016, the Marcel Colomb First Nation Election Appeal Committee ("MCFN Election Appeal Committee") did not meet, did not conduct any election appeal hearing, did not make any election appeal decision, and did not make a decision voiding the results of the February 1, 2016 election for Chief and Council.

3. A declaration that pursuant to the Marcel Colomb First Nation Election Law ("MCFN Election Law"), even where the persons claiming to be election appeal committee members are in fact genuine members of that body:

    a. The quorum requirement for members of election appeal committee to convene a duly called meeting is all 3 of their members;

b. They have no jurisdiction and no authority to convene a meeting or make a decision where no written appeal has been launched within the 4 days after the election.

c. By virtue of section 4(2), their authority does not extend to calling for or authorizing new elections, and that the authority to call new elections in instances where an elected candidate did not breach any provisions of the election law rests only with the election committee.

4. A declaration that any office as election appeal committee members that any of the Respondents Joseph Colomb, Urgel Linklater or Solomon Bighetty may have had, expired prior to the March 16, 2016 purported decision (by two of them, Joseph Colomb and Urgel Linklater) pursuant to which they claimed to have annulled the election results of February 1, 2016.

5. A declaration that the March 16, 2016 purported decision of Urgel Linklater and Joseph Colomb by which a [*sic*] they purported to decide or claim that the office of the Chief and Council elected on February 1, 2016 was vacant, is of no force and effect;

6. An order in the nature of *quo warranto* that the Respondents Joseph Colomb, Urgel Linklater and Solomon Bighetty do not hold the positions of members of the MCFN Election Appeal Committee.

7. Alternatively, if the decision of Joseph Colomb and Urgel Linklater, was in fact a decision of a duly constituted election appeal committee, then:

   a. An order, if required, under section 18.1(2), extending the 30 day time limit to seek judicial review; and

   b. An order quashing that decision and being contrary to law, unreasonable and in breach of natural justice.

8. A declaration that the May 16, 2016 unchallenged decision by Elise Colomb, Crystal Michelle, and Eustache Sinclair, in their capacity as the Marcel Colomb Election Committee ("MCFN Election Committee"), wherein they confirmed that the then proposed May 16, 2016 Chief and Council election process was not a valid Band election, and decided that there would not be new elections, was a decision of the MCFN Election Committee.

9. A declaration that the Applicants, Elise Colomb, Crystal Michelle, and Eustache Sinclair continue to and currently hold office as the members of the MCFN Election Committee.

10. A declaration that the purported May 16, 2016 election process, by which the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart, and Gordon Colomb claim to have been elected as the Band's Chief and Council, was not an election process under the MCFN Election Law, and is not binding on the Band.

11. A declaration that the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart, and Gordon Colomb are not the elected Chief and Council of the Band.

12. An order in the nature of *quo warranto* that the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb Joseph Colomb, Urgel Linklater and Solomon Bighetty do not hold the positions of the Chief and Council of the Band.

13. A declaration that that the alleged Band Council Resolution of March 17, 2016 by which Christopher Colomb, Gordon Colomb, Douglas Hart and Suzanne Hart in their claimed capacity as Chief and Council of the Band sought to change the Band's signing authorities for the Band's financial accounts, is not a decision of the Band's Chief and council, and is of no force and effect.

14. A declaration that the alleged Band Council Resolution of August 12, 2016 by which Christopher Colomb, Gordon Colomb, Douglas Hart and Suzanne Hart in their claimed capacity as Chief and Council of the Band purported to terminate the services of Mark D'Amato and Terry Laliberty, (the Co-managers), is not a decision of the Band's Chief and Council, and is of no force and effect.

15. If either of the impugned decisions referred to above by Christopher Colomb, Gordon Colomb, Douglas Hart and Suzanne Hart are in fact decisions of the Band's Chief and Council, then:

    a. An order, if required, under section 18.1(2), extending the 30 day time limit to seek judicial review; and

    b. An order quashing that decision and being contrary to law, unreasonable and in breach of natural justice.

16. An order that the financial affairs of the Band are to be managed by Mark D'Amato and Terry Laliberty (the Co-managers) in the same manner that they were managed prior to the election of May 16, 2016 in accordance with the agreement between the Band and the Co-managers and as approved by Indigenous and Northern Affairs Canada ("INAC", formerly AANDC.)

17. An order either:

    a. Declaring that the persons elected on February 1, 2016, being Priscilla Colomb, Evelyn Sinclair and Angel Castel, and Sarah Copapay are the Chief and council of the band with their terms to expire on February 1, 2020; or

    b. Ordering new elections under the MCFN Election Law for the office of Chief and Council, together with an order:

        i. Confirming that the Applicants will serve as the Band's election committee for that election, or alternatively directing who shall serve as the Election committee for that election;

        ii. Appointing an independent electoral officer to conduct those elections or directing who is to have authority to make such an appointment;

        iii. Appointing an independent election appeal committee to consider any duly filed appeals in respect of the new election, or directing who is to have authority to make such an appointment;

        iv. Specifying both the nomination date and the election date for such elections;

        v. Providing such further direction as will ensure that any new election process is conducted in accordance with MCFN Election Law.

18. Interlocutory orders pending a full and final hearing of the application herein and in Court file T-1335-16:

    a. That the Respondents Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay, being the Band Council elected on February 1, 2016 shall continue as the lawfully elected Chief and Council of the Band;

b. Prohibiting the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb from purporting to hold themselves out as the Band's Chief and Council;

c. Prohibiting the Respondents Joseph Colomb, Urgel Linklater or Solomon Bighetty from purporting to hold themselves our as the MCFN Election Appeal Committee;

d. Prohibiting all parties from interfering with the financial administration activities that the Respondents Marl D'Amato and Terry Laliberty are authorized by their agreement with the Band to undertake.

e. Prohibiting all parties from contacting financial institutions to seek to change the signing authorities without the consent of the co-manager Mark D'Amato.

19. Costs of this Application on a solicitor and client basis; and

20. Such further and other relief as may be required and this Honourable Court may deem just.

[2] In T-1335-15, the Applicants are seeking the following relief:

a) an interim Order staying any further action pursuant to the Decision until the final disposition of this Application for judicial review and any appeals therefrom;

b) an interim Order that the individual Applicants continue as the lawfully elected Chief and Council of Marcel Colomb First Nation until the final disposition of this Application for judicial review and any appeals therefrom;

c) a writ of *quo warranto* against the Respondents and a declaration that the Respondents do not constitute the Election Committee of Marcel Colomb First Nation;

d) an Order quashing and setting aside the Decision;

e) costs of the within Application; and

f) such further and other Order as counsel may advise and this Honourable Court may permit.

II. PRESENT MATTERS

[3] At this point in the dispute, the parties are before the Court on the following matters:

(a) In T-1442-16, the remaining Respondents have brought a motion to strike the application primarily on the grounds that it was knowingly filed out of time, intentionally violates the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] and includes claims for relief that are beyond the jurisdiction of the Court to grant and for which the Applicants have no standing;

(b) In T-1442-16, the Applicants have brought a motion for an interlocutory injunction requesting:

1. An order pursuant to Rule 8 abridging the time for the hearing of this motion if necessary;

2. An order under Rule 105 consolidating these proceedings with the proceedings in court File No. T-1335-16.

3. An interlocutory order pending final disposition of these proceedings, that the financial affairs of the Marcel Colomb Cree Nation (the "Band") are to be managed by Mark D'Amato and Terry Laliberty, the Band's co- managers, in accordance with:

    a. The Band Management and Capacity Development Agreement with Mark D'Amato and Terry Laliberty, executed on February 25, 2016.

    b. The check signing authorities and procedures and financial controls put in place by the band and Mark D'Amato and Terry Laliberty prior to May 16, 2016.

4. An interlocutory order pending final disposition of these proceedings enjoining all persons, including all those claiming to be the band's Chief and council, from:

    a. Interfering with the due administration by the Co-managers Mark D'Amato or Terry Laliberty of the bands financial affairs.

    b. Prohibiting all parties from interfering with the financial administration activities that the Respondents Mark D'Amato and Terry Laliberty are authorized by their agreement with the band to undertake.

c. Prohibiting all parties from contacting financial institutions to seek to change the signing authorities without the consent of the co-manager Mark D'Amato.

d. Taking steps to terminate the services of the Co-managers Mark D'Amato or Terry Laliberty, or to act upon any termination that any party claims has already taken place;

5. An interlocutory order pending final disposition of these proceedings that the respondents Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay, being the band council elected on February 1, 2016 shall continue as the lawfully elected Chief and Council of the Marcel Colomb First Nation.

6. An interlocutory order pending final disposition of these proceedings prohibiting the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb from purporting to hold themselves out as the band's Chief and council;

7. An interlocutory order pending final disposition of these proceedings prohibiting Joseph Colomb, Urgel Linklater or Solomon Bighetty from purporting to hold themselves out as the band's Election Appeal Committee.

8. An order dispensing with the requirement to give an undertaking.

9. Costs on a solicitor and own client basis;

10. Such further and other relief as counsel may advise and this honourable court may deem just.

(c) In T-1335-16, the Applicants are asking the Court to decide the application itself.

III. BACKGROUND

[4] The political, administrative and financial situation at Marcel Colomb First Nation [MCFN] is presently intolerable. A dispute over who are the legitimate Chief and Councillors has resulted in political and financial chaos, and both sides advise the Court that the band is suffering as a result.

[5] This untenable state of affairs was inevitable given the series of events that have taken place since February 2016. On February 1, 2016 [February Election], a general election was held and Priscilla Colomb was elected Chief, and Evelyn Sinclair, Angel Castel, and Sarah Copapay were elected Councillors [FCC].

[6] Another purported election was held on May 16, 2016 [May Election] in which 59 members voted (the total electorate is about 237). The evidence suggests that most Chief and Council elections at MCFN have a participation rate of between 101-117 members. Many electors boycotted this election because they believed it to be unauthorized and invalid. In the May Election, Christopher Colomb was elected Chief and Suzanne Hart, Douglas Hart and Gordon Colomb were elected Councillors [MCC].

[7] Inevitably, then, both the FCC and MCC claimed to be the legitimate Chief and Council of MCFN, and this dispute has evolved from that conflict.

[8] Initially, the FCC took no legal action to establish their legitimacy because they regarded the May Election as a complete sham that had come about as a result of a purported decision made by Urgel Linklater and Joseph Colomb on March 16, 2016 purporting to act as an Election Appeal Committee [EAC] which declared the February Election invalid and that FCC were not Chief and Council, and calling a new election for May 16, 2016 to fill the vacant positions.

[9] There is no doubt on the evidence before me that these individuals could not have been an EAC under the MCFN Election Law, that no appeal of the February Election ever occurred,

that no EAC meeting took place, that no grounds for voiding the February Election existed and, that the documentation produced and circulated by this sham EAC and their cohorts was a complete fraud upon the MCFN electorate. In fact, these individuals – and those they acted for – have a lot to answer for because it was this documentation that purportedly paved the way for the May Election and the ensuing chaos that has resulted from that election. I will come to that evidence later, but it is notable that these individuals have not come forward in this dispute to answer for themselves or provide evidence, and have not responded to requests for information as to how they were able to act as EAC and/or how they were able to justify voiding the February Election and calling the May Election in which MCC were elected to Chief and Council.

[10] In terms of the MCFN Election Law, this means that the FCC have never been removed from office. So it is easy to understand why they took no legal action against MCC in light of such an obvious fraud practiced by the EAC. However, eventually the MCC were able to persuade the Royal Canadian Mounted Police and third parties, including Indigenous and Northern Affairs Canada [INAC], that they were a duly elected Chief and Council. Once this occurred, administration and governance at MCFN began to break down and the FCC were compelled to take legal action.

[11] Following the May Election, the FCC and Mark D'Amato, one of the MCFN's co-managers under a Band Management and Capacity Development Agreement executed on February 25, 2016, as well as Elise Colomb, Crystal Michelle and Eustache Sinclair (parties in the matters before me who purport to be the MCFN Election Committee [EC] under the

Election Law) went about trying to persuade the MCFN community that the May Election was not legitimate, but it was eventually decided that legal action was necessary and, on June 3, 2016 – some 76 days after the EAC decision of March 16, 2016 – commenced an application for judicial review of that decision in T-888-16 [888 Application].

[12] However, on July 27, 2016, the 888 Application was dismissed by Prothonotary Lafrenière somewhat informally on the basis of correspondence from counsel because he was not satisfied that the Applicants in the 888 Application had acted with due diligence in complying with Rule 306. The merits of the 888 Application were never heard or pronounced upon by Prothonotary Lafrenière.

[13] The implications of the dismissal of the 888 Application appear not to have been understood by the FCC and the EC until they appointed new legal counsel. However, it appears that the EC eventually decided that the only way out of an apparent legal impasse was to conduct a further election. The FCC agreed with this approach but the MCC did not, and MCC insisted that they were the legitimate Chief and Council of MCFN.

[14] So, on August 9, 2016, the EC announced that they were calling a new election. At this point, the MCC took legal action to prevent this from occurring and brought the application in T-1335-16 to both prevent the election from taking place and to have the Court declare that the EC were, in fact, not an election committee under the MCFN Election Law and could not call an election.

[15] In response, the EC brought an application in T-1442-16 to have the Court review the whole situation and provide guidance on who were the legitimate Chief and Council of MCFN. This application refers to four decisions for review, but there is no doubt that the central issue remains the same: who are not the legitimate Chief and Council of MCFN.

[16] Various motions and cross-motions were initiated in both T-1335-16 and T-1442-16 and the legal chaos began to reflect the confusion at MCFN. Fortunately, Prothonotary Lafrenière stepped in as Case Manager and the parties agreed that the application in T-1335-16 could be dealt with now, without the need for interlocutory relief, and that MCC's motion to strike and the EC's motion for interim injunctive relief on T-1442-16 could be heard at the same time as the T-1335-16 application. All of these matters are inter-related and the parties agree that the records filed for each can be used for my deliberations in deciding all three matters before me.

[17] The parties are in agreement that the central issue is, as I have stated above: which of FCC and MCC are the legitimate Chief and Council of MCFN. But they approach this basic issue from different directions. The EC wants me to decide the merits of who is the legitimate Chief and Council of MCFN, while MCC, in addition to wanting me to side-line the EC in the T-1335-16 application, wants me to strike T-1442-16 in its entirety for being, in particular, out of time and nothing more than an end run on the decision the Court has already made by dismissing the 888 Application. At this point, MCC wishes to avoid the merits and, if T-1442-16 is struck, they assume that this will leave them as the legitimate Chief and Council of MCFN.

[18] It probably makes no difference which matter I deal with first because they all bring up the same facts and they all, to a greater or lesser extent, require the Court to consider the legitimacy issue. I think it best to start with MCC's application in T-1335-16 because the central issue in this dispute has to be faced pretty well head-on in this application. By bringing the T-1335-16 application in the name of the "Marcel Colomb First Nation," the MCC has placed the issue of representative legitimacy firmly before me, and that issue has been raised and argued by the EC in response to the application.

IV. APPLICATION – T-1335-16

A. *The MCC Position*

[19] Reduced to basics, the MCC argue in this application for *quo warranto* against the EC Respondents because the EC's term of office expired in December 2015 and they were never re-appointed in accordance with the MCFN Election Law which governs such appointments. The MCC have provided the Court with a meticulous and well-argued account of the underlying facts and the relevant provisions of the Election Law to demonstrate that the EC could not have been a legitimate election committee and why it could not have legitimately called an election on August 9, 2016 and arrange for a nomination meeting thirty (30) days from that date.

B. *The EC Position*

[20] While disagreeing with MCC's arguments and grounds on the legitimacy of the EC and its powers to call an election on August 9, 2016, the EC are more emphatic that this application should be dismissed because:

(a) It is moot. The August 9, 2016 decision was rescinded and an election was never called; and

(b) The MCC have no standing to bring this application on behalf of MCFN because they are not the legitimately elected Chief and Council of MCFN.

[21] As always with the EC Respondents, the principal issue is legitimacy. They say in their written submissions that:

> 103. Whether or not the Respondents are the Election Committee of the band, those claiming to have been elected on May 16, 2016 are not the persons whom the band electorate has chosen as their leaders in any fair or inclusive election process.
>
> 104. The public interest requires that the electorate at the Marcel Colomb First Nation be allowed to choose their leaders in [a] fair election conducted in accordance with their electoral process, at which only those eligible to be candidates are elected to office.
>
> 105. If that group is not the Priscilla Colomb group, then a new electoral process is warranted, which should be run by a person appointed by the court to ensure a fair an [sic] inclusive election process.
>
> 106. In short, the band electorate deserves better than to have their affairs governed by a group that does not represent the will of the electorate.
>
> 107. If the Applicants are allowed to remain in office, their ascendancy to power is nothing short of an orchestrated coup that offends the rule of law, and strikes at the very heart of democracy.

C. *Analysis*

[22] First of all, I disagree with the EC Respondents that this application is entirely moot. The August 9, 2016 decision to call an election may have been rescinded, and the EC may well have placed the central governance issue in the Court's hands, but the MCC still want the Court to consider and rule upon the legitimacy of the EC and to order that the EC has no power to

conduct or represent itself as an election committee, or to call an election at any time in the future.

[23] As regards standing, the MCC argue that the legitimacy of the March 16, 2016 EAC decision is not before me in this application and, in any event, has already been dealt with by Prothonotary Lafrenière when he dismissed the 888 Application. They also argue that the February Election which brought the FCC to power was no more valid than the May Election which brought the MCC to power, and that the validity of either election is not at issue. The May Election was not challenged, so that MCFN are stuck with the result.

[24] In my view, these assertions by MCC are untenable. There was no challenge to, or appeal of, the February Election, and the March 16, 2016 EAC decision that purported to void that election was a complete fraud and a non-event legally. MCC's counsel has very capably led the Court through the Election Law and the facts in this application to demonstrate that the EC Respondents are not a legitimately appointed election committee and cannot call an election, but he has also meticulously avoided conducting the same exercise with regard to the EAC, and its March 16, 2016 decision, which is the root of the problems in this dispute. I understand why he has done this: the evidence is conclusive that this was not a decision of a legitimate EAC and its creation and use were a fraud. The MCC seek to establish legitimacy in this case, not through compliance with the Election Law, but through the use of procedural impediments to the T-1442-16 application. In effect, the MCC are saying that, even if the March 16, 2016 EAC decision is a fraud, that's too bad because the May Election was not challenged in time and its legitimacy cannot be questioned now. In my view, these assertions are not tenable. Political

legitimacy under the MCFN Election Law cannot be obtained by the mere effluxion of time in a law suit. And the issue of legitimacy and standing in this application cannot be avoided, because it is firmly and rightly raised and the Court must deal with it. In the application and motions before me, the MCC take the position that the merits of the dispute are not at issue. What this means, in reality, is that it doesn't matter to them what the MCFN Election Law says about the way Chiefs and Councillors are either elected or removed. This means that the will of the MCFN electorate is not relevant because MCC are content to achieve power as a result of a procedural technicality in this Court. FCC were willing to resign their positions and put the issue to the electorate in a new election, but MCC refused to do this. MCC do not wish to face their own electorate and are content to hang on to power as a consequence of a legal technicality. This is a strange and disquieting position to take when there is no provision under their own Election Law that allows power to be achieved in this way, and when legitimate power should only be entrusted to those who have been elected in a fair and duly called election that allows the MCFN members to make their preferences known. If the political culture at MCFN is allowed to be this disrespectful and neglectful of the will of the people, it will inevitably result in further chaos. MCC have the same evidence as I have concerning the March 16, 2016 EAC decision and they must know that it is not valid and that the FCC were never legitimately removed from office and the May Election was never legitimately called. They have not sought to support the March 16, 2016 EAC decision before me in their motion to strike that requires them to put their best foot forward. They claim power on the basis of a legal technicality, not the will of their own people. As might be expected, the jurisprudence of this Court does not allow this, and is firmly on the side of supporting legitimately elected leaders who have won the support of their own people in duly conducted elections. In fact, the Court has dealt with similar situations before.

[25] In *Lac des Mille Lacs First Nation v Chapman*, [1998] FCJ No 752 [*Lac des Mille Lacs*], two separate groups claimed to be Chief and Council of the first nation. The first Chief and Council decided that the election code under which they had been elected did not properly reflect band custom and decided to call a referendum to ratify a new draft code. However, before the referendum was held, some members of the band organized an election at which a second Chief and Council were elected. The second election was boycotted by the first Chief and Council. In the second election, Mr. Sawdo was elected as Chief and he and his Council went about building support for themselves as the legitimate Chief and Council of the band. A new election code was then allegedly adopted by referendum and a third Chief and Council were elected. Inevitably, the usual political and administrative chaos ensued and the Court was asked to intervene to determine who held legitimate power. Mr. Sawdo and his Councillors sought a declaration from the Court that they were the legitimate Chief and Council.

[26] It was clear on the facts that the first Council were purporting to hold office without legitimate authority, but they could not be removed from office by Mr. Sawdo and his Councillors as a result of a second election. Justice Cullen provided general guidance, much of which is applicable to the case before me:

> 15 The applicant seeks a declaration that he and his Councillors (collectively constituting Council No.2) are the true Council of the First Nation. This therefore must be the first issue addressed by examining the legitimacy of the election by which they were purportedly put into power.
>
> 16 Mr. Sawdo and Council No.2 were elected in 1996. The evidence indicates that it was Mr. Sawdo himself, with the help of other unidentified band members, who arranged for, called and administered the 1996 election. The affidavit of Mr. Sawdo states at paragraph 18 that Hereditary Chief and elder Robert Sandy Patrick Sawdo and Pam Sawdo, the applicant's father and sister respectively, had verbal confirmation from Mr. Green, District

Manager, Western District, Ontario Region, DIAND, that they could hold the election. However, as the first affidavit of Mr. Brent Lepage clearly states at paragraph 8, it is highly unlikely that such confirmation did come from Mr. Green because it was not within the jurisdiction or mandate of DIAND to approve the calling of an election. As the First Nation was to select its leaders according to band custom, the role of the Department was one of recognition only. Additionally, it was incumbent on counsel for the applicant to provide the court with the affidavit of either or both Mr. Patrick Sawdo or Ms Pam Sawdo relating what exactly had been said to them. As this evidence was not provided, and considering the contrary affidavit evidence from DIAND, I disregard this purported "affirmation" as any justification for the election. However, in the end this is of little relevance because, even assuming Mr. Green had supported the election, such support would have had no legal effect.

17 Mr. Sawdo, it is not disputed, was and is a band member. However, at the time Mr. Sawdo purportedly called the election in 1996 there was already a Council in place which was holding itself out as continuing in office. There is no evidence which indicates that attempts were made to convince Council No. 1 to step down and/or call an election prior to the election called by Mr. Sawdo. There is evidence however that DIAND offered to provide mediation to the parties in order to resolve the dispute but that neither party would participate without their lawyers and that the parties further wished DIAND to cover the legal fees. This was not acceptable to DIAND however. (See the first affidavit of Mr. Lepage, at paragraph 6(d))

18 The proper course which should have been followed by Mr. Sawdo is to have sought a writ of *quo warranto* from this court. Heald J. canvassed the law of *quo warranto* in the context of disputes relating to the proper Council of a First Nation in *Bone v. Sioux Valley Indian Band No. 290* (1996), 107 F.T.R. 133 (Fed. T.D.). In *Bone* an appeal had been taken to the Appeal Board pursuant to the Band Election Code on the grounds that the elected Chief was not eligible to stand for election as he did not meet the residency requirement of the Election Code. The Appeal Board ordered that a new election be held. However, under the Band Regulations, only the Chief and Council could call an election, which they refused to do on the advice of the elders of the First Nation. The Chief was the respondent in the case and he refused to step down. Heald J. held that the court could issue a writ of *quo warranto* if the court was satisfied that the individual against whom the writ is issued has no legal basis for holding the position

in question. At 151 Heald J. cited Teitelbaum J. in *Jock v. R.*, [1991] 2 F.C. 355 (Fed. T.D.) wherein Teitelbaum J. writes:

> According to de Smith's *Judicial Review of Administrative Action* (4th Ed. by J.M. Evans, 1980), the old substantive law rules for *quo warranto*, with only slight modifications, still apply, as listed below (at pp. 463-464):
>
> 1. The office must be one of a public nature.
>
> 2. The holder must have already exercised the office; a mere claim to exercise it is not enough.
>
> 3. The office must have been created by the Crown, by a Royal Charter, or by an Act of Parliament.
>
> 4. The office must not be that of a deputy or servant who can be dismissed at will.
>
> 5. A plaintiff will be barred from a remedy if the plaintiff [sic] has been guilty of acquiescence in the usurpation of office or undue delay.
>
> 6. The plaintiff must have a genuine interest in the proceedings. Nowadays probably any member of the public will have sufficient interest, provided that he has no private interest to serve

There were other criteria cited by Heald J. which need not be discussed here as this is in fact not a motion for a writ of *quo warranto.*

19 Counsel for the applicant submits however that the 1996 election was proper and valid because:

1. it followed the same procedure for selection as was used in 1990 and 1992; and

2. that, once the 93-001 Code had been withdrawn, Council No. 1 no longer had any mandate or power and therefore there was no other Council in place.

20 In my view this second argument fails on the above-mentioned fact that, if it was the case that Council No. 1 was purporting to continue to act without authority, a writ of *quo warranto* should have been pursued and the lack of authority with

respect to Council No. 1 did not thereby confer any authority on the applicant.

21 The proper course in the situation as described above would have been to seek a writ of *quo warranto* on the basis that: the office of Chief is public; there is no dispute that Mr. Chapman has exercised the office; as found by Heald J. in *Bone*, even an office holder elected by Band Custom satisfies the third requirement; the Chief cannot be dismissed at will; and, Mr. Sawdo has a genuine interest in the proceedings. Counsel for the respondent argued that the applicant was guilty of delay and had in fact acquiesced in the continuation of Mr. Chapman as Chief. This point, however, need not be decided for purposes here as no party has requested that the court issue a writ of *quo warranto*. However, I am satisfied that Mr. Sawdo should have pursued this course of action. There is much to recommend this course of action. First, it sends a clear message that the members of the First Nation will not abide a Council which overstays its term of office. Second, and most importantly, such a course of action avoids situations such as the one in this case. By seeking a writ of *quo warranto* as the first step, there is never any ambiguity as to who actually speaks on behalf of the members of the First Nation. Failing to do so, Mr. Sawdo has not demonstrated to the court that he had the authority to hold an election in the face of a different Council already holding office which did not participate in the 1996 election. In my view, the burden was his to establish such authority. Because Mr. Sawdo has not demonstrated that he had the proper authority, the court is unable to declare that the 1996 election was valid and therefore unable to give Mr. Sawdo the declaration he seeks.

22 With respect to the first argument, viz. that the procedure alone validates the election, I point out that the lack of authority to institute the proceedings in the first place is fatal. Furthermore, the paragraph from Mr. Sawdo's affidavit which describes the manner in which the election was announced is insufficient. The applicant fails to name where and when these advertisements were placed. The only copy of a purported advertisement with respect to the 1996 election appears in the Record of the respondent and it fails to state the time and place of the election. Even if the applicant had submitted sufficient evidence with respect to the advertising of this meeting and election, it does not cure the above noted defects. Thus, the failure of proceeding with a writ of *quo warranto* is fatal to the applicant.

23 This leaves me to determine whether the respondents are validly in office. I pause here to discuss the court's jurisdiction to pronounce on the validity of the respondents holding office in light

> of counsel for the applicant's contention that, as no cross-motion was brought by the respondents, it was not within the jurisdiction of the court to make any findings with respect to the validity of Council No. 1 or its successor Council.
>
> 24 In the Originating Notice of Motion dated September 23, 1997, paragraph 9 asks for:
>
> > Such further and other relief as this Honourable Court may deem fair and just in the circumstances
>
> In my view, in the interests of resolving all of the issues which these parties dispute, it is incumbent on this court to make factual findings and to render "further and other relief" which is "fair and just in the circumstances".
>
> 25 When elected in 1992, Council No. 1 had a mandate for two years. Subsequently to their election, Council No. 1 adopted Electoral Code #93-001 which extended their term of office to four years. However, this Code was revoked by Resolution of Council on January 29, 1995. Thus, the Council had overstayed its mandate by almost a year, as the only Code which had not been revoked was the original Code by which they had been elected. Thus, the situation in 1995 was that Mr. Chapman and his Councillors were holding office without legitimate authority. However, Council No. 1 continued to conduct the business of the First Nation.
>
> 26 As I stated earlier, at this point, or any point subsequent, Council No. 1 could only be removed from office by voluntarily stepping down, by calling an election or by someone seeking a writ of *quo warranto* against them. None of these events in fact occurred.

[27] In *Lac des Mille Lacs*, the first Council had clearly exceeded the period of its mandate, yet it could only be removed from office by voluntarily stepping down, by calling an election or by someone seeking a writ of *quo warranto* against them. It could not be removed by the second election. In the case before me, there is no doubt that the FCC was still the legitimate Chief and Council of MCFN when the May Election was held and they boycotted that election and refused to step down. In other words, the FCC have never been removed from office and they are still the

legitimate Chief and Council of MCFN. The MCC attempt to claim legitimacy by the use of the May Election, and now before me with technical legal arguments centering on the effluxion of the 30-day limit and the dismissal of the 888 Application by the Court, but these arguments are untenable.

[28] The reason for the process outlined by Justice Cullen is obvious. It is all too easy for competing groups excluded from power in one election to persuade band members (many of whom will be their own supporters) that the Chief and Council elected are not legitimate, and to persuade someone to call a new election. And, as the present case demonstrates, allowing this to occur creates political and social chaos. As Christopher Colomb says in his affidavit for this application at para 25:

> The improper calling of an election creates many issues for MCFN in dealing with the responsible government authorities, professional advisors and other third parties, and in particular financial institutions.

Apparently, Mr. Colomb believes that advice should apply to others but not himself and his purported Councillors.

[29] Justice Rennie made the principal issue before the Court very forcefully in *Poker v Mushuau Innu First Nation*, 2012 FC 1 [*Poker*]:

> [30] The Court makes no findings in regard to this later allegation. In any event, regardless of which individual or individuals may have cause or contributed to the shortcomings in the process, *the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in ensuring that Band confidence in Band elections is merited, as it*

> *strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.*
>
> [emphasis added]

[30] In the present case, Christopher Colomb, Gordon Colomb and Douglas Hart all ran in the February Election and were disqualified because they did not submit the criminal clearance checks required by MCFN Election Law. A fraudulent EAC then declared the February Election void, ostensibly on the basis of these three disqualifications, but for no real reason that has been explained to the Court. In the May Election, the same three individuals ran and, in an election boycotted by the FCC and many band members, were elected, even though they did not, once again, provide the required criminal clearance checks under the Election Law. MCC's presentation in this case leaves unanswered some very disturbing facts. For example:

(a) Why did Ms. Janet Moore, the Electoral Officer in the February Election that brought the FCC to power confirm to INAC and others that the February Election was completed, no appeals had been brought and that FCC was the Chief and Council of MCFN, and then a short time later in March act together with a fraudulent EAC to declare the February Election void? Someone must have persuaded her to change her mind and position. She confirms FCC to be the legitimate Chief and Council and then, within a short span of time she takes the position that they are not. Fortunately, Mr. D'Amato recognized that an illegitimate coup was taking place and did his best to make Ms. Moore understand this, but she insisted he was wrong. Ms. Moore has not been brought forward in these proceedings to explain why she acted in such a contradictory manner and who, or what, caused her to completely reverse her position and to work in concert with a fraudulent EAC, that she, as an Electoral Officer, must have known was a sham. Mr. D'Amato should be commended for recognizing a coup for what it was, and for taking measures to safeguard MCFN from the dangers of illegitimate power. Ms. Moore, on the other hand, together with Urgel Linklater and Joseph Colomb, also has a lot to answer for in the chaos and hardship brought upon the MCFN by her acts and failure to do her duty;

(b) Why have the other two (2) members of the EAC (Urgel Linklater and Joseph Colomb) not been brought forward in this case to explain their actions? The sham March 16, 2016 decision to declare the February Election void is so obviously one of the key elements in this dispute that the Court can only draw a negative inference from the failure of MCC to bring these two individuals forward to explain themselves and submit to cross-

examination. Notably, they have also failed to respond to the EC's request for documentation and an explanation of their conduct. We have the purported resolution which they both signed but there is no explanation of how they came to be – at that time – the EAC under the Election Law, how the alleged meeting was called and appropriate notice given (the FCC received no notice) and the basis for the decision that the February Election was void because Christopher Colomb, Gordon Colomb and Douglas Hart had failed to submit criminal clearances certificates in accordance with the Election Law while the people who were elected had submitted those certificates. In the absence of some explanation, the Court must regard this ground as completely spurious. It was the only reason they could think up to justify voiding an election from which there were no appeals and under which the Electoral Officer, Ms. Moore, had declared FCC to be the duly elected Chief and Council of MCFN. Fortunately, the Court has clear evidence from Mr. Bighetty, the third former member of the EAC that he was asked to participate in an obvious fraud, and that there was no such meeting. This evidence has not been challenged by MCC. Mr. Bighetty is to be commended for doing his duty and his refusal to participate in an obvious fraud, and for providing evidence for this dispute in a community where there are likely to be pressures on anyone not to come forward;

(c) Why did Christopher Colomb, Gordon Colomb and Douglas Hart run in the May Election without providing the criminal record checks that they knew were required, because the failure to provide these checks had disqualified them from the February Election? And why did Ms. Moore, who was apparently acting as Electoral Officer for the May Election (and who had acted in concert with Urgel Linklater and Joseph Colomb to void the February Election on this very ground) allow these people to run without record checks? Without an explanation, the Court must again, draw the obvious inference that Christopher Colomb, Gordon Colomb and Douglas Hart did not submit the checks in May because they knew that, this time, they would not be asked for them. Mr. Hart has been examined on an affidavit and confirmed that he had been convicted of an indictable offence and that they were not asked for those checks. The Court can only assume that, for these three individuals, gaining power at MCFN is a matter of what you can get away with, and is not a matter of observing the will of MCFN members as expressed in the Election Law. Mr. Hart, at the hearing before me, attempted to recant his evidence, given under oath, that he has been convicted of an indictable offence and now says that it was a summary offence. I have decided to admit this new evidence, but I also have to note the contradiction and the fact that Mr. Hart has not been cross-examined on this new assertion. Consequently, it still remains unclear as to what kind of offence he committed, but this is of no real import because the evidence is clear that Douglas Hart, Christopher Colomb, and Gordon Colomb were all allowed to run in the May Election without submitting criminal record checks when these same individuals had been disqualified from the February Election for failing to provide the same checks, and that election was declared void by a bogus EAC for that very reason. In addition, the Court has to note that, at the hearing before me, MCC attempted to correct Mr. Hart's position (summary rather than indictable) because they knew this was a "merit" point in their favour. But they certainly did not dispute that no record checks had been produced, and there was no evidence brought forward to show whether Christopher Colomb and Gordon Colomb have criminal records. This is a strange and revealing omission. It shows that MCC are only willing to address merit points and bring evidence forward that favours them when it

> comes to explaining a highly disputed election. It also shows that, if they can make a merit point that favours them, they are willing to address merit. They can't have it both ways.

There are many other anomalies and unexplained matters that I refer to elsewhere, but this will suffice to demonstrate how crucial issues have not been addressed by MCC in the proceedings before me.

[31] However, when respondent's counsel attempted to distinguish *Lac des Mille Lacs,* above, he did so on the basis of the obviousness of the lack of merit in Mr. Sawdo's position and it was Mr. Sawdo who had engineered the second election in that case. The irony is that, in *Lacs des Mille Lacs*, it was obvious that the first Chief and Council had exceeded their mandate and were not legitimately maintaining power. In any event, it is clear that "merit" cannot just be ignored in these situations. First nations are not governed by the *Federal Courts Rules* of procedure and practice, and Rule 3 makes this very clear that:

3 These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.	3 Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[32] I think this will suffice to show why the Court cannot accept that MCC has any standing to bring this application and why there is no point in examining the merits of the application. The Court has to conclude that MCC are not the Chief and Council and have no authority to represent MCFN. That authority remains with FCC who were legitimately elected on February 1, 2016 and who remain the legitimate Chief and Council of MCFN.

[33] As in *Lac des Mille Lacs*, above, MCC's failure to proceed with a writ of *quo warranto* is fatal to the application in T-1335-16; it is also fatal in MCC's motion to strike in T-1442-16. Although MCC are not named in the style of cause on that file as representing MCFN (for the obvious reasons that FCC did not recognize them as such) the position they take up in that motion is based upon their claim to be the legitimate Chief and Council of MCFN. It may also render much of the relief that the EC Applicants seek in T-1442-16 unnecessary.

[34] In this application, MCC ask, *inter alia*, for "such further and other Order as counsel may advise and this Honourable Court may permit." Counsel for the EC Respondents and counsel for the other parties still involved in this dispute have asked the Court, as Justice Cullen did in *Lacs des Mille Lacs*, above, to fashion a remedy that will resolve all of the issues in dispute and to render "further and other relief" that is fair and just in the circumstances. The jurisprudence of the Court, suggests that I may do this. In *Ominayak v Returning Officer for the Lubicon Lake Indian Nation Election*, [2003] 3 CNLR 180, Justice Dawson cited authorities for this approach:

> 51 As Mr. Justice Muldoon observed in *Ballantyne v. Nasikapow* (2000), 197 F.T.R. 184 (Fed. T.D.) at paragraph 79, the jurisprudence of this Court demonstrates that the Court may fashion a remedy appropriate to the circumstances. This reflects the fact that remedies available on judicial review are discretionary.
>
> 52 An application for judicial review is a public law proceeding. Therefore, the relief granted by the Court should further the public interest. See: *Canada (Attorney General) v. P.S.A.C.* (1999), [2000] 1 F.C. 146 (Fed. T.D.) at paragraph 220 and following.

[35] It has been suggested that I should extend the term of office of FCC to reflect the disruption in their term caused by this dispute and/or to bring their term back into line with the

usual schedule for elections that has been disrupted in this case for various reasons. Subsection 3(9) of the Election Law stipulates that general elections shall be held every 4 years in the month of June. My view is that these are matters for the MCFN members and their legitimate Chief and Council to resolve in accordance with their own procedures as reflected in the Election Law. They are not matters that are properly before me. Chief and Council under the Election Law are elected for a 4-year term and, hence, the electorate of MCFN elected FCC for a 4-year term. It is not for the Court to adjust what the electorate have chosen to do and endorsed at the unchallenged February Election.

[36] It is also clear from the application in T-1335-16 that the election, mandate, and term of office under the Election Law of the election committee need to be clarified and formalized. Otherwise, disputes over these issues are likely to arise in the future. I have dismissed this application for reasons given, but this does not mean that I accept the legitimacy of the EC Applicants. Once again, however, that is a matter for MCFN and their Chief and Council to resolve in a way that is acceptable to the community and which complies with the Election Law, which may need amendments.

[37] My conclusions on this application are that:

(a) The persons elected on February 1, 2016, being Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay are the Chief and Council of MCFN who were duly elected in accordance with the MCFN Election Law and were not removed from office by a decision of Joseph Colomb and Urgel Linklater of March 16, 2016 purporting to act as an EAC, and their terms expire on February 1, 2020;

(b) The purported May 16, 2016 election process by which Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb claim to have been elected as MCFN's Chief and Council, was not an election process under the MCFN Election Law and is not binding on MCFN so that Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon

Colomb did not become, and are not now, Chief and Council of MCFN, and all decisions and acts which they purport to have carried out in that capacity are of no force and effect;

(c) Because Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb are not the duly elected Chief and Council of MCFN and have no capacity or standing to bring this application on behalf of MCFN, the application is dismissed.

V. MOTION TO STRIKE – T-1442-16

A. *The MCC Arguments*

[38] The MCC say that the application on this file, in which the EC Applicants are seeking judicial review of an alleged "series of decisions," is really an attempt to seek judicial review of the March 2016 decision of the EAC which led to the election of the MCC on May 16, 2016.

[39] They say that the EC Applicants are seeking the same relief that the FCC sought in the June 3, 2016 888 Application. The 888 Application was dismissed by Prothonotary Lafrenière on June 27, 2016, and no appeal was filed.

[40] They say that the T-1442-16 application, which seeks the same relief as the 888 Application, was filed out of time and is an abuse of process that also intentionally violates the *Federal Courts Rules* and includes claims for relief that are beyond the jurisdiction of the Court and for which the EC Applicants have no standing. For these reasons, it should be struck.

(1) Application Out of Time

[41] The MCC say that it is clear on the face of the Notice of Application that the EC Applicants were aware of the EAC decision at the time that it was communicated to the public on March 16, 2016.

[42] On or before March 30, 2016, each of the EC Applicants (and the 888 Applicants) signed a petition indicating their preference to maintain the FCC (888 Applicants) in their positions.

[43] In addition, the past Chief (the Respondent Priscilla Colomb) posted a notice in the MCFN community on April 5, 2016, in which she took the position that the election scheduled for May 2016, was not valid.

[44] The EC Applicants joined the boycott of the May Election. They then purported to act as the EC of MCFN, without any colour of right, authority or jurisdiction, and declared the May Election results to be invalid.

[45] Even then, they took no legal action within thirty (30) days and now purport to request declaratory relief in respect of their own actions.

[46] On August 9, 2016, the EC Applicants, again, without any colour of right, authority or jurisdiction, purported to call a new election which they rationalized, illogically, on the basis of the dismissal of the 888 Application.

[47] They then rescinded their call for an election in the face of the T-1335-16 application and the motion for interlocutory injunctive relief therein.

[48] Only then, more than thirty (30) days after the dismissal of the 888 Application, did they attempt to commence an application for judicial review.

[49] It is obvious that the "essential character" of the within application is an attempt to challenge the EAC decision of March 16, 2016.

[50] The attempt to veil the application as addressing a "series of decisions" is simply an attempt to circumvent the requirements of s 18.1(2) of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and the requirement to apply for an extension of time prior to commencement pursuant to Rule 67; all contrary to the principles set out in *Roitman v Canada*, 2006 FCA 266.

[51] As noted above, in *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*], the Court emphasized that "applications for judicial review must be brought quickly."

[52] More recently, in *Robertson v Canada (Attorney General)*, 2016 FCA 30 [*Robertson*], although not decided on a motion to strike, the Federal Court of Appeal upheld a lower court decision to dismiss an application for judicial review where it was filed outside the 30-day time limit. The Court stated:

> On the timeliness issue, the mandatory 30 day time limit provided in subsection 18.1(2) of the FCA runs from the date an applicant has knowledge of the decision he or she wishes to review. In the appellant's case, that date was April 11, 2014. The applicable time limit was not extended by the fact that the appellant wrote subsequent letters of complaint to CSC or by the fact that CSC responded to them. Thus, the appellant's application for judicial review was filed late. As he did not seek an extension of the time limits, the Federal Court committed no error in dismissing the appellant's application for being untimely.

[53] The decision in *Robertson* emphasizes that choosing to pursue means other than an application for judicial review does not relieve or excuse an applicant from the requirements of the *Federal Courts Act*, nor does it constitute a continuing interest to pursue such an application.

[54] In the present case, the EC Applicants consciously and deliberately chose to pursue means other than judicial review and only attempted to do so after their alternate efforts proved unsuccessful. The EC Applicants should be held to their choice.

(2) Violation of Federal Courts Rules and Procedures

[55] Rule 302 of the *Federal Courts Rules* clearly provides that an application for judicial review will be limited to a single order in respect of which relief is sought.

[56] In the present case, on the face of the application, the EC Applicants purport to claim relief in respect of decisions dated March 16, 2016, May 16, 2016, May 17, 2016, and August 12, 2016.

[57] Even more offensive, the application purports to request relief in respect of the decisions made by three separate and distinct federal boards, commissions or other tribunals: the EAC, the purported EC and the MCC.

[58] Exacerbating matters further, these violations of the *Federal Courts Rules* were committed not as a result of exigencies reasonably beyond the control of the EC Applicants, but rather to consciously circumvent the statutory requirements and procedures of the Court and set out above.

(3) Beyond the Jurisdiction of the Court

[59] At paragraphs 8 and 9 of the Notice of Application, the EC Applicants request certain declaratory relief within an application for judicial review that is neither "against" any federal board, commission or other tribunal, nor seeks to invalidate or quash a decision of any federal board, commission or other tribunal.

[60] The EC Applicants joined the boycott of the May Election. They then purported to act as the EC of MCFN and, without any colour of right, authority or jurisdiction, declared the May Election results to be invalid.

[61] In other words, this portion of the Notice of Application does not request any relief contemplated by the provisions of the *Federal Courts Act* in respect of the Court's jurisdiction in applications for judicial review.

[62] At paragraphs 16 and 17 of the Notice of Application, the EC Applicants request relief to enforce a contract for services, now terminated, between the Respondents, Mark D'Amato and Terry Laliberty and MCFN.

[63] Commercial contracts and decisions relating thereto by Council of a first nation are not the subject matter of judicial review. See *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812.

[64] Issues with respect to commercial arrangements are within the exclusive jurisdiction of the Courts of the Provinces, in this case, the Court of Queen's Bench of Manitoba.

(4) Lack of Standing

[65] Subsection 18.1 of the *Federal Courts Act* permits anyone "directly affected" by the matter in respect of which relief is sought, to commence an application for judicial review.

[66] As indicated above, the EC Applicants purport to apply for judicial review of the termination of any contract of services between the Respondents Mark D'Amato and Terry Laliberty, however, there is no privity of contract involving the EC Applicants, nor are the EC Applicants "directly affected."

[67] Accordingly, the EC Applicants do not have standing pursuant to s 18.1 of the *Federal Courts Act* to bring an application in respect of this matter.

(5) Abuse of Process

[68] As indicated above, a realistic appreciation of the essential character of the within application is an attempt to challenge the EAC decision of March 16, 2016, some five and a half months after it was made.

[69] Clearly, the within application is even further out of time than was the case with the 888 Application. Had the 888 Application not been dismissed, the EC Applicants would never have attempted to commence this application.

[70] The EC Applicants are acting in concert with the 888 Applicants in an attempt to do an end run around Prothonotary Lafrenière's Order dismissing the 888 Application.

[71] The 888 Applicants chose not to appeal the dismissal Order but are effectively attempting to do so with the assistance of the EC Applicants herein.

[72] The Court must guard against such blatant misuse and abuse of the Court's process.

(6) Conclusions

[73] The present motion to strike is not based solely on a timeliness issue, nor a violation of the *Federal Courts Rules* and procedures. The motion presents all of the faults referred to above, together with a scheme to work around a prior Court Order.

[74] When the “series of decisions” is broken down into its components, it reveals instead, a series of violations of the Court’s rules and processes.

[75] When decocted, its essence is an inappropriate attempt to avoid the statutory and regulatory requirements of the Court.

[76] Permitting the within application to proceed in these circumstances can only bring the administration of justice into disrepute and cause significant disruption, upset and prejudice to a first nation’s community.

[77] Accordingly, MCC respectfully requests that the Notice of Application be struck and removed from the Court’s files.

B. *EC Arguments*

(1) Application Not Out of Time

[78] The motion to strike is principally based on the assertion that, since the date of filing the application was some 5 months after the alleged EAC decision was rendered on March 16, 2016, then a 30-day time limit has been missed, and that there is no possible arguable basis for the Court to extend the time for filing. These propositions are fundamentally flawed for a number or reasons.

(a) *There is no 30-day time limit. The application does not principally seek judicial review of a decision at all*

[79] The 30-day time limit in s 18.1(2) only applies where a genuine "decision" of a federal board or tribunal has been rendered. Such is not the case here.

[80] The gravamen of the application in T-1442-16 is not judicial review of a "decision" of a federal board or tribunal; it is *quo warranto* and declaratory relief respecting the offices of a federal board or tribunal, for which there is no time limit.

[81] The Federal Court of Appeal has consistently held that where the relief sought is for declaratory or prerogative relief, and no decision of a federal board or tribunal is being challenged, the 30-day time limit within s 18.1(2), does not apply. The Federal Court of appeal explained:

> While it is true that, normally, judicial review applications before this Court seek a review of decisions of federal bodies, it is well established in the jurisprudence that subsection 18.1(1) permits an application for judicial review "by anyone directly affected by the matter in respect of which relief is sought". The word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought: *Krause v. Canada*, [1999] 2 F.C. 476 at 491 (F.C.A.). Ongoing policies that are unlawful or unconstitutional may be challenged at any time by way of an application for judicial review seeking, for instance, the remedy of a declaratory judgment: *Sweet v. Canada* (1999), 249 N.R. 17.

(*May v CBC/Radio Canada*, 2011 FCA 130 at para 10).

[82] The crux of the present case is not that there is a decision of a federal board or tribunal that needs to be reviewed, but that the people claiming to be a federal board or tribunal do not, in fact, hold that office, and that whatever the March 2016 paper claiming to have removed the FCC is, it is not a "decision" of a federal board or tribunal.

[83] If the EC Applicants are successful in their plea for a declaration and *quo warranto*, then there never has been any decision of a federal board or tribunal that needed to be reviewed. The result would necessarily be that the FCC was not in fact removed, and that the May Election was, as reasonably believed by the majority of band membership, a nothing.

[84] The evidence before the Court overwhelmingly supports a finding that there has been no "decision" of a federal board or tribunal removing the FCC.

[85] It is only if and when the Court rules that the March 16 or 17, 2016 paper purporting to be a "decision" of the EAC is, in fact, a genuine decision of a federal board or tribunal, that the 30-day time limit needs to be addressed.

(b) *Even if there is a decision of a federal board or tribunal, the 30-day time limit has not been missed*

[86] The argument of an alleged missed time limit prejudges the outcome of the central *lis* as between the parties. The argument presumes that the Court has already found that there was a decision that needed to be judicially reviewed.

[87] It is the position of the EC Applicants in T-1442-16 that, in the unique facts of this case, where there is no reasonable basis to believe that there was a decision of a federal board or tribunal, then it is only if and when the Court were to rule on that issue in favour of the Applicants in T-1335-16 that the 30-day time limit would commence running.

[88] The time to file judicial review of a decision is 30 days from when the "decision" of the federal board or tribunal is first communicated by the federal board or commission.

[89] Within the time limit is the presumption that it is plain and obvious that there has, in fact, been a decision of a federal board, commission or tribunal. But this very fundamental, underlining "trigger," is hotly contested in this case.

[90] It is admittedly a rare situation for there to be no reasonable basis to conclude that a decision of a federal board or tribunal has in fact been made. But such is the case here.

[91] Because of the rarity of a situation, where the evidence supports that there is no "decision" of a federal board or tribunal, it is not surprising that there is no case law addressing the discoverability issue.

[92] But case law dealing with the judge-made discoverability rule, as well as the statute law concerning discoverability of limitation periods, supports the view that it is not the accrual of the cause of action, nor the knowledge of the facts giving rise to the underlying cause of action that causes a time limit to commence running. What is required is not only reasonable discoverability

of the facts on which a claim is based, but an appreciation that proceeding to court to secure a remedy is an appropriate step to take. See *Manitoba Limitations of Actions Act*, CCSM C.L-150, s 20(3) and *British Columbia Limitation Act*, [SBC 2012] C.13 at para 8(d).

[93] By analogy to limitations laws, given the unique facts of this case, the time period has not yet commenced running.

[94] Moreover, it is important to recall that the delay in discoverability was fundamentally caused by the failure of those persons seeking to uphold the validity of the March 16, 2016 EAC document to seek the Court's assistance as they were obliged to do. See *Lac des Mille Lacs,* above, at paras 16-21.

[95] The onus to pursue immediate Court steps following the events of March 2016 did not rest with the EC or the FCC. The consequences of delay should not be visited upon them.

[96] If anyone has long since missed a time limit in this current Court dispute, it is the Applicants in T-1335-16.

[97] The EC Applicants in T-1442-16 were left with no reasonable basis to believe that there was in fact any "decision" of a federal board or tribunal that needed challenging in the Courts. The time period to file has not been missed.

(c) *If any time limit was missed an extension is warranted*

[98] If any time limit was missed, the EC Applicants in T-1442-16 have sought, in the alternative, an extension of time under s 18.1(2).

[99] Where it is not admitted that there is any decision to review, such relief is necessarily and appropriately brought in the alternative, and should appropriately be considered by the Court only if the Court is satisfied at the hearing of the main application that a time limit has been missed.

(d) *No preliminary motion to extend the time is appropriate in this case*

[100] If the EC Applicants in T-1442-16 would have made a preliminary motion, it would have to be on the basis that they admit that there was a decision for which an extension was required.

[101] Hence, where a party denies the existence of a decision, there is no need to bring a motion to extend the time on a preliminary basis. The appropriate time to consider the merits of an argument that the party is out of time (and any basis to extend the time) is at the hearing of the application on its merits, and not before. See *Maracle v Six Nations of the Grand River Band of Indians*, [1998] FCJ No 332 at paras 7-8.

(e) *If the 30 days has otherwise expired, there are arguable grounds under s 18.1(2) to extend the time limit*

[102] Alternatively, if, even absent a ruling on whether such relief is even necessary, the Court wishes to consider, as part of this preliminary motion, whether the Court might grant an extension to pursue judicial review, then the EC Applicants in T-1442-16 say that not only is there an arguable case that the Court should grant an extension, but that such relief ought to be granted if it is needed.

[103] The factors to consider in whether or not to grant an extension of time to pursue judicial review beyond the usual 30 days has been set forth by the Federal Court of Appeal in *Canada (Attorney General) v Larkman*, 2012 FCA 204 [*Larkman*]:

> (2) The test for an extension of time
>
> 61 The parties agree that the following questions are relevant to this Court's exercise of discretion to allow an extension of time:
>
> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
>
> See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249 at paragraph 8.
>
> 62 These questions guide the Court in determining whether the granting of an extension of time is in the interests of justice: *Grewal*, supra at pages 277-278. The importance of each question depends upon the circumstances of each case. Further, not all of these four questions need be resolved in the moving party's favour.

> For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal*, at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 at paragraph 33; *Huard v. Canada (Attorney General)*, 2007 FC 195, 89 Admin LR (4th) 1.

(f) *A continuing intention to pursue the application?*

[104] The continuing intention element most often arises where there is no dispute as to whether or not there has been a decision or not.

[105] A person who has no reason to believe that there is, in fact, any decision, cannot logically form the intention to pursue judicial review of a decision.

[106] Happily, however, a continuing intention to protect ones rights suffices to satisfy the element of continuing intention. See *Apv Canada Inc v Canada (Minister of National Revenue)*, [2001] FCJ No 1099 at para 13, cited with approval in *Cottrell v Chippewas of Rama Mnjikaning First Nation Band*, 2007 FCA 288 at para 15 [*Cottrell FCA*].

[107] The facts of this case clearly demonstrate throughout, that the EC was pursuing ways within its authority, and in accordance with its understanding of the applicable laws, to challenge the claim that the removal of the FCC was valid, and to challenge the claim of the MCC that they are the duly elected Chief and Council of MCFN.

(g) *Is there some potential merit to the application?*

[108] If the "merit" to be considered has anything to do with the issue as to whether those claiming to hold office do, in fact, hold such office, then the evidence before the Court overwhelmingly supports a finding that there was no decision of MCFN's EAC, and that there was no valid election process on May 16, 2016.

[109] There is also significant merit to the alternate argument that any "decision" ought to be set aside on judicial review. The evidence, together with a reading of the Election Law establishes that:

(a) There were no appeals launched;

(b) There were no appeal hearings;

(c) Any decision did not involve all 3 appeal committee member, hence there was a lack of quorum (see *Dennis v Adams Lake Indian Band*, 2011 FCA 37 at para 19);

(d) None of the interested parties, including the FCC purportedly removed, were given any notice of any hearing or any opportunity to participate in the process before a decision was made;

(e) The decision had on it at least one forged signature;

(f) Even if there were a duly constituted EAC holding a duly convened meeting, as a matter of law, they lack the authority under the Election Law to remove an elected Chief and Council who have not breached any Election Law, and they lack the authority to call new elections.

[110] The most basic elements of natural justice and procedural fairness were ignored in this case.

(h) *Is there prejudice from the delay?*

[111] Prejudice that the party may be subject to losing the merits of the case cannot be the prejudice complained of. Such prejudice wrongly presumes the outcome of the case. More is required. See *Cottrell v Chippewas of Rama Mnjikaning First Nation Band*, 2007 FC 269 at paras 25-28, aff'd *Cottrell FCA*, above.

[112] On the facts of this case, there is no compelling evidence of prejudice.

[113] It is often said that prejudice is inherent in delay, but there is a distinct lack of evidence of genuine prejudice in the present case.

[114] It is submitted that the issue of prejudice, like all issues, ought properly to await the hearing on the merits.

(i) *Is there a reasonable explanation for the delay?*

[115] The evidence before the Court supports a finding that there is a reasonable explanation for the delay of the EC Applicants in pursuing the T-1442-16 application brought on August 30, 2016. In brief, the explanation is as follows:

(a) Given that there was every reason to believe that there were no appeals, no appeal hearings, no meeting of the EAC and only a forged form of decision, there was no reason to believe that there had been any decision of a federal board or tribunal requiring any judicial review;

(b) Given that the onus rests upon those claiming to have removed the FCC and claiming the right to hold new elections to forthwith go to Court following the mid-March "decision"

(see *Lac des Mille Lacs*, above), it was reasonable for the incumbents not to proceed to Court;

(c) Until about mid-May 2016, (3 months after the "decision" was circulated), the "decision" was not materially impacting the FCC's ability to govern so as to warrant the expense of an application to Court especially absent any onus to do so;

(d) The FCC applied to Court in early June 2016, within a few weeks of genuine trouble requiring the Court's assistance, but due to missteps or errors within that application, it was struck without a hearing on the merits on July 27, 2016;

(e) Shortly after the July 27, 2016 decision striking the 888 Application on technical grounds, the EC Applicants pursued a remedy that they thought was available to them: seeking the direction of the band electorate to call new elections, which is the exact avenue used in November 2015 to address the invalid July 2015 election process. Their November 2015 election call was unchallenged;

(f) In this regard, one of the bars to judicial review is a failure to pursue and exhaust all internal remedies reasonably available. The EC Applicants had every reason to believe that seeking the direction of the electorate on new elections, as they did in November 2015, was a proper internal remedy;

(g) Only after it became clear that the MCC brought their judicial review application in T-1335-16 wherein they deny the validity of the new August 9, 2016 election call, did it become appropriate and timely for the EC Applicants to proceed with their judicial review proceeding. This they did.

(2) No Violation of *Federal Courts Rules* and Procedures

[116] There are only two bodies whose alleged decisions are, in the alternative to *quo warranto* and declaratory relief, being challenged. They are the decisions of the EAC and the decisions of the MCC in their claimed capacity as the band's Chief and Council.

[117] These "decisions" form a series of interrelated decisions evidencing a continued course of conduct which is at the center of this dispute, namely, who is entitled to hold themselves out as the real Chief and Council of MCFN, and who gets to control the funds derived from the public purse.

[118] At the end of the day, s 302 has not been offended.

[119] However, if it has been, and as the Court in *Shotclose v Stoney First Nation*, 2011 FC 750 ruled, the Court ought, in these circumstances, properly to invoke s 65 and dispense with compliance with s 302.

[120] In this regard, the EC Applicants further ask the Court to be mindful of the high cost of litigation and the need to interpret and apply the *Federal Courts Rules* so as to "secure the just, most expeditious and least expensive determination of every proceeding on its merits."

(3) Jurisdiction

[121] The Federal Court of Appeal in *Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 50-60 canvassed the various factors the Court must consider before deciding on whether the contract at issue is one that has a sufficient public nature to it such that judicial review is appropriately sought.

[122] The Federal Court of Appeal said:

> 60 In determining the public-private issue, all of the circumstances must be weighed: *Cairns v. Farm Credit Corp.*, [1992] 2 F.C. 115 (T.D.); *Jackson v. Canada (Attorney General)* (1997), 7 Admin. L.R. (3d) 138 (F.C.T.D.). There are a number of relevant factors relevant to the determination whether a matter is coloured with a public element, flavour or character sufficient to bring it within the purview of public law. Whether or not any one factor or a combination of particular factors tips the balance and makes a matter "public" depends on the facts of the case and the overall impression registered upon the Court.

[123] The contract with the MCFN's co-manager (Mark D'Amato) relates to the usage of public funds in administering government functions. It is not akin to a private law arrangement where a band council hires a janitorial service.

[124] It is enough at the present stage that there remains an arguable case that the contract is sufficiently public in nature to warrant being the subject of a judicial review proceeding.

(4) Applicants Have Standing

[125] Whether as members of the MCFN's governance structure (it's Election Committee), or as band members, each of the Applicants in T-1442-16 stands to be potentially directly affected by the outcome of the proceedings being brought.

[126] In fact, their direct interest is conceded given that they are the named Respondents in the related T-1335-16 proceedings.

[127] All band members have the right to ensure that they are governed by a duly elected Chief and Council and all band members have a direct interest in protecting MCFN's funds.

[128] A band is unlike a corporation. It is a *sui generis* collective, and if the band has a direct interest in the matter, which it surely does, so too must its membership.

(a) *In any event, the EC Applicants have public interest standing*

[129] In any event, if there were no classic "direct interest" this is a case where the EC Applicants would have public interest standing to pursue the application herein. The three factors, to be considered in a liberal and generous manner are:

(a) Whether there is a serious justiciable issue;

(b) Whether the party bringing the application has a real stake or a genuine interest in its outcome; and

(c) Whether, having regard to a number of factors, the proposed suit is an effective means to bring the matter before the Court.

See *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras 37-50.

[130] If there is no direct interest, there is surely public interest standing.

(5) No Abuse of Process

[131] The moving parties seek to cast the application in T-1442-16 as an abuse of the Court's process, given the decision of Prothonotary Lafrenière of July 27, 2016.

[132] The core of an abuse of process is where the strict elements of *res judicata* or issue estoppel do not apply, often due to a lack of mutuality of parties in the first proceedings, and that there is an attempt to re-litigate a decision previously heard and decided by the Court on its merits.

[133] There is no validity to such a complaint in this case.

[134] The only issue decided by the Prothonotary on July 27, 2016 was whether the lawyer for the FCC explained the delay sufficiently to allow her to file her affidavit material. He decided she did not.

[135] The Prothonotary did not decide that the application was without merit. He did not even decide that he would refuse an extension of time to seek judicial review - no such application was before him.

[136] The 888 Application was dismissed on very narrow technical grounds with the Prothonotary being kept in the dark as to the true state of affairs.

[137] The current EC Applicants were not parties to those proceedings and could not have appealed that decision.

[138] The FCC had every reasonable basis not to appeal that decision themselves, given the wishes of the MCFN membership to hold new elections on August 4, 2016.

[139] It is not an abuse of process to seek to have the merits of a case decided by the Courts, so that the MCFN membership can know who their real Chief and Council are, and whether the MCFN's use of public funds should remain within the control of an independent third party who has a proven track record of preventing any financial abuse.

[140] And this is ultimately the important point: this application is being brought with a view to the best interests of the MCFN membership. In *Poker*, above, the Court was faced with an allegation that the party seeking relief had contributed to the band's electoral problems, and hence relief ought to be denied. The words of Justice Rennie are worth repeating:

> 30 ... In any event, regardless of which individual or individuals may have cause or contributed to the shortcomings in the [election] process, the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in ensuring that Band confidence in Band elections is merited, as it strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.

[141] At the end of the day, it is the MCFN electorate who are entitled to be governed by those elected in fair and democratic elections held in accordance with the MCFN's chosen governance model. If there is one thing in this case that is absolutely crystal clear, is that the May Election process was not such a process.

C. *Analysis*

[142] Given my decision, above, in T-1335-16 that FCC is the legitimate Chief and Council of MCFN and that the MCC are not, this motion to strike is, strictly speaking, moot. However, I also wish to make it clear that, even without my decision in T-1335-16, above, the strike motion would have to be dismissed.

(1) The Legal Test

[143] There is no Federal Court rule that deals with the striking of an application, but it is now well-recognized that the Court can dismiss an application in a summary way in exceptional cases. In *JP Morgan*, above, relied upon by the MCC, the Federal Court of Appeal provided the following guidance:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; cf.. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[144] The MCC argue that the law has gone further than this and, relying upon the Federal Court of Appeal decision in *Forner v The Professional Institute of the Public Service of Canada*, 2016 FCA 35, they say that the Court must "take into account all of the circumstances in order to strike a balance between the two competing interests." I don't disagree with anything the MCC say about the need to avoid misuse and abuse of the Court's processes, and the need to look behind clever drafting to see what is really going on. However, in my view, in looking into such issues, the Court must still be careful not to dismiss an application (and particularly a complex application such as the present one) if it has "any possibility of success," and there is no "obvious fatal flaw striking at the root of this Court's power to entertain the application," to quote the Federal Court of Appeal in *JP Morgan*, above. The MCC point to several such "flaws" and I will deal with each in turn.

(2) Application is Out of Time

[145] This is the MCC's strongest argument. However, as the Court has pointed out before, any issue of a time bar should, in the usual case, be argued at the hearing of the application and not on a motion to strike. See *Professional Institute of the Public Service of Canada v Canada (Customs and Revenue Agency)*, (2002) FCT 119; aff'd 2003 FCA 48. The reason for this is that time limits, and the possibility of obtaining extensions, are often complex issues that require the full facts behind the application.

[146] In the present case, the MCC believe it is obvious that the 30-day time limit set out in s 18.1(2) of the *Federal Courts Act* runs from the date that an applicant has knowledge of the decision he or she wishes to review which, in this case, is really the March 16, 2016 decision of the purported EAC, and that there is no arguable case for extending the time to August 30, 2016, when the application was filed.

[147] However, there are several complicating factors in this case which suggest to me that this issue has to be left to the Applications judge to determine. To begin with, the 30-day time limit under s 18.1(2) can be extended to "any further time that a judge of the Federal Court may fix or allow before or after the expiration of those 30 days." We know that, in order to obtain an extension, an applicant must both justify the delay and establish a reasonable chance of success on the merits.

[148] In the present case, there are several reasons why the limitations issue should not be used to strike the application:

a) There is a real dispute between the parties as to whether the application in this case is "in respect of a decision or order of a federal board, commission or other tribunal." The EC Applicants argue, for instance, that the March 16, 2016 decision of the EAC was a "nothing" because there was no EAC empowered under the Elections Law at that time, and, in any event, there was no meeting held in accordance with the Election Law and the whole process that led to the "nothing" was a deliberate fraud perpetrated on the MCFN. On the record before me in this motion, this is not an untenable argument. Where a judicial review application is not in respect of a tribunal's decision or order, the 30-day limitation period does not apply and the Court will have to consider whether or not the delay is reasonable in the circumstances. See *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3. In order to decide whether the delay in this case was reasonable in the circumstances, the Court will need to consider the full application record;

b) Subsection 18.1(2) itself contains a discretion to relieve a party from the 30-day rule even if there is a reviewable decision in this case. The general principles for the extension of time are set out in *Larkman*, above, and we know that not all of the four issues cited by the Federal Court of Appeal in that case need to be resolved in favour of a party seeking an extension, and that the overriding consideration is that the interest of justice be served. The way this dispute has unfolded and the possibility of fraud against the MCFN electorate by the MCC, or those who facilitated the May Election, means that justice in this case may well require the extension of any normally applicable limitation period. In addition, this is not a dispute about the personal interests of the parties. This is a dispute about who are the legitimate Chief and Council of MCFN, and the "paramount consideration in considering whether to grant or hold relief is the Band membership's confidence in the electoral process itself," to quote Justice Rennie in *Poker*, above. This paramount consideration cannot be dealt with by simply striking the application on the basis of a 30-day limitation period at this stage in the dispute;

c) The EC Applicants are seeking a declaration and/or *quo warranto*, which raises the issue of whether a fixed time limit is applicable and whether delay will have to be considered generally and in accordance with equitable principles;

d) We also know that an applicant need not in all cases establish a continuing intention to bring an application for judicial review, and that it may be sufficient to show a continuing intention to protect their rights. In the present case, the evidence before me in this motion could well establish such a continuing intention.

[149] There are other factors that come into play in this case such as the overriding need for the Court to establish which of FCC or MCC is the legitimate Chief and Council of MCFN. This

uncertainty has already had a very serious impact upon the financial affairs of the community. But the political culture has also been thrown into disarray and will remain in disarray until this issue is settled. The EC Applicants and those they represent may not be the whole community, but they are a sufficiently large group to demonstrate that the conflict in this case needs a speedy solution from the Court. If the merits are not addressed by the Court, then political instability at MCFN will continue into the future. All of this will need to be considered before the impact of delay can be established in this case. In my view, the MCC have come nowhere near establishing that the application should be struck for limitation reasons or unreasonable delay. In my view, the paramount interests of the MCFN require this dispute to be heard and determined on the merits as quickly as possible. If the EAC have done what the EC Applicants say they have done and practised fraud on the MCFN, and that fraud goes unexamined by this Court, then it will set a pattern that will be noted and followed in the future. It will undermine MCFN's whole political culture and discourage those who want a fair election process and accountability.

(3) Violation of *Federal Courts Rules* and Procedures

[150] The MCC point to Rule 302 and say that, on the face of the application, the EC Applicants purport to claim relief in respect of 4 decisions dated March 16, 2016, May 16, 2016, May 17, 2016 and August 12, 2016. The MCC also point out that these decisions are made by "three separate and distinct federal boards, commissions or other tribunals: the EAC, the purported EC and Current Council." The MCC asserts that these violations of Rule 302 are a deliberate and conscious attempt to circumvent the Court's statutory requirements and procedures.

[151] Rule 302 does not give the MCC the technical knockout they are looking for in this motion to strike. The MCC acknowledges the central issue in this dispute: who are the legitimate Chief and Council of MCFN. In order to deal with each decision, the Court will be examining the same facts and the same record in each case. To require the EC Applicants to file separate application records would serve no useful purpose and would not, in accordance with Rule 3, which I am bound to apply ("shall") "secure the just, most expeditious and least expensive determination" of this proceedings in its merits.

[152] In any event, the evidence before me in this motion suggests that it is the MCC who are attempting to do an "end run" on their own Election Law by seeking to knock out the application through the use of the *Federal Courts Rules* that, in their view, require the Court to disregard the merits of the central issue in dispute. This is not what the *Federal Courts Rules* and procedures were intended for. See, for example, Rule 3.

(4) Beyond the Jurisdiction of the Court

[153] There can be no doubt that the Federal Court has the jurisdiction to deal with what all parties agree is the central and fundamental issue in this dispute. Which of FCC or MCC are the legitimate Chief and Council of MCFN? The answer to this question will impact many collateral issues where jurisdiction may come into play. However, until the Court has all of the facts before it and has decided that central issue, it cannot deal with separate collateral issues and they should not be struck at this juncture.

(5) Lack of Standing

[154] On this issue, the MCC complain that the EC Applicants do not have standing pursuant to s 18.1 of the *Federal Courts Act* to ask the Court to review the termination of the contracts with Mark D'Amato and Terry Laliberty on the ground that there is no privity of contract involving the EC Applicants, and the EC Applicants are not "directly affected."

[155] It seems to me that, as the EC Applicants say, at this stage in the proceedings and given the record before me, it is not possible to say that there is no public dimension to this contract so as to clearly remove it from the Court's jurisdiction in judicial review proceedings. In addition, I don't think that it can be said that the EC Applicants, or any other member of the MCFN, has not been directly affected by the termination of this contract and the consequence of that termination for the MCFN community.

[156] The status of this contract has a lot to do with the legitimacy of its termination by MCC. Should it turn out that MCC are not the legitimate Chief and Council of MCFN and never were, the legality of any acts and omissions of MCC will be an inevitable consideration for the Court. The contract simply cannot be disconnected from the central issue of this dispute. Nor can the Court's jurisdiction to review the termination of that contract.

(6) Abuse of Process

[157] The MCC complain that the EC Applicants are simply attempting an "end run" around the Order of Prothonotary Lafrenière that dismissed the 888 Application, which Order was not appealed. They say this is an abuse of process.

[158] In Prothonotary Lafrenière's Order of July 27, 2016, he made his decision to dismiss the 888 Application "by way of correspondence from counsel instead of requiring the 888 Applicants to bring a formal motion" for an extension time, and on the basis of the material before him, which consisted of letters from counsel and was not the record that is before me. In counsel's correspondence, the MCC were described as duly elected and applicant's then counsel did not address the issues before me. Prothonotary Lafrenière was not satisfied that the 888 Applicants had acted with due diligence in complying with Rule 306. Essentially, the 888 Application was dismissed because counsel for the 888 Applicants – who is not counsel before me – had failed to file affidavit material in time and the excuse she offered was not sufficient for Prothonotary Lafrenière to exercise his discretion to extend the time limits for the filing of this material. He also refused to extend the time limit because, based upon a letter from Respondent's counsel, the 888 Application was "on its face, untimely," and the delay had "worked a prejudice not only to the Respondents but to the band community at large" so that "any challenge to the Appeal Committee's decision should have been made promptly and pursued diligently."

[159] Prothonotary Lafrenière found himself to be "substantially in agreement with the written representations submitted by counsel for the Respondents," and, given the inadequate nature of the written representations put forward by FCC counsel for the 888 Applicants, his decision to dismiss the 888 Application was, in my view, both proper and inevitable.

[160] However, Prothonotary Lafrenière did not have before him the extensive record that is now before me and that demonstrates the extremely serious consequence to the members of the MCFN if the Court declines to deal with the merits of this dispute.

[161] I also have detailed submissions on timeliness from both sides and a formal request to extend time if necessary. There are no *res judicata* issues because the EC Applicants are not the 888 Applicants and Prothonotary Lafrenière did not deal with the matters before him on the basis of the merits. He simply did not have the record before him that would have allowed him to weigh the merits. I now have detailed evidence and submissions on the merits that Rule 3 and the governing jurisprudence on extensions of time say I must consider. Prothonotary Lafrenière applied *Canada (Attorney General) v Hennelly*, (1999) FCJ No 846 (FCA) which required him to consider whether the 888 Application had any merit. But the informality of the process (letters to the Court) and the inadequacy of the submissions made by FCC counsel for the 888 Applicants meant that there was no way for him to assess the merits of the 888 Application or give them any weight in his deliberations. Given the record before Prothonotary Lafrenière, any appeal of his decision would have been pointless and a waste of party and Court resources.

[162] Prothonotary Lafrenière's Order does not, *per se*, prevent the EC Applicants from bringing their application. It is true that timeliness issues will, once again, have to be considered, but there is now a much fuller record upon which to assess them and, as I have already indicated, the record before me suggests that they cannot be used to deliver the knockout punch in a motion to strike that the MCC would like to achieve and disregard the merits of this dispute and the "paramount" interests for the people of MCFN.

(7) Conclusions

[163] Justice Rennie made the following important point in *Poker*, above:

> The Court makes no findings in regard to this later allegation. In any event, regardless of which individual or individuals may have cause or contributed to the shortcomings in the process, the paramount consideration in considering whether to grant or withhold relief is the Band membership's confidence in the electoral process itself. There is an overarching public interest in ensuring that Band confidence in Band elections is merited, as it strengthens Band governance. In consequence, given the importance of the electoral process, relief will not be withheld.

[164] Justice Rennie's words pinpoint precisely what is at issue in this dispute. At present, the evidence before me suggests that MCFN is suffering financial and political disarray. The dignity and legitimacy of the MCFN electoral process are under threat and, in my view, it would be an insult to the members of the MCFN to simply hand victory to MCC on the basis of any procedural rule that does not include a full consideration of the merits. It is the MCFN membership who need the full support of the Court in dealing with the present difficulties they are facing. And, whatever the result of this dispute, the Court must take great care to ensure that

what Justice Rennie identified in *Poker*, above, as the "overarching public interest in ensuring that Band confidence in Band election" is protected.

[165] The EC Applicants, and those MCFN members they represent, thought that the best way to protect this "overarching public interest" was to go back to the electorate with a new election and let the voters decide. This approach has been blocked by MCC's failure to agree and its present attempts in T-1335-16 to ensure that the EC Applicants won't try this approach again.

[166] Instead, the MCC wish to retain power on the basis of the May Election results that, on the record before me, are highly suspect for various reasons, one of which is that only 59 people voted in that election, and more members boycotted the election because they did not believe it had been legitimately called. And the evidence concerning the purported March 16, 2016 EAC decision suggests that they were right. Because of the confusion that surrounds the May Election, it cannot be said that the electorate of MCFN had an opportunity in that election to express their will on the central issue in this dispute. Instead, they were forced to either vote in an election whose legitimacy was in serious doubt or abstain and risk the chaos that has now come to pass. To regard this as merely a dispute between FCC and MCC would be to neglect the "overarching public interest" identified by Justice Rennie and, certainly, to try and resolve the dispute on the basis of technical procedural rules alone in a motion to strike will not solve the problems faced by the MCFN.

[167] This is because, even if the application in T-1442-16 were struck, it would not render MCC the legitimate Chief and Council of MCFN. Nor does Prothonotary Lafrenière's striking

the 888 Application render them the legitimate Chief and Council. MCC are attempting to arrest power from FCC who were elected in accordance with the Election Law and who have never been removed. As *Lac des Mille Lacs*, above, makes clear, a second election cannot displace a Chief and Council who have never been removed in accordance with a band's election law. MCC wish to avoid having to face that issue by having this application struck. They have repeatedly taken the position before me that the merits are not on trial in this motion. But as *Lac des Mille Lacs* makes abundantly clear, they are and have to be. MCC are attempting to gain power, not through MCFN's Election Law which, in my view, is the only way they can achieve legitimate power, but through prescription and the application of *Federal Courts Rules* of procedure that are not part of the Election Law. They wish to avoid their own Election Law and, apparently, their own electorate. They have made no real attempt before me to explain how they can possibly sidestep *Lac des Mille Lacs* by using a limitation rule and the other grounds for striking they have raised in this motion. To use their own words, I don't think it would be appropriate for the Court to permit MCC to do an end run on their own Election Law by granting this motion to strike.

VI. EC APPLICANTS' MOTION FOR INJUNCTION – T-1442-16

[168] As with the motion to strike, this motion is also rendered moot by my decision in T-1335-16, but I think it is worth pointing out that, in the circumstances of this case, it would have to have been granted, at least in part.

[169] There is no dispute between the parties that the Court should apply the usual conjunctive *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 test to this motion for

injunction relief. This requires the Court to consider serious issue, irreparable harm and balance of convenience.

[170] The EC Applicants are seeking the following relief:

> 1. An order pursuant to Rule 8 abridging the time for the hearing of this motion if necessary;
>
> 2. An order under Rule 105 consolidating these proceedings with the proceedings in court File No. T-1335-16;
>
> 3. An interlocutory order pending final disposition of these proceedings, that the financial affairs of the [MCFN] are to be managed by Mark D'Amato and Terry Laliberty, the Band's co- managers, in accordance with:
>
>   a. The Band Management and Capacity Development Agreement with Mark D'Amato and Terry Laliberty, executed on February 25, 2016.
>
>   b. The check signing authorities and procedures and financial controls put in place by the band and Mark D'Amato and Terry Laliberty prior to May 16, 2016.
>
> 4. An interlocutory order pending final disposition of these proceedings enjoining all persons, including all those claiming to be the band's Chief and council, from:
>
>   a. Interfering with the due administration by the Co-managers Mark D'Amato or Terry Laliberty of the bands financial affairs.
>
>   b. Prohibiting all parties from interfering with the financial administration activities that the Respondents Mark D'Amato and Terry Laliberty are authorized by their agreement with the band to undertake.
>
>   c. Prohibiting all parties from contacting financial institutions to seek to change the signing authorities without the consent of the co-manager Mark D'Amato.
>
>   d. Taking steps to terminate the services of the Co-managers Mark D'Amato or Terry Laliberty, or to act upon any termination that any party claims has already taken place;

5. An interlocutory order pending final disposition of these proceedings that the respondents Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay, being the band council elected on February 1, 2016 shall continue as the lawfully elected Chief and Council of the Marcel Colomb First Nation.

6. An interlocutory order pending final disposition of these proceedings prohibiting the Respondents Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb from purporting to hold themselves out as the band's Chief and council;

7. An interlocutory order pending final disposition of these proceedings prohibiting Joseph Colomb, Urgel Linklater or Solomon Bighetty from purporting to hold themselves out as the band's Election Appeal Committee.

8. An order dispensing with the requirement to give an undertaking.

9. Costs on a solicitor and own client basis;

10. Such further and other relief as counsel may advise and this honourable court may deem just.

[171] In refusing the MCC's motion to strike, I am obviously of the view that there is a serious issue to be dealt with in the application. Several issues arise, but suffice to say that, at this point, the dispute between the parties as to whether the FCC or the MCC are the legitimate Chief and Council of MCFN is not frivolous or vexatious, nor is the claim by the EC Applicants that the May Election process was a nullity because, *inter alia*, there were no appeals of the February Election and there was no legitimate EAC decision on or about March 16, 2016, and the purported EAC decision was a fraud.

[172] Neither side can really allege that they will suffer irreparable harm personally if the injunction is, or is not, granted. The real concern here has to be whether MCFN and its membership are, on a balance of probabilities, at risk of irreparable harm.

[173] The MCC say that there is no longer any immediate urgency at MCFN to secure essential social assistance, and employee payments as the MCFN's funders and bank now recognizes the MCC and an approved co-manager as representing the MCFN.

[174] The EC Applicants, on the other hand, say that the political integrity of the MCFN as well as the financial well-being of the MCFN and its members have been damaged, and continue to be damaged, as a result of the actions of the MCC to:

a. Improperly suspend the band manger;

b. Improperly suspend the public works officer;

c. Close down the band office;

d. Purport to change the band's signing authorities contrary to their co-management and funding agreements in place;

e. Purport to terminate the contract of the highly experienced and effective co-manager who has enjoyed the confidence of all councils since he was appointed in 2012.

[175] The EC Applicants say that these actions have caused the MCFN's bank accounts to be frozen, and have jeopardized the delivery of essential services including welfare payments to the members who desperately need and rely upon these payments. There is evidence to support these claims.

[176] Over and above all of this, however, is the paramount and overarching public interest in maintaining public faith in the integrity of the election process at MCFN in the face of what appears from the record before me to have been an abuse of that process by the EAC and MCC.

[177] The evidence before me on this issue is pretty well the evidence that will be before the Application judge. Counsel for MCC in the strike motion before me suggested that the record could be supplemented, but he was vague on what he had in mind and how it might change the current picture. In any event, on a motion to strike, each party must put its best foot forward, so I am assuming that MCC have done this. In fact, MCC have, before me, suggested that I should not deal with the merits and focus, instead, upon the rules that govern the various grounds they have raised to strike the application.

[178] It seems to me that this is misconceived in several respects. First of all, Federal Court rules of procedure are not applied in a vacuum that disregards the merits. For example, the Court cannot apply the 30-day rule under s 18.1(2) of the *Federal Courts Act* without looking at the merits. This is because s 18.1(2) itself gives me the power to allow filing "within any further time that a judge of the Federal Court may fix or allow before or after the expiration of those 30 days," and the jurisprudence on extensions of time requires me to look at the merits as one of the factors to be taken into account and stipulates that the overriding consideration is that the interest of justice be served. See *Larkman*, above. In addition, Rule 3 of the *Federal Courts Rules* imposes upon me a mandatory obligation to ensure that the rules are "interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding *on its merits*" [emphasis added]. This does not mean, of course, that the Court will lightly or

routinely abandon a limitations rule, but it does mean that I, and whoever considers the application, has to look at the merits in the full context of what has transpired in this case.

[179] In the present motion before me, there is an extremely strong case for the reasons pointed out above that, on the merits, MCC is attempting to secure power for itself by illegitimate means.

[180] I say this because the evidence shows that the FCC were elected on February 1, 2016 in an election from which there were no appeals and in which the Electoral Officer (Ms. Janet Moore) confirmed to INAC officials that the appeal period had expired without any appeals and that the FCC had been elected. INAC and other third parties dealt with the FCC based upon this declaration of legitimacy.

[181] Problems only arose because on March 16, 2016, two individuals claiming to be the EAC signed a piece of paper saying that the EAC had met and had declared the February Election void and were calling a new election. There is no evidence before me that demonstrates how this piece of paper (or pieces of paper) could possibly be a real decision of an election appeal committee created and passed in accordance with the Election Law. To begin with, the term of office of the members of the EAC for the February Election had expired, and there is nothing to show how another EAC could have come into being. In addition, the Court has before it, the unchallenged affidavit of Mr. Bighetty, the third former member of the February EAC that there was no election appeal, there was no election appeal hearing, the election appeal period had expired, and the EAC no longer existed because their term of office had expired. Mr. Bighetty also opines that he was asked to sign a document voiding the February Election, but refused to

do so because it had no legitimacy, and it still isn't entirely clear whether or not his signature was forged on the documentation that MCC has now placed before the Court.

[182] Before me, the MCC have not shown how the EAC could possibly have become a legitimate election appeal committee, given that their term of office had expired and there were no appeals from the February Election as confirmed by the Electoral Officer on February 9, 2016.

[183] The purported EAC were asked to produce the record for their March 16, 2016 decision, but have not responded, so there is no evidence before me as to how they came into being and how they reached the decision they did. For reasons given above in T-1335-16 the purported EAC decision makes no sense because the only persons who failed to provide criminal record checks were Christopher Colomb, Gordon Colomb and Douglas Hart, who didn't provide such checks in the May Election either.

[184] These problems were soon recognized by many members of the MCFN, who refused to participate in the May Election on the basis that it was a sham. In fact, to confirm this, 72 members of the MCFN signed a petition confirming the election results of the February Election, which is more than the 59 members who voted in the May Election.

[185] There is also one further important consideration that must be taken into account for purposes of this motion. Christopher Colomb, Gordon Colomb and Douglas Hart did not provide criminal record checks, which means, under the MCFN Election Law that they could not run in

the February Election. None of these candidates were elected in the February Election. All of the candidates who were elected in the February Election provided criminal record checks and there is nothing before me to suggest they were not legitimately elected.

[186] So the only possible reason why the purported EAC could declare that "Priscilla Colomb, Angel Castel, Sarah Copapay and Evelyn Sinclair [who were elected in Feb, 2016] DO NOT represent MARCEL COLOMB FIRST NATION" is because the ineligible candidates who ran could somehow have affected the voting. Yet there is nothing from the EAC to show how they could have arrived at such a conclusion, and there is nothing before me to that effect either.

[187] What must be added to this picture is that Christopher Colomb, Gordon Colomb and Douglas Hart, who were disqualified in the February Election, all ran in the purported May Election and won. They are most of the MCC in these motions who want the Court to confirm them in power. Yet, in the May Election they again failed to provide criminal record checks. And further, they have not provided criminal record checks before me. So the Court has no evidence that Christopher Colomb and Gordon Colomb are even qualified to fill the offices of Chief or Councillor and there is remaining doubt about Douglas Hart. Douglas Hart was cross-examined on his affidavit and gave evidence under oath that he had been convicted of an indictable offence and that he knew that this meant disqualification from office. He also gave evidence that he never provided a criminal record check for the May Election.

[188] Mr. Hart has attempted before me to now file an affidavit to clarify that he has only been convicted of a summary offence. This gives rise to all kinds of procedural problems about case

splitting, and it means he has not been cross-examined on the inconsistency, but to be fair to MCC, I have decided to admit that evidence because it goes to the merits. However, it makes no difference to my conclusions. Christopher Colomb and Gordon Colomb did not qualify to run in either the February Election or the May Election, and neither of them has presented evidence before me that they don't have criminal records that prevent them from being either Chief or Councillor. This is a troubling omission in a dispute that, in the end, is all about political legitimacy.

[189] Subsections 7(2)(e) of the MCFN Election Law says that anyone who runs in an election has to provide "a criminal check clearance and is not pending any criminal charges." The evidence is clear from Mr. Hart that he did not provide a criminal clearance check for either the February Election or the May 2016 election. It is also clear that Christopher Colomb and Gordon Colomb did not provide a record check for the February Election, and there is nothing before me to suggest that they provided a check for the May Election. The failure of the purported EAC to even respond to a request for some record of their March 16, 2016 decision and the failure of Christopher Colomb and Gordon Colomb to provide criminal clearance checks means that these individuals have not demonstrated to the Court that they are even qualified to hold office at MCFN under the governing Election Law.

[190] The irony is that Christopher Colomb, Gordon Colomb and Douglas Hart are relying upon what appears to be, on the evidence before me, a completely fraudulent EAC decision, the basis of which was that the February Election was void because they (not the elected candidates) did not provide criminal clearances, yet they say the May Election is legitimate even though they

did not, and have not before me, produced the same criminal clearances. In my view, this is unacceptable. The Court cannot allow individuals to hold and exercise the powers of Chief and Council when they have not even demonstrated that they are entitled to do so under the Election Law.

[191] On the other hand, there is no evidence before me to suggest that Priscilla Colomb, Angel Castel, Sarah Copapay and Evelyn Sinclair were not legitimately elected to office and did not govern appropriately and competently until the March 16, 2016 EAC decision and the May Election eventually brought confusion to the governance of MCFN. The evidence before me shows that Priscilla Colomb has been elected either as Councillor or Chief in every general election since June 19, 2003. This suggests someone who has consistency and repeatedly won the confidence of the MCFN electorate who have trusted her for many years to manage the affairs of MCFN.

[192] On the evidence before me, I think that I have to find that, on a balance of probabilities, the March 16, 2016 purported EAC decision was a sham and the May Election was not legitimately called and was not legitimately held. This means that, in addition to whatever political and financial damage the people of MCFN may have suffered, an abuse of the political process has occurred here that is, in and of itself, a form of irreparable harm that the Court cannot allow to continue. In addition, as I have pointed out above, the MCC has made no real attempt to demonstrate to the Court how they could possibly be a legitimate Chief and Council, given the decision of this Court in *Lac des Mille Lacs*, above, and the fact that the FCC have never been removed from office in accordance with the Election Law.

[193] I have to act upon what is before me. In argument before me, MCC's counsel repeatedly directed the Court's attention away from merits and asked me to strike the application on the basis of, in particular, s 18.1(2) of the *Federal Courts Act* and the lapse of the 30-day period, and the decision of Prothonotary Lafrenière to dismiss the 888 Application. However, when considering irreparable harm, I know of no rule that places a time limitation on the evidence I should consider, and nor was any such time limit argued by MCC. MCC have made no effort to persuade me that the March 16, 2016 EAC meeting and letter were not a fraud. Their case is that what matters is the effluxion of time or the breach of a procedural rule. This means that I have to look at present realities and one of these realities, on the evidence before me, is that the purported EAC decision of March 16, 2016 was a sham that allowed unqualified candidates to assume office in the face of considerable protest from a majority of the MCFN community who could be expected to vote, and there is no evidence that Christopher Colomb and Gordon Colomb are even qualified to run for Chief and Councillor in an election, while on the other hand, the FCC have a trusted Chief at their head who, on the evidence before me, has governed competently until the MCC were able to convince third parties to deal with them, and MCFN administration became impossible.

[194] Much the same can be said for the balance of convenience issue. MCC want me to support the status quo, by which they mean themselves. The jurisprudence is clear that this is the usual approach of the Court. However, the Court must be reluctant to support a status quo that has failed to demonstrate that it even qualifies to hold office and which, on a balance of probabilities achieved office as a result of an abuse of process. It is true that the MCC have been recognised by third parties for certain purposes, but this does not give them any legitimacy under

the MCFN Election Law and it does not mean that the same third parties would in any way be reluctant to deal with the FCC if the Court concludes that this is appropriate in the circumstances. The important third parties dealt with FCC before the May Election. And I don't know how the Court could say to the people of MCFN that they must continue to be governed by people who, on the evidence before me, have no right to occupy the offices they do and who achieved office as part of what appears at this stage to be an abuse of process that they have not addressed in any forthright way in motions before me. The people of MCFN need to know that the Court respects and supports their Election Law. To grant MCC what they ask for in this motion, and to deny FCC what they seek would, on the record before me, amount to condoning usurpation and encouraging political instability at MCFN both now and in the future. The Court cannot endorse such an abuse of process, even if only temporarily, but I don't think that, at a practical and administrative level, the MCFN will suffer if the FCC, who were legitimately elected and who governed with no apparent problems from February 2016 until MCC began to persuade third parties to recognize them, and who, on the evidence before me, were never legitimately removed from office, should now be allowed to govern MCFN until this application is finally dealt with. I see only further chaos if MCC are given this role.

[195] My conclusion is that the FCC, consisting of Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay shall continue as the lawful elected Chief and Council of MCFN and that all members and third parties will deal with them as such. The MCC, consisting of Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb will cease to hold themselves out to any person as being the Chief and Council of MCFN and will refrain from interfering in the administration of the financial and other affairs of MCFN.

JUDGMENT AND ORDERS

THIS COURT'S JUDGMENT is that:

In the T-1335-16 application, by way of declaration or *quo warranto*,

1. This Court declares that:
    (a) The persons elected on February 1, 2016, being Priscilla Colomb, Evelyn Sinclair, Angel Castel and Sarah Copapay were duly elected as the Chief and Council of MCFN and continue to be the Chief and Council until their terms expire on February 1, 2020;
    (b) The purported May 16, 2016 election process by which Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb claim to have been elected as MCFN's Chief and Council was a nullity because it was not an election process under the MCFN Election Law;
    (c) The said Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb are not the Chief and Council of MCFN and all decisions and acts which they purport to have carried out in that capacity are of no force and effect;
    (d) The said Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb have no capacity or standing to bring or pursue the within application as representatives of MCFN;
2. This Court further orders that:
    (a) The within application is dismissed;
    (b) The said Christopher Colomb, Suzanne Hart, Douglas Hart and Gordon Colomb shall cease to represent or hold themselves out as being the duly

elected Chief and Council of MCFN or deal with MCFN members or with non-members in that capacity. They will also promptly return any property of MCFN that is in their possession;

(c) The parties will make submissions to the Court on costs. This will be done, initially at least, in writing, and the Court will make a further supplementary order dealing with costs in T-1335-16;

(d) A copy of this Judgment shall be placed on file T-1442-16.

THIS COURT ORDERS that:

In the T-1442-16 motions,

1. The Respondents' motion to strike is dismissed for reasons given;
2. The Applicants' interlocutory injunction is granted and the interlocutory relief requested therein;
3. The parties shall make submissions to the Court on costs. This will be done, initially at least, in writing and the Court will make a further supplementary order dealing with costs in T-1442-16;
4. A copy of this Order shall be placed on file T-1335-16.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1335-16
STYLE OF CAUSE:	MARCEL COLOMB FIRST NATION ET AL v ELISE COLOMB ET AL
AND DOCKET:	T-1442-16
STYLE OF CAUSE:	ELISE COLOMB ET AL v CHRISTOPHER COLOMB ET AL
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	OCTOBER 27, 2016, NOVEMBER 3, 2016
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	NOVEMBER 15, 2016

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