

Federal Court



Cour fédérale

Date: 20181221

Docket: T-1768-17

Citation: 2018 FC 1272

Ottawa, Ontario, December 21, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

KEVIN BRUCE MERCREDI

Applicant

and

**FOND DU LAC DENESULINE FIRST NATION,
FOND DU LAC DENESULINE FIRST NATION
2017 ELECTION APPEAL BOARD,
AL SAYN, DEAN CLASSEN, SCOTT HALE,
NAPOLEAN MEDAL, AND
MARGARET PAQUETTE POWDER**

Respondents

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under section 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of an October 16, 2017. On October 16, 2017, the Fond Du Lac Denesuline First Nation Election Appeal Board [the Appeal Board] reversed its previous decision, dated

October 10, 2017, allowing the Applicant's appeal regarding the September 15, 2017, General Election [General Election] of the Chief and Council of the Fond Du Lac Denesuline First Nation.

[2] In his application, the Applicant seeks the following conclusions from the Court:

1. The Office of the Chief of the Fond du Lac Denesuline First Nation be declared immediately vacant;
2. A by-election for the position of Chief shall be called forthwith;
and
3. Only those persons who were qualified to run for the position of Chief in the General Election shall be able to submit Declarations of intent to run in the by-election but (*sic*) none of the said eligible candidates shall be required to run.

[3] The grounds for the application are that there were several breaches of the Fond du Lac Denesuline Election Act during the General Election.

[4] The Court has considered the written and oral submissions of the parties and is persuaded by the Applicant's argument. This matter involved unique circumstances and, as a result, a unique approach to address this situation is required. The application for judicial review is granted for the reasons below.

II. Background

[5] The Fond du Lac Denesuline First Nation [First Nation] is a band within the meaning of the *Indian Act*, RSC 1985, c I-5. The First Nation is a Treaty 8 nation location in Northern Saskatchewan.

[6] The process for electing Chief and Councillors is governed under the provisions of the law, The Fond du Lac Denesuline First Nation Election Act [the Election Act] established by the community.

[7] The Applicant and his cousin, Louis Mercredi, ran for Chief of the First Nation in the General Band Election as eligible candidates. There is no dispute as to the eligibility of either the Applicant or Louis Mercredi for the position of Chief of the First Nation. What is in dispute is how the General Election, and specifically the handling of the appeal of the election, was conducted.

[8] In accordance with the Election Act, band members were to select a Chief Electoral Officer [CEO], as well as members of the Appeal Board, 45 days prior to Election Day. On August 1, 2017, the band members selected the CEO, however, the band members failed to proceed with the selection of five members of the Appeal Board. It is this deviation from the process outlined in the Election Act that is at the heart of this case.

[9] The CEO had the power to select electoral officers to assist in the conduct of the election and did so purportedly in accordance with the Election Act. The Deputy CEO was selected by the CEO on or around the date that the CEO was appointed. The Applicant takes issue with the fact that three of the polling clerks who were appointed to assist the CEO had voted in the advance polls prior to Election Day. The three polling clerks who voted in the advance polls did so prior to being asked by the CEO to participate in the election. The Election Act prohibits election officials from participating in an election as a candidate, nominator, seconder or a voter. The Respondents gave evidence that polling clerks have voted in previous elections. Again, this was another circumstance that made this case unique, as will be discussed more below.

[10] The results for the position of Chief during the General Election were as follows:

Total Number of Band Members	1429
Total number of Electors	570
Candidates	No. of Votes
Mercredi, Kevin Bruce	142
Mercredi, Louis J	144
[...]	[...]
The total number of ballots primed for Chief:	785
(Applicant's Record, Exhibit "E", CEO's Report, p 70)	

[11] The Applicant was the runner up in the election for Chief as he was defeated by a margin of two votes. Two days following the election results, a recount was requested and the original count was confirmed.

[12] On September 29, 2017, the Applicant appealed the election results on the grounds that there was a conflict of interest, corrupt practices and violations of the Election Act.

[13] Following the Applicant's Notice of Appeal, the CEO appointed five members of the Appeal Board for the 2017 election. No Band Council Resolution was passed for the appointment of the Appeal Board members, as required under the Election Act. As well, and more importantly, this appointment process of the Appeal Board was not conducted in accordance with the Election Act.

[14] On October 10, 2017, the Appeal Board rendered a decision declaring that:

the office of Chief is declared immediately vacant, a by-election for the position of Chief shall be called forthwith and only those persons who were qualified to run for the position of Chief in the General Election shall be able to submit Declarations of intent to run in the by-election but none of them shall be required to run.

III. The Decision

[15] On October 16, 2017, upon being prompted by a letter from the Chief elect's legal counsel, the Appeal Board unanimously decided to reverse the decision dated October 10, 2017, thereby dismissing the appeal. In this second decision, the Appeal Board wrote: "Due to a time factor we feel that there are some issues that were overlooked and things were not followed through in the proper order". Recommendations were also included in the decision. For instance, members of the Appeal Board recommended that "Electoral Officers and assistants should have training on the Election Act as stated within the Band's policies in order to follow the proper

protocol”, “[t]he by-laws need consistency and clarification in order to bring forth the proper and most effective decision”, as well as that “[t]he Election Act should be reviewed”.

[16] On November 15, 2017, the Applicant sought judicial review of the October 16, 2017 decision.

IV. Issues

[17] The Applicant submits that the following are at issue:

- A. Did the acceptance and casting of the three votes of the Polling Clerks affect the outcome of the Chief Election? If so, then should the decision of the Appeal Board be upheld?
- B. If the Appeal Board was not properly constituted and its decision is null and void, can the Federal Court render a decision on the above-mentioned issue?

[18] The Respondents submit that the following are at issue:

- A. Is the Applicant permitted to file and to rely upon additional affidavit evidence following completion of cross-examination?
- B. Whether the Federal Court has jurisdiction to decide the within application for judicial review?
- C. What is the applicable standard of review?
- D. Whether the Appeal Board was properly constituted pursuant to the Election Act?
- E. If the above-mentioned issue is answered in the affirmative, did the purported Appeal Board have the authority to make the decisions of October 10, 2017, quashing the

election results and calling a by-election with respect to the office of Chief, and of October 16, 2017, reversing the earlier decision?

- F. Whether the Federal Court has jurisdiction to grant the relief sought by the Applicant in the within application for judicial review?
- G. Were there breaches of the provisions of the Election Act with respect to election procedure, operation of the polls, and/or the procedure following the election?
- H. If there were breaches of the Election Act, were the irregularities of such a nature so as to warrant the quashing of the election results with respect to the office of Chief and calling of a by-election for the office?

[19] Based on a review of the written and oral submissions, the Court will render its decision on the following issues:

- A. Is the Applicant permitted to file and rely on additional affidavit evidence following the completion of cross-examination?
- B. Does the Federal Court have jurisdiction over the decision(s) of the Appeal Board?
- C. Was the Appeal Board properly constituted pursuant to the Election Act?
- D. Does the Federal Court have jurisdiction to grant the relief sought by the Applicant?

V. Relevant Legislation

[20] The provisions of the Election Act that are relevant in this proceeding are identified in “Schedule A”.

[21] The following provision of the *Federal Court Rules*, SOR/98-106, is also relevant in this proceeding:

Additional steps	Dossier complémentaire
312 With leave of the Court, a party may	312 Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	c) déposer un dossier complémentaire.

VI. Applicant's Written Submissions

[22] According to the Applicant, the applicable standard of review on issues regarding breaches in the Election Act is that of correctness.

[23] The Applicant argues that there have been several breaches to the Election Act throughout the whole election process, however, he specifically points out the fact that the three Polling Clerks should not have participated in the voting for the Chief Election of Fond Du Lac Denesuline First Nation in September 2017. According to section 2.13 of the Election Act, no Polling Clerk may participate in an Election or By-election whether as Candidate, Nominator, Secunder or Voter.

[24] The Applicant further submits that “[t]here is public interest in this review as it affects the application of the rule of law in a small tightknit community and everyone would be aware of the many infractions of the Act as was overlooked by the Election Officials.” The Applicant refers to *Laboucan v Little Red River # 447 First Nation*, 2010 FC 722 [*Laboucan*], at paragraph 36, stating that Band Councils must act according to the rule of law.

[25] In the case at bar, the Applicant also argues that the Appeal Board was not properly constituted in order to render its decision.

VII. Respondents’ Written Submissions

[26] The Respondent’s submissions are summarized below.

[27] As a preliminary issue, the Respondents submit that the Applicant’s second affidavit sworn June 27, 2018, should not be permitted to be filed nor should the Court rely on the evidence contained therein because it would be “highly prejudicial” to the Respondents to allow an additional affidavit. The Respondents argue that the authorized period for cross-examinations had already been completed when the Applicant served and filed the Applicant’s Record on June 29, 2018, along with the additional affidavit of the Applicant. Pursuant to Rule 309(2) of the *Federal Court Rules*, only the Affidavit of Kevin Bruce Mercredi, sworn December 15, 2017, in support of the present application for judicial review should be relied on as cross-examination of the Applicant on said Affidavit was duly completed by the Respondents on April 26, 2018.

[28] The Respondents further submit that the Federal Court generally has jurisdiction to decide the present application for judicial review, pursuant to sections 2(1) and 18(1) of the *Federal Courts Act*. They submit that “an Appeal Board of the FDLDFN [Fond Du Lac Denesuline First Nation] appointed pursuant to the FDLDFN Election Act would arguably be considered a ‘federal board, commission or other tribunal’”. According to the Respondents, however, the Court does not have jurisdiction to review the present application. It is argued that the decision dated October 16, 2017, was rendered by an improperly formed Appeal Board, which would not be considered a “federal board” in accordance with the *Federal Courts Act*.

[29] According to the Respondents, the applicable standard of review on decisions of Band Councils is that of reasonableness (*Fort McKay First Nation v Orr*, 2012 FCA 269 at para 11). It was also submitted by the Respondents that issues referring to the interpretation of the Election Act should also be reviewed under the reasonableness standard.

[30] The Respondents argue that the Appeal Board was not properly constituted to decide on the Applicant’s appeal, in accordance with sections 2.5, 3.1, 4.1 and 11.1 of the Election Act. In fact, the Appeal Board was neither formed at the special band meeting nor appointed by Band Council members. It was the CEO who unilaterally appointed the five members of the Appeal Board.

[31] The Respondents further submit that the Appeal Board’s decision dated October 10, 2017, not subject of the present application for judicial review, should constitute “a continuous course of conduct” in the event that the Court concludes the invalidity of the Appeal Board

(*Twinn v Sawridge First Nation*, 2017 FC 407 at para 75 [*Twinn*]). In that case, not only would the October 16, 2017 decision become void, but the October 10, 2017 decision would also have to have the same outcome.

[32] The Respondents argue that the Court cannot grant the relief sought by the Applicant in the within application for judicial review, as it was determined by this Court in *Felix Sr. v Sturgeon Lake First Nation*, 2011 FC 1139 [*Felix*] that:

[56] The Court does not have jurisdiction to set aside the election results and order a new election. Rules 3 and 4 of the Rules do not allow the Court to go as far as creating a substantive relief that is not provided for in the Election Act. Rule 3 is an interpretation rule and Rule 4, often called the “Gap Rule”, is procedural in nature and does not allow the Court to invent relief not contemplated in the applicable legislation. The responsibility of deciding whether the election results should be set aside and if a new election is warranted rests with the Appeal Tribunal and the Court must not usurp that role.

[33] The Respondents argue that the Court cannot remit the matter back to a newly constituted Appeal Board as there are no provisions in the Election Act granting the Court such authority (*Felix* at para 57). They also submit that “[t]his Court does have jurisdiction, pursuant to subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 to issue directions of great specificity. [...] However, this jurisdiction is to be exercised with caution.” (*Wilson v Ross*, 2008 FC 1173 at para 38 [*Wilson*]).

[34] As for the issue regarding the Polling Clerks who voted in the 2017 General Election, the Respondents submit that these three people had already voted when asked by the CEO to participate in the election as Polling Clerks. Contrary to the Applicant’s argument, the

Respondents argue that “it would be inappropriate to make an assumption that their votes changed the outcome of the election” considering that the Applicant has not presented any evidence to support his claim. In any event, the Respondents submit that the alleged violations of the Election Act, as stated by the Applicant in his Notice of Application, should be assessed and considered in front of the Appeal Board in accordance with the Election Act.

VIII. Standard of Review

[35] The primary issue that the Court will determine on the standard of correctness is whether the Appeal Board was properly constituted pursuant to the Election Act. Issues of procedural fairness are to be reviewed under a standard of correctness (*Twinn* at para 22; *Beardy v Beardy*, 2016 FC 383 at para 45).

[36] The Court acknowledges, however, that Band Councils have the knowledge and expertise on the Band’s customs and traditions, as well as factual determinations on the process for electing Council and Chief within their community (*Martselos v Salt River Nation #195*, 2008 FCA 221 at para 30; *Whitehead v Pelican Lake First Nation*, 2009 FC 1270 at para 1). Consequently, “the standard of review applicable to the decisions of the Band Council interpreting the Election Regulations is reasonableness” (*Johnson v Tait*, 2015 FCA 247 at para 28).

IX. Analysis

[37] For the following reasons, the application for judicial review is allowed.

[38] The Court reviewed affidavit evidence of Louis Mercredi, the Applicant, and the Deputy CEO, however, the Court was not provided with affidavit evidence of the CEO. This case turns on the actions of the CEO in appointing the Appeal Board members.

A. *Is the Applicant permitted to file and to rely upon additional affidavit evidence following completion of cross-examination?*

[39] Pursuant to Rule 312(a) of the *Federal Court Rules*, a party may file affidavits additional to those provided for in Rules 306 and 307 with leave of the Court. The Court cannot allow the Applicant to file an additional affidavit without first exercising “the discretion of the Court to permit the filing of additional material” (*Mazhero v Canada (Industrial Relations Board)*, 2002 FCA 295 at para 5). The Court is persuaded by the argument of the Respondents that the Applicant needed to file a motion before submitting additional affidavit in order for the Court to go through the affidavit material and to determine whether “it would serve the interests of justice, would assist the Court, would not cause substantial serious prejudice to the Crown and is not material which was available before cross-examination” (*Hughes v Canada (Customs and Revenue Agency)*, 2004 FC 1040 at para 8). The Court therefore excludes the additional affidavit sworn June 27, 2018, filed in the Applicant’s Record.

B. *Whether the Federal Court has jurisdiction over the Appeal Board?*

[40] The Respondents argued that the Appeal Board should not be considered as a “federal board, commission or other tribunal” as defined in sections 2, 18 and 18.1 of the *Federal Courts Act*, since the members of the Appeal Board were not duly appointed in accordance with the Election Act. In *Algonquins of Barriere Lake v Algonquins of Barriere Lake (Council)*, 2010 FC 160, at paragraph 106, the Court stated:

Consequently, whether the selection process is carried out by election pursuant to the *Indian Act*, or pursuant to custom, the Federal Court has supervisory jurisdiction over the process, and over those bodies, such as electoral officers, appeals boards or elders councils, purporting to exercise authority under the process. [...] In either circumstance, this Court has jurisdiction.

[41] Further, in *Felix*, the Court made it clear that both Band Councils and Appeals Tribunals are federal boards and, therefore, under this Court's jurisdiction. At paragraph 15, the Court stated:

[15] It is widely accepted that a band council is a "federal board, commission or other tribunal" for the purposes of subsection 2(1) of the FCA. This Court in *Gabriel v. Canatonquin*, [1978] 1 FC 124, 9 CNLC 74, as affirmed by the Federal Court of Appeal in *Canatonquin et al. v. Gabriel et al.*, [1980] 2 FC 792, [1981] 4 CNLR 61 (CA), decided that even a band council elected pursuant to band custom, as opposed to the provisions of the Indian Act, is a federal board for the purposes of subsection 2(1) of the FCA. The same principle was reaffirmed by Justice Martineau in *Mohawk of Kanasatake v. Mohawk of Kanasatake (Council)*, 2003 FCT 115, [2003] 4 FC 1133. In *Sparvier v. Cowessess Indian Band #73*, [1993] 3 FC 142 at para 14, 63 FTR 242, Justice Marshall Rothstein reasoned that because a band council elected pursuant to customary aboriginal law is a federal board, an election Appeal Tribunal elected pursuant to customary aboriginal law is also, logically, a federal board for the purposes of the FCA.

[42] The Court has jurisdiction in this matter. An election appeal board or committee is a "federal board". The question in this case is - what does one do when the appeal body is not validly created. These are the unique circumstances referred to earlier.

[43] The Appeal Board is formed under the Election Act and its powers also derive from the Election Act. As the parties have both raised the validity of their community's Appeal Board, it is then the Court's role to determine, under the correctness standard, whether there was a breach

of procedural fairness the manner in which the Appeal Board was selected and the manner in which it arrived at its decision. Alternatively, the Court can also determine whether there was a breach of the Election Act in the way the Appeal Board was selected.

[44] The importance of the Appeal Board is self-evident. It is a body that the people of the First Nation created to settle disputes related to the First Nation's elections. It is a key body in the First Nation's expression of self-determination.

C. *Whether the Appeal Board was properly constituted pursuant to the Election Act?*

[45] After reviewing the parties' submissions, as well as the evidence on file, the Court finds that there were several breaches of the Election Act which may also give rise to breaches of procedural fairness. The Court, however, shall determine whether the Appeal Board had the legal authority to render the decision under review, dated October 16, 2017. It is acknowledged by the parties that the members of the Appeal Board were not appointed in conformity with the Election Act, which requires at least four of the five members to meet the same eligibility requirements as do Candidates. It is also acknowledged by the parties that it was the CEO who appointed the five members when they should have been selected by the members of the Band at the special band meeting held on August 1, 2017. Moreover, no Band Council Resolution was passed with respect to the appointment of the Appeal Board members, as required by the Election Act. The Court concludes that the only reasonable interpretation of the Election Act is that the Appeal Board was not properly constituted. The decision dated October 16, 2017, is therefore considered void.

[46] The Court concludes that the Applicant's right to a fair assessment of his appeal was breached due to the manner in which the Appeal Board was formed in this instance. The Court

agrees with the Applicant's position on the importance for Band Councils to act according to the rule of law. "This implies that Council must act in accordance with the duty of procedural fairness when taking decisions which may affect the legal rights or interests of a band member." (See *Laboucan* at para 36).

[47] Having determined that the Appeal Board is not properly constituted as per the Band's Election Act, it is not necessary for the Court to address the remainder of the issues as they refer to the Appeal Board's decision dated October 16, 2017, (which is now found to be invalid) and to the interpretation of the Election Act respecting the polling clerks.

[48] The Court notes that the Respondents also raised that the initial decision of the Appeal Board, dated October 10, 2017, should be viewed as a continuing course of conduct along with the October 16, 2017 decision. The Court accepts this argument and this has the effect of also rendering the October 10, 2017 decision to be invalid due to the Appeal Board being improperly constituted. Both decisions were made within a week of one another and were based on the same facts.

D. *Does the Federal Court has jurisdiction to grant the relief sought by the Applicant in the within application for judicial review?*

[49] The Court needs to determine what the appropriate remedy is given the particularity of the present case. The Court cannot give the Applicant what he is asking for (i.e. a By-election for the position of Chief), because the Applicant is trying to indirectly ask the Court for specific remedies that should only be addressed directly by a properly constituted Appeal Board. The remedies, as outlined by the Applicant in his Notice of Application, are not available on judicial

review (*Wilson* at paras 35-40). It is the Appeal Board that has the power and discretion to grant such remedies under the Election Act (*Felix* at paras 55-56).

[50] Given the exceptional and unique circumstances of this case, the Court concludes that the present application for judicial review is allowed. As this Court has stated previously, exceptional and complex situations may call for exceptional measures or remedies (*Parenteau v Badger*, 2016 FC 535; *Bill v Thomas*, 2007 FC 1152).

[51] This situation is somewhat like the situation this Court found in *Abbott v Pelican Lake Band Appeal Board*, 2003 FCT 340 [*Abbott*]. In that case, the Court dealt with the decision of an improperly constituted appeal body, which was to be selected at the nomination meeting, and referred the matter back “to a Board properly constituted to decide in accordance with the Act” [*Abbott* at para 30]. That remedy was granted notwithstanding that the Appeal Body was to have been created at the nomination meeting, which had since passed.

[52] The exceptional and complex circumstances present in this matter also require an exceptional remedy. It is this Court’s view that s 3.3 of the Election Act allows for a process that can be adapted to address this unique situation while still respecting the intentions of the First Nation to be self-determining respecting the settling of election disputes. The relevant portion of that section reads as follows:

3.3. The Appeal Board *shall* serve for a period equal to the term of office of the Chief and Council and *shall* be responsible for all **By-Elections** that may be called during the same term. If any Appeal Board Member is unable or unwilling to oversee a **By-election**, a special Band meeting *shall* be convened to appoint a replacement. If fewer **than five (5)** adult Band **Members**, in addition to the

Chief and Council, attend the special meeting convened for the purpose of appointing Appeal Board Members, then the Chief and Council *may*, without further notice, appoint the Appeal Board Members. ***No serving member of the Appeal Board may participate in a General Election or By-election whether as Candidate, Nominator, Seconder or Voter.***

[Emphasis in original.]

[53] The above section allows for replacement Appeal Board members to be selected at a special meeting of the First Nation if they are unable or unwilling to sit as a member in a by-election. While that is not the case in the case before the Court, allowing the First Nation members to select a new Appeal Board at a special band meeting respects the law making of the First Nation, provided that the process outlined in s 3.3 is carried out in a procedurally fair and accountable manner. This approach would be consistent with this Court's previous approach in *Abbott*.

[54] A newly constituted Appeal Board will be in the best position to assess the merits of the Applicant's appeal. Sending this matter back to a newly constituted Appeal Board also respects the intentions and aspirations of the community who undertook the very important work of creating an Election Act which, in turn, allowed for the creation of the Appeal Board pursuant to the Election Act.

[55] The Applicant has the right to file his Notice of Appeal in front of a duly formed Appeal Board who has the knowledge and experience to address the Applicant's complaints. The matter is therefore remitted to a newly and properly formed Appeal Board to be appointed in accordance with the process set out in s 3.3. of the Election Act which shall be adapted to

address the particular circumstances of this case. The Court reiterates the following conclusion from the Federal Court of Appeal in *Hamelin v Sturgeon Lake Cree Nation*, 2018 FCA 131, at paragraph 50:

Only if it was clear that the appeals were entirely without merit, so that there would be no purpose served by sending the appeals back to the Appeal Committee, might it have been appropriate to exercise the discretion not to grant this relief: *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 at paras. 51-52. On the record before us, I cannot conclude that the appeals are entirely without merit.

[56] The Court has acknowledged on several occasions that it would prefer to find the least intrusive manner in which to oversee election matters out of respect for the efforts the First Nation and its membership have taken to enact rules governing their election processes (*Shirt v Saddle Lake Cree Nation*, 2017 FC 364; *Loonskin v Tallcree*, 2017 FC 868; *Sweetgrass First Nation v Gollan*, 2006 FC 778).

[57] The Applicant and counsel for the Respondents both acknowledged the need for the Election Act to be reviewed and amended to provide clarity for future elections. This Court commends the parties for this acknowledgement.

X. Conclusion

[58] The application for judicial review is allowed. The matter shall be remitted back to an Appeal Board that is to be appointed in accordance with the provisions of s 3.3 of the Election Act which process is to be adapted or modified for the unique circumstances of this case. The Applicant is granted costs.

JUDGMENT in T-1768-17

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is referred back to a newly constituted Appeal Board that is to be appointed in accordance with the s 3.3 of the Election Act which process is to be adapted or modified to fit the unique circumstances of this case. Costs are awarded to the Applicant.

“Paul Favel”

Judge

SCHEDULE “A”

FOND DU LAC DĚNESUŁINE FIRST NATION CUSTOM ELECTION ACT

[...]

2.5 “Candidate” means an individual who meets all of the following criteria:

(a) a person who is eighteen (18) years of age or older on or before the Nomination Day;

(b) a person who is registered member of the Fond du Lac Denesuline First Nation and whose name is on the Band Membership List;

(c) a person who has been nominated in accordance with this Act;

(d) a person who is Ordinarily Resident on the Fond du Lac Denesuline First Nation Reserve or, in the case of an off-Reserve member, a person who is prepared to take up residence on the Fond du Lac Indian Reserve within thirty (30) days of being elected, or as soon thereafter as may be practicable, and to maintain his or her primary residence on the Fond du Lac Indian Reserve for his or her full term;

(e) a person *who* has not been convicted of a **Corrupt Practice**, accepting a bribe, dishonesty or malfeasance for a period of either three (3) terms or six (6) years, whichever is less;

(f) a person who does not owe any money to the Band;

(g) a person who does not have any Band property in their possession without due authority to have custody or control of the same;

(h) a person who is not otherwise disqualified from running in an Election or **By-election** by virtue of having been convicted of an indictable offence under the *Criminal Code of Canada* for a period of at least five (5) years or of a hybrid or dual offence with respect to which the Crown has elected to proceed by way of indictment or of an offence under *Narcotic Control Act* or the *Food and Drug Act* involving trafficking of a prohibited or controlled substance; **and**

(i) where applicable, a person who has applied for or is eligible

to apply for a pardon.

[...]

2.13 “**Election Official**” includes the **Chief Electoral Officer** and the **Deputy Electoral Officer(s)**, and **Polling Clerks**. *No Election Official may participate in an Election or By-election whether as Candidate, Nominator, Seconder or Voter.*

[...]

2.21 “**Polling Clerks**” means those individuals who are appointed by the **Chief Electoral Officer** to manage the **Polling Station(s)** and to assist with counting ballots.

[...]

Commencement of Election

3.1 No less than forty-five (45) days prior to an election being held, a special Band meeting shall be convened to select a **Chief Electoral Officer** and the Appeal Board.

[...]

4 Nomination Procedure

The Nomination Procedure *shall* be as follows:

4.1 Subject to section 3 of this Act, the Chief Electoral Officer and Appeal Board *shall* be formally appointed by Chief and Council through a **Band Council Resolution [BCR]** which **will**

- (a) contain their full names;
- (b) set out a date, time and place for the Declarations of Intention to Run for Office to be filed, the Nomination meeting, the Polling Day and the Advance Polls(s), if any;
- (c) describe the type of Election (i.e., General Election or **By-election**) which is to be conducted;
- (d) describe the powers given or bestowed upon the **Chief Electoral Officer** and Appeal Board as those set out in this Election Act; *and*
- (e) establish the rate of remuneration for the **Chief Electoral Officer, Deputy Electoral Officer, and Appeal Board** [a flat fee of \$100.00/day to a maximum of \$2,000 for the Chief

Electoral Officer and a flat fee of \$75.00/day to a maximum of \$1,500 for the Deputy Electoral Officer or *per diems* for the Appeal Board and proper travel-related expenses (mileage, meals, etc.)).

[...]

11.1 The Appeal Board *shall* be made up of five (5) persons, up to four (4) of whom *shall* meeting the same eligibility requirements as do **Candidates** and at least one (1) of whom is a business person, bank manager or professional person from the Athabasca region and who is neither a Band **Member** and who is unbiased and impartial. This person is not required to be of First Nations ancestry.

11.2 No one sitting on the Appeal Board may participate in the Election or By-election whether as a Candidate, Nominator, Secunder or Voter.

[...]

12.1 Any Candidate at the Election or any Elector who gave or tendered his or her vote at the Election may, within fourteen (14) calendar days of the Pool, appeal the Election if he or she has reasonable and probable grounds for believing that:

(a) error or violation of the Election Act was made in the interpretation or application of the Act which might have affected the outcome of the Election;

(b) **Candidate** who ran in the Election was ineligible to do so pursuant to this Act; *and/or*

(c) there was a **Corrupt Practice** in contravention of the Election Act.

12.2 An Appeal of the Election or By-election may be launched in the following manner:

(a) a Notice of Appeal in writing, duly verified by a properly sworn Affidavit, *shall* be forwarded by registered mail or hand delivered to the **Chief Electoral Officer** outlining the grounds for the Appeal.

(b) The Notice of Appeal must be received within fourteen (14) calendar days of the Election.

(c) the **Chief Electoral Officer** shall, as soon as practicable,

deliver to each member of the Appeal Board a copy of the Notice of Appeal.

12.3 The Appeal Board *shall*, within seven (7) days of receiving the complaint, rule on whether to allow or disallow an Appeal Hearing based on the sufficiency of the evidence presented in the complaint.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1768-17

STYLE OF CAUSE: KEVIN BRUCE MERCREDI v FOND DU LAC
DENESULINE FIRST NATION, FOND DU LAC
DENESULINE FIRST NATION 2017 ELECTION
APPEAL BOARD, AL SAYN, DEAN CLASSEN,
SCOTT HALE, NAPOLEAN MEDAL, AND
MARGARET PAQUETTE POWDER

PLACE OF HEARING: SASKATOON, SASKATCHEWAN

DATE OF HEARING: AUGUST 29, 2018

JUDGMENT AND REASONS: FAVEL J.

DATED: DECEMBER 21, 2018

APPEARANCES:

Kevin Bruce Mercredi

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Anil K. Pandila

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Pandila and Co.
Barristers and Solicitors
Prince Albert, Saskatchewan

FOR THE RESPONDENTS