

Federal Court



Cour fédérale

**Date: 20161209**

**Docket: T-1408-16**

**Citation: 2016 FC 1365**

**Ottawa, Ontario, December 9, 2016**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**DONALD SAYAZIE**

**Applicant**

**and**

**THE BLACK LAKE DENESULINE FIRST  
NATION AS REPRESENTED BY COREEN  
SAYAZIE, IN HER CAPACITY AS CHIEF  
AND TREVOR BONELYE, DELBERT  
BOUVIER, GEORGE CATHOLIC, DARLENE  
FERN, JOSEPH RENIE, JOHN TOUTSAINT  
AND PAULINE TOUTSAINT IN THEIR  
CAPACITY OF COUNCILLORS**

**Respondents**

**JUDGMENT AND REASONS**

[1] The Applicant, Donald Sayazie, seeks judicial review of the decision or omission of the Black Lake Denesuline First Nation [BLFN] Chief and Council to appoint an Appeal Board prior to the commencement of the 2016 General Election, as required by *The Black Lake Denesuline*

*First Nation Election Act* (the Election Act) and also challenges the authority of the Chief and Council to hold office because the election results were not certified by an Appeal Board.

I. Overview

[2] The Applicant, Mr. Sayazie, was a candidate in the 2016 election. He did not garner sufficient votes. He states that he and two other Band members appealed the results of the election and their appeals were not determined. He submits that the election results have not been certified by an Appeal Board as required by the Election Act and, as a result, the Chief and Council cannot lawfully hold office. He also argues that the Chief and Council have violated the Election Act by taking the benefits of an office they do not hold and that this constitutes a corrupt practice.

[3] For the reasons that follow, the application for judicial review is dismissed. The Applicant has not established any unreasonable action or omission by the Respondents, nor any unlawful action or corrupt practice.

[4] The Respondents, the current Chief and Council, are not responsible for the failure of the previous Chief and Council to strictly comply with the Election Act and to confirm by Band Council Resolution (BCR) the appointment of a seven member Appeal Board. Moreover, the Applicant's appeal was submitted beyond the prescribed time limit and did not otherwise comply with the Election Act. There was no need for an Appeal Board to adjudicate appeals that were not in accordance with the requirements of the Act. Nor was there any requirement for an Appeal Board to certify the results of the election in the absence of valid appeals.

II. The Applicant's Submissions

[5] The Applicant initially sought both judicial review of the decision or omission of the Chief and Council to appoint an Appeal Board prior to the commencement of the 2016 General Election, as required by the Election Act and an interim injunction to enjoin the current Chief and Council from acting as Chief and Council pending the determination of this application, in addition to other relief.

[6] By Order of Justice Mactavish dated October 4, 2016, and as a result of a Case Management Conference held on September 30, 2016, a date for an expedited hearing of this application for judicial review was set rather than first determining the Applicant's motion for an interim injunction.

[7] The Applicant's application record and written memorandum of argument replicate to a large extent the memorandum filed in support of the interim injunction. The Court has considered only the issues relevant to the underlying action for judicial review.

[8] The Applicant notes that he ran as a candidate for Chief. He submitted a Notice of Appeal following the election.

[9] The Applicant points to the Election Act which provides that seven members of an Appeal Board must be chosen by Band members at a special Band meeting. He submits that there was no BCR appointing an Appeal Board and, therefore, no Appeal Board exists within the

meaning of the Act. The Applicant argues that because there was no Appeal Board to determine his and the other appeals and to certify the election results, the Chief and Council cannot lawfully assume their Office.

[10] The Applicant submits that even if members of an Appeal Board were selected, they are not a valid Appeal Board nor did they make any decision regarding his or the other appeals. He adds that he was not informed of the outcome of his appeal.

[11] The Applicant further submits that it is a tradition that the Chief Electoral Officer (CEO) supervises the swearing-in of the Chief and Council. He submits that the CEO could not do so because there were outstanding appeals. He also submits that the transmission of the election results by the Deputy Electoral Officer was done contrary to the wishes of the CEO.

[12] He argues that the Chief and Council are self-proclaimed and have unlawfully used their names in positions of trust or authority and that this constitutes a “corrupt practice” pursuant to the Election Act.

[13] The Applicant acknowledges that it was the responsibility of the former Chief and Council to convene the meeting for the selection of an Appeal Board and to pass a BCR to confirm the membership. He also appears to agree that the present Chief and Council have no authority to “fix” the omission of the previous Chief and Council. Regardless, he submits that because the Current Chief and Council inherited this decision or omission, they should rectify

the situation. He submits that a remedy is needed because the current Chief and Council lack the authority to pass any BCR's.

[14] The Applicant proposes that the Court should make an Order appointing an *ad hoc* emergency Appeal Board Selections Committee consisting of the previous Chief and Council. That Committee would then make submissions to the Court for the appointment of an Appeal Board. The Order should also provide that once the Appeal Board is in place, the CEO should call a by- election. Following the results of the by-election, if there are appeals, the Appeal Board would determine the appeals and certify the election results, or pursue the appropriate action in accordance with the Election Act.

### III. The Respondents' Submissions

[15] The Respondents note Justice Mactavish's Order and point out that, despite the agreement to expedite the application for judicial review, the Applicant refiled the same material and advanced arguments related to interim relief. As a result, the Respondents were required to anticipate and respond to arguments that might be relevant to the application for judicial review.

[16] The Respondents note that a special Band meeting was held on May 24, 2016 to select a Chief Electoral Officer and an Appeal Board. Six members were chosen for an Appeal Board, but two later declined to be on the Board. The Respondents acknowledge that no BCR regarding an Appeal Board has been provided.

[17] The Respondents submit that the Applicant has named the wrong respondents in this application. It is the former Chief and Council who were responsible for convening a Band meeting to choose the CEO and Appeal Board and to pass a BCR to confirm the selection. The current Chief and Council cannot do anything to address this omission. The Respondents dispute the Applicant's argument that the current Chief and Council inherited the decision or omission and must rectify it.

[18] The Respondents submit that as Chief and Council, they have not made any unreasonable or unlawful order or taken any action or omitted to perform any action and that the Court lacks jurisdiction to consider this application for judicial review.

[19] Alternatively, the Respondents submit that if the application for judicial review was filed beyond the 30 day limit in the *Federal Courts Act* and, therefore, the Court should decline to consider the application. The Applicant was informed of the results of the election on June 24, 2016 but did not bring his application until August 16, 2016.

[20] The Respondents acknowledge that the Election Act was not strictly complied with in that there was no BCR to confirm that an Appeal Board had been selected and that the Appeal Board did not have the requisite seven members. However, six members were chosen and four remain. The Respondents submit that this is a validly constituted Appeal Board despite the irregularities and that it reflects the will of the Band which should be respected.

[21] The Respondents further submit that some of the provisions of the Election Act are mandatory while others are merely directory. Where there is no consequence for non-observance, the provision is directory (*Aspsassin v Canada (Department of Indian Affairs and Northern Development)* [1988] 3 FC 20 (T.D.)).

[22] The Respondents argue that the provisions of the Election Act governing the appointment of an Appeal Board are directory, rather than mandatory, given that there are no consequences for failure to appoint an Appeal Board. Therefore, the failure to strictly comply is not fatal to the election results. A four member Appeal Board was selected in substantial compliance with the Election Act and could have adjudicated any appeals that were properly submitted within the time limits.

[23] The Respondents submit that the provisions of the Election Act governing filing appeals differ in character and are mandatory. Appeals must be brought within the prescribed time limits and determined within the prescribed time limits by the Appeal Board. The Chief and Councillors can then perform their duties or alternatively, depending on the results of the appeal, a by-election could be called in a timely manner. To allow appeals to be brought beyond the time limits at any point in the tenure of the Chief and Council would cause chaos and disruption and would undermine the governance model.

[24] The Respondents note that all three appeals were filed out of time. There were no valid appeals to forward to an Appeal Board. In addition, the four members of the Appeal Board had no obligation to determine late-filed appeals. Therefore, there was no need for the CEO to certify

the election results. The Respondents add that the results of the Election held on June 24, 2016 were decisive.

[25] The Respondents submit that the Applicant's claim that he had no information and was not advised about the outcome of his appeal is not credible. The Respondents point to the letters from their former and current counsel that advised the Applicant that his appeal was out of time. The Respondents also point to the evidence of Terri-Lynne Beavereye, who stated that she advised the CEO, Mr. Robillard, on July 18, 2016 that all three appeals were filed beyond the time limits.

[26] The Respondents also argue that none of the appeals, even if filed in time, would have affected the results of the election. The Applicant's appeal was based on his granddaughter voting twice. Regardless of who his granddaughter voted for, and whether she voted once or twice, there would have been no impact on the election results given the decisive number of votes for Ms. Sayazie as Chief. The Respondents submit that an appeal would be denied where the evidence presented does not indicate an infraction of the Act and where an infraction would not have affected the results, the results would stand (Section 12.8).

[27] The Respondents also submit that there was no requirement to certify the Election results in these circumstances. The Chief and Council took their oaths of office before a Commissioner. The Act does not require the CEO to oversee their swearing-in. The Chief and Council have carried out their duties as elected officials and this does not constitute a corrupt practice.



[28] The Respondents add that the Applicant's proposed remedy for the lack of strict compliance with the Election Act due to the apparent omission of the previous Chief and Council to select a seven member Appeal Board and to pass a confirmatory BCR is extreme, even if there were any merit to the Applicant's arguments, and that there is no reason to quash the election results.

#### IV. The Issues

[29] The Applicant's submissions do not set out clear issues for determination on this application for judicial review. In my view, the Applicant's issues can be summarized as follows: whether the Applicant's appeal should have been determined; whether the lack of a properly constituted Appeal Board to do so has resulted in a failure to certify the election results; and, whether the current Chief and Council have lawfully taken office.

[30] The Respondents raised additional issues including; whether the Applicant named the wrong respondents; whether there was an Appeal Board in place, albeit not in strict compliance with the Election Act; whether the Applicant's appeal was out of time, and as a result, an Appeal Board was not required to consider his appeal; and, whether the Applicant's application for judicial review was out of time because the alleged omission regarding the Appeal Board occurred before the Election took place on June 24, 2016 and the Applicant would have been aware of this.

V. The Standard of Review

[31] The Council of a band is a “federal Board” within the meaning of section 2 of the *Federal Court’s Act* and, therefore the Court has jurisdiction to review any order made or action taken.

[32] The application raises questions of law and fact which are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

VI. The Evidence

[33] The Election Act governs the process of the election from the time of choosing the Electoral Officers to the completion of any appeal period. It sets out, among other things, the criteria for candidates, the role and responsibilities of the Electoral Officers, the appointment and composition of an Appeal Board and the process for an appeal. The relevant provisions of the Election Act are set out in Annex A.

*The Affidavit of Mr. Donald Sayazie*

[34] Mr. Sayazie, the Applicant, attests that he was a candidate in the June 24, 2016 election. He states that he submitted his appeal in writing to the CEO and a commissioner of oaths witnessed his signature.

[35] He asserts that the Chief and Council took office without a proper oath of office and without certification by an Appeal Board and that this amounts to a corrupt practice. He states that the CEO advised him that the Chief and Council hired a commissioner of oaths to administer the oath of office and asserts that this is contrary to the spirit of the *Black Lake Denesuline First Nations Act*. He also states that the CEO informed him that an Appeal Board must certify the results of the election and the CEO has been unable to do so because there is no Appeal Board.

[36] On cross examination, Mr. Sayazie's responses were vague and inconsistent in some respects. He acknowledged that he submitted his appeal on July 18, 2016. He stated that he had not read the Election Act and suggested that he was not aware of the 14 day time limit or the meaning of "calendar days". However, he agreed that this time limit is in the Act. He also cited several other provisions to support his own arguments, which suggests that he had read the Election Act.

[37] He stated that he was present at the May 24, 2016 Band meeting but left early. However, he also stated that he was in attendance when Mr. Robillard was elected as Chief Electoral Officer, which, as noted in the Minutes, was at midnight. He stated that he was not present when any Appeal Board was selected and noted that there was no reference to this in the Minutes.

[38] He responded to several questions about the basis of his appeal. His answers were not clear with respect to whether his concern was that his granddaughter voted twice or rather that the practice of being told that she could not vote because she had voted in the advance poll and then being advised that she could return to the poll and vote was somehow improper.

[39] He stated that he never received any information from the Appeal Board about his appeal. However, he agreed that his lawyer had received correspondence indicating that his appeal was out of time and this had been conveyed to him.

[40] When directed to the relevant provisions of the Election Act, he agreed that there was no provision that required the Chief and Councillors to be sworn in by the Chief Electoral Officer.

*The Affidavit of Ms. Coreen Sayazie*

[41] Ms. Sayazie states that she is the duly elected Chief as a result of the band election held on June 24, 2016. Ms. Sayazie attached, as an exhibit, the Electoral Officer's Report signed by the Deputy Electoral Officer, Janelle Boneleye, which was submitted to and accepted by the Department of Aboriginal Affairs and Northern Development Canada. This indicates that: Coreen Sayazie received 274 votes; Anne Gordon Toutsaint received 220 votes and Donald Sayazie received 185 votes.

[42] Ms. Sayazie states that she was not present at the Band meeting of May 24, 2016. She notes that Tricia Cook took the minutes of the meeting which are attached to her affidavit.

[43] Ms. Sayazie attests that Tricia Cooke advised her and she believes that six members of the Appeal Board were chosen at that meeting, although the minutes do not reflect this. Subsequent to the meeting, two members declined to sit on the Appeal Board because their wives were candidates. Ms. Sayazie states that the CEO, Mr. Robillard, must have been aware that six

members were selected and two resigned given that he sent a memo to the four remaining members on July 13, 2016.

[44] Ms. Sayazie states that there is no requirement in the Election Act that the Chief Electoral Officer administer the oath of office to the Chief and Councillors. Ms. Sayazie explains that the CEO is usually present, but Mr. Robillard refused to attend. The Chief and Councillors took their oaths before a Commissioner of Oaths in the presence of the Deputy Electoral Officer.

[45] Ms. Sayazie states that Mr. Sayazie has been aware since July 25, 2016 that his appeal was filed out of time. Ms. Sayazie attached a series of letters to her affidavit. A letter sent on July 22, 2016 to Mr. Robillard, the Chief Electoral Officer, by Mr. Partyka, the former counsel for the Applicant, asserts that, because no Appeal Board is in place, those wishing to appeal have been denied their rights and suggests that the election is void.

[46] Mr. Pandilla, counsel for BLFN, replied on July 25, 2016, noting the relevant provisions of the Act and advising that no appeals were filed within the 14 day limit, which was July 8, 2016.

[47] The letter from the current counsel for the Applicant, dated August 11, 2016 refers to, among other things, the CEO's concerns about three appeals that have not been adjudicated because there is no Appeal Board.

[48] The letter from Mr. Pandilla, Counsel for the Respondents, dated August 12, 2016 sets out the chronology of events, refers to provisions of the Election Act and responds to the previous correspondence, noting that the Applicant's former counsel, Mr. Partyka, was advised that none of the appeals were filed in time and that Mr. Robillard has no authority to call a by-election.

[49] Ms. Sayazie's affidavit attaches a copy of two Notices of Appeal. The Applicant's Notice of Appeal is dated July 13, 2016, and was sworn on July 18, 2016. The Applicant's Notice of Appeal states that an error or violation of the Election Act was made that might have affected the outcome. He describes that his granddaughter, Robin Sayazie, attended to vote and was told that she could not vote because she had done so in the advance poll. She was later contacted by the Deputy Electoral Officer and told she could vote and did so. Mr. Sayazie states "I need to recount the election resolve [sic] on June 24, 2016 for chief & councillors".

[50] Mr. Alphonse's Notice of Appeal, dated July 4, 2016, and sworn on July 13, 2016, asserts that his name was left off the candidates list by the CEO because he had not provided his criminal records check and also refers to Mr. Sayazie's granddaughter returning to vote after first being told she had voted in the advance poll.

[51] Mr. Robillard's memo to the four Appeal Board members dated July 13, 2014 notes that he had received Mr. Alphonse's criminal record check on the date of the election and he asks for a decision by the Appeal Board on Mr. Alphonse's appeal by July 24, 2016.

[52] Ms. Sayazie's affidavit also attaches the Minutes of the May 24, 2016 meeting. The Minutes are very cryptic but appear to reflect a discussion regarding business unrelated to the election. The meeting began at 4:51 p.m. and ended at midnight. There is a gap in the Minutes from 8:11 p.m. to 11:26 p.m.. At the 11:33 p.m. mark, it is noted that the CEO needs to be elected. Several names are noted. It appears that Mr. Robillard received 27 votes and was chosen CEO.

[53] On cross examination, Ms. Sayazie confirmed that she was not a member of the previous Council and could not state what it did or did not do regarding the appointment of an Appeal Board. She indicated that she was advised that an Appeal Board had been selected, that the members had been announced by Mr. Robillard at the nominating meeting on June 10, 2016 and that two members had later declined to sit on the Appeal Board, but she was not aware of a BCR to this effect.

[54] Ms. Sayazie could not answer why the Minutes of the May 24, 2016 meeting did not refer to the selection of an Appeal Board, noting again that she was not responsible for these Minutes nor was she part of the Council at that time. She stated that in her view, Mr. Robillard's memo of July 13, 2016 to four Appeal Board members indicates that Mr. Robillard thought there was an Appeal Board.

[55] She also confirmed that she and the other Councillors took their oath of office before a Commissioner. In response to questions about the CEO's refusal to attend their swearing in, Ms.

Sayazie responded that she had been told that Mr. Robillard refused because he wanted to be paid to do so, not that he was awaiting the views of the Appeal Board.

*The Affidavit of Terri- Lynn Beavereye*

[56] Ms. Beavereye attests that she is a business manager for the Band and that she was appointed as a member of the Appeal Board on May 24, 2016.

[57] She states that on July 18, 2016, Mr. Robillard, the CEO, attended at her office and advised her that he had received three election appeals. Mr. Robillard advised her that none of the appeals were received by him on or before July 8, 2016. She further attests that she told Mr. Robillard that none of the appeals could be dealt with by the Appeal Board because they were filed out of time.

[58] On cross examination, Ms. Beavereye stated that she was not at the May 24, 2016 meeting and agreed that there was nothing in the Minutes about the appointment of the Appeal Board. She also stated that there were two different Band meetings on May 24, 2016, but she did not know about another set of Minutes.

[59] She stated that Mr. Robillard announced the six members of the Appeal Board at the June 10, 2016 nominating meeting.

[60] Ms. Beavereye also stated that when Mr. Robillard attended at her office on July 18, 2016 he advised that he was delivering a copy of the three appeals to the other Appeal Board



members. Ms. Beavereye stated that she spoke with two other Appeal Board members who had received the copies of the appeals, however the group did not meet together to make a decision.

*The Affidavit of Mary Rose Bouvier*

[61] Ms. Bouvier attests that she was a former Band Councillor. She states that she did not sign any BCR for an Appeal Board and she believes that no Appeal Board was selected at the May 24, 2016 Band meeting.

[62] On cross examination, Ms. Bouvier responded that she was in attendance at the May 24, 2016 meeting, but left at 11:00 p.m. before the appointment of the CEO or any Appeal Board. She noted that there was some discussion among community members about who had been named to the Appeal Board.

[63] She confirmed that she was not aware of any requirement for the CEO to preside at the swearing in ceremony of the Chief and Councillors.

*Summary of the evidence*

[64] In addition to the relevant provisions of the Election Act, the evidence I have relied on in determining this application is summarized below:

- Members of the Appeal Board were chosen at the May 24, 2016 meeting, but not in conformity with the Act that requires seven members.
- There was no BCR confirming the appointment of an Appeal Board.

- The Minutes of the May 24, 2016 meeting do not refer to the appointment of an Appeal Board. The Minutes are very cryptic and do not provide any relevant information due to their brevity and missing pages.
- There may have been a second meeting held on May 24, 2016 but Minutes have not been provided.
- The CEO, Mr. Robillard, announced six members of the Appeal Board at the June 10, 2016 nominating meeting. Two of the members subsequently declined to sit on the Appeal Board.
- Mr. Robillard sent a memo to the four members of the Appeal Board on July 13, 2016 and sent copies of the appeals received to some of the members of the Appeal Board on July 18, 2016.
- The three appeals filed were all out of time as none were sworn or delivered until well after July 8, 2016.
- The Applicant acknowledged that he filed his appeal after the 14 day limit but also claims that he did not read that part of the Election Act. He did not attach a copy of his appeal to his own affidavit. However, his appeal indicates that it was sworn on July 18, 2016.
- The basis of the Applicant's appeal is that his granddaughter may have voted twice and he requested that the election results be recounted. However, whether his granddaughter voted twice or not would not have affected the results of the election.

- There is no affidavit from the Applicant's granddaughter, Robin Sayazie, to confirm what occurred at the time she voted, nor is there a copy of her own appeal.
- Although several affiants refer to what the CEO, Mr. Robillard, did or said, there is no affidavit from Mr. Robillard.
- The memo sent by the CEO, Mr. Robillard, on July 13, 2016 suggests that he acknowledged the four member Appeal Board. This contradicts the Applicant's assertion that Mr. Robillard was concerned about the inability to certify the election results and that he intended to call a by-election.
- The Applicant was aware on or around July 25, 2016 that his appeal had been filed beyond the prescribed time limit. He acknowledged that he was advised by his lawyer that a letter had been sent indicating that his appeal was out of time.
- The results of the election were decisive and in favour of Ms. Sayazie as Chief.
- There is no evidence of any requirement or any practice for the CEO to preside at the swearing in of the Chief and Councillors. The Election Act does not include such a provision.
- The Chief and Councillors took their oath of office before a Commissioner of Oaths in the presence of the Deputy Electoral Officer.

VII. The Applicant has not established any unlawful or unreasonable act or omission by the Respondents

[65] The Applicant argued that there is uncertainty in the community due to the unlawful election results and that an expeditious court order is needed to restore certainty. In my view, the Applicant has brought this uncertainty to his community by his own actions in bringing this unfounded application to the Court. The results of the election were definitive. The Applicant's purported appeal, if it had been filed in time, would not have affected the outcome of the election as it could only have resulted in a difference of, at most, one vote. Moreover, the Applicant's description of the alleged irregularity is far from clear. There is no direct evidence from Robin Sayazie or from the Chief Electoral Officer, Mr. Robillard.

[66] The Applicant notes the cautionary words of Justice Rothstein in *Long Lake First Nation v Canada (Minister of Indian and Northern Affairs)* [1995] FCJ No1020 at para 31:

Members of Council and /or members of the Band cannot take the law into their own hands. Otherwise there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interests they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[67] The Applicant submits that the lack of oversight by the previous Chief and Council to appoint an Appeals Board and to allow the election of the Respondents in contravention of the Act is irresponsible and is not in accordance with the rule of law. The Applicant further submits that the Respondents' unlawfully hold office.

[68] In my view, this is a gross overstatement. The election of the Respondents is not in contravention of the Act and is not illegal. While the omission is that of the previous Chief and Council, the evidence suggests that there was clearly an intention to appoint an Appeal Board, although only six persons were selected, rather than seven, two declined and no BCR was passed. The previous Chief and Council are not respondents to this application, so allegations against them are pointless. The current Chief and Council, who are the named Respondents, are not at fault for the omission of their predecessors.

[69] The Applicant has not established that the current Chief and Council acted or failed to act in an unlawful manner or in an unreasonable manner that would justify any intervention by this Court.

[70] The Applicant's position is very inconsistent. On one hand, he argues that the current Chief and Council have assumed office unlawfully and have no authority. On the other hand, he argues that the current Chief and Council should fix the gap in the Election Act.

[71] The Applicant also seeks to rely on some provisions of the Act but not on others. He fails to take a broader view of the overall situation. Although there was no properly constituted Appeal Board, his appeal, along with the other two appeals, were not filed in time. The lack of a seven member Appeal Board confirmed by a BCR is of no consequence to the Applicant's appeal given it was filed out of time.

[72] The Applicant's assertion that he was not informed of the results of his appeal is contradicted by the clear evidence on the record. In oral submissions, his counsel suggested that, although he was advised that his appeal was out of time, this was only the opinion of counsel and not a determination of his appeal. However, it is clear that the Applicant was advised that his appeal was filed beyond the prescribed time limit in the Election Act. There was no requirement for an Appeal Board to determine this appeal as it was filed beyond the 14 day time limit.

[73] Nor is there a requirement for the Appeal Board to certify the results of this election. Section 11.4 of the Election Act provides that "It shall be the duty of the Appeal Board to certify the Election or By-election results of the First Nation Council if there is an Appeal after an Election or By-election". There was no such duty because there were no valid appeals.

[74] I agree with the Respondents that the provisions of the Election Act governing the filing and determination of appeals (Section 12) are mandatory. Appeals must be properly submitted within 14 days and a preliminary ruling provided within 7 days. Where a hearing is held, the Appeal Board must make a decision within 7 days. These time limits are necessary so that the Chief and Council can move forward following the determination of any valid appeals without the risk of appeals arising later that would impede their ability to govern.

[75] The Election Act does not include any consequences for non-compliance with the requirement to appoint an Appeal Board. This suggests that the provisions regarding the Appeal Board are not mandatory. Although the role of the Appeal Board is important, the Act does not

include provisions to address the replacement of members of the Appeal Board or to permit a lesser number of members to fulfill the duties of the Appeal Board.

[76] There is no requirement in the Election Act and no evidence of any practice that the CEO must supervise the swearing-in of the Chief and Council. The Chief and Council took their Oaths as required by the Act in the presence of the Deputy Electoral Officer. The results of the election were communicated to the Department of Indian Affairs and Northern Development (now the Department of Indigenous Affairs and Northern Development).

[77] The Chief and Council have lawfully assumed their Office and have the authority to govern. The Applicant should accept this.

[78] With respect to the Respondents' submission that the application for judicial review was filed beyond the 30 day time limit in the *Federal Courts Rules*, it is not clear when the clock started to run given the vagueness of the evidence regarding when the Applicant knew that a seven member Appeal Board had not been confirmed by a BCR. As a result, the Court has considered all the issues that both parties raised.

[79] I acknowledge that the Appeal Board may be called upon to address other issues that may arise in the course of the Chief and Council's tenure. The lack of a seven member Appeal Board confirmed by a BCR is an issue that in the future may affect the Band as a whole and not the Applicant in particular. It is not an issue that must be determined on this application for judicial review. As I noted at the hearing, the Court is reluctant to craft remedies to resolve issues for a

community that has the capacity to resolve them on their own and in a manner that would likely be more acceptable to all members of the community.

[80] However, given that the parties appear to be at an impasse, the Court will offer some suggestions. These suggestions are not intended to usurp the role of the Band in managing their elections and their government, but rather to avoid the need to return to the Court. Gaps in the Election Act which provide opportunities for members to stir up controversy or encourage litigation should be avoided and addressed.

[81] The Band could first consider whether the four persons chosen as members of the Appeal Board can be recognized as the Appeal Board for the tenure of the current Chief and Council. If so, these members could sit in panels of three (to ensure no tie votes), to address issues that arise in accordance with section 11.3, other than appeals of the election results given that the time to bring an appeal has long passed.

[82] For a more long term approach, the Band should consider amendments to the Election Act to provide for the replacement of members of the Appeal Board, who would or should have been appointed by the previous Chief and Council in advance of an election, in the event of their illness, death, disqualification or resignation. The Election Act provides for the replacement of the CEO at Sections 3.2 and 11.3 and these provisions could provide a model to be adapted for the replacement of Appeal Board members. Alternatively, or in addition, the Election Act could permit that if members resign or are disqualified, the remaining members would continue to act as the Appeal Board, as long as the membership does not fall to below a particular number of



members. Another option for consideration would be to require the Chief Electoral Officer or the Deputy Electoral Officer to call a special meeting for the nomination and selection of replacement members by vote among band members which would then be presented to the Chief and Council and ultimately confirmed by a BCR.

VIII. Costs

[83] The Respondents are entitled to their costs. The Respondents were called upon to defend decisive election results and to anticipate the Applicant's arguments with respect to the application for judicial review because the Applicant twice refiled and relied on the arguments prepared for the purpose of seeking an interim injunction which did not address the merits of the underlying application.

[84] The Respondent submitted a draft Bill of Costs which I have considered and have no doubt were incurred. However, I exercise my discretion to award lump sum costs to the Respondents in the lesser amount of \$6,500, inclusive of disbursements and interest.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

The Respondent is awarded costs in the amount of \$6,500.

"Catherine M. Kane"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1408-16

**STYLE OF CAUSE:** DONALD SAYAZIE v THE BLACK LAKE  
DENESULINE FIRST NATION AS REPRESENTED BY  
COREEN SAYAZIE, IN HER CAPACITY AS CHIEF  
AND TREVOR BONELYE, DELBERT BOUVIER,  
GEORGE CATHOLIC, DARLENE FERN, JOSEPH  
RENIE, JOHN TOUTSAINT AND PAULINE  
TOUTSAINT IN THEIR CAPACITY OF  
COUNCILLORS

**PLACE OF HEARING:** SASKATOON, SASKATCHEWAN

**DATE OF HEARING:** NOVEMBER 10, 2016

**JUDGMENT AND REASONS:** KANE J.

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**APPEARANCES:**

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## ANNEX A

### *The Black Lake Denesuline First Nation Election Act*

The relevant excerpts are set out below:

Section 2 sets out definitions including:

[...]

2.3 “**Band Council Resolution or BCR**”, means a formal expression of the will of the Chief and Council set out in the prescribed form and executed by a quorum of council.

[...]

2.7 “**Chief Electoral Officer**” means the person empowered and entrusted to conduct and oversee an Election and/or By-election according to the terms of this Act.

2.8 “**Corrupt Practice**” means any act done by an elected official, whether Chief or Councillor, who unlawfully and/or wrongly uses his/her name or position of authority or trust to procure some benefit or favour for him/herself or for another person contrary to his her official or fiduciary duties and/or the rights of other persons and includes any act or omission that is recognized by law or custom to be a corrupt practice.

[...]

2.10 “**Deputy Electoral Officer**” means a person who is appointed by the **Chief Electoral Officer** to assist him/her with overseeing the **Election or By-election**.

[...]

3 An Election shall be commenced as follows:

3.1 Prior to an election being called, a special Band meeting *shall* be convened to select a Chief Electoral Officer and the Appeal Board.

3.2 The Chief Electoral Officer *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. A Chief Electoral Officer *may* be reappointed. If the Chief Electoral Officer 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 a Chief Electoral officer, then the Chief and Council *may* appoint the Chief Electoral Officer.

3.3 An 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, No serving member of the Appeal Board *may* participate in a General Election or By-election whether as Candidate, Nominator, Seconder or Voter.

[...]

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 the date, time and place for the Nomination meeting, the Polling Day and Advance Poll(s);
- (c) describe the type of Election, whether General Election or By- election, which is to be conducted; *and*
- (d) describe the powers given or bestowed upon the Chief Electoral Officer and Appeal Board as those set out in this Elections Act and any amendments thereto.

(Sections 4.1-4.10) set out the nomination procedure and the duties of the Chief Electoral Officer.

Section 5 sets out additional responsibilities of the CEO regarding the nomination and voting process.

Section 6 governs the conduct of nomination meetings.

Sections 7- 10 govern the conduct of elections and by- elections and the counting of ballots.

11. An Appeal Board *shall* be appointed at the time the Election is called.

11.1 The Appeal Board *shall* be made up of seven (7) persons, up to six (6) of whom who meet the same eligibility requirements as do Candidates and at least one (1) of whom is a local business person, bank manager or professional person who is neither a Band member and who is unbiased an impartial, This person may or may not be of First Nation ancestry.

11.2 *No one sitting on the Appeal Board may participate in the Election of By-election whether as a candidate, nominator, seconder or voter.*

11.3 The Appeal Board *shall* supervise and administer all Election and By-election Appeals in accordance with this Elections Act. The Appeal Board *may* be reconvened to deal with any disciplinary matters that arise during an elected official's term of office and or to appoint a Chief Electoral Officer if the person who holds that title is unable or unwilling to serve in that capacity until the next General Election.

11.4 It **shall** be the duty of the Appeal Board to certify the Election or By- election results of the First Nation Council if there is an Appeal after an Election or By-election.

12. The Appeal Procedure **shall** be as follows:

12.1 Any candidate at the Election or By- election who gave or tendered his her vote at the Election **may**, within fourteen ( 14) calendar days of the Poll, appeal the Election if he/ she has reasonable and probable grounds for believing that:

(a) an 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) a 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.

Sections 12.4- 12.10 govern appeal hearings and decisions.

12.8 The Appeal Board **shall** within seven (7) days of holding an Appeal Hearing, make one of the following decisions:

(a) **deny** the Appeal on the grounds that the evidence presented did not indicate an infraction of the Act and so advise the Band and the Complainant;

(b) **uphold the Appeal but allow the Election to stand**, on the ground that the infraction could not reasonably be seen to have affected the results of the Election; or

(c) **uphold the Appeal and call for a new Election**, within twenty-one (21) days of the determination of the Appeal for all or some of the positions which were contested, giving clear instructions to the election official such that the reason for the original Appeal [ error or omission] is corrected. There shall be no new or additional

nominations beyond the slate that ran in the Election or By-election that is the subject of Appeal but no Candidate shall be required to let his/ her name stand in the new Election. Candidates for Chief may not run for a position as Councillor and vice versa.

13.1 An **Oath of Office**, a copy of which is attached hereto, shall be taken by each newly elected Chief and Councillor before they assume office or exercise any of the powers or discretions of that office.

[...]

[*Sic* throughout]