

Federal Court



Cour fédérale

Date: 20161216

Docket: T-1979-14

Citation: 2016 FC 1388

Ottawa, Ontario, December 16, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**HORNEPAYNE FIRST NATION AS
REPRESENTED BY CHIEF & COUNCIL,
CHIEF RON B. KOCSIS, COUNCILLOR
JUDY MAYHEW, COUNCILLOR ISOBEL
PEEVER, AND 18 ELDERS
ELDER SINCLAIR TAYLOR, ELDER
ROSABELL GOULET, ELDER ALFRED
MARTIN, ELDER DONNA MARTIN, ELDER
JOHN MAYHEW, ELDER HARRY
MAYHEW, ELDER DOROTHY RENDELL,
ELDER SHIRLEY TARDIFF, ELDER MINNIE
TAYLOR, ELDER EVA WESLEY, ELDER
ALICE SUMMERS, ELDER GEORGE
BEDWASH, ELDER MARIA GIONET,
ELDER IDA BEDWASH, ELDER CAROLINE
EDNA CHARLEBOIS, ELDER ELI TAYLOR,
ELDER LINDA ESQUAT SR., ELDER ANGUS
SHAGANASH, AND 55 BAND MEMBERS
RHODA BAXTER, ALICEA BOERE,
NATALIE ARENOVICH, JUSTIN DUBE,
SHELDON DUBE, NAPOLEON GOULET,
ROBERT GOULET, MARGIE GOULET, JIM
KOCSIS, RENEE MARTIN, MITCHELL
MARTIN, PAUL MARTIN, KEVIN MAYHEW,
ROBERT MAYHEW, BRENDA ROMAN,
BRIAN TAYLOR, CHAD TAYLOR, JOYCE
TAYLOR, ROBERT TAYLOR, DONNA
WESLEY, CHELSY MCGOWAN, CHARLES
SPARLING, GEORGE SPARLING,
STEWART BEDWASH, MARLENE
TOWGESHIC, NORA TAYLOR, WILFRED**

**MAYHEW, CRYSTAL SUMMERS, SHYLO
ELMAYAN, JOHN SUTHERLAND,
MARILYN TAYLOR, JENNIFER WRIGHT,
AMANDA WRIGHT, ASHLEY WRIGHT,
VIVIAN LACOUCIERE, CANDICE MARTIN,
PAUL JAMES MARTIN, RICHARD
ZACHARIE, SHANNON BUCKNELL,
DAKOTA BUCKNELL, FRAN TAYLOR,
BRENDA DAMPER , LAWRENCE TAYLOR,
JOHN TAYLOR, CHAD KOCSIS, JUSTIN
OLSON, DOROTHY TAYLOR, SAMUAL JAY
SPENCE, SIMEON RALPH TAYLOR,
GEROME TAYLOR, MARIO GIONET,
PAMELA TAYLOR, PRISCILLA
SHAGANASH, KRISTA-LEE TAYLOR,
CLARA PAUL**

Applicants

and

**LAURA MEDEIROS, GORDON
SHAGANASH, JEAN OLIVIER, ALFREDO
RAYMOND MEDEIROS**

Respondents

JUDGMENT AND REASONS

[1] This matter has a long procedural history, however, at this stage before this Court it concerns an application for judicial review of a decision by Canada Post Corporation (“Canada Post”) to suspend mail service to a postal box utilized by the Hornepayne First Nation (“HFN”). This application is made pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F 7 (“*Federal Courts Act*”).

Procedural History and Factual Background

[2] It is necessary to consider this application for judicial review within the context of its procedural history as well as its factual background. In that regard, I first refer to and borrow from the decision of Justice LeBlanc made in this matter and dated January 26, 2015 (2015 FC 103).

[3] As set out by Justice LeBlanc, this matter stems from a disputed election held on July 10, 2014 involving the HFN. Certain of the Applicants, Ron B. Kocsis, Judy Mayhew and Isobel Peever, claim to be the newly elected councillors of the HFN (“New Council”). The Respondents, Laura Medeiros, Gordon Shaganash, Jean Olivier and Alfredo Raymond Medeiros, refuse to recognize the results of that election, which they claim is invalid, and contend that they remain the duly-elected representatives of the HFN (“Prior Council”).

[4] The Applicants contended that this leadership crisis disrupted the HFN’s daily operations, including the mail delivery. On September 19, 2014, they filed an application for judicial review seeking the following relief:

1. An Order to set aside the decision of Canada Post to suspend and end the Prime Mode Postal Box Service to the Hornepayne First Nation Band Membership;
2. An Interim Order for injunction restraining and prohibiting Canada Post from suspending and ending the Prime Mode Postal Box Service to the Hornepayne First Nation Band Membership until the conclusion of this proceeding;
3. An Order of Declaration that the Hornepayne First Nation Democratic Election results as of July 10, 2014 are binding upon the Hornepayne First Nation Band Membership;

4. An Interim Order for injunction restraining and prohibiting the Past Leadership from communicating to all third party groups that the Hornepayne First Nation Band deals with relating to its daily operations until the conclusion of this proceedings.

[5] On November 4, 2014, the Applicants filed a notice of motion for an interlocutory injunction enjoining Canada Post from suspending and ending mail service to the postal box utilized by HFN until the application for judicial review was resolved by this Court. The Applicants subsequently discontinued the Application against Canada Post and filed a further notice of motion, this time seeking to enjoin the Respondents from interfering with the delivery of the community mail to the HFN community membership until such time as the application for judicial review was determined.

[6] That motion was heard by Justice Annis, on December 9, 2014 (2014 FC 1188) and dismissed on the ground that it was outside the scope of the underlying application, which was to set aside the decision of Canada Post suspending delivery to the postal box where mail, addressed to the HFN community membership, is received. Justice Annis stated that this issue had nothing to do with who succeeded in the impugned 2014 election, or the role of the Prior Council in causing Canada Post to suspend mail delivery.

[7] The same day that Justice Annis' decision was released, the Applicants filed a further motion for an interlocutory injunction. This time, they sought to enjoin the Respondents, through a writ of *quo warranto*, from holding office as the Chief and Council of HFN until the leadership crisis was resolved by court order (the *Quo Warranto* Motion). In response, the Respondents brought a motion claiming that this Court had no jurisdiction to address the July 2014 election issues. In particular, they submitted that they are individuals acting in the

capacity of directors of the provincially incorporated entity HFN Incorporated and that, as such, neither they or the corporation is a “federal board, commission or tribunal” within the meaning of s 18 of the *Federal Courts Act*.

[8] The parties agreed to argue the jurisdictional issue as a preliminary matter and filed evidence and written submissions in support of their respective positions.

[9] In his decision of January 26, 2015, Justice LeBlanc noted that the HFN is an unincorporated association that does not have the legal status of an Indian band under the *Indian Act*, RSC, 1985, c I-5 (“*Indian Act*”). Its membership is made up of approximately 264 individuals who are “Indians” within the meaning of the *Indian Act*. And, although it has received political recognition from various First Nations organizations and has, for many years, been attempting to establish itself as an Indian band under the *Indian Act* with reserve status, this has not been successful.

[10] As to HFN Incorporated, this was created in 1992 as an administrative instrument, initially to effect the purchase of a former hospital to be converted into a community resource center for the benefit of the HFN membership. However, according to its letters patent, the objects for which HFN Incorporated was incorporated were broader. The Respondents claimed that one of the main tasks of HFN Incorporated was to work towards developing a membership list and an election protocol with a view to, eventually, carrying out an election for the HFN as a fully recognized First Nation with band status under the *Indian Act*.

[11] As to running of elections, the Applicants contended that the HFN had always had a formal process under their band custom to elect Chief and Council. They asserted that this process was in place well before the creation of HFN Incorporated and that in March 2001, it was put into writing in the form of an election “policy manual”, the first election under that “policy manual” having been held on April 28, 2001. The Applicants also claimed that the duly elected Chief and Council become *ex officio* directors of HFN Incorporated so that a separate election of its directors was never required.

[12] Conversely, the Respondents submitted that the only elections that had ever occurred were elections of the president and directors of HFN Incorporated who, once elected, used the titles of Chief and Councillors. They claimed that although these titles were used, there had been no formal process for electing a chief and councillors for the HFN community.

[13] Justice LeBlanc found, for the reasons set out in his decision, that the HFN community powers to hold an election do not originate from a federal act or prerogative. Further, as to the elections of the president and directors of HFN Incorporated, the source of the power or jurisdiction to be exercised in that regard originated from provincial law. More specifically, that issues relating to who should act or continue to act on behalf of HFN Incorporated was a matter to be determined by the corporate by-laws and/or the provisions of the Ontario *Corporations Act*, RSO 1990, c C-38 (“*Corporations Act*”). In the result, because the power to hold the July 2014 election and to elect the board of directors of HFN Incorporated did not originate from a federal act or prerogative, the Respondents were not a “federal board, commission or other tribunal” and this Court, therefore, lacked jurisdiction to entertain the *Quo Warranto* Motion as well as any

issues in the application for judicial review related to who succeeded in the disputed July 2014 election. Put otherwise, the Court lacked jurisdiction to entertain the application insofar as it sought remedy against the Respondents.

[14] Subsequently, Mr. Kocsis, as the representative of the Applicants, sought clarification of Justice LeBlanc's decision. In response, on February 2, 2015, Justice LeBlanc issued a Direction stating:

The Applicants' judicial review application, to the sole extent it concerns the authority of the Canada Post Corporation to suspend or end the delivery of mail addressed to Postal Box 1553, is still alive (the Residual Application), subject to this Court having jurisdiction over the said Residual Application, an issue which the January 26, 2015 Order did not address and is not dispositive of.

[15] Justice LeBlanc also directed that Laura Medeiros, Gordon Shaganash, Jean Olivier and Alfredo Raymond Medeiros remain named as Respondents to the Residual Application, subject to their right to show cause why they should not so remain so as interested persons adverse in interest to the Applicants. The direction gave the Respondents until February 5, 2015 to inform the Court in writing as to whether they intended to show cause why they should not remain named as Respondents. On February 12, 2015, Justice LeBlanc directed that Laura Medeiros, Gordon Shaganash, Jean Oliver and Alfredo Raymond Medeiros remain named Respondents to the Residual Application, as defined in his February 2, 2015 direction.

[16] Thus, to the extent this Court has jurisdiction to consider it, the only issue before me concerns the Applicants' challenge to Canada Post's decision to suspend or end the delivery of mail to the subject postal box.

[17] The relevant background facts to that issue are as follows:

[18] On July 3, 2014 Mr. Michael Strickland of Buset & Partners LLP, identifying himself as counsel for Ron B. Kocsis with respect to HFN Incorporated, wrote to Canada Post providing copies of executed Resolutions of the Board of Directors, a copy of the directors' and officers' Registers, and, Form 1 - Notice of Change, and requested that Canada Post update its records accordingly.

[19] It appears that at some point prior to July 10, 2014, Mr. Kocsis contacted Canada Post indicating that a new lock was to be installed on the subject postal box, being postal box 1553, located at 200 Front Street, Hornepayne, Ontario ("Postal Box") and which has been assigned to the HFN for about 25 years. On July 11, 2014 Mr. Anthony Carfagnini sent an email to Mr. Clive Henderson, Local Area Superintendent, Canada Post, copied to Mr. Strickland, asserting that Mr. Carfagnini was the corporate solicitor for HFN Incorporated and that the election of the new officers of that entity was in dispute. Mr. Carfagnini requested that Canada Post hold the mail until at least the following week while attempts were made to resolve the dispute.

[20] On July 22, 2014, Ms. Trina Kemeridis, legal counsel at Canada Post, emailed Mr. Strickland and Mr. Carfagnini stating that she understood that Mr. Kocsis effected a lock change for the Postal Box, belonging to HFN Incorporated. Further, that shortly thereafter, Canada Post had been contacted by Mr. Carfagnini, who identified himself as a corporate solicitor for HFN Incorporated, and advised of a dispute over the current directors and officers of

that corporation. Mr. Carfagnini requested that all mail for HFN Incorporated be held while the parties attempted to resolve the leadership issue. Ms. Kemeridis advised that Canada Post had no authority to adjudicate business or mail ownership disputes. As there was a dispute over ownership of mail for HFN Incorporated, Canada Post would temporarily hold all mail to provide the parties with time to submit a joint direction informing Canada Post as to who should be provided with a key to the Postal Box. If that had not occurred by 5 p.m. on August 5, 2014, mail addressed to HFN Incorporated would be returned to its sender. Alternatively, the parties could seek a court order directing Canada Post on the matter.

[21] By email of August 12, 2014, Ms. Kemeridis advised both counsel that, following a call from Mr. Kocsis, she was extending the time for both parties to provide a joint direction or a court order. If such was not received by August 19, 2014 at 5 p.m., mail addressed to the HFN would be returned to its sender. On that same date Mr. Kocsis, identifying himself as Chief of the HFN, wrote to the local area superintendent of Canada Post describing the disputed election, advising that the election of the New Council must now be respected and requesting that the hold status be lifted from the Postal Box.

[22] By email of August 13, 2014 to Mr. Strickland, Ms. Kemeridis reiterated the need for a court order or joint direction and noted that Mr. Strickland had sought an extension of time to hold mail until 5 p.m. on August 28, 2014.

[23] By email of August 21, 2014, Ms. Kemeridis reminded both counsel that Canada Post would only hold the mail for HFN Incorporated until 5 p.m. on August 28, 2014 and asked

whether the parties were working towards providing a joint declaration or court order prior to that deadline. On the same date, she sent an email to Mr. Strickland asking him to remind Mr. Kocsis, who had been contacting one of Canada Post's supervisors directly, that Canada Post could not release the mail to him without a joint declaration or court order, as she had previously advised.

[24] By email of August 26, 2014, from Ms. Kemeridis to both counsel, she raised a possible resolution that had been discussed with Mr. Strickland earlier that day. Specifically, the possibility of the parties agreeing that the mail for the HFN be redirected to counsel until the dispute was resolved. This would apply to mail for the "political body" (elected chief and council) and the "corporate entity" (HFN Incorporated). Counsel could then agree amongst themselves as to what trust conditions would be placed on the redirected mail. She asked, if this was agreeable, that she be advised in writing and that a forwarding address be provided, she would then direct the post office accordingly. She again reminded counsel that Canada Post would only hold the mail for the HFN until 5 p.m. on August 28, 2014.

[25] By letter of August 26, 2014 Mr. Kocsis, identifying himself as Chief of the HFN, wrote to Ms. Kemeridis, alleging that there was no leadership dispute to warrant Canada Post's actions against the HFN, although past leadership and its counsel continued to claim controversy. Mr. Kocsis asserted that Canada Post had taken a position against the HFN by suspending essential mail service to the community and, as of August 28, 2014, terminating that service. He asked that the HFN members' right to essential mail service be reinstated immediately and protected from future disruption. However, if Canada Post intended to maintain its position, that

it not return the mail being held or terminate mail service until the HFN had time to file a Notice of Application for Judicial Review to challenge that decision. A further letter was sent on September 28, 2014 attaching minutes of an Elders Council Emergency Meeting by which a motion proposing that no leadership dispute existed was passed.

[26] On August 29, 2014 Ms. Kemeridis sent a lengthy email to both counsel detailing the events to date. She concluded that there remained a dispute over which party had the right to the key to the Postal Box and the ownership of mail for HFN. She reiterated that it is not Canada Post's role to adjudicate business or mail ownership disputes or to hold mail until the parties come to a resolution. Canada Post would be reviewing the matter the following week and finally deciding on returning to sender the mail that was currently on hold and future mail until the matter was resolved. She also reminded each party that they could contact their mailers directly to make alternate delivery arrangements.

[27] By email of September 3, 2014, Ms. Kemeridis advised both counsel that, as requested by Mr. Kocsis, mail would continue to be held until October 3, 2014 so that Mr. Kocsis could obtain a court order.

[28] On September 19, 2014 the subject application for judicial review was filed by the Applicants.

[29] There is no evidence in the record before me indicating what the status of mail addressed to the HFN or HFN Incorporated has been since October 3, 2014. Presumably, Canada Post has suspended delivery to the Postal Box and returned mail addressed there to its senders.

Decision Under Review

[30] The Applicants submit that on or about July 17, 2014 Canada Post arbitrarily and without notice suspended mail service to the HFN.

[31] I would note that there was no written decision rendered by Canada Post on July 17, 2014. Rather, as described above, on July 11, 2014, Mr. Carfagnini, as the purported corporate solicitor for HFN Incorporated and presumably on behalf of the Prior Council, requested that Canada Post hold the mail until at least the following week while attempts were made to resolve the dispute.

[32] In my view, the decision under review is Canada Post's decision, after various communications with both counsel for HFN Incorporated attempting to have them resolve the issue, to continue to hold the mail and latterly to suspend mail service to the Postal Box, until such time as a mutual agreement had been reached as to access to the Postal Box; a court order directing Canada Post in that regard was provided; or, the underlying leadership dispute had been resolved. That decision was articulated in writing on July 22, 2014, and repeatedly thereafter until a final decision was reached by Canada Post some time after August 29, 2014. Mail was returned to senders and service suspended on or about 5 p.m. on October 3, 2014, which, based

on the record before me, appears to be the last extension that was granted by Canada Post for the holding of mail for the Postal Box.

[33] Although the Applicants assert that the decision under review was made on July 17, 2014, in these circumstances, I am satisfied that, in essence, the Canada Post decision was a continuing course of conduct which commenced when the mail was first held to the time that service to the Postal Box was eventually suspended. The decisions to hold and then suspend mail service to the Postal Box are so closely linked that they should be considered as a continuing course of conduct and should properly be considered together. They pertain to the same set of facts, they were made by the same decision-maker, and both concern the question of which party should have access to the Postal Box and the restoration of mail service (*Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6; *Landriault v Canada (Attorney General)*, 2016 FC 664 at para 27; *Balfour v Norway House Cree Nation*, 2006 FC 213 at para 16; *Shotclose v Stoney First Nation*, 2011 FC 750 at para 64).

Positions of the Parties

[34] As a preliminary point, I note that both the Applicants and the Respondents were self-represented. The Court record indicates that Mr. Kocsis has appeared in this matter on behalf of the Applicants at every prior motion. A Notice of Intention to Act in Person was filed on behalf of the Respondent, Laura Medeiros, on February 27, 2015. On March 5, 2015 Justice LeBlanc directed that the Notice of Intention to Act in Person was deemed to have been filed in the name of all Respondents and was therefore binding on all of them. However, when appearing before me, Ms. Medeiros sought to have Mr. Noah Medeiros represent the Respondents. Mr. Medeiros

is not legal counsel nor is he a named Respondent. Further, the Respondents' Record contains an affidavit of Mr. Medeiros supporting the Respondents' position. Accordingly, and as the request was not made in advance of the hearing, it was denied, although Mr. Medeiros sat with and was consulted by Ms. Medeiros during the hearing.

[35] As to Canada Post's role, the Applicants' Notice of Application and Application itself named Canada Post as a Respondent. Pursuant to Rule 318(1)(a) of the *Federal Courts Rules*, SOR/98-106 ("*Rules*"), on October 22, 2015, Canada Post filed a certified copy of the material requested by the Applicants ("Canada Post Record"). On November 3, 2014 the Applicants discontinued the application as against Canada Post by filing a Partial Notice of Discontinuance on Consent. Canada Post consented to the discontinuance in whole of the application and undertook that it would abide by any interim and final order this Court may make; that pursuant to Rule 317 it would provide a certified copy of the material requested in the within application; and, would not seek costs.

[36] In the result, Canada Post played no further role in the application for judicial review of its decision. The Applicant did not seek to have the Attorney General or any other party act on Canada Post's behalf.

[37] During the course of the hearing the Respondents submitted that they had not been provided with a copy of the Canada Post Record. Given the circumstance of the Canada Post decision, described above, and that the record provided the basis for that decision, it was agreed that following the hearing the Applicants would provide the Respondents with a copy of the

Canada Post Record. Subsequent to receipt and review, the Respondents could, if they chose to do so, make brief written submissions addressing the content of the Canada Post Record to which the Applicants could, if they wished, provide a brief written response.

[38] At the hearing, I stated that I would issue a Direction to that effect following the hearing, that direction was issued on October 26, 2016, a further Direction extending the filing timeline was issued on November 3, 2016. As permitted by the Directions, the Respondents filed further written submissions on November 28, 2016 and the Applicants filed their submissions in reply on December 5, 2016.

Applicants' Position

[39] The Applicants' memorandum of fact and law does not identify a particular legal issue. The Applicants, in essence, assert that on July 17, 2014 Canada Post arbitrarily and without notice suspended mail service to the HFN and failed to give reasons for its decision. The Applicants submit that Canada Post is an administrative body and, as such, was required to exercise procedural fairness in making its decision. The Applicants reference *Canadian Daily Newspaper Assn v Canada Post Corporation*, [1995] 3 FCR 131 ("*Canadian Daily Newspaper Assn*") in support of their position that Canada Post has been determined to be a federal board, commission or other tribunal and therefore that, pursuant to s 18 of the *Federal Courts Act*, this Court has jurisdiction to hear the matter and that Canada Post is required to exercise procedural fairness.

[40] The Applicants also reference *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 SCR 311 to support that they should have been treated fairly, not arbitrarily, and *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 (“*Baker*”) to support the proposition that there is a duty of procedural fairness owed to affected individuals. They also suggest that substantive fairness may be constitutionally guaranteed by s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982 (UK)*, 1982, c 11, but did not develop or pursue that argument.

[41] The Applicants sought an order setting aside the decision of Canada Post and that mail service be restored to the Postal Box as it was as of July 17, 2014. That is, as it was after the changing of lock effected by Mr. Kocsis which order would, in effect, permit the Applicants, including the New Council, to have control of the Postal Box and the mail delivered to it.

[42] When appearing before me, the Applicants submitted that by accepting the documentation provided by Mr. Strickland on behalf of the New Council and updating their records based on those documents, Canada Post made a decision to accept the election of the new officers and directors of HFN Incorporated. Canada Post then unreasonably altered that decision based on the meritless allegations made by the Respondents. Further, that Canada Post should have compelled the Respondents to pursue other remedies, such as those available pursuant to the *Corporations Act*, before deciding to hold and suspend mail service. The Applicants submitted that they no longer sought the remedy that mail service be restored to the Postal Box as it was as of July 17, 2014. This was because the Applicants have the key to the

Postal Box. Therefore, if Canada Post's decision is quashed, by default they would have access to the mail.

Respondents' Position

[43] In their written submissions the Respondents identified the issue as the legal ownership of the Postal Box. They then identify four "questions of law", however, none of these concern Canada Post's decision. Rather, the questions posed were whether Mr. Kocsis had the legal authority to file false entries within the Province of Ontario Ministry of Government Services; whether the Applicants have the authority to disseminate falsified documents; and, whether declarations of bankruptcy by certain Applicants disqualify them as directors pursuant to the *Corporation Act*. Most of the submissions concern the background to or merits of the disputed election, which are not relevant to the issue before me. Some background information addresses the change in access to the Postal Box but mostly in the context of alleged resultant harm to the community. The Respondents cite no case law or legislation in support of their submissions.

[44] The Respondents seek an order setting aside Canada Post's decision to suspend the mail service and restoring the original lock on the Postal Box. This, in effect, would see the mail delivered to and in the control of the Prior Council. The Respondents also request that if the Court is of the opinion that the Applicants' actions were illicit in gaining access to the corporate documents and assets, that it order their return. Similarly, if the Applicants illicitly gained access to certain personal finances that the Court order reimbursement, and, order that the Applicants are prohibited from misrepresenting HFN Incorporated.

[45] When appearing before me the Respondents expressed the view that Canada Post's decision was tied to the circumstances surrounding the disputed election and appointment of the new officers and directors of HFN Incorporated. The decision was in error as it was based on wrongful acts of the Applicants that resulted in the election results that are disputed. Further, the Postal Box belongs to HFN Incorporated and, therefore, only the properly elected officers and directors, being the Prior Council, should have access to mail delivered there. Moreover, Ms. Medeiros, as the prior president of HFN Incorporated, had not been notified by Canada Post of the decision to hold and then suspend mail service to the Postal Box. Although they sought to have Canada Post's decision quashed, the Applicants submitted that this Court does not have jurisdiction as the matter should be heard with related matters in other courts.

Further Submissions of the Parties

[46] The Respondents' further written submissions filed pursuant to my Directions described above are in no way responsive to the content of the Canada Post Record or the decision under review. The submissions simply reassert that the decision was based on misleading, improper, defective and fraudulent documents.

[47] The Applicants' submissions in reply correctly note that the Respondents' further submissions are non-responsive to the Canada Post Record. The Applicants made further "closing submissions", however, these were not responsive to the subject submissions of the Applicants and were not permitted by my Directions.

Issues

[48] While the parties do not clearly articulate the issues, in my view they are, first, does this Court have jurisdiction to review Canada Post's decision? If so, did Canada Post exceed its jurisdiction or breach its duty of procedural fairness in reaching its decision? And, finally, was the decision reasonable?

Does this Court have jurisdiction?

[49] Subsections 18(1) and (3) of the *Federal Courts Act* give exclusive, original jurisdiction to the Federal Court for judicial review in respect of "any federal board, commission or other tribunal". Section 2 defines that term:

2 (1) In this Act,

federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution*

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

Act, 1867;

...

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

...

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

...

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

...

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[50] The Federal Court of Appeal in *Pokue v Innu Nation*, 2014 FCA 271 (“*Pokue*”) identified the correct test for determining whether an entity is a federal board, commission or tribunal (“federal board”):

[11] The leading authority with respect to the proper interpretation of the definition of federal board is the decision of this Court in *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137. At paragraph 29 of the reasons, Justice Nadon, writing for the Court, observed that “a two-step enquiry”

must be made in order to determine whether an entity is a federal board. The first enquiry is directed to what jurisdiction or power is being exercised. The second enquiry is directed to the source or origin of the jurisdiction or power that is being exercised.

[12] At paragraph 30, Justice Nadon quoted with approval from D.J.M. Brown and J.M. Evans “Judicial Review of Administrative Action in Canada”, volume 1, looseleaf (Toronto: Canvasback Publishing, 1998) at paragraph 2:4310 to the effect that the primary determination of whether a board falls within the definition of a federal board is the source of the board’s authority. The primary determination is not the nature of either the power exercised or the entity exercising the power.

(Also see *Hornepayne First Nation v Medeiros*, 2015 FC 103 at paras 18-19).

[51] The Federal Court of Appeal stated that the proper questions to be answered are: first, what jurisdiction or power was being exercised; and, second, what was the source of that jurisdiction or power (*Pokue* at para 17).

[52] This Court has previously found that Canada Post is a federal board as defined in s 2 of the *Federal Courts Act*. One of these decisions is referenced by the Applicant, *Canadian Daily Newspaper Assn*. There the decision under review concerned Canada Post allowing only its own personnel access to apartment mailbox keys to distribute unaddressed flyers. The Court found that the decision to provide access to locked apartment mailboxes was an exercise of authority deriving from regulation, the *Mail Receptacle Regulations*, and not merely an exercise of the general powers of management of any corporation.

[53] In reaching that decision the Court referred to *Aeric, Inc v Chairman of the Board of Directors, Canada Post Corporation*, [1985] 1 FC 127 (FCA) (“*Aeric*”). There the application

for judicial review concerned the decision of the Board Chairman of Canada Post dismissing an appeal from a refusal to register a periodical published by the Conference Board of Canada as second class mail. The Federal Court of Appeal noted that the decision in that case was made in the exercise of an authority conferred by a regulation and was not merely in the exercise of a general power of management. The Board Chairman was entertaining and disposing of an appeal as described by regulation and, therefore, the decision was not only a business decision but an administrative one. In *Aeric*, the Federal Court of Appeal also found that Canada Post is distinct from an ordinary commercial corporation in that it does have a significant public character including as derived from s 5(2)(e) of the *Canada Post Corporation Act* which refers to “the role of the Corporation as an institution of the Government of Canada”.

[54] Finally, in *Rural Dignity of Canada v Canada Post Corporation*, [1991] FCJ No 33 (FC) (affirmed by the FCA, 139 NR 203; leave to appeal to the SCC refused, 141 NR 399) (“*Rural Dignity of Canada*”), both parties conceded that Canada Post was a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*. The Court held that to close a local post office and to substitute a retail postal outlet affects the interests of the inhabitants of the community concerned and, as such, they have a right individually or collectively to have such a decision reviewed. As the corporation was a part of the government decision-making machinery that comes within the meaning of s 2 of the *Federal Courts Act*, its decisions to close the post offices in question were subject to review by this Court under the provisions of s 18 of that Act.

[55] In this case, Canada Post held and then suspended delivery of mail to the Postal Box. Applying the test in reverse its source of power for the operating of postal services is the *Canada*

Post Corporation Act, RSC, 1985, c C-10 (“*Canada Post Corporation Act*”). It is pursuant to that Act that Canada Post is established as a corporation. Its objects are set out in s 5(1) and include the establishing and operating of a postal service for the collection, transmission and delivery of messages, information, funds and goods both within Canada and between Canada and places outside Canada (s 5(1)(a)).

[56] In my view, Canada Post’s mandate to operate a postal service was the power that was being exercised when Canada Post decided to hold and then suspend delivery of the mail to the Postal Box. More specifically, and although no submissions were made by the parties on this question, I note that s 5(2)(c) of the *Canada Post Corporation Act* states:

...	...
(2) While maintaining basic customary postal service, the Corporation, in carrying out its objects, shall have regard to	(2) Dans l’exercice de sa mission, la Société, tout en assurant l’essentiel du service postal habituel :
...	...
(c) the need to conduct its operations in such manner as will best provide for the security of mail;	c) tend à assurer son exploitation dans les meilleures conditions de sécurité du courrier;
...	...

[57] Faced with a clear dispute as to the authority of the New Council or the Prior Council and, therefore, the proper officers of HFN Incorporated to receive mail addressed to the Postal Box, Canada Post was entitled to consider the security of the mail that otherwise would have been delivered as an operation of its postal service. And, as it stated, it had no obligation to attempt to determine the merits of the dispute between the parties. Significantly, Canada Post

was not refusing to provide postal service, rather it was suspending that service until, by court order or agreement of the parties, it received direction as to the appropriate recipient of the mail.

[58] Thus, as to the first part of the jurisdictional test, the power or jurisdiction being exercised can be attributed to s 5(2)(c) of the *Canada Post Corporation Act*. However, unlike *Canadian Daily Newspaper Assn* and *Aeric*, in this case the parties have not pointed the Court to any specific regulation granting Canada Post the authority to suspend or hold mail service or, conversely, precluding it from doing so. And, unlike *Rural Dignity of Canada*, a service is not being permanently discontinued or altered. Rather, it is being suspended while the parties to the dispute that caused the suspension resolve the issue as between themselves. This could raise the question of whether Canada Post was exercising a general power of management which would place its decision outside of the Court's jurisdiction.

[59] The Newfoundland Supreme Court in *Labrador Airways Ltd v Canada Post Corporation*, [2001] NJ No 28 ("*Labrador Airways Ltd*") addressed the type of decision which would properly be a general power of management in the context of decisions made by Canada Post. In that case, the court considered whether it had jurisdiction to consider Canada Post's powers to engage in a procurement process in order to fulfill its statutory object of operating a postal service:

6 All parties made submissions as to whether this Court had jurisdiction to entertain this application, in light of the provisions of s. 18 of the *Federal Court Act*, R.S.C. 1985, C. F-7, as amended by 1990, c. 8, s. 4, which confers upon the Trial Division of the Federal Court exclusive original jurisdiction to issue, amongst other things, writs of certiorari and mandamus against "a federal board, commission and tribunal." Canada Post Corporation has in some circumstances been held or conceded to be a federal board, commission or tribunal and thus subject to review by the Federal Court. See *Rural Dignity of Canada v. Canada Post Corp.* (1991),

78 D.L.R. (4th) 211 (Fed. T.D.); (1992), 88 D.L.R. (4th) 191 (Fed. C.A.); and *Canadian Daily Newspaper Assn. v. Canada Post Corp.*, [1995] 3 F.C. 131 (Fed. T.D.).

7 In this case, however, and unlike the situations in *Rural Dignity* and *Canadian Daily Newspaper Association*, what is at issue is the exercise of the general powers of management of the corporation in the exercise of its rights as a natural person and not the exercise of any specific authority derived from statute or regulation. While there is no doubt that Canada Post has, in the carrying out of its statutory mandate, a significant public character as an agent of Her Majesty in Right of Canada and by virtue of its subjection to a certain degree of ministerial direction and control in respect of some of its activities, there is no allegation here that the Corporation has exceeded or violated its statutory powers. What is involved is a challenge to a commercial decision in exercise of the corporation's contracting power derived from its powers as a natural person. That does not involve the jurisdiction of the Federal Court.

8 Accordingly, I conclude that this Court has jurisdiction to entertain this matter.

[60] In the circumstances before me, Canada Post's decision was not commercial or contractual in nature and, in the absence of submissions on the point, I am satisfied that the decision did not fall within its general management authority. I am also unable to conclude, again in the absence of substantive submissions on the point by the parties, that in these circumstances Canada Post was conducting itself privately or exercising a power of a private nature. The Federal Court of Appeal in *Air Canada v Toronto Port Authority*, 2011 FCA 347 noted that whether a matter has a sufficiently public character to bring it within the purview of public law will depend on the facts of each case and the impression which is registered upon the Court. A decision that potentially affects the service of mail to a community, to the extent that mail addressed to the HFN or HFN Incorporated is community mail, has a public character and is

also an exercise of power which is central to Canada Post's public responsibilities pursuant to the *Canada Post Corporation Act*.

[61] As such, I am satisfied that Canada Post was acting as a federal board, commission or tribunal when it made its decision and, therefore, this Court has jurisdiction to review the decision.

Did Canada Post exceed its jurisdiction or breach its duty of procedural fairness?

[62] To the extent that the Applicants are arguing that Canada Post had no authority to suspend service to the Postal Box, as noted above, the Applicants do not point the Court to a provision of the *Canada Post Corporation Act* which precludes such an action. Further, and as also noted above, that Act does state that while maintaining basic customary postal service, Canada Post, in carrying out its objects shall have regard to the need to conduct its operations in such a manner as will best provide for the security of the mail. In the absence of substantive submissions on the point, I am not convinced that Canada Post did not have jurisdiction or exceeded its authority by holding or suspending delivery of the mail to the Postal Box to provide for the security of the mail in these circumstances. This is particularly so as it was within the power of the parties to obtain a court order providing direction to Canada Post as to which of them were entitled to receive the mail or to reach an agreement between themselves as to how the mail would be dealt with while the election dispute was resolved. By doing so, service would be restored.

[63] The Applicants also submit that Canada Post breached its duty of fairness by suspending service arbitrarily and without notice or reasons. It is trite law that the doctrine of procedural

fairness is a fundamental component of administrative law. The question in every case being what the duty of procedural fairness may reasonably require of an authority by way of specific procedural rights in a particular legislative and administrative context. That is, the content of the duty of procedural fairness will vary with circumstances and the legislative and administrative context (*Canada (Attorney General) v Mavi*, 2011 SCC 30 at paras 38-39 (“*Mavi*”). In *Mavi* the Supreme Court of Canada referenced its prior decision in *Baker*, which described some of the elements to be considered in determining the content of procedural fairness noting (at para 22) that underlying all of those factors:

... is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[64] In the circumstances of this case, in my view, there is no merit to the submission that Canada Post breached its duty of procedural fairness. As seen from the communications described above, Canada Post initially held the mail addressed to the Postal Box at the request of Mr. Strickland, who identified himself as counsel for Mr. Kocsis with respect to HFN Incorporated. Shortly thereafter, Canada Post clearly advised both corporate counsel claiming to represent HFN Incorporated that it was not in a position to adjudicate business or mail ownership disputes. It provided clear time lines during which it would hold the mail and prior to which it would suspend service and requested the parties to provide a court order or mutual agreement as to the appropriate recipient of the mail within those deadlines. Further, at the request of counsel, it extended the timelines on a number of occasions prior to making its final decision to return the held mail and suspend service to the Postal Box. Canada Post’s

actions were not arbitrary. It explained in writing why it was suspending service and gave notice of what was required to avoid suspension of service and of the timeline within which the issue had to be dealt with by the parties to avoid suspension.

[65] As to the opportunity to make submissions to Canada Post, the Applicants did make submissions indicating that there was no dispute between the parties, why they were of that view and, accordingly, that Canada Post should resume service. I would note, however, those submissions amounted to no more than a unilateral declaration that a dispute did not exist, and they were not endorsed by the Respondents. Both parties also submitted information to Canada Post to support that they were properly entitled to receive the mail. Additionally, through their counsel, both parties were in continued communication with Canada Post. However, it was not Canada Post's role to make determinations connected to the election dispute.

[66] In my view, any duty of fairness owed in these circumstances was low and was clearly met.

Was the decision reasonable?

[67] Questions of fact, mixed fact and law, discretion or policy, are to be reviewed on a deferential standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 (“*Dunsmuir*”). Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of

the facts and the law (*Dunsmuir* at paras 45, 47-48; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59-62).

[68] In my view, in these circumstances, the decision by Canada Post is well within a range of possible acceptable outcomes that are defensible in respect of the facts and law and is entirely reasonable. Canada Post was not in a position, nor did it have any authority, to make a decision on the merits as to which party was properly entitled to be the recipient of mail delivered to the Postal Box, which would have entailed making a determination on the election dispute. The decision it did make, to hold mail and to subsequently suspend mail services to the Postal Box when the parties failed to provide a court order or mutually agreed direction as to the recipient was, in reality, probably the only appropriate course of action open to it in the circumstances.

[69] For these reasons, the application for judicial review is dismissed.

[70] Given my conclusion, it was not necessary to address the Applicants' motion brought at the commencement of the hearing, and without notice to the Respondents who objected to the motion, seeking to add HFN Incorporated as a party to the application for judicial review. Nor is it necessary to address the Applicants' submissions on the admissibility of the portions of the Respondents' Record. Indeed, none of the supporting materials found in that record addressed Canada Post's decision.

[71] I would also note, as an aside, that even if I am wrong in my jurisdictional analysis, the practical result for the parties is that they would be required to seek review of Canada Post's

decision in another court. Further, even if I had reached a different conclusion in my procedural fairness or reasonableness analysis, because I have no jurisdiction to address the merits of the election dispute, which is ongoing, I would not have been prepared to direct that either party have access to the mail while the election dispute is ongoing or that service should revert to a particular party. Further, I am doubtful that quashing the decision and sending it back to Canada Post for reconsideration is a real or useful remedy in these circumstances as Canada Post cannot make a decision on the merits and, therefore, has a limited ability to address the dispute. In the result, on a practical level, the Respondents should, without further delay, proceed with their challenge of the election dispute and appointment of the officers and directors of HFN Incorporated in the appropriate forum(s) having jurisdiction and seeking any interim relief in that forum if mutual agreement on receipt of the mail cannot be reached between the parties while the election dispute is being pursued.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. There shall be no order as to costs.

“Cecily Y. Strickland”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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BY CHIEF & COUNCIL ET AL v LAURA MEDEIROS
ET AL

PLACE OF HEARING: TIMMINS, ONTARIO

DATE OF HEARING: OCTOBER 26, 2016

**REASONS FOR JUDGMENT
AND JUDGMENT:** STRICKLAND J.

DATED: DECEMBER 16, 2016

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