Federal Court  Cour fédérale

Date: 20210129

Docket: T-154-21

Citation: 2021 FC 96

Ottawa, Ontario, January 29, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

GERALD FELIX MCDONALD AND MARK PACQUETTE, IN THEIR CAPACITIES AS CANDIDATES AND ELECTORS OF THE FOND DU LAC DENESULINE FIRST NATION

Applicants

and

FOND DU LAC DENESULINE FIRST NATION, AS REPRESENTED BY FORMER CHIEF LOUIE MERCREDI, AND COUNCILLORS WILLIE JOHN LAURENT, JAKE MERCREDI, RONNIE AUGIER, SUSANNE "SABRINA" FERN, ANDREW ISADORE AND FREDERIC MARTIN; AND, DEREK MACDONALD, IN HIS CAPACITY AS CHIEF ELECTORAL OFFICER, JULES LIDGUERRE, IN IS CAPACITY AS DEPUTY ELECTORAL OFFICER

Respondents

ORDER AND REASONS

[1] The applicants, Mr. McDonald and Mr. Pacquette, have brought a motion for an interim injunction to stop the elections for the council of the Fond du Lac Denesuline First Nation, initially scheduled for today.

[2] In these reasons, I summarize the facts that gave rise to the motion and the events that took place after the motion was filed. I then explain why I am dismissing the motion and what the next steps will be.

I. Background

[3] The elections for the council of the Fond du Lac Denesuline First Nation [Fond du Lac] are governed by its own Election Act, sometimes described as a "custom." Elections must take place every three years, in the month of September. The Election Act sets out detailed rules and timelines for each step of the process, including the appointment of a Chief Electoral Officer, a nomination meeting, advance polls and polling day. It also provides for the appointment of an Appeal Board tasked with hearing complaints about the conduct of the elections.

[4] This is not the first time the Fond du Lac elections give rise to litigation. The result of the 2017 elections was challenged before the Appeal Board. In *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 [*Mercredi*], my colleague Justice Paul Favel found that the Appeal Board was not properly constituted. He thus quashed the Appeal Board decision and ordered that a new Appeal Board be appointed at a special meeting of the First Nation Members. Justice Favel's order was upheld by the Federal Court of Appeal: *Fond du Lac First Nation v Mercredi*,

2020 FCA 59. I have no information as to whether further steps were taken with respect to the challenge to the 2017 election.

[5] The next election was supposed to be held in September 2020. The applicants provided evidence that the process laid out in the Election Act was not strictly followed. Thus, the election was initially called for October 16, 2020, instead of September, raising questions as to whether the chief and council's term of office expired. Some steps were taken towards holding an election on that date. However, it appears that the council adopted a resolution on September 15, postponing the election to November 19. Mr. McDonald, one of the applicants, was nominated for chief, although the precise date of the nomination meeting is unclear.

[6] On November 9, given the evolution of the COVID-19 pandemic, the Fond du Lac Elders council issued a notice asking the council of the First Nation to postpone the election "to a later date and up to six months and until safe." It appears that two days later, on November 11, the council adopted a resolution extending its term of office until April 1, 2021, although the applicants have not provided a copy of this resolution.

[7] In early January 2021, Mr. McDonald was advised by the deputy electoral officer that the election would take place at the end of January. On January 15, a notice was issued that the election would be held on January 29, with advance polls on January 22 and 26. A list of candidates was also circulated. Mr. McDonald's name appears on the list of candidates for chief. The name of Mr. Pacquette, the other applicant, appears on the list of candidates for councillor.

II. The Present Motion

[8] The applicants filed this motion on Friday, January 22, 2021, at approximately 3:00 pm, seeking an *ex parte* interim injunction. They allege a number of irregularities in the electoral process, including with respect to the appointment of the Chief Electoral Officer and the Appeal Board, the eligibility of certain candidates and the lack of conformity with the timelines set forth in the Election Act. In particular, they are highly critical of the repetitive postponement of the elections.

[9] Invoking rules 372 and 374 of the *Federal Courts Rules*, SOR/98-106, they seek interim orders delaying the election and restraining the chief and councillors from exercising their duties. While they have not yet filed an underlying application for judicial review, they announce their intention to seek an order requiring strict compliance with the Election Act and the Court's oversight of the election.

[10] Rule 374 provides that an interim injunction may be issued *ex parte* if, in a case of urgency, it is not possible to give notice to the other party. This is a narrow exception to the principle that both parties must be given an opportunity to speak, embodied in the Latin maxim, *audi alteram partem*. It applies only in cases of real impossibility.

[11] Upon receiving the applicants' motion on January 22, I formed the view that there was no urgency justifying an *ex parte* order, mainly because there was still a week to go before election day. This is why I ordered the applicants to give notice to the respondents. The respondents were

notified by email on January 27. I ordered that a hearing take place by videoconference on January 28. The registry notified the respondents and provided them with instructions to join the conference.

[12] None of the respondents participated in the hearing. After the hearing was concluded, two of the respondents, Mr. MacDonald and Mr. Lidguerre, who are respectively Chief and Deputy Electoral Officers, called the registry to indicated that they had attempted to join the videoconference about ten minutes after it started. However, after a hearing begins, the registry officer must lock the videoconference and it is no longer possible to join. In any event, Mr. MacDonald and Mr. Lidguerre mentioned that they only wanted to observe the hearing, not make any submissions.

[13] At the opening of the hearing, counsel for the applicants mentioned a significant new development. After the motion was filed on January 22, it appears that a notice was circulated in the community, postponing the election for a further two weeks.

III. The Test for Issuing an Interim Injunction is not Satisfied

[14] Rule 374 provides that an interim injunction may be granted *ex parte* "where the judge is satisfied […] in a case of urgency, that no notice is possible." Given the postponement of the election for another two weeks, the matter is no longer urgent. I am also far from certain that no notice was possible.

[15] Beyond that, an interim injunction can only be granted if the applicant satisfies the well-known three-part test laid out in cases such as *RJR – Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, and *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196.

[16] In considering the first part of the test, whether there is a serious legal issue, we must take into account the doctrine of prematurity or exhaustion of remedies: *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paragraph 24, [2018] 1 FCR 590. In a nutshell, where the legislation creates a process to redress grievances, the rule is that applicants must exhaust that process before coming to the courts. If they fail to do so, we say that their application is premature. In *Dugré v Canada (Attorney General)*, 2021 FCA 8, the Federal Court of Appeal recently reiterated that we should not hear a case when there is an alternative remedy, save in truly exceptional circumstances.

[17] Following this rule is particularly important when we deal with First Nations governance issues. As I mentioned in *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at paragraph 19, [2019] 4 FCR 217, decision-making is a component of self-government. Here, the Election Act provides the applicants with a remedy. It creates an Appeal Board that can hear complaints to the effect that the process laid out in the Election Act was not followed, or that a candidate was ineligible. Most of the applicants' complaints fall squarely within the Appeal Board's jurisdiction. They should not ask this Court to perform in advance a function assigned to the Appeal Board.

[18] Indeed, in *Mercredi*, at paragraph 56, Justice Favel stated the following:

> The Court has acknowledged on several occasions that it would prefer to find the least intrusive manner in which to oversee election matters out of respect for the efforts the First Nation and its membership have taken to enact rules governing their election processes […].

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

[20] There is an additional reason for refusing the order sought by the applicants. To obtain an interlocutory injunction, applicants must also prove that they will suffer irreparable harm if the injunction is not granted. Yet, there is no irreparable harm in this case, because a recourse before the Appeal Board will provide the applicants with an opportunity to air their grievances and to obtain a remedy, if warranted: *Awashish v Conseil des Atikamekw d'Opitciwan*, 2019 FC 1131, at paragraphs 36–38; *Jean v Swan River First Nation*, 2019 FC 804, at paragraphs 20–21. I note that the situation in this case is different from the ones before the Court in *Buffalo v Rabbit*, 2011 FC 420, and *Perry v Cold Lake First Nations*, 2016 FC 1081, two cases cited by the applicants.

IV. Next Steps

[21] It follows that the election must take place and that any grievances regarding the conduct of the election must be submitted to the Appeal Board.

[22] At the hearing of this motion, however, counsel for the applicants suggested that the members of the Appeal Board have not been appointed, a situation reminiscent of what took place three years ago and led to Justice Favel's decision in *Mercredi*. If this is true, this would be a serious obstacle to the regular application of the community's own process.

[23] Given the paucity of information in the record at this stage, I am not in a position to order any remedy in this regard. However, the applicants may wish to realign their proposed application to seek remedies aimed at ensuring the proper functioning of the appeal process set out in the Election Act. I will make orders intended to expedite the matter, in order to avoid delays similar to those that marred the challenges to the 2017 election.

ORDER in T-154-21

THIS COURT ORDERS that:

1. The applicants' motion for an interim injunction is dismissed, without costs.

2. The applicants have 15 days to file their underlying application for judicial review.

3. Pursuant to rule 384, the application for judicial review, when filed, will continue as a specially managed proceeding.

4. The matter is referred to the Chief Justice for the appointment of a case management judge.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-154-21
STYLE OF CAUSE:	GERALD FELIX MCDONALD AND MARK PACQUETTE, IN THEIR CAPACITIES AS CANDIDATES AND ELECTORS OF THE FOND DU LAC DENESULINE FIRST NATION v FOND DU LAC DENESULINE FIRST NATION, AS REPRESENTED BY FORMER CHIEF LOUIE MERCREDI, AND COUNCILLORS WILLIE JOHN LAURENT, JAKE MERCREDI, RONNIE AUGIER, SUSANNE "SABRINA" FERN, ANDREW ISADORE AND FREDERIC MARTIN; AND, DEREK MACDONALD, IN HIS CAPACITY AS CHIEF ELECTORAL OFFICER, JULES LIDGUERRE, IN IS CAPACITY AS DEPUTY ELECTORAL OFFICER
PLACE OF HEARING:	BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND SASKATOON, SASKATCHEWAN
DATE OF HEARING:	JANUARY 28, 2021
ORDER AND REASONS:	GRAMMOND J.
DATED:	JANUARY 29, 2021

APPEARANCES:

Alisa R. Lombard	FOR THE APPLICANTS

SOLICITORS OF RECORD:

Semaganis Worme Lombard Barristers and Solicitors Saskatoon, Saskatchewan	FOR THE APPLICANTS