

Federal Court



Cour fédérale

**Date: 20141216**

**Docket: T-1210-14**

**Citation: 2014 FC 1215**

**Ottawa, Ontario, December 16, 2014**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**KENNETH HENRY JR., GARY ROBERTS,  
CECIL JAMES, and EVELYN ALEXANDER,  
in their personal capacity, and in their capacity  
as current members of the elected Chief and  
Council of the ROSEAU RIVER ANISHINABE  
FIRST NATION**

**Applicants**

**and**

**THE ROSEAU RIVER ANISHINABE FIRST  
NATION CUSTOM COUNCIL AND  
ALFRED HAYDEN**

**Respondents**

**and**

**CHARLES NELSON**

**Intervenor**

**JUDGMENT AND REASONS**

**I. THE APPLICATION**

[1] The Applicants have applied for judicial review of a decision of the Custom Council of the Roseau River Anishinabe First Nation [the RRAFN] dated June 17, 2014 [the Decision]. It

removed them from office as the RRAFN's elected Chief and Councillors. They ask, *inter alia*, that the Decision be quashed and they seek a declaration that a By-Election held on July 29, 2014 [the By-Election] is null and void. For the following Reasons, the application will be allowed.

II. THE HEARING

[2] The Hearing of this application was held at RRAFN Reserve #2.

III. THE PARTIES

[3] The Applicants, Ken Henry Jr., Gary Roberts, Cecil James and Evelyn Alexander [collectively the Applicants] are the Chief and the three Councillors of the RRAFN who were removed from office by the Decision. However, an interim injunction has left them in their positions. In the ordinary course, their terms will expire in March 2015 at which time the RRAFN will hold a general election. The Applicants are represented by counsel and have filed 14 affidavits in this proceeding.

[4] The Respondent, Alfred Hayden, is the only Councillor who was not removed by the Decision. He filed his own affidavit and two others. The Intervenor, Charles Nelson, was elected as Chief of the RRAFN in the By-Election. He did not file an affidavit and because of the interim injunction, he has not assumed office. Messrs. Hayden and Nelson are represented by the same counsel.

[5] The Respondent, the RRAFN Custom Council [the Custom Council] is not represented by counsel and has filed no material. Its spokesperson is its Chair, Ms. Roberts.

#### IV. BACKGROUND

[6] The RRAFN is a Tribe of Ojibway which owns two reserves in southwestern Manitoba. Approximately half its 1800 members reside on Roseau River Indian Reserve #2. Another 150 members live on Roseau River Indian Reserve #2A and the balance reside off-reserve, primarily in Winnipeg.

[7] The RRAFN decided to become self-governing in 1991. For that purpose, it established two governing bodies. One is composed of an elected Chief and four Councillors and the other is a Custom Council composed of representatives chosen by each RRAFN family.

[8] Since 2003, the Custom Council has previously removed the RRAFN's elected Chief and Councillors three times. This Court has issued decisions about the propriety of each removal. They will be described below.

[9] The present controversy began to unfold on May 13, 2014 when the Custom Council held a meeting and passed a motion removing the Applicants from office [the First Motion]. The First Motion was a typed document which was passed around for signature during the meeting.

[10] However, on May 16, 2014, Mr. Justice Beaudry granted an interim injunction [the Injunction] which maintained the Applicants in the positions they held before the First Motion. Thereafter, on May 20, 2014, the Custom Council rescinded the First Motion.

[11] On May 21, 2014, the Custom Council sent the Applicants four letters [the Demand Letters]. In broad terms, they required the Applicants to submit a budget for 2014/15 and to provide details of salaries and expenditures for Custom Council's approval. They also asked the Applicants to attend a Custom Council meeting on June 17, 2014. The Demand Letters did not mention that a vote to decide whether the Applicants would be removed would be held at that meeting.

[12] On June 4, 2014, in response to the Demand Letters, the Applicants provided Custom Council with an information package of approximately 90 pages [the Information Package].

[13] On June 17, 2014, at the request of Applicants' counsel, Mr. Justice Mandamin convened a conference call. Therein he stated that the Injunction remained in effect. Ms. Roberts was present during that teleconference.

[14] However, later on June 17, 2014, notwithstanding Mr. Justice Mandamin's statement during the teleconference, Ms. Roberts advised a meeting of Custom Council [the Meeting] that the Injunction was no longer in effect. The Custom Council then voted to remove the Applicants from office [the Removal Vote and the Removal]. There is no record in evidence which tabulates the vote or shows who attended the Meeting.

[15] On the following day – June 18, 2014, members of Custom Council signed a resolution removing the Applicants from office [the Removal Resolution]. It is in evidence. It cites the RRAFN's Constitution and section 14 (a to f) of the RRAFN Election Act [the Election Act] as the authorities for the Removal.

[16] On June 23, 2014, Mr. Justice Mandamin issued a Direction confirming that the Injunction remained in effect. A copy of that Direction was faxed to counsel for the Custom Council.

[17] On July 28, 2014, notwithstanding Mr. Justice Mandamin's Direction, a Notice was posted on Reserve #2 indicating that the By-Election would be held the next day. The Applicants say that the Removal Vote and the By-Election show Custom Council's contempt for the Injunction. However, contempt proceedings have not been commenced.

[18] On July 29, 2014, the Intervenor was elected Chief of the RRAFN. The three Councillors who were also elected are not parties to this application.

[19] On August 27, 2014, an audit showed that no illegal or improper payments had been made by the Applicants during their tenure. However, the auditors did not offer an unqualified opinion due to a lack of documentation.

[20] By way of background, I also note that there are three alleged sources of Custom Council's authority to remove the RRAFN's elected Chief and Councillors. They are:

i. The RRAFN Draft Constitution

[21] In this application, the Applicants say that the RRAFN's Draft Constitution [the Constitution] is not in effect because it was never ratified. However, they acknowledge that, in some respects, it accurately describes the RRAFN's governance. For example, the Applicants agree that the Custom Council has the authority to remove them from office using the Impeachment Provisions in Article XVI of the Constitution. It states:

Section 1 Impeachment

- i) Any elected and appointed official shall be subject to impeachment for willful neglect of duty, corruption of office, habitual drunkenness, incompetency, becoming incapable of performing their duties or any offense involving moral turpitude while in office.
- ii) Impeachment proceedings shall be upon submission to the Judicial Department of a valid petition, stating the cause of action duly signed by the Custom Council.
- iii) The official against whom charges may be preferred shall be entitled to a hearing by the Custom Council under rules and proceedings prescribed by the Custom Council.
- iv) The official against whom articles of impeachment are preferred, shall be suspended from the exercise of duties of their office during the pending of their impeachment proceedings.
- v) The Custom Council shall appoint a Prosecutor to present the charges before the Custom Council. Such Prosecutor shall be a citizen of the Roseau River Anishinabe First Nation and shall not be employed or hold office in the Roseau River Anishinabe First Nation.
- vi) The Custom Council shall sit as a Court in all cases of impeachment and its decision shall be final.
- vii) The Custom Council shall prescribe rules and procedures that are necessary to give effect to the provisions of this Article.

- viii) **Total consensus of the Custom Council shall be required to impeach an official.** [My Emphasis]

[22] In her oral submissions, the Custom Council's Chairperson said that, in her view, the Constitution is binding. However, there is no evidence that other members of the Custom Council share her opinion and there is no evidence that the Constitution has ever been ratified by the RRAFN.

[23] I have concluded that whether the Constitution is in force need not be decided because, although the Removal Resolution cites the Constitution as authority for the Removal, the Custom Council did not in fact use the Impeachment Provisions in the Constitution to accomplish the Removal.

ii. The RRAFN Election Act

[24] There is no dispute that the Election Act has been ratified and is in force. The Custom Council considers that Sections 14 and 15 of the Election Act gave it authority to hold the Removal Vote. However, the Applicants disagree. They deny that those sections give the Custom Council the power to remove an elected Chief and Councillors. I will consider this issue below.

iii. The Customary Procedure

[25] There is evidence in the affidavit of Dianne Alexander, sworn on May 15, 2014 and filed on the Applicants' behalf, that the Custom Council may remove an elected Chief and Councillors

if a certain customary procedure is followed [the Customary Procedure]. Ms. Alexander says that she was the Alexander family's representative on the Custom Council from 1991 to 1996.

She describes the Customary Procedure as follows:

Before Custom Council representatives are allowed to vote on such important issues as the removal of Chief and Council, it is well known and understood among tribal membership and especially among Custom Council representatives and its Chair and Vice Chair that:

- a. The allegations of wrongdoing must amount to a substantial breach of the Chief and Council's duties of office as set forth in the *Election Act* or Constitution in order for there to even be grounds for removal by Custom Council; and
- b. The allegations of wrongdoing must be true. It is only if the allegations of wrongdoing are manifestly proven to be true, with little doubt on the subject, that grounds even exist in order for the elected Chief and Council to be removed (if due process is followed); and
- c. The standard for removal of Chief and Council from their elected office requires the Custom Council members to be satisfied, not only that the alleged breaches happened, but it is also a requirement that the Custom Council be satisfied that there was no reasonable excuse, and that there are compelling reasons, to believe that removal from office is the only way to remedy the proven complaints; and
- d. Those members of Chief and Council who are accused of wrongdoing must be given notice of the specific allegations made against them by the Custom Council and must be given an opportunity to respond and defend themselves before a decision is made; and
- e. Custom Council representatives are not allowed to make unilateral decisions about such momentous resolutions as removing Chief and Council without first taking the resolution back to their respective families for discussion and consideration, with a view to seeking instructions, based on a consensus, as to how the representative is to respond.



[26] I note that this description does not indicate how many members of Custom Council must vote in favour of removal for a resolution to pass.

[27] The Applicants' Amended Notice of Application asks for a declaration that elected Chiefs and Councillors can be removed using this Customary Procedure. However, since Custom Council did not endorse this procedure, and since the Respondent and the Intervenor did not deal with it in their evidence or submissions, and since the description appears to be incomplete, and since there is no evidence that it has ever been used, I am not prepared to conclude that the Customary Procedure exists. In any event, since it was not followed in this case, it is not necessary to give it further consideration.

#### V. THE ISSUES

[28] In view of the urgency of this matter, I have decided to consider only three of the many issues raised by this application. They are:

1. Did Custom Council have a quorum of its members present when it held the Removal Vote on June 17, 2014?
2. Did Custom Council observe the principles of natural justice when it removed the Applicants?
3. Did Custom Council have the authority to remove the Applicants under the Election Act?

VI. THE STANDARD OF REVIEW

[29] Issues 1 and 2 will be reviewed using correctness as the standard. Issue 3 will be reviewed on the reasonableness standard as the Custom Council was interpreting its own legislation.

Issue I – Quorum

[30] The Applicants say that the Decision is invalid because an insufficient number of eligible family representatives were present for the Removal Vote. The parties agree that 10 members of the Custom Council, not including its Chair, constitute a quorum [the Quorum]. As well, 10 is the number specified in Article VIII, Section 2 of the Constitution as the Quorum for meetings of Custom Council.

[31] The Constitution also makes it clear in Article IX that minutes are to be taken of meetings of the Custom Council and the evidence is that minutes are in fact normally prepared and are made available for inspection. Minutes of the Custom Council meeting of May 13, 2014 are in the Court record. They show which family representatives were present at the meeting and indicate the number of votes cast for and against the First Motion.

[32] The Amended Notice of Application for this case was filed on July 23, 2014. It included a request for the minutes of the Meeting of June 17, 2014 [the Minutes]. A reminder letter of

September 24, 2014 again asked for the Minutes. They were not produced by the Custom Council in the ordinary course of this litigation.

[33] Two days before the hearing, I issued a Direction asking Ms. Roberts to bring the Minutes to the hearing. She did so explaining that she had just received them even though she had asked for them two months earlier. I did not accept this as a credible explanation for the Custom Council's failure to produce a critical document in a timely manner. In the absence of a satisfactory explanation, I declined to accept the Minutes. I think it reasonable to infer that they were withheld because they did not show that a quorum of Custom Council members who were eligible to vote was present for the Removal Vote.

[34] While there is no issue that the Removal Vote was held at the Meeting, the Court record does not include a record of the votes cast for and against Removal, nor is there evidence of who attended or whether a motion or resolution dated June 17, 2014 was signed at the Meeting.

[35] What does appear in the Court record is a document titled "Custom Council Resolution" dated June 18, 2014, the day after the Removal Vote. It is signed by the representatives of 14 families. Its recitals show that it was prepared to serve as Notice to the Minister of Aboriginal Affairs and Northern Development that the Applicants had been removed and that the By-Election would be called. The Resolution states, in part:

THEREFORE BE IT RESOLVED THAT, the Custom Council of the Roseau River Anishinabe First Nation in a duly convened meeting of June 17, 2014 did as aforementioned above remove elected representatives from office of Chief and Council, namely; (former) Chief Ken Henry, Jr., Councillor(s) Gary Roberts, Cecil

Bruce James and Evelyn Alexander, effective immediately on this date, June 17, 2014.

[36] However, other evidence before the Court shows that a Quorum of Custom Council was not present for the Removal Vote. That evidence is found in letters from those who attended the Meeting [the Attendance Letters]. They are found in Exhibit 2 to the affidavit of Sherelyn Hayden of October 6, 2014.

[37] When the Attendance Letters are reviewed, those written by the four people named below indicate that they each voted at the Meeting on behalf of their respective families. Further, their status to vote as a Family Representative, Alternate or Elder is confirmed by the list of Custom Council members dated May 1, 2014 [the List], which is found as Exhibit C to the affidavit of Sandra Hayden of May 15, 2014.

[38] Taken together, the Attendance Letters and the List show that the following members of the Custom Council who were entitled to vote were present at the Removal Vote:

Gloria Antonie  
Maryann Patrick  
Lorraine Martin  
David Seenie

[39] Affidavit evidence also shows that Dianna French and Sherelyn Hayden were present and voted, and that Stan James Jr. was present. Their names appear on the List. However, even when they are counted, this evidence does not show that a Quorum was achieved.

[40] The difficulty is whether to accept the Attendance Letters, which are unsworn, or the Removal Resolution dated one day after the Meeting, which is also unsworn, as the best evidence of whether 10 eligible voters were present at the Meeting.

[41] I have decided that the Attendance Letters are more reliable because they refer specifically to their authors' presence at the Meeting. I have discounted the Removal Resolution because it was prepared a day after the Meeting and because there is no evidence that the people who signed it are the same people who voted at the Meeting on the previous day. Indeed there is evidence to suggest that not everyone who signed the Removal Resolution was present at the Meeting. I have also discounted the Removal Resolution because, as described above, the Minutes were not produced.

[42] Finally, I am troubled by the absence of a motion in writing dated June 17, 2014 because at the meeting of May 13, 2014, the First Motion was passed around for signature during the meeting. It seems peculiar that there is no evidence that a similar procedure was followed at the Meeting on June 17<sup>th</sup>. The absence of a motion suggests to me that the Removal Vote did not have a Quorum.

*Issue2 – Was There a Breach of Natural Justice?*

[43] The Applicants say that Custom Council was required to:

- i. give them notice that the Removal Vote was going to be held; and
- ii. give them an opportunity to understand and respond to specific allegations against them.

[44] In my view, the Custom Council gave the Applicants no notice that the question of their removal would be put to a vote on June 17, 2014. The Applicants acknowledge that they had heard rumours that such a vote might be held, but the Demand Letters explained that the Meeting was being convened so they could present and discuss the Information Package. The Demand Letters established the framework for the Meeting and they said nothing about the possibility of the Removal Vote.

[45] As well, Custom Council gave the Applicants no precise notice of its concerns. The Removal Resolution is not helpful in this regard because it says that the Removal was under Article 14 (a to f inclusive) of the RRAFVN's Election Act. It provides:

REMOVAL FROM OFFICE

14. Once duly elected by tribal members the Chief and Councillors represent and are therefore accountable to all tribal members whereupon said Chief and Councillors may be removed from office if they:

- a) Fail to uphold the Standards of Conduct as cited in Section 12, subsections A – J inclusive, of this Act.
- b) Are absent from two (2) consecutive meetings without justifiable cause.
- c) Bring disrespect and dishonour upon themselves, their office or other tribal members through action(s) which is/are attributable to said Chief and Councillors.
- d) Are convicted of an indictable offence.
- e) Engage in actions and behaviour to the extent which causes failure to uphold the Declaration and Standards of Conduct as set out in this Act.
- f) Are fraudulent or criminal in their actions and are convicted of such.

[46] Section 12 of the Election Act reads as follows:

STANDARDS OF CONDUCT BY CHIEF AND  
COUNCILLORS

12. The elected Chief and Councillors, as trustees of all tribal members, their culture, their language, their Treaties and Reserved Land shall:

- a) Uphold the Declaration as cited in this Act.
- b) Provide credible and strong leadership which a majority of tribal members can respect and support.
- c) Communicate and consult with, to hear and act on concerns of the Custom Council, in matters which affect said tribal members.
- d) Demonstrate and practice fairness, honesty and courage.
- e) Demonstrate and practice honour, respect, justice and acceptable conduct at all times.
- f) Uphold honesty by consistently working toward the elimination of rumour, deceit, distortion, and conflict while holding elected office.
- g) Enhance and safeguard the Treaties and Treaty Rights.
- h) Ensure all Tribal laws are followed, are consistent with Inherent Rights and the Spirit and Intent of Treaty Rights.
- i) Communicate and inform the Tribal members of all matters and ensure the people are aware of any initiative and gain their approval through quarterly reports – every three (3) months.
- j) Attend and remain at all official meetings called by the tribal membership, Custom Council or Chief and Council.

[47] Because the Removal Resolution referred to every conceivable ground for removal, it does not suggest that the Applicants were given any actual notice of Custom Council's concerns and it does not indicate which concerns were relied on to justify the Removal.

[48] Nevertheless, the Applicants' evidence is that they were aware of Custom Council's dissatisfaction with their performance. In May, Custom Council passed the First Motion removing them from office and although it was rescinded, there was a discussion about concerns at that time. However, the Information Package was subsequently provided. In my view, fairness required the Custom Council to provide updated and specific concerns which took the material in the Information Package into account. Ideally, those concerns should have been put in writing. Custom Council was also required to give the Applicants reasonable time to address the concerns. Neither of these requirements were met.

Issue 3 – Can Custom Council Remove Elected Chief and Councillors Under the Election Act?

[49] The Respondents submit that Custom Council has this authority by reason of Section 15 of the Election Act when read with the opening passage of Section 14. They provide as follows:

AUTHORITY OF CHIEF AND COUNCILLORS

15. The Custom Council is the prime authority and representative of the total tribal membership of the Tribe. The Custom Council are leaders who assist, support and counsel the Chief and Councillors in carrying out their duties as cited in the Declaration and Section 12 of the Act.

REMOVAL FROM OFFICE

14. Once duly elected by tribal members the Chief and Councillors represent and are therefore accountable to all tribal members whereupon said Chief and Councillors may be removed from office if they:

...

[50] As noted above, the removal of elected RRAFN Chiefs and Councillors by the Custom Council was before this Court in three earlier cases. The Respondents and the Intervenor submit



that those decisions support Custom Council's power to remove elected Chiefs and Councillors under the Election Act. I will discuss each decision in turn.

[51] In *Roseau River Anishinabe First Nation v Roseau River Anishinabe First Nation (Council)*, 2003 FCT 168, Mr. Justice Kelen decided that the Custom Council had the power under Section 19 of the Election Act to amend the Act and reduce the term of the Tribe's elected officials from four to two years. That amendment had the effect of removing them from office. The Court found that a duty of fairness was owed but that it had been met since the Applicants were aware that the proposed amendment would trigger an election and they had had an opportunity to address the amendment at Custom Council meetings.

[52] However in that case, Custom Council did not vote on removal under Section 14 of the Election Act and did not assert a power to remove under Sections 14 and 15 of that Act. The issues in the case were described in paragraph 4 of Mr. Justice Kelen's decision as follows:

1. Is the Custom Council a "federal board, commission or other tribunal" as defined in section 2 of the Federal Court Act, R.S.C. 1985, c. F-7 ?
2. Did the Custom Council fail to follow the procedure prescribed in the Election Act when it purported to amend the Act?
3. Did the Custom Council owe a duty of fairness to the applicants and did it breach that duty?
4. If the amendment was validly enacted, did it apply retrospectively and end the term of the Hayden Council?

[53] This list of issues shows that the application did not address whether Sections 14 and 15 of the Election Act gave Custom Council authority to remove the RRAFN's elected officials.

[54] Against this background, the following statements made by Kelen J are clearly *obiter dicta*. He said at paragraphs 22 and 28:

22. This recognition [of the Custom Council as “council of the band” in section 2(b) of the Indian Act] gives the Custom Council the power to manage and govern the affairs of the Band. The Custom Council are persons “who assist, support and counsel” the Chief and Councillors in carrying out their duties. In this way, the Custom Council is responsible for carrying out the powers of a band council to administer band monies, reserve lands and other powers conferred under the Indian Act. Its decision to remove the elected Chief and Council from office is a manifestation of this power.

28. One relevant example of the consensus model of governance is section 14 of the Election Act. It provides several grounds upon which the Custom Council could remove an elected Council from office. However, noticeably lacking from the Election Act is a formal impeachment process for the Custom Council to follow. Rather, it is expected that the Chief and Councillors will step down if the Custom Council requests their removal.

[55] To summarize, Mr. Justice Kelen’s decision stands only for the proposition that Custom Council has the power to amend the Election Act regardless of whether, in consequence, elected officials are removed.

[56] Finally, it is noteworthy that Kelen J. observed in paragraph 65 of his decision that Custom Council amended the term of the elected officials under the Election Act because “it had no other procedure to remove the Hayden Council when they did not voluntarily resign”. This statement indicates that the Custom Council did not understand that it had either the power to remove as part of its powers to manage and govern the affairs of the Band, or the power to remove under Section 14 of the Election Act. Those powers were suggested by Mr. Justice Kelen in *obiter*.

[57] The next case involved consolidated applications for judicial review before Mr. Justice Phelan (see *Roseau River Anishinabe First Nation Custom Council v Roseau River Anishinabe First Nation*, 2009 FC 655). Among other matters, the Custom Council sought a declaration that its Resolution removing the RRAFN's elected Chief and Councillors was valid.

[58] The Custom Council had removed them from office because of concerns about their mismanagement and misappropriation of funds and because they had failed to attend Custom Council meetings. To deal with this issue, the Court considered whether the Custom Council had the authority to remove. Without noting that Mr. Justice Kelen's conclusions were *obiter* and without any fresh analysis, Mr. Justice Kelen's conclusions in paragraphs 22 and 28 were adopted by Mr. Justice Phelan in his decision at paragraphs 57 and 62.

[59] In my view, this failure to conduct a fresh analysis was understandable because the Decision shows that there were no submissions made to the effect that Custom Council lacked the authority to remove. The point was not argued. The elected Chief and Councillors only said that the resolution which removed them from office was invalid because the Custom Council's Chair and Co-Chair and some family members had not been validly appointed and because the requirements of procedural fairness were not met.

[60] The third case is the decision of Mr. Justice Russell in *Roseau River Anishinabe First Nation v Nelson*, 2013 FC 180. In that case, the Applicants sought declarations that the Respondents had ceased to hold office and that the newly elected Chief and Councillors were

validly in power. They also sought an order in the nature of *quo warranto* preventing the former Chief and Councillors from holding themselves out as still being in office.

[61] The Court found that the former Chief and Councillors had been validly removed and that their attempts to pass resolutions reversing the decision of Custom Council were illegal. In considering whether Custom Council had authority to remove, Mr. Justice Russell relied on Mr. Justice Phelan's decision and concluded in paragraphs 54(a) and 55 that the Custom Council had authority to remove under Section 14 of the Election Act.

[62] However, at paragraph 71 of his Decision, Mr. Justice Russell made it clear that the legality of Custom Council's decision to remove had not been challenged. This means that, once again, the question of whether the Custom Council has the authority to remove under the Election Act was not argued.

[63] My review of these decisions leads me to conclude that they are not helpful in the present case because the Court has never actually been called on to consider whether the Election Act gives the Custom Council the power to remove the RRAFN's elected Chief and Council. Mr. Justice Kelen dealt with the question in *obiter* and the issue was not argued before either Mr. Justice Phelan or Mr. Justice Russell.

[64] In my view, Section 14 creates a power to remove but confers that power on all members of the Tribe because the elected leaders are described as "accountable" to all Tribal Members. This statement of accountability also appears in the Declaration in Section 1 of the Election Act.

For this reason, I have concluded that a referendum or some other form of vote would be needed to allow all members of the RRAFVN to vote on a removal.

[65] As well, Section 19 of the Election Act states that amendments to the Act can be made by a resolution of the Custom Council. In other words, when the Election Act gives power to the Custom Council, it does so in clear terms. No comparable provision exists stating that removal can be accomplished by a resolution of the Custom Council.

[66] Neither does Section 15 of the Election Act include such a power. It merely speaks of the support Custom Council is to give the RRAFVN's elected Chief and Councillors in carrying out their duties. In my view, the fact that Custom Council is described as the "prime authority" and "representative of the total tribal membership of the Tribe" in the context of supporting its elected officials does not mean that it has the power to remove them.

[67] For all these reasons, I have concluded that it was unreasonable for Custom Council to conclude that it has the power to remove the elected Chief and Councillors under the Election Act.

## VII. CONCLUSIONS

[68] The application for judicial review will be allowed because:

- i. there was no Quorum present for the Removal Vote; and
- ii. because the requirements of procedural fairness were not met before the Removal Vote was held; and

- iii. because Sections 14 and 15 of the Election Act do not give Custom Council the power to remove elected Chiefs and Councillors.

[69] The Order will show that the By-Election is a nullity, and that the Applicants and the Respondent, Alfred Hayden, continue to serve as Chief and Councillors of the RRAFN. No order as to costs will be made because the Applicants indicated that they do not seek costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

- i. the Application is allowed;
- ii. the Custom Council's Decision of June 17, 2014 to remove the Applicants is hereby set aside;
- iii. the Custom Council's Removal Resolution of June 18, 2014 is hereby set aside;
- iv. the Applicants and the Respondent, Alfred Hayden, are currently the Chief and Councillors of the RRAFN; and
- v. the By-Election of July 29, 2014 is a nullity and the Chief and Councillors who were elected in the By-Election do not hold office.

"Sandra J. Simpson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1210-14

**STYLE OF CAUSE:** KENNETH HENRY JR., GARY ROBERTS, CECIL JAMES, and EVELYN ALEXANDER, in their personal capacity, and in their capacity as current members of the elected Chief and Council of the ROSEAU RIVER ANISHINABE FIRST NATION v. THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL AND ALFRED HAYDEN AND CHARLES NELSON

**PLACE OF HEARING:** ROSEAU RIVER, MANITOBA

**DATE OF HEARING:** NOVEMBER 26, 2014

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** DECEMBER 16, 2014

**APPEARANCES:**

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