

Federal Court



Cour fédérale

Date: 20241016

Docket: T-1578-24

Citation: 2024 FC 1636

Vancouver, British Columbia, October 16, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

RUBY JOHNNY

Applicant

and

**DEASE RIVER FIRST NATION
MYLES MANYGREYHORSES
JAMES MALONE
ETHAN ALEXANDER CARLICK
AND MICHAEL JOHNNY**

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the April 25, 2022 and May 5, 2023 Band Council Resolutions (“BCR”) of the Dease River First Nation (“DRFN”) to extend the DRFN Chief and Council’s term of office. In addition, this application seeks to review DRFN’s July 12,

2024 BCR wherein the DRFN Chief and Council approved amendments to the election regulations and set the date for the next general election to November 7, 2024.

[2] For the reasons that follow, this Application is granted in part.

II. Background

[3] The Respondent, DRFN, is a “band” as defined in subsection 2(1) of the *Indian Act*, RSC, 1985, c I-5. The elected council of the DRFN has one Chief, and three Councillors. The individually named Respondents, Chief Manygreyhorses and Councillors James Malone, Ethan Carlick, and Michael Johnny (collectively “Chief and Council”), were duly elected to the DRFN council on July 6, 2020. There has not been another DRFN election since July 6, 2020.

[4] The Applicant, Ruby Johnny, is a registered member of DRFN and held the position of Chief of DRFN from July 2014 to July 2018.

[5] The DRFN reserve is located at Good Hope Lake, in Northern British Columbia. Approximately 38 members live on-reserve, and approximately 150 members living off-reserve. While these members are located throughout North America, there are significant pockets of DRFN community members located in Prince George, British Columbia; Terrace, British Columbia; Watson Lake, Yukon; and Whitehorse, Yukon.

[6] DRFN elections were never brought under the *Indian Act* election scheme set out at sections 74 – 90. DRFN elections are held in accordance with the custom of the band, as set out

in the *Regulations for the Custom Elections of the Chief and Council of the Dease River Indian Band* [*DRFN Election Regulations, 1992*], developed following DRFN's separation from Liard First Nation in 1992.

[7] Section 7 of the *DRFN Election Regulations, 1992* fixed the term of office for Chief and Council at two years:

The Chief and Councillors elected to the Dease River Indian Band shall hold office for a terms of two (2) years commencing at midnight the day of the Dease River Indian Band election and terminating at midnight the day of the next Dease River Indian Band election.

[8] Section 11 of the *DRFN Election Regulations, 1992* permits amendments to the regulations as follows:

The Dease River Band Council may amend these regulations from time-to-time provided that any such amendment is enacted not less than sixty (60) days prior to a Dease River Indian Band election.

[9] On March 29, 2022, Chief Manygreyhorses received a memorandum from DRFN's legal counsel, Mara K. Pollock, with her legal opinion concerning "[whether] DRFN Chief and Council ha[d] the authority to extend their terms of office or postpone the 2022 election?" In the memorandum, DRFN received the recommendation that "[a]n amendment to section 7 would allow Chief and Council to continue in their positions until July 2023... Taking this approach allows Chief and Council to meets [sic] its objectives and is authorized by the Election Regulations."

[10] On April 25, 2022, Chief and Council passed a BCR amending section 7 of the *DRFN Election Regulations, 1992*, pursuant to section 11, to extend their term of office from two years to three years (“2022 BCR”).

[11] In a letter dated April 25, 2022 from Chief and Council, they note that when they were elected they “embarked on an ambitious path to restructure, reorganize and develop new governance systems for the DRFN”. Their two year term of office was nearing completion and they “still [had] much work to accomplish in order to meet [the] restructuring objectives.” They noted that they “know that [DRFN members] are in support of this important and necessary work”; therefore, they extended their term by a one-year period.

[12] On June 13, 2022, an unsigned letter was sent to Crown-Indigenous Relations and Northern Affairs Canada and others, advising that Chief and Council’s terms were set to expire on July 6, 2022, after which “they will no longer have the authority to represent, speak or act on behalf of members, and have no authority to conduct, perform any financial transactions concerning DRFN’s entities, corporations, or accounts in which the DRFN has an interest.” It is not clear from the record who sent this letter.

[13] In and around this same time, a flyer was posted in the community advising that Chief and Council’s terms would expire on July 6, 2022, and demanded an election.

[14] On August 10, 2022, a petition demanding an election signed by DRFN Elders was sent to Chief and Council.

[15] On May 5, 2023, Chief and Council passed a BCR amending section 7 of the *DRFN Election Regulations, 1992*, pursuant to section 11, to extend their term of office from three years to four years (“2023 BCR”).

[16] In a letter dated May 5, 2023, Chief and Council advised its members of the further amendment to the *DRFN Election Regulations, 1992*. The rationale for the further extension was that “[o]ur three-year terms are nearing their completion but we still have work to accomplish in order to meet our restructuring objectives.” In addition, the letter also stated:

We believe that this amendment will enable us to meet the desires of the community to establish the foundations for a well-run, accountable, efficient and responsive DRFN Chief and Council and government. To this end, we will be holding a special community meeting in August or September 2023 to speak directly with you, our members. It has been many years since we have gathered together to celebrate our community, to speak with each other and for Chief and Council to provide you with an update on the very important work that we have been doing.

[17] Due to the impacts of an unprecedented wildfire season and subsequent evacuations of northern British Columbia, the meeting referenced in the May 5, 2023 letter to the DRFN membership did not take place.

[18] On May 24, 2024, Chief and Council hosted a community meeting at the Community Hall to discuss draft amendments to the *DRFN Election Regulations, 1992*. Daryn Leas, counsel for the DRFN, attended the meeting and presented the draft “Dease River Indian Band Custom Election Regulations” [Draft Amended Regulations]. The PowerPoint presentation highlighted the rationale behind the proposed amendments, and the differences between the *DRFN Election Regulations, 1992* and the Draft Amended Regulations.

[19] At this time, Chief and Counsel advised that the next DRFN election would be on November 7, 2024 and would be governed by the Draft Amended Regulations.

[20] On May 31, 2024, Chief and Council sent a memorandum to DRFN members, setting out the community consultation process for the Draft Amended Regulations. A copy of the Draft Amended Regulations and the PowerPoint presentation from the May 24, 2024 meeting was attached. The memorandum summarised the key elements of the proposed amendments, comments received at the meeting on May 24, 2024, and next steps:

... Before the Council makes a decision about any amendments to the current DRFN Custom Election Regulations, the Council is committed to consult with DRFN members about the Amended Regulations. At the community meeting on May 24, 2024, it was recommended that the DRFN convene a zoom meeting to provide an opportunity for all DRFN members to learn about the Amended Regulations and provide their comments and views to the Council for its consideration. To that end, a community zoom meeting will be held at 1:00 pm on Friday, June 7, 2024.

[21] Chief and Council “encourage[d] all DRFN members to submit written feedback to the DRFN before June 30, 2024, so that the Council will be able to review and consider any comments from DRFN members before it considers the approval of the Regulations in July 2024.”

[22] No members attended the June 7, 2024 community Zoom meeting to discuss the Draft Amended Regulations.

[23] On July 12, 2024, the Chief and Council passed a BCR which approved the *Dease River First Nation Custom Election Regulations [2024 Amended Regulations]* and confirmed

Thursday, November 7, 2024 as the date for the next DRFN general election (“2024 BCR”) (“Decision”).

[24] The Applicant made an application for injunctive relief to prevent DRFN from imposing the *2024 Amended Regulations* to govern the planned November 7, 2024 election and to postpone the election until this Court decides this Application.

[25] On September 4, 2024, Mr. Justice Régimbald granted the injunction, enjoining the Respondents from holding an election until the Courts decision in this application, and ordered that the hearing of this application be expedited. The general election planned for November 7, 2024 was vacated by the September 4, 2024 Order of Mr. Justice Régimbald, pending the outcome of this Application.

III. Issues

[26] The issues before me on this application are:

- a) Preliminary matters
 - i) Is the application concerning the 2022 BCR and 2023 BCR timely?
 - ii) Is the application with respect to the 2024 BCR properly before this Court?
- b) What is the correct standard of review?
- c) Did the Respondents have the jurisdiction to issue the Decision?
- d) Did the Decision breach the principles of procedural fairness?
- e) What is the appropriate remedy?

f) Costs.

IV. Analysis

A. *Preliminary matters*

[27] The Respondents raised two preliminary issues. The first was the timeliness of the application in respect of the 2022 BCR and the 2023 BCR, both of which extended Chief and Council's term of office. The second issue was if the 2024 BCR was properly before this Court, which extended Chief and Council's term of office, approved the *2024 Amended Regulations*, and set the date for the next DRFN general election.

(1) Timeliness of application for 2022 BCR and 2023 BCR

[28] The Applicant argued that the 2022, 2023, and 2024 BCRs are part of a continuing course of conduct.

[29] The Respondents argued that these are distinct events. The Respondents took the position that the Applicant is out of time to judicially review the 2022 BCR and the 2023 BCR.

(a) *Extension of time*

[30] Paragraph 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7 establishes a time limitation of 30 days to make an application for judicial review in respect of a decision or an order of a federal administrative tribunal, board or commission.

[31] An order granting an extension of time is discretionary. To obtain an extension of time, an applicant must demonstrate:

- a) A continuing intention to pursue the application;
- b) That the application has some merit;
- c) That no prejudice to the respondent arises from the delay; and
- d) That a reasonable explanation for the delay exists.

(*Canada (Attorney General) v Hennelly*, 1999 CanLII 8190 (FCA), 167 FTR 158 [*Hennelly*] at para 3; *Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at para 40).

[32] The Federal Court of Appeal has clarified that it is not always necessary to satisfy all four factors (*Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3). As noted recently by Madam Justice Christine Pallotta in *Whitelaw v Canada (Attorney General)*, 2023 FC 1410 at para 50, “[t]he overriding consideration is whether it is in the interests of justice that the extension of time be granted.”

(b) *Continuing course of conduct*

[33] Rule 302 provides that an application for judicial review shall be limited to a single decision (*Federal Courts Rules*, SOR/98-106). However, an applicant may challenge multiple decisions in a single application, where the decisions constitute a continuing act or course of conduct (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 [*Suzuki*] at para 173; *Shotclose v Stoney Frist Nation*, 2011 FC 750 [*Shotclose*]; *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2021 FC 447; *Prairie Chicken v Blood Tribe Band Council*, 2024 FC 1151 [*Prairie Chicken*]; *Tallman v Whitefish Lake First Nation #459*, 2023 FC 1411 [*Tallman*]; *Claxton v Tsawout First Nation*, 2024 FC 1546 [*Claxton*]; and *Tootoosis v Poundmaker Cree Nation #345*, 2024 FC 1171 [*Tootoosis*]).

[34] This Court has found that Rule 302 does not apply where there is a continuous course of conduct. A continuous course of conduct is one where “[t]he decisions in question are so closely linked as to be properly considered together” (*Shotclose* at para 64).

[35] As noted by this Court recently in *Claxton* at paragraph 62:

As held in *Suzuki*, referenced by both parties, the factors to be considered in determining whether there is a continuing act or course of conduct include, for the purposes of Rule 302, (a) whether the decisions are closely connected; (b) whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; (c) whether it is difficult to pinpoint a single decision; and (d) based on the similarities and differences, whether separate reviews would be a waste of time and effort (*Mahmood v Canada*, 1998 CanLII 8450 (FC); *Truehope Nutritional Support Ltd v Canada (Attorney General)*, 2004 FC 658 at para 6; *Potdar v Canada (Citizenship and Immigration)*, 2019 FC 842 at paras 18 – 20; *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2021 FC 447 at paras 20-21).

[36] In my view, the Applicant has not satisfied the factors set out in *Hennelly* for the granting of an extension of time. The Applicant did not demonstrate a continuing intention to pursue this application. The delay in bringing forward an application to judicially review the 2022 BCR and the 2023 BCR at this time is prejudicial. It is likely that had the Applicant successfully challenged the 2022 BCR and the 2023 BCR at the time they were passed, the Respondents’ may not have undertaken the work and expense to create the *2024 Amended Regulations*. No reasonable explanation for the delay has been provided by the Applicant.

[37] Further, I agree with the Respondents that the 2022 BCR and the 2023 BCR are distinct events in this matter that cannot be found to be part of a continuous course of conduct.

[38] The 2022 BCR and the 2023 BCR could have been challenged at the time they were passed by the Chief and Council. The Applicant acknowledges in her affidavit that she received a copy of the 2022 BCR and rationale letter, and the 2023 BCR and rationale letter from other DRFN members. It appears that she had knowledge of these two events contemporaneous to when the BCR decisions were made by the DRFN Chief and Council to extend their term of office.

[39] The Applicant stated in her affidavit that she did not agree with the 2022 BCR and the 2023 BCR decisions. Further, there is some evidence that certain members of the community, although it is not clear from the documents on record if this was the Applicant, had concerns about the initial extension of the term of office following the 2022 BCR. However, I have no evidence before me to explain why applications to challenge those decisions were not made at the time.

[40] In my opinion, the jurisprudence relied upon by the Applicant to establish a continuing course of conduct is distinguishable from the present application. In *Tootoosis*, the applicant was challenging two BCRs, an indefinite suspension and a removal order that prevented the applicant from remaining on the Band Council. In *Prairie Chicken*, the Court found that the ratification vote and the vote itself were a continuing course of action; however, other decisions related to the validity of the settlement agreement and trust agreement were not part of a continuing course of conduct. Finally, in *Shotclose*, the Court found evidence “that there was no transparency about the course of action that was being followed by the Chief and Council” (*Shotclose* at para 65).

There was no evidence that notice was provided to members that the election in that matter had been cancelled and the terms of office had been extended.

[41] In this application, there is evidence that the Applicant was aware of the 2022 BCR and the 2023 BCR and as set out in the affidavit from Chief Manygreyhorses, there is some evidence before me of the steps that the Chief and Council took to keep community members informed of the work they were engaged in, this included speaking to members who reside at Good Hope Lake and posts on Facebook concerning the May 24, 2024. I will note that Chief Manygreyhorses highlighted in his affidavit and in the cross-examination of his affidavit, that the DRFN is a very small band. He noted that only 38 members reside on-reserve at Good Hope Lake and the remaining members are “scattered”. In cross-examination on his affidavit, Chief Manygreyhorses indicated that typically, the Chief and Council communicates in community through word-of-mouth, and attempts to contact members for whom they have contact information via text or email.

[42] The DRFN does not appear to have a complete list of all members’ contact information, home addresses, telephone numbers, and email addresses. The majority of the members live off-reserve. While DRFN does not know the location of all community members, Chief Manygreyhorses indicated that there are significant pockets of DRFN members residing in: Prince George, British Columbia; Terrace, British Columbia; Watson Lake, Yukon; and Whitehorse, Yukon.

[43] While the Respondents acknowledged that attempts to keep DRFN members apprised of their work was “not perfect” due to the lack records of all members contact information and the limited resources such a small First Nations has, there is some evidence that the residents of Good Hope Lake were provided notice of the May 24, 2024 meeting, as were other members through Facebook posts. In addition, I note that the Applicant was made aware of and in fact attended the May 24, 2024 meeting.

[44] To summarise, the Applicant has not satisfied the *Hennelly* factors for an extension of time to challenge the 2022 BCR and the 2023 BCR. Nor has the Applicant demonstrated that the 2022 BCR and the 2023 BCR are connected to a continuing course of conduct, consistent with the *Suzuki* factors.

(2) Is the Application with respect to the 2024 BCR properly before this Court?

[45] The scope of an application for judicial review is determined by the notice of application. Rule 301 sets out the content of an application, and highlights at subsection (e) that a complete and concise statement of the grounds intended to be argued must be set out in the notice of application. Generally, an applicant may not raise an argument not set out in the notice of application. To raise new grounds, an applicant must file a motion to amend the notice of application (*Republic of Cyprus (Commerce and Industry) c International Cheese Council of Canada*, 2011 FCA 201).

[46] So-called “basket clauses” set out in a notice of application that request “such further and other relief as counsel may advise and the Court may permit” do not permit a party to seek relief

that is not ancillary to the relief requested in a notice of application and that would take another party by surprise (*SC Prodol 94 SRL v Spirits Int BV*, 2009 FCA 88).

[47] It is trite that the purpose of proper pleading is to define the issues for the parties and the Court. Proper pleadings permit efficient use of scarce judicial resources (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 16).

[48] That said, this Court has also clarified that a notice of application should not be reviewed with the same vigour as a statement of claim (*Simpson Strong-Tie Company, Inc v Peak Innovations Inc*, 2008 FC 52; *Testawich v Duncan's First Nation*, 2014 FC 1052).

[49] The present application was filed on June 8, 2024. At paragraph 12 of the notice of application, the Applicant referenced the May 24, 2024, meeting where Chief and Council presented the Draft Amendment Regulations and gave notice of an upcoming election planned for November 7, 2024. The notice of application indicates that this is the final decision that was communicated on or about May 25, 2024.

[50] In the supplemental affidavit from Chief Manygreyhorses, he stated that the DRFN Chief and Council convened a meeting on July 12, 2024 and unanimously passed the 2024 BCR that approved the *2024 Amended Regulations* and confirmed that the next DRFN general election would be held on November 7, 2024.

[51] The Applicant filed an amended application on September 11, 2024 to include the individually named Respondents. However, the amended application did not include any reference to the 2024 BCR. The Applicant did not make oral submissions to make further amendments to her application.

[52] That said, this Court has found that amendments to a notice of application should be permitted at any stage for the purpose of determining the real questions in controversy between the parties, provided that such amendments serve the interests of justice and would not result in an injustice to the other party (*GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2020 FC 348 at para 66). In other words, amendments that would serve the interests of justice ought to be permitted so long as any prejudice to the other party can be compensated through costs (*Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 1564 at para 15).

[53] In addition, as noted by the Federal Court of Appeal in *Fond du Lac First Nation v Mercredi*, 2020 FCA 59 at paragraph 8, “[f]or the good of the community, disputes over the conduct of elections must be resolved quickly”. To that, I would add that disputes that call into question the authority of community leadership must be resolved quickly.

[54] While the notice of application is not a model of pleading, it is clear that the Applicant intended to challenge the decision of the DRFN Chief and Council to amend the *DRFN Election Regulations, 1992* and to postpone the election. Indeed, the Respondents acknowledged the issue

to be determined in this application is the applicable election regulations for the upcoming election.

[55] Insisting on a formal amendment to the pleadings in this case, where it is clear the Court and all parties understand the nature of the Decision at issue, would unduly stymie the timely and effective resolution of matters and will result in the endless merry-go-round scenario denounced by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraph 142. In my view, the additional delay would not be in the interests of justice.

[56] Accordingly, the Application with respect to the 2024 BCR is properly before this Court.

B. *Standard of Review*

(1) Reasonableness

[57] This Court has consistently found that the interpretation of a First Nation's custom, including jurisdiction granted pursuant to those laws and custom, is reviewable on a reasonableness standard:

The standard of reasonableness therefore applies to a First Nation council when the issue involves the interpretation of written Indigenous laws, including a customary electoral code and the power to remove an elected official (*Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at para 7 [*Alexander*]; *Bacon St-Onge* at para 71; *Mercredi v Fond du Lac Denesuline First Nation*, 2018 FC 1272 at para 36; *Whalen* at para 30; *D'Or* at paras 5–7; *Johnson v Tait*, 2015 FCA 247 at para 28; *Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Coutlee v Lower Nicola Indian Band*, 2016 FCA 239 at para 5; *Cold Lake First Nations v Noel*, 2018 FCA 72 at para 24; *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 8–12; *Pastion* at paras 16–

29; *Porter v Boucher-Chicago*, 2021 FCA 102 at para 27; Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, 1994) (loose-leaf updated 2023, release 6), ch 7, section 7:19 at paras 7.833, 7.835).

Bellegarde v Carry the Kettle First Nation, 2024 FC 699 [*Bellegarde*] at para 96.

[58] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, a reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

[59] Generally, the onus is on the challenging party to demonstrate that the decision is unreasonable, due to the deferential nature of judicial review (*Bellegarde* at para 28; *Vavilov* at para 291).

[60] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

[61] This Court has accorded Indigenous decision-makers significant deference because they possess expertise and insight as to the intention and purpose of their communities’ law and custom. Indigenous decision-makers are better placed than non-Indigenous courts to understand the laws and customs of Indigenous communities, and also the unique circumstances of the communities which they serve. This “militate[s] in favour of greater deference towards

Indigenous decision makers” and that they be “accorded a high degree of deference within the reasonableness range of outcomes” (*Pastion v Dene Tha’ First Nation*, 2018 FC 648 at para 22, citing *Commanda v Algonquins of Pikwakanagen First Nation*, 2018 FC 616 at para 19).

(2) Correctness

The standard of review for procedural fairness issues is correctness, or akin to correctness (*Vavilov* at para 53; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56). The reviewing court must consider what level of procedural fairness is necessary in the circumstances and whether the “procedure followed by the administrative decision maker respect[s] the standards of fairness and natural justice” (*Chera v Canada (Citizenship and Immigration)*, 2023 FC 733 at para 13). In other words, a court must determine if the process followed by the decision maker achieved the level of fairness required in the circumstances (*Kyere v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 120 at para 23, citing with approval *Mission Institution v Khela*, 2014 SCC 24 at para 79).

C. *Did the Respondents have the jurisdiction to issue the Decision?*

[62] As noted above, on May 5, 2023, the DRFN Chief and Council passed the 2023 BCR that amended section 7 of the *DRFN Election Regulations, 1992*, pursuant to section 11, and extended their term of office from two years to four years.

[63] Accordingly, pursuant to the 2023 BCR, the amended section 7 of the *DRFN Elections Regulations, 1992* read as follows:

7. Chief and Councillors elected to the Dease River Indian First Nation shall hold office for a term of four (4) years commencing at midnight the day of the Dease River Indian Band election and

terminating at midnight the day of the next Dease River Indian Band election.

[64] A plain reading of section 7 suggests that the term of office was for four years, commencing at midnight the day of the DRFN election. The last DRFN election was held on July 6, 2020. Therefore, the DRFN Chief and Council's term of office expired on July 6, 2024. Modern principles of statutory interpretation provides that "the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Vavilov* at paras 117-120, citing *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21).

[65] In addition, I note there was some debate as to whether or not the *DRFN Election Regulations, 1992* had been properly ratified by the DRFN. As this Court has observed, custom is determined by the band as whole and not by the Chief and Council (*Shotclose* at para 59, citing *Bone v Sioux Valley Indian Band No 290* (1996), 107 FTR 133, [1996] 3 CNLR 54; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 [*Bertrand*] at paras 37, 50).

[66] The evidence in this application indicated that the *DRFN Election Regulations, 1992* had not been ratified. Nonetheless, it is clear that since 1992, the DRFN had operated in a manner that was consistent with the *DRFN Election Regulations, 1992* from 1992 – 2020. Accordingly, this appears to have been the operating custom of the DRFN, as determined by the members of the DRFN (*Bertrand* at paras 40, 50).

[67] There is no evidence that indicates that the Chief and Council took steps through a BCR or otherwise to bridge their term of office between July 6, 2024 and the proposed next DRFN general election planned for November 7, 2024.

[68] At the May 24, 2024 community meeting and in the May 31, 2024 letter, the Chief and Council provide notice to members that they had planned a general election for November 7, 2024. However, they did not provide for an extension of their term of office.

[69] As noted above, on July 12, 2024, the Chief and Council passed the 2024 BCR to approve the *2024 Amended Regulations* and confirmed the next DRFN general election would be on November 7, 2024.

[70] As noted by this Court in *Gagnon v Bell*, 2016 FC 122 at paragraph 57, “[t]he Applicant has the burden of establishing why the elected Respondents are not legally in office (see *Bone* at para 105)”. I agree, and for the reasons set out above, the Applicant as met this burden.

[71] After July 6, 2024, the Chief and Council were not operating with a proper mandate or authority. In other words, the Respondents’ term of office expired on July 6, 2024. Accordingly, after July 6, 2024, the Chief and Council did not have a mandate or the authority to pass the 2024 BCR and the *2024 Amended Regulations*.

D. *Did the Decision breach the principles of procedural fairness?*

[72] While my reasons concerning the jurisdictional issue are determinative of this application, it is important to address the applicable principles of procedural fairness.

[73] The DRFN Chief and Council undertook an important and gargantuan task to restructure, reorganise and develop new governance systems for their community. This Court acknowledges the importance of having clear, workable governance structures in place to ensure a prosperous, functional community. This Court understands that this work is particularly challenging for First Nation communities with a small population where it can be difficult to retain persons with the necessary skill set and there are scarce resources available for such work. The work of the Chief and Council was further complicated by the COVID-19 pandemic and accompanying restrictions, and an unprecedented wildfire season in 2023; both factors made it difficult to conduct in-person meetings and consult with DRFN members about this work. The *2024 Amended Regulations* are the culmination of a significant amount of hard work, and this work is commendable.

[74] A review of the record for this Application indicates that the Chief and Council attempted to do this work in a good way. They sought legal advice ahead of the proposing changes to the *DRFN Election Regulations, 1992*. They also had a community consultation session on the Draft Amended Regulations on May 24, 2024, and made changes to the Draft Amended Regulations following feedback received at that meeting.

[75] The DRFN Chief and Council proceeded with the work of revising the DRFN governance structures and the *DRFN Election Regulations, 1992*, pursuant to section 11:

The Dease River Band Council may amend these regulations from time-to-time provided that any such amendment is enacted not less than sixty (60) days prior to a Dease River Band election.

[76] The Respondents take the position that because they provided notice of the changes at the May 24, 2024 meeting, the 2024 BCR was passed on July 12, 2024 pursuant to section 11.

[77] As set out above, in my view, the mandate for the DRFN Chief and Council expired on July 6, 2024. Further, notice of the changes were only issued on May 24, 2024, 41 days in advance of the expiration of their mandate, which I have found was July 6, 2024, pursuant to section 7 of the *DRFN Election Regulations, 1992*.

[78] In addition, I note that the amendments set out in the *2024 Amended Regulations* represent a significant change to the DRFN custom, which has been followed since 1992.

[79] As noted by the Federal Court of Appeal, while Indigenous governing bodies ought to be given latitude to determine their own processes and interpret their laws and customs, “basic procedural safeguards must be in place” (*Labelle v Chiniki First Nation*, 2022 FC 456 at para 96, citing *Bruno v Samson Cree Nation*, 2006 FCA 249 at para 22, emphasis added).

[80] As laudable as the actions of the Chief and Council were, the manner in which they proceeded with the amendments to the *DRFN Election Regulations, 1992* were for the reasons that follow, made in breach of DRFN members right of procedural fairness and cannot be justified (*Shotclose* at para 97, citing *Prince v Sucker Creek First Nation # 150A*, 2008 FC 1268, 303 DLR (4th) 438 [*Prince*], aff'd 2009 FCA 40; *Long Lake Cree Nation v Canada (Minister of Indian and*

Northern Affairs), [1995] FCJ No 1020 (QL); *Balfour v Norway House Cree Nation*, 2006 FC 213).

In *Prince*, the Court held that:

Band Councils must operate according to the rule of law. This obligates Band Councillors to respect the duty of procedural fairness in exercising their powers and taking decisions in the interests of those they were elected to serve.

[81] As noted by Madam Justice L’Heureux-Dubé in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [*Baker*], a factor that shapes the duty of fairness includes the importance of the decision to the individual(s) affected - “The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated” (*Baker* at para 25).

[82] Similar to this Court’s finding in *Shotclose*, DRFN members had a reasonable expectation that “any changes to their electoral practices would be preceded by fair notice, an opportunity to be heard and a vote on the changes. Fair notice in this context required full disclosure of the proposals. An opportunity to be heard required meetings open to all members or a reasonable consultation process. That was not done in this case” (*Shotclose* at para 93).

[83] I agree with the Applicant that the approach taken by Chief and Council and their interpretation as to what section 11 of the *DRFN Election Regulations, 1992* required was not reasonable and is a breach of the duty of procedural fairness.

[84] DRFN members had a reasonable expectation that the culmination of the Chief and Council's work to revise their governance processes, particularly in view of such sweeping proposed changes, would be preceded by a process that included: fair notice of meetings to discuss the proposed changes and the rationale behind them; an opportunity to provide comments and see revised versions of the changed regulations; and a ratification vote on the proposed changes. The proposed amendments included: changes to the voting age; changes to the composition of council – reducing the council size from 1 Chief and 4 Councillors to 1 Chief and 3 Councillors; residency requirements for Chief and Council candidates; extension of the term of office from two to four years; and changes to electors based on residency. This significantly changed the prior election custom as set out in the *DRFN Election Regulations, 1992*.

[85] While section 11 of the *DRFN Election Regulations, 1992* contemplated some amendments, the nature of the proposed changes set out in the *2024 Amended Regulations* required the Respondents to respect DRFN members' fundamental right of procedural fairness.

[86] In my view, this required the Chief and Council to provide meaningful opportunities for the DRFN membership to consider the proposed changes and to have a ratification vote to accept the proposed changes.

E. *What is the appropriate remedy?*

The Applicant seeks:

- A declaration that the 2022 BCR, 2023 BCR and the 2024 BCR were contrary to custom;
- A declaration that DRFN members have the right to be consulted and vote on any new proposed election regulations;
- An order of *certiorari* quashing the 2022, 2023 and 2024 BCRs;

- A writ of *mandamus* requiring an election;
- An order in the nature of *quo warranto* to remove the Respondents from office;
- An order prohibiting the use of the *2024 Amended Regulations* in the next election;
- The appointment of an Electoral Officer; and
- Costs.

[87] The general election planned for November 7, 2024 was vacated by the September 4, 2024 Order of Mr. Justice Régimbald, pending the outcome of this Application. In other words, there is no date fixed for the next DRFN general election. Accordingly, I cannot agree with the Respondents that a writ of *mandamus* in this case would serve no practical purpose.

[88] As set out above, the Chief and Council currently do not have a mandate to continue in office and do not have the authority or jurisdiction to make decisions on behalf of the DRFN.

[89] I understand and appreciate that an order in the nature sought by the Applicant puts in jeopardy the extensive work undertaken by the Respondents to restructure, reorganise and develop a modern governance structure for the DRFN.

[90] In light of the significant time and resources that have gone into the development of the *2024 Amended Regulations*, I am of the view that it is more appropriate to take steps to correct the breaches of procedural fairness and to permit the DRFN membership an opportunity to review and vote on the *2024 Amended Regulations*. Therefore, I will provide the parties with declaratory relief and an order in the nature of *mandamus* setting out the conditions under which community consultation and a ratification vote shall proceed, and conditions for a general election for the next DRFN Chief and Council (*Shotclose* at para 106; *Tallman* para 67).

[91] However, in light of the current situation, this is an exceptional case where an order in the nature of *quo warranto* should issue (*Shotclose* at para 105; *Jock v Canada (TD)*, 1991 CanLII 13610 (FC), [1991] 2 FC 355). Therefore, Chief and Council will be prohibited from continuing to hold office pending a general assembly and election as set out in the order below.

[92] The Court recognises that while the DRFN has the right to determine its internal processes, including those for general elections, the processes chosen by the DRFN must respect the right of procedural fairness enjoyed by its members. The members of DRFN must be provided with an opportunity to vote on the changes to the election processes to ensure that the proposed changes represent the collective's desires and respect the member's right of procedural fairness.

F. *Costs*

[93] The parties requested that I permit them an opportunity to make submissions on the question of costs following a decision on the merits of this Application.

[94] Accordingly, the Applicant shall file and serve written submissions regarding costs no later than October 23, 2024. The Respondents shall file and serve their written submissions in response no later than October 30, 2024. The Applicant shall file and serve their reply, if any, no later than November 4, 2024. The submissions shall be limited to 5 pages of text double-spaced.

JUDGMENT in T-1578-24**IT IS THE JUDGMENT OF THE COURT that:**

1. The application for judicial review is granted in part;
2. The application to quash the April 25, 2022 and the May 5, 2023 Band Council Resolutions is out of time and is therefore dismissed.
3. A suspended order in the nature of *quo warranto* is granted and the Respondent Chief and Council of the Dease River First Nation will be removed from office and will be prohibited from continuing to hold office and enjoined from exercising any of the powers of those offices pending the next election to be held in accordance with this order (on or before January 24, 2025);
4. An order in the nature of *mandamus* is granted as follows:
 - a. The Dease River First Nation will appoint forthwith or within 15 days from this order (on or before Wednesday, October 30, 2024), an Electoral Officer. The Electoral Officer must be a person who is viewed among community members as independent and may not be the Applicant or the Respondent Chief or Council or the spouse, child or parent of those persons, nor a member (or the spouse, child or parent of same) who intends to run for the position of Chief or Councillor in the next Dease River First Nation election;
 - b. Within 45 days of this order (on or before, Saturday, November 30, 2024), the Electoral Officer will hold a General Assembly meeting for the Dease River First Nation to review and vote on the ratification of the *2024 Amended Regulations*. This meeting shall be held in-person at the Dease River First Nation and via Zoom, to ensure that all members have an opportunity to participate.

- c. Ratification of the *2024 Amended Regulations* will require a simple majority of 50% +1.
 - d. Registered members over the age of 18 are eligible to participate and vote in the General Assembly meeting to ratify the *2024 Amended Regulations*.
 - e. Voting for the *2024 Amended Regulations* will not be by proxy. In other words, members wanting to cast a vote must attend the meeting in-person or via Zoom.
 - f. Within 100 days of this order (on or before Friday, January 24, 2025), the Electoral Officer will hold an election for the positions of Chief and Councillors of the Dease River First Nation. The election will follow the process outlined in the *2024 Amended Regulations*, if ratified by the DRFN at the upcoming General Assembly or the *DRFN Election Regulations, 1992*, if the *2024 Amended Regulations* are not ratified.
5. Notice for both the General Assembly meeting and the general election shall be given as follows:
- A general posting on the DRFN Facebook page;
 - A request for a posting on the Kaska Dene Council web page, for which DRFN appears to be a member;
 - Notice in a newspaper in general circulation in the cities of Prince George, British Columbia; Terrace, British Columbia; Watson Lake, Yukon and Whitehorse, Yukon;
 - Posters in the community of Good Hope Lake;

- Posters at the following community Friendship Centres: Prince George Native Friendship Centre; Kermode Friendship Society, Terrace; and Skookum Jim Friendship Centre, Whitehorse.
 - Emails and text messages to all members of the DRFN for whom this information is available.
6. The Electoral Officer shall maintain records of notice for both the General Assembly and the general election as directed above.
 7. The Electoral office shall include in the notice for the General Assembly a copy of the *2024 Amended Regulations*.
 8. The Electoral Officer shall include in the notice for the general election a copy of the relevant DRFN Election Regulations, as per the results of the General Assembly.
 9. The parties may make written submissions as to costs in accordance with the reasons provided for this judgment.

"Julie Blackhawk"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1578-24

STYLE OF CAUSE: RUBY JOHNNY V. DEASE RIVER FIRST
NATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 9, 2024

JUDGMENT AND REASONS: BLACKHAWK J.

DATED: OCTOBER 16, 2024

APPEARANCES:

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