

Federal Court



Cour fédérale

Date: 20251117

Docket: T-857-24

Citation: 2025 FC 1830

Ottawa, Ontario, November 17, 2025

PRESENT: Madam Justice Azmudeh

BETWEEN:

**CLARENCE APSASSIN AND JOSEPH APSASSIN ON
BEHALF OF THE BLUEBERRY
RIVER FIRST NATIONS
EDWARD APSASSIN FAMILY AND ELDERS GROUP**

Applicants

and

**COUNCILLOR WAYNE YAHEY,
COUNCILLOR SHELLEY GAUTHIER,
COUNCILLOR TROY WOLF,
COUNCILLOR SHERRY DOMINIC, AS COUNCIL
REPRESENTATIVES OF BLUEBERRY RIVER FIRST NATIONS
AND
CHIEF JUDY DESJARLAIS AS CHIEF REPRESENTATIVE OF
BLUEBERRY RIVER FIRST NATIONS**

Respondents

REASONS AND JUDGMENT

I. Introduction

[1] This declaratory decision concerns the governance structure of the Blueberry River First Nations (BRFN or Nation). BRFN is a band under the *Indian Act*, RSC 1985, c I-5 in the province of British Columbia.

[2] The Applicants, two BRFN elders, have applied to this Court to judicially review ongoing decisions by four of BRFN's five councillors (Respondent Councillors) that allegedly violate the Nation's laws and customs.

[3] Each one of five BRFN family groups is represented by one councillor. The Respondent Councillors represent four of the five family groups. The Respondent Councillors are Councillors Wayne Yahey, Shelly Gauthier, Troy Wolf and Sherry Dominic. Councillor Shelly Gauthier represents the family group of the Applicants, Elders Clarence and Joseph Apsassin. The BRFN elected Chief is Judy Desjarlais who is also a named Respondent. Despite being a named respondent, Chief Desjarlais supports the Applicants' judicial review application.

[4] All parties agree that the Blueberry River Custom Election By-Law, 2017 (By-Law) applies to the Nation's governance. The Applicants also filed another document titled "BRFN Elder Council Policy" (Policy). The Respondents disputed that the Policy had the force of law or custom. The Applicants agreed, but argued that it is a helpful interpretive aid for the application of the By-Law. The Applicants never referred to the Policy to interpret any of the By-Law's

provisions, nor have the parties raised an issue regarding the By-Law's interpretation, so I have not considered the Policy in my reasons.

[5] The Applicants allege that over several months leading to this application, the Respondent Councillors have been making a series of decisions and operating contrary to the laws and customs of the Nation. These alleged decisions and operations include ongoing efforts to investigate and oust the duly-elected Chief of the Nation, Chief Judy Desjarlais, which proceeded without consultation with the membership, as explicitly required by BRFN's By-Law and customs.

[6] Similarly, the Applicants allege that the Respondent Councillors have been making ongoing and important decisions regarding the Nation's rights and territories pursuant to the BRFN Implementation Agreement (Implementation Agreement), without any meaningful consultation with the membership, and frequently behind closed doors, in breach of the By-Law.

[7] The Implementation Agreement has a serious impact on the development and protection of BRFN's land and values, and it is therefore important to the Nation. It was borne out of a June 2021 British Columbia Supreme Court decision (*Yahey v British Columbia*, 2021 BCSC 1287 [Yahey]). The Court in *Yahey* found that the British Columbia Government had breached BRFN's Treaty 8 rights by over-developing land in its territory (*Yahey* at para 3). As such, the Nation and the Province had to work out land management rules that protect BRFN's Treaty rights and implemented the Court's ruling.

[8] The Applicants allege that the Respondent Councillors' ongoing actions, notably their failure to hold duly-constituted Council meetings and holding meetings *in camera* without the necessary adherence to the By-Law, has made keeping track of the decision-making process difficult. They allege that the Respondent Councillors' ongoing failure to observe the Nation's legal and customary requirements, rather than any single decision, has contributed to a crisis in the Nation's governance.

[9] In summary, the Applicants allege that the Respondent Councillors' decisions have breached the requirements of the Nation's Laws. First, the Respondent Councillors have allegedly failed to hold regularly scheduled Band Council meetings with an agenda at least twice monthly. Second, the Respondent Councillors have allegedly held *in camera* or secret meetings in ways not contemplated by the Laws. Third, the Respondent Councillors have allegedly failed to consult the Nation's members in accordance with the By-Law, including the family group or the elders they represent, in advance of making major decisions on behalf of the Nation. Fourth and more specifically, the Applicants challenge the Respondent Councillors' passing of the Band Council Resolution (BCR) on March 12, 2024 that initiated the investigation in the conduct of Chief Desjarlais, in breach of the By-Law.

[10] However, since the Applicants have agreed that the March 12, 2024 BCR and the issue of Chief Desjarlais' removal from office are not under review here, I find that I need not deal with the last point.

[11] The Applicants seek several declarations that reflect the above allegations. I ultimately find that the Respondent Councillors' actions surrounding governance on the first three points are a continuing course of conduct subject to judicial review, and that the continuing course of conduct surrounding governance was unreasonable. I grant the application in part, for the following reasons.

II. Preliminary Matters

A. *Does this Court have Jurisdiction to Decide the Judicial Review?*

[12] I find that this Court has jurisdiction to decide this judicial review on its merits because the BRFN's Band Council is a "Federal Board, commission or other tribunal" under the *Federal Courts Act*, RSC 1985, c F-7 s 18.1 [*Federal Courts Act*]. As I will later find, the Applicants have identified a continuing course of conduct subject to judicial review.

[13] In a previous case involving BRFN, the main issue on judicial review was the stalemate in BRFN's governance structure (*Gauthier v Blueberry River First Nation* 2021 FC 446 at paras 1, 12 [*Gauthier*]). The central issue in *Gauthier* was the Chief Operating Officer (COO) and/or Band Council's failure to hold Band Council meetings (*Gauthier* at para 28). This Court affirmed its jurisdiction, noting that the *Custom Code* (the By-Law) came into effect via a Ministerial Order under the *Indian Act*, and that the Chief, Council, and COO exercise powers conferred by federal law, making them a "federal board, commission or other tribunal" under section 18.1 of the *Federal Courts Act* (*Gauthier* at para 32).

[14] This case is analogous to *Gauthier*. Like this case, *Gauthier* involved a governance crisis where this Court found non-compliance with the By-Law. Thus, the court has jurisdiction to judicially review an alleged course of conduct by the Respondent Councillors.

B. *Is the Case involving Chief Desjarlais Before This Court?*

[15] The case involving Chief Desjarlais is not before me. My decision in this case is meant to have no bearing on other cases before the Federal Court.

[16] There is at least one other pending application for judicial review before this Court involving the BRFN. One involves Chief Desjarlais' application to judicially review the process that led to the investigation of her conduct and her removal from office (Court File No. T-2700-24). This Court dismissed the Applicants' motion to adjourn the hearing of the case before me to join both cases, and I agree that each case largely deals with a different matter.

[17] Though the Applicants have raised the issue of the March 12, 2024 BCR's legality, which initiated the investigation into whether the Chief's conduct breached the Nation's By-Law, I conclude that it is not before this court. In their memorandum, the Applicants have not sought a remedy with respect to said BCR. I also stated to the parties during the hearing that I will not interfere with the other matter(s) before this Court.

[18] I will therefore not consider whether said BCR, or the process for passing it, breached the Chief's procedural fairness rights, or whether passing the BCR was unreasonable. Since the main issue before me concerns the Respondent Councillors' continuing and ongoing actions

surrounding governance, I must only determine whether on a balance of probabilities, the Respondent Councillors' course of conduct surrounding governance breached the By-Law.

[19] I also do not engage with the truth of the content of the report that led to Chief Desjarlais' removal. The Report's existence is only relevant to the context that explains the dynamic between the parties. This is because this judicial review does not evaluate whether it was reasonable for Council to remove Chief Desjarlais. This judicial review instead evaluates whether the actions described through affidavit evidence breached BRFN's By-Law.

C. *What is the Proper Scope and Timeline of the Judicial Review?*

- (1) The timeline of the Judicial Review stretches from the beginning of the disputes in mid-2023 to September 13, 2024

[20] As it is the date of the latest evidence the parties filed, this judicial review's scope will end in September 2024 when a BCR removed Chief Desjarlais from her office.

[21] The Applicants allege that the Respondent Councillors' ongoing and continued actions have unduly undermined the By-Law. The Respondent Councillors argue that the application is made up of general allegations about "ongoing actions". There is neither a decision under review, nor are the allegations based on admissible facts. They therefore argue that the judicial review is not properly before this Court and its timeline is not clear.

[22] The parties agree that in January 2022, BRFN held a Council election, and in that election, the Nation's five Family Councillors elected Chief Desjarlais as the Chief. Chief

Desjarlais suggests that the disputes within Council began in mid-2023, and the Respondent Councillors submit that these disputes arose because of her unilateral decision around that time to meet with a Calgary-based company, Petronas, to discuss the Nation's business prospects.

[23] Regardless of the reasons for the governance issues, the parties' evidence suggests that at least by mid-2023, the problems started. I note that I cannot be more precise than "mid-2023" because the Respondent Councillors' have failed to comply with the requirement to file a Certified Tribunal Record (CTR), which would have allowed this Court to review individual meetings and specific dates (see paragraph [91] of these reasons). There is also no dispute that the latest date of the evidence filed by the Respondent Councillors is September 13, 2024 (the parties have agreed not to accept Councillor Gauthier's second affidavit dated October 4, 2024).

[24] Therefore, given that the latest evidence filed by the Respondent Councillors is September 13, 2024, I find that the relevant period is from mid-2023 until September 13, 2024.

- (2) Rule 302 does not prevent this court from judicially reviewing the respondents' course of conduct surrounding governance

[25] I also find that the Respondent Councillors' ongoing and continued actions constitute a proper ground for judicial review. The Respondents are correct that in general, Rule 302 requires that a judicial review pertain to a single decision (*Federal Courts Rules*, SOR/98-106 [Rules]). However, Rule 302 does not apply where the decisions constitute a continuing act or course of conduct (see *Johnny v Dease River First Nation*, 2024 FC 1636 at para 34; *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173 [*David Suzuki*]; *Shotclose v Stoney*

First Nation, 2011 FC 750 at para 64 [*Shotclose*]; *Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2021 FC 447 at paras 19–20; *Prairie Chicken v Blood Tribe Band Council*, 2024 FC 1151 at paras 20, 23; *Claxton v Tsawout First Nation*, 2024 FC 1546 at paras 61–71 [*Claxton*]; and *Tootoosis v Poundmaker Cree Nation #345*, 2024 FC 1171 at para 7).

[26] The Respondent Councillors argue that an argument based on a continuous course of conduct, absent an underlying decision to challenge, cannot succeed (RM at paras 77–78). I disagree with the Respondent Councillors’ characterization of the principle. As highlighted by Associate Chief Justice Gagné, the Court can make a Rule 302 exception where “the decisions concern the same parties and arise from the same facts and decision maker” (*Canadian Coalition for Firearm Rights v Canada (Attorney General)*, 2021 FC 447 at para 21, citing *Lessard-Gauvin v Canada (Attorney General)*, 2016 FC 227 at para 6).

[27] 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). It includes a general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action (*Key v Cote*, 2025 FC 1329 at para 48 [*Key*], citing *David Suzuki* at para 173).

[28] To assess whether a decision is a continuous course of conduct, a reviewing court considers (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 (*David Suzuki* at para 173, *Claxton* at para 62, citing *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; *Thomas v One Arrow First Nation* 2019 FC 1663 at para 17).

[29] Paragraphs 155-173 of *David Suzuki* describe various kinds of continuing course of conduct which can be reviewed in the absence of an underlying decision to challenge. As an example of a continuing course of conduct, in *CBC*, the Courts Martial Administrator continually refused to provide unredacted copies of decisions subject to a publication ban (*Canadian Broadcasting Corporation v Canada (Attorney General)*, 2016 FC 933, at para 26 [*CBC*]). The FC found that a decisionmaker's ongoing practice was a course of conduct and properly subject to judicial review:

The application for judicial review does not arise from a single decision of the CMA. Rather, the CBC requested a number of decisions involving a publication ban at different times, and on each occasion, the CMA informed the CBC that it was required, pursuant to the publication ban, to remove any information that could disclose the identity of the complainant or a witness in the case. In my view, it is the ongoing practice of the CMA to redact the court martial decisions subject to a publication ban that is alleged to be unlawful and subject to judicial review (*CBC* at para 26).

[30] In the case at bar, I analyse the evidence at length when I decide on the merits of the case. In the merits, I find that the Respondent Councillors failed to file a CTR and to fulfill undertakings for discovery requested by the Applicants. In doing so, I draw the adverse inference

that the Respondent Councillors did not hold more than 3 meetings that complied with the By-Law during the period under review (see paragraph [90] of these reasons). As a result, the lack of a proper evidentiary record that would underpin a single decision, or a number of related decisions, occurs because the Respondent Councillors failed to comply with the requirement to file a CTR. Failing to file a CTR has obscured the Respondent Councillors' process regarding whether they have complied with the By-Law for each meeting. Obscuring the process hampers the Applicants' ability to challenge individual decisions.

[31] On the first factor, the decisions are connected, but they largely arise out of different meetings over the period between mid-2023 and September 13, 2024. On the one hand, the issue is largely similar – the decisions arise out of alleged non-compliance with the By-Law's specific provisions concerning meeting notice, meeting frequency, or moving meetings *in camera* (see paragraphs [65]–68, [70], [76]–77 of these reasons, on the portions of the By-Law setting out explicit requirements). In this sense, an improperly held meeting, such as the 13 September 2024 meeting that led to the BCR removing Chief Desjarlais, might have multiple procedural failures.

[32] However, the choice to ignore procedure in respect of each individual meeting over the relevant period does not necessarily imply that the decisions are connected. For example, the Respondent Councillors have not appended evidence on the record showing that they have followed the By-Law when moving meetings *in camera* (see paragraph [83] of these reasons), admitted to not consulting with the membership in respect of the September 13, 2024 meeting (see paragraph [116] of these reasons), and admitted to holding unduly constituted meetings (see paragraph [69] of these reasons). Each decision not to prepare a proper motion to move meetings

in camera, to maintain minutes, and not to consult is not necessarily connected because these decisions arise in respect of each individual meeting.

[33] In *Claxton*, justice Strickland held that decisions were closely connected in part because the “facts grounding each decision are the same”, and the “basis for both decisions and the subject conduct were premised on the same reasoning” (*Claxton* at para 63). However, in this case, because the Respondent Councillors were habitually constituting meetings by not complying with the By-Law over the relevant period, there is more of a connection between the decisions than if, say, only two meetings in different years were alleged to be non-compliant. Thus, the first factor is neutral towards recognizing a continuous course of conduct.

[34] On the second factor, the fact situations are similar. The same decision-makers, the Respondent Councillors, are involved each time. Further, legal issues that arise from non-compliance with the By-Law are always raised; the Applicants allege that the Respondent Councillors failed to follow the By-Law in respect of the due constitution of meetings, of meetings moved *in camera*, and on consultation of membership regarding important decisions affecting BRFN. Finally, the Applicants seek the same relief for any of these alleged breaches: restoration of governance that complies with the By-Law. The second factor supports recognizing a continuous course of conduct.

[35] On the third factor, it is difficult to pinpoint a single decision. The Respondents’ evidence establishes that they have held meetings outside of the meetings contemplated in the By-Law, where decisions important to the Nation have been taken (see paragraph [69] of these reasons).

Furthermore, the By-Law sets out requirements to move meetings *in camera* (see paragraph [76] of these reasons), and the Respondent Councillors have not fulfilled undertakings requested by the Applicants that they provide evidence regarding motions that would have complied with the By-Law (see paragraph [84] of these reasons). The Respondent Councillors' own affiant did not recall whether a motion was held to move a meeting *in camera*, in a meeting that did not comply with the By-Law (see paragraph [78] of these reasons). The Respondent Councillors' refusal to disclose a CTR (see paragraph [83] of these reasons) supporting compliance with the By-Law hides each individual decision from this Court's view, as there are no individual explanations for why particular meetings were or were not held *in camera*. The third factor thus points to an ongoing practice on the part of the Respondent Councillors.

[36] On the fourth factor, separate reviews would be a waste of time and effort. Forcing the Applicants to bring separate applications for each meeting held without adhering to the procedure set out in the By-Law, each meeting not moved *in camera* with a properly recorded motion, and each meeting where the membership was not consulted, would be duplicative and wasteful. This is especially true when the applicants cannot be reasonably expected to access documents not in their possession in order to prove that these occurred, and the Respondent Councillors have refused to provide these documents to the Applicants (see paragraph [83] of these reasons). The Respondent Councillors' disclosure of a CTR, which is required under the *Rules*, might make judicial reviews of individual decisions more effective. However, as this has not occurred, the fourth factor must strongly suggest that the coherent way to litigate is to treat the ongoing pattern as one continuous matter.

[37] In the present case, the Respondent Councillors' persistent failure to follow the By-Law constitutes a continuous course of conduct squarely within the framework articulated in *Suzuki* at para 173. The allegedly unlawful conduct is not reducible to one isolated resolution or discrete decision; it is an ongoing pattern of the same decision-maker repeatedly acting contrary to its governing rules, raising the same legal issue and calling for the same relief. The Respondent Councillors have continuously implemented steps that may have ignored the By-Law's requirements to hold duly-constituted meetings. Reviewing these steps together is therefore appropriate.

[38] In *Dease River*, this Court recognized that a series of BCRs may be a reviewable course of conduct (*Johnny v Dease River First Nation*, 2024 FC 1636 at paras 33–44 [*Dease River*]). In *Dease River*, the applicant's knowledge of prior BCRs and delay in bringing a judicial review precluded review of earlier BCRs. Here, however, the repeated absence of disclosed documents as a practice and Councillor Gauthier's own admissions of non-compliance (as discussed in the merits) suggest that the alleged illegality is systemic and continuing. Accordingly, the Respondent's conduct should be reviewed and remedied as a continuous course of conduct.

[39] The Respondent Councillors argue that this Court lacks jurisdiction because the Applicants or the Chief are not challenging a specific, identifiable decision as required by section 18.1 of the *Federal Courts Act* and Rule 302. Furthermore, the Applicants or Chief are not pegging their arguments to specific actions that can reasonably form a continuous course of conduct.

[40] According to the Respondent Councillors, in the absence of specific decisions that would reasonably suggest a problematic course of conduct with some continuity, it is hard to understand the Applicants' grievance or mount a proper defence. They argue that the Applicants heavily rely on their inadmissible opinion evidence to litigate what they refer to as "years" of general grievance without identifying any specifics to their allegations on a continuous course of conduct. Even though this matter has been ongoing for nearly a year, they also displayed surprise at the hearing that they had to defend this case.

[41] In *Key*, the challenged BCRs (which covered the period from August 2023 to December 2024) were easily identified, ensuring no prejudice to the Respondents (*Key* at para 54). Justice Blackhawk then found that there was a sufficient nexus between the decisions to properly consider all challenged BCRs in a single application, as they were all grounded in the same factual background (*Key* at para 54).

[42] *Key* contrasts with the case before me. Here, there are no identifiable decisions. However, as the Applicants and the Chief allege, and I agree, the absence of identifiable decisions is caused by the Respondent Councillors' lack of transparency in continuously making decisions concerning meeting procedure without a proper record. The Respondent Councillors possessed the relevant documents and failed to disclose them.

[43] To now argue that the absence of a specific decision—created by the Respondents' own conduct—deprives the Court of jurisdiction to review under rule 302, because there is an insufficient paper trail to prove that the decision occurred, is circular. Such an argument also

places an unreasonable burden on the Applicants to prove a negative when they cannot access the documents that would allow them to identify the challenged decisions. Failing to recognize a continuing course of conduct would in effect allow the Respondents to immunize themselves from judicial review and due process contemplated by the By-Law, simply by obstruction, failing to maintain adequate records, or by conducting business in an opaque manner.

D. *Is the Applicants' Affidavit Evidence Admissible?*

[44] I find that Rule 81 affects the weight and the probative value to be accorded to the Applicants' affidavits but is not a barrier to their admissibility (see *Lumonics Research Ltd v Gould*, 1983 CanLII 5000 (FCA) at p 369; *Ottawa Athletic Club Inc v The Athletic Club Group Inc*, 2014 FC 672 at para 119; *Split Lake Cree First Nation v Sinclair*, 2007 FC 1107 at para 26).

[45] The Respondent Councillors rely on Rule 81 to argue that affidavits must be confined to the personal knowledge of the affiant and not contain opinions or arguments. They argue that much of the evidence presented by the Applicants is inadmissible because it does not contain first-hand information. More specifically, they argue that the affidavits are inadmissible because they include hearsay evidence, matters outside of the affiant's knowledge, speculations or arguments as opposed to facts, and correspondence and BCRs not involving the affiant.

[46] Rule 81 reads as follows:

Content of affidavits

81 (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.

Affidavits on belief

(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

[47] I agree that Rule 81 sets out the general requirement that confines the content of an affidavit to the affiant's personal knowledge. However, this requirement does not necessarily exclude hearsay evidence when such evidence is deemed reliable and necessary (see *Ethier v Canada (RCMP Commissioner)*, 1993 CanLII 2935 (FCA)).

[48] In addition, the case law on rule 81 has interpreted information and belief as being synonymous with hearsay, such that evidence which is admissible under an exception to the hearsay rule does not offend the prohibition in Rule 81(1) (*Cabral v Canada (Citizenship and Immigration)*, 2018 FCA 4 at para 32). I understand that I must balance reliability, necessity and fairness in considering whether hearsay or opinion evidence is admissible (See *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 223 at para 30).

[49] Further, there are two exceptions to the general rule that opinion evidence is inadmissible, the first of which is relevant here (see *Canada (Attorney General) v Mosaic Forest Management Corporation*, 2022 FCA 216 at paras 17–18 [*Mosaic Forest*]). Lay witnesses can offer opinions where (1) they are in a better position than the trier of fact to form a conclusion; (2) the conclusion is one that a lay person can make; (3) the witness has the necessary experience to draw the conclusion; and (4) the opinion is a “compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions” (*Mosaic Forest* at para 17).

[50] I find that the BRFN evidence is admissible. In this case, the BRFN elders' opinions were provided in the context of their observations and beliefs based on their first-hand knowledge of the Nation's customs and codes. Their understanding of the Nation's customs and codes puts them in a better position than the Court, as the trier of fact, to form a conclusion, and it is a conclusion that is within the confines of their knowledge as lay persons. All affiants have been involved with the BRFN as members, elders or as their manager, and they therefore have the necessary experience to form their opinions (see *Canada (Attorney General) v Mosaic Forest Management Corporation*, 2022 FCA 216). Finally, the *Practice Guidelines For Aboriginal Law Proceedings September 2021* (Guidelines) suggest the importance of the Aboriginal perspective, and respect to Elders and their testimony (Guidelines, pp 37-38). The opinion evidence here, led to help the Court understand the By-Law's conceptual provisions, suggests facts that are too subtle or complex to be narrated without conclusions.

[51] Rule 81(2) allows Courts to draw an adverse inference from a party's failure to provide evidence from persons having personal knowledge. This subsection clearly contemplates that the affidavit is still admissible and that it provides information and belief, together with an explanation why the best evidence is not available, unless this is otherwise apparent. However, the information or belief could impact the weight of the evidence. The rule is consistent with the approach that the failure to provide the best evidence goes to the weight to be accorded the affidavit, and not its admissibility (see *Lumonics Research Ltd. v Gould*, 1983 CanLII 5000 (FCA) at p 369).

[52] I will not exercise the Court's discretion to strike a non-compliant affidavit in this case. While the Court can strike out a non-compliant affidavit, the discretion is exercised sparingly and only where it is in the interest of justice to do so, as in cases where a party would be materially prejudiced or where not striking an affidavit or portions of it would impair the orderly hearing of the application (see *Canada (Board of Internal Economy) v Canada (Attorney General)*, 2017 FCA 43 at para 29). While the fact that the affidavits contain opinion evidence is relevant to the weight I assign them, the Respondents are not prejudiced to admit the evidence when they had ample opportunity to cross-examine all affiants and challenge their evidence, and chose only to cross-examine one witness, Elder Clarence Apsassin.

[53] While in general the discretion to strike out non-compliant affidavits should be exercised cautiously, in cases involving First Nation evidence, the Court should show even more restraint. By relying on the flexibility envisioned by Rules 3, 55, and 380-391, the Guidelines encourage a flexible procedural framework for the resolution of First Nation litigation cases. The Guiding Principles of the Guidelines highlight procedural flexibility, the importance of the Aboriginal perspective, respect to Elders and their testimony, including on oral history (*Guidelines* at pp 37–38). None of these principles encourage a strict adherence to the formal rules of evidence without keeping the context in mind (see *Jim Shot Both Sides v Canada*, 2019 FC 789 at paras 95–96.)

[54] The Respondents argue that the dispute in this case is not about differing interpretations of the Nation's custom and practices but about the By-Law. Therefore, the oral understanding of historical facts is irrelevant to the interpretation of the By-Law and the evidence should be inadmissible due to non-compliance with Rule 81.

[55] However, the affiants' evidence concerns their personal experience with the Nation's practice of democracy, which is relevant to interpreting the By-Law, especially its conceptual and esoteric provisions, such as those requiring the governing body to act in the interest of the Nation (By-Law, ss 19(a), 20(b)). The Respondents' argument emphasizes form over substance, and formality divorced from its context, is not compatible with the Court's duty to make findings of facts on a balance of probabilities.

[56] Furthermore, this evidence's relevance is limited in scope, and most of the analysis in the merits of this decision relies on the express text of the By-Law. In the merits, I address three grounds for which the Respondents' Councillors' continuing course of conduct was unreasonable. The first is whether the Respondent Councillors failed to hold duly-constituted meetings, as the By-Law requires. The second is whether the Respondent Councillors held *in camera* meetings without following the By-Law's requirements for moving meetings *in camera*. The third is whether the Respondent Councillors failed to consult with the families on the material decisions they made on behalf of the Nation.

[57] Among the three grounds of judicial review I address in the merits, the first two can be disposed of by only using the express text of the By-Law. Interpreting sections 19 and 20 of the By-Law with the Elders' evidence only provides a second ground for the unreasonableness of the Respondent Councillors' failure to hold proper motions to move meetings *in camera* (see para [80] of these reasons). Further, on the third ground of unreasonableness, concerning duties arising out of sections 19 and 20 to consult membership on important decisions, the Respondent Councillors' witness agreed that members were not consulted. Thus, even if I accepted the

Respondent Councillors' argument that the opinion evidence should not be admissible, this argument would not affect the ultimate finding on the judicial review of the course of conduct.

[58] This Court has held that oral history evidence in affidavit can provide evidence to the customs and practices of a Nation, not necessarily captured by its by-laws (*Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 at paras 57–58 [*Whalen*]). This circumstance is analogous to *Whalen*. I acknowledge that the BRFN elders' perspective about the Nation's customs matters because it conveys the context that informs the Court's interpretation of the By-Law. Such evidence is often required to read the written documentary record and the unwritten elder perspective together to provide a complete picture necessary for the Court's interpretation of instruments such as the By-Law.

[59] Moreover, the Respondents had procedural tools at their disposal to challenge the evidence. As stated, they chose to cross-examine only Elder Clarence Apsassin even though the Applicants had filed affidavits from a total of five witnesses.

[60] I therefore find that the Applicants' affidavits are admissible, and to the extent necessary, the deficiencies affect the weight of the evidence.

III. Standard of Review

[61] I agree with the parties that the standard of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 13, 15, 25, 99 and *Coutlee v Lower Nicola First Nation*, 2024 FC 47 at paras 47–49). The Respondent Councillors'

course of conduct must be reasonable in light of the facts and law that constrain them (*Vavilov* at para 105).

IV. Analysis

A. *Did the Respondent Councillors' Continuing Course of Conduct Breach the By-Law and the Nation's customs?*

[62] I ultimately find that the preponderance of the evidence demonstrates that the Respondent Councillors have engaged in an unreasonable course of conduct that has continuously blocked the participation of other lawful participants. The Respondent Councillors have held meetings that were not duly-constituted; have held *in camera* meetings in breach of the framework set out by the By-Law; and have systematically failed to consult BRFN's membership. In making these findings, I also draw an adverse inference from the Respondent Councillors' failure to provide a CTR and undertakings for discovery that *in camera* meetings were held without proper motions and that Council had not met at least twice per month.

[63] Thus, the respondents' continuing course of conduct concerning actions that have breached the By-Law is unreasonable.

B. *Did the Respondent Councillors fail to hold duly-constituted meetings, as required by the By-Law?*

[64] I find that the Respondent Councillors failed to hold duly-constituted meetings, as mandated by the By-Law.

[65] The By-Law sets out the formal requirements of Council meetings. Annex A, below, contains the relevant parts of the By-Law. Part 18 of the By-Law (sections 141-165 inclusive) outlines Council's meeting procedures. Specifically, under section 142, the Nation must hold regularly scheduled meetings "at least two (2) times per month" on dates, at times and in locations set by Council.

[66] Section 143 requires notice of all regularly held meetings by "posting the dates, times and locations of each Council meeting" in various accessible locations. Section 144 allows the Chief to call for special meetings on urgent matters with "at least twenty-four (24) hours written notice", and section 148 allows all members to attend all Council meetings, except for those portions of the meeting that are held *in camera*.

[67] Section 150 names the Chief as the Chair at meetings, unless Council approves another member to chair a specific meeting. Section 152 calls for an agenda that follows a certain order. Section 157 requires minutes to be taken and maintained and section 158 defines the information that those minutes must contain. Under section 145 and 146, Council members must attend the meetings, subject to a yearly limit on absenteeism, and decisions must include reasons and be communicated within 24 hours.

[68] Thus, the formal requirements set out in the By-Law clearly prescribe how and by whom decisions are made. When meetings comply with the By-Law, they are duly-constituted, and it is reasonable to expect that that all important decisions are made in duly-constituted meetings.

[69] On the evidence before me, I find that the Respondent Councillors have made decisions in meetings that were not duly-constituted because they did not comply with the By-Law.

Respondent Gauthier admitted as much on cross-examination:

Q Will you agree that Council decisions must be made a duly constituted meeting of Council?

A No.

Q Council meetings don't have to be made at a duly constituted meeting of Council?

A In the bylaw, it says we must have two meetings per month, "dually" convened meetings, and then we can have other meetings as business arises.

Q Okay. But for the purpose of this, maybe to clarify, we'll say that when I say duly constituted, I mean that it's held in accordance with what's set out in the bylaw.

A meeting? Council meeting?

Q That's right, yeah.

A Yes.

Q So do you agree, then, with that definition in mind, that Council decisions must be made at these duly constituted Council meetings as provided for in the bylaw?

A No. We have -- we can have other meetings where decisions can be made. It doesn't have to be at the Council meeting, the twice-a-month meetings, no

Q So what are these other meetings that you refer to?

A Well, we could be having a meeting with --regarding a project in the community, such as maybe arbor. So we can have a discussion; we can make decisions. It doesn't have to be at a duly convened meeting that is -- with a code, like the two meetings per month. If we waited to do -- to make decisions only twice a month, then we would be hindering our process.

Q Okay. So meetings -- sorry, decisions of Council are, then, made in some cases outside of duly convened meetings?

A Yes. We have meetings within Council, as they arise.

[70] First, subsection 142(a) of the By-Law contemplates meetings in addition to the minimum 2 per month. Second, nothing in the By-Law, in subsection 142(a) or otherwise, allows the formal requirements of further meetings to be suspended.

[71] In fact, Respondent Gauthier's evidence may suggest that the important decisions are left for meetings that would fall outside of the By-Law's requirements, which is the very subject of the Applicants' grievance. I find that Councillor Gauthier's evidence establishes that the Council sets up meetings that are not compliant with the By-Law.

[72] I therefore find that the Respondent Councillors have held meetings that are not duly-constituted, contravening the By-Law's requirement under paragraph 142(a).

[73] The Respondent Councillors argue that the Chief failed to comply with the By-Law, and only complains because the Respondent Councillors initiated removal proceedings against her. The Chief's alleged breach is not before this Court. However, even if I agreed that the Chief has also breached the By-Law, such a breach would not allow the Respondent Councillors to display a cavalier attitude towards the importance of the Nation's By-Law.

[74] I take a moment to address the Respondent Councillors in *obiter*. The Respondent Councillors decided to terminate the Nation's manager, Ms. Ned. This decision is not under review before this Court. I could not help but note, however, that under section 144, it is the Chief who may summon a special meeting to deal with urgent matters such as terminating the

band manager. In the record before me, the Chief has neither called for a special meeting nor supported Ms. Ned's termination.

C. *Did Council hold in camera meetings in breach of the By-Law?*

[75] The Respondent Councillors held *in camera* meetings that breached the By-Law.

[76] Sections 161 through 165 of the By-Law set out circumstances when a private or *in camera* meeting is allowed. Under section 162, if certain conditions are met, then, the Council may hold a portion, or whole of the meeting, *in camera*. This contemplates a motion, and under section 163-165, minutes must be taken, kept in a secure area, and only shown to those who were privy to the *in camera* session. Therefore, the By-Law creates a transparent regime for private meetings that meet certain conditions and that enables Council to move to hold them privately. The By-Law creates a procedure for Council to respect the need for confidentiality in certain circumstances defined in section 162 without being unduly shielded from accountability.

[77] For duly-constituted *in camera* meetings, the By-Law requires the Respondent Councillors to have meeting agendas that would signal that a portion or the whole of a meeting would be held *in camera*, and minutes of the public portion of the meeting to signal that they had moved to hold the meeting, in part or in whole, *in camera* (By-Law, ss 152, 158).

[78] On the examination of the evidence before me, Respondent Gauthier admitted to holding *in camera* meetings but did not remember whether a proper motion was passed in the process under section 162:

Okay. So at the same time as you were engaging with the community on the Implementation Agreement, you were also holding regular in camera Council meetings about the Implementation

Agreement; correct?

A Yes.

Q So to confirm, these meetings were not open to members?

A No.

Q Did members receive notice that these meetings were being held?

A I believe that I told my family that we have weekly implementation meetings. So we signed in January. I want to say our meetings started shortly after, which would have been February. When we first started these meetings, we had them twice a week. I believe they were -- Friday for sure was one day. I want to say Tuesday, I'm not 100 percent sure because it's -- goes back a couple years. But we started out with having them twice a week.

Q Okay. What was the basis for holding these meetings in camera?

A We had to discuss confidential, sensitive information within the Implementation Agreement. We had to ensure we were following the timelines.

Q Okay. And was a motion passed for each of those Council meetings authorizing them to be held in camera?

A I don't recall.

[79] The Respondents argued that dealing with the Implementation Agreement, a significant and complicated issue, was a legitimate reason for the Respondent Councillors to hold *in camera* meetings. For this they needed privileged legal advice from their legal counsel. Though this is a valid basis for moving a meeting *in camera* (By-Law, s 162(d)), the respondents did not respect the By-Law's procedure to hold meetings *in camera*. In other words, the issue is whether the Respondent Councillors could suspend the formal requirements of the By-Law, only because the

ends justify the means (i.e. effecting a breach); not whether the subject matter of those meetings fell under one of the circumstances contemplated by the By-Law. Nothing in the By-Law allows the Council to hold *in camera* meetings secretly.

[80] The Respondent Councillors rely on section 154 of the By-Law to argue that all motions before Council must be decided by a majority vote, and since the Respondent Councillors constitute the majority vote, they were authorized to hold the *in camera* meetings. They also rely on section 162 to argue that they could hold *in camera* meetings. Furthermore, the Chief and Councillors' duties are explained in sections 19 and 20 respectively. These sections provide a non-exhaustive list of duties and responsibilities that promote accountability and transparency, such as the duty to communicate with the members, to be accountable, to avoid conflicts of interest, to demonstrate leadership with a focus on community, etc. These duties create procedural safeguards to promote democratic values such as transparency and accountability.

[81] The By-Law heavily emphasizes the "means" as a tool for democratic values. The Respondent Councillors' arguments amount to expecting the ends to justify the complete suspension of the means. When the Respondent Councillors have not filed any motions on which their majority vote forced a certain action, they cannot reasonably argue that the adopted procedure did not matter, because their quorum would have achieved the desired outcome anyway. This argument, if it stood, would allow councillors to retroactively adopt courses of action that would conflict with the duties the By-Law expects its Chief and Council will uphold.

[82] Moreover, the Respondent Councillors have not followed the strict text of the By-Law. While the By-Law provides for a specific procedure that would trigger an *in camera* meeting, or that it requires regularly-held meetings with agendas and minutes, there is no evidence of compliance with such a procedure before me. The Chief alleges having been excluded from governance, and the Respondent Councillors agree, but justify this exclusion through the BCRs that resulted in her removal. Therefore, though the Respondent Councillors possessed or ought to have possessed documents that would have proven compliance with agendas and minutes for their decisions, they chose not to file any of them.

[83] In this case, the Respondent Councillors never filed a CTR. As early as May 2025, Associate Judge Coughlan had ordered the Respondent Councillors to file a CTR. In fact, even though this Court ordered them to file a CTR, and counsel's follow up letters had highlighted the request, the Respondent Councillors ignored it. These documents could have demonstrated a course of conduct that largely complied with the By-Law, or could have challenged the Applicants' allegations that a problematic continuing course of conduct had occurred.

[84] After Councillor Shelly Gauthier was cross-examined on October 18, 2024, she undertook to provide the following documents:

- 1 Provide the dates of every member meeting and family group meeting that took place regarding the Implementation Agreement. Provide details as to how the meetings were held, who was in attendance at these meetings, and the notices, agenda, minutes, record of all who were in attendance for each of these meetings

- 2 Provide the motions authorizing meetings to be held in camera

(TAKEN UNDER ADVISEMENT)

3 Provide the dates of all in camera meetings regarding the Implementation Agreement as well the minutes that were required to be taken under the bylaws for these in camera meetings (TAKEN UNDER ADVISEMENT)

4 Provide the minutes of the December 8, 2023, meeting regarding the investigation of the Chief

5 Provide the recording and the minutes of the May 31, 2024, meeting as well as a record of those members in attendance

6 Provide the dates of all meetings at which members were consulted on the investigation of the Chief as well as any notices, agendas or minutes or records of attendance for those meetings

7 Provide the September 22, 2023, meeting recording

8 Provide dates, notices and minutes of all such meetings with Ms. Gauthier's family group regarding the implementation of the Implementation Agreement

9 Provide all dates, notices, minutes of family group meetings regarding implementation of the Gundy Plan (TAKEN UNDER ADVISEMENT)

[85] Councillor Gauthier never provided any of the requested listed documents.

[86] Counsel for the Applicants followed up on the said documents by email to Respondent Councillors' counsel on December 13, 2024 and on January 2, 2025. On January 9, 2025, counsel for the Respondent Councillors responded. The first part of the response was about how the Respondent Councillors had not acted upon the BCR dated March 12, 2024. Likely persuaded, the Applicants abandoned a relief in respect of this BCR in the reliefs sought in their memorandum, which meant that no BCR was under review, and relief in this decision was only declaratory. The second part of the response reads as follows (I have added a brief description for each request):

Request 1(dates of meeting regarding the Implementation Agreement): The request made is entirely too broad and irrelevant as it predates any of the allegations in the Application. Much of the request dates back to the Implementation Agreement which was entered into in January 2023, when there was no alleged 'Council Block'.

Request 2 (request for motions authorizing meetings to be held in camera) : This request is far too broad and unclear.

Request 3: (request for dates of all in camera meetings and their meeting minutes)
This request is entirely outside the scope of allegations made in the Application and is also far too broad.

Request 4: (request for minutes of December 8, 2023 meeting regarding investigation of Chief Desjarlais)
We are seeking this document and will provide it if it exists.

Request 5: (request for recording and minutes of Dec 8, 2023 meeting and record of attendees)
We are seeking the materials requested and will provide them if they exist.

Request 6: (request for dates of all meetings where members were consulted regarding Chief's investigation and any related notices, agendas, minutes, or records of attendees) This request is outside the scope of the Application and is far too broad to be reasonably responded to.

Request 7 (request for sept 22, 2023 meeting recording) We are seeking this document and will provide it if it exists.

Requests 8 and 9: (request for dates, notices and minutes of meetings with the Gauthier family group regarding the Implementation Agreement and meetings regarding implementation of Gundy Plan) These requests are outside the scope of the Application and far too broad.

[87] On January 9, 2025, counsel for the Respondent Councillors also sent the Applicants the following documents by email:

Aaron, below are the recordings you requested.

Naz Mitha

Hi Shelley,

Here are the recordings you requested.

2023-12-08 Chief \u0026 Council Meeting

2023-09-22 Chief \u0026 Council Meeting

I do not see a meeting from May 8th 2023, but have included this one as it's the only other one in May 2023:

2023-05-17 Chief \u0026 Council

[88] Despite another follow up on the same day by the Applicants' counsel, all parties agree that the above response on January 9, 2025 was the only response or action the Respondent Councillors ever took to provide documents to the Applicants.

[89] I find that the above documents show that at most, no more than three duly-constituted meetings were held in all of 2023, when the By-Law required a minimum of 24 (at the rate of twice per month) (By-Law, s 142). No evidence before me suggests that the Respondent Councillors took the required procedural steps to move any of these or other meetings *in camera*.

D. *Does the Respondents' Failure to Provide a CTR and Undertakings for Discovery Ground an Adverse Inference?*

[90] I draw an adverse inference from the Respondent Councillors' failure to provide a CTR and to provide evidence required by undertakings arising in Councillor Gauthier's cross-examination. I infer that Council had not met at least twice per month and held *in camera* meetings without proper motions.

[91] Rule 317 allows the Applicants to request relevant materials, and Rule 318 sets out how and when such documents must be transmitted. The requests were included in the Notice of Application, as well as in Associate Judge Coughlan's May 24, 2024 case management order, and later in the undertakings from Councillor Gauthier's cross-examination. The Respondent Councillors were required to transmit a CTR. They never did. At most, counsel for the Respondent Councillors circulated via email a handful of uncertified documents. These documents were not properly identified, nor did they respect the prescribed format for filing a CTR under Rules 317 and 318.

[92] Based on the respondents' undertakings from cross-examination, one would reasonably expect to see the dates of every member meeting and family group meeting that took place regarding the Implementation Agreement, including its agenda, attendees, notices and minutes. One would also reasonably expect to see the motions authorizing meetings to be held *in camera*. This information would have contained the dates of those *in camera* meetings on the Implementation Agreement.

[93] The Respondent Councillors also allege that the December 8, 2023 meeting was about the investigation of the Chief, but they never filed any minutes to reflect this allegation.

[94] I disagree with the Respondent Councillors' characterization that the over-generalized nature of the request authorizes them to ignore the Applicants' and the Court's legitimate requests for a CTR. The Applicants' memorandum, particularly at paragraph 43, contains references to specific documents that were reasonably expected to be in the Respondent Councillors' possession but were never provided.

[95] The parties agree that the Respondent Councillors only provided three recordings, with no context or supporting documentation, such as minutes, notices or lists of attendees, information and documents required by the By-Law. The existence of these documents could have supported the reasonableness of their continuous course of action.

[96] I draw an adverse inference that the Council had not met at least twice per month and held *in camera* meetings without proper motions. I draw this inference from the fact that the Respondent Councillors possess, or ought to possess, the required documents as prescribed by the By-Law but they have not disclosed them to the parties and the Courts, which has breached the Court's Rules and Associate Judge Coughlan's order. I am guided by this Court's ruling in *Rebel News Network Ltd. v Guilbeault*, 2023 FC 121 at para 82 that:

Rule 81(2) thus allows an adverse inference to be drawn from the failure of a party to provide evidence from persons having personal knowledge. This suggests that an affidavit on information and belief should provide an explanation why the best evidence is not available, unless this is otherwise apparent. The Rule is consistent with the approach that the failure to provide the best evidence goes to the weight or probative value to be accorded to the affidavit (*Lumonics Research Ltd v Gould*, 1983 CanLII 5000 (FCA), [1983] 2 FC 360 at page 369; *Ottawa Athletic Club* at para 119), and does not constitute a barrier to admissibility (*Split Lake Cree* at para 26).

[97] I also acknowledge that this Court has ruled that the case law has given it the discretion necessary to "consider what inferences should be drawn" from affidavit evidence (*Gray v Canada (Attorney General)*, 2019 FC 301 at para 142). I find that it is necessary for me to exercise my discretion in this case because the Respondents' Councillors were given multiple opportunities and directions to provide the necessary documentation, and failed to do so without a reasonable explanation. I find that on a balance of probabilities, the absence of the evidence

before me means that the Respondent Councillors failed to comply with the By-Law's requirements to hold meetings or move to hold them *in camera*.

[98] The Respondents argued that the requests were too general and too broad for them to comply. However, I do not find this to amount to a reasonable explanation for their failure to comply with the Rules, the Court Order, and the Applicants' follow-up requests. I find that many of the Applicants' requests referred to a request for documentation on specific meetings held on specific dates, and the Respondents' argument on the generality of the request is incorrect and does not amount to a reasonable explanation or justification for their continued disregard for the Rules, this Court's order, or legitimate requests of the parties. Second, the requests made pursuant to the undertakings during Councillor Gauthier's cross-examinations were precise and clear, including those that had requested dates of meetings.

[99] The absence of the documents alone allows me to draw an adverse inference that the Council had not met at least twice per month and held *in camera* meetings without proper motions, in breach of the By-Law.

[100] However, in addition to the adverse inference I have drawn from the absence of documents, I find that the totality of the evidence also supports the Applicants' evidence and arguments. For example, the Chief's evidence further supports that the Respondent Councillors breached the By-Law. Exhibit H of Chief Desjarlais' affidavit is an email she sent to Councillor Wolf on August 16, 2023 copying the other councillors. This email demonstrates her dismay with meetings that were not duly conveyed, were not transparent, and were held in secret to

avoid accountability. The minutes of this meeting (at Exhibit K) also showed that the Chief did not attend the August 16, 2023 *in camera* meeting that she had found to be in breach. It is in this improperly constituted *in camera* meeting that the Respondent Councillors appointed a spokesperson among themselves, when the By-Law sees being a spokesperson as a duty of the Chief that only falls to a Councillor “when authorized by Council” (By-Law, ss 19(j), 20(j)).

[101] The Respondents argue that Council has the authority to appoint a Council member other than the Chief to act as spokesperson for Council when authorized by Council (By-Law, ss 20(j), 154). Even if the Respondent Councillors are the majority on Council, the By-Law does not authorize the majority of the Council to do away with procedural requirements, exclude the rest of Council and act unilaterally. This assumes that the procedural safeguards contemplated by the By-Law to ensure accountability and transparency can be suspended at the will of the majority every time a majority of councillors agree on an issue. Even if the majority can ultimately achieve their intended results, process matters, and they cannot suspend it and act unilaterally.

[102] The Respondent Councillors also argue that the Chief too acted in breach of the By-Law and in a secretive manner. They point to the evidence that the Chief attended a meeting with a Calgary company, Petronas, and excluded the entire Council. The Chief’s behaviour is not at issue in this proceeding. However, I asked the Respondent Councillors to point to the relevant provisions of the By-Law that would allow the Councillors to act unilaterally if and when they believe that the Chief is also in breach. They pointed to the sections of the By-Law that prescribe the necessary steps to remove the Chief (By-Law, ss 184-202). These sections prescribe clear actions and steps. They do not provide the individual members of Council a carte blanche to

suspend the requirements of the By-Law at will. In other words, the removal provisions are consistent with the transparency prescribed by the By-Law and do not support secrecy.

[103] Not only did the Respondents not point to any provisions authorizing the rest of the Council to act unilaterally, my reading of the By-Law also does not support the Respondents' argument that in response to dealing with a Chief they saw as dictatorial, they could suspend any provision of the By-Law. Two wrongs do not make a right.

E. *Did the Respondent Councillors systematically fail to consult with the families on the material decisions they made on behalf of the Nation?*

[104] I ultimately find that the Respondent Councillors failed to consult with the Nation's Family Groups on the material decisions the Respondent Councillors made on behalf of BRFN.

[105] Under section 2, the By-Law defines the "Council" as "the sum of all those members elected pursuant to this By-law into the offices of Chief and Family Councillor". A "Family Councillor" is defined as an elected Blueberry Nation member included in a "Family Group", and a "Family Group" is described as those related to five family groups or elders. The relevant references are reproduced in Annex A.

[106] Section 20 of the By-Law sets out each Family Councillor's duties and responsibilities. These include the duty to inform their respective Family Group of all Blueberry River affairs, as well as matters under consideration by Council, to conduct Council business in an open and transparent manner, and the duty to represent the interests and concerns of the Family Group

without compromise to the Nation as a whole (By-Law, s 20(b-d)). Section 20(i) also states that they are to “work with the Chief” in negotiations, lobbying, consulting with government, industry, business, etc. to fulfil the Nation’s objective.

[107] It is therefore not controversial that the Family Councillors are expected to inform their respective families of the decision-making process. When read in the context of the other subsections of section 20, and the other requirements of the By-Law, including on how meetings should be held, this expectation exists to avoid arbitrary actions and decision-making.

[108] It is also not controversial that the By-Law is an important and binding document on the Council running the nation. This fact was confirmed by Justice Phelan in *Gauthier* who referred to the By-Law as the Custom Code that is analogous to the Nation’s constitution. This Court has repeatedly held that *Custom Codes* “are the supreme law of the First Nation in question, and they must be paramount to the laws and decisions made by the council” (See *Coutlee v Lower Nicola First Nation*, 2024 FC 47 at para 60 citing *Whalen* at para 48).

[109] Councillor Shelly Gauthier is the Family Councillor for Family Group 2, the late Edward Apssassin family, and is bound by the duties and responsibilities set out for her role in the By-Law. She has admitted that there was no consultation with the members regarding the decision to remove the Chief (Applicant Record, pages 419, 426 and 430 [AR]):

p. 419:

What kind of consultation with members was taken regarding the decision to remove the Chief as the spokesperson for Blueberry?

A There was no consultation with members.

...

p. 426:

Q Okay. And were members consulted at that time?

19 A How do you mean consulted?

20 Q Were their opinions asked or given on the -- the
21 BCR that was being considered there?

22 A No

...

p. 430:

19 So another -- again, this is not in your

20 affidavit, as it happened afterwards, but I

21 believe it flows from the issues that we're

22 discussing in your affidavit. You recently

23 Blueberry councillors recently passed a BCR

24 removing the Chief from office pursuant to the

25 bylaw; correct?

26 A Yes.

27 Q Was there any consultation with the members

28 regarding the decision to remove the Chief?

29 A No.

[110] It is also not controversial that the matters concerning the Chief's removal are important for and impact the entire Nation. Yet, in Councillor Gauthier's words, there was no consultation.

[111] Councillor Gauthier also admitted to not have met with Clarence or Joseph Apsassin regarding the concerns they had raised in their letter about lack of consultation with the membership (AR, pp 441-442):

Have they raised these concerns with you?

37 A Not that I can recall.

38 Q So is the first time that you've been made aware
39 of these concerns, when you saw it in this letter?

40 A Like I mentioned earlier, there were some letters

41 that were addressed to me. The one letter I --

42 that I made -- that I was talking about, I'm

43 pretty sure that was also given to Councillor Troy

44 Wolf, Councillor Robin Ewaskow, and I believe the

45 former Chief as well.

46 Q And did you meet with them to address these

47 concerns then?

1 A No, we didn't.

[112] Councillor Gauthier's affidavit states that she has been consulting with her family group. However, her evidence on cross examination is consistent with those of the Applicants' that she has not. In fact, the Applicants have filed five affidavits that support their positions. In his affidavit at paragraph 53, Applicant Joseph Apsassin (whom the Respondents chose not to cross-examine), also mentioned the time when Councillors Gauthier and Wayne Yahey declared themselves as the Nation's spokespersons even though this is the duty of the Chief, both under section 19 of the By-Law (specifically s 19(j)), and as the Elders understand it.

[113] Elder Joseph Apsassin has also provided evidence that the elders are excluded and silenced. When Councillor Gauthier admits to the fact that she did not even meet with him after

he had raised his concerns in a letter, this is credible and supports his objection to the unjustified lack of transparency in the Council's decision-making.

[114] The Respondents have not filed any other affidavits to suggest that the other Respondent Councillors have been consulting with their family members, in accordance with the By-Law. This uncontested evidence includes statements that the Respondent Councillors have not consulted their family groups (Affidavit of Joseph Apsassin at paras 36, 39, this affiant was never cross-examined) and that Councillor Wolf raised his voice on the Elders, telling them to be quiet when they tried to raise concerns (Affidavit of Gabe Harvey at para 12, a member of the BRFN).

[115] The Respondent Councillors argued that the Applicants' allegations are too vague and general because they cannot pinpoint the Respondent Councillors' specific failures. First, the Respondents have argued this with respect to Councillor Gauthier's specific failure to consult her family group on an important issue, the removal of the Chief. However, the Applicants have filed affidavits by Elders and members of the Nation on the Respondent Councillors' failures. Furthermore, Chief Desjarlais's letter titled "Chief and Council Attendance Policy – October 2022" (Exhibit G of her affidavit), clarifies that she too had complained about the Council's systemic failure to be around the members, and had reminded the Council of its duties.

[116] To counter these affidavits, the Respondents have filed one affidavit from Councillor Gauthier. Even though she had stated she had consulted, she agreed to the lapse in consultation during cross-examination (see paragraph [109] of these reasons). When I read both parties'

affidavits together with the other evidence before me, I find that the Applicants have proved on a balance of probabilities that the Respondent Councillors have consistently failed to abide by their duties in the By-Law to consult their family groups.

V. Costs

[117] At the conclusion of the hearing, the parties submitted, and I agreed, to receive written submissions on costs.

[118] The parties are directed to set a schedule for their written submissions on costs within 10 days of the date of this Order.

VI. Conclusion

[119] The Respondent Councillors engaged in an unreasonable course of conduct. It was not reasonable for the Respondent Councillors to arrange non-duly-constituted meetings, as required by the By-Law; to hold meetings *in camera* in ways not contemplated by the By-Law; and to systemically fail to consult its family groups in relation to the material decisions they made on behalf of BRFN.

[120] In coming to my decision, I have drawn an adverse inference from the fact that it is the Respondents who have been in a position to rebut the allegations made against them with sufficient credible evidence; they have chosen to not file a CTR, to not comply with the

undertakings raised during the cross-examination of Councillor Gauthier, and to ignore the multiple requests of the Applicants' counsel for documentation.

[121] For the reasons given, the application is granted in part as follows:

- a) A declaration that the Respondents have breached Blueberry River First Nation's laws and customs, namely the Blueberry River First Nations *Custom Election By-Law* (By-Law);
- b) A declaration that Blueberry River First Nations Council and the Respondent Councillors are required to meet regularly and as a whole of Council, in accordance with the By-Law;
- c) A declaration that Blueberry River First Nations Council and the Respondent Councillors are required to consult with and represent the views of Blueberry's members, including Family Groups and Elders, in advance of making major decisions on behalf of the Nation, in accordance with the By-Law.

JUDGMENT in T-857-24

THIS COURT ORDERS that:

1. The Applicants' application for judicial review is granted in part as follows:
 - a) A declaration that the Respondents have breached Blueberry River First Nations' laws and customs, namely the Blueberry River First Nations *Custom Election By-Law* (By-Law);
 - b) A declaration that Blueberry River First Nations Council and the Respondent Councillors are required to meet regularly and as a whole of Council, in accordance with the By-Law;
 - c) A declaration that Blueberry River First Nations Council and the Respondent Councillors are required to consult with and represent the views of Blueberry's members, including Family Groups and Elders, in advance of making major decisions on behalf of the Nation, in accordance with the By-Law.
2. The parties are directed to set a schedule for their written submissions on costs within 10 days of the date of this Order.

"Negar Azmudeh"

Judge

Annex A

Blueberry River Custom Election By-law, 2017

Duties of the Chief

19. Duties and responsibilities of the Chief shall include, without limitation, the following:

- (a) to act in the best interests of Blueberry River honestly, impartially and in good faith;
- (b) to communicate with the Blueberry River members including members of each Family Group;
- (c) to be accountable to Blueberry River members who are resident on Reserve and off Reserve and to conduct Council business in an open and transparent manner;
- (d) to avoid a conflict of interest or the appearance of a conflict of interest and to avoid being involved in any transaction or business matter where the Chief is in a conflict of interest or appears to be in a conflict of interest;
- (e) to avoid use of any property or assets owned by Blueberry River for personal use or for operation of the Chief's own business, to avoid purchasing property or assets owned by Blueberry River unless such use or purchases are equally available to all on and off Reserve Blueberry River members and the use or purchase is authorized by a quorum of Family Councillors;
- (f) to demonstrate leadership with a focus on the Blueberry River community, the needs of future generations and fulfilling the vision statement in this By-law;
- (g) to act as a team leader for all negotiations;
- (h) to respect confidentiality in Blueberry River business and negotiation meetings;
- (i) to be a liaison with Blueberry River Elders; and
- (j) to be spokesperson for Council when consulting with government, industry, first nations organizations, media and the general public.

...

Duties of Family Councillors

20. Duties and responsibilities of each Family Councillor shall include, without limitation, the following:

- (a) to elect the Chief at the Chief election meeting;
- (b) to act in the best interests of Blueberry River honestly, impartially and in good faith;
- (b) to represent the interests and concerns of their Family Group without compromise to Blueberry River interests as a whole;
- (c) inform their Family Group of all Blueberry River affairs and matters under consideration by Council and to conduct Council business in an open and transparent manner;
- (d) be accountable to all Blueberry River members within their Family Group regardless of whether they reside on or off Reserve;
- (e) avoid use of any property or assets owned by Blueberry River for personal use or for the operation of a personal business, to avoid purchasing property or assets owned by Blueberry River unless such use or purchases are equally available to all on and off Reserve Blueberry River members and the use or purchases are authorized by Council;
- (f) make reasonable efforts to ensure that Elders within their Family Group are aware of the Blueberry River benefits, entitlements and services available to them;
- (g) avoid a conflict of interest in any situation where a Family Councillor, immediate family member or Family Group member has a personal or business interest in a transaction or business matter under consideration by Council;
- (h) demonstrate leadership with a focus on the Blueberry River community, the needs of future generations and fulfilling the vision statement in this By-law;
- (i) work with the Chief in representing Blueberry River interests in negotiations, lobbying and consulting with government, industry,

business, first nation organizations or other bodies to fulfill Blueberry River community objectives;

- (j) act as spokesperson for Council when authorized by Council; and
 - (k) act as chairperson for Council when authorized by Council in the absence of the Chief.
- Eligibility to be a Candidate / Member of Council

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41. To be eligible for nomination as a candidate, and to be eligible to act as a Council member, a person must:

- (a) be an elector;
- (b) in the case of a nomination for Family Councillor, be listed as a member of the Family Group eligible to nominate that Family Councillor on the elector's list;
- (c) not have been convicted of an indictable criminal offence before the date of the nomination meeting or during the Council member's term in office, unless:
 - (i) they have been granted a pardon in relation to that conviction, or
 - (ii) the conviction is directly related to the exercise of that person's Aboriginal rights;
- (d) not have been removed from a position on Council within the five (5) years prior to the date of the nomination meeting;
- (e) not be bankrupt, as that term is defined in the Bankruptcy and Insolvency Act, on the date of the nomination meeting or during the Council member's term in office;
- (f) if it is a by-election, not be the person who resigns or is removed from their position on Council, prompting the holding of the by-election;
- (g) not have a civil court judgment against them or a criminal conviction in respect of any matter involving theft, fraud or misuse of property either:
 - (i) within the five (5) years before the date of the nomination meeting, or
 - (ii) during the Council member's term in office;
- (h) not be in arrears for any debt to Blueberry River or a Blueberry River business entity, unless:

- (i) they have a debt repayment agreement that is entered into at least six (6) months before election day, and
 - (ii) they are in good standing in relation to their debt repayment agreement; and
- (i) if the candidate is employed with Blueberry River or a Blueberry River business entity, they must agree at the time of nomination to either take an unpaid leave of absence or resign from that employment immediately after being sworn in to office.

Requirement to Resign from Blueberry River or Blueberry River Business Entity Employment if Elected

42. Where an employee of either Blueberry River or a Blueberry River business entity is declared elected they must either take an unpaid leave of absence or resign from their position as an employee, effective on the date they take office as a Council member and continuing for the duration of that term in office.

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First Meeting of Council

141. The first meeting of a newly elected Council must take place no later than one (1) month after the electoral officer posts a Declaration of Election Results for Chief.

Subsequent Meetings of Council

142. After the first meeting of Council, regularly scheduled Council meetings must take place

- (a) at least two (2) times per month and as often as is necessary for Council to address the business or affairs of Blueberry River; and
- (b) on dates, at times, and in locations set by Council.

Notice of Council Meetings

143. The chief operating officer must provide members with at least five (5) business days notice of all regularly scheduled Council meetings by posting the dates, times and locations of each Council meeting in a conspicuous place on the Blueberry River website and at all public buildings located on a Blueberry River reserve where members may attend to access Blueberry River programs or services.

Special Meeting of Council

144. (1) Where urgent matters arise in the business or affairs of Blueberry River, the Chief may summon a special meeting of Council by providing each Council member at least twenty-four (24) hours written notice of the date, time and location of that special meeting of Council, and a summary of the urgent matter that will be discussed.

(2) A notice under subsection (1) must be delivered by the Chief to each Council member either at an email address or at a texting phone number that is provided by each Council member for such purpose.

Council Member's Duty to Attend Council Meetings & Perform Functions of Office

145. (1) Council members must not be absent from three (3) or more Council meetings, either consecutively or within any twelve (12) month period, unless:

(a) such absence is due to illness or incapacity of the Council member and the Council member who will be absent provides notification of such absence to the Council chairperson before the Council meeting; and

(b) the Council makes a majority vote at the Council meeting approving the Council member's absence, which approval should not be unreasonably denied.

(2) When Council makes a decision under paragraph (1)(b), within twenty-four hours (24hrs) of the decision being made the Council chairperson must notify the Council member to whom the decision relates of the decision that was made and the reasons for that decision.

146. Council members must not be absent from twelve (12) or more Council meetings, or be unavailable to perform their functions of office for any period longer than six (6) months, regardless of any illness or other incapacity.

147. Any Council member in breach of section 145 or 146 will be subject to progressive disciplinary action in accordance with section 184.

Blueberry River Member's Right to Attend Council Meetings

148. Blueberry River members have a right to attend all Council meetings, except those portions of a Council meeting that are held in camera.

149. Where a Blueberry River member disrupts the conduct of a Council meeting, the Council chairperson may expel them from the remainder of that Council meeting.

Council Chairperson

150. The Chief is the Council chairperson at a Council meeting, unless Council approves another Council member to be the Council chairperson for a specific Council meeting.

151. The Council chairperson is responsible for:

- (a) calling Council meetings to order;
- (b) introducing agenda items;
- (c) determining the order of speakers for each agenda item; and
- (d) maintaining order in Council meetings.

Council Meeting Agendas

152. For every agenda for a Council meeting, the order of business must be as follows:

- (a) reading and adoption of the agenda;
- (b) reading and adoption of previous Council meeting minutes;
- (c) unfinished business;
- (d) presentation and reading of correspondence and petitions;
- (e) presentation and consideration of reports of committees;
- (f) new business; and
- (g) adjournment.

Motions at Council Meetings

153. Any Council member may make or second a motion at a Council meeting and every motion at a Council meeting must be made and seconded before it is decided.

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Council Meeting Minutes

157. The Council chairperson is responsible for delegating someone to take minutes at Council meetings and the chief operating officer is responsible for maintaining copies of all Council meeting minutes.

158. The minutes of a Council meeting must:

- (a) provide a summary, not verbatim transcripts, of Council discussions;
- (b) reflect that Council deliberated before making a decision, which might include documentation of a brief summary of the options considered, or pros and cons raised; and
- (c) identify any motions made, and the outcome of any votes taken or consensus reached, but not identify how the vote was split in a majority decision, or how individual Council members voted, unless a Council member asks that their vote go on record in which case that person's vote must be documented.

Storage of, and Access to, Council Meeting Minutes

159. The chief operating officer must store all Council meeting minutes in a secure area or computer system.

160. Upon request to the chief operating officer, the chief operating officer must provide Blueberry River members' access to Council meeting minutes.

In Camera Sessions at Council Meetings

161. For the purposes of this section, "in camera" means the part of a Council meeting that is held in private and closed to Council members who are in a conflict of interest with regard to the topic of discussion.

162. Council may approve a motion to order that a portion of, or whole, Council meeting be held in camera if Council is satisfied that either:

- (a) the order is necessary to address a conflict of interest of a Council member;
- (b) the order is necessary to maintain the confidentiality of information relating to human resources, including Council's oversight of the chief operating officer's employee performance;
- (c) the order is necessary to allow for independent auditors to present audit results to Council without interference from the Blueberry River administration or members;
- (d) the order is necessary to protect the confidentiality of information relating to a civil or criminal proceeding, or information that is subject to solicitor-client privilege; or
- (e) the order is necessary for the safety of a person.

In Camera Session Meeting Minutes

163. The Council chairperson must appoint someone to take separate minutes at an in camera session, setting out:

- (a) the names of those persons who were in attendance at the in camera session;
- (b) the names of any person who is granted permission by those in attendance at the in camera session to view the minutes;
- (c) provide a summary, not verbatim transcripts, of discussions;
- (d) reflect that Council deliberated before making a decision, which might include documentation of a brief summary of the options considered, or pros and cons raised; and
- (e) identify any motions made, and the outcome of any votes taken or consensus reached but not identify how the vote was split in a majority decision, or how individual Council members voted, unless a Council member asks that their vote go on record in which case that person's vote must be documented.

Storage of, and Access to, In Camera Session Meeting Minutes

164. The chief operating officer must store all in camera Council meeting minutes in a secure area or computer system.

165. The chief operating officer must not allow anyone, except those persons who were privy to the in camera session and who are granted permission by those in attendance at the in camera session, access to the in camera meeting minutes.

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184. A Council member may be subject to disciplinary actions if:

- (a) they have breached their Oath of Office or Confidentiality Agreement;
- (b) they are absent from three (3) or more Council meetings either consecutively or within any twelve (12) month period without the approval of Council pursuant to section 145.
- (c) they have breached or failed to perform their duties or obligations set out in any Blueberry River law, by-law or policy;
- (d) they have engaged in conduct at Council meetings, community meetings, or in other public forums or functions which causes substantial harm to Blueberry River's ability to conduct business or deliver programs and services; or

(e) they have engaged in physical violence or any other unwanted or inappropriate conduct directed at any of the following persons, that the person finds offensive and harmful and that a reasonable person would view as unwelcome or offensive:

- (i) staff or a contractor of Blueberry River;
- (ii) a director, manager or employee of a Blueberry River business entity; or
- (iii) any person while present on the Reserve or at the place of business of a Blueberry River business entity; or

Council Removal from Office

185. The Chief may be subject to removal from office if:

- (a) they lose the confidence of Blueberry River, as evidenced by a petition that:
 - (i) is signed by at least sixty per-cent (60%) of Blueberry River electors; and
 - (ii) sets out each of those elector's full names, membership numbers, phone numbers and either their mailing or email addresses;
- (b) a Council member submits a report in accordance with section 187 alleging that the Chief:
 - (i) has become ineligible under section 41; or
 - (ii) has engaged in conduct listed in section 184; or
- (c) a member of Blueberry River submits a report under section 188 alleging that the Chief:
 - (i) has become ineligible under section 41; or
 - (ii) has engaged in conduct listed in section 184.

186. A Family Councillor may be subject to removal from office if:

- (a) they lose the confidence of their Family Group, as evidenced by a petition that:
 - (i) is signed by at least sixty per-cent (60%) of electors listed with the Family Group that the Family Councillor represents; and

- (ii) sets out each of those elector's full names, membership numbers, phone numbers and either their mailing or email addresses;
- (b) a Council member submits a report in accordance with section 187 alleging that the Family Councillor:

Mandatory Report by Council Members Regarding Grounds for Disciplinary Action or Eligibility of a Council Member to Hold Office

187. A Council member must make a written report to the Council directly if they have reason to believe that another Council member:

- (a) has participated in conduct that is subject to disciplinary action as set out in section 184; or
- (b) is no longer eligible to hold office under section 41.

Report by Member Regarding Grounds for Disciplinary Action or Eligibility of a Council Member to Hold Office

188. A member of Blueberry River may make a written report either to a Council member or to the chief operating officer if they:

- (a) have reason to believe a Council member participated in conduct that is subject to disciplinary action as set out in section 184;
- (b) have reason to believe the Council member is no longer eligible to hold office under section 41; or
- (c) wish to request the removal of a Council member from office due to a loss of confidence in that Council member and they have a petition to submit that meets the criteria set out in section 185 or 186.

Requirements in Written Report Regarding Grounds for Disciplinary Action or Eligibility to Hold Office

189. A report under section 187 or 188 must set out:

- (a) the name of the Council member to whom the allegation or loss of confidence relates
- (b) either:
 - (i) the specific paragraph in section 184 to which the allegation or loss of confidence relates,
 - (ii) that they wish to seek the removal of that Council member, or
 - (iii) the eligibility criteria under section 41 to which the allegation relates;

- (c) where relevant, a description of the allegation, including the names of any witnesses to the alleged circumstances; and
- (d) where relevant, any supporting documentation such as the original petition signed by electors in accordance with section 185 or 186, respectively.

Addition of Report to Council Meeting Agenda, Notice of Report as an Agenda Item, and Distribution of Report

190. Where a Council member or the chief operating officer receives a written report under section 187 or 188:

- (a) they must immediately provide a copy of that report to every Council member and to the chief operating officer, as applicable;
- (b) the chief operating officer must immediately after receiving the report:
 - (i) add a review of that report to the agenda for the next Council meeting, and
 - (ii) contact the following people to advise them of the date, time and location of the Council meeting at which the report will be considered:
 - (A) the person who made the report, and
 - (B) where the report is made in relation to a loss of confidence in the Council member, each person whose signature is set out in the petition; and
- (c) the chief operating officer must prepare and post a copy of that report, with the name of the person making the report redacted from it, along with a notice setting out the date, time and location on which the report will be reviewed by Council in a conspicuous place:
 - (i) on the Blueberry River website, and
 - (ii) at all public buildings located on a Blueberry River reserve.

Duty of Petitioners to Be Available for Council Meeting

191. Each person whose name is set out on a petition regarding their loss of confidence in a Council member must:

- (a) make themselves available either in person or by other telephonic or electronic means on the date and at the time of the Council meeting at which the report will be heard, to confirm their signatures, and that they seek the removal of the Council member from office; and

- (b) advise the chief operating officer of the best manner in which they may be contacted during the Council meeting at which the report will be heard.

Review of Report at Council Meeting

192. At the next duly convened Council meeting following the distribution of a report under section 190:

- (a) Council must review the report;
- (b) where the report relates to a loss of confidence in a Family Councillor, Council must send a copy of the report to each member of the Family Group represented by the Family Councillor at the mailing address or email address listed by their name on the electors' list;
- (c) where the report relates to a loss of confidence in a Council member, Council must contact each person who signed the petition in the manner specified by them under section 191, to confirm their signatures, and that they seek the removal of the Council member from office; and
- (d) where the report relates to any other allegation or to a Council member's eligibility to hold office, the Council member who is the subject of the report must:
 - (i) provide his or her perspective on the allegation or eligibility criteria; and
 - (ii) either:
 - (A) admit in full to the facts set out in the report,
 - (B) admit to some of the facts set out in the report, specifying which facts are admitted and which facts are denied, or
 - (C) deny the allegations in the report.

Allegation Admitted or Signatures on Petition for Removal Confirmed

193. (1) Where a Council member admits in full to allegations in a report and the report relates to:

- (a) conduct that is subject to disciplinary action under section 184, Council must make an order under section 199; or
- (b) that Council member's eligibility to hold office under section 41, Council must make an order under section 200, the details of which must be provided to the Minister of Indigenous and Northern Affairs Canada.

(2) Where every person whose signature is on a petition regarding their loss of confidence in a Council member confirms their signature on that petition and confirms that they seek the removal of the Council member from office, Council must make an order that the Council member is removed from office, the details of which must be provided to the Minister of Indigenous and Northern Affairs Canada.

Allegation Partially Admitted or Denied

194. Where a Council member admits in part to, or denies, an allegation in a report, Council must:

- (a) consider the report;
- (b) determine whether to initiate an investigation into the allegation, taking into consideration whether an investigation is required in the best interests of Blueberry River; and
- (c) make a decision by Council resolution on whether to initiate an investigation into the allegation.

Factors to Consider in Ordering an Investigation

195. To determine under section 194 whether an investigation is in the best interest of Blueberry River, Council must consider all relevant factors, including whether:

- (a) the alleged conduct is serious in nature;
- (b) a finding that the alleged conduct is proven is likely to result in a significant disciplinary action being taken;
- (c) considerable harm has been caused by the alleged conduct to Blueberry River, a member or membership at large;
- (d) the alleged conduct involves the use, or threatened use, of a weapon or physical violence, harassment or bullying;
- (e) the Council member has relevant previous disciplinary actions against them;
- (f) the alleged conduct is criminal in nature;
- (g) there are grounds for believing that the alleged conduct may be continued or repeated; or
- (h) there is a need to protect the integrity of Council as a whole.

Appointment of Investigator

196. If Council orders an investigation under section 195, they must pass a Council resolution appointing an independent investigator.

Obligation to Cooperate and Failure to Cooperate

197. (1) A Council member who is under investigation must cooperate with the investigator and provide the investigator with all details relating to the allegation against him or her.

(2) A Council member who is under investigation and fails to comply with subsection (1) is deemed to be admitting to the allegations against him or her, in which case the Council must make an order section 199 or 200, as applicable.

Investigation Process

198. In conducting an investigation under this Part, the investigator must:

- (a) explain to the Council member who is under investigation, the processes that the investigator will follow in their conduct of the investigation;
- (b) complete their investigation within twenty-one (21) days from the date that Council appoints them;
- (c) be as thorough as necessary in their investigation, given the circumstances;
- (d) be fair and impartial in their investigation, providing both the person who made the allegations and the Council member who is under investigation equal treatment in evaluating the allegations;
- (e) be sensitive to the interests of all parties involved, and maintain confidentiality;
- (f) be focused on finding facts and evidence, including interviews of the person making the allegations, the Council member who is subject of the allegations, and any witnesses; and
- (g) when their investigation is concluded, provide the Council with a report setting out whether the investigator has determined that the evidence showed it is more likely than not that the allegations in the report are true, including the reasons for the investigator's decision.

Disciplinary Action Orders

199. (1) Where a Council member admits to a breach of section 184 or where an investigator's report concludes that the evidence shows it is more likely than not that grounds for disciplinary action exist under section 184, Council must make one (1) or more of the following orders:

- (a) that the Council member be suspended from exercising their specific responsibilities or role within Council for a specified period of time, not exceeding sixty (60) days, without honoraria;
- (b) that the Council member be issued a verbal warning;
- (c) that the Council member be issued a written warning;
- (d) that the Council member be removed from office, the details of which must be provided to the Minister of Indigenous and Northern Affairs Canada; or
- (e) that Blueberry River's legal counsel take legal action against the Council member on behalf of Blueberry River, including the commencement of civil proceedings for breach of fiduciary duty or otherwise.

(2) In making an order under subsection (1), Council must consider the following factors:

- (a) the need to ensure the membership's confidence in the integrity of Council;
- (b) the responsibility of Council as a whole to act in the best interests of the membership;
- (c) the need to deter the Council member, and all members of current and future Councils, from committing similar actions;

Member of Council

200. Where a Council member admits that they no longer meet the eligibility criteria set out in section 41 or where an investigator's report concludes that it is more likely than not a Council member no longer meets the eligibility criteria set out in section 41, the Council must make an order that the Council member is removed from office, the details of which must be provided to the Minister of Indigenous and Northern Affairs Canada.

Reasons for Decision

201. Where the Council makes an order under section 193, 199 or 200, they must provide the Council member who is the subject of that order with reasons for their decision.

Notice of Order Made Under this Part

202. Where the Council makes an order under section 193, 199 or 200:

(a) the Council chairperson must ensure that the decision and the reasons for the decision are recorded in the Council minutes; and

(b) the chief operating officer must ensure that a notice setting out the decision and reasons for decision is posted:

(i) in a conspicuous place on the Blueberry River website; and

(ii) at all public buildings located on a Blueberry River Reserve.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-857-24

STYLE OF CAUSE: CLARENCE APSASSIN AND JOSEPH APSASSIN ON
BEHALF OF THE BLUEBERRY
RIVER FIRST NATIONS EDWARD APSASSIN
FAMILY AND ELDERS GROUP v COUNCILLOR
WAYNE YAHEY, COUNCILLOR SHELLEY
GAUTHIER,
COUNCILLOR TROY WOLF, COUNCILLOR
SHERRY DOMINIC, AS COUNCIL
REPRESENTATIVES OF BLUEBERRY RIVER FIRST
NATIONS AND
CHIEF JUDY DESJARLAIS AS CHIEF
REPRESENTATIVE OF
BLUEBERRY RIVER FIRST NATIONS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 9, 2025

REASONS FOR JUDGMENT: AZMUDEH J.

DATED: NOVEMBER 17, 2025

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