Federal Court  Cour fédérale

Date: 20171115

Docket: T-199-15

Citation: 2017 FC 1038

BETWEEN:

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

Applicants

and

THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL, SHERELYN HAYDEN, GOLORIA ANTOINE, HEATHER LITTLEJOHN, GLADYS NELSON, RODNEY PATRICK, FRANK PAUAL, MARTHA LAROQUE, GRACE SMIT H, CHARLIE NELSON, EDWARD SMITH, BERNIE HENRY, LORRAINE EDWARDS

Respondents

REASONS FOR ORDER

MANDAMIN J.

[1] On May 16, 2016, I considered the Report of Ms. Sherri Thomas, the Electoral Officer for the Roseau River Anishinabe First Nation [the RRAFN] concerning an election appeal filed after the March 12, 2015 RRAFN elections for chief and councillors. The appeal had concerned

an allegation that a successful candidate bought the vote of an elector by giving her money on the day of the election.

[2] The Electoral Officer concluded the preponderance of evidence did not support the allegation that the councillor had intended to buy the elector's vote when he gave her money. In providing some money in response to her request, the councillor was most likely acting in a manner consistent with his pre-established pattern of lending or giving her money from time to time. The evidence was that it was common practice for members of the RRAFN council to lend money to community members from their own pockets. While contradictions in the evidence of witnesses would require the assessment of credibility, it did not appear that requiring witnesses to provide their evidence *viva voce* would do much to change the result. The Electoral Officer recommended dismissal of the appeal.

[3] After hearing submissions from legal counsel for the Electoral Officer and counsel for the other Parties on the law and the evidence, I issued my May 16, 2016 Order dismissing the election appeal. In doing so, I indicated reasons would follow.

[4] I have chosen to write these reasons because I am of the view this particular proceeding offers an opportunity to address not only the intersection of Indigenous law with Canadian jurisprudence but also the alternative Indigenous process of seeking resolution through agreement as contrasted with the process of litigation and adjudication.

[5] I must begin by expressing my appreciation for the invaluable participation and co-operation by all Parties and their respective counsel.

[6] My reasons follow.

I. **Background**

[7] I begin by noting that this proceeding specifically relates to Indigenous law on First Nation governance. These reasons are delayed in part because of the press of other matters but more so because I wanted to give some thought to the matter.

A. *Indigenous Laws and Canadian Jurisprudence*

[8] The law in Canada has followed its own unique development reflecting the diverse historical nature of Canadian society. In addition to the common law and civil law, courts and governments, the latter through statues and treaties, have recognised and utilized Indigenous law.

[9] Shortly after Canadian Confederation in1867, the Quebec Superior Court decided the case of *Connolly v Woolrich* (1 CNLC 70; [1867] QJ No 1 (QL)) holding a marriage in accordance with the Cree practice in what is now Manitoba was a valid marriage such that the son of that union was entitled to inherit a portion of his father's estate under Canadian law. In doing so, the Court gave recognition to Indigenous marital law, noting that the government of the time had not abrogated Indigenous marriage customs within the area where the traditional ceremony took place and that the "Court must acknowledge and enforce them." (at paras 143-144 [cited to QL])

[10] A more contemporaneous example is the seminal case of *Calder v British Columbia (AG)* ([1973] SCR 313, 34 DLR (3d) 145). This case involved a claim by the Nishga for a declaration that they held Aboriginal title to their traditional lands in British Columbia. Although the *Calder* appeal was dismissed on technical grounds, the Supreme Court of Canada held that Aboriginal title was cognizable in Canadian courts, although divided on the issue of extinguishment. The Supreme Court has since found that Aboriginal title in addition to being cognizable under our

Canadian legal system continued to exist in the instance of the 2014 case of *Tsilhqot'in Nation v British Columbia* (2014 SCC 44, [2014] 2 SCR 257).

[11] The validity of Indigenous laws may also be recognized by legislation. Subsection 2(1) of the *Indian Act*, RSC 1985, c I-5, for instance provides that the leadership (council) of certain First Nations, Indian Bands to use *Indian Act* parlance, may be chosen by 'custom', in other words by the Indigenous law of that First Nation. It is this governance aspect of Indigenous law that is under consideration in this proceeding.

B. *Custom Election Laws*

[12] Many First Nations choose to create election laws, which detail their customary practice, and set them down in a constitution or an election act. Usually these codes set out the eligibility for voters and candidates, the election process and an appeal mechanism. When there is a challenge to the validity or compliance with a provision of the election law, or there is an alleged breach of natural justice in the election or appeal process that cannot be resolved within the First Nation, an applicant may choose to bring an application for judicial review in the Federal Court.

[13] I canvassed the jurisdiction of the Federal Court to conduct judicial reviews of First Nations' governance issues in *Gamblin v Norway House Cree Nation Band Council* (2012 FC 1536, [2013] 2 CNLR 193). In that case I concluded the Federal Court did have jurisdiction to hear such matters. However, while the Federal Court has the jurisdiction to adjudicate First Nations custom governance issues arising, the law that the Court applies usually is the Indigenous law of the First Nation in question.

[14] The Federal Court receives a number of applications for judicial review on First Nations custom governance issues each year. Litigation over such applications can be both bruising for community members and costly for the First Nation while only resolving narrow legal issues. Such court proceedings can cause acrimony amongst First Nation members and leave hard feelings afterward.

[15] The Federal Court, in its consultations through the Federal Court Aboriginal Law Bar Liaison Committee and sessions with Indigenous elders, notably at Turtle Lodge, Manitoba and Kitigan Zibi, Quebec, has explored alternatives for resolving such disputes more in keeping with the Indigenous practice of resolving disputes through agreement.

[16] An alternative process for dispute resolution was first set out in the 2012 First Nations Dispute Resolution Pilot Project. This process is now incorporated into the Federal Court Practice Guidelines for Aboriginal Law Proceedings.

[17] The Aboriginal dispute resolution process proceeds by agreement of the parties. All the while, it is to be remembered that the option remains for parties to proceed by way of litigation in court if they so choose.

II. **The Present Application**

[18] The RRAFN select their leaders by their own Indigenous laws: the *Roseau River Anishinabe First Nation Constitution* [*RRAFN Constitution*] and the *Roseau River Anisihinabe First Nation Election Act* [*RRAFN Election Act*]. Their legislation created two entities, the Custom Council consisting of family representatives and the Chief and Council consisting of elected First Nations representatives.

[19] In the past, the RRAFN experienced issues between these two entities which lead to multiple applications for judicial review in Federal Court as demonstrated by the adjudicated decisions in 2003 FCT 168, 2009 FC 655, 2013 FC 180 and 2014 FC 1215.

[20] In the present application, the road to resolution took a different path.

[21] In January 2015, a dispute arose between the family Custom Council and the elected Council. The Applicants, the RRAFN Chief and Council, applied for an urgent injunctive order related to the impending election for chief and council. The substantive dispute concerned the jurisdiction, authority and makeup of the RRAFN Custom Council but the immediate issue concerned the conduct of the impending RRAFN election. The elected Chief and Council had chosen an electoral officer to conduct the election but the Custom Council disputed that decision contending it should chose the electoral officer.

[22] Following the procedure for the First Nation Dispute Resolution, I convened an informal teleconference with legal counsel for the contending Parties to explore the prospects for resolving the issues in a way satisfactory to all Parties. Out of this discussion, all Parties - the Applicants, the Respondents and other interested Parties - agreed to a consent order to have joint electoral officers functioning with a judicial officer, myself, to administratively decide election disputes in keeping with the provisions of the *RRAFN Election Act*.

[23] In assuming this role, I followed the precedent set by Justice François Lemieux in *Mohawks of Akwesasne v Canada (Human Resources and Social Development)*, 2010 FC 754, 191 ACWS (3d) 401, where he undertook to decide the issue of costs although the main substance of the application had been resolved by agreement of the parties. Justice Lemieux

undertook this role as the settlement agreement reached in resolving the application included a term "that the payment of costs shall be determined by this Court acting as an arbitrator based upon written submissions filed with the Court, which determination shall be binding upon the parties and not subject to appeal." (at para 5)

A. *The Initial Consent Order*

[24] On February 16, 2015 I issued the Consent Order which reflected the agreement of the Parties. It provided for two Co-Electoral Officers, one appointed by the Applicant Chief and Council and one appointed by the Respondent Custom Council. The two Co-Electoral Officers would decide electoral matters jointly and where they were not in agreement, they would seek such direction or order from myself as may be appropriate on an urgent basis.

[25] The Consent Order also provided that any appeal would be decided by consensus of the two Co-Electoral Officers and, if no consensus, they would refer the appeal to myself whose decision would be binding as though it were a decision of a duly appointed appeal committee under the *RRAFN Election Act*. Otherwise and throughout, the *RRAFN Election Act* remained in force.

[26] The RRAFN election for Chief and Council proceeded on schedule on March 12, 2016.

B. *The Allegation Arising from the Election and Subsequent Court Orders*

[27] There was an appeal after the March 12, 2015 RRFN election concerning an allegation of vote buying by one of the candidates who was elected as a councillor. The Co-Electoral Officers did not agree on whether or not to accept the appeal, one viewing the appeal as deficient in form,

the other viewing the appeal as substantive in content. When it was time to refer the question to me, a difficulty arose because one of the Co-Electoral Officers was no longer available.

[28] On receiving the report of the appeal by the remaining Co-Electoral Officer, I issued a June 30, 2015 Direction that:

i) the appeal was to be considered validly made for the purpose of initiating the appeal process;

ii) notice was to be provided to the councillor whose election was being appealed;

iii) a report on the election and its results was to be prepared together with the rules, regulations or procedures that applied in addition to the *RRAFN Election Act* if any; and

iv) the Parties were to participate in a teleconference on the next steps to be followed.

[29] After the teleconference with the Parties, I followed up with a September 1, 2015 Direction indicating that the Parties were to determine how they wished the election appeal to proceed and further directed to the Federal Court Registry to provide all Parties with the relevant documentation on file with the Court in order that every Party would be fully apprised of the history of the proceeding.

[30] After the further teleconference with the Parties and on their consent, I issued the November 3, 2015 Consent Order that in proceeding to hear and decide the election appeal:

i) standing was granted, in relation to this election appeal, to:

i. the remaining Electoral Officer, Ms. Sherri Anne Thomas

ii. Mr. Cecil James, the Councillor whose election was appealed, separate from his capacity as a Councillor of the Applicant;

ii) the election appeal would be treated as a validly submitted;

iii) the Electoral Officer would have authority to investigate the allegations with all witness statements being confirmed by affidavit, and confirm other evidence obtained in the investigation process though her own affidavit; in exercising this authority the Electoral Officer was also able to come before the court if requiring an order for her to examine property or non-party witnesses;

iv) Mr. James, along with the Applicant and Respondent, would be served with all applicable reports and affidavits obtained by the Electoral Officer and Mr. James would also provide any responding affidavit to all parties;

v) after the exchange of affidavits, each would have the opportunity to cross-examine on the affidavits and file transcripts thereof;

vi) on completion of cross-examinations, the RRAFN Custom Counsel, the RRAFN Chief and Council, and Mr. James were to serve written representations in respect of the Election Appeal on the Electoral Officer and each other;

vii) the Parties were to then requisition a hearing before myself. The Electoral Officer, Mr. James, the Chief and Council, and the Custom Council were all entitled to make representations to the Court at the hearing.

[31] As previously noted, all Parties consented to my jurisdiction as the proper authority for consideration and determination of the election appeal as per the earlier February 16, 2016 Order.

[32] Finally, the November 3rd Order specified this Court may consider relevant sources of law, including but not limited to the *RRAFN Election Act*, the *RRAFN Constitution*, as well as all

relevant Canadian legislation and jurisprudence. While not expressly stated, the process adopted effectively followed Rule 52(1) of the *Federal Courts Rules*, SOR/98-106.

[33] Rule 52 of the *Federal Courts Rules* provides:

Role of assessor	Services d'un assesseur
52 (1) The Court may call on an assessor	52 (1) La Cour peut demander à un assesseur :
(a) to assist the Court in understanding technical evidence; or	a) de l'aider à comprendre des éléments de preuve techniques;
(b) to provide a written opinion in a proceeding.	b) de fournir un avis écrit dans une instance.
Fees and disbursements	Honoraires et débours
(2) An order made under subsection (1) shall provide for payment of the fees and disbursements of the assessor.	(2) L'ordonnance rendue en application du paragraphe (1) doit prévoir le paiement des honoraires et débours de l'assesseur.
Communications with assessor	Communications avec l'assesseur
(3) All communications between the Court and an assessor shall be in open court.	(3) Les communications entre la Cour et l'assesseur se font en audience publique.
Form and content of question	Forme et contenu de la question
(4) Before requesting a written opinion from an assessor, the Court shall allow the parties to make submissions in respect of the form and content of the question to be asked.	(4) Avant de demander un avis écrit de l'assesseur, la Cour donne aux parties l'occasion de présenter leurs observations sur la forme et le contenu de la question à soumettre.
Answer by assessor	Réponse de l'assesseur
(5) Before judgment is rendered, the Court shall provide the parties with the questions asked of, and any opinion given by, an assessor and give them an opportunity to make submissions thereon.	(5) Avant de rendre jugement, la Cour transmet aux parties la question soumise et l'avis de l'assesseur et leur donne l'occasion de présenter leurs observations à cet égard.

[34] A leading case on the role of assessors is *Porto Seguro Companhia De Seguros Gerais v Belcan SA*, [1997] 3 SCR 1278, 153 DLR (4th) 577. In that case, the Supreme Court modified the existing rule to permit assessors to give the judge assistance on technical matters and on matters of disputed facts so long as the advice is disclosed to the parties who are to have the right of response (at para 40).

[35] When assessors advise judges on matters of fact in dispute between the parties, natural justice requires disclosure of the questions put to the assessor and the assessor's response, as well as a right of response by the parties.

[36] As an aside, the role assigned to the Electoral Officer in this proceeding has paralleled the discussions of the Federal Court Aboriginal Law Bar Liaison Committee on the proposal for the use of Assessors in Aboriginal law proceedings.

C. *The Role of the Electoral Officer*

[37] The Electoral Officer investigated the allegation contained in the March 13, 2015 appeal of the March 12, 2015 election between November 2015 and March 2016 by interviewing witnesses. She was assisted in this exercise by legal counsel. In conducting this investigation she was assisting the Court in the determination of how to dispose of the election appeal and was not an advocate for one party or another.

III. **The Issues to be Addressed**

[38] There are two questions arising in this appeal; the first is a legal issue: Is vote buying a valid ground of appeal? The second is factual in nature, being whether the facts disclose vote buying in the election.

A. *Is Vote Buying a Ground for Appeal in an RRAFN Election?*

[39] There is no specific prohibition to "vote buying" in the *RRAFN Election Act*. Paragraph 4(i) sets out:

> (i) Any candidate who is running for office is not eligible, who is fraudulant [fraudulent] or criminal in his/her actions to gain electors' support.

[40] Subsection 10(b) of the *RRAFN Election Act* sets out grounds for an election appeal:

> i) election practices which contravene the Act. [and]
>
> ii) illegal or criminal activity on the part of a candidate which might discredit the high integrity of the tribal government of the Roseau River Anishinabe First Nation.

[41] Having reviewed the memorandum of fact and law prepared by the Electoral Officer I agree with her conclusion that vote buying was a valid ground for appeal of the election result. Without restating the entirety of her analysis, the Electoral Officer suggested that for a valid appeal issue to exist "vote buying" needed to be, according to the *RRAFN Election Act*, either "fraudulent", "illegal" or "criminal".

[42] In looking at these grounds the Electoral Officer stated that although vote buying is immoral it might not amount to fraudulent misrepresentation. She further observed that although vote buying in relation to a First Nation's council election is not explicitly outlined in the *Criminal Code*, RSC 1985, c C-46, it most closely relates to the offence of purchasing public office, s 124, and criminal fraud, s 380(1), although it, vote buying, may not fit the *Criminal Code's* exact requirements.

[43] The Electoral Officer notes that the use of the word illegal encompasses not only criminal matters but also matters against other types of law such as other statutes, the common law, equity

and Indigenous law. The Electoral Officer states that under the common law bribing someone to vote a certain way is an offence, citing Henry Hardcastle, *Bushby's Manual on the Practice of Elections*, 4th ed (London: Stevens and Haynes, 1874) at 107-115 [*Bushby's*]. She concludes by stating that if this did not cause vote buying to fall within the criminal or illegal grounds to appeal the election, statutory interpretation would, to avoid an absurd result, read in a provision against vote buying to the *RRAFN Election Act*.

[44] Having examined the Electoral Officer's analysis I agree with the end result that vote buying is a valid ground for appeal under the *RRAFN Election Act* and below I set out my analysis of how I arrived at this conclusion.

[45] The modern rule for statutory interpretation was set out by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd,* [1998] 1 SCR 27 at 41, 36 OR (3d) 418, where the Court cited with approval the following statement of Elmer Driedger:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[46] This approach has application with custom governance legislation enacted by First Nations, with this Court using this principle in the past to examine the purpose of a different First Nation's Election Act in *Meeches v Meeches*, 2013 FC 196, 428 FTR 208. In this case, Justice James Russell, when using the interpretation technique outlined in *Rizzo*, found at paragraph 85 that:

> The purpose of the Election Act is to ensure fair elections that lead to legitimate government. It is not the purpose of Election Act to allow officers who may have come to power in an unfair election to remain in power at their own discretion. The Election Act must be read in a way that makes sense of its obvious purposes.

[47] Although an appeal of this decision was allowed in part, the Federal Court of Appeal upheld Justice Russell's purposeful interpretation of the sections at issue (2013 FCA 177 at paras 43-45, [2014] 1 CNLR 267).

[48] Turing to the present case, a reading of the *RRAFN Election Act* as a whole discloses it has as its purpose the holding of fair elections that reflect the free choice of the RRAFN electors in deciding their leadership. The practice of vote buying is a corrupt practice and contrary the holding of fair elections.

[49] The *RRAFN Election Act* also requires at subsection 12 (a) that elected officials shall "[u]phold the Declaration as cited in this Act." In examining the materials there are two declarations provided with the *Act*. One Declaration is found within section 1 of the *Act* and provides general statement, much like a preamble, that includes a statement that those seeking office "must have demonstrated characteristics which reflect[] Trust, Fairness, Confidence and Competence." The other declaration, which is appended to the end of the *Act*, is titled "Declaration of Office for Elected Officials" in which a number of undertakings are listed for those elected including that they must promise and declare that they "have NOT received and WILL NOT receive payment or reward for the exercises of any corrupt practice or illegal execution of this office." [emphasis in original]

[50] In interpreting these two declarations and the *Act* as a whole, it is clear that those who do not have the characteristics of fairness, such as those who engage in corrupt practice to receive a reward in the execution of their office, are in turn eligible for removal from office under subsection 14(a) of the *RRAFN Election Act*.

[51] A prohibition against unfair and corrupt practice for those in office, but not for those in the process of seeking election to that office, would be illogical and certainly contrary to the overall purpose of the *RRAFN Election Act* which is the holding of fair elections that reflect the free choice of the RRAFN electors in deciding their leadership.

[52] As a result I conclude that the immoral and corrupt practice of vote buying is contrary to the public interest of the RRAFN to have free and fair elections and is therefore contrary to the *RRAFN Election Act*.

[53] In arriving at this position I would read the term 'corrupt practice' as included in the *RRAFN Election Act's* paragraphs 4(i) and 10(b)(ii) reference to 'criminal' actions or activity such that vote buying is a ground for appeal in a RRAFN election appeal.

[54] Although when looking at the word 'criminal' on its own the first response is to consider criminal offences, in the context of the *RRAFN Election Act* it is clearly intended to mean more than just criminal offences given the associated references in paragraphs 4(i) and 10(b)(ii) to "actions to gain electors' support" and "activity … which might discredit the high integrity of the tribal government of the Roseau River Anishinabe First Nation" respectively. In examining these associated references criminal is to be interpreted as also including "scandalous [or] deplorable" (*The Canadian Oxford Dictionary*, 2nd ed, sub verbo "criminal") conduct such as corrupt practices, including vote buying.

[55] In arriving at such an interpretation it also prevents the absurd result noted above of persons being prohibited, only while holding office, from corrupt practices. This method of interpretation in such a way as to avoid absurd results has been recently affirmed by the Supreme

Court in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paragraph 31, [2017] SCJ No 50 (QL), with the Court referencing paragraph 27 of Rizzo for the proposition "that the legislature does not intend to produce absurd consequences."

[56] Although not part of my reasons, I would note that since my oral determination of this matter, this Court has also, in another case where a custom election act and vote buying was at issue, found that "corrupt practice" should be a ground of election appeal even when there were no explicit grounds for election appeal provided in the First Nation's custom election act nor any reference to "corrupt practice" or "vote buying", with the only related reference being that elected officials could be removed from office for misconduct, misfeasance, or neglect of duty (*Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 78-80, [2016] FCJ No 569 (QL), upheld in its entirety by the Federal Court of Appeal in 2017 FCA 203, [2017] FCJ No 914 (QL)).

B. *What is Involved in Vote Buying?*

[57] At common law, bribery occurs when a vote is procured from an elector for valuable consideration. Both the impugned candidate and compromised elector must agree to the exchange of consideration in return for a promise to vote a certain way and, at common law, no bribery occurs if no condition is placed on the consideration given (*Bushby's* at 107-109).

[58] In *McKay v Glen* (1880), 3 SCR 641, 1880 CanLII 27 (SCC), the Supreme Court of Canada declined to find bribery where a candidate had made unconditional charitable gifts absent proof that they were offered for the purpose of influencing voting. In *Generux v Cuthbert* (1884), 9 S.C.R. 102, 1884 CanLII 37 (SCC), the Supreme Court found the defendant had committed a corrupt practice contrary to section 96 of the *Dominion Elections Act*, 1874, 37 Vic, c 9, but did not find he committed bribery where pre-paid train tickets were given to voters in

order to allow them to vote in an election but where voters were not asked to vote for a particular candidate.

[59] In other words, there is no bribery, or vote buying, when money is given without any condition to vote in a certain way.

IV. **The Electoral Officer's Findings of Fact**

[60] The Electoral Officer interviewed electors, including the elector who appealed the election. The Electoral Officer confirmed their information by having each provide affidavits confirming their statements.

[61] The Electoral Officer also interviewed other electors who gave evidence refuting the allegations. Again she took affidavits from each.

[62] All of the Parties, including the candidate whose election was appealed, had the opportunity to cross examine the deponents on their affidavits.

[63] At the conclusion of the process, the Electoral Officer reported that the uncontroverted evidence was:

i) that the candidate and the elector met in person on the day of the election;

ii) that the candidate gave the elector $20 on the day of the election;

iii) that the candidate had a history of giving or lending money to the elector; and

iv) that the elector did not vote in the election.

[64] What is clear in the Electoral Officer's report is that the elector requested money from the candidate. When the candidate asked her to vote for him, she suggested he should "hook it up" with the money given either as a loan or gift.

[65] The candidate had lent money to the elector previously. The candidate testified under cross-examination that First Nations members would frequently approach him for money in varying amounts given his position as a sitting councillor and that other members of the Council had engaged in this practice.

[66] Generally, this practice of loans was discontinued during elections. The candidate personally did not see any loans or gifts by other Council members during the election period. He admitted struggling with the idea of giving or loaning money to the elector before the polling station closed. He relented to her request when he was satisfied the elector would not vote because she appeared intoxicated, stated she had no identification, and as a result would be disqualified from voting.

[67] The Electoral Officer carefully assessed the evidence gathered. The only credible evidence is that the candidate did not expressly ask the elector to vote for him in exchange for money. The suggestion for cash for a vote was raised by the elector. The evidence tends to show the candidate was acting in a manner consistent with his pre-established relationship with the elector, namely he would lend her money from time to time. The candidate considered such to be a loan but was aware it may not be repaid.

[68] The elector's allegation that the candidate approached her to buy her vote was not supported by other witnesses present at the exchange of the money. In summary, the allegation

that the candidate intended to buy the elector's vote was not supported by the preponderance of the evidence.

[69] While the contradictions between the evidence of the witnesses require assessments of credibility, which is outside the Electoral Officer's jurisdiction, she was of the view that that requiring witnesses to provide their evidence *viva voce* would not change the assessment of the evidence.

[70] As a result the Electoral Officer recommended that I dismiss the appeal.

V. **Decision on the Appeal**

[71] Legal counsel for the Electoral Officer made submissions based on the Memorandum of Fact and Law which I append as Appendix A. Legal counsel for Mr. James concurred with both the legal analysis and recommendation to dismiss the Appeal. Legal counsel for the Applicant Chief and Council agreed with the analysis that vote buying was prohibited by the *RRAFN Election Act* but refrained from submissions on the Appeal. The Respondent Custom Council took no position.

[72] I agreed and accepted the facts as discerned by the Electoral Officer. In accepting the recommendation based on those facts, I issued my May 16, 2016 Order dismissing the Appeal.

VI. **Further Observations by the Court**

[73] I would add that in this proceeding there were a number of features that accorded with the advice given by the Elders advising the Federal Court to have regard to resolving disputes by agreement. These are measures that ensured those involved the opportunity to participate and be

heard, to present and examine evidence and to make submissions on what should be the outcome:

i) all participants had the opportunity to contribute in determining a way to move forward and agreed with the procedures that I set out in the consent court orders;

ii) other than the teleconferences and the final hearing, the events were conducted in the RRAFN community or at locations acceptable to all;

iii) the law that governed was the law of the RRAFN, namely the *RRAFN Election Act*;

iv) the Electoral Officer was a member of the RRAFN and had a depth of knowledge of the First Nation that went well beyond what a Court could learn in the course of any application;

v) the Electoral Officer was neutral in that she was not an advocate of any party but rather engaged in a fact finding process to assist me in coming to a decision on the appeal; additionally, the Electoral Officer was well supported by legal counsel;

vi) all Parties had the opportunity to present evidence to the Electoral Officer and participate in examination on affidavits by witnesses;

vii) the focus of the gathering of evidence was to ascertain what happed and not on challenging or discrediting the evidence of others.

viii) the entire process emphasized finding ways to agree on a process to reach a resolution of the issue at hand.

[74] I attach the following as appendices to these reasons:

A. Memorandum of Fact and Law of the Electoral Officer,

B. February 16, 2015 Consent Order,

C. November 3, 2015 Consent Order,

D. May 16, 2016 Order,

E. Part III, subsection A - Dispute Resolution Through Dialogue, Federal Court Practice Guidelines for Aboriginal Law Proceedings.

[75] In closing, it was my sense of the outcome, as represented to me in the May 16, 2016 hearing, that there was no acrimony or dissatisfaction with this result. The approach followed avoided protracted litigation of issues and enabled the 2015 RRAFN election process to proceed to an acceptable conclusion.

"Leonard S. Mandamin"
Judge

Ottawa, Ontario
November 15, 2017

APPENDIX A

Court File No. T-199-15

FEDERAL COURT

BETWEEN:

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

Applicants,

- and -

THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL, SHERELYN HAYDEN, GLORIA ANTOINE, HEATHER LITTLEJOHN, GLADYS NELSON, RODNEY PATRICK, FRANK PAUL, MARTHA LAROQUE, GRACE SMITH, CHARLIE NELSON, EDWARD SMITH, BERNIE HENRY, LORRAINE EDWARDS,

Respondents.

MEMORANDUM OF FACT AND LAW
OF THE ELECTORAL OFFICER, SHERRI THOMAS

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PART I – STATEMENT OF FACTS

Purpose

1. Pursuant to the Consent Order signed by the Honourable Mr. Justice Mandamin and dated February 16, 2015, Sherri Thomas ("Sherri") was appointed as 1 of 2 electoral officers in respect of the 2015 Roseau River Anishinabe First Nation Election ("Election").

2. Pursuant to the Order of the Honourable Mr. Justice Mandamin dated November 3, 2015 (the "November Order"), Sherri was given the authority to investigate the allegations contained in an appeal of the results of the Election received on March 13, 2015 (the "Election Appeal") which was also accepted as a validly submitted appeal.

3. Between November 12, 2015 and March 12, 2016, Sherri conducted her investigation by interviewing witnesses.

4. The results of the investigation carried out by Sherri are set out in her Affidavit affirmed January 19, 2016, in the Affidavit of Cecil James Bruce, Sworn February 12, 2016, the Affidavit of Erin Egachie, Sworn February 12, 2016 and the Transcripts of the Cross-Examinations of Cecil James Bruce, Erin Egachie, Susan Carollyn Antoine, Barry Antoine and Sherri Anne Thomas, all of which have been filed herein.

5. The role of Sherri is to assist this Honourable Court in determining how it should to dispose of the Election Appeal. It is not to advocate for one party or another.

6.

PART II – POINTS IN ISSUE

ISSUE 1: **Should the Election Appeal be allowed or dismissed?**

i. Is Vote Buying a Valid Ground of Appeal?

ii. Did Cecil Buy Selina's Vote?

ISSUE 2: **What is the most appropriate remedy in this case?**

PART III – SUBMISSION

ISSUE 1: Should the Election Appeal be allowed or dismissed?

Is Vote Buying a Valid Ground for Appeal?

7. The Election Appeal is contained in the email of Barry (Buster) Antoine ("Barry") dated March 14, 2015 which is attached as Exhibit "B" to the Affidavit of Sherri Anne Thomas, affirmed January 19, 2016. In his email, Barry alleges that Cecil James ("Cecil") and Erin Egachie ("Erin") bought votes in respect of the Election. Attached to his Email, Barry included a document titled "Affidavit" purporting to bear the signature of Selina Thomas ("Selina"). This document states that on March 12, 2015, the day of the Election, Cecil gave Selina $80 and then instructed her to vote for him as well as for Erin.

8. Elections for the Roseau River Anishinabe First Nation ("RRAFN") are conducted pursuant to custom legislation called the Roseau River Anishinabe First Nation Election Act and Regulations (the "Act").

9. Section 10(b) of the Act "restricts" the grounds for any election appeal to:

a. practices which contravene the Act; or

b. illegal or criminal activity on the part of a candidate.

10. In other words, an election can be appealed on the basis of a practice which does not contravene the Act but which is otherwise criminal or illegal in nature.

11. Does the conduct complained of in the Election Appeal (i.e. vote buying) constitute either a practice which contravenes the Act or an illegal or criminal act?

12. There is no specific reference to "vote buying" in the Act. In other words, there is nothing in the Act which expressly forbids the practice. Subsection 4(i) of the Act sets out that "any candidate who is running for office is not eligible who is fraudulant [fraudulent] or criminal in his/her actions to gain electors' support." Presumably then, a practice which could lead to an ineligible candidate taking office would contravene the Act. However, a candidate is only ineligible under s. 4(i) of the Act if their actions to gain the support of electors are "fraudulent" or "criminal." This brings us back to determining whether "vote buying" constitutes a "fraudulent," "illegal" or "criminal" act.

13. Is vote-buying a "fraudulent" action designed to gain the support of electors? Fraud involves a misrepresentation, an untrue statement which the maker knows to be false and upon which the recipient reasonably relies. The Act clearly seeks to limit the ability of candidates to make "false promises" or "...place false hopes and expectations in the minds of the people." Vote-buying involves an offer of money in exchange for a promise to vote in a particular way, the intention being to influence the outcome of the election. When examined in that lens, it is clear that while vote-buying is an immoral act, it is not necessarily amount to fraud.

Ref: *Kelemen v. El-Homeira,* [1999] A.J. No. 1279 at para. 7 – **TAB 10(A)**

14. The word "illegal" as used in s. 10(b) of the Act carries a different meaning than the word "criminal" also issued in that section of the Act. "Illegal" is defined in Black's Law Dictionary as "forbidden by law; unlawful" whereas the word is defined as "having the character of a crime; in nature of a crime" or "connected with the administration of the penal justice."

Ref: *Black's Law Dictionary*, 8th ed. (2004) – **TAB 10(B)**

15. However, in ***Rios v. Canada (Minister of Employment and Immigration), [1990] F.C.J. No. 609***, the Federal Court of Appeal (dissent)

considered the definition of the word "Lawful" which was distinguished from the word "legal." The term "illegal" was associated with the word "invalid" to suggest that an illegal act was one which was not compliant with technical or formal rules but which did not necessarily import a moral substance or ethical permissibility.

Ref: *Rios v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 609 at pg. 5 – **TAB 10(C)**

16. If one accepts this characterization of the word "illegal" as representing a technical violation of a law, then the distinction between an "illegal" act and a "criminal" act becomes clear. An act may be illegal in the sense that it does not comply with a specific law but it may not be criminal.

17. The word "illegal" also renders s. 10(b)(i) of the Act more restrictive than s. 10(b)(ii) of the Act. Recall that s. 10(b)(i) of the Act permits an election to be appealed as a result of an alleged practice contravening the Act. Section 10(b)(ii) therefore applies to conduct which may not only contravene the Act but is also forbidden by law generally (i.e. another statute, common law, equity or to an unwritten custom, tradition or practice of the RRAFN). As a result, even if "vote buying" is not expressly prohibited under the Act, it may still be an "illegal" practice and therefore form the basis of an election appeal.

18. At common law, bribery is a criminal and a civil offence that is committed whenever a vote is procured from an elector for valuable consideration, both parties to the transaction agreeing to that intent and actionable regardless of whether the voter actually votes. It may therefore be argued that vote-buying is captured as a ground of appeal because of its status as an illegal act at common law.

Ref: *Bushby's Manual of the Practice of Elections*, 4th ed. 1874 at pg. 107 – **TAB 10(D)**

Ref: *Langois c. Auger*, 29 C.S. 373 at paras. 20-21 – **TAB 10(E)**

19. There are no specific provisions of the *Criminal Code* which deal with vote buying as it does not appear that the offence of purchasing office pertains to the offices of an Aboriginal Government. Vote buying may however constitute criminal fraud. It should be recalled however be noted that bribery is a common law offence carrying both criminal and civil remedies.

Ref: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 380(1) and 124 – **TAB 10(F)**

Ref: *Bushby's Manual of the Practice of Elections*, 4th ed. 1874 at pgs. 114-115 – **TAB 10(D)**

20. However, in the event that "vote buying" does not clearly constitute a practice that contravenes the Act or which is illegal or constitutes criminal activity, it could be concluded that the drafters of the Act either intended to exclude vote buying as a ground or did not turn their minds to the possibility of an appeal on that basis. This creates ambiguity which must be resolved through statutory interpretation.

21. The Act is not the legislation of the Federal or a Provincial Government, it is the legislation of an Aboriginal Government. That said, it must still be interpreted in accordance with statutory interpretation principles developed pursuant to the common law.

Ref: *Fitzpatrick v. Boucher*, 2012 FCA 212 at para. 25 – **TAB 10(G)**

22. The cardinal rule for statutory interpretation was set out by the Supreme Court of Canada in ***Rizzo v. Rizzo Shoes Ltd., [1987] 1 S.C.R. 27*** and is as follows:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Ref: *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21 – **TAB 10(H)**

23. The purpose of custom election legislation was identified by the Honourable Mr. Justice Russell of this Honourable Court in ***Meeches v. Meeches, 2013 FC 196*** when he wrote (in reference to the custom election act of the Long Plain First Nation):

> "The purpose of the Election Act is to ensure fair elections that lead to legitimate government. It is not the purpose of Election Act to allow officers who may have come to power in an unfair election to remain in power at their own discretion. The Election Act must be read in a way that makes sense of its obvious purposes."

Ref: *Meeches v. Meeches*, 2013 FC 196 at para. 85 – **TAB 10(I)**

24. If it is accepted then that the purpose of this Act is also to ensure a fair election, a legitimate government and that those who come into power unfairly do not remain in power at their own discretion, it would run contrary to the purpose of the Act and would arguably lead to an absurdity if the results of an RRAFN election could not be appealed on the basis of allegations of vote buying.

25. Though Courts should typically avoid the practice of filling in legislatives "gaps," an exception to this rule can be found when doing so avoids an otherwise absurd result. According to the Supreme Court of Canada in *Rizzo*, "An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or

incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment."

Ref: *Charles v. Canada (Attorney General)*, [1996] O.J. No. 914 at paras. 21-22 – **TAB 10(J)**

Ref: *Rizzo v. Rizzo Shoes Ltd.*, [1987] 1 S.C.R. 27 at para. 27 – **TAB 10(H)**

26. As a result, if this Honourable Court concludes that "vote buying" is not an enumerated ground for appeal under the Act, either because it is not a practice which contravenes the Act or is illegal or a criminal activity, it is respectfully submitted that this "absurd" result could be resolved by reading that ground into the Act.

Did Cecil buy Selina's Vote?

27. At common law, *bribery* occurs when a vote is, directly or indirectly, procured from an elector for valuable consideration. Both parties must agree to the transaction (i.e. the exchange of consideration for vote).

Ref: *Bushby's Manual of the Practice of Elections*, 4th ed. 1874 at pgs. 107-115 – **TAB 10(D)**

28. The fact that a vote must be procured creates a clear distinction between consideration given conditionally (i.e. for a vote) and consideration given *unconditionally*. As a result, if no condition is placed on the consideration given, there is no bribery at common law.

Ref: *Bushby's Manual of the Practice of Elections*, 4th ed. 1874 at pgs. 107-115 – **TAB 10(D)**

29. Therefore, in ***Genereux v. Cuthbert (1884), 9 S.C.R. 102***, the Supreme Court of Canada found that the defendant had committed a corrupt practice contrary to the provisions of the *Dominion Elections Act, 1874* but failed to find that he had committed bribery where pre-paid train tickets were given to voters in order to allow them to vote in an election but where voters were not asked to vote for a particular candidate.

Ref: *Genereux v. Cuthbert (1884)*, 9 S.C.R. 102 at pg. 5 – **TAB 10(K)**

30. A similar result occurred in ***McKay v. Glen (1880), 3 S.C.R. 641*** where the Supreme Court of Canada declined to find bribery where a candidate had made unconditional charitable gifts.

Ref: *McKay v. Glen (1880)*, 3 S.C.R. 641 – **TAB 10(L)**

EVIDENCE SUPPORTING APPEAL:

31. Sherri carried out her investigation by interviewing Barry who testified to having been told by Selina that Cecil had paid her $80.00 in exchange for her vote. Barry gave evidence under oath that he had prepared the "Affidavit" which Selina ultimately signed which stated that Cecil had paid her $80.00 to vote for him and for Erin.

32. Selina was subsequently interviewed and gave evidence under oath that Cecil gave her and her sister, Creelyn, $60.00 each on the condition that they vote for Cecil and Erin. Selina then went on to state that she received an additional $20.00 and cigarettes from Erin.

33. Further, Susan gave evidence under oath corroborating some of the evidence previously given by both Barry and Selina.

34. Finally, Selina's mother Sharon also testified under oath that Selina had told her that Cecil had given Selina money in exchange for her vote, though the specific details are somewhat different than those set out by Selina, Barry and Susan.

35. It should be noted that, according to Selina, the only people who witnessed Cecil give money to Selina in exchange for her vote are:

a. Selina;

b. Cecil;

c. Creelyn; and

d. Erin.

36. It should also be noted that Selina was not cross-examined on her evidence by Cecil or anyone else.

37. Barry and Susan were cross-examined on their evidence. On cross-examination, Barry confirmed that he did not witness any dealings between Cecil, Erin and Selina and therefore had no first-hand knowledge of the events alleged by Selina in her Appeal. Susan confirmed her evidence which also did not place her as a witness to any dealings between Cecil and Selina.

EVIDENCE REFUTING APPEAL:

38. Creelyn gave evidence under oath that she did not see Cecil give money to Selina. She did however give evidence that Selina and Cecil engaged in a conversation on Facebook and that, in the course of this conversation, Selina had asked Cecil for money. Creelyn also stated that she observed Selina drunk on

the day of the Election and assumed that Cecil had given her the money she would have needed to get drunk. Finally, Creelyn indicated that she did not receive money from anyone for her vote.

39. The evidence given by Creelyn challenges the credibility of the evidence given by her sister Selina but, more importantly, it narrows the field of witnesses who are potentially able to give first-hand accounts of the alleged exchange between Cecil and Selina. It also precludes a finding that Cecile gave money to Creelyn for her vote.

40. Erin gave evidence under oath denying the allegations made by Selina that Erin gave her money in exchange for her vote. Erin did confirm that she gave Selina a ride in her car and "a dollar" on the day of the Election, but stated that she did this without expectation of anything in return. With respect to the allegations against her husband Cecil, Erin gave evidence that she dropped him off at the Government Office before she met Selina.

41. Erin was cross-examined on her evidence. On cross-examination, Erin testified that she observed Cecil with Selina at the Government Office but denied the allegation contained in Selina's Affidavit indicating that she was present when Cecil gave Selina money in exchange for her vote. If accepted, Erin's evidence therefore further narrows the field of witnesses who are potentially able to give first-hand accounts of the alleged exchange between Cecil and Selina.

42. Finally, Cecil gave evidence confirming that, on the day of the Election, he met with Selina and loaned her money ($20). Cecil does however deny the allegation that he loaned Selina the money *in exchange for her vote*. Cecil presented evidence (a series of exchanges on Facebook) that he had a history of loaning money to Selina. The Facebook exchanges presented by Cecil show that, on the morning of the Election, Cecil and Selina had a conversation wherein he reminded her to vote for him. In reply, Selina indicated that he "...should hook it up wit 20 or burrow me?" and, in response to that comment, Cecil replied

"tonight." However, approximately 30 minutes after making this comment, Cecil informed Selina that he was "at the government office" which prompted Selina to write that she would attend there soon.

43. This exchange between Selina and Cecil on Facebook completely contradicts the series of events Selina previously laid out under oath. Selina stated that Cecil and Erin stopped her and Creelyn by the side of the road whereas her exchange on Facebook suggests that she met up with Cecil at the Government Office.

UNCONTROVERTED EVIDENCE:

44. Notwithstanding the contradictions, some of the allegations made by Selina are admitted by Cecil. Specifically, the following appears not to be contested:

a. that Cecil and Selina met in person on the day of the Election;

b. that Cecil gave Selina at least $20 on the day of the Election;

c. that Cecil had a history of giving or lending money to Selina; and

d. that Selina did not vote in the Election.

45. What is also clear from their exchange on Facebook on the morning of the Election is that Selina requested money from Cecil and that it was Selina who suggested, in response Cecil reminder her to vote for him that he should "hook it up" with money (either as a gift or a loan).

46. In terms of the relationship between Cecil and Selina, the exchanges between them on Facebook indicate previous instances wherein Cecil gave or

lent money to Selina. Creelyn indicated in her evidence that she believed that Cecil and Selina became romantically involved after the Election but this was denied by Cecil and Creelyn indicated that she did not believe that they were in a romantic relationship at the time of the Election.

47. Cecil did however testify under cross-examination to being frequently approached by members of RRAFN for money. Depending on the amount requested, Cecil testified that he would sometimes lend money to Members from his own pocket. Cecil indicated that he expected repayment and tried to keep a running record of his loans, but admitted that he normally left the Members to repay him based on what they recall having borrowed. Cecil testified that numerous members of Chief and Council had also engaged in this practice.

48. With respect to elections, Cecil indicated that the practice changed during an election campaign and that he didn't personally see other Council members giving or loaning money to Members during an election. Cecil himself also admits that he struggled with the idea of giving or loaning money to Selina before the polling station closed on the day of the Election. Cecil testified that he was trying to avoid the perception of buying votes and only relented when he was satisfied that Selina could not vote (because she appeared intoxicated and had informed him that she had no identification).

APPLICATION OF EVIDENCE:

49. As Cecil admits that he loaned money to Selina on the day of the Election, the question remains whether this admission amounts to something which violates the Act?

50. It is clear from the above authorities that the exchange of consideration between a candidate and a voter is not enough to support a claim of bribery. Something more is required. Specifically, the candidate must intend that the

consideration secure the vote of the voter in some way (i.e. in favour of the candidate or in favour of no one). The voter must understand that the consideration is being given in exchange for their vote. In other words, the condition placed on the receipt of the consideration must be communicated to the voter in some way.

51. At page 122 of his text, *Bushby* states that it matters not whether the voter can vote. It should be noted however that this statement is in reference to the requirements of the statutory offence of bribery as set out in the British *Corrupt Practices Act, 1854* which does not necessarily codify the common law on that point. Given that bribery at common law requires an elector, it is unlikely that consideration given to someone who is not an elector can satisfy the test. It may however satisfy the test for attempt to commit bribery which does not carry the same consequences.

52. The Facebook exchange between Cecil and Selina shows that she requested money from him (as a gift or loan) on the morning of the Election. The request was made after Cecil reminded Selina that she should vote for him. In response, it was Selina who raised the prospect of tying the giving of money to her vote. Hesitant and concerned about the implications of giving her anything while the polling station was open, Cecil replied "tonight" which he later clarified as meaning after the close of the polls.

53. Cecil did however resile from that position and, within 30 minutes of telling Selina that she would need to wait until "tonight" before he would give her anything, he informed her that he was at the Government Office. Approximately 30 minutes after that, Cecil met up with Selina at the Government Office. Cecil admits that, during this meeting, he gave Selina $20.00.

54. Did Cecil intend that the money he gave Selina was to secure her vote? Cecil's initial response of "tonight" is not necessarily a defence to a claim of bribery. So long as the arrangement for the giving of consideration in exchange

for a vote is made before the vote occurs, the fact that the consideration is only exchanged after the vote occurs is inconsequential. Therefore, the question remains unanswered after considering this evidence.

55. Cecil however did testify under cross-examination that Selina had told him that she did not have any identification. Coupled with her observed intoxicated state, Cecil testified under cross-examination that he was satisfied that Selina did not have the capacity to vote (i.e. that she would be turned away at the polling station). It is important to note that this evidence did not come from his initial Affidavit. Further, Cecil appeared to have only raised those concerns with Selina upon meeting her. If Cecil truly had concerns about Selina's capacity to vote, one would think that those concerns would have been raised before he advised her of his location. Cecil failed to do this which challenges his true intention.

56. Did Selina have capacity to vote? The only evidence that she did not comes from Cecil. Selina herself gave evidence under oath that she did not vote. Therefore, it remains unknown whether she would have qualified to vote if had tried to. According to ss. 3(d) and 4(c) of the Act, an "Elector" must be a member of the RRAFN and must be at least 18 years of age on the date of the election. There is nothing specifically in the Act which prohibits an intoxicated member of RRAFN from voting. At page 4 of Tab "F" of the Affidavit of Sherri Thomas, affirmed January 19, 2016, Sherri sets out the identification requirements for voting in the Election. According to Sherri's Report, while valid identification was required, eligible Electors could receive a Guarantor Declaration Form during the Election Day hours. Therefore, even if Selina did not have proper identification, it is not certain that she would have been precluded from voting.

57. There is however evidence that Cecil had developed a history of lending money to Selina. Under cross-examination, Cecil testified that he had lent money to Selina about 10 times before the Election. Further, Cecil's reply about his whereabouts at the Government Office came after Selina made the comment "jus so you know im not wit dat larissa chik anymore." Therefore, in lending money to

Selina, it may be argued that Cecil's intention was to foster a relationship (romantic or otherwise) with Selina and not necessarily to influence her vote. It must of course be noted that Cecil denies the existence of any romantic relationship with Selina and that Salina did not report this during her investigation.

58. Selina's evidence was not challenged through cross-examination. The testimony of Cecil and Erin was not put to Selina for reply. However, there are clear contradictions in the evidence presented by Selina and the evidence presented by Cecil, particularly considering their Facebook exchange. This evidence entirely casts doubt on Selina's credibility as a witness. The series of events suggested by Cecil is also corroborated by Erin and Selina's sister Creelyn.

CONCLUSION:

59. The only credible evidence is that Cecil did not expressly ask Selina to vote for him in exchange for money. The suggestion of cash-for-vote was raised by Selina. Cecil did not dismiss the idea and, soon after that exchange, Cecil met with Selina and money was admittedly lent. The allegation made by Selina that Cecil approached her and requested her vote in exchange for money is simply not supported by the available evidence. The allegation that Cecil intended to buy Selina's vote is also not supported by the preponderance of the evidence. In giving money to Selina, Cecil was most likely acting in a manner consistent with his pre-established relationship with her.

60. It should be noted at this stage that nothing in the Act generally prohibits the giving of money during an election. During her investigation, Sherri did not come across any custom or practice which indicated that this was a prohibited practice. To the contrary, Sherri received evidence that it was common practice for Chief and Council to lend money from their own pockets. While Cecil admitted that he didn't see this practice continue during an election (and had concerns

about it himself) that is not the same as suggesting an outright prohibition on the practice.

61. While contradictions between the evidence of the witnesses require assessments of witness credibility which was outside the scope of Sherri's jurisdiction as Electoral Officer, given the available evidence, it does not appear that requiring witnesses to provide their evidence *viva voce* would do much in this case to change the result.

62. Therefore, Sherri recommends that this Honourable Court dismiss the Appeal.

PART IV – ORDER(S) SOUGHT

1. an Order dismissing the Election Appeal; and

2. an Order that the legal costs incurred by Sherri in connection with the investigation of the Election Appeal be paid by RRAFN the RRAFN Custom Council, or both.

PART V – LIST OF AUTHORITIES

NO.	AUTHORITY	TAB
1	*Kelemen v. El-Homeira*, [1999] A.J. No. 1279	**10A**
2	*Black's Law Dictionary*, 8th ed. (2004)	**10B**
3	*Rios v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 609	**10C**
4	*Bushby's Manual of the Practice of Elections*, 4th ed. 1874 at pg. 107	**10D**
5	*Langois c. Auger*, 29 C.S. 373	**10E**
6	*Criminal Code*, R.S.C. 1985, c. C-46	**10F**
7	*Fitzpatrick v. Boucher*, 2012 FCA 212	**10G**
8	*Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27	**10H**
9	*Meeches v. Meeches*, 2013 FC 196	**10I**
10	*Charles v. Canada (Attorney General)*, [1996] O.J. No. 914	**10J**
11	*Genereux v. Cuthbert (1884)*, 9 S.C.R. 102	**10K**
12	*McKay v. Glen (1880)*, 3 S.C.R. 641	**10L**

Dated at Winnipeg, Manitoba this 21st day of April, 2016.

MYERS WEINBERG LLP
Barristers and Solicitors

Per: _____
ANTHONY LAFONTAINE GUERRA
Counsel for the Electoral Officer,
Sherri Thomas

APPENDIX B

Federal Court Cour fédérale

Date: 20150216

Docket: T-199-15

Ottawa, Ontario, February 16, 2015

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

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

Applicants

and

THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL, SHERELYN HAYDEN, GLORIA ANTOINE, HEATHER LITTLEJOHN, GLADYS NELSON, RODNEY PATRICK, FRANK PAUL, MARTHA LAROQUE, GRACE SMITH, CHARLIE NELSON, EDWARD SMITH, BERNIE HENRY, LORRAINE EDWARDS

Respondents

CONSENT ORDER

THIS MOTION, made by the Applicants was heard on Friday, February 13, 2015, by teleconference in Winnipeg, Manitoba and Ottawa, Ontario.

UPON hearing the submissions of counsel for the Applicants and Respondents, as well as counsel for other interested parties, and noting the consent of all Parties to the form and content of this order;

AND UPON noting the parties' agreement to have a judicial officer administratively decide election disputes as per clause 4 below and election appeal disputes per clause 7 below;

AND UPON noting a like approach in *Mohawks of Akwesasne v Canada (Minister of Human Resources and Social Development*), 2010 FC 754, para 5;

THIS COURT ORDERS that:

[1] The 2015 Roseau River Anishinabe First Nation ("RRAFN") Election milestone dates shall be as follows:

a. Nomination Date: February 26, 2015

b. Winnipeg Advance Poll Date (secret ballot) March 10, 2015

c. Election Date: (secret ballot) March 12, 2015

[2] The following persons be appointed to conduct the election in a fair, impartial and democratic manner, at all times exercising their duties jointly and by consensus with the other holder of their office:

a. Electoral Officer(s): Sherry Ann Thomas and Joyce Mazur

b. Deputy Electoral Officer(s): Lois Thomas and Robert Egachi

c. Returning Officer(s): Riley Hayden and Corey Littlejohn

d. Alternate Returning Officer(s): Rachel Ferreria and Bob Laroque

[3] Pursuant to Rule 384, that this matter is continued as a "specially managed proceeding", and that a Prothonotary of the Court be assigned to give direction, issue orders, and provide guidance to the parties and the Electoral Officers appointed by this Court under paragraph two of this order.

[4] That in the event that there is a dispute between any shared office holders named in paragraph 2(b), 2(c) or 2(d), the Electoral Officers shall forthwith resolve the dispute by consensus. If the Electoral Officers appointed at paragraph 2(a) herein are unable to forthwith come to a consensus, they shall forthwith seek direction and an order deciding the matter from The Honourable Justice Mandamin and he shall provide such direction, and issue such orders as may be appropriate, on an urgent basis, and his decision will be final and binding.

[5] The Advance Poll scheduled and ordered to be held on March 10, 2015 in Winnipeg shall, as was the case in the 2013 Elections, be open to any RRAFN elector who wishes to vote at the Winnipeg Advance Poll instead of at the regular poll on Election Day.

[6] There shall not be an Election Appeal Committee as normally required by the RRAFN Election Act.

[7] Any complaint, appeal or issue which otherwise would have been submitted to the Appeal Committee pursuant to Article 10 of the Election Act, shall instead be brought to the Electoral Officers, who shall forthwith decide the Appeal by consensus, provided, if no decision is reached by consensus, the Electoral Officers shall forthwith refer the Appeal to The

Honourable Justice Mandamin whose decision will be binding as though it were the decision of a duly appointed appeal committee.

AND THIS COURT FURTHER DECLARES that:

[8] The RRAFN Election Act remain in force and is binding on RRAFN and the Electoral Officers, except insofar as this Court makes orders or issues directions contrary to the RRAFN Election Act, in which case the impugned section or sections of the RRAFN Election Act is of no force or effect to the extent of the inconsistency.

[9] This order is made without prejudice to the position of any person or party as to who the members of the RRAFN Custom Council actually are, and who their legal representative is.

"Leonard S. Mandamin"
Judge

APPENDIX C

Federal Court  Cour fédérale

Date: 20151103

Docket: T-199-15

Ottawa, Ontario, November 3, 2015

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

KENNETH HENRY JR., GARY ROBERTS, CECIL JAMES AND EVERLYN ALEXANDER, IN THEIR CAPACITY AS CURRENT MEMBERS OF THE ELECTED CHIEF AND COUNCIL OF THE ROSEAU RIVER ANISHINABE FIRST NATION

Applicants

and

THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL, SHERELYN HAYDEN, GLORIA ANTOINE, HEATHER LITTLEJOHN, GLADYS NELSON, RODNEY PATRICK, FRANK PAUL, MARTHA LAROQUE, GRACE SMITH, CHARLIE NELSON, EDWARD SMITH, BERNIE HENRY, LORRAINE EDWARDS

Respondents

ORDER

THIS MOTION, made by the parties was heard on September 11, 2015 by teleconference in Winnipeg, Manitoba and Ottawa, Ontario.

UPON hearing the submissions of counsel for the Applicants and Respondents, as well counsel for other interested parties and noting the consent of all interested parties to the form and content of this order;

AND UPON noting the parties' agreement through the Consent Order dated February 6, 2015 (the "Consent Order") to the appointment of Sherri Anne Thomas and Joyce Mazur as Electoral Officers (the "Electoral Officers") and to the resolution of appeals by a consensus or by the Honourable Mr. Justice Mandamin in the event that a decision cannot be reached by consensus of the appointed Electoral Officers;

AND UPON noting that an appeal of the Election of Chief and Council of the Roseau River Anishinabe First Nation held on Mach 12, 2015 (the "Election") was received by the Electoral Officers on or about March 13, 2015 (the "Election Appeal");

AND UPON noting that the Electoral Officers were unable to reach a consensus as to how to resolve the Election Appeal and referred the Appeal to the Honourable Mr. Justice Mandamin for disposition;

AND UPON noting that Joyce Mazur has since failed to continue to act in her position as Electoral Officer and is therefore deemed to have abandoned her position;

AND UPON noting that the Parties hereto desire a fair and expedient process for resolving the Election Appeal;

AND UPON noting that the Parties hereto have consented as to form and content of this Order;

THIS COURT ORDERS THAT:

1. Sherri Anne Thomas is hereby granted standing to participate in this proceeding as it relates to the resolution of the Election Appeal.

2. Cecil James, a Councillor of the Roseau River Anishinabe First Nation Band Council, and the subject of the Election Appeal, is hereby granted standing to participate in this proceeding as it relates to the Election Appeal, in his own capacity, separate from his capacity as a Councillor of the Applicant.

3. The Election Appeal will be treated as a validly submitted appeal and shall be heard and decided as set out herein.

4. Sherri Anne Thomas shall have authority as the Electoral Officer to investigate the allegations contained in the Election Appeal (the "Investigation"). Witness statements shall be confirmed by an Affidavit from each respective witness. Sherri Anne Thomas may verify evidence other than witness statement, including the investigation process, through her own Affidavit. Roseau River Anishinabe First Nation and Roseau River Anishinabe First Nation Custom Council may also present Affidavits to Sherri Anne Thomas during her Investigation. All Affidavits confirmed through the Investigation shall be served upon Cecil James, the Roseau River Anishinabe First Nation and Roseau River Anishinabe First Nation Custom Council and shall be filed with this Honourable Court along with appropriate proof of service.

5. Sherri Anne Thomas shall investigate and determine if the ballots, along with any related election materials, such as scrutinized electoral lists which can demonstrate which eligible voters in fact voted, have been kept and maintained, or destroyed, in accordance with s. 9 (f) of the

Roseau River Anishinabe First Nation Election Act and Regulations. In the event that the investigation locates ballots and any other related election materials or records, Sherri Anne Thomas shall be required to preserve, maintain, and not destroy any ballots and any other related election materials or records until 30 days after the resolution of the Election Appeal. Sherri Anne Thomas shall report back on her findings of said investigation, including whether any ballots or other related election materials or records were located, in the status report referred to in paragraph 8 of the Order below.

6. In the event that Sherri Anne Thomas deems it necessary to inspect property but is precluded from doing so, Sherri Anne Thomas may move, pursuant to Federal Courts Rule 249 for an Order for Inspection.

7. In the event that Sherri Anne Thomas deems it necessary to examine witnesses who are not parties to this proceeding, Sherri Anne Thomas may move, pursuant to Federal Courts Rule 238 for an Order to Examine a Non-Party.

8. Sherri Anne Thomas shall complete her Investigation, serve and file all applicable Affidavits or serve Cecil James, the Roseau River Anishinabe First Nation and the Roseau River Anishinabe First Nation Custom Council and file a status report with the Court detailing the steps completed, the steps to be completed and the anticipated timeframe for completion of the remaining steps in the Investigation by Friday, November 6, 2015.

9. Within 10 days of the date on which the Investigation is completed, Cecil James shall serve Sherri Anne Thomas, the Roseau River Anishinabe First Nation and the Roseau River Anishinabe First Nation Custom Council with and file in the Court, together with appropriate

proof of service, copies of all Affidavits upon which he intends to rely in defence of the Election Appeal allegations.

10. Within 15 days from the date on which Cecil James serves his responding Affidavit(s), or expiry of the time do so, whichever is earlier, Sherri Anne Thomas and Cecil James shall complete cross-examinations on the filed Affidavits and file the transcripts thereof forthwith upon their completion. Representatives of the Roseau River Anishinabe First Nation and the Roseau River Anishinabe First Nation Custom Council shall be permitted to attend and to cross-examine any affiant.

11. Within 10 days from the date of the completion of cross-examinations, or the expiry of time to do so, the Roseau River Anishinabe First Nation Custom Council shall serve Sherri Anne Thomas, Cecil James and the Roseau River Anishinabe First Nation and file written representations in support of the Election Appeal;

12. Within 10 days from the date of service of the written representations of the Roseau River Anishinabe First Nation Custom Council, Cecil James and the Roseau River Anishinabe First Nation shall serve each other as well as Sherri Anne Thomas and the Roseau River Anishinabe First Nation Custom Council with written representations in response to the Election Appeal.

13. Within 5 days from the date of service of the written representations of the Roseau River Anishinabe First Nation and Cecil James, the parties shall requisition a contested hearing date before the Honourable Mr. Justice Mandamin.

14. Roseau River Anishinabe First Nation, Roseau River First Nation Anishinabe Custom Council, Cecil James and Sherri Anne Thomas shall be entitled to make representations to the Court at any contested hearing.

15. By indicating their consent to the form and content of this Order, Roseau River Anishinabe First Nation, Roseau River First Nation Anishinabe Custom Council, Cecil James and Sherri Anne Thomas accept the jurisdiction of this Court for the purposes set out in this Order and agree that this Court is the proper venue for the consideration and determination of the Election Appeal.

16. In making its decision, this Court may consider all relevant sources of law, including but not limited to the Roseau River Anishinabe First Nation Election Act, the Roseau River Anishinabe First Nation Constitution, as well as all relevant Canadian legislation and jurisprudence.

"Leonard S. Mandamin"
Judge

APPENDIX D

Federal Court Cour fédérale

Date: 20160516

Docket: T-199-15

Winnipeg, Manitoba, May 16, 2016

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

KENNETH HENRY JR., GARY ROBERTS, CECIL JAMES AND EVELYN ALEXANDER IN THEIR CAPACITY AS CURRENT MEMBERS OF THE ELECTED CHIEF AND COUNCIL OF THE ROSEAU RIVER ANISHINABE FIRST NATION

Applicants

and

THE ROSEAU RIVER ANISHINABE FIRST NATION CUSTOM COUNCIL, SHERELYN HAYDEN, GLORIA ANTOINE, HEATHER LITTLEJOHN, GLADYS NELSON, RODNEY PATRICK, FRANK PAUL, MARTHA LAROQUE, GRACE SMITH, CHARLIE NELSON, EDWARD SMITH, BERNIE HENRY, LORRAINE EDWARDS

Respondents

ORDER

UPON receiving the report of the Electoral Officer, Ms. Sherri Anne Thomas, concerning the March 13, 2015 Election Appeal made following the Roseau River Anishinabe Election held on March 12, 2015;

AND UPON noting that election appeals were to be resolved by the Honourable Mr. Justice Mandamin pursuant to the February 16, 2015 Consent Order;

A**ND UPON** hearing the submissions of counsel for the Electoral Officer, for the Roseau River Anishinabe First Nation Chief and Council and for Mr. Cecil James;

AND UPON hearing the application of Rohith Mascarenhas for leave to withdraw as counsel for Mr. Herman Atkinson;

THIS COURT ORDERS THAT:

1. The Election Appeal of Ms. Selina Thomas is dismissed.

2. Mr. Rohith Mascarenhas has leave to withdraw.

3. The Parties are to confer on the matter of legal costs incurred by Ms. Sherri Anne Thomas in her capacity as Electoral Officer and, if unable to reach agreement within 60 days, they are to apply in writing for an order on costs.

4. Reasons are to follow. Justice Leonard S. Mandamin remains seized of this matter.

"Leonard S. Mandamin"
Judge

APPENDIX E

FEDERAL COURT

FEDERAL COURT ~ ABORIGINAL LAW BAR LIAISON COMMITTEE

PRACTICE GUIDELINES FOR ABORIGINAL LAW PROCEEDINGS

APRIL 2016

CONTENTS

PART III - PRACTICE GUIDELINES

A. DISPUTE RESOLUTION THROUGH DIALOGUE

Aboriginal Elders: *Emphasis on Dialogue to Resolve Disputes by Agreement*

In 2009, the Federal Court hosted a *Symposium on Oral History and the Role of Aboriginal Elders*, opening a dialogue with Elders from across Canada along with representatives of the public and private Bar. In turn, these same Elders hosted a historic meeting in 2010 at Turtle Lodge to promote a better understanding of the Aboriginal perspective. This led to a judicial education seminar at Kitigan Zibi in late 2013, developed in collaboration with the Elders, on Aboriginal dispute resolution. Throughout, the Elders who were consulted have shown their preference for dispute resolution through dialogue: *talking things out to resolve disputes by agreement.*

To better assist with the efficient resolution of disputes involving Aboriginal people, the Court is moving to facilitate dispute resolution between parties other than through adjudication, though without preventing parties from pursuing judicial adjudication. Although the Court will encourage parties to reach a settlement or narrow their issues in dispute through agreement, ultimately the parties must decide whether they want to pursue this avenue, understanding that there is also a cost to settlement discussions, which do not always lead to a settlement of the dispute. It is recognized that if successful, settlement by agreement helps to restore the relationship and trust between the parties, a form of reconciliation.

It is important to keep in mind that there is often overlap between settlement and judicial adjudication: many disputes that begin as adversarial proceedings may shift over to dialogue and resolution by agreement, even if only for some of the issues in dispute. Moreover, the experience of the Court is that many parties who are at first unwilling to enter into a dialogue discover they are later able to find common ground and a shared interest in reaching a resolution, leading to an acceptable resolution for all parties. Parties enter a dialogue process on a "without prejudice" basis, meaning that if the dispute is not resolved by agreement, they can return to a process of adversarial litigation without compromising their initial position. Through such dialogue, parties gain a much better understanding of their own legal position as well as that of the other parties, allowing for a more efficient and less costly litigation process if a mediated agreement is not reached.

Court Framework for Dispute Resolution through Dialogue Between Parties
In 2012, by Practice Direction, the Court launched a pilot project to facilitate more expeditious, cost effective and satisfactory resolution of judicial review applications dealing with First Nations governance disputes. The 'pilot' is now an established Court practice and is integrated into these Practice Guidelines, which now also extend the practice, *in a flexible manner*, to all Aboriginal law proceedings in Federal Court.

The process starts with an initial assessment ("triage") by a member of the Court, who may, *in appropriate cases*, informally invite the parties to consider alternative means of proceeding, including mediation away from the Court or judicially assisted dispute resolution (by either a judge or a prothonotary).

The assessment, initiated either by the Court or a party, typically proceeds as follows:

Assessment on Request by a Party

- When filing a statement of claim or notice of application, a plaintiff / applicant may include a letter requesting that the proceeding be specially managed pursuant to Rule 384. Such letters should include relevant facts and submissions. If an *expedited* special case management process is requested, this should be noted in the letter.

- A defendant / respondent may make such a request at any time after receiving notice of the proceeding.

- Either party may also request a 'standstill' order, which, if all parties consent, would allow the parties to consider all options for resolution of the dispute without the pressure of being subject to normal time-lines for proceeding with adversarial litigation.

- Upon such request by either party, the Registry will immediately refer the file for timely assessment by the Court.

Assessment on Referral by the Registry of the Court

- Even if neither party has made a request described above, the Registry may refer any file for assessment by the Court if it considers that the file *may* fall within the scope of this framework.

Assessment by the Court

- A judge or prothonotary of the Court will review each file that has been referred and, in appropriate cases, may invite the parties to an informal meeting in person or by conference call.

- The judge or prothonotary will consider whether the file should continue as a specially managed proceeding pursuant to Rule 384. Where the potential for a streamlined court-assisted resolution is identified, an Order will be issued and a case management judge assigned.

- Where a prothonotary and judge are assigned jointly to case manage the file, the prothonotary will have day to day carriage of the case unless otherwise stipulated.

The objective of an informal meeting of the parties and Court will be to identify the parties' preferred approach to resolving the dispute in the most timely, cost-effective and satisfactory manner for those involved, and the manner in which the Court may facilitate that process.

The options available for parties include, but are not limited to:

- special case management of the proceeding under Rules 383 to 385;
- a consent standstill order;
- a stay of proceedings under Rule 390, including the suspension of filing requirements pending alternate dispute resolution processes outside the Court;
- utilization of Aboriginal dispute resolution processes acceptable to the parties;
- formalization of settlement agreements by consent Order, if appropriate;
- arrangements for mediation, judicial dispute resolution and attendance at hearings, if feasible;
- focused organization of facts, documents, and other evidence, and identification of issues;
- separation of the issues in dispute, pursuant to Rule 107, allowing for some issues to be adjudicated by the Court and others to be settled by agreement;
- dispute resolution services offered by the Court, including:
    - review of a request, if any, by a party for assignment of a judge or prothonotary with specific mediation and / or cross-cultural experience
    - mediation – Rule 387(a) [Rules 389, 419, and 420 governing settlement]
    - early neutral evaluation – Rule 387(b)
    - mini-trial – Rule 387(c)

A core group of judges and prothonotaries are available for assignment to conduct a judicially-assisted dispute resolution or mediation process.

Where judicially-assisted resolution by the parties is unsuccessful or not pursued, or settlement is reached only with respect to some issues in dispute, the remaining issues will then be heard by a judge / prothonotary who has not been involved in the matter, unless there is consent between the parties to continue with the same judicial officer.

> **Rule 389(2)** Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.
> (3) Where no settlement can be reached at a dispute resolution conference, the case management judge shall record that fact on the Court file.
>
> **391.** A case management judge who conducts a dispute resolution conference in an action, application or appeal shall not preside at the hearing thereof unless all parties consent.

Dispute Resolution through Dialogue: ***Additional Considerations***

- ***Confidentiality: Discussion Regarding Possible Publication of Settlement***

Settlement discussions are generally privileged, meaning that unless there is agreement among the parties otherwise, they are without prejudice and not to be entered into evidence or disclosed to the Court (see exception in Rule 422).

Settlement discussions are also generally kept confidential. Subject to special agreements for response to media inquiries or public education, the parties may not broadcast or disclose to third parties what is discussed.

> **Rule 388.** Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.

Although settlement discussions held under the *Federal Courts Rules* are typically kept confidential, in some cases there may be some value to the parties in Aboriginal law proceedings to have the terms of the settlement agreement, or at least a *summary* of the process and final agreement, made public. In addition to providing transparency for the wider communities affected by the agreement, publication can also provide a model – both *process* and *outcome* – for other communities who may be open to resolving similar disputes by way of a settlement. In some cases, a settlement may be accompanied by a Court order that endorses the settlement outcome and which provides legal finality to the proceeding. If appropriate in the circumstances of the case and with all parties' agreement, such an Order could include a summary of the settlement and be placed on the public record of the Court.

- ***Barriers to Settlement by Agreement***

Although in some cases a mediated settlement may offer many advantages for all parties as compared to an adjudicated outcome, it is important to consider barriers that may exist to a successful dialogue so that parties can engage in the dialogue with realistic expectations. The following factors, though not an exhaustive listing, should be considered:

- cost – although a mediated settlement is nearly always much less costly than full adversarial litigation, there are nonetheless some costs for all parties, which must be balanced with the prospect of reaching a settlement of at least some of the issues in dispute;

- knowledge of the claim – in early days of a claim or a judicial review, litigators may not have sufficient knowledge of the facts or issues in a claim to recommend settlement. In judicial review proceedings in particular, the respondent is not required under the rules to provide a substantive response to the application, making it difficult for the applicant to know the respondent's view of the application and what potential defenses may be raised.

- approval process to get mandate to settle – many claims have significant legal, practical, and financial implications for parties. A lengthy approval process for federal government, Aboriginal, or other parties to obtain a settlement mandate may preclude formal settlement discussions at early stages of a proceeding.

- timing – there are barriers to *early* attempts to settle, as noted above. However, if parties commit considerable financial and human resources into the adversarial path without seriously considering settlement options, this too can create a barrier to settlement. Experience has shown that parties are often reluctant to 'change course' once they have committed themselves to adversarial proceedings, even if settlement may still offer some benefits over an adjudicated outcome.

- ***Class or Representative Proceedings***

Special rules are applicable to settlement discussions in *class proceedings* (Rules 334.1 and following) or *representative proceedings* (Rules 114 and 115):

> **Rule 114 (4)** - The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.
>
> **Rule 334.29(1)** – A class proceeding may be settled only with the approval of judge.
>
> **Rule 334.3** – A proceeding commenced by a member of a class of persons on behalf of the members of that class may only be discontinued with the approval of judge.

- ***Rules Related to Costs in Legal Proceedings***

"Costs" refer to the legal fees for a party's lawyer(s) as well as disbursements (such as the printing costs, filing fees, interpreter's fees or witness travel expenses). Although the general rule in legal proceedings, if adjudicated by the Court, is that costs are allocated to the parties in accordance with the outcome of the case, there is no fixed rule that the successful party will automatically be entitled to costs. In many cases the successful party may be awarded some, *though rarely all*, of their litigation "costs. There are many factors, set out in Rule 400, that are considered by the Court when deciding costs:

> **Rule 400.** (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.
> (2) Costs may be awarded to or against the Crown.
> (3) In exercising its discretion under subsection (1), the Court may consider
> (*a*) the result of the proceeding;
> (*b*) the amounts claimed and the amounts recovered;
> (*c*) the importance and complexity of the issues;
> (*d*) the apportionment of liability;
> (*e*) any written offer to settle;
> (*f*) any offer to contribute made under rule 421;
> (*g*) the amount of work;
> (*h*) whether the public interest in having the proceeding litigated justifies a particular award of costs;
> (*i*) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
> (*j*) the failure by a party to admit anything that should have been admitted or to serve a request to admit;
> (*k*) whether any step in the proceeding was
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (*l*) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;
> (*m*) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;
> (*n*) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299;
> (*n.1*) whether the expense required to have an expert witness give evidence was justified given
> (i) the nature of the litigation, its public significance and any need to clarify the law,
> (ii) the number, complexity or technical nature of the issues in dispute, or
> (iii) the amount in dispute in the proceeding; and
> (*o*) any other matter that it considers relevant.

The effective use of offers to settle (that is, an effort to settle the dispute by agreement) is an important consideration. Parties who are able to show they made a genuine effort to reasonably settle their dispute, particularly early on, are able to have such efforts considered as a factor in any Court assessment of costs (if there is a *written* offer to settle). The *cost* implications of offers to settle are set out at Rules 419 to 421. Settlement agreements should consider the question of costs. In the alternative, the question of costs may be put to the Court, either by way of written submissions or, instead, at an oral hearing. See, for example, the costs Order following settlement in the case of *Knebush v. Maygard*.[2]

Note that Rule 334.39 provides for costs related to a class proceeding. Generally, absent special circumstances, there are no costs awarded in respect of the certification motion, which is a significant undertaking.

B. ACTIONS

An "Action" is a type of Court proceeding to enforce, redress, or protect a right. The party bringing an action is called the "Plaintiff" and the opposing party is called the "Defendant." In addition to any documentary evidence that might be put before the Court, it is normal to have witnesses who give oral testimony at the hearing (the "trial") of an action, including expert witnesses[3] and Aboriginal Elders (for whom special guidelines are provided in Part D).

Where relief is claimed against the Crown, the plaintiff may bring the action either in Federal Court or in a provincial court.[4]

1. The Pre-Claim Phase

Where practical, *before* filing a proceeding with the Court, parties should make every effort to:

- review the anticipated claim with potential or retained witnesses, including expert witnesses or Elders, so as to clarify the ultimate factual and legal issues in dispute
- exchange with other parties a *draft* statement of claim, case brief, or similar document
- engage in discussion with other parties to clarify the ultimate factual and legal issues in dispute

For discussions with the Department of Justice (Canada), contact should be made to the Director of the Aboriginal Law Section of the appropriate Regional Office, or the

[2] *Knebush v. Maygard*, 2014 FC 1247.
[3] See Rules 52.1 to 52.6 and 279 – 280.
[4] See section 17, *Federal Courts Act*, as well as section 21, *Crown Liability and Proceedings Act*.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-199-15
STYLE OF CAUSE:	KENNETH HENRY JR., GARY ROBERTS, v THE ROSEAU RIVER ANISHINABE FIRST NATION
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MAY 16, 2016
REASONS FOR ORDER:	MANDAMIN J.
DATED:	NOVEMBER 15, 2017

APPEARANCES:

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MARKUS BUCHART	FOR THE APPLICANT CECIL JAMES
COREY SHEFMAN	FOR THE APPLICANT ROSEAU RIVER ANISHINABE FIRST NATION (RRAFN) CHIEF AND COUNCIL
ROHITH MASCARENHAS	FOR THE RESPONDENTS

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