Federal Court  Cour fédérale

Date:20240723

Docket: T-1567-21

Citation: 2024 FC 1151

Ottawa, Ontario, July 23, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ROGER PRAIRIE CHICKEN AND EUGENE FOX

Applicants

and

THE BLOOD TRIBE BAND COUNCIL AND THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Roger Prairie Chicken and Eugene Fox [Applicants], both members of the Blood Tribe, seek judicial review of the conduct by the Blood Tribe Band Council [Council] in holding a ratification vote [Ratification Vote] to approve a Treaty 7 Cattle Claim Settlement Agreement

[Settlement Agreement] negotiated with Her Majesty in Right of Canada [Canada]. The process began with a July 13, 2021 band council resolution [BCR] that set the date for the Ratification Vote, appointed a ratification officer [RO], and set dates for information sessions. On September 16, 2021, the eligible Blood Tribe members of voting age [Eligible Voters] approved the Settlement Agreement in the Ratification Vote.

[2] The Applicants contend that the decision to conduct the Ratification Vote, as evidenced by the BCR, is unreasonable for failing to comply with the provisions of the *Indian Act*, RSC 1985, c I-5 [*Indian Act*] and that the process of conducting the Ratification Vote also breached the Applicants' rights to procedural fairness. They seek declaratory relief to this effect.

[3] The application for judicial review is dismissed. The Court does not have jurisdiction to judicially review the matter. For the sake of completeness, I have reviewed the merits and I also find that the Applicants were not denied procedural fairness and that the decision to hold the Ratification Vote was reasonable.

II. Background

[4] The Blood Tribe, the Applicants and the Council are all descendants of the Kainai people, who entered into Treaty 7 with the Crown. Treaty 7 included the promise of cattle and/or implements to sustain the Kainai people [Treaty Cattle Promise] in light of changes caused by settlement and the loss of the buffalo, but the Crown never fulfilled the Treaty Cattle Promise.

[5] In 1997, the Council of the Blood Tribe commenced an action on behalf of all Blood Tribe members against Canada seeking compensation for Canada's failure to fulfill the Treaty Cattle Promise. In May 1998, the Blood Tribe filed a specific claim [Cattle Claim] pursuant to Canada's Specific Claims Policy and stayed the legal proceedings pending a response. The Minister of Aboriginal Affairs and Northern Development [Minister], on Canada's behalf, rejected the Cattle Claim on September 20, 2011. The Blood Tribe then filed the Cattle Claim with the Specific Claims Tribunal on September 18, 2012.

[6] Canada and the Blood Tribe agreed to negotiate a settlement of the Cattle Claim in 2018. In 2021, the parties agreed to terms of the Settlement Agreement and a trust agreement [Trust Agreement].

III. Procedural History

[7] On January 25, 2022, Associate Judge Ring granted the Attorney General of Canada's motion, on behalf of Canada, for a confidentiality order under Rule 151 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] restricting the disclosure of confidential information relating to the Settlement Agreement to the parties and Court while sealing the material from disclosure to the public. Accordingly, two records were created to give effect to the confidentiality order, a public redacted one and a confidential unredacted one.

[8] On July 21, 2022, Associate Judge Ring granted a motion on consent to amend the style of cause to remove the Applicants' references to acting on behalf of the members of the Blood Tribe. Associate Judge Ring declined to grant the other relief sought by the Council, namely

striking the Notice of Application for lack of jurisdiction or lack of standing on a preliminary motion.

[9] On February 17, 2023, Associate Judge Milczynski granted the Applicants' motion to sever the application of Lori Scout, an original named applicant, from the application.

IV. The Decision and Events Subsequent to the Decision

[10] On July 13, 2021, Council passed the BCR at issue. Council issued the Notice of Ratification Vote on July 16, 2021, which provided the Eligible Voters with 60 days to inform themselves about the Settlement Agreement and Trust Agreement prior to the Ratification Vote. The Notice of Ratification Vote stated that summaries and complete copies of the Settlement Agreement, the Trust Agreement and such other information that the Blood Tribe determines is useful will be made available to Eligible Voters. It further stated that an application for amendments to the Voters List, forms, or requests for copies of the Voting Guidelines, Settlement Agreement or Trust Agreement should be made to the RO, Robin Little Bear.

[11] Information about the Ratification Vote was available throughout the Blood Tribe reserve. The Notice of Ratification and summaries of the Settlement Agreement and Trust Agreement were posted on the Blood Tribe website on July 16, 2021. On July 30, 2021, the Tribal Government Committee made a presentation about the Settlement Agreement and Trust Agreement available on the Blood Tribe website. In August 2021, information packages were prepared and delivered to the homes of Blood Tribe members on-reserve and member households in neighbouring communities, which consisted of the Notice of Ratification Vote,

notice of a virtual meeting scheduled for August 18, 2021, an overview of the Cattle Claim, a plain language summary, and a question and answer sheet. These documents were also previously posted on the Blood Tribe's website on July 28, 2021. An executive summary of the proposed Trust Agreement also confirmed that each member of the Blood Tribe would receive a set per capita distribution.

[12] The virtual information meeting was held on August 18, 2021 with speakers from the Tribal Government Committee, legal counsel, a financial adviser, and the RO. It was recorded and later posted on the Blood Tribe's website with notice of its posting. Council posted various communiques and notices related to the Ratification Vote on the Blood Tribe's website and sent by email between July 16, 2021 and September 15, 2021.

[13] Mr. Prairie Chicken asserted that he received a Notice of Ratification Vote that was one-page long and did not include information on how to request full copies. The Applicants further assert that the Settlement Agreement was only disclosed to the Applicants on or about January 25, 2022, which was well after the Ratification Vote. Instead, they had access to the summaries of the Settlement Agreement and Trust Agreement.

[14] On August 26, 2021, the Applicants and Chris Shade, a former Chief, held a public forum to discuss the Ratification Vote and the Cattle Claim, which about 15 members attended. On September 13, 2021, legal counsel for several Blood Tribe members (including Mr. Prairie Chicken), who were not on record at the hearing of this matter, wrote to Council requesting that Council postpone the Ratification Vote. The Blood Tribe did not respond to this letter.

[15] On September 16, 2021, the Council held the Ratification Vote. The Ratification Vote passed after a total of 2,187 members voted with 1,734 (approximately 79%) voting yes and 453 (approximately 21%) voting no. A majority of Eligible Voters were not required to vote in favour of the Ratification Vote in order to meet the required voting threshold.

[16] On October 4, 2021, the Federal Court issued an Order granting Council's application for approval of the discontinuance and settlement of the Cattle Claim. Canada deposited the compensation into the Blood Tribe's account on January 27, 2023 and those settlement monies are now Trust Property within the meaning of the Trust Agreement. Between February 14 and 16, 2023, the Blood Tribe made a $3,000 per capita distribution to members. On March 16, 2023, the Blood Tribe discontinued its claim before the Specific Claims Tribunal.

V. The Evidence

[17] The Applicants' evidence consists of affidavits from Roger Prairie Chicken, Eugene Fox, Chris Shade and Charlene Plume. In general, their collective evidence is that not every Eligible Voter received copies of the Settlement Agreement and Trust Agreement, it was difficult to contact the RO to receive same, and the Settlement Agreement's release provision is too broad and unfavourable to the Blood Tribe. All affiants were cross-examined on the content of their affidavits.

[18] The Blood Tribe's evidence consists of affidavits from Dorothy First Rider and the RO. In general, their collective evidence is that the Blood Tribe provided sufficient information to the Eligible Voters prior to the Ratification Vote, the information provided was sufficient for the

Eligible Voters to make an informed decision, and the Applicants did not contact the RO through the channels provided in the Notice of Ratification Vote. They were also cross-examined on the content of their affidavits.

VI. Preliminary Issues

[19] The parties raised several issues before addressing the merits of the application. Two of those issues are set out below.

A. *What decision is under review?*

[20] The Council submits that this application for judicial review is limited to the July 13, 2021 BCR. The Amended Notice of Application states that it is an application "for a judicial review of the Council's decision to hold a Ratification Vote of an Agricultural Benefits Settlement Agreement and Trust Agreement…." The Applicants also seek to judicially review the subsequent actions taken by Council between July 13, 2021 and September 16, 2021, contrary to Rule 302 of the *Federal Courts Rules*, which limits an application for judicial review to "a single order in respect of which relief is sought" unless the Court orders otherwise. A Court may allow more than one decision to be reviewable if the impugned decisions or actions comprise a "continuing act" or "continuing course of conduct" (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173 [*Suzuki*]). However, the Court should decline to consider such matters on the basis of Rule 302, as the Applicants have not sought an order to extend this application to multiple decisions. Furthermore, Council's actions between July 13,

2021 and September 16, 2021 in conducting the Ratification Vote extend beyond the terms of the July 13, 2021 BCR, involve different decision-makers, and engage different legal issues.

[21] The Applicants submit that the Council's framing of the decision is incorrect and an unduly narrow reading of the Amended Notice of Application (*Shotclose v Stoney First Nation*, 2011 FC 750 at paras 49-51, 64 [*Shotclose*]). The Amended Notice of Application must be read as a whole and with the records available at the time of its filing, October 15, 2021, which did not include the Settlement Agreement and Ratification Vote rules. The Amended Notice of Application also does not mention the July 13 BCR, but it explicitly challenged the Ratification Vote which was communicated on September 16, 2021, the day of the Ratification Vote, which sought relief in respect of the Ratification Vote itself. At the hearing, the Applicants confirmed that they were not seeking judicial review of the Settlement Agreement or the Trust Agreement.

[22] Canada generally agrees with the Council's submissions and also notes that the Settlement Agreement itself is not subject to judicial review (*Ballantyne v Bighetty*, 2011 FC 994 at para 34 [*Ballantyne*]).

[23] After considering the parties' submissions, I determine that the decision to hold the Ratification Vote and the Ratification Vote itself represent a continuing course of conduct. The July 13, 2021 BCR enables the Ratification Vote held on September 16, 2021 and specifies the terms for how Council carried out the Ratification Vote. The decisions are closely connected, based on the same factual situation and raise the same legal issues, and relate to the same

decision-makers (*Suzuki* at para 173). However, the validity of the Settlement Agreement and Trust Agreement is not part of this continuing course of conduct and is not reviewable.

B. *Is the judicial review limited by issues of Council not acting as an administrative decision-maker, justiciability, and/or standing?*

(1) Was the Council acting as an administrative decision-maker?

[24] Council submits that the decision is not reviewable because the Council was not acting as a federal board, commission, or other tribunal when working within the Negotiation Protocol or when negotiating the Settlement Agreement. In determining the nature of Council's role, the proper questions to ask are: "first, what jurisdiction or power was being exercised; and, second, what was the source of that jurisdiction or power" (*Innu Nation v Pokue*, 2014 FCA 271 at para 17 [*Pokue*]; *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at para 29 [*Anisman*]).

[25] Not all band council decisions are subject to judicial review (*Hengerer v Blood Indians First Nation*, 2014 FC 222 at para 41; *Knibb Developments Ltd v Siksika First Nation*, 2021 FC 1214 at para 10; *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 at para 60; *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812 at paras 43-45, 58-59 [*Devil's Gap*]). Council submits that it was exercising its inherent power to negotiate the fulfillment of an unfulfilled promise made at the time of Treaty 7 and it is a continuation of the self-governance powers of Council, as successor to the original leaders who entered into Treaty 7.

[26] Furthermore, Council submits it was also not acting as an administrative decision-maker when negotiating the final text of the Settlement Agreement. It involved no question about the

rule of law and the limits of an administrative decision-maker's exercise of power, so it did not have a public character (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paras 14, 20 [*Highwood Congregation*]). Alternatively, if the Court finds it has jurisdiction, any actions that fall within the scope of the terms of the Settlement Agreement cannot be subject to review, such as the substance of the July 13, 2021 BCR borne out of the Settlement Agreement.

[27] The Applicants submit that this matter raises issues of a public nature and that the Council was acting in their capacity as a federal board. The matter is public in nature as it concerns the settlement in relation to a promise in Treaty 7. Accordingly, the matter may be subject to a judicial review (*Shanks v Salt River First Nation #195*, 2023 FC 690 at para 34 [*Shanks*]; *George v Heiltsuk Tribal Council*, 2023 FC 1705 at para 22; *Ballantyne* at para 38).

[28] Canada does not make submissions on this issue.

(2) Are the issues raised in this application non-justiciable?

[29] The Council submits that this matter is non-justiciable. The question of justiciablity "concerns the appropriateness and ability of a court to deal with an issue before it" and exercises of executive power are non-justiciable if they are "suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis" (*Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at paras 62, 66 [*Hupacasath*]). Council created the Settlement Agreement and Trust Agreement by balancing political, social, and economic

concerns, meaning this Court “has no supervisory role over the political aspects of the negotiation entered into by the parties” (*Birch Narrows Dene Nation v Canada*, 2018 FC 11 at paras 28, 31). The Federal Court of Appeal has similarly held that “factors underlying a decision to sign a treaty are beyond the courts' ken or capability to assess, and any assessment of them would take courts beyond their proper role within the separation of powers” (*Hupacasath* at para 68).

[30] Canada does not make submissions on justiciability. The Applicants did not make written submissions on justiciability but at the hearing, drew the Court’s attention to *Hupacasath* at paragraphs 69-70 where the Federal Court of Appeal determined that Canada’s justicability objection had no merit since assessing whether or not legal rights exist, such as legal rights to be consulted before the executive’s decision to bring an agreement into effect, lies at the core of what courts do.

(3) Do the Applicants have standing to bring this Application?

[31] Council submits that the Applicants can seek judicial review only in relation to matters that directly affect their own enforceable legal rights and not a judicial review of a decision allegedly affecting a collective right. A party must be “directly affected by the matter in respect of which relief is sought” to apply for judicial review (*Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], s 18.1(1)). A right to judicial review will not arise if “the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects” (*Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 29 [*Air Canada*]). One such example is that certain rights are collective in nature and only the lawful

representatives of the collective can enforce those rights (*Commanda v Canada*, 2018 FC 189 at para 27). The Supreme Court of Canada has found that a First Nation had not authorized an applicant to represent it for the purpose of challenging an authorization, and the individual applicant could not assert a breach of the duty to consult as it is owed to the community (*Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 31 [*Behn*]). Although, there is an exception where individual members may have a vested interest in the protection of the communal rights and can assert certain Aboriginal or treaty rights in appropriate circumstances (*Behn* at para 33). However, the Court has found that this exception does not extend to declaratory relief that would undo the settlement of a claim reached between a First Nation and Canada (*Waquan v Canada (Attorney General)*, 2017 ABCA 279 at para 40). This means that the Applicants cannot enforce the duty to consult under section 35, as it is a collective right nor can the Applicants enforce a collective treaty entitlement under the Treaty Cattle Promise.

[32] The Applicants submit that the Respondent's argument is a red herring as judicial review is an individual and constitutionally guaranteed entitlement to challenge government action (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 31; *Bellegarde v Carry the Kettle First Nation*, 2023 FC 86 at paras 14-15). The Applicants' legal rights are affected since members of the Blood Tribe are subject to and bound by the Settlement Agreement for which they were asked to ratify. Furthermore, the Treaty rights are not only communal. First, the *United Declaration on the Rights of Indigenous Peoples*, implemented through the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, makes it clear that Indigenous peoples and Indigenous "individual(s)" hold these rights. Second, Council misconstrues *Behn*, as the Supreme Court of Canada acknowledged that Treaty rights have collective and individual aspects

in *obiter*. Third, the purpose of treaties was to sustain future generations and not just the current one (*Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para 314; *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at paras 169, 332, 360, 419).

(4) Analysis

[33] I agree with Council that the Court does not have jurisdiction. Before engaging with the specific submissions and applicable law, I will situate the matter in the proper context.

[34] The Applicants confirmed that they were not seeking judicial review of the Settlement Agreement or the Trust Agreement. In answering my question as to why they were making submissions about the release provision in the Settlement Agreement if this were the case, Applicants' counsel indicated that it was related to their procedural fairness submission.

[35] The case law has drawn a distinction between when a band council is operating as a "federal board, commission or other tribunal" pursuant to subsection 18.1(a) of the *Federal Courts Act* in relation to settlement agreements and when it is not. BCRs related to private commercial transactions or a decision to settle tort litigation are not subject to judicial review since band councils have an implied power to contract, without specific authority under the *Indian Act* (*Shanks* at para 33).

[36] However, the Court has found that it can review settlements in the following scenarios: a specific claim settlement where all members sought review of whether the referendum complied

with the *Indian Referendum Regulations*, CRC, c 957 [*Indian Referendum Regulations*] (*Brass v Key Band First Nation*, 2007 FC 581 [*Brass*]); a BCR purporting to approve an accelerated lump sum of a settlement with Manitoba Hydro in exchange for a full and final release (*Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 [*Gamblin*]); and the management and distribution of settlement funds under a Treaty settlement agreement with Canada (*Shanks*).

[37] In *Ballantyne*, the Court sought to distinguish itself from *Brass* on the grounds that the referendum in *Brass* was conducted in accordance with the *Indian Referendum Regulations* and unlike *Brass*, private law governed the decision to settle the tort litigation (*Ballantyne* at paras 31-40). The Court in *Brass* did not address the issue of jurisdiction besides briefly stating that the Court did have jurisdiction and that the respondents did not contest jurisdiction (at para 19).

[38] Together, *Shanks* and *Gamblin* suggest that the administration of settlement funds is reviewable. *Ballantyne* and *Brass* suggest that the involvement of federal legislation, such as the *Indian Referendum Regulations*, may cause a settlement to become reviewable.

[39] Actual settlements arising from an implied power, without specific authority under the *Indian Act*, are not the subject of judicial review but administrative steps in relation to the settlements may be reviewable if it is sufficiently public in nature. In making this determination, the Court must first ask the following questions to determine whether the Council was acting as a federal board, commission or other tribunal: (1) what jurisdiction or power is the Council exercising; and (2) what is the source or origin of the jurisdiction or power that the Council is exercising (*Pokue* at para 11, citing *Anisman*).

[40] I agree with the Council that, when it negotiated the Settlement Agreement, it was exercising its inherent authority as successors to Treaty 7 to negotiate the fulfillment of a Treaty right. I am not persuaded that Council was exercising a jurisdiction or power authorized by federal legislation when carrying out the Ratification Vote. The *Indian Act* or other federal legislation does not to confer any power on the Council to conduct a vote or seek membership approval in circumstances such as these. Instead, Council's power to conduct a vote in these circumstances is a continuation of the Council's inherent governance roles to settle claims and as successors to Treaty 7.

[41] Alternatively, and in the event that I am incorrect that Council was not acting as a purely administrative body, it is also my view that the impugned conduct is not sufficiently public in nature for the Court to review it. As recognized in *Highwood Congregation* at paragraph 14, a public body may make decisions of a private nature. There is often no bright line and while I do agree that the nature of carrying out the Ratification Vote has public aspects, it falls closer to having a private nature.

[42] *Air Canada* provides guidance on the distinction between "public" and "private" (at paras 56-60). First, the character of the matter is private in that it relates to the carrying out of an agreement with Canada. However, in contrast to the *Devil's Gap* line of case law, the carrying out of the Ratification Vote is also of broad importance to the members as it relates to the passing of an agreement determining whether Canada has fulfilled a Treaty right, so it is not purely a commercial private agreement. Second, although a band council may act as an administrative body charged with public responsibilities, I have found above that the Council

was not acting as a purely administrative body in these particular circumstances. Although, I note that there is still a public element since a band council must act on behalf of its members. Third, contract law principles pursuant to the Settlement Agreement governed how Council carried out of the Ratification Vote rather than public sources of law. Fourth, the Council's role in this circumstance does not appear woven into the network of government. For instance, its actions do not relate to a code and other statutory schemes, as it was in *Jimmie v Council of the Squiala First Nation*, 2018 FC 190 at paras 58-60 [*Jimmie*]. Fifth, there is nothing to suggest that Council is an agent of the federal government or directed, controlled, or significantly influenced by a public entity. Council willingly negotiated the Settlement Agreement terms and gave effect to how to ratify the Settlement Agreement. Sixth, there is some limitation to the suitability of public law remedies, but the Applicants may have a more appropriate avenue seeking remedies available at common law before another court (*Jimmie* at para 65). Lastly, the existence of compulsory power or exceptional cases where the conduct has attained a serious public dimension may be factors, but these considerations are irrelevant here (*Jimmie* at paras 67-69). There are both public and private aspects, but after considering the circumstances in their totality, I determine that this matter is more private in nature.

[43] On the issue of justiciability, I do not agree that the carrying out of the Ratification Vote was "so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government" or "suffused with ideological, political, cultural, social, moral and historical concerns" (*Hupacasath* at paras 62, 66). While this objection may apply if the Settlement Agreement itself were reviewable as part of the decision, the process of carrying out a

Ratification Vote is not so political that it calls into question the appropriateness or ability of the Court to deal with the issues before it (at para 62). The jurisdictional issues above capture the issue with the Court interfering with this matter more appropriately than the issue of justiciability.

[44] Furthermore, the Council takes issue with the Applicants' lack of standing to enforce collective rights. This argument has little relevance, as the Applicants do not make submissions on the duty to consult or other collective rights. This matter also does not concern the substance of the Settlement Agreement relating to the Treaty Cattle Promise. Instead, the main issues are procedural fairness and the reasonableness or unlawfulness of the Ratification Vote, which are issues where Council do not appear to dispute that the Applicants have standing.

[45] Notwithstanding my finding that this Court does not have jurisdiction to consider the matter, for the sake of completeness, I will asses the merits of the submissions as they pertain to procedural fairness and reasonableness of the Ratification Vote.

C. *Compliance with Confidentiality Order*

[46] Towards the conclusion of the hearing, counsel for the Applicants raised a concern that the Respondents made references to confidential information in contravention of the confidentiality order granted by Associate Judge Ring. According to the Applicants, both Respondents failed to comply with the confidentiality order and only the Applicants complied with its terms.

[47] From my review, only Canada complied with the terms of the confidentiality order by drawing the Court's attention to parts in the record that were redacted in the public version without reading the content into the record. Council read out several documents that were redacted in the public versions of the record related to the Settlement Agreement. Although the Applicants requested a portion of the hearing be *in camera* to comply with the confidentiality order, Applicants' counsel nevertheless read confidential material related to Settlement Agreement and Voting Guidelines into the record at the hearing.

[48] Nothing turns on this except in considering costs.

VII. Issues and Standard of Review

[49] After considering the parties' submissions, this matter raises the following issues:

1. Was the Ratification Vote procedurally unfair?
2. Was the Ratification Vote unreasonable or *ultra vires* due to paragraph 2(3)(a) of the *Indian Act*?
3. What remedy is available?

[50] The parties agreed that the standard of review for procedural fairness is on whether the procedure actually used was fair having regard to all of the circumstances (*Shotclose* at para 60; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]). I agree that issues of procedural fairness attract a standard of review akin to correctness (*CP Railway* at para 54; *Mission Institution v Khela*, 2014 SCC 24 at para 79). On a correctness review, no deference is owed to the decision-maker (*Blois v Onion Lake Cree*

Nation, 2020 FC 953 at para 26). Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Canada (Minister of Citizenship and Immigration) v Vavilov* at para 77 [*Vavilov*]; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) at paras 21-28 [*Baker*]).

[51] On the merits, the Applicants raise the allegation that the decision does not comply with the *Indian Act* as a basis for either setting aside the decision for being unreasonable and/or without jurisdiction. The Applicants do not explicitly identify the standard of review for the merits of the decision but do refer to unreasonableness. The Council recognizes that the standard of review is reasonableness and submits that a high degree of deference is owed, as Council possesses unique expertise and knowledge in relation to the political, cultural, social, and historical considerations that informed the Settlement Agreement and Trust Agreement. Canada agrees that the standard of review is reasonableness but submits that the Applicants have not shown or argued that any aspects of the decision was unreasonable.

[52] This case does not engage one of the exceptions set out by the Supreme Court of Canada in *Vavilov*. Therefore, the presumption of reasonableness is not rebutted (at paras 16-17). A reasonableness review is a robust form of review that requires the Court to consider both the administrator's decision-making process and the outcome of the decision (*Vavilov* at paras 83, 87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 58 [*Mason*]). A reviewing court must take a "reasons first" approach to assess whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is

justifiable in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 99; *Mason* at paras 59-61). The onus is on the applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

VIII. Analysis

A. *Was the Ratification Vote procedurally unfair?*

(1) Applicants' Position

[53] The duty of fairness required the disclosure of the actual settlement agreement at minimum, based on administrative law, fiduciary law, and Treaty 7. All material necessary to make an informed vote is necessary in a ratification process such as the one under review here (*Fort McKay First Nation v. Laurent*, 2009 FCA 235 at para 45 [*Fort McKay*], citing *Goldex Mines Ltd v Revill et al*, 1974 CanLII 433 (ON CA)). Similarly, this Court found that the content of duty of fairness required full disclosure when amending an election code and extending a term of office (*Shotclose* at para 93). The disclosure obligation is heightened because it concerns a Treaty right and because of the fiduciary relationship between a band council and its members.

[54] Council did not provide the Settlement Agreement and Trust Agreement to members by default unless an individual requested it in the correct way. There is no evidence before the Court

that any members obtained a copy of the Settlement Agreement. Instead, the evidence is that the Applicants and Chris Shade were unable to obtain a copy despite their efforts. Furthermore, although Council made a "plain language" summary available, it was inadequate to meet the disclosure requirements as it did not include the wording of key parts of the Settlement Agreement, including the release clause.

[55] This matter is distinguishable from cases in the context of a motion to strike a statement of claim where the courts have found that there was no legal requirement for a referendum to approve a Treaty settlement agreement since the successor Council had authority to confirm whether the Treaty had been performed by Canada (see *Goodswimmer v Canada (Attorney General)*, 2017 ABCA 365 at para 88 [*Goodswimmer 2017*]). First, contrary to the Council's submissions, there is no evidence that Chiefs and headsmen entered into Treaty 7 without consultation with their members. Second, the Applicants had legitimate expectations that they would be consulted before relinquishing a part of Treaty 7 (*Reference re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC)). Members had been consulted on lesser settlement agreements in the past and there is evidence that other nations also held ratification votes. Third, the cause of action is distinct as in motion to strike cases where applicants seek to challenge executed settlement agreements years after execution. In contrast, the Applicants here are asserting the novel argument that a federal board or tribunal, in extinguishing a provision of Treaty 7 and deciding to conduct a ratification vote, is required as a matter of administrative law to ensure that the voting process is fair.

(2) Council's Position

[56] The duty of fairness was not triggered in relation to the negotiation of the Settlement Agreement, the drafting of the Trust Agreement, or the passage of the July 13, 2021 BCR because those decisions of Council were not administrative in nature.

[57] If the Court characterizes the Council's actions between July 13, 2021 and September 16, 2023 in conducting the Ratification Vote as administrative and attracting a duty of fairness, the content of that duty is minimal. In terms of the *Baker* factors, the process being followed in making the decision was not akin to a judicial process; there was no statutory or other framework dictating procedural protections for members in a Ratification Vote such as this; the Applicants had no legitimate expectations for any other procedure; and while the settlement of the Cattle Claim is important to the Blood Tribe, it is not under review and the specific impugned decisions are of little importance. Council further noted that the Applicants' claims that the alleged failure to consult does not amount to amending the Treaty or extinguishing a clause. Procedural fairness must also be viewed in the context of the Voting Guidelines and content of the Settlement Agreement.

[58] In stating that the duty of procedural fairness required the disclosure of the Settlement Agreement, the Applicants ignore that that they failed to take the minimum initiative required to avail themselves of the information, despite the Blood Tribe making copies of the Settlement Agreement available. The Court has previously found that there was not a breach of procedural fairness where the applicant failed to avail herself of procedural rights after refusing to accept service of a petition by an electoral officer that would inform her of the case against her and give

notice of an opportunity to be heard (*Bighetty v Barren Lands First Nation*, 2014 FC 171 at paras 51-53). Similarly, the Applicants had various ways to access information regarding the Ratification Vote, the Settlement Agreement and Trust Agreement, but took steps to wilfully ignore information that was or could have been made available to them. The Applicants testified about having adequate notice of the Ratification Vote. The Applicants also took some steps to inform themselves by accessing information or attending information sessions, including about the Notice of Ratification Vote, overview of the Cattle Claim, and summaries of the Settlement Agreement and Trust Agreement. The Applicants also made no effort to contact the RO through the proper means specified in the Notice of Ratification Vote, despite Mr. Shade testifying that the process was satisfactory when he contacted the RO properly to request certain documents.

(3) Canada's Position

[59] There was no breach of procedural fairness. The Council gave adequate notice of the Ratification Vote, held several information meetings for Blood Tribe members, and met reasonable disclosure requirements by providing summaries of the Settlement Agreement and related documents. The evidence also indicates that full copies of the Settlement Agreement were available upon request to the RO.

[60] Specifically, notices included the Notice of Ratification Vote and summaries on the Blood Tribe website; further notices posted on the Blood Tribe website, Facebook page and on local buildings; and hard copies delivered to the households of Blood Tribe members on-reserve and in neighbouring communities. There was also adequate disclosure regarding the Settlement Agreement through the information packages and several information meetings. Similarly,

summaries of the Settlement Agreement were available on the Blood Tribe website, which did not misconstrue the Settlement Agreement as the Applicants suggest because it does not relinquish a Treaty right. Furthermore, the Council's evidence is that full copies of the Settlement Agreement and related documents were made available at the Blood Tribe administration office and that members could contact the RO for copies of the Settlement Agreement. The Applicants did not receive copies because they did not follow the correct methods of contacting the RO whereas the evidence is that Mr. Shade was able to request documents after calling the RO at the number listed on the Notice of Ratification Vote.

(4) Conclusion on Procedural Fairness

[61] There was no breach of procedural fairness.

[62] The main assertion of the Applicants is that they, along with each Eligible Voter, were entitled to copies of the Settlement Agreement and Trust Agreement to meet the notice requirements for procedural fairness or that they were entitled to receive copies upon request.

[63] The protections owed are not at the high end of the spectrum for the following reasons. First, the nature of the decision being made and the process followed in making it do not attract a high level of procedural fairness here, as is the case in judicial or quasi-judicial proceedings (*Baker* at para 23). Second, there is no surrounding statutory scheme granting or limiting protections (at para 24). Third, the Applicants have not shown that they had legitimate expectations about what procedures Council would follow (at para 26). Finally, weight must also

be given to the choice of procedures selected by the Council in carrying out the Ratification Vote of the Settlement Agreement that it negotiated (at para 27).

[64] However, somewhat elevated procedural protections are warranted due to the importance of the Ratification Vote to the individuals affected (*Baker* at para 25). Overall, the level of procedural fairness owed is not at the high end.

[65] Council specified how the Ratification Vote would be carried out in the July 13, 2021 BCR. Council and representatives on behalf of Council, such as the RO and volunteers, distributed information through a variety of channels, including the Blood Tribe website, a newsletter, bulletin boards, delivery to the households of members, and a virtual information meeting due to COVID-19. Word of mouth was also a common source of information amongst members as is the case in many Indigenous communities. The types of documents shared included the Notice of Ratification Vote, an overview of the Cattle Claim, a questions and answers document, a "plain language" summary of the Settlement Agreement, a video presentation, and a recording of the virtual meeting held on August 18, 2021. The Notice of Ratification Vote stated that members could contact the RO at a specific cellphone number and email for requests for documents, including copies of the Settlement Agreement and Trust Agreement. The overview of the Cattle Claim document, questions and answers document, and a communique dated August 25, 2021 listed a toll-free number that members could call for the documents. The toll-free number was also provided at the virtual meeting on August 18, 2021.

[66] The evidence of both the RO and Councillor Dorothy First Rider is that the full Settlement Agreement and Trust Agreement were not included in the information because it would have been a massive undertaking to make copies of it for all members. Summaries were provided instead so that members could understand the contents of the Settlement Agreement and Trust Agreement in plain language. Copies of the Settlement Agreement and Trust Agreement were also available upon request.

[67] That said, the evidence also indicates that the provision of information about the Ratification Vote may not have been communicated perfectly. However, the process did not have to be perfect. The evidence of the Applicants and Mr. Shade show that there were gaps in the coordination of sharing information about the Ratification Vote. For instance, both Mr. Prairie Chicken and Mr. Shade did not receive the information packages that were delivered to households. However, Mr. Prairie Chicken was able to access the package later on the Blood Tribe website while Mr. Shade was able to contact the RO at the number advertised in a local newspaper (the same number as listed on the Notice of Ratification Vote) and request the package. In other words, the evidence is that the Applicants' initial difficulties in accessing information was remedied.

[68] The Applicants alleged difficulty in contacting the RO to request a copy of the Settlement Agreement, despite the fact that the contact information for the RO was contained in the Notice of Ratification Vote. Mr. Prairie Chicken tried to call the general administration number for the Blood Tribe a few times and tried once to call the toll-free number but received no answer and

was unable to leave a message. He did not try to contact the RO at the number posted on the Notice of Ratification Vote or attempt to contact the toll-free number again.

[69] Mr. Fox had also tried to call the general administration number for the Blood Tribe but received no answer and was unable to leave a message. He did not attempt to call the number posted on the Notice of Ratification Vote or the toll-free number. Mr. Fox also attempted to view a copy of the Settlement Agreement by going to the Blood Tribe administration office at least three times but was not allowed upstairs to view it. However, the RO noted in her affidavit that the Blood Tribe departments were closed to the general public and employees were mainly working from home due to COVID-19 restrictions.

[70] The Federal Court of Appeal has held that "electors should be given all of the information that they reasonably require to form an intelligent judgment on whether and how to vote" as that is the standard that has been adopted for corporate affairs (*Fort McKay* at para 45). Electors are entitled to expect information that is fairly presented, reasonably accurate, and not misleading (at para 45). For information to be misleading, it must mislead electors enough to affect the outcome of the referendum (at paras 48-50).

[71] After a consideration of the evidence, it is my view that Blood Tribe members had sufficient notice of, and information about, the Ratification Vote. It is fair to say that the conduct of a Ratification Vote is an immense undertaking, considering the number of Eligible Voters, the fact that the Eligible Voters reside on and off the Blood Tribe reserve and the complex nature of a claim itself, let alone determining the best methods to reach out to Eligible Voters. Needless to

say, the processes typically are imperfect. The Applicants do not dispute whether there was adequate notice of the Ratification Vote. However, the Applicants are concerned that the information that was disseminated did not contain the exact terms of the release provision and that they were unable to obtain copies of the Settlement Agreement to inform themselves fully. However, the documents provided did included a summary of the release provision, which described the impact of the release and indemnity provisions. I have sympathy for the Applicants' belief that these provisions extinguish a right, but with respect, that is only their perspective.

[72] On the other hand, the Council provides authority that a release clause for a treaty land entitlement agreement represented that the rights related to land have been fulfilled rather than extinguished, even despite the broad release language in that matter as the Applicants point out (*Goodswimmer v Canada (Attorney General)*, 2016 ABQB 384 at para 7 [*Goodswimmer 2016*]; *Goodswimmer 2017*). In any event, as everyone agreed, the terms of the Settlement Agreement are not subject to judicial review. The Applicants have not shown that the information provided was misleading enough to affect the outcome of the Ratification Vote nor have they demonstrated that, save for their perspective on the meaning of the release provision, that they did not know and understand the Settlement Agreement.

[73] There was a broad range of sources of information provided to inform members about the Ratification Vote and Settlement Agreement. I also find that the Settlement Agreement and Trust Agreement were available if electors required it to inform themselves further about how to vote at the Ratification Vote. The RO's evidence is that other Blood Tribe members were able to call

the two phone numbers successfully and her practice was to call numbers back even when there was no message. In contrast, the Applicants have not shown that the process to request a copy of the Settlement Agreement did not work, as they had notice from multiple sources of information on how to receive copies. However, the Applicants did not call the cellphone number listed on the Notice of Ratification Vote and Mr. Prairie Chicken only called the toll-free number once. It is unfortunate that they did not avail themselves of the appropriate methods of contact to receive the Settlement Agreement, but this does not render the Ratification Vote procedurally unfair.

B. *Was the Ratification Vote unreasonable or ultra vires due to paragraph 2(3)(a) of the Indian Act?*

(1) Applicants' Position

[74] The Ratification Vote should be set aside as unreasonable for not following the *Indian Act* or for being made without jurisdiction as it was made without the requisite approval of the majority of electors for matters of this magnitude. The Applicants acknowledge that no cases have directly considered whether paragraph 2(3)(a) of the *Indian Act* applies to the release of a treaty entitlement to require a ratification vote; however, the Applicants submit that if a surrender of land requires ratification, then so should a *de facto* surrender of a treaty entitlement. There is no principled reason or legal basis for the surrender of a treaty promise not to be subject to the same legal requirement as a land surrender.

[75] Paragraph 2(3)(a) has been extended beyond land surrenders. The Saskatchewan Court of (then) Queen's Bench has extended the requirement to an agreement allotting reserve land and extinguishing the First Nation's land entitlement under Treaty 6 (*Lac La Ronge Indian Band v*

Canada, 1999 SKQB 218 at para 201, rev'd 2001 SKCA 109). This rationale should be extended to this matter.

[76] Furthermore, paragraph 2(3)(a) refers to power conferred on a band, as opposed to a band council, requiring an elector majority vote. The Council has acknowledged that the Treaty Cattle Promise belongs to the "collective" in its motion to strike, which means that neither Council nor a minority of electors could release this promise.

(2) Council's Position

[77] Paragraph 2(3)(a) of the *Indian Act* only refers to powers conferred by the *Indian Act* (*Gadwa v Kehewin Cree Nation*, [1996] 109 FTR 12, 61 ACWS (3d) 1032 at para 11 (FCTD); *Bone v Sioux Valley Indian Band No 290*, [1996] 3 CNLR 54, 107 FTR 133 at para 33 (FCTD)). In *Peter Ballantyne Cree Nation v Peter Ballantyne Cree Nation (Council)*, 2000 CanLII 16531 (FC), this Court has also held that:

> [32] In my opinion, in the absence of statutory, regulatory or other authority requiring that a referendum on a matter other than set out by ss. 38 and 39 of the [*Indian Act*], i.e., a surrender or designation of reserve lands, the Chief and Council are not bound to follow the [*Indian Referendum Regulations*] if they seek to assess support of band electors through a referendum process.

[78] In light of the authorities above, paragraph 2(3)(a) has no relevance to this application. The Applicants' attempt to invoke paragraph 2(3)(a) of the *Indian Act* reflects an improper attempt to usurp the authority of the Blood Tribe's duly elected leaders and void a clear expression of the will of the members who voted in the Ratification Vote. The Applicants also misunderstand the nature and effect of the Settlement Agreement. It does not extinguish a treaty

right, but rather represents a band's agreement that the treaty right has been fulfilled (*Goodswimmer 2016* at para 7).

(3) Canada's Position

[79] Paragraph 2(3)(a) of the *Indian Act* has no application in this context. It is confined to situations involving a power conferred on a band by statute, such as absolute land surrenders under section 39 of the *Indian Act*. The *Indian Act* does not contain a similar provision specific to the ratification of claims that do not involve an absolute surrender of land.

[80] There is also no basis to find that the Settlement Agreement involves a *de facto* absolute surrender of land or that it amounts to amending the Treaty or waiving a Treaty entitlement, as the Applicants suggest.

(4) Conclusion on Reasonableness or *Ultra Vires*

[81] Paragraph 2(3)(a) of the *Indian Act* does not apply, so the decision to hold the Ratification Vote was not unreasonable or *ultra vires*.

[82] Paragraph 2(3)(a) specifies:

> 2(3) Unless the context otherwise requires or this Act otherwise provides,
>
> (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
>
> …
>
> [emphasis added.]

[83] The essence of the Applicants' submission is that there should be a contextual exception because this matter is analogous to an absolute surrender as it surrenders a Treaty right. However, the flaw in the Applicants' submission is that they do not address the issue of whether the Council was exercising a power conferred on a band under the *Indian Act*. In my view, the *Indian Act* does not confer a power to the Blood Tribe in relation to Treaty entitlement or ratification votes, aside from when there is an absolute land surrenders under section 39 of the *Indian Act*.

C. *What remedy is available?*

(1) Applicants' Position

[84] Given the passage of time, the Applicants seek a declaration that the Settlement Agreement was done in violation of the duty of procedural fairness, without jurisdiction and/or unreasonable. The relief is not moot and it may be the only remedy open for the conspicuous breaches of a fair ratification process. A declaration is appropriate in these circumstances given the *prima facie* unlawful conduct of not disclosing the Settlement Agreement that Council sought to have ratified and, which, at minimum extinguished a significant claim, and, in the Applicants' submissions released a Treaty entitlement forever (*Watson v Canada*, 2020 FC 129 at para 524; *Restoule v Canada (Attorney General)*, 2021 ONCA 779 at para 547).

(2) Council's Position

[85] This matter is analogous to cases where the Courts have exercised their discretion not to grant the relief sought. In *Ballantyne*, the Court declined to grant relief in a matter concerning a

judicial review of a decision to settle a tort claim against Canada and the corresponding ratification vote. The Court found that the harm of quashing the decision outweighed the need to denounce the defects in decision-making since it could delay Canada's payment of settlement funds and put the implementation of the settlement agreement in jeopardy (at paras 58-59, 79). Similarly, the Court in *Gamblin* considered whether to quash BCRs related to the settlement of claims in relation to projects that affected potable water supply. The Court found that the drawbacks of finding a BCR invalid outweighed the procedural violations as it would cause burdens and risks to the other parties to the settlement and had financial consequences of requiring the return of monies already paid (at paras 90, 98, 104).

[86] Council further submit that the drawbacks of disturbing the Settlement Agreement or Trust Agreement outweigh any procedural violations alleged by the Applicants. A significant majority of members who cast a vote in the Ratification Vote had voted in favour of the Settlement and Trust Agreements, which should outweigh the positions and preferences of the two Applicants. Similar to *Gamblin*, Canada has relied on the results of the Ratification Vote and has made the required payment to the Blood Tribe, which has since been disbursed to members.

(3) Conclusion on Remedy

[87] Having found that the Court does not have jurisdiction to judicially review the Council's decision to conduct the Ratification Vote, and further finding that, even if this Court had jurisdiction to review this decision, there has been neither a breach of procedural fairness nor a contravention of paragraph 2(3)(b) of the *Indian Act*, it follows that it is within the Court's discretion to refuse to grant a remedy. As the Applicants submit, they are only seek a declaration

so the Court still could grant the remedy without quashing the Ratification Vote. However, the circumstances of this matter are such that the harm outweighs the need to cure any defects in decision-making (*Ballantyne* at para 79; *Gamblin* at para 100). A declaration on the validity of the Ratification Vote has consequences for both the Settlement Agreement and Blood Tribe members (*Gamblin* at paras 90-98). Despite any flaws, electors voted in favour of the Settlement Agreement and Trust Agreement and Canada has since paid the monies accordingly, which Blood Tribe has distributed to its members.

IX. Costs

A. *Applicants' Position*

[88] The Applicants seeks their costs in any event of the cause. This matter is a novel issue which is of the interest to the members of Blood Tribe and any members of treaty nations releasing or amending treaty rights (*Shotclose v Stoney First Nation*, 2011 FC 1051 at para 11; *Knebush v Maygard*, 2014 FC 1247 at para 41; *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525 at para 23). Furthermore, Council engaged in personalized attacks against the Applicants, including by raising an inadmissible criminal charge by the Council's own police and the 2020 election results; cross-examinations took an unduly long time and were largely irrelevant; and Council engaged in targeted attacks on the Applicants through their community-wide newsletter and by statements from Councillor First Rider.

B. *Council's Position*

[89] Council seeks a 40% lump sum award in respect of fees incurred in defending this judicial review. The Court should exercise its discretion to order a lump sum costs award because calculating costs based on an application of Tariff B of the *Federal Courts Rules* would be inadequate, unnecessarily complicated, and burdensome (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 157 at para 11). In *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 1119, Justice Grammond exercised the Court's powers under Rule 400(4) to award a lump sum representing 40% of actual costs incurred (at para 35). Council indicated that if the Court makes a costs order, it would like to seek leave to make further costs submissions.

C. *Canada's Position*

[90] Canada is not seeking costs. However, Canada disagrees that the Applicants should have costs in any event of the cause. Council's decision to ratify the Cattle Claim is not a novel issue and there is no extinguishment or amendment of a Treaty 7 right. Canada does not take a position on the Applicant's assertions that the Council engaged in personalized and targeted attacks.

D. *Conclusion on Costs*

[91] Pursuant to Rule 400(1), the award of costs is discretionary based on certain factors. Having considered the parties' submissions and taking into account the factors set forth in Rule 400(3), I am exercising my discretion not to award costs to any party.

[92] The issues raised were not novel and, as illustrated above, previous decisions of considered similar circumstances. I also note that there were strategic procedural decisions made by both the Applicants and Council that somewhat complicated this matter being hearing-ready, which also weighs in favour of not granting any costs. In addition, both the Applicants' counsel and Blood Tribe's counsel contravened the confidentiality order. Overall, in my view, it is in the interests of justice not to award costs.

X. Conclusion

[93] For the reasons above, this application for judicial review is dismissed.

JUDGMENT in T-1567-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Paul Favel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1567-21
STYLE OF CAUSE:	ROGER PRAIRIE CHICKEN, EUGENE FOX AND LORI SCOUT ON THEIR OWN BEHALF, AND ON BEHALF OF THE MEMBERS OF THE BLOOD TRIBE v THE BLOOD TRIBE BAND COUNCIL AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 30-31, 2024
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JULY 23, 2024

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