

Court File No. _____

FEDERAL COURT

B E T W E E N:

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

APPLICANTS

AND

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

RESPONDENTS

APPLICATION UNDER SECTIONS 18, 18.1, and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and Rule 301 of the *Federal Courts Rules*, S.O.R./98-106.

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date _____ Issued by _____
(Registry Officer)

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*LAWYER FOR THE RESPONDENT, CHIEF JUDY DESJARLAIS AS CHIEF
REPRESENTATIVE OF BLUEBERRY RIVER FIRST NATIONS*

APPLICATION

This is an application by Elders Clarence Apsassin and Joe Apsassin on behalf of the Blueberry River First Nations Edward Apsassin Family and Elders Group (the “**applicants**”) for judicial review of ongoing efforts by a bloc of councillors of Blueberry River First Nations (Wayne Yahey, Shelley Gauthier, Troy Wolf, and Sherry Dominic – collectively, the “**Council Bloc**”) to make decisions and govern the Nation in a manner inconsistent with the laws and customs of the Nation (the “**Ongoing Actions**”), the most recent example of which is a March 12, 2024 band council resolution purporting to authorize an investigation of the Chief of the Nation (the “**March 12, 2024 BCR**”) on politically-motivated grounds. These Ongoing Actions, including the March 12, 2024 BCR, have proceeded without consultation with the membership, as explicitly required by Blueberry’s laws and customs; have not been authorized by duly-constituted meetings of Council and in particular have proceeded without the involvement and in some cases without the knowledge of the Chief; and in the case of decisions regarding investigation of the Chief, despite a conflict of interest on the part of the Council Bloc.

THE APPLICANT MAKES APPLICATION FOR:

1. A declaration that the March 12, 2024 BCR was not duly passed, or in the alternative, an order in the nature of *certiorari* quashing the March 12, 2024 BCR on the basis that it is unreasonable, procedurally unfair, and inconsistent with Blueberry River First Nation’s laws and customs;
2. A declaration that the Council Bloc have breached Blueberry River First Nations’ laws and customs, including the Blueberry River First Nations *Custom Election By-Law* (“**By-Law**”);
3. A declaration that Blueberry River First Nations Council and the Council Bloc are required to meet regularly and as a whole of Council, in accordance with the By-Law;

4. A declaration that the Council Bloc are in a conflict of interest with respect to the investigation of Chief Desjarlais, and are required to remand such decisions to the members, in accordance with the By-Law;
5. A declaration that Blueberry River First Nations Council and the Council Bloc are required to consult with and represent the views of Blueberry's members, including Family Groups and Elders, in advance of making major decisions on behalf of the Nation, in accordance with the By-Law;
6. An order that the application be specially case managed;
7. An order that the parties participate in mediation;
8. An interim and/or interlocutory injunction suspending and or staying the March 12, 2024 BCR and the Ongoing Actions, pending the determination of this application;
9. Costs; and
10. Such further and other relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

(a) Background

11. Blueberry River First Nations ("**Blueberry**") is a band under the *Indian Act*, R.S.C., 1985, c. I-5 in the province of British Columbia.
12. The applicants are members of Blueberry and Elders who speak on behalf of the Blueberry Edward Apsassin Family group, one of the five family groups and the Elders Group.
13. The respondents are four of the councillors of Blueberry (the Council Bloc) and the elected Chief of Blueberry.

i. Blueberry River First Nations Custom Election By-Law

14. Blueberry adopted the By-Law in August 2017. The By-Law governs elections of Blueberry Council as well as procedures and conduct of Council, once elected.

15. Under the By-Law, the Blueberry Band Council is composed of five councillors representing five family groups, and a chief elected by the five councillors.
16. The By-Law provides that councillors are accountable to and have a duty to engage with and represent members of their family group and Elders. Moreover, councillors may be subject to removal from office where they lose the confidence of their family group.
17. The Duties and responsibilities of each Family Councillor include without limitation:
 - (a) to act in the best interests of Blueberry River honestly, impartially and in good faith and to represent the interests and concerns of their Family Group without compromise to Blueberry River interests as a whole (s. 20(b));
 - (b) inform their Family Group of all Blueberry River affairs and matters under consideration by Council and to conduct Council business in an open and transparent manner (s. 20(c));
 - (c) be accountable to all Blueberry River members within their Family Group regardless of whether they reside on or off Reserve (s. 20 (d));
 - (d) make reasonable efforts to ensure that Elders within their Family Group are aware of the Blueberry River benefits, entitlements and services available to them (s. 20 (f));
 - (e) demonstrate leadership with a focus on the Blueberry River community, the needs of future generations and fulfilling the vision statement in this By-law (s. 20(h));
 - (f) work with the Chief in representing Blueberry River interests in negotiations, lobbying and consulting with government, industry, business, first nation organizations or other bodies to fulfill Blueberry River community objectives (s. 20(i)).

18. Moreover, the By-law provides specific Rules to follow when a conflict of interest arises. Indeed, where all Council members are in conflict of interest with regard to a decision that must be made, they must refer that decision to a community vote which must be conducted in accordance with Part 21 (s. 155).
19. Sections 187 to 198 of the By-Law set out the procedure for authorizing and conducting an investigation into a band council member. The procedure includes:
 - (a) A requirement that a written report be made describing the grounds for the allegation prior to any meeting where a motion to authorize an investigation is brought (ss. 187 and 188);
 - (b) A requirement that any written report set out the specific paragraph in section 184 to which the allegation relates, and where relevant, a description of the allegation, including the names of any witnesses and any supporting documentation (s. 189);
 - (c) A requirement that a copy of that report be provided to every council member prior to any meeting where a motion to authorize an investigation is brought (s. 190(a));
 - (d) A requirement that a copy of that report be published on the Blueberry River First Nations website and all public buildings located on a Blueberry River reserve prior to any meeting where a motion to authorize an investigation is brought (s. 190(c));
 - (e) A requirement that the report be distributed at the next duly convened council meeting for review (s. 192);
 - (f) A requirement that the council member who is the subject of the report must provide his or her perspective on the allegation at the council meeting where review of that report occurs (s. 192(d));

- (g) A requirement that after the member who is the subject of the report has denied in part an allegation in the report, council must make a decision by council resolution on whether to initiate an investigation (s. 194); and
 - (h) A requirement that council consider all relevant factors to determine whether authorizing an investigation would be in Blueberry River's best interest, including whether the alleged conduct is serious in nature, the council member has relevant previous disciplinary actions against them, and whether there are grounds for believing that the alleged conduct may be continued or repeated (s. 195).
20. Under sections 2 and 196 of the By-Law, for council to order an investigation, council must pass a resolution appointing an independent investigator by way of a formal motion moved by a council member, seconded by another member, and approved by a majority of a quorum of council at a duly convened meeting of council.

ii. Ongoing governance dispute and efforts to investigate/oust Chief

21. There has been an ongoing political dispute between the Council Bloc and the Chief regarding the governance of the Nation.
22. The Council Bloc in the past several months have taken a series of actions contrary to Blueberry's laws and customs, including specific provisions of the By-Law governing the conduct of Council, and contrary to the best interests of the Nation. Among other things, the Council Bloc have:
- (a) Failed to meet and make decisions on behalf of Blueberry as a whole of council, without the involvement of and in some cases without the knowledge of the Chief, instead meeting and making decisions independently and often in secret, as a bloc, outside of duly-constituted Council meetings, including with respect to the investigation of the Chief;
 - (b) Failed to consult with Blueberry Family Groups and Elders and represent their views in major decisions, as required by the By-Law and Blueberry's customs; and have in fact excluded participation of the applicants and others in meetings or otherwise silenced them for raising valid concerns about the governance of the Nation; and

- (c) Purported to make a number of major decisions on behalf of Blueberry, contrary to the By-Law, in the manner outlined above. This includes, for example, the October 27, 2023 purported decision to terminate the employment of Blueberry's Band Manager in apparent retribution for her efforts to ensure the observance of Blueberry's laws and policies. They have also purported to make critical decisions regarding Blueberry's Implementation Agreement with the Province which will have major implications for the Nation and its members, similarly without the involvement or knowledge of the Chief and members of the Nation.
23. Due to the above actions, there is currently a petition circulating to remove councillor Shelley Gauthier from office for failure to consult with and properly represent her Family Group, the Edward Apsassin Family.
24. At a September 22, 2023 meeting, Councillor Sherry Dominic brought a motion without prior notice to add a band council resolution authorizing an investigation into Chief Desjarlais' conduct to the meeting agenda. This motion was seconded by Councillor Shelley Gauthier and it was added to the agenda for consideration by council (the "**September 22, 2023 BCR**").
25. None of the steps required by the By-Law were taken in respect of the September 22, 2023 BCR. Among other things, the Council Bloc failed to prepare and distribute a written report, failed to consider the written report, and failed to consult with the community as required.
26. The September 22, 2023 BCR was never ultimately passed by a quorum of Council.
27. Despite the failure to pass the September 22, 2023 BCR at any point in time, a lawyer at the law firm named in that BCR purported to begin the investigation by letter to Chief Desjarlais, dated 6 October 2023.
28. On October 19, 2023 Chief Desjarlais filed a notice of application for judicial review of the September 22, 2023 BCR in this Court on the grounds that the BCR was "unreasonable, procedurally unfair, and not in conformity with the requirements of the By-Law" (Court File No. T-2229-23).

29. On December 8, 2023, the Council passed a Band Council Resolution approving a s. 187 report and appointing the law firm, Mitha Law Group – legal counsel for the Council Bloc – to conduct an investigation into the conduct of Chief Desjarlais.
30. As counsel for the Chief raised a concern about Mitha Law Group conducting the investigation, the Council purported to pass another BCR on January 10, 2024, appointing the law firm Cassels Brock to conduct the investigation. The Chief was not given any notice and was not in attendance at this meeting.
31. On February 1, 2024, Cassels Brock advised they had a conflict of interest and could not proceed with the investigation.
32. On or around March 1, 2024, at a council meeting the Council Bloc attempted to go *in camera* to table a BCR similar to the September 22, 2023 BCR. The Chief did not attend due to lack of notice and the BCR was not voted on at that time.

iii. The March 12, 2024 BCR

33. In the March 12, 2024 BCR, the Council Bloc purported to:
 - (a) Amend prior Band Council Resolutions regarding initiating investigation of the Chief;
 - (b) Appoint the law firm Sugden McFee and Roos LLP as independent investigators to conduct the Investigation into the conduct of Chief Desjarlais as set out in the section 187 Report made on or about December 3, 2023; and
 - (c) Request all reasonable legal fees and disbursements associated with the appointment of Sugden McFee and Roos LLP be paid by the BRFN.
34. No significant consultation regarding the March 12, 2024 BCR (nor prior BCRs) was ever carried out by the Council Bloc, nor does the BCR enjoy the required support of the Family Groups, Elders, and Blueberry community.
35. The Council Bloc have since indicated that they may amend the March 12, 2024 BCR further to accommodate an adjustment to timelines and appointment of investigators.

(b) Grounds for review

36. The Ongoing Actions are unreasonable and/or procedurally unfair on the following grounds:
- (a) Failure to consult with Family Groups, Elders, and membership on decisions of critical importance to the Nation, as required by the By-Law, and relatedly the lack of support of Family Groups, Elders, and members for these decisions;
 - (b) Failure to make decisions at duly-constituted meetings of Council, with the presence, participation, and knowledge of the Chief, and instead purporting to make decisions independently and in secret as a bloc of four councillors; and
 - (c) Failure otherwise to observe the procedure and other requirements of the By-Law.
37. Specifically, the ongoing efforts by the Council Bloc to investigate the Chief (a subset of the Ongoing Actions), including the March 12, 2024 BCR, are also procedurally unfair on the following grounds:
- (a) The outcome of the March 12, 2024 meeting was pre-determined, and tainted by the prior actions of the Council Bloc. The Council Bloc met privately and decided independently of the whole of Council, including the Chief, to have the Chief investigated. This is reflected in the September 22, 2023 BCR, which was tabled without notice and contrary to the By-Law, and not ultimately passed, despite efforts by the Council Bloc to implement it. These irregularities have tainted the process and cannot be cured in the manner attempted by the Council Bloc; and
 - (b) The Council Bloc were in a conflict of interest by reason of the engagement of their private interests and their political dispute with the Chief, and therefore in accordance with the By-Law ought to have remanded any decision regarding the investigation of the Chief to the membership.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) the affidavits of Joe Apsassin and/or Clarence Apsassin, to be affirmed; and
- (a) such further and other material as counsel may advise and this Court may permit.

The applicant requests, pursuant to Rule 317(2), that the Council Bloc transmit a certified copy of the following material that is not in the possession of the applicants but is in the possession of the respondents to the applicant and to the Registry:

1. Any material that was before the Council Bloc or that they considered or relied on in purporting to authorize themselves to make decisions and govern the Nation without the involvement or knowledge of the Chief, and without consulting with members in accordance with the By-Law; and
2. Any material that was before the Council Bloc or that they considered or relied on in purporting to seek the investigation of the Chief, including the March 12, 2024 BCR specifically and interim/cancelled/amended BCRs leading up to the March 12, 2024 BCR.

DATED: April 10, 2024



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