

Federal Court



Cour fédérale

Date: 20221215

Docket: T-137-22

Citation: 2022 FC 1743

Ottawa, Ontario, December 15, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

**DAKOTA PLAINS WAHPETON OYATE AS REPRESENTED BY
EVANGELINE TOWLE IN HER CAPACITY AS HEREDITARY CHIEF OF
DAKOTA PLAINS WAHPETON OYATE, CRAIG BLACKSMITH AND
ALVIN SMOKE IN THEIR CAPACITY AS REPRESENTATIVE
DAKOTA PLAINS WAHPETON OYATE COUNCIL MEMBERS**

Applicants

and

DONALD RAYMOND SMOKE

Respondent

JUDGMENT AND REASONS

[1] This judicial review concerns a dispute over who has the authority based upon unwritten hereditary custom to act as the Chief of Dakota Plains Wahpeton Oyate First Nation [DPFN] following the death of Chief Orville Smoke in October 2021.

[2] The Applicant, Evangeline Towle, claims to be the Hereditary Chief of DPFN. She and representative Council members Craig Blacksmith and Alvin Smoke bring this Application in the name of DPFN and seek various remedies. They seek orders of *quo warranto* removing the Respondent, Donald Smoke, as Chief and proclaiming Evangeline Towle as Chief of DPFN. They also ask the Court to quash Band Council Resolutions [BCR] that name the Respondent as Hereditary Chief of DPFN.

[3] For the reasons that follow, I am dismissing this Application. I have determined the Applicants have failed to establish their purported custom. This finding is determinative of Evangeline Towle's claim to be the Hereditary Chief and is also determinative of the request for *quo warranto* relief. Further, I have concluded there are no grounds upon which to set aside the BCRs recognizing the appointment of the Respondent as Chief.

[4] Finally, having concluded that the Applicants did not have legal standing to bring this Application in the name of DPFN, they will be personally responsible for costs to the Respondent. I have agreed to allow the parties to make written submissions on costs following the issuance of this decision.

I. Background

[5] DPFN is a First Nation located near Portage la Prairie, Manitoba with approximately 280 members. Canada has recognized DPFN as an independent Nation since 1972.

[6] DPFN has followed a hereditary custom where Chiefs have been selected from the descendants of Chaske and Tiyo Smoke. Chaske and Tiyo Smoke had ten children. After the death of Chief Chaske Smoke, his eldest son Laurence Smoke became Chief, until he renounced the role shortly afterwards. Next, Chief Chaske Smoke's fifth child Ernie Smoke became Chief, until his death in 1994. Finally, Orville Smoke, the ninth child of Chaske Smoke, became the Chief of DPFN and held that position for 26 years.

[7] Chief Orville Smoke had three children, who in order of birth are - Arden Smoke, Donald Smoke (the Respondent), and Evangeline Towle (one of the Applicants).

[8] Chief Orville Smoke's daughter, the Applicant Evangeline Towle, claims to be the Hereditary Chief according to DPFN custom. The Applicant Craig Blacksmith was the Chief Executive Officer [CEO] of DPFN during the last few years of Chief Orville Smoke's chieftainship. The Applicant Alvin Smoke is a former employee of DPFN. All three of the Applicants are members of DPFN.

[9] The evidence is that Chief Orville Smoke gave the Respondent various DPFN responsibilities. In 2015, the Respondent was appointed as the Vice-Chief of DPFN for the purpose of succession planning, and was reappointed to this role in February 2021. The Respondent acted as political proxy for the Chief/his father with the Southern Chiefs Organization and the Assembly of Manitoba Chiefs. He attended the 2018 National Chiefs Assembly where Chief Orville Smoke introduced him as the next leader of DPFN. In September 2021, the Respondent attended a flag raising ceremony on behalf of DPFN.

[10] On August 31, 2021, a band meeting was called and approximately 2/3 of the adult members of DPFN attended. At this meeting, the Respondent informed the community that Chief Orville Smoke was intending to step down in the coming weeks and planned to pass the chieftainship to the Respondent.

[11] On September 26, 2021, the late Chief Orville Smoke posted on his Facebook page that September 27 would be his last day in office.

A. *September BCRs*

[12] On September 27, 2021, Chief Orville Smoke and his two brothers Leslie Smoke and Ronald Smoke Sr. signed three BCRs. The full text of the BCRs is outlined later in these reasons. The most contentious BCR is the first BCR, which names the Respondent as Chief of DPFN and states:

BE IT RESOLVED, That of this day, September 27, 2021 the former Chief Orville Smoke and Elder's Council of the Dakota Plains Wahpeton Oyate have named Donald Raymond Smoke DOB May 19th 1971 as Chief of the Dakota Plains Wahpeton Oyate.

BE IT RESOLVED, That of September 28, 2021 Donald Raymond Smoke will assume the role and responsibility as the lead governing authority of the Dakota Plains Wahpeton Nation and will assume the responsibility held by Orville Smoke going forward of September 28, 2021

BE IT RESOLVED, That of September 28, 2021, the official notice of change of title will be forwarded to the appropriate channels including, but not limited to Indigenous Services Canada.

BE IT FINALLY RESOLVED, that the Chief Donald Smoke shall hold his seat until such time when he cannot perform the essential components of a job in a safe, efficient and reliable manner.

[13] A second BCR signed on September 27, 2021, notes the Respondent can maintain his position as Director of Education while Chief. The third BCR also signed on September 27, 2021, outlines selection criteria for the incumbent DPFN leader.

[14] On September 28, 2021, the late Chief Orville Smoke posted on his Facebook that his “Hepan took the reins today, as per Dakota tradition”. There is evidence that “*hepan*” means ‘second son’ in the Dakota language. The Respondent is the second son of Chief Orville Smoke.

[15] On October 5, 2021, Chief Orville Smoke passed away.

B. *Events Following the Death of Chief Orville Smoke*

[16] Following the death of Chief Orville Smoke, the Respondent signed BCRs as Chief and initiated an operational review of DPFN. He attended various meetings as the Chief, and there is evidence that the members of DPFN recognized him as the Chief. For example, on December 5, 2021, he received a letter from community members addressed to him as “Chief Don Smoke”.

[17] On November 23, 2021, the Applicants organized a community meeting at the Band Office to discuss governance issues and alternative governance models for DPFN. The Respondent attended this meeting. During the meeting, the Respondent advised the Applicant Craig Blacksmith that an operational review of DPFN was being undertaken and that Craig Blacksmith, as the CEO, needed to provide information to Chief and Council.

[18] On November 29, 2021, a meeting was scheduled between Craig Blacksmith, the Respondent as Chief, and Council to discuss the operational review. Craig Blacksmith did not attend the meeting. A BCR was passed at this meeting, signed by the Respondent as Chief, which revoked all signing authority for DPFN bank accounts pending the outcome of the operational review.

[19] In December 2021, some two months after the BCR affirming the Respondent's appointment as Chief of DPFN, Evangeline Towle and others signed a series of BCRs. These are the BCRs relied upon by the Applicants to establish that the Applicant Evangeline Towle is the rightful Chief of DPFN. The details of these BCRs are as follows:

- On December 2, 2021, Evangeline Towle signed a BCR removing the names of those who had signing authority on the DPFN General Account at Peace Hills Trust Company. This BCR also appointed new signing authorities on the account, including herself and Alvin Smoke.
- On December 6, 2021, a BCR was signed by purported representatives of the Youth Council, Women's Council, and Elder's Council [December 6 BCR]. This BCR states:

WHEREAS: Dakota Plains Wahpeton Oyate is a Dakota Nation governed by a Hereditary Chief and Council system since time immemorial.

AND WHEREAS: Dakota Plains Wahpeton Oyate has suffered the loss of Chief Orville Smoke as their Chief.

AND WHEREAS: Dakota Plains Wahpeton Oyate governs accordingly under the Dakota Hereditary custom with a Chief, an Elders Council, a Womans [sic] Council, a Youth Council.

AND WHEREAS: Dakota Plains Wahpeton Nation Chieftainship passes from Father to Eldest Son.

THEREFORE BE IT RESOLVED THAT: Dakota Plains governance recognizes Arden Smoke, Orville Smoke's Eldest son, as Chief under the Dakota Plains Wahpeton Nation Hereditary system.

- On December 10, 2021, a BCR was signed by purported representatives of the Youth Council, Women's Council, and Elder's Council, which recognized Arden Smoke's renunciation as Chief and appointed Evangeline Towle as Chief of DPFN [December 10 BCR]. This BCR states:

WHEREAS: Dakota Plains Wahpeton Oyate is a Dakota Nation governed by a Hereditary Chief and Council system since time immemorial.

AND WHEREAS: Dakota Plains Wahpeton Oyate has suffered the loss of Chief Orville Smoke as their Chief.

AND WHEREAS: Dakota Plains Wahpeton Oyate governs according to Dakota Hereditary custom with a Chief, an Elders Council, a Womens [sic] Council, and a Youth Council.

AND WHEREAS: Dakota Plains Wahpeton Nation Chieftainship passes from Father to Eldest Son. In the event that an heir rescinds his title, Dakota Plains Governance has the responsibility to recognize a younger sibling as Chief.

THEREFORE BE IT RESOLVED THAT: Dakota Plains governance appoints and recognizes Evangeline Renee Dawn Towle, Orville Smoke's Eldest Daughter as Chief under the Dakota Plains Wahpeton Nation Hereditary system.

- On December 10, 2021, a BCR was signed by Evangeline Towle as Chief, giving herself signing authority over the DPFN General Account at Peace Hills Trust Company.

[20] On December 10, 2021, a letter was sent to the Regional Director General of Indigenous Services Canada [ISC], advising that DPFN would be in mourning for a one-year period following the death of Chief Orville Smoke and that DPFN would be holding a referendum. The letter was signed by Evangeline Towle as Chief of DPFN, and Gordon Smoke, Chandelle Smoke-Towle, and Elizabeth Smoke as Councillors. The letter states:

Upon the results of the community referendum and subsequent election or continuation of the Dakota Plains Hereditary system, Indigenous Services Canada will be officially notified by Dakota Plains Band Council Resolution.

[21] On December 13, 2021, the Respondent as Chief and Council terminated Craig Blacksmith's employment as CEO when no response was received to either the November 23 letter or a follow-up letter of December 9, 2021.

[22] On December 16, 2021, a BCR was signed by the Respondent as Chief and nine Representative Council Members removing Evangeline Towle's bank signing authority on the DPFN General Account at Peace Hills Trust Company.

[23] On December 20, 2021, Arden Smoke signed a formal declaration renouncing his position as Hereditary Chief, effective December 10, 2021.

[24] On December 21, 2021, legal counsel for the Applicants forwarded a cease-and-desist letter to the Respondent. The Respondent replied that Evangeline Towle was not recognized by DPFN as Chief and he would continue to act as DPFN Chief until he received a court order restraining him from doing so.

[25] On January 25, 2022, the Applicants filed this judicial review Application.

[26] On February 7, 2022, ISC advised that in light of the governance dispute at DPFN, ISC was appointing a Third Party Manager for the management of ISC programs and services.

C. *Jurisdiction Order*

[27] The issue of the Court's jurisdiction over this Application was the subject of an Order issued by my colleague Justice Ahmed on June 16, 2022 (*Dakota Plains First Nation v Smoke*, 2022 FC 911) where he determined:

[15] I agree with the Applicants' position that the jurisprudence clearly shows that the Court has jurisdiction over this matter. Indeed, while the Respondent is the sole person named in the Notice of Application, I can appreciate the Applicants' explanation that they did not name the Respondent in his capacity as the Hereditary Chief of Dakota Plains, because the Applicants do not recognize him as such. The disagreement over who is to govern Dakota Plains is precisely the issue before this Court. The Respondent in this matter is holding himself out to be the Hereditary Chief of Dakota Plains, according to custom. As noted by the Applicants, this Court's jurisprudence has established that a First Nation's band council constitutes a "federal board, commission or other tribunal" and this Court has jurisdiction over decisions made by a First Nation's band council (*Gamblin* at paras 29-63). This Court has also determined that decisions made pursuant to custom are reviewable in this Court. In *Thomas v One Arrow First Nation*, 2019 FC 1663 ("*One Arrow*"), my colleague Justice Grammond stated at paragraph 14:

There can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws, including where these laws are said to be "customary." See, for example, *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paragraphs 96-106; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraphs 29-63.

[28] With respect to the availability of *quo warranto* relief, Justice Ahmed relied upon *Ojibway Nation of Saugeen v Derose*, 2022 FC 531 at paragraph 91 [*Saugeen*] to determine that it is open to the Court to name the lawful governing authority on *quo warranto*.

II. Issues

[29] In their Amended Notice of Application, the Applicants seek several forms of relief, which I would summarize as follows:

- (a) An Order in the nature of *certiorari* quashing all decisions and BCRs made by the Respondent acting as Chief;
- (b) An Order in the nature of *quo warranto* declaring the Respondent lacks the lawful authority to act as the Chief and declaring that Evangeline Towle is the Chief of DPFN; and
- (c) An Order in the nature of *mandamus* requiring the Respondent to disclose and account for all decisions made or steps taken since September 27, 2021.

[30] In their written submissions, the Applicants frame the issues as follows:

1. Does the Federal Court have jurisdiction to hear this matter?
 - a. Standing of the Applicants;
 - b. Section 18.1(2) and Rule 302; and
 - c. Standard of Review.

2. Evidentiary Issues
3. Does the Respondent have lawful authority to govern DPFN?
 - a. What is the current custom regarding DPFN's governance?
 - b. Should the writ in the nature of *quo warranto* be applied?
 - c. Validity of the Impugned BCRs.
4. With respect to the December 16 BCR, did the Respondent have the authority to remove Applicant Evangeline Towle as a signing authority?
5. What are the appropriate remedies?
6. Costs.

[31] After hearing oral submissions, and considering the Order of Justice Ahmed referenced above, I will address the issues as follows:

- A. Standard of Review
- B. Custom
 - (1) Applicable Legal Principles
 - (2) Have the Applicants Established their Version of the DPFN Custom?
 - (a) Do the Councils have a Role in the Selection of the DPFN Hereditary Chief?

(3) Conclusion - Custom

C. Should an Order of Quo Warranto be Granted?

D. Are the Challenged BCRs Valid?

(1) September 27, 2021 BCRs

(2) December 16, 2021 BCR

E. Do the Applicants have the Legal Authority to Bring this Application in the Name of DPFN?

F. What is the Appropriate Remedy?

G. Costs

III. Analysis

A. *Standard of Review*

[32] On this Application, the issue is who has a valid claim to be the Hereditary Chief of DPFN. As there is no DPFN body or process to resolve this issue, I adopt the approach articulated by Justice Grammond in *Saugeen*, where he notes:

[28] In contrast, in the present case, the parties do not allege that ONS has any decision-making body that could settle the dispute between them. There is no independent decision-maker to which the Court should defer. Showing deference in this context would give an undue advantage to one party over the other based on arbitrary factors such as the sequence in which the applications for judicial review are brought or which aspect of the parties' conduct is considered the "decision" to be reviewed. Moreover, as a

practical matter, there cannot be two persons with an equally reasonable claim to be chief; one must be right and the other, wrong.

[29] I would also add that the role of this Court is not to inquire into allegations of maladministration made by ONS members against Chief Edward Machimity. **The Court is called upon to clarify the legal rules concerning the selection of ONS's leadership and to apply them to the situation at hand.** In doing so, the Court is not assessing the relative merit of the contenders nor passing judgment on the actions of the incumbent administration: *Gadwa v Joly*, 2018 FC 568 at paragraphs 30–33; *Standingready v Ocean Man First Nation*, 2021 FC 434 at paragraphs 13–14. [Emphasis added]

[33] Although *Saugeen* addressed competing claims filed in two judicial review applications, in my view the same principles and approach apply to this Application.

B. *Custom*

(1) Applicable Legal Principles

[34] In *Da'naxda'xw First Nation v Peters*, 2021 FC 360 at paragraphs 66-72 [*Da'naxda'xw*], Justice Strickland comprehensively reviews the applicable considerations and evidence necessary to establish a custom. I would highlight the following principles that are relevant to this case:

- There must be evidence of a practice and the manifestation of the will of the First Nation's members to be bound by that practice;
- There must be evidence demonstrating the custom is firmly established, generalized, and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus;

- Chief and Council alone cannot determine that a change in circumstance comprises a new custom, as there must be broad consensus among the membership;
- Custom is not frozen in time, but any change requires a broad consensus of the membership;
- The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate there is no consensus;
- Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence;
- The burden is on the party trying to demonstrate custom to prove that there is a broad consensus; and
- The existence of a band custom and whether or not it has been changed with the substantial agreement of the band members will always depend on the circumstances.

[35] In accordance with the principles identified in *Da'naxda'xw*, the Applicants' evidence must establish their custom, or change in custom, is firmly established, consistently followed, and has broad consensus among the members of DPFN.

(2) Have the Applicants Established their Version of the DPFN Custom?

[36] The Applicants have the evidentiary burden to establish the custom they claim is part of DPFN law. In her Affidavit, Evangeline Towle, states the DPFN hereditary governance custom is as follows:

4. Dakota Plains First Nation is governed by a Hereditary system in accordance with the unwritten custom selection process since time immemorial.
5. The Hereditary governance structure consists of one (1) Hereditary Chief; custom Councils which consist of an Elder's Council, Women's Council and Youth Council; and all members of the First Nation who are over the age of eighteen (18) are considered representative Council members of Dakota Plains First Nation.
6. The appointment of a Hereditary Chief traditionally consists of a decision by a group of representative Council Members and the chieftainship normally passes from the Chief to the eldest son or child of the Chief. If this person is not a suitable candidate for the position of Chief or they do not wish to hold that position, then another suitable candidate is selected from the other children of the Chief.

[37] The Applicants claim the current DPFN governance consists of a Youth Council, a Women's Council, and an Elder's Council. They claim these Council bodies are accepted in the community and appear on DPFN letterhead.

[38] Based upon the Applicants' version of DPFN custom, upon the death of Chief Orville Smoke, his eldest son Arden Smoke became the Chief. When Arden Smoke renounced the position, Evangeline Towle was selected as the DPFN Hereditary Chief by representatives of the Youth Council, the Women's Council, and the Elder's Council.

[39] The Applicants explain that traditionally if the eldest son was not a suitable candidate to become the Hereditary Chief, the matriarchs of the community would select and prepare another sibling for the role. However, as there are no traditional matriarchs at DPFN, the decision to appoint the next Chief becomes a decision of the community.

[40] In support of their position as to the custom regarding the selection of the Hereditary Chief of DPFN, the Applicants rely upon the Affidavit of Katherine Whitecloud. In her Affidavit, Katherine Whitecloud states:

34. There are some in the Community that understand the traditional ways, but Dakota Plains First Nation does not have a matriarch like the time when the Communities split in 1972, and the understanding of the language and ways of being good relatives to one another has dissipated. **The Community generally lacks the understanding of the Dakota ways and the relationships we are supposed to have with one another.**

35. If there is not an understanding of the traditional Dakota ways, the role of individuals in each family (Tiwahe) and the role within a Tiospaye (extended family) as well as in the Oyate (Community/Nation), walking with the principals [sic] and values of Dakota Wichohan (our way of life: Humility, Compassion, Positiveness, Respect, Helpful, Dependable, Silence, Courage, Patience, Bravery, Cherish, Value, Love, Gentleness, Honesty, Generosity, Strength and finally Wisdom.) There are milestones in our lives that are celebrated when Grandmothers and Aunts recognize that a child has learned attributes of Dakota Wichohan, for example knowing the difference between right and wrong, and learning and exhibiting the understanding of these ways, eventually earning the right to the "Rite of Passage: from child to young adulthood. **If there is not this understanding of our traditional Dakota Ways, then it is a conflicting approach to try to use a traditional approach to leadership that is not properly understood. Leadership is not something to be played with or to be taken lightly, you are responsible for each member of your community and must place their interests above all else, especially personal interest. Leadership means sitting together in respectful council and listening to your community members and respecting their voice. It is important for the Community to know the governance models - including**

the traditional custom governance system, and other systems available. [Emphasis added].

[41] The Applicants urge the Court to accept the evidence of Katherine Whitecloud on DPFN custom because it is objective evidence.

[42] Based upon my reading of Katherine Whitecloud's Affidavit, she describes what she understands Dakota custom should be, rather than what she has observed at DPFN. In that sense, her description of custom is more aspirational rather than observational. She does not provide evidence of a practice, nor does she speak of a broad consensus among the members of DPFN. As such, her Affidavit is of limited assistance to the Court in assessing whether there is evidence of a DPFN community consensus on the custom for appointing a Hereditary Chief. Furthermore, as Katherine Whitecloud is not a member of DPFN, her ability to speak to the custom of DPFN is limited, especially considering that there has not been a change in Chief at DPFN for 26 years.

[43] In the circumstances, I prefer the direct evidence from Elder Leslie Smoke who personally witnessed the transfer of the chieftainship in the past. Leslie Smoke is a son of

Chaske and Tiyo Smoke and a brother to the late Chief Orville Smoke. In his Affidavit, Leslie Smoke describes the custom as follows:

6. Dakota Plains is governed by what is termed by Indigenous Services Canada as a “hereditary system”, however it is important to recognize that our governance system does not operate on the basis of a hereditary succession system whereby a chieftainship simply passes upon the death of the current Chief to his eldest son.
7. The Dakota Plains’ custom selection process traditionally involved a gathering of the surviving members of the Founding Family, so my late mother and father, along with my siblings and I, at my parents’ house in Dakota Plains to discuss as a group the selection of the next Hereditary Chief.
8. During my lifetime, the selection of a succeeding Chief has always been made by the Founding Family. Our hereditary selection process has traditionally provided a large measure of discretion to the current Chief to express his desired successor, but since at least my father Chaske Smoke’s chieftainship, if not since time immemorial, the surviving members of the Founding Family have, to the best of my knowledge, always come together to discuss and provide approval of the selection of the next Chief.
9. The selection of a succeeding Chief involves consideration of their merit of the position, including factors such as level of education and community involvement.
10. The chieftainship of Dakota Plains was passed from the former Chief, the late Chaske Smoke, to my eldest brother, Laurence Smoke. The late Lawrence Smoke renounced his chieftainship shortly afterwards because he decided to work outside of the Dakota Plains community and wanted to pass on the chieftainship to someone with a higher education who would be better able to manage the governance and affairs of the Dakota Plains community.
11. When my brother, the late Laurence Smoke wished to renounce his chieftainship, my siblings and I, including Chief Laurence Smoke as he then was, met with our mother at her house in Dakota Plains to discuss who would be Laurence Smoke’s successor as Chief of Dakota Plains.

12. My brother, the late Ernie Smoke, was selected by my late mother, the late former Chief Laurence Smoke, and our remaining nine siblings to be Laurence Smoke's successor as Chief during our family meeting at my mother's residence. Ernie Smoke was not the next eldest child after Laurence Smoke.
13. Upon the sudden and unexpected passing of the late former Chief Ernie Smoke, in or around 1994, my late mother and the remaining siblings gathered at my mother's residence in Dakota Plains to select Ernie Smoke's successor. Despite Ernie having descendants at the time, my younger brother, the late former Chief Orville Smoke, was selected by the family to succeed Ernie Smoke as Chief. During his lifetime my brother Chief Ernie Smoke had talked about who should take over from him when the time came and he expressed in the time prior to his passing that he wanted it to pass to my brother Orville Smoke. Myself, and my other brothers had less schooling than the late Chief Orville Smoke and he was more familiar with the membership and was, at the time, best suited to be Chief of Dakota Plains.
14. The selection of the current Chief, Donald Smoke, as the successor to the late former Chief Orville Smoke, was in keeping with our customary selection process.

[44] Additionally, the Affidavit of Elder Deborah Smoke-Houle, daughter of Arnett Smoke, another son of Chaske and Tiyo Smoke, describes the same process as that outlined above in the Affidavit of Leslie Smoke and adds:

9. The selection of a succeeding Chief has always been made by the Founding Family with consideration given to factors such as the level of education and community involvement of the successor and not simply a passing of Chieftainship from Chief to eldest son.
10. As the daughter of a member of the Founding Family, I have never participated in the selection of the next Hereditary Chief, however as an elder of the community the knowledge of this custom has been passed down to me from the elders who came before me. It is my understanding from the passing of this knowledge through generations that the manner of selection

described above in this my affidavit is the method that has been used to select the three Hereditary Chiefs since my grandfather Chaske Smoke stepped down from the role.

[45] Leslie Smoke and Deborah Smoke-Houle confirm that DPFN custom has not been simply a matter of passing of the chieftainship to the eldest son upon the Chief's death. They describe the selection process of the next Hereditary Chief as being done by the surviving members of Chaske and Tiyo Smoke's family (referred to above as the Founding Family) with consideration to factors such as education and community involvement and not necessarily birth order.

[46] Both Leslie Smoke and Deborah Smoke-Houle state that they were not surprised when the Respondent was named Hereditary Chief, given his preparation for the role and the family discussions that he would be appointed.

[47] On the issue of custom, I prefer the evidence of Elders Leslie Smoke and Deborah Smoke-Houle. They were not cross-examined on their Affidavits. Accordingly, their evidence is unchallenged on the custom followed by DPFN in selecting Hereditary Chiefs.

[48] I pause to note here that the Applicants chose not to cross-examine any of the Respondent's witnesses on their Affidavit evidence. While this does not mean the Court must accept this evidence at face value, it does mean that on the key contentious issues between the parties, such as the custom for change in Chief at DPFN, the Respondent's evidence stands unchallenged.

[49] Consistent with the evidence of the Elders as to the steps taken to prepare the next Hereditary Chief, there is evidence of steps undertaken by Chief Orville Smoke to prepare his son, the Respondent, for the role of Chief, including the following:

- Sending the Respondent to Lethbridge University to obtain a diploma in Business Management and Self-Government Systems in the 1990s;
- In January 2015, appointing the Respondent as Vice-Chief of DPFN to negotiate DPFN's entry into the Manitoba First Nation's School System;
- Allowing the Respondent, as Vice-Chief, to act as political proxy with the Southern Chiefs Organization and Assembly of Manitoba Chiefs;
- Announcing the Respondent as the incumbent leader of DPFN at a June 2017 community event for DPFN Elders;
- In March 2018, asking the Respondent to accompany him to the National Chiefs Assembly and introducing the Respondent to attendees as the next leader of DPFN;
- In June 2020, giving the Respondent a headdress and stating the headdress would belong to the Respondent from that day forward as the future hereditary leader of DPFN. This event was photographed;
- Allowing the Respondent to continue to act as proxy at meetings between 2020 and 2021;

- By letter dated February 2, 2021, writing to ISC, the Assembly of Manitoba Chiefs, the Southern Chiefs Organization, Manitoba Keewatinown Okimakanak Inc, and “all other concerned parties”, advising the Respondent had been designated as Vice-Chief and was authorized to act on behalf of Chief Orville Smoke as Chief of DPFN, as part of the Nation’s succession planning;
- On August 31, 2021, permitting the Respondent to hold his first band meeting, acting as Chief;
- On September 3, 2021, posting on Facebook that a BCR would be forthcoming, announcing the Respondent as his successor; and
- On September 14, 2021, permitting the Respondent to attend the Dakota Flag Raising Ceremony in Winnipeg and to wear the headdress he had been given.

[50] In response to this evidence, the Applicants state the Respondent was only ever acting as the proxy for the Chief and that these events were not intended to prepare the Respondent to become Chief. Again, I note that the Applicants chose not to challenge the Respondent on any of this evidence.

[51] By contrast, the Applicant Evangeline Towle has not offered any evidence of steps taken by her father Chief Orville Smoke to prepare her to become Chief. I note that she has worked for DPFN for 30 years, most recently in an administrative role in the Band Office, and she claims to have worked closely with her father and attended meetings with him. She says that in

January 2021, her father told her that she was the best candidate for the position of Chief. However, she has not produced other evidence to support this statement and has offered no evidence of her father making a public pronouncement of her becoming the Chief of DPFN.

[52] Further, there is evidence that Evangeline Towle actually acknowledged the Respondent as Chief when on October 13, 2021, she signed a BCR (regarding security on DPFN) as a Councillor where the Respondent is clearly identified as “Chief Donald Smoke”.

[53] Evangeline Towle’s claim to be Chief is contingent upon the assertion that by DPFN custom, Arden Smoke, the eldest son of Chief Orville Smoke, became Chief upon the death of his father. However, there is no evidence – customary or otherwise – to support this assertion. There is no direct evidence from Arden Smoke himself, and there is no evidence that he conducted himself as Chief, despite purporting to have renounced the role two months after his father’s death. In fact, the December 2, 2021 BCR, in which the Applicants attempted to change the signing authorities of the DPFN General Account at Peace Hills Trust Company, does not identify Arden Smoke as the Chief.

[54] In his Affidavit, the Applicant Craig Blacksmith states Chief Orville Smoke “did not know who would take over the position of Chief when he passed.” This statement is inconsistent with the Applicants’ position that the well-know custom was that Arden Smoke was to become the next Chief automatically after Chief Orville Smoke’s death.

[55] A further inconsistency with the Applicants' purported custom, is that they fail to explain how the passing of the chieftainship from Laurence Smoke to Ernie Smoke and then to Orville Smoke is consistent with their version of DPFN custom. On cross-examination Evangeline Towle states "there wasn't really any customs or traditions" beyond handing the chieftainship "down to the oldest son" and then went on to say that her father Chief Orville Smoke was appointed by 20 unidentified family members when her grandmother made a meal one day. This statement appears to support the Respondent's purported custom.

[56] Overall, the Applicants' own evidence on custom is inconsistent. Aside from the BCRs prepared by the Applicants over two months after the death of Chief Orville Smoke, there is no corroborative documentary evidence for their purported custom. This stands in stark contrast to the evidence of custom offered by the Respondent, which is confirmed by two DPFN Elders, and with the documentary evidence of the steps taken by the late Chief Orville Smoke to prepare his second son, the Respondent, to assume the responsibility to lead DPFN as Chief.

[57] Accordingly, the Applicants have failed to establish their purported custom. There is no evidence of a broad consensus in the community for their purported custom, no evidence that members of DPFN recognized Arden Smoke as Chief after the passing of the late Chief Orville Smoke and no evidence that Evangeline Towle was recognized as Chief.

[58] However, there is both credible Affidavit and documentary evidence to establish that the Respondent was being prepared for and was in fact selected as the Hereditary Chief of DPFN according to DPFN custom.

(a) *Do the Councils have a Role in the Selection of the DPFN Hereditary Chief?*

[59] As part of the custom advanced by the Applicants, they claim that the power to select a new Hereditary Chief is vested in the Youth Council, Women's Council, and Elder's Council.

[60] The Applicants have offered no evidence of a broad consensus of the membership of these Councils or their power and duties within DPFN governance. The only details provided by the Applicants about these Councils are that any female DPFN member over the age of 28 is purportedly part of the Women's Council and any DPFN member over the age of 60 is purportedly part of the Elder's Council. There is no evidence as to the criteria for membership on the Youth Council.

[61] These Councils appear to have come into existence during the late Chief Orville Smoke's chieftainship. Since they are a more recent development, these Councils would not have been involved in any past customary appointments of DPFN Chiefs.

[62] The Respondent says these Councils are not active, do not hold meetings, and do not have power or authority in DPFN governance matters. This appears to be confirmed by the statements made by the Applicants Craig Blacksmith and Alvin Smoke on cross-examination, where they admitted they did not know if there are formal meetings or membership lists for these Councils.

[63] Leslie Smoke and Deborah Smoke-Houle, who would be members of the Elder's Council, state in their Affidavits they were not notified of any meetings of the Elder's Council regarding the appointment of a representative empowered to sign a BCR appointing the Hereditary Chief of DPFN.

[64] Additionally, Joan Smoke, Donna Lynn Smoke, and Lisa Marie Roulette, who are all purportedly members of the Women's Council, state in their Affidavits they were not notified of a meeting of the Women's Council regarding the appointment of a representative empowered to sign a BCR to appoint the Hereditary Chief of DPFN.

[65] Chandelle Smoke-Towle (the daughter of Evangeline Towle), who signed the December 6 BCR and the December 10 BCR on behalf of the Women's Council, does not reference a meeting of the Women's Council where she was selected to represent this Council in her Affidavit. On cross-examination, she acknowledged there was no meeting of the Women's Council to appoint her as a representative.

[66] Aside from the Applicants' own December 6 and December 10 BCRs which state these Councils are part of DPFN governance, they have produced no other evidence to support this claimed custom. There is no evidence to establish a broad consensus that these councils play a governance role in DPFN.

[67] I am not persuaded that the Youth Council, the Women's Council, or the Elder's Council play any role in the appointment of the DPFN Hereditary Chief. The Applicants' evidence fails

to demonstrate a broad consensus among the membership of DPFN to confirm that these recently created Councils have any role in the selection of the Hereditary Chief.

[68] Accordingly, the Applicants' claim that representatives of these Councils validly signed the December 6 BCR, appointing Arden Smoke as Hereditary Chief, and the December 10 BCR, appointing Evangeline Towle as Hereditary Chief, must fail.

(3) Conclusion – Custom

[69] The parties agree that DPFN appoints Hereditary Chiefs pursuant to custom – they disagree on the custom. There are inconsistencies in the Applicants' evidence of their purported custom as follows: (1) there is no evidence Arden Smoke became the Chief on the death of his father Chief Orville Smoke; (2) there is no evidence the Applicants' custom was followed in the appointment of Chief Orville Smoke; and (3) there is no evidence that the Youth Council, Women's Council, and Elder's Council are empowered to appoint a Hereditary Chief.

[70] On the first point, the evidence does not support the Applicants' purported custom that the DPFN chieftainship passes to the Chief's eldest son. There is no evidence that Arden Smoke acted as Chief following his father's death, or that DPFN membership recognized Arden Smoke as Hereditary Chief.

[71] Secondly, the Applicants' purported custom was not followed in the appointment of Chief Orville Smoke. Chief Ernie Smoke had his own adult children, but after his passing, his younger brother, Orville Smoke became Chief. In fact, Evangeline Towle's evidence on cross-

examination about her father's selection as Chief supports the Respondent's articulation and evidence of the custom. Evangeline Towle stated her father, Chief Orville Smoke, "was appointed by -- my grandma made a meal one day. And there was 20 different family members at that meeting who appointed my father as chief." This is consistent with the evidence led by the Respondent that the Hereditary Chief is chosen at a meeting of Chaske and Tiyo Smoke's family.

[72] Thirdly, there is a complete lack of evidence to support the Applicants' contention that the Youth Council, Women's Council, and Elder's Council hold any power to appoint the Hereditary Chief. There is simply no evidence to establish that these Councils play any role in the governance of DPFN.

[73] With respect to a change in custom, unless and until the established custom for the selection of the Hereditary Chief has been changed, as evidenced by a broad consensus of the members of DPFN, the established custom continues to apply. There is no evidence of a broad consensus or a course of conduct of the members of DPFN to change the custom, which has been followed consistently since the time of Chaske Smoke's chieftainship.

[74] The customary practices of DPFN for the selection of the Hereditary Chief cannot be changed by the *ad hoc* actions of the Applicants. Although the Applicants' claim the custom by which the Respondent was selected is not sustainable, that assertion does not disprove the custom. Furthermore, the fact the custom may need to change in the future is an issue beyond the scope of this judicial review Application.

[75] The Applicants have failed to establish their version of DPFN custom and have failed to demonstrate the Respondent was not appointed as the Hereditary Chief of DPFN pursuant to custom. Accordingly, pursuant to the September 27, 2021 BCR, effective September 28, 2021, the Respondent has the lawful authority to govern DPFN as Hereditary Chief.

C. *Should an Order of Quo Warranto be Granted?*

[76] The Applicants seek *quo warranto* relief in two forms. First, they seek to have the Respondent removed as Chief. They argue the Respondent is not legally entitled to exercise the powers as Chief of DPFN. Second, they seek *quo warranto* to have Evangeline Towle confirmed as Chief.

[77] As I have concluded that the Applicants have not established the custom they rely upon to challenge the Respondent's claim to be the Hereditary Chief, and as I have accepted the Respondent was appointed in accordance with past custom, the claim for *quo warranto* relief must fail. However, I will briefly address this claim for relief.

[78] The test for *quo warranto* relief and the factors for the Court to consider are set out in *Jock v Canada (TD)*, [1991] 2 FC 355 at 370-371. The factors include that the office in question must be one of a public nature; the purported holder must have exercised the office; and the moving party must not have acquiesced to the holder exercising the office. Each of these criteria must be satisfied for *quo warranto* to be granted (*Jock* at 378).

[79] The Applicants assert the Respondent has no legal basis to hold the position of Hereditary Chief of DPFN in accordance with DPFN customary law. The Applicants claim they have met the *Jock* criteria because:

- (a) The office of Chief of DPFN is public in nature;
- (b) The Respondent has exercised the office of Hereditary Chief;
- (c) The Hereditary Chief cannot be dismissed at will;
- (d) The Applicants have not acquiesced or unduly delayed, as shown by the cease-and-desist letter, attempts to resolve the dispute at the community level, and ultimately this Application;
- (e) The Applicants have a genuine interest in the proceeding and are all members of DPFN;
- (f) The length of time that elapsed from when the Applicants discovered the Respondent's purported claim to be Chief to the date of filing this Application was a short duration and not unreasonable; and
- (g) There is no dispute resolution mechanism under the DPFN custom hereditary system for disputes over the office of the Hereditary Chief.

[80] In considering the *Jock* criteria, I accept the Respondent has acted as the Hereditary Chief and the office is public. I also accept there does not appear to be any other recourse under DPFN customary law to challenge the office of the Hereditary Chief.

[81] However, the fatal flaw in the Applicants' claim for *quo warranto* relief is they have not established their version of the DPFN custom. Accordingly, there is no wrongful holding of office by the Respondent, which is the first criteria necessary to support a claim for *quo warranto*.

[82] In any event, I would have concluded the Applicants' right to claim *quo warranto* relief was extinguished by their acquiescence. The BCR recognizing the Respondent as the Hereditary Chief was signed in September 2021. Chief Orville Smoke provided a Facebook notification accordingly. Considering the relatively small size of DPFN, and the fact that Evangeline Towle and the Respondent are siblings, I do not accept that Evangeline Towle and the other Applicants were not aware of the Respondent's appointment as the Hereditary Chief until November or December 2021.

[83] It is simply not credible for the Applicants to say they were not aware the Respondent had been appointed as Chief.

[84] The Applicants' request for *quo warranto* relief is denied.

D. *Are the Challenged BCRs valid?*

(1) September 27, 2021 BCRs

[85] The Applicants challenge three BCRs signed on September 27, 2021, which name the Respondent as Chief and change the criteria for incumbent leadership. Although the Applicants

claim these BCRs were signed by the Respondent, the BCRs are signed by Chief Orville Smoke and his brothers Leslie Smoke and Ronald Smoke Sr. The full text of the BCRs are reproduced below.

[86] The first BCR, which names the Respondent as Chief, states as follows:

The Council of the Dakota Plains Wahpeton Nation

...

DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021 the Dakota Plains Wahpeton Nation Chief and Council resolve; Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. As of this day, September 27, 2021 Orville Smoke has fulfilled his duties as Chief of Dakota Plains Wahpeton Oyate. The preceding chief and council of elders have chosen an acceptable replacement and will exercise their right to change authority through custom process.

BE IT RESOLVED, That of this day, September 27, 2021 the former Chief Orville Smoke and Elder's Council of the Dakota Plains Wahpeton Oyate have named Donald Raymond Smoke DOB May 19th 1971 as Chief of the Dakota Plains Wahpeton Oyate.

BE IT RESOLVED, That of September 28, 2021 Donald Raymond Smoke will assume the role and responsibility as the lead governing authority of the Dakota Plains Wahpeton Nation and will assume the responsibility held by Orville Smoke going forward of September 28, 2021

BE IT RESOLVED, That of September 28, 2021, the official notice of change of title will be forwarded to the appropriate channels including, but not limited to Indigenous Services Canada.

BE IT FINALLY RESOLVED, that the Chief Donald Smoke shall hold his seat until such time when he cannot perform the essential components of a job in a safe, efficient and reliable manner.

[87] The second BCR states:

The Council of the Dakota Plains Wahpeton Nation

...

DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021 the Dakota Plains Wahpeton Nation Chief and Council resolve; Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. Donald Raymond Smoke DOB May 19th, 1971, was selected as the Chief of Dakota Plains Wahpeton Nation.

BE IT RESOLVED, That of this day, September 27, 2021 Orville Smoke will act as elder advisor for Chief Donald Smoke of the Dakota Plains Wahpeton Nation in conjunction with the Dakota Plains council of elders.

BE IT RESOLVED, That of this day, September 27, 2021 Donald Raymond Smoke will be expected to continue his duties of Director of Education for Dakota Plains School in addition to the responsibilities of being named Chief of Dakota Plains Wahpeton Nation.

BE IT FINALLY RESOLVED, that the Chief Donald Smoke shall hold his seat until such time when he cannot perform the essential components of a job in a safe, efficient and reliable manner.

[88] The third BCR states:

The Council of the Dakota Plains Wahpeton Nation

...

DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021 the Dakota Plains Wahpeton Nation Chief and Council resolve the following: Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. Indian Act elections further erode age-old traditions and cultures by neutralizing the role of the traditionally elected leader. Our governing principles are anchored in our own cultural traditions as the Dakota Plains Wahpeton Oyate and our form of governance pre-dates the

imposition of colonialism. Dakota Plains Wahpeton will remain recognized as having a hereditary system as is our custom. We reserve our inherent right to adopt, by way of custom our own method for naming a new chief on Dakota Plains Wahpeton Nation.

BE IT RESOLVED, That Chief and Council of the Dakota Plains Wahpeton Oyate will protect the integrity of our hereditary system by requiring incumbent leadership in future years to have postsecondary education. Only those who attain a level of education such an apprenticeship or trades certificate, diploma or degree from an accredited college, university or trade school will be considered as hereditary leaders on Dakota Plains Wahpeton Oyate. Incumbents will be required to have a clear criminal and child abuse registry check as well as be free and clean from any illicit substances. Proof of eligibility will be required. This is the irrefutable requirement [sic] made by the original members of the Dakota Plains Wahpeton Oyate and the current council of Elders in the Dakota Plains Wahpeton Nation.

BE IT FINALLY RESOLVED, that the Chief shall hold his seat until such time when he or she cannot perform the essential components of a job in a safe, efficient and reliable manner.

[89] The Applicants argue the BCRs are unlawful and invalid on a number of grounds.

[90] First, the Applicants argue there was no “duly convened meeting of the Chief and Council in the Council Chambers” on September 27, 2021 as noted in the BCRs. The Applicants rely upon *Peguis First Nation v Bear*, 2017 FC 179 at paragraph 47 [*Peguis*], to argue that a duly convened meeting required notice to all Councillors and Chief, with the date and time identified, and an opportunity to make representations. The Applicants say there was no such notice of a meeting on September 27, 2021.

[91] However, the *Peguis* decision is of little assistance to the Applicants as the issue in *Peguis* was the adherence to written guidelines. There are no such written guidelines at DPFN.

[92] The evidence is that Chief Orville Smoke conducted DPFN business informally. There is no evidence that DPFN practice required BCRs to be signed at a duly convened meeting of the Band Council. DPFN practice did require that the Chief and any two other Councillors – being any two adult band members – sign BCRs. As noted in the Affidavit of the Respondent, DPFN does not follow a hereditary process for selecting Councillors. To conduct DPFN business, the practice during Chief Orville Smoke’s tenure was that any two adult band members could sign a BCR as Councillors, but that a BCR required the signature of the Chief to be valid.

[93] I accept that the late Chief Orville Smoke did not attend a ‘duly convened meeting’ as noted in the BCR, but there is evidence, from both parties, which confirms the late Chief Orville Smoke was confined to his home due to his medical condition and the risks associated with COVID-19 on September 27, 2021. The fact that the late Chief Orville Smoke signed these BCRs in his home, rather than at the Band Office, is not a basis upon which to invalidate the BCRs. Based on Chief Orville Smoke’s confinement to his home and the fact that DPFN conducts business informally, I am satisfied that these BCRs were signed in a similarly informal manner.

[94] I note that Evangeline Towle herself signed a BCR in October 2021 (relating to Long Plain Security team) in her home when the Respondent brought it to her. Furthermore, Evangeline Towle did not hold a duly convened meeting to have the December 10 BCR signed, which she purports to rely upon in support of her claim to have been appointed Chief. There is likewise an absence of any evidence that the Women’s Council held a meeting to appoint a representative with the power to select Evangeline Towle as Chief.

[95] Generally, the evidence does not support the Applicants' claim that DPFN BCRs could only be signed at a duly convened meeting.

[96] Another ground on which the Applicants attack the validity of the BCRs is their claim that the Respondent did not go to Chief Orville Smoke's home on September 27, 2021 to have the BCRs signed. This is directly contradicted by the Respondent, who states in his Affidavit that he did go to his father's house on the morning of September 27, 2021. The Respondent states he saw John David Kirkbride carrying pieces of a bed while he was at the late Chief Orville Smoke's home. Although John David Kirkbride claims he did not see the Respondent at the late Chief Orville Smoke's home on September 27, 2021, he also admits to having left for a short period of time. I accept the evidence of the Respondent, which was not directly challenged by the Applicants.

[97] The Applicants also make veiled accusations that the Respondent perpetrated a fraud in relation to the late Chief Orville Smoke's signature on the three BCRs – essentially claiming that the Respondent forged the Chief's signature. This is a serious allegation, and one that is wholly unsupported by any evidence. The Respondent provided the Court with the originals of these BCRs for inspection at the hearing and I would note that no irregularities are obvious on the face of these BCRs. Furthermore, had the Applicants wished to properly pursue this allegation, they should have cross-examined the Respondent on this point. They choose not to do so. This allegation is wholly without merit.

[98] Finally, the Applicants argue that if Chief Orville Smoke did sign the BCRs, he was lacking the mental capacity to do so given his medical condition and the medications he was taking. The evidence is that Chief Orville Smoke was suffering from pulmonary fibrosis, but there is no medical evidence that Chief Orville Smoke did not have the mental capacity to sign the BCRs on September 27, 2021. In fact, his Facebook posts and text messages from that time suggest he fully understood what he was doing. Without medical evidence to the contrary, to suggest that Chief Orville Smoke was mentally incapacitated is a baseless allegation.

[99] In any event, I do not accept that imperfect BCRs are invalid BCRs. I acknowledge that the preamble to the BCRs does not accurately reflect the circumstances under which the BCRs were signed. However, the BCRs are signed by Chief Orville Smoke and his two brothers as Councillors. This is consistent with the practice at DPFN. Furthermore, the purpose of the BCRs is corroborated by the evidence of communications from the late Chief Orville Smoke to the Respondent and the community, confirming the Respondent was appointed as the Hereditary Chief of DPFN. This all supports the conclusion that the BCRs are valid.

[100] The Applicants have not established that the September 27, 2021 BCRs signed by Chief Orville Smoke and his brothers, Leslie Smoke and Ronald Smoke Sr., are invalid in any manner. In fact, the evidence suggests that the BCRs were signed in a manner consistent with the past practices of DPFN.

(2) December 16, 2021 BCR

[101] The relevant part of this BCR states as follows:

THE CHIEF AND COUNCIL OF DAKOTA PLAINS
WAHPETON OYATE, AT A DULY CONVENED MEETING
ON THURSDAY, THE 16TH DAY OF DECEMBER 2021, DO
HEREBY RESOLVE:

Whereas: Dakota Plains Wahpeton Nation Chief and Council hereby authorizes changing of the signing authority of the Peace Hills Dakota Plains General Account [...] effective Thursday, December 16th 2021

Whereas: Dakota Plains Wahpeton Nation Chief and Council hereby authorizes the removal of Evangeline Towle as signing authority.

Whereas: Dakota Plains Wahpeton Nation Chief and Council authorizes the addition of Matthew Smoke, Donald Smoke and Sandra Smoke as signing authorities with any 2 to sign.

Therefore Be It Resolved: that Peace Hills Trust change signing authorities as instructed by the Dakota Plains Wahpeton Nation Chief and Council

[102] The Applicants challenge the validity of the December 16, 2021 BCR removing Evangeline Towle's signing authority for the DPFN bank account. They allege the Respondent did not have authority to sign the BCR and the removal of her signing authority was done in a manner that was not procedurally fair.

[103] In reality, the Applicants' challenge to this BCR is related to the claim that the Respondent did not have the authority to sign the BCR, as he was not the Chief. Having found that the Respondent was the lawful Chief at the time of signing the December 16 BCR, and noting that this BCR relates to the administrative functions of DPFN, I am satisfied that such a

decision was within the power and authority of the Chief. The Applicants did not offer any evidence or argument as to why the Chief would not have the authority to make this administrative decision.

[104] I am not satisfied that Evangeline Towle, as an employee of DPFN, was entitled to any advance notice or procedural fairness in relation to the change of bank signing authority for DPFN made by the Chief. However even if she was, considering the factors from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, any such notice or procedural fairness would be minimal. I would also note the evidence demonstrates the signing authority for all DPFN members was suspended pending an operational review of band management.

[105] The Applicants' reliance on *Da'naxda'xw* is misplaced as the procedural fairness issues considered in that case related to the suspension of a Chief, and not the removal of signing authority on a First Nation's bank account.

[106] Finally, in my view the actions of the Applicant Evangeline Towle in attempting to usurp the position of Chief of DPFN by her own BCRs in December 2021, disentitled her to any notice of decisions made by the Respondent in the administration of DPFN.

[107] The Applicants have not established that the December 16, 2021 BCR is invalid on any grounds.

E. *Do the Applicants have the Legal Authority to Bring this Application in the Name of DPFN?*

[108] As I have determined that the Respondent was appointed the Chief of DPFN in accordance with custom, the Applicants did not have the legal capacity to bring this Application in the name of DPFN.

[109] I accept the Applicants had the right to bring an Application in their personal capacity as members of the community. However, to make this claim ostensibly on behalf of DPFN is not appropriate. While this may have been a valid ground upon which to strike the Application, at this stage, it is a matter that will be considered on the issue of costs.

F. *What is the Appropriate Remedy?*

[110] I am fully dismissing the Applicants' judicial review Application and denying any of the requested relief.

[111] As the Respondent has the lawful authority to govern DPFN, no further remedy is necessary.

G. *Costs*

[112] The Applicants embarked on a course of conduct that has seriously disrupted the functioning of DPFN. While the Applicants may have been motivated by a desire to provoke a change in governance at DPFN, less disruptive methods could have been undertaken.

[113] The Respondent is entitled to his costs. As I have determined the Applicants did not have the authority to bring this Application in the name of DPFN, they will be personally responsible for costs. I have agreed to allow the parties to make written submissions on costs following receipt of this Decision.

JUDGMENT IN T-137-22

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed;
2. The Respondent is the Hereditary Chief of DPFN;
3. The BCRs enacted on September 27, 2021, and December 16, 2021, are valid;
and
4. The Respondent is entitled to costs to be paid personally by Evangeline Towle, Craig Blacksmith, and Alvin Smoke. The parties may make written submissions on costs not exceeding 10 pages to be received within 15 days of the date of this Judgment, failing which, the Court will make an award of costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-137-22

STYLE OF CAUSE: DAKOTA PLAINS WAHPETON OYATE ET AL v
DONALD RAYMOND SMOKE

PLACE OF HEARING: WINNIPEG, MB

DATE OF HEARING: NOVEMBER 9, 2022

JUDGMENT AND REASONS: MCDONALD J.

DATED: DECEMBER 15, 2022

APPEARANCES:

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