Federal Court Cour fédérale

Date: 20230516

Docket: T-95-22

Citation: 2023 FC 690

Ottawa, Ontario, May 16, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

RICHARD SHANKS

Applicant

and

SALT RIVER FIRST NATION #195

Respondent

JUDGMENT AND REASONS

[1] Mr. Richard Shanks is a member of Salt River First Nation #195 [SRFN]. On this Application for judicial review, Mr. Shanks challenges the October 26, 2021, SRFN Band Council Resolution [BCR] that excluded him and other SRFN members from receiving per capita distribution [PCD] payments from the funds held by SRFN from a Treaty Settlement Agreement.

[2] Mr. Shanks argues the BCR excluding SRFN members added to the Band membership list after 2002 from receiving a PCD payment is unreasonable and perpetuates historical discriminatory practices.

[3] SRFN argues this Court does not have jurisdiction over this matter, as it submits in passing the BCR, SRFN was not acting as a federal board for the purpose of section 18.1 of the *Federal Courts Act,* RSC 1985, c F-7. Alternatively, it argues the BCR is an exercise of self-governance by SRFN and is therefore entitled to deference.

[4] For the reasons that follow, I have determined the Court has jurisdiction and I have concluded the BCR is unreasonable.

I. Background

[5] Mr. Shanks' mother married a non-Indigenous man and thereby lost her Indian status. In 1985, Parliament passed *An Act to Amend the Indian Act,* SC 1985, c 27, known as Bill C-31, in an attempt to eliminate discrimination against Indigenous women in the *Indian Act,* RSC 1983, c I-5, prior to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (UK), 1982, c 11 coming into force. Bill C-31 restored Indian status for women who lost their status under subparagraph 12(1)(b) of the *Indian Act* for marrying 'non-Indians'.

[6] Following Bill C-31, Mr. Shanks' mother had her Indian status restored in 1989 and became a member of SRFN. However, as the child of an Indigenous woman who married a non-Indian, Mr. Shanks' mother could not pass her Indian status on to him.

[7] Therefore, Mr. Shanks remained ineligible for Indian status until 2010 and the passing of the *Gender Equity in Indian Registration Act*, SC 2010, c 18 [Bill C-3] in response to *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153. Bill C-3 amended the *Indian Act* to permit eligible grandchildren of Indigenous women who lost Indian status due to marrying 'non-Indian' men to be registered as Indians.

[8] Mr. Shanks was granted Indian status on February 24, 2012, and was registered as a member of SRFN.

A. *SRFN Treaty Settlement Agreement and Trust*

[9] SRFN is a signatory to Treaty 8, which gave rise to obligations on The Government of Canada [Canada] to set aside reserve lands for First Nations, including SRFN. Canada did not provide the reserve lands or agricultural benefits that SRFN's predecessors were entitled to for over 100 years.

[10] In the 1990s, Canada and SRFN began negotiating the Treaty Land Entitlement Claim.

[11] Canada and SRFN signed the Salt River First Nation Treaty Settlement Agreement [TSA] on November 13, 2001. The compensation provided for in the TSA was based upon the

population of SRFN as of June 2002, which was 757 members. SRFN refers to these individuals as the "Original Beneficiaries".

[12] The TSA states the compensation funds paid to SRFN were 'personal property' and outside the *Indian Act*. The compensation was placed into a trust fund [Trust]. The Settlement Trust Agreement [Trust Agreement] governs the Trust.

[13] In 2010, SRFN members approved adding the SRFN Settlement Revenue Account Law [Revenue Account Law] to the SRFN Consolidated Election Code. The Revenue Account Law states "members of Council may permit a per capita distribution each fiscal year to all Members of the First Nation from the amount of annual income paid into the Settlement Revenue Account in that calendar year".

B. *SRFN Membership and PCD Payments*

[14] Since June 2002, Mr. Shanks and others have been added to the SRFN Band membership list by Canada. As SRFN does not have a membership code, Indigenous Services Canada [ISC] maintains the SRFN Band membership list.

[15] SRFN has held two membership code referendums, in September 2014 and December 2015, in an attempt to control its own Band membership list. However, as less than 50% of SRFN members participated in the referendums, ISC does not recognize the membership code.

[16] Following a Special Meeting of SRFN members held on November 7, 2016, a band council resolution was adopted, which states in part:

> **WHEREAS** at a Special Meeting of SRFN Members on November 7, 2016 in Fort Smith, a majority of Members present directed SRFN Council to take every step necessary to protect and preserve the land and the trust fund established based on the original 757 beneficiaries (the TLE) and stop dilution of the benefits of the TLE, including stopping payment of any future PCDs, to anyone on our Membership list who is not either an original beneficiary or a descendant of an original beneficiary...

[17] This band council resolution is referred to by SRFN as the "Dilution Prevention Policy".

[18] Mr. Shanks received PCD payments from 2012, when he was first recognized as a member of SRFN, until the enactment of the Dilution Prevention Policy.

[19] On October 30, 2017, Mr. Shanks received a letter from SRFN explaining that he was no longer eligible to receive PCD payments as SRFN Chief and Council interpret 'member' as only those persons who were on the SRFN Band membership list as of the date the TSA concluded, or their descendants. The letter refers to the Dilution Prevention Policy passed at the 2016 Special Meeting which limits the benefits of the Trust to the 757 "Original Beneficiaries" and their descendants. The letter indicated Chief and Council would continue to fight for additional lands or settlement monies from Canada for those now excluded members to be included in the TSA.

II. BCR Under Review

[20] The October 26, 2021 BCR resolves as follows:

> **WHEREAS** Salt River First Nation No. 195 (herein "SRFN") HAS THE INHERENT Aboriginal right and authority to govern relations among its members and between SRFN and other governments and agencies; and
>
> **WHEREAS** the aboriginal and Treaty rights of SRFN to self-government were recognized and affirmed in Treaty 8 entered between Her Majesty the Queen and SRFN and confirmed by the *Constitution Act* of 1982; and
>
> **WHEREAS** the SRFN Council (the "Council") is legally and traditionally authorized to make decisions on behalf of SRFN and its Members in furtherance of the welfare, best interests and good governance of SRFN and its Members; and
>
> **WHEREAS** in accordance with the section 13.1 of the Salt River First Nation Treaty Land Entitlement Agreement the Reserve Funds are not "Indian Moneys" as defined in the Indian Act of Canada and are not governed by the provisions of that Act; and
>
> **WHEREAS** there were 827 members on SRFN's membership list of as [sic] June 22, 2002 when SRFN signed our Treaty Land Entitlement Agreement, the Settlement Trust was established and the first PCD payment was made ("the Original Members"); and
>
> **WHEREAS** the compensation Canada agreed to pay to SRFN to establish the Settlement Trust was calculated by Canada based on the Original Members notwithstanding that SRFN asked Canada to pay additional compensation into the Settlement Trust to recognize other individuals that Canada might add to our membership list in the future who were not descendants of the Original Members born after June 22, 2002;
>
> **WHEREAS** on November 7, 2016 Membership directed Council to take every step necessary to protect and preserve the Reserve Land and Settlement Trust that had been established based on the Original Members (the "TLE") and to stop dilution of the benefits of the TLE, including payment of any future PCD's, to anyone on our membership list who is either an Original Member or a descendant of an Original Member born after June 22, 2002 who are Members are of SRFN; and

> **WHEREAS** SRFN will receive net income from investment of the Settlement Trust earned in 2020 per the terms of the SRFN Settlement Revenue Account Law.
>
> **THEREFORE IT BE RESOLVED THAT:**
> SRFN administration is authorized to issue to each Original Member and to each descendant of an Original Member born after [June] 22, 2002, whose names are on the SRFN membership list from Indigenous and Northern Affairs Canada as of October 1, 2021, a Per Capita Distribution (PCD) payment of $800 (Eight Hundred and Zero Cents) from the net income SRFN received from the Settlement Trust earned in 2020.

III. Issues

[21] The following issues arise in this Application:

A. Does the Court have jurisdiction?

B. Is the BCR reasonable?

C. What is the appropriate remedy?

IV. Standard of Review

[22] Jurisdiction issues are threshold questions. If the Court determines it does not have jurisdiction to consider this Application, that is the end of the legal proceeding.

[23] If, however, the Court has jurisdiction, the standard of review for the BCR is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

A. *Does the Court have Jurisdiction?*

[24] SRFN argues that in enacting this BCR, it was not acting as a "federal board, commission or other tribunal" and, therefore, the Federal Court does not have jurisdiction. Further, SRFN submits that even if the SRFN Council was acting as a federal board, not all federal board decisions are subject to judicial review. SRFN argues the BCR was a private law matter that is not reviewable by the Court, based upon *Air Canada v Toronto Port Authority Et Al*, 2011 FCA 347 at paragraph 52 and *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at paragraph 14.

[25] In the alternative, SRFN argues Chief and Council were acting as a private trustee in making discretionary PCD payments, in accordance with the Revenue Account Law and the TSA. As such, the BCR is governed by private law trust principles, not public law.

(1) Subsection 18.1(a) of the *Federal Courts Act*

[26] Subsection 18.1(a) of the *Federal Courts Act* confers jurisdiction to the Federal Court over "any federal board, commission or other tribunal".

[27] The parties agree on the applicable test to determine whether an entity is a federal board or tribunal, namely: (1) what jurisdiction or power the body seeks to exercise; and (2) what is the

source or origin of the said jurisdiction or power (*Innu Nation v Pokue*, 2014 FCA 271 at para 11 [*Pokue*]).

[28] SRFN argues that Chief and Council were not acting in accordance with federal legislation, based on the second branch of the *Pokue* test. They claim SRFN Chief and Council were exercising a power pursuant to SRFN's own laws, derived from SRFN's inherent right to self-governance. Therefore, SRFN's position is that Chief and Council were not acting as a federal board in enacting the BCR.

[29] The BCR at issue was made under the Revenue Account Law. The Revenue Account Law is part of the SRFN Election Code. The Federal Court regularly judicially reviews decisions taken under custom First Nation's election codes.

[30] As noted by Justice Grammond in *Thomas v One Arrow First Nation*, 2019 FC 1663, "[t]here can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws" (at para 14).

[31] Further, the Federal Court of Appeal in *Horseman v Horse Lake First Nation*, 2013 FCA 159 noted:

> [5] The focus of judicial review is to quash invalid government decisions or require government to act or prohibit it from acting by a speedy process. *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 ("*TeleZone*") at para. 26. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) complained about: *Ibid*. As noted in *TeleZone* at para. 32, the *Federal Courts Act* is designed to enhance government accountability as well as to promote access

> to justice, and it should be interpreted in such a way as to promote those objectives.
>
> [6] It has long and consistently been held that a band council is a federal board contemplated by section 18 of the *Federal Courts Act*: *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (C.A.); *Sebastian v. Saugeen First Nation No. 29*, 2003 FCA 28, [2003] 3 F.C. 48 at para. 51. The Federal Court's jurisdiction under section 18 extends not only to the band council, but also to the individual chief and councillors acting, or purporting to act, in their official capacity: *Lake Babine Band v. Williams* (1996), 194 N.R. 44, 61 A.C.W.S. (3d) 256 (F.C.A.); *Salt River First Nation 195 (Council) v. Salt River First Nation (2003)*, [2004] 1 C.N.L.R. 319 (F.C.A.).
>
> [7] In this case, based on his claim that the band council meeting at which certain resolutions were adopted was improperly called and held, the appellant sought declaratory and injunctive relief against the band councillors acting in their official capacity under the *Indian Act. Prima facie*, this is a matter over which the Federal Court has exclusive jurisdiction.

[32] Also instructive is the decision in *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 [*Gamblin*], where Justice Mandamin considered the jurisdiction of the Court to hear a judicial review of a decision of a custom elected Band Council. The impugned decision was a band council resolution that approved a lump sum accelerated payment of compensation from a settlement agreement. Justice Mandamin held:

> [50] In my view, the NHCN Council decisions are not "private law" decisions. They are made by a First Nation entity that is federal in nature. The NHCN derives its jurisdiction from both the federal common law of aboriginal rights and its capacity to exercise federal statutory powers conferred on a council of an Indian band by the federal *Indian Act.* The nature of jurisdiction the NHCN Council is exercising is in relation to First Nation governance and is a matter of public interest given the impugned decisions are part of a series of decisions relating to the provision of potable water for the members of the NHCN.
>
> …

[53] Having regard to the factors Justice Dawson drew from in *DRL Vacations Ltd*., I would note:

a. *Powers conferred by or under an Act of Parliament should be given a liberal interpretation*: the *Indian Act* in s 2 recognizes councils selected by the "custom of the band" and confers the powers set upon band councils upon custom First Nation councils including the NHCN Council; in effect, the *Indian Act* recognizes custom First Nation councils as the governing body of the First Nation;

b. The powers do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: the NHCN Council is not an ordinary corporation and its powers to make decisions are those necessary to carry out its responsibilities for NHCN governance; these are wide powers that include the capacity for entering into agreements and implementing approved settlements. The NHCN Guidelines provide the NHCN Council is responsible for forming the local government for the well being and benefit of the members of the NHCN and ensuring established policies, guidelines and regulations are put into effect through by-laws and resolutions;

c. *The character of the powers being exercised*: the BCR/050 decision of the NHCN Council is one that is intimately related to the antecedent decisions that involve the well being of the membership of the NHCN, namely the securing a supply of potable water for NHCN members; as such, it is not merely a private law commercial matter but rather a matter of public interest;

d. *The nature of the powers being exercised:* the power being exercised by the NHCN Council in BCR/050 is the power to financially contract and consent to release but this financial aspect cannot be separated from the subject matter of the antecedent decisions which concern agreements relating to the supply of potable water for the NHCN membership.

[Emphasis added]

[33] I acknowledge SRFN's argument that band council resolutions relating to private commercial transaction (*Peace Hills Trust Co v Moccasin*, 2005 FC 1364 at para 61; *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (Wauzhushk Onigum Nation)*, 2008 FC 812 [*Devil's Gap*] at para 46) or a decision to settle litigation (*Ballantyne v Bighetty*, 2011 FC 994 at para 40 [*Ballantyne*]) are not subject to judicial review, as band councils have an "implied power to contract, without specific authority under the [*Indian*] *Act*" (*Devil's Gap* at para 46).

[34] Here, however, the BCR enacted by the Council of SRFN was done following a meeting "duly convened within the meaning of Subsection 2(3) of the Indian Act" and concerns the payment of net income earned "per the terms of the SRFN Settlement Revenue Account Law". In these circumstances, I conclude the SRFN Council was not acting "privately", but was acting as a federal board within the meaning of section 18.1 of the *Federal Courts Act.*

[35] Furthermore, the BCR to authorize distribution of PCD payments is inherently a governance issue. It relates to management and dispensation of the funds from a settlement, which was established for the benefit of SRFN. The well-being of the Nation is a core governance function of the SRFN Council. The factual scenario differs from *Ballantyne*, where the decision to settle litigation was held to be contractual. This was not a decision to settle; this was a decision administering a settlement. The situation here is more analogous to *Gamblin*, where the management of the settlement compensation was found to be a public governance issue that was reviewable by the Court.

[36] This Court has jurisdiction to deal with decisions of Chief and Council where the issue concerns a matter of a "public" nature regardless of whether the decision was taken pursuant to the *Indian Act*, a Band by-law, or involves the application of a custom or practice of the First Nation (*Crowchild v Tsuut'ina Nation*, 2017 FC 861 at para 27, citing *Vollant v Sioui*, 2006 FC 487 at para 25; *Hill v Oneida Nation of the Thames Band Council*, 2014 FC 796 at paras 37-38).

(2) Private Law Trust Principles

[37] SRFN also argues the distribution of funds was pursuant to a private trust and therefore not subject to judicial review.

[38] The PCD payments are paid from the Settlement Revenue Account, according to subsection 3(a) of the Revenue Account Law. The funds in the Settlement Revenue Account are income from Trust accounts set up under the Trust Agreement. It is not a payment from the TSA funds themselves.

[39] Section 8.2 of the Trust Agreement explicitly states "[f]unds paid by the Trustee into the Settlement Revenue Account <u>are not Trust Property</u> and therefore the Trustee has no responsibility for the application of funds in this account" [emphasis added].

[40] Based upon this clear language, PCD payments are not paid out of a trust account. Accordingly, I do not agree with SRFN's position that trust principles apply to these payments.

[41] I conclude that, therefore, the Court has jurisdiction over the issues raised by Mr. Shanks in this judicial review application.

B. *Is the BCR Reasonable?*

[42] Mr. Shanks is not challenging the TSA, the Trust, the Trust Agreement, or the amounts paid out as PCD payments. He challenges the BCR on the grounds that it unreasonably disenfranchised him from receiving a PCD payment. Mr. Shanks submits that but for the now-repealed sections of the *Indian Act,* he would be considered an "Original Beneficiary". In any event, there is no dispute that he is now a member of SRFN.

[43] At the core of this Application is SRFN's approach that only "Original Beneficiaries" qualify for PCD payments. According to Mr. Shanks, the BCR to distribute PCD payments to a select group of members is based upon a flawed interpretation of the TSA. Mr. Shanks argues there is nothing in the TSA that defines "member" in the manner set out in the BCR. He also notes there is no Band membership list attached to the TSA. Mr. Shanks argues the SRFN Chief and Council's interpretation that the TSA was only meant for the benefit of those who were SRFN members at the time the TSA was concluded is inconsistent with the text of the document itself.

[44] SRFN submits the TSA and Trust Agreement must be interpreted in light of the circumstances at the time the TSA was reached and the language used in the documents. According to SRFN, a key issue in the negotiations was the population figure that would be used

to determine SRFN's compensation, as the entitlement to reserve land under Treaty 8 was population based.

[45] Thus, SRFN submits it is reasonable to interpret the definition of "member" in the Trust Agreement in relation to the members at the time the TSA was signed in June 2002. It argues the intention of the TSA was to provide compensation to individuals who were members as of June 2002.

[46] In assessing the reasonableness of this interpretation, it is necessary to consider the provisions of the relevant settlement documents.

[47] Section 1.1 of the TSA provides as follows:

> In this Settlement Agreement, the terms "Band", "Council of the Band", "Department", "Indian", "Member of a Band", "Minister" and "Reserve" have the same meaning as they have in the *Indian Act*, R.S.C., 1985, c. 1-5. "Council of the Band" is sometimes referred to in this Settlement Agreement as "Council" and "Member of a Band" is sometimes referred to as "Member" in this Settlement Agreement.

[48] The *Indian Act* defines "member of a band" as "a person whose name appears on a Band List or who is entitled to have his name appear on a Band List" (subsection 2(1)). The same definition was in effect when the TSA was signed in 2001 (*Indian Act*, subsection 2(1) as it appeared on November 13, 2001).

[49] The TSA release provisions [Release] at Schedule A and Schedule D include the following language that SRFN “on its own behalf, and on behalf of all past, present or future Members…” of SRFN.

[50] The Trust Agreement provides:

> 1.2.15 "**Member**" means a person whose name appears on the Salt River Membership List as maintained by the Department of Indian Affairs or by Salt River upon approval of a Membership Code.
>
> …
>
> 3.1 The Settlor and beneficiary of the Settlement Trust is the Salt River First Nation located on the reserves of Salt River.

[51] The SRFN Consolidated Election Code notes the following:

> 2. …
>
> y) "**Member**" means a person whose name appears on the list of the First Nation that is maintained by Aboriginal Affairs and Northern Development Canada in accordance with the *Indian Act* of Canada until the First Nation assumes control of its own membership by establishing its own membership rules, and after the First Nation assumes control of its own membership, a person whose name appears on the membership list maintained by the First Nation under its own membership rules;

[52] The Revenue Account Law is attached to the SRFN Election Code as Schedule B. The relevant provisions of this Law are:

> 1. (a) This Law shall be known as the **Salt River First Nation Settlement Revenue Account Law.**
>
> (b) Any of the terms not defined in this Law shall have the same definition as set out in the First Nation's

> Treaty Settlement Agreement or the First Nation's Settlement Trust Agreement.
>
> …
>
> **PER CAPITA PAYMENTS TO MEMBERS**
>
> 3. (a) Subject to paragraph 3(b), members of Council may permit a per capita distribution each fiscal year to all Members of the First Nation from the amount of annual income paid into the Settlement Revenue Account in that calendar year.
>
> (b) The total amount of the per capita distribution in each fiscal year to all Members of the First Nation shall not exceed fifteen (15%) per cent of the amount remaining in the Settlement Revenue Account after the payments of the amounts set out in Section 2 have been made to the Settlement Trust.

[53] The language of the TSA itself does not restrict its application to only those members on the Band membership list on the date of signing the agreement. The definition of "member" in the TSA supports an interpretation that the TSA was meant to provide for both currently enrolled members, and those who were entitled to be enrolled, such as Mr. Shanks.

[54] Subsection 3(a) of the Revenue Account Law states, "members of Council may permit a per capita distribution each fiscal year to all Members of the First Nation from the amount of annual income paid into the Settlement Revenue Account in that calendar year" [emphasis added].

[55] On a plain reading of the definition of "member" in the Trust Agreement, which is incorporated into the Revenue Account Law through subsection 1(b), Mr. Shanks was a member of SRFN in 2021 who would be entitled to a PCD payment.

[56] Further, this interpretation is reasonable when compared to other sections of the Trust Agreement that set out specific timeframes for eligibility. For example, subsection 5.3(a) states "[o]ne of the purposes of the Settlement Trust is to enable Salt River…to effect a one time per capita payment in the amount of Three Thousand ($3,000) Dollars to each living Member at the time of the distribution" [emphasis added]. No such qualification is included in the definition of "member" in the Trust Agreement or the Revenue Account Law.

[57] Finally, while the TSA compensation was calculated based on SRFN's population at a specific point in time, these benefits are intended for the Nation as a whole. The Trust Agreement states the beneficiary of the Trust is the Nation. The preamble of the Trust Agreement also states "Salt River and the Trustee acknowledge and agree that the funds to be paid by Canada to the Settlement Trust are intended to benefit Salt River as beneficiary of the Trust" [emphasis added].

[58] Additionally, the wording of the Release provisions that bind all members–past, present, or future–does not support the SRFN position that the "Original Beneficiaries" are the sole members entitled to PCD payments. It is not a reasonable interpretation that all members of SRFN would be covered by the Release provisions, but would not have the right to compensation under the TSA.

[59] Based upon the forgoing, it is not reasonable to interpret the TSA as being intended only for the benefit of the "Original Beneficiaries" and their descendants.

[60] SRFN has not pointed to any provision, section, or article in the TSA, Trust Agreement, or any other settlement document that suggests PCD payments are limited to the "Original Beneficiaries". It argues this is a reasonable interpretation based upon the contextual and background information on negotiations. However, this stipulation or condition only appears in the Dilution Prevention Policy which was introduced for the first time in 2016.

[61] The issue of whether Canada should have provided compensation based upon a changing population of SRFN is a separate issue from the intention expressed by the parties in the wording used at the time the TSA was signed.

[62] Further, although SRFN relies on *Taylor v Ginoogaming First Nation*, 2019 ONSC 328 [*Ginoogaming*], the case is clearly distinguishable. In *Ginoogaming*, the trustees of Ginoogaming First Nation settlement trust brought an application seeking direction from the Ontario courts regarding whether the trustees were required to provide per capita distribution payments to individuals who would have been on the Band membership list but for the discriminatory provisions of the *Indian Act* at the time the trust agreement was signed. The settlement agreement defined a 'member' as "a person whose name appears on the First Nation's Band List on the Voting Day" (*Ginoogaming* at paras 14, 36). The Ontario Superior Court held, based on a plain reading of the trust agreement, "the settlors of the Trust expressed an intention to limit the payment to those individuals who were members of Ginoogaming on the Voting

Day" (*Ginoogaming* at para 40). Persons who became members after the voting day were not eligible for per capita distribution payments.

[63] However, the facts in *Ginoogaming* are different from the case here. The definition of 'member' in *Ginoogaming* very clearly sets out the member must have been on the Band membership list on the voting day. There is no such temporal limit in the SRFN Trust documents.

[64] In my view, the SRFN Council therefore applied an unreasonable interpretation of member in the BCR which renders the BCR unreasonable.

C. *What is the Appropriate Remedy?*

[65] In this Application, Mr. Shanks seeks a remedy pursuant to subsection 18.1(3) of the *Federal Courts Act*, namely:

> A declaration that the decision of the respondent dated October 26, 2021 to pay Per Capita Distributions to only certain members of SRFN, namely those individuals who were either registered members of SRFN in 2002 or the descendants born after 2002 of those individuals, was unlawful and a breach of Chief and Council's fiduciary obligations to the Applicant.

[66] Having found the BCR is unreasonable, I decline to make the declaration sought by Mr. Shanks.

[67] The BCR is quashed and shall be reconsidered by reference to these Reasons.

VI. Costs

[68] As the successful party, Mr. Shanks is entitled to his costs. At the hearing, the parties asked to be given the opportunity to make submissions on costs following receipt of the Court's Judgment.

JUDGMENT IN T-95-22

THIS COURT'S JUDGMENT is that:

1. This Application for judicial review is granted and the Salt River First Nation #195 Band Council Resolution dated October 26, 2021, is set aside; and

2. Mr. Shanks is entitled to costs. The parties may make written submissions on costs, not exceeding 10 pages, to be delivered within fifteen (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

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APPEARANCES:

Ian Knapp John Foster	FOR THE APPLICANT
Colleen Verville, K.C. David C. Rolf, K.C.	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MACKENZIE FUJISAWA LLP Barristers & Solicitors Vancouver, BC	FOR THE APPLICANT
MLT Aikins LLP Edmonton, AB	FOR THE RESPONDENT