

**FEDERAL COURT**

B E T W E E N:

BAND MEMBERS ALLIANCE AND ADVOCACY  
ASSOCIATION OF CANADA

Applicant

-and-

ROSEAU RIVER ANISHINABE FIRST NATION

Respondent

**NOTICE OF APPLICATION**

**APPLICATION UNDER** sections 18(1) and 18.1 of the *Federal Courts Act* and Rule 301 of the *Federal Courts Rules*.

**TO THE RESPONDENT:**

**A PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the applicant. The relief claimed by the applicant appears below.

**THIS APPLICATION** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at 635 8<sup>th</sup> Ave SW, Calgary.

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

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

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

Date: \_\_\_\_\_

Issued by: *(Registry Officer)*

Address of local office:  
635 8<sup>th</sup> Ave SW, 3<sup>rd</sup> Floor  
Calgary, AB T2P 3M3

TO: Roseau River Anishinabe First Nation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Respondent**

## APPLICATION

1. The Applicant, the Band Members Alliance and Advocacy Association of Canada (“**BMAAAC**”), brings this application for judicial review of the *Roseau River Anishinabe First Nation Illegal Drug By-Law* (“**the By-Law**”), enacted by the Roseau River Anishinabe First Nation (“**RRAFN**”) under authority delegated by section 81(1) of the *Indian Act*.
2. BMAAAC asserts that the By-Law is *ultra vires*, as well as contrary to sections 6(1), 7, 8, 9, 11(h) and 12 of the *Canadian Charter of Rights and Freedoms* (“**the Charter**”).

## RELIEF SOUGHT

3. BMAAAC seeks the following relief:
  - a. A Declaration that the By-Law is *ultra vires* RRAFN’s authority;
  - b. A Declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that the By-Law infringes sections 6(1), 7, 8, 9, 11(h) and 12 of the *Charter*, and that none of the infringements are saved by section 1;
  - c. An order that no costs of this proceeding be awarded to or against any party, regardless of the outcome;
  - d. Such further and other relief as counsel may advise and this Court considers appropriate.

## STANDING

4. The law regarding public interest standing is well settled. An applicant may be granted public interest standing by the court if the following three conditions are fulfilled:
  - a. There is a serious issue to be tried;
  - b. The applicant has a real stake or a proven connection to the matter;
  - c. The lawsuit is a reasonable and effective means of bringing the case to court.

### *Serious justiciable issue*

5. The constitutionality of delegated legislation enacted by Indigenous governing bodies is, by its nature, a serious issue, as would be the case with any level of government. For Indigenous Canadians who live on reserve, the issue is especially acute, as reserve residents are far less likely to have the legal sophistication or the resources to challenge their own governments that other Canadians enjoy. As such, Indigenous Canadians on reserve are at the mercy of their band councils to a greater degree than other Canadians are with their local governments. The scrutiny of *Indian Act* by-laws for constitutional compliance has an extra dimension of importance in this regard.

6. Apart from imprisonment for criminal or regulatory offences, there is likely no greater or more serious punishment that can be imposed on reserve residents than exile from their homes, families and communities. Banishment is an extraordinary punishment that courts have deemed an extreme measure, justified only in exceptional circumstances. Wherever a statute or by-law provides for banishment as a penalty, the need for robust procedural safeguards, as well as *Charter* compliance, is self-evident.
7. The threshold for this prong of the test is relatively low; it is sufficient that the issue not be frivolous. Banishment from First Nation reserves is self-evidently not a frivolous issue. This prong of the test is therefore satisfied.

#### *Genuine interest*

8. This factor seeks to screen out the “mere busybody”, and asks whether an applicant has a real stake in the proceedings or an engagement with the issues raised. The court looks to the applicant’s reputation, and to whether the applicant has an interest in, or link to, the claim.
9. BMAAAC is an incorporated, non-partisan, federal non-profit society, whose mandate is to facilitate access to justice on behalf of First Nation band members. It is, to the Applicant’s knowledge, the only national organization dedicated to assisting band members in demanding transparency and accountability from their Indigenous governments.
10. In the years since BMAAAC was incorporated in 2019, the organization has been at the forefront of Canadian jurisprudence involving Indigenous legal issues. It has been involved as an applicant in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220, in which the applicants successfully overturned band election eligibility rules that discriminated on the basis of sex and marital status. BMAAAC has also intervened in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525, in which the applicant successfully challenged the respondent’s extension of its term in office, as well as regulations allowing for the postponement of band elections due to COVID. Most significantly, BMAAAC intervened in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10, the landmark case establishing that the *Charter* applies to self-governing First Nations, subject to the narrow shield provided by section 25 of the *Charter* involving “Indigenous difference”. A full list of BMAAAC’s involvement in litigation is included in the affidavit of Robert Louie, filed in support of this Application.
11. BMAAAC’s litigation and intervention experience, and its mission as an advocate for ordinary Indigenous citizens to demand transparency and accountability from their Indigenous governments, give it a real connection and a genuine interest in this litigation. This prong of the test is therefore satisfied.

*Reasonable and effective means*

12. This factor considers whether the proposed lawsuit will promote access to justice, while being an efficient use of judicial resources. Indicia that the court may consider include:
  - a. The applicant's capacity to bring the claim forward;
  - b. Whether the case is of public interest;
  - c. Whether there are alternative means of resolving the issue;
  - d. The potential impact of the proceeding on others.
13. As discussed in the preceding section of this Application, the Applicant has been at the forefront of Indigenous legal matters, through its advocacy, litigation and intervention. The Applicant is supported in this matter by established constitutional litigators funded by the Justice Centre for Constitutional Freedoms. As such, the Applicant has both the resources and expertise to present a thorough case in the proposed proceedings.
14. In considering whether a case is of public interest, courts are urged to take into account whether the proposed litigation provides access to justice for disadvantaged persons whose legal rights are affected. Reserve residents who are subjected to banishment orders by their Indigenous governments are among the most disadvantaged and marginalized people in Canadian society. This case goes directly to the interests of such people, and is consistent with the underlying purpose of public interest litigation.
15. Finally, it is worth noting that the By-Law at issue in this Application is not unique to RRAFN. It appears to be identical, word for word and clause for clause, with similar drug by-laws enacted by at least two other First Nations, and potentially many others. This supports the inference that the By-Law is drawn from a template being used by multiple First Nation band councils. As such, a ruling on the *vires* and the constitutionality of the By-Law would have far-reaching effects among First Nations, and their members, nationwide.
16. Bringing this Application, on these facts, with this Applicant, is a reasonable and effective means of resolving this issue and promoting access to justice for those whose need for it is acute. As such, this prong of the test is satisfied.

*Conclusion on public interest standing*

17. The seriousness and justiciability of the issue of banishment from a reserve, the Applicant's genuine interest and capability of advancing the matter, and the far-reaching implications across the landscape of First Nation governance, all argue in favour of granting public interest standing to the Applicant, BMAAAC, for the purposes of this Application.

## THE BY-LAW

### *Prohibitions*

18. Section 3.01 of the By-Law prohibits the sale, barter, supply or manufacture of illegal drugs on reserve lands. Illegal drugs are defined as any substance prohibited or controlled under the *Controlled Drugs and Substances Act*, as well as any substance proscribed by RRAFN council in time of emergency.
19. Section 3.02 of the By-Law prohibits the use or possession of illegal drugs on reserve lands.
20. Section 3.03 of the By-Law prohibits the harbouring of an individual who has been previously removed or banished pursuant to the By-Law.

### *Penalties*

21. Section 6.01(a) provides that a person convicted of an offence against section 3.01 is liable to a maximum fine of \$1000 and/or 6 months' imprisonment.
22. Sections 6.01(b) and 6.01(c) provide that a person convicted of an offence against section 3.02 or 3.03 is liable to a maximum fine of \$100 and/or 3 months' imprisonment.
23. Section 6.02 provides for supplementary penalties that may be imposed upon those convicted of an offence under the By-Law. Section 6.02(h) provides for removal or banishment from the RRAFN reserve.

### *Banishment procedure*

24. Section 10.03 provides that any person who has been removed or banished under section 6.02(h) has an automatic right to appeal that decision. Sections 10.04 and 10.04(a) establish a 5-member Appeal Committee consisting of one "elder", one "youth", one "community member", one member of council, and one lawyer or "individual with an education in law". These terms are not defined in the By-Law. Section 10.04(b) outlines the circumstances in which a member of the Appeal Committee may, or must, withdraw from a hearing due to conflict of interest.
25. Section 10.03(a) provides that a banished person must notify the Appeal Committee of their intention to appeal within 20 days of receiving notice of banishment. Section 10.03(b) provides that a hearing must be held by the Appeal Committee within 14 days of receiving notice of appeal, and provides a list of factors that the Committee must consider in making a decision. Those factors include the nature and severity of the offence; attempts at rehabilitation or reparation made by the banished person; the banished person's connection to the community, including the effect on any dependents; and whether the banishment is in the best interests of community safety.
26. Section 10.03(d) requires the Appeal Committee to communicate their decision within 10 days of the hearing.

27. Section 10.03(e) provides that decision of the Appeal Committee are final and not reviewable by any court or tribunal.
28. Section 10.05 provides that banishment takes effect 30 days after the decision has been communicated to the banished person, or in cases where the decision is appealed, 10 days after notice of the Appeal Committee's decision.
29. Section 10.06 provides that banished persons may apply to the Appeal Committee for the banishment to be lifted after 5 years. It places an onus on the applicant to provide reasons to the Committee as to why the banishment should be lifted.
30. Section 10.07 grants discretion to the Appeal Committee to "provid[e] conditions" to banished individuals, including temporary readmission to the reserve for funerals, or under other extenuating circumstances.

#### *Detention and search procedure*

31. Section 9.01 of the By-Law authorizes RRAFN to establish checkpoints on reserve lands for the purpose of searching persons and vehicles for illegal drugs. Section 9.02 provides that refusing to submit to a search may result in denial of entry and a demand to leave, and that failing to comply with such a demand is an offence.

### **GROUND OF APPLICATION**

32. BMAAAC challenges the By-Law on the following grounds.

#### Jurisdiction

*This court has jurisdiction over the subject matter of these proceedings*

33. RRAFN is a body exercising delegated authority under the *Indian Act*. As such, it is a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*, and falls under the exclusive original jurisdiction of this Court under section 18(1) of the *Federal Courts Act*.

#### Vires argument

*Banishment is ultra vires RRAFN's authority*

34. Section 81(1) of the *Indian Act* authorizes band councils, including RRAFN, to enact by-laws on a variety of subject areas. However, neither section 81(1) nor any other provision of the *Indian Act* permits a band council to enact a by-law empowering the council to unilaterally banish a band member, effectively for a minimum of 5 years. Furthermore, neither section 81(1) nor any other provision of the *Indian Act* permits a band council to do so without affording affected band members a sufficient degree of procedural fairness.
35. Further, neither section 81(1) nor any other provision of the *Indian Act* permits band councils to enact unconstitutional by-laws.
36. For the reasons discussed below, sections 6.02(h) and 10.03 through 10.07 of the By-Law are procedurally unfair, administratively unreasonable, and unconstitutional.

37. Accordingly, RRAFN's enactment of sections 6.02(h) and 10.03 through 10.07 of the By-Law was, and remains, *ultra vires* its authority under section 81(1) of the *Indian Act*.

*Banishment unreasonably interferes with members' rights*

38. RRAFN reserve lands were established pursuant to Treaty 1, with such lands being established in proportion to "each family".
39. RRAFN is a "band" under the *Indian Act*, which is defined as "a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart...". Likewise, RRAFN reserve lands are a "reserve" under the *Indian Act*, which is defined as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band...".
40. The By-Law, insofar as it provides for the removal or banishment of band members, is thus *ultra vires* the authority of RRAFN in that it purports to deprive members of their treaty and statutory rights to the use and benefit of reserve lands. Further, the By-Law, insofar as it provides for the removal or banishment of band members, unreasonably interferes with these rights.

Administrative law argument

*The By-Law lacks sufficient procedural fairness*

41. Given the serious nature of the decision to banish an individual, and its importance and detriment to the affected person, a high degree of procedural fairness is owed to the individual.
42. When an administrative decision by a governing body affects the rights or interests of an individual, natural justice requires, at a minimum, that the individual be given prior notice, and a chance to be heard, before the decision is taken. Often, fairness will require much more than this basic minimum. In the case at bar, the By-Law provides for no prior notice to an individual before a decision to evict or banish is taken. This is procedurally unfair.

*The By-Law places an initial decision-maker in charge of the appeal*

43. Although the By-Law does not expressly say so, it is implied that the decision to banish or evict an individual is made by the Chief and Council of RRAFN. Section 10.04(a) provides that one member of the Appeal Committee be drawn from the same council that made the initial banishment decision. Putting a decision-maker in charge of reviewing his or her own decision, even as part of a committee, leads to a reasonable apprehension of bias. This is especially the case where the decision-maker is an elected official holding public office.

*The By-Law does not require written reasons*

44. Although the By-Law provides for a list of factors that the Appeal Committee must consider in the context of an appeal, there is no provision in the By-Law for written reasons to be provided to the banished individual, either at the stage of the initial order or after an appeal is heard. Given the importance of the decision, and its impact on the individual, this is insufficient.

*The By-Law does not specify factors that must be considered*

45. Although the By-Law provides for a list of factors that the Appeal Committee must consider in the context of an appeal, there is no similar provision of factors that must be considered by the decision-maker of first instance, presumably Chief and Council. Given the importance of the decision, and its impact on the individual, this is insufficient.

*The By-Law forecloses recourse to the courts*

46. Section 10.03(e) of the By-Law is an express privative clause, providing that banishment procedure is exhausted after the Appeal Committee decides the matter. RRAFN intends for banishment decisions to be completely unreviewable by any outside court or tribunal. This legislative choice, which was freely made by RRAFN, increases the degree of procedural fairness owed to affected individuals.

*The By-Law imposes a justificatory burden on the applicant*

47. In applying for readmission to the reserve after serving a minimum 5-year term of banishment, section 10.06 requires that the applicant bear the onus of justifying his or her own reinstatement, and of proving to the Appeal Committee that the applicant is no longer a threat to the community. At the same time, there is no requirement in the By-Law that the banished person be provided with written reasons, either for the initial decision to banish or the dismissal of an appeal.
48. In such circumstances, an applicant for readmission bearing the burden of justification is not aware of the case he or she has to meet. This is not only procedurally unfair to the applicant for readmission, it is also contrary to the “culture of justification” at the heart of Canadian administrative law.

*Banishment decisions merit the highest degree of procedural fairness*

49. In sum, the nature of the decision, its importance to the individual, and the statutory scheme chosen by RRAFN all indicate that a very high degree of procedural fairness is owed to band members who are subject to banishment decisions under the By-Law. As such, banishment under the By-Law calls for safeguards such as:
- a. A fair hearing, with full disclosure, before a neutral decision-maker, before the initial decision to banish is taken;
  - b. Written reasons for the initial decision;

- c. Right of appeal before a fully impartial appeal body, with written reasons for the appeal decision;
  - d. A statutory right of further appeal to a court of competent jurisdiction;
  - e. A clear and comprehensible right of reconsideration within a reasonable time, with an onus on the decision-maker to justify the continuation of a banishment.
50. The By-Law, as it currently exists, does not conform to any of the specifications in the preceding paragraph.
51. As such, the By-Law does not afford sufficient procedural fairness to band members subject to a banishment decision under section 6.02(h).

#### *Conclusion on procedural fairness*

52. No administrative or legislative body exercising delegated authority is authorized to enact by-laws or make decisions that afford insufficient procedural fairness to affected individuals. As such, sections 6.02(h) and 10.03 through 10.07 of the By-Law are *ultra vires* the authority of RRAFN.

#### Charter argument

##### *The availability of Charter review in this proceeding*

53. RRAFN is a “government” and is subject to the *Charter*, pursuant to section 32(1) of the *Charter*.
54. The By-Law, having been duly enacted under delegated authority pursuant to the *Indian Act*, is subject to review under the *Charter*.

##### *The By-Law violates section 6(1) of the Charter*

55. Section 6(1) of the *Charter* provides:
- Every citizen of Canada has the right to enter, remain in and leave Canada.
56. A purposive interpretation of section 6(1) supports a general guaranteed right of mobility within Canada, including within provincial borders, without state restraint or a requirement for state authorization. Laws and government actions that limit the ability of Canadian citizens to move freely within Canada, or make such movement contingent on state authorization, infringe section 6(1) of the *Charter*.
57. Persons who are banished from RRAFN reserve lands under the By-Law are restricted from moving freely within, or even entering, RRAFN territory. Such restriction remains in place for at least 5 years, and may endure indefinitely. This is a clear example of a law limiting a person’s ability to move freely within a particular territorial catchment, in a non-fleeting, non-trivial manner.
58. RRAFN has not demonstrated that sections 6.02(h) and 10.03 through 10.07 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.

59. Accordingly, these provisions violate section 6(1) of the *Charter* and cannot be saved by section 1.

*The By-Law violates section 7 of the Charter*

60. Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

61. The By-Law provides that RRAFN Chief and Council may banish members from RRAFN reserve lands for a minimum of 5 years, which constitutes a significant interference with the liberty and security of the person of RRAFN members, by denying them access to their homes, their families and their community. Such a mandatory minimum term of banishment for a person who has been convicted of contravening the By-Law is overbroad, arbitrary and grossly disproportionate.
62. A member who has contravened section 3.01, 3.02 or 3.03 of the By-Law could very realistically, through rehabilitation or other personal or situational changes, pose no threat to the community in a far shorter time than 5 years.
63. Empowering Chief and Council to banish a member for a minimum of 5 years if they are found to have engaged in harbouring, contrary section 3.03 of the By-Law, may also be an inordinate length of time to achieve RRAFN's objectives of ensuring community safety and protection.
64. Notwithstanding the foregoing, banishment under the By-Law endures for a minimum of 5 years, and absent an application for reinstatement by the banished individual, is permanent. There is no possibility for calibration of the banishment, either before or after it is ordered, to balance individual and communal rights and interests in a proportionate manner.
65. As such, banishment for a minimum 5-year term as contemplated by the By-Law deprives a person of their liberty and security of the person, in manner not in accordance with the principles of fundamental justice.
66. RRAFN has not demonstrated that sections 6.02(h) and 10.03 through 10.07 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
67. Accordingly, those provisions violate section 7 of the *Charter* and cannot be saved by section 1.

*The By-Law violates section 8 of the Charter*

68. Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.

69. A search within the meaning of section 8 is any state activity that interferes with a reasonable expectation of privacy. Whether a reasonable expectation of privacy exists is

analyzed on a case-by-case basis in the totality of the circumstances, but it is indisputable that a reasonable expectation of privacy exists in a person's vehicle, and a high expectation of privacy exists on a person's body and clothing.

70. A search or seizure is reasonable if it is authorized by law, where the law is itself reasonable, and the search is carried out in a reasonable manner.
71. Warrantless searches, even where authorized by legislation, are presumptively unreasonable, and must be justified by the state actor as authorized by law, where the law is reasonable, and carried out in a reasonable manner.
72. Section 9.01 of the By-Law authorizes RRAFN to establish checkpoints on or around reserve lands, the purpose of which is to search all vehicles and persons for illegal drugs. Section 9.02 provides that refusing to consent to a checkpoint search results in a denial of entry, and refusal to leave in such circumstances is an offence.
73. Because these searches are authorized by the By-Law, whether they are reasonable for the purposes of section 8 of the *Charter* depends on whether the By-Law is a reasonable authorizing law.
74. While there is no "hard and fast" test for reasonableness under section 8 of the *Charter*, a reasonable authorizing law must strike a reasonable balance between the state interest that is pursued by the law on the one hand, and the individual privacy interest on the other. Considerations identified in case law include:
  - a. The nature and purpose of the legislative scheme;
  - b. The mechanism employed, having regard for the degree of its potential intrusiveness and its reliability;
  - c. The availability of judicial supervision.
75. In the present case, the purpose of the legislative scheme is to promote public health and safety by regulating the presence of intoxicants on reserve. The Applicant concedes that this is a legitimate and substantial objective.
76. A law authorizing a search or seizure should reflect the least intrusive means by which the state interest can be achieved. The mechanism chosen by RRAFN in this case – the warrantless search of persons and vehicles – attracts a moderate to high expectation of privacy, and is highly intrusive.
77. Another consideration relevant to the mechanism is the threshold on which the search may be conducted, and whether the power to search is narrowly targeted. In this case, the law authorizes a checkpoint that targets all passing persons and vehicles without exception, without discretion, and without reasonable and probable grounds. It is as wide a net as can be cast. A method of searching that captures an inordinate number of innocent individuals, as every checkpoint surely must do, cannot be reasonable.
78. Finally, the By-Law contains no provision for judicial oversight and no review mechanism, either before or after a search is executed. Given the high expectation of privacy that is engaged, and the intrusiveness of the search, this is unreasonable.

79. In sum, the By-Law is an unreasonable authorizing law, and where it authorizes the warrantless search of persons, baggage and vehicles, those searches are unreasonable, contrary to section 8 of the *Charter*.
80. RRAFN has not demonstrated that sections 9.01 and 9.02 of the By-Law amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
81. Accordingly, these provisions violate section 8 of the *Charter* and cannot be saved by section 1.

*The By-Law violates section 9 of the Charter*

82. Section 9 of the *Charter* provides:

Everyone has the right not to be arbitrarily detained or imprisoned.

83. A detention occurs when a person is placed under a significant form of physical or psychological restraint by the state.
84. A detention is arbitrary when it is not authorized by statute or common law, or when it is authorized by a law that is itself arbitrary. Generally, detention is not arbitrary where there are standards that are rationally related to the purpose of the power of detention. A law authorizing automatic detention without any standards is arbitrary. Similarly, a law that confers absolute discretion to detain will be arbitrary if there are no criteria, express or implied, which govern its exercise.
85. Sections 9.01 and 9.02 of the By-Law contemplate roadside checkpoints that detain and search all persons and vehicles for illegal drugs. Supreme Court jurisprudence has long held that roadside checkstop programs are only permissible for very narrow purposes related to road safety, such as confirming the licensing, insurance and sobriety of motorists, and the roadworthiness of vehicles. The SCC has expressly stated that checkstop programs cannot and must never be expanded into a more general investigative, information-gathering or law enforcement tool. A checkstop program that searches all persons and vehicles for contraband, without discretion and without exception, is both contrary to SCC guidance and arbitrary within the meaning of section 9 of the *Charter*.
86. RRAFN has not demonstrated that sections 9.01 or 9.02 of the By-Law amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
87. Accordingly, these provisions violate section 9 of the *Charter* and cannot be saved by section 1.

*The By-Law violates section 11(h) of the Charter*

88. Section 11(h) of the *Charter* provides:

Any person charged with an offence has the right, if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

89. Section 11(h) is engaged either when a person is tried twice for the same offence, or punished twice in respect of the same offence. An administrative sanction imposed as a supplement to the prescribed punishment for an offence may qualify as a second punishment if it fits the criteria as discussed below.
90. Section 6.01 of the By-Law provides the standard punishment for contraventions of sections 3.01, 3.02 and 3.03 upon summary conviction. An offence against section 3.01 is punishable by a fine of up to \$1000 and/or imprisonment of up to 6 months. An offence against section 3.02 or 3.03 is punishable by a fine of up to \$100 and/or imprisonment of up to 3 months.
91. Section 6.02 lists a number of additional “sanctions” to which a convicted offender may be subjected at the decision-maker’s discretion. The decision-maker is presumably RRAFN Chief and Council, although the By-Law is not explicit on this point.
92. The discretionary additional “sanctions” under section 6.02 include:
  - a. Termination of employment with RRAFN (6.02(a));
  - b. Termination or denial of a variety of public benefits (6.02(b));
  - c. Denial of housing on reserve (6.02(c));
  - d. Removal from the reserve housing list (6.02(d));
  - e. Eviction from housing on reserve (6.02(e));
  - f. Publication of the offender’s name (6.02(f));
  - g. Refusal by RRAFN to do business with the offender (6.02(g));
  - h. Removal or banishment from the reserve (6.02(h)).
93. A “sanction” constitutes “punishment” within the meaning of sections 11(h), 11(i) and 12 of the *Charter* if it satisfies the following criteria:
  - a. It is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and
  - b. It is either:
    - i. Imposed in furtherance of the purpose and principles of sentencing, or
    - ii. It has a significant impact on an offender’s liberty or security interests.
94. A person convicted of an offence under section 3.01, 3.02 or 3.03 of the By-Law is liable to the corresponding punishment under 6.01 of the By-Law. As the By-Law is written, such an offender is also liable to any or all of the additional sanctions under section 6.02 for the same offence, at Chief and Council’s discretion. The additional sanctions under 6.02 form part of the “arsenal of sanctions” to which an accused is liable in respect of the offence.
95. Removal or banishment from the reserve is intended to separate the offender from society, to denounce the offender’s conduct, and to achieve general deterrence, all of which are fundamental principles of sentencing.

96. Removal or banishment from the reserve has an obvious and self-evident impact on an offender's liberty interests.
97. Accordingly, removal or banishment under section 6.02(h) of the By-Law is not merely an additional sanction; it is a punishment within the meaning of section 11(h), 11(i) and 12 of the *Charter*.
98. A person convicted of an offence under section 3.01, 3.02 or 3.03 is punished with the corresponding penalty in section 6.01. Removal or banishment under section 6.02(h) is a second punishment in respect of the same offence. As such, it infringes section 11(h) of the *Charter*.
99. RRAFN has not demonstrated that sections 6.02(h) and 10.03 through 10.07 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
100. Accordingly, those provisions violate section 11(h) of the *Charter* and cannot be saved by section 1.

*The By-Law violates section 12 of the Charter*

101. Section 12 of the *Charter* provides:  
Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
102. A state-imposed treatment or punishment is cruel and unusual if it is grossly disproportionate to a judicially-determined fit treatment or punishment for a given instance of misconduct.
103. Section 10.06 provides that a banished person may apply for readmission to RRAFN reserve lands no earlier than 5 years from the date of banishment. Readmission is at the discretion of the Appeal Committee. Banishment decisions have no inherent end point. Absent an application for readmission, banishment is permanent. This is effectively a 5-year mandatory minimum sentence, which is grossly disproportionate to the scope of possible conduct that sections 3.01, 3.02 and 3.03 of the By-Law may capture. As such, it is a cruel and unusual punishment, contrary to section 12 of the *Charter*.
104. RRAFN has not demonstrated that sections 6.02(h) and 10.03 through 10.07 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
105. Accordingly, those provisions violate section 12 of the *Charter* and cannot be saved by section 1.

*The banishment provisions of the By-Law, and the detention and search provisions of the By-Law, are of no force or effect*

106. In light of the above, and pursuant to section 52(1) of the *Constitution Act, 1982*, BMAAAC pleads that sections 6.02(h), 9.01, 9.02, and 10.03 through 10.07 of the By-Law are of no force or effect.

*No costs should be awarded*

107. BMAAAC acts in this Application as a public interest litigant. Accordingly, it does not seek costs, and submits that no costs should be ordered against it, regardless of the outcome of these proceedings.

**The Applicant relies on the following statutory provisions, rules and principles:**

- a. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11, including the *Canadian Charter of Rights and Freedoms*.
- b. *Treaty No. 1 between Her Majesty the Queen and the Chippewa and Swampy Cree Tribes of Indians at Lower Fort Garry and St. Peters*, 3 August 1871.
- c. *Federal Courts Act*, RSC 1985, c F-7, ss 18, 18.1.
- d. *Federal Courts Rules*, SOR/98-106.
- e. *Indian Act*, RSC 1985, c I-5.
- f. *By-Law No. 002 of the Roseau River Anishinabe First Nation Band – A By-Law to Prohibit Illegal Drugs* (RRAFNF).
- g. *Controlled Drugs and Substances Act*, SC 1996, c 19.

**This Application will be supported by the following material:**

- a. The Affidavit of Robert Louie, to be filed;
- b. Such further and other affidavits and material as counsel may advise and this Court permits.

**Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests that the Respondents send the following material that is not in the possession of the Applicant but in the Respondent's possession, to the Applicant and the Registry:**

- a. All documents and other materials related to the adoption, review and continued utilization of sections 6.02(h) and 10.03 through 10.07 of the By-Law;
- b. Such further and other material that may be in the possession, power or control of the Respondent and which may be relevant to these proceedings.

Date: 8 September 2026



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Counsel for the Applicant