Federal Court  Cour fédérale

Date: 20201223

Docket: T-66-19

Citation: 2020 FC 1184

Ottawa, Ontario, December 23, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SHERRI MCKENZIE, DARREN MERCREDI, AND RUBI SHIRLEY

Applicants

and

MIKISEW CREE FIRST NATION CHIEF AND COUNCIL ARCHIE WAQUAN, RAYMOND RANDY MARTEN, CALVIN WAQUAN, AND SALLY JOAN WHITEKNIFE

Respondents

JUDGMENT AND REASONS

[1] This is the judicial review of a Mikisew Cree First Nation [MCFN] Band Council Resolution [BCR], dated December 11, 2018, suspending the Applicants, Sherri McKenzie, Darren Mercredi and Rubi Shirley, as MCFN Band Councillors.

Factual Background

[2] The MCFN is an Indian Band under the *Indian Act*, RSC 1985 c.I-5. In 1996, MCFN adopted the *Mikisew Cree First Nation Customary Election Regulations* [Election Regulations]. Pursuant to the Election Regulations, MCFN is governed by a Council consisting of one Chief and six Councillors. A "Quorum of Council" is defined as at least four members of Council, one of whom must be the Chief or Sub-Chief (ss 3.1, 2.0(s)).

[3] In the election held on June 20, 2017, the Applicants, together with the Respondents Sally Whiteknife, Randy Marten and Calvin Waquan were elected as Councillors, and Archie Waquan was elected as Chief of MCFN.

[4] Not long after the election, conflict between the Applicants and the remainder Chief and Council arose.

[5] At a November 27, 2018 meeting of Chief and Council a "Petition for Removal of Councillor Sally Whiteknife and Councillor Randy Marten from Office" [Petition], signed by 100 MCFN members was presented. The Petition alleged that Sally Whiteknife and Randy Marten were not resident on MCFN Reserve land during their term as councillors, as required by s 14.1 of the Election Regulations and, pursuant to s 15.1(b)(v), that this was grounds for their removal from office. The Petition noted that, pursuant to s 15.3 of the Election Regulations, upon receipt of such a petition Council was required to convene a special meeting to consider removal.

[6] According to the evidence of the Applicants, specifically the Affidavit of Rubi Shirley, affirmed on January 9, 2019 [Shirley Affidavit], a special meeting of MCFN Chief and Council was held on November 28, 2018 and a motion was made and passed to suspend Councillors Whiteknife and Marten pending an investigation. However, I note that the record before me does not contain a Band Council Resolution supporting this statement. Rather, attached as Exhibit 3 of the Shirley Affidavit is an "Affidavit of Facts – Minutes & Statement of Events on November 29, 2018" which states that the Chief accepted a motion by Councillor Mercredi to suspend Councillors Whiteknife and Marten and that the Chief and the Applicants voted in favour of this. This Affidavit of Facts is signed by the three Councillor Applicants, an Elder and a Band Member, but it is not signed by the Chief. It appears that shortly thereafter the Applicants provided letters of suspension, dated November 28, 2018, to Councillors Whiteknife and Marten advising them that they were immediately suspended pending the outcome of an investigation.

[7] Conversely, evidence submitted by the Respondents indicates that on November 28, 2018, MCFN Chief and Council held a regularly scheduled meeting with the MCFN Government and Industry Relations Department to discuss its quarterly report. This was not a Special Meeting convened with respect to the Petition. Following the meeting, the MCFN Chief Executive Officer [CEO] Doreen Cardinal was advised of the Petition, the relevant Election Regulations provisions (s 15) were reviewed and the CEO was accordingly instructed to obtain a legal opinion with respect to the validity of the Petition. According to the Affidavit of Doreen Cardinal dated January 10, 2019 [Cardinal Affidavit] a Band Council Resolution, dated November 28, 2018, and signed by Chief Waquan and Councillors Whiteknife, Marten and Calvin Waquan was issued in that regard. According to the Respondents, no band council resolution was passed

suspending Councillors Whiteknife and Marten. The requested legal opinion was provided on December 3, 2018 by Rath & Company.

[8] In the meantime, various emails were exchanged between November 29 and December 5, 2018. Chief Waquan sent emails to the Councillors on November 29 and December 4, 2018 stating that Councillors Whiteknife and Marten had not been suspended and that a legal opinion was being sought, pursuant to s 15.4 of the Elections Regulations, on an urgent basis. He asked that letters not be sent on behalf of the MCFN and indicated that all letters on behalf of the First Nation required his signature until the matter was resolved. The Applicants replied on December 4, 2018 asserting, among other things, that at a Special Meeting held on November 28, 2018 a decision was made by a majority of Chief and Council to suspend the two Councillors until a legal opinion was received and that the Chief had voted in favour of this.

[9] On December 6, 2018, Rubi Shirley also sent an email to Chief and Council requesting that a Special Meeting be convened that afternoon. Both Chief Waquan and Councillor Calvin Waquan responded to Ms. Shirley's email, noting that she had not given enough notice for a special meeting and indicating that Chief Waquan was away at meetings in Ottawa and no Chief and Council meetings would be held until the legal opinion was received. No meeting was held on December 6th.

[10] On December 10th, Rubi Shirley sent an email to Chief and Council requesting that a Special Meeting be convened that day to discuss a couple of "important items". Councillor

Calvin Waquan replied to Ms. Shirley's email noting that a regularly scheduled meeting was scheduled for, and would be held, the next day, December 11, 2018.

[11] Regardless, Councillors Shirley, Mercredi and McKenzie met on December 10th at the MCFN Band Office and purported to pass a motion terminating Doreen Cardinal's employment as CEO. Mr. Mercredi then gave Doreen Cardinal a termination letter, dated December 10th. This letter is on MCFN letterhead and is signed by each of the Applicants as Councillors and also includes the name of Chief Archie Waquan – without his signature. The Cardinal Affidavit states that Ms. Cardinal immediately contacted Chief Waquan who told her that she had not been terminated and was to report for work the following day.

[12] Things did not improve the next day.

[13] The scheduled Chief and Council meeting was held on the morning of December 11, 2018 at the Band Office and all Councillors and the Chief attended. This meeting was disrupted, with some Band Members refusing to leave the boardroom, and the meeting disbursed. The meeting was either re-convened, or a second meeting was held, that afternoon at the home of Chief Waquan. The afternoon meeting was attended by Chief Waquan and Councillors Whiteknife, Marten and Calvin Waquan. At that meeting, Band Council Resolution BCR 00461-702-2018-2019-037 was passed [Suspension BCR]. The Suspension BCR states that the Applicants had engaged in conduct contrary to the MCFN Election Regulations, Appendix E, Ethical Guidelines for Conduct of Council by interfering with the day-to-day operations of MCFN by purporting to terminate members of senior staff, by engaging in political activity

designed to undermine other members of Chief and Council, by making false allegations with regard to other members of Chief and Council, by acting without authority to purport to call "Band General Meetings" for the express purpose of calling the governance of the MCFN into disrepute. The Suspension BCR suspended the Applicants from Council until they acknowledged their unethical conduct and the harm they caused to the MCFN through their behaviour and provided a letter of apology in the form attached.

[14] The next day, December 12, 2018, there was further disruption at the Band Office. MCFN sought and obtained a Preliminary Ex Parte Interim Injunction Order, issued by the Court of Queen's Bench of Alberta, on December 12, 2018 that restrained and prohibited defendants named therein, which included Rubi Shirley and Sherri McKenzie, from interfering with, disturbing or obstructing the ongoing administration and business operations of MCFN. On January 3, 2019 the defendants to that action brought an application to set aside the injunction order which was granted on January 11, 2019.

[15] The Applicants filed their application for judicial review on January 9, 2019 challenging the Suspension BCR.

[16] At the hearing, in response to my inquiry as to Mr. Mercredi's current involvement in this application, counsel for Ms. McKenzie and Ms. Shirley advised that he represented only those Applicants and was not aware of the status of Mr. Mercredi. Subsequent review of the Court's file indicates that by letter to the Court dated February 27, 2019 Mr. Mercredi advised that he wished to remove himself from file no T-66-19, effective February 19, 2019. Former counsel for

all of the Applicants requested to be and was eventually removed as counsel of record. Current counsel is counsel of record only for Ms. McKenzie and Ms. Shirley. Formal steps to remove Mr. Mercredi as an Applicant and to revise the style of cause were not taken but Mr. Mercredi did not further participate in the application. The record before me indicates that Mr. Mercredi signed the Acknowledgement of Unethical Conduct and Apology and was reinstated to his office as a Councillor on February 19, 2019. There is no indication that Mr. Mercredi continues to seek any relief by way of this Application.

[17] At the hearing counsel for Ms. McKenzie and Ms. Shirley advised that subsequent to the application for judicial review being filed, a new election was held on August 27, 2020. New Chief and Council were sworn in on September 12, 2020. Ms. McKenzie was re-elected. Ms. Shirley also ran but was not re-elected. As a result, counsel for those Applicants advised that the relief sought by them no longer includes being restored to office. Those Applicants seek an order quashing the Suspension BCR and a declaration that they ought to have been restored to office and that they are to be paid their wages from the date of their suspension to the date that new council took office.

Decision under review

[18] The Suspension BCR states, in part:

> WHEREAS: The Mikisew Cree First Nation Chief and Council have been elected to represent and empowered to act on behalf of the constituents of the Mikisew Cree First Nation;
>
> WHEREAS: The Powers and Authorities of the Council are exercised as provided for under the Indians Act; and

WHEREAS: The liabilities of Council are limited to those specifically provided for under the Indian Act; and

WHEREAS: This Council has met duly convened meeting on December 11, 2018; and

WHEREAS: Rubi Shirley, Darren Mercredi, and Sherri McKenzie have engaged in conduct contrary to the MIKISEW CREE FIRST NATION CUSTOMARY ELECTION REGULATIONS: APPENDIX E ETHICAL GUIDELINES FOR CONDUCT OF COUNCIL by interfering in the day to day operations of Mikisew Cree First nation by purporting to terminate members of senior staff, by engaging in political activity designed to undermine other members of Chief and Council, by making false allegations with regard to other members of Chief and Council, by acting without authority to purport to call "Band General Meetings" for the express purpose of calling the governance of the Mikisew First Nations into disrepute;

IT IS HEREBY RESOLVED:

That Rubi Shirley, Darren Mercredi, and Sherri McKenzie are hereby suspended from Council of the Mikisew Cree First Nations until such time as they have acknowledged their unethical conduct and acknowledged the harm that they have caused to the Mikisew Cree First Nation, its members, and its Chief and Council through their prohibited behaviour, and apologised in writing for this conduct in the form attached to the Band Council Resolution;

THEREFORE LET IT BE FURTHER RESOLVED:

That the payment of salaries, honoraria, and expenses for Rubi Shirley, Darren Mercredi, and Sherri McKenzie are hereby suspended.

THEREFORE LET IT FURTHER BE RESOLVED:

That Jeff Rath will be retained to deal with any issues or claims resulting from any petition or suspension from Rubi Shirley, Darren Mercredi, and Sherri McKenzie or affiliated persons.

> The quorum for this First Nation consists of four (4) Council Members.

[19] All Chief and Council members' names appear on the Suspension BCR but it bears only the signatures of Chief Waquan and Councillors Whiteknife, Marten and Calvin Waquan.

[20] The letter referenced in the Suspension BCR is also found in the record. This states:

> Dear Chief and Council:
>
> **Re: Acknowledgement of Unethical Conduct and Apology**
>
> This letter is written to acknowledge that I, _____, acknowledge that I have engaged in conduct contrary to the EHTICAL GUIDELINES OF CONDUCT FOR COUNCIL.
>
> I have inappropriately undermined the day to day functioning of the Mikisew Cree First Nation's government by making false allegations about fellow members of the Chief and Council, I have inappropriately interfered with the functioning of the Mikisew Cree First Nation government by attempting terminate (*sic*) a member of the Mikisew Cree First Nation senior administrative staff, I have engaged in political conduct aimed directly at fellow members of the Chief and Council for the express purpose of attempting to take over the functions of the entire Chief and Council for my own personal gains and purposes and have, without authority, called Band General Meetings without the authority of Chief and Council for the purpose of engaging in personal attacks on the Chief and my fellow Councillors.
>
> I acknowledge the harm that this has caused to the Mikisew Cree First nation and its membership. I understand that my actions directly contravened the Ethical Guidelines for Conduct of Council. I apologize to the Members of the Mikisew Cree First Nation and the Chief and Council for my unethical conduct and I promise that I will not engage in such conduct ever again while sitting as a member of the Mikisew Cree First Nation Chief and Council.
>
> Yours very truly
>
> _____

Relevant Legislation

[21] The relevant provisions of the Mikisew Cree First Nation Customary Election Regulations are as follows:

PREAMBLE

WHEREAS:

…..

E. The Mikisew Cree First Nation now desires that the customs and traditions of the nation in relation to the Election of the Chief and Councillors be incorporated and recorded in written customary election regulations and procedures; and

….

2.0 **DEFINITIONS**

Unless other wise expressly stated, in this regulation:

i) "Senate of Elders" means the Elders appointed by the Council and recognized by the membership of the First Nation.

s) "Quorum of Council" means at least four members of Council, one of whom must be the Chief or Sub-Chief.

3.0 **COMPOSITON AND TERM OF OFFICE OF COUNCIL**

3.1 Composition

The Nation will be governed by a Council consisting of one (1) Chief and six (6) Councillors.

15.0 REMOVAL OF CHIEF OR COUNCILLORS FROM OFFICE

15.1 Grounds for removal from office:

The Chief or any Councillor may be removed from office on the following grounds:

a) …..

b) While in office, the chief or any Councillor

(i) who engages in drunk, disorderly, and irresponsible conduct at Council meeting, community meetings or in other forums or function which interferes with the conduct of business or brings the reputation of the Nation and/or the Council into disrepute;

…..

(v) who fail to remain resident on Mikisew Cree First Nation Reserves or Fort Chipewyan for the duration of their term of office;

(ix) who refuse to sign or breach the Code of Ethics for Chief and Councillors set out in Schedule "E".

15.3 Petition for Removal

Upon receipt of a Petition signed by at least one hundred (100) Electors stating the grounds for seeking the removal of a named Chief or Councillor, the Council will convene a special meeting of the Council to consider the removal of the Chief or Councillor from office.

15.4 Resolution for Removal

Upon consideration of a legal opinion as to whether the alleged grounds for removal of a Chief or Councillor fall within the provision of S15.1 or S 15.2 [*sic*], the Council may then by Resolution must state the grounds for removal and the effected date of the removal of the person from office.

Schedule "B"
POWERS AND AUTHORITY OF THE COUNCIL

The powers and authority of the Chief and Council include:

1. Approving and implementing policies concerning the management and administration of First Nation affairs including, but not limited to, finance and administration, housing, lands, education. Social programs, economic development and related issues.

2. Responsibly managing and protecting the First Nation's assets.

3. Formulating, reviewing, approving and implementing by-laws as authorized under the Indian Act and adopting and approving legislation pursuant to the authority granted Aboriginal governments in the Constitution Act, 1982 (as amended).

4. Negotiating, finalizing, and executing financial and other agreements between the First Nation and Governments of Canada and/or Alberta.

5. Formulating, reviewing, and approving amendments to the Membership Code, Customary Election Regulations, By-Laws, legislation, or other acts or policies of the First Nation with approval of, and in consultation with, the membership in regards to any such amendments.

6. Voting as deemed proxy holder for the members of the Mikisew Cree First Nation in relation to all shares held by the membership of the First Nation in any First Nation Corporation, Societies, or Non-profit corporate organizations.

7. Establishing committees, hiring staff, retraining advisors, and responsibility for any other managerial or administrative decisions necessary and incidental to the foregoing.

8. Notwithstanding the foregoing, the Council may not exceed the budget approved by the majority of eligible Electors at the Annual General Meeting of the First Nation unless the excess is approved in advance at a general or social meeting of the membership of the First Nation.

9. Other actions and decisions as deemed necessary from time to time for the proper governance of the Mikisew Cree First Nation

Schedule "C"
ROLE AND FUNCTION OF THE SENATE OF ELDERS

The role and functions of the Senate of Elders include:

1. Providing advice and recommendations to the Council on issues of concern to the First Nation.

2. Acting as the Election Appeal Committee for the purposes of these Regulations

Schedule "E"
ETHICAL GUIDELINES OF CONDUCT FOR MEMBERS OF COUNCIL

The proper operation of democratic government of the Mikisew Cree First Nation requires that:

(i) Elected Officials be independent, impartial, and duly responsible to the people of the Mikisew Cree First Nation;

(ii) By-laws, policy, and decisions be made through the proper channels of Mikisew Cree First Nation government structure;

(iii) The People of the Mikisew Cree First Nation have confidence in the integrity of its government.

According [*sic*], certain ethical principles and guidelines must govern the conduct of member of Council in order that they maintain the highest standards in public office and faithfully discharge the duties of office.

Members of Council shall:

1. Govern their conduct in accordance with the obligations and regulations governing the conduct of the Council of the Mikisew Cree First Nation; …

4. Preserve the integrity, reputation, and impartiality of Council by conducting themselves at all times in a matter [*sic*] that will no dishonor [*sic*] their office or bring the reputation of the Council into disrepute;

5. Not engage in any unethical activities not covered or specifically prohibited by these ethical guidelines of conduct or by any law;

…..

> As a Member of this Council, I agree to uphold the spirt and terms of these guidelines and to govern my actions accordingly.

Issues

[22] In my view, the issues identified by the parties can be framed as follows:

Preliminary Issue: Is this application for judicial review premature and/or moot?

Issue 1: Did Chief and Council have the authority to suspend the Applicants?

Issue 2: If so, was the process by which the Applicants were suspended procedurally fair?

Standard of review

[23] The Applicants made no written submissions regarding the standard of review. However, when appearing before me current counsel submitted that the reasonableness standard applies to the question of whether Chief and Council had the authority to suspend the Applicants and that the correctness standard applies to issues of procedural fairness.

[24] The Respondents submit that the decision to suspend the Applicants falls within the standard of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]) and, throughout their submissions, emphasise that deference is owed by this Court to the decision maker on a reasonableness review. The Respondents made no submissions regarding the standard of review for procedural fairness in their written submissions.

[25] The Supreme Court of Canada in *Vavilov* held that the standard of reasonableness presumptively applies whenever a court reviews an administrative decision (*Vavilov* at paras 16, 23, 25). That presumption may be rebutted in two circumstances. The first is where the legislature has prescribed the standard of review or has provided a statutory appeal mechanism thereby signalling the legislature's intent that appellate standards should apply (*Vavilov* at paras 17, 33). The second circumstance is where the rule of law requires the application of the correctness standard. This will be the case for certain categories of questions, namely, constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at paras 17, 53).

[26] In my view, the issue of whether the Chief and Council had the jurisdiction or authority to suspend the Applicants does not fall into any of the circumstances that the Supreme Court identified in *Vavilov* as requiring the application of the correctness standard. Indeed, the Supreme Court stated that it "would cease to recognize jurisdictional questions as a distinct category attracting correctness review" (at paras 65, 68).

[27] I also note that, prior to *Vavilov*, the Federal Court of Appeal held that questions involving the authority or jurisdiction of a First Nation chief and council to suspend a councillor are governed by the reasonableness standard (*Fort McKay First Nation v. Orr*, 2012 FCA 269 [*Orr*] at para 12). Post *Vavilov*, this Court has held that the Supreme Court's decision in *Vavilov* does not change the application of reasonableness standard of review to a First Nation's band

council decision regarding its authority or jurisdiction to take challenged actions (*Tourangeau v. Smith's Landing First Nation*, 2020 FC 184 at para 25 [*Tourangeau*]).

[28] As the presumption has not been rebutted, the reasonableness standard applies to the issue of the authority or jurisdiction of the MCFN Chief and Council to suspend the Applicants as well as to the substantive review of that decision. The decision must be reviewed for intelligibility, justification, and transparency (*Vavilov*, para 15).

[29] Issues of procedural fairness are reviewed on the correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada v Akisq'nuk First Nation*, 2017 FCA 175 at para 19; *Gadwa v Kehewin First Nation*, 2016 FC 597 at para 19, aff'd 2017 FCA 203; *Morin v. Enoch Cree First Nation*, 2020 FC 696 at para 21; *Tourangeau* at para 26).

[30] On a correctness review, no deference is owed to the decision maker and the reviewing court determines if the duty of procedural fairness owed to the applicant was breached (*Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57).

Preliminary Issue: Is this application for judicial review premature and/or moot?

[31] In their written submissions, the Respondents argue that this application for judicial review is premature because Ms. McKenzie and Ms. Shirley have not exhausted all of the internal remedies available to them. Further, where an administrative appeal route exists, parties

are barred from seeking judicial review (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44) and courts will only interfere with ongoing administrative processes in exceptional circumstances (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell*]).

[32] According to the Respondents, those Applicants have been offered numerous internal remedies to facilitate their return to Council, which they have not pursued. Specifically, they could have negotiated and signed the letter of Acknowledgement of Unethical Conduct and Apology attached to the Suspension BCR; they could have responded to offers of settlement; and, they failed to pursue their right of appeal through the Senate of Elders. The Respondents submit that *Vavilov* requires that deference be afforded to band governance to resolve internal disputes and that premature intervention by the Courts is counter to the spirit of reconciliation. In this case, a high level of deference should be afforded both because this is an internal conflict resolution process and because the suspensions were meant to promote dialogue. The only reason the suspensions continued is because those Applicants refused to avail themselves of the internal processes or to conduct themselves in a reasonable manner.

[33] In my view, the Respondents' assertion that this application for judicial review is premature cannot succeed.

[34] The Supreme Court of Canada in *Strickland v Canada (Attorney General)*, 2015 SCC 37 [*Strickland*] confirmed that judges of this Court have discretion in determining whether judicial review should be undertaken (paras 37-38). Further, that one of the discretionary grounds for

refusing to undertake judicial review is that there is an adequate alternative, such as a right of appeal found within the applicable appeal procedure or review process (at para 40-41). However, while an adequate alternative remedy is one ground for refusing judicial review, a number of considerations must be taken into account and balanced in making that determination:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; *Harelkin*, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?"

[35] Further, it is for courts to identify and balance the relevant factors in the context of a particular case. A court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances:

> [43] In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).
>
> [44] This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in

> issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:
>
> > While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief. [Emphasis added; p. 447.]
>
> [45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

[36] As stated by the Federal Court of Appeal in *C.B. Powell*, the jurisprudence has clearly established that the normal rule is that the parties can proceed to the court system only after all adequate remedial recourses "in the administrative process" have been exhausted (at para 30) and:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing

> administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[37] It is significant to note at the outset of this analysis that the Respondents do not identify an existing statutory or other framework that provides the Applicants with, and governs, an alternative internal remedy which permits them to challenge or appeal the decision of a quorum of Chief and Council to suspend the Applicants as members of Council, by way of the Suspension BCR.

[38] The Respondents sole submission as to a right of appeal available to the Applicants is that "the Applicants have not pursued their right of appeal through the Senate of Elders". However, the only reference to the Senate of Elders found in the record before me is contained in the Election Regulations, Schedule C. This states that the role and functions of the Senate of Elders include providing advice and recommendations to the Council on issues of concern to the First Nation and acting as the Election Appeal Committee for the purposes of the Election Regulations.

[39] That the Applicants were duly elected as Councillors by the members of the MCFN has not been challenged and is not at issue. Accordingly, this is not a matter where the Senate of Elders may, pursuant to the Election Regulations, resolve the dispute in its role as election appeal committee.

[40] Further, the Election Regulations make provision for the removal of Chief or Councillors from office. The Regulations set out the grounds for removal (s 15.1), the requirement for a

petition for removal (s 15.3) and, a band council resolution for removal after Council have obtained a legal opinion (s 15.4). This process does not include a right of appeal, to the Senate of Elders or otherwise, of a band council resolution removing or suspending a councillor from office.

[41] Thus, the only identifiable administrative review process in the Election Regulations, being to the Senate of Elders as an Election Appeal Committee, does not include a right of appeal from a band council resolution removing a councillor from office. The Election Regulations are silent as to appealing the suspension of elected councillors.

[42] The Respondents make no substantive submissions and offer no evidence in support of the Senate of Elders' inherent authority to hear appeals of other matters. I would also note that the Respondents have not tendered any evidence that they have sought the recommendations and advice of the Senate of Elders with respect to the Suspension BCR.

[43] In my view, the Respondents have not established that the Applicants could appeal the Respondents' authority and decision to suspend them, or the procedural fairness and reasonableness of the Suspension BCR, to the Senate of Elders. Therefore, the Respondents have not established that such an appeal serves as an adequate alternative remedy that the Applicants have failed to exhaust.

[44] Nor does the doctrine of exhaustion apply where the alternative administrative remedy is ineffective or does not allow the issues to be properly raised. As the FCA stated in *C.B. Powell* at para 33:

> Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, **as long as that process allows the issues to be raised and an effective remedy to be granted**
>
> [emphasis added]

[45] In *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 [*Whalen*] a councillor challenged the decision by the Council of the Fort McMurray No. 468 First Nation to suspend her. The First Nation submitted, among other things, that the application was premature. Justice Grammond rejected the prematurity argument, for the reasons he set out, including:

> [25] Third, Councillor Whalen takes the position that the Council was biased and did not have the power to make the impugned decision. While raising issues of jurisdiction and bias does not lead to an automatic exception to the prematurity rule, in this case I am convinced that the process that has been deployed is sufficiently problematic to warrant early review by this Court. Moreover, the jurisprudence on prematurity appears to have developed mainly in the context of adjudicative decision-making, where the process and the jurisdiction of the bodies involved are defined by legislation. In the present case, however, there is no legislation providing for the suspension of councillors. The decision was not made by an independent adjudicative body, such as a First Nation's judicial council (as in *Edzerza*), but by Councillor Whalen's political adversaries.
>
> …
>
> [27] Fourth, giving effect to the prematurity objection in this case would be tantamount to insulating from review a category of

> decisions that have the potential to undermine the good governance of First Nations. It is in the public interest to rule on the powers of First Nations councils in similar circumstances.

[46] Similarly, here the Election Regulations do not provide for the suspension of a councillor and, as will be discussed below, the process by which the decision to do so was reached was deeply flawed.

[47] As to the Respondents' submission that the Applicants were afforded the "internal remedy" of negotiating and signing a letter of acknowledgment and apology and therefore that "remedial recourse in the administrative process have not been exhausted", this cannot succeed. Signing an acknowledgement and apology is not an administrative process found in the Election Regulations, which as noted above, do not speak to appealing councillor suspensions. It appears that this "process" is a construct of the Respondents. More significantly, the Acknowledgment of Unethical Conduct and Apology letter is not an avenue for dispute resolution. The form of the letter was dictated to the Applicants by the Suspension BCR, to which it was attached. Regardless of any potential "negotiation" of its terms, it essentially requires that the Applicants acknowledge the Respondents' authority to suspend them, the allegations of misconduct and harm asserted in the letter, and therefore the validity of their own suspensions. This is a "take it or leave it" demand and does not resolve the underlying issue, which is the authority of Chief and Council to suspend the Councillors and the validity of that action. In my view, this purported internal remedy is not a "process allows the issues to be raised and an effective remedy to be granted" (*CB Powell* at para 33).

[48] Similarly, the Respondents' characterization of the Applicants' non-response to settlement offers, said to have been extended to them, as an internal administrative process that has not been exhausted lacks merit. The potential of settling a dispute as between the parties is not a right of appeal. There is no administrative process identified in which internal settlement efforts are a required step.

[49] In summary, here there is no administrative process for the Applicants to appeal the authority and validity of the Suspension BCR. While concerns about procedural fairness and the existence of a dispute as to the jurisdiction of a decision maker generally do not alone amount to an exceptional circumstance permitting a party to commence a judicial review before the administrative process has been completed, this is so only if a process exists that allows the issues to be raised and an effective remedy granted (*C.B. Powell* at para 33 and 39). The Election Regulations do not provide for an appeal, by way of the Senate of Elders or otherwise. Further, the purported internal remedies of signing the Acknowledgment of Unethical Conduct and Apology letter, or some negotiated version thereof, or the parties settling, do not amount to effective remedies if the Applicants are not willing to concede or agree to the Respondents' terms. They also do not allow the Applicants to address the underlying issue of Chief and Council's authority to suspend the Applicants.

[50] While negotiation and settlement are always preferable to proceeding to litigation, resolution by that means cannot be unilaterally imposed on the Applicants. In that regard, it is of note that the Suspension BCR is dated December 11, 2018. The Respondents assert that the suspensions were meant to "promote dialogue" and that "[T]he only reason that the suspensions

continue is the Applicants refusal to avail themselves of internal processes or conducting themselves in a reasonable manner". However, the reality of this situation is that two years have passed and the Applicants were suspended until the end of their elected term of office. Thus, in effect, the suspension was indefinite and permanent – or a removal. Unless and until the Applicants signed the Acknowledgment of Unethical Conduct and Apology or reached a settlement on terms acceptable to the Respondents, the Applicants would and did remain suspended, until their election term ran out.

[51] In that regard, when appearing before me, counsel for the Respondents submitted that the application for judicial review is now moot, that the matter is now no more than a claim for damages in the guise of a judicial review and that it would be unjust to allow the matter to proceed. No case law was referenced in support of this view. However, this Court has the discretion to hear a matter even if it is moot (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-363; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195 at paras 10, 13-14). In this case, whether the Respondents had the authority to suspend the Applicants from office and, if they did, whether they breached procedural fairness in doing so, are not resolved by the expiration of the Applicants' elected term of office. These remain in controversy. The further relief sought by Ms. McKenzie and Ms. Shirley in the event that the Suspension BCR is quashed by the Court – that they be returned to their elected positions – is no longer available to them. However, because the Suspension BCR also suspended the Applicants' councillor remuneration, the status of their remuneration during the suspension also remains at issue.

[52] I am mindful of the fact that the Respondents originally argued that the application for judicial review was premature. Now that the Applicants' term of office has expired, the Respondents argue that the application is moot. This approach would, in effect, immunize the actions of the Respondents – indefinitely suspending elected councillors from office – from judicial review in a circumstance where there is also an absence of an internal administrative process through which the Applicants could challenge the authority and validity of the Suspension BCR. In my view, this is a circumstance where the Court should exercise its discretion to hear the matter even if some aspects of the original dispute are moot.

[53] For these reasons, and having considered all of the circumstances, I have concluded that the application for judicial review is not premature as the alternative remedies identified by the Respondents are not adequate to address the Applicants' grievance. Nor is it moot and, even if it is, this is a circumstance where it is appropriate for the Court to exercise its discretion and decide the matter.

Issue 1: Did MCFN Chief and Council have the authority to suspend the Applicant Councillors?

Applicants' Position

[54] The Applicants submit that MCFN Chief and Council has no power or authority under the Election Regulations to suspend a Councillor, or to suspend the Applicant Councillors based on the process followed in this case (*Whalen; Orr*). Nor is there any evidence to support that the Respondents had inherent authority, or authority deriving from custom, to suspend the Applicants from their elected positions as councillors.

Respondents' Position

[55] The Respondents acknowledge that the Election Regulations do not include definitive provisions for councillor suspensions. However, they submit that the power to suspend is found in Schedule B of the Election Regulations, Powers and Authority of the Council, which states that Council has the authority to take "other actions and decisions as deemed necessary from time to time for the proper governance of the Mikisew Cree First Nation".

[56] Further, that Chief and Council have inherent power to suspend based on band custom. The Respondents rely on two events that they say prove that a band custom exists to suspend councillors. The first being that the Applicant Sherri McKenzie was suspended in November 2017 and, at that time, did not question the authority of Chief and Council to effect the suspension. Second, that the Applicants themselves tried to suspend Councillors Whitehead and Marten.

[57] The Respondents submit that where election regulations are silent, or "do not cover the field", regarding suspension powers, then the council's authority may still exist where it is based on retained general custom and usage (*Prince v Sucker Cree First Nation No. 150A*, 2008 FC 1268 [*Prince*]; *Lafond v Muskeg Lake Cree Nation*, 2008 FC 726 [*Lafond*]; W*hitehead v Pelican Lake First Nation*, 2009 FC 1270 at para 41-42, 55[*Whitehead*]). Further, that this situation is distinguishable from *Orr* and *Whalen*, which are relied upon by the Applicants.

[58] When appearing before me, counsel for the Respondents asserted that because it was clear to the Respondents that the Applicants were behaving improperly and had acted in breach of the Ethical Guidelines of Conduct for Members of Council, and because the suspensions were intended to have a "limited administrative effect", i.e. they were intended to be of short term duration, the Respondents actions were justified. Further, that the Applicants had failed to mitigate their damages by not signing the Acknowledgment of Unethical Conduct and Apology, or some negotiated version thereof. Counsel for the Respondents also submitted that the transcript of the cross-examination of Ms. McKenzie included an admission of her wrongdoing. The cross-examination of Ms. Shirley demonstrated that she was disingenuous in her refusal to admit the alleged wrongdoings.

Analysis

i. Election Regulations – section 15

[59] The first question to be addressed is whether the Election Regulations provide the MCFN Chief and Council with the authority to suspend councillors.

[60] Items D and E of the preamble to the MCFN Election Regulations state that:

> D. The current customs and traditions of the Mikisew Cree First Nation require democratic, fair, and open elections for their leadership;
>
> E. The Mikisew Cree First Nation now desires that the customs and traditions of the nation in relation to the Election of the Chief and Councillors be incorporated and recorded in written customary election regulations and procedures.

[61] The MCFN Election Regulations contain provisions concerning the removal of elected Chief or Councillors from office. Section 15.1 lists the grounds that can support removal from office. Section 15.3 describes the process for removal, being that upon receipt of a petition, signed by at least 100 electors and stating the grounds for seeking removal, Council will convene a special meeting to consider the subject removal from office. Having considered a legal opinion as to whether the alleged grounds for removal fall with s 15.1, Council "may then by Resolution (*sic*) must state the grounds for removal and the effective date of the removal of the person from office". The Election Regulations are silent as to suspension of Chief or Councillors from office.

[62] In *Orr*, the applicant sought judicial review of the First Nation's band council resolution to suspend him without pay until a criminal charge against him was resolved. In the decision under review, this Court found that prior jurisprudence established that a council may retain the inherent power to suspend as rooted in custom to ensure harmony in the community, however, only if the band's election regulations had not "covered the field", citing *Whitehead* at para 41 and *Lafond* at para 10. The Court held, given the broad and specified causes for suspension found in the First Nation's election code before it, that the field was covered.

[63] On appeal, the Federal Court of Appeal held that even if a custom or inherent power exists, it may be ousted by express legislative language (at para 17, citing *Lafond* at para 10). The Federal Court of Appeal agreed that the provisions of the subject First Nation election code on the removal or suspension of councillors ousted any inherent power that may have existed on those subjects and covered the field (at para 16).

[64] In *Orr* the chief or a councillor could be removed or suspended from office by a vote of the electors. That process could be commenced by either a resolution of council or a petition of the electors. Upon receipt of a petition or resolution meeting all of the described requirements, the chief was required to call a special meeting for the purpose of conducting a vote for the removal or suspension of the councillor. If the electors voted in favour of removing or suspending the councillor, he or she would be deemed removed from office. The Federal Court of Appeal held that:

> [18] The *Election Code* sets out very detailed, carefully constructed, and precisely worded provisions regulating when and how councillors may be removed or suspended. It would be surprising if such demanding regulation could be so easily circumvented by relying upon an undefined, general, inherent power, as the Chief and Council suggest.

[65] The Respondents submit that *Orr* can be distinguished because the MCFN Election Regulations are silent on councillor suspensions and leave Chief and Council with broad inherent authority by way of s 9 of Schedule B of the Election Regulations, Powers and Authorities of the Council. The Respondents also assert that the Suspension BCR provided the Applicants with "the power and authority" to end their suspension by submitting the Acknowledgment of Unethical Conduct and Apology, the terms of which "were always negotiable". Thus, any argument that the length of suspension is indefinite, and therefore amounts to a removal from office, is without merit. I disagree with this view.

[66] It is true that the Election Regulations are silent as to suspensions. However, s 15 of the MCFN *Election Regulations*, like the relevant provisions at issue in *Prince* and *Lafond*, governs the removal of councillors from office. In both *Prince* and *Lafond*, the Court rejected any

distinction between removal and what was essentially an indefinite suspension (*Lafond* at paras 12 – 13; *Prince* at para 33). Because the suspensions were not time limited, they effectively amounted to removal. In *Whalen*, Justice Grammond provided an additional reason for rejecting any distinction between suspension and removal:

> [49] In this context, the distinction suggested by FMFN between suspension and removal is untenable. Both have the same effect of preventing a councillor from exercising his or her powers and duties, including the right to participate and vote at council meetings. The rationale for withholding from the council the power to suspend (or remove) councillors is obvious. **Suspension by the council would deprive FMFN electors of the right to choose their leaders. The suspension of a councillor has the practical effect of overturning the results of the election and of depriving the electors of representation**… This cannot be reasonably reconciled with the purpose and structure of the Election Regulations.
>
> (emphasis added)

[67] As I noted above, here the suspensions occurred 2 years ago. The Respondents argue that the suspensions would have been lifted when Applicants signed the letter of Acknowledgment of Unethical Conduct and Apology, or a negotiated version of it acceptable to the Respondents. However, the reality is that if the Applicants were not prepared to concede that the Chief and Council had the authority to suspend them in the manner that they did, to acknowledge or concede the alleged conduct attributed to them and, therefore, the validity of their suspension and consequent loss of income, then the suspension would not be lifted and could, and did, run until the end of their elected term. Thus, as in *Lafond*, while this is "couched as a suspension from office, and thus quantitatively different from a removal, what has actually occurred… is a removal of the applicant from his elected position" (*Lafond* at para 12). Justice Tremblay-Lamer concluded that the applicant in *Lafond* was removed from his elected office, not suspended, and I reach the same conclusion in this case. Thus, s 15 covers the field.

[68] Nor do I agree that item 9 of Schedule B provides the Respondents with the authority to suspend the Applicants. The powers and authority listed in items 1 to 8 of Schedule B are the: approving and implementing policies concerning the management and administration of the MCFN affairs; responsibly managing the MCFN's assets; effecting by-laws; negotiating financial and other agreements with the Crown; effecting amendments to the Election Regulations, by-laws and other legislation; voting as a deemed proxy holder in specified circumstances; establishing committees and hiring staff, all within budget constraints. Item 9 is a catch all provision, stating "Other actions and decisions as deemed necessary from time to time for the proper governance of the Mikisew Cree First Nation". Thus, viewed in whole, it is apparent that Schedule B is concerned with the powers and authority of Chief and Council to manage the day-to-day operations and administration of the MCFN. In my view, while item 9 of Schedule B is broadly stated, viewed in this context, item 9 does not provide authority to suspend a councillor from office.

[69] In sum, because s 15 of the Election Regulations provides the grounds and process for removing Chief or Councillors, and because an indefinite suspension such as the one imposed in this case in effect amounts to a removal, s 15 "covers the field" and ousts any inherent power of removal that may otherwise have been available to Chief and Council.

ii. Custom

[70] However, if I am wrong and if the suspension was not, in reality, a removal from office and, as such, was not governed by s 15 of the Election Regulations (but was also not authorized

by item 9 of Schedule B), the question remains whether the Chief and Council had the authority to suspend the Applicants based on custom.

[71] The Respondents bear the burden of proving an established band custom (*Whalen* at para 41; *Samson Indian Band v. Samson Indian Band (Election Appeal Board)*, 2006 FCA 249; *Orr* at para 20; *Gadwa* at para 50). As to what comprises custom, in *Beardy v Beardy*, 2016 FC 383 at paras 93 – 97, I summarized the jurisprudence regarding the proving of custom, and concluded that:

> [97]….in order to determine whether the actions of the Elections Committee were consistent with custom, the Respondents must demonstrate that this type of decision-making was firmly established, generalized, and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus [citations omitted].

[72] In *Whalen*, Justice Grammond stated that a review of this Court's jurisprudence shows custom to mean "the norms that are the result of the exercise of the inherent law-making capacity of a First Nation" (at para 32). Broad consensus can be evidenced by a law enacted by a majority vote of a First Nation or by a course of conduct which expresses the First Nation's membership tacit agreement to a particular rule (at paras 33, 36).

[73] However stated, in my view, the Respondents have failed to demonstrate an established custom as the source of Council's power to suspend duly elected councillors from office. The single example of Ms. McKenzie's November 2017 suspension is insufficient to demonstrate an established practice and broad consensus. Further, the Applicants' November 28, 2017 attempt to remove Councillors Whiteknife and Marten is not evidence of established and accepted custom

because the Applicants, in that attempt, followed the process described in section 15 of the Election Code by presenting a petition signed by 100 band members and seeking a legal opinion. In sum, the evidence the Respondents rely on to prove an existing custom does not demonstrate a firmly established course of action which enjoys broad consensus in the MCFN community.

[74] Further, the absence of a ground for suspension in the Election Regulations does not necessarily mean that Council can fill in that gap based on any inherent or customary power. As stated in *Whalen* at para 53: "In the Election Regulations, the absence of a provision authorizing suspension in the circumstances of this case may well be a deliberate choice… This deliberate choice does not create a gap to be filled by this Court".

[75] Finally, the Respondents submit that Justice Grammond's decision in *Whalen*, which allowed the application for judicial review of a decision by Council of the Fort McMurray No. 468 First Nation to suspend a councillor because the First Nation had no power under its election regulations to suspend her, was wrongly decided and is distinguishable on the facts.

[76] According to the Respondents, Justice Grammond:

> … has truncated and incorrectly interpreted established legal principles to find Ms. Whalen's suspension *ultra vires*. At paragraph 49, Justice Grammond summarizes the principle in *Prince* that a "suspension of a Councillor has the practical effect of overturning the results of the election and of depriving the electors of representation". This is incorrect as *Prince* held that "indefinite suspensions" amount to removal and accepted that "Council has powers through custom which are not codified in the Election Regulations or elsewhere (*Prince* at para 31). By leaving out the word "indefinite", the Justice effectively changed the Ratio of *Prince* to ensure it could be used as a precedent in *Whalen*. Furthermore, the characterization that "*Whitehead* has been

> overtaken by the Federal Court of Appeal's decision in *Orr* [at para 80] is improper. At no point does *Orr* assert that *Whitehead* is wrong, overruled or even "overtaken". In actuality, the cases distinguish each other on the facts. *Orr* deals with a suspension where the code is complete, whereas in *Whitehead* the Court found a custom because the band legislations did not "cover the field".

[77] I do not agree with the Respondents' assertion.

[78] In *Prince* this Court considered two applications for judicial review, the first sought review of the Sucker Lake First Nation #150A's decision to suspend the applicants as elected councillors; the second was an application for judicial review of the Band Council's resolutions to remove the applicants from their positons. With respect to the suspension, this Court stated:

> [31] The Court agrees that the Council has powers through custom which are not codified in the Election Regulations or elsewhere. The Council has the authority through customary practice to discipline or sanction Council members short of removal. For example, the Council had the authority to suspend the applicants' duties with respect to the ATCO contract, and I upheld this aspect of the applicants' suspension while granting the interlocutory injunction reinstating the applicants from their suspension. **However, the indefinite suspension of Councillors who are elected for three year terms is effectively a removal**, with serious consequences. Not only does it deprive Councillors of the ability to fulfill their duties before any allegations against them have been proven, it also leaves the constituents who elected them unrepresented. **To achieve such an outcome, the Council must follow the removal procedure outlined in the Election Regulations**. Further, as discussed below, the process used in suspending the applicants was lacking in procedural fairness. Even if there exists a general consensus that the Council has the power to suspend Councillors, a suspension carried out in this manner is a breach of procedural fairness and cannot be protected as a customary practice.
>
> …..
>
> [33] I am satisfied, as was Madam Justice Tremblay-Lamer in *Lafond v. Muskeg Lake Cree Nation*, 2008 FC 727 at paragraphs 10 to 12, that the Chief and Council retain customary powers and

> authority, where Band legislation has not "covered the field", to suspend and discipline councillors. However, like Madam Justice Tremblay-Lamer in that case, **I am satisfied that the applicants "suspension" from office was in fact a "removal" from their elected position**. Justice Tremblay-Lamer said at paragraph 12:
>
> > **Nevertheless, I am of the view that while couched as a suspension from office, and thus qualitatively different from a removal, what has actually occurred in the present case is a removal of the applicant from his elected position.**
>
> (emphasis added)

[79] In *Whalen* the applicants had attempted to distinguish *Orr* on a number of basis, none of which involved the length, or indefinite nature, of the suspension. In rejecting those submissions, Justice Grammond stated:

> [49] In this context, **the distinction suggested by FMFN between suspension and removal is untenable. Both have the same effect of preventing a councillor from exercising his or her powers and duties, including the right to participate and vote at council meetings.** The rationale for withholding from the council the power to suspend (or remove) councillors is obvious. Suspension by the council would deprive FMFN electors of the right to choose their leaders. **The suspension of a councillor has the practical effect of overturning the results of the election and of depriving the electors of representation**: *Prince v Sucker Creek First Nation*, 2008 FC 1268 at paragraph 31 [*Prince*]. This cannot be reasonably reconciled with the purpose and structure of the Election Regulations.
>
> ….
>
> [55] Other decisions of this Court have rejected arguments to the effect that First Nations councils have an inherent power to suspend councillors where their election code covers the subject and does not provide for such a power: *Lafond v Muskeg Lake Cree First Nation*, 2008 FC 726; *Laboucan v Little Red River # 447 First Nation*, 2010 FC 722; *Louie v Louie*, 2018 FC 550 at para 28. In *Prince*, the Court concluded that the suspension of a councillor was tantamount to a removal and was not authorized by the election code. Insofar as the Court in that case mentioned an implied power to suspend a

> councillor, it appears that it was referring to a suspension of specific responsibilities, not from the office of councillor as such (at paragraph 31).
>
> (emphasis added)

[80] The primary point made by both *Prince* and *Whalen* – as well as *Orr*, *Lafond* and other cases – is that where election regulations cover the subject then there is no inherent right to suspend or remove councillors. *Prince*, like *Lafond*, held that the application to set aside the suspension of the councillors must be allowed because the indefinite suspension was effectively a removal and the council had not followed the election rules to remove the applicants. In *Whalen*, Justice Grammond was not quoting *Prince* nor did he misstate that decision. He implicitly acknowledged that the finding in *Prince* was concerned with the indefinite suspension when he stated that in *Prince* the suspension was tantamount to a removal. Moreover, his analysis was not concerned with the duration of the suspension, but with the rationale for withholding from the council the power to suspend (or remove) councillors and the impact of either a suspension or a removal, being that suspension would deprive the electors of the right to choose their leaders.

[81] As to *Whitehead*, it is a 2009 decision of this Court. In *Whalen* Justice Grammond stated "In any event, insofar as it [*Whitehead*] is invoked as authority for the proposition that the council of a First Nation has powers of suspension or removal that are not provided in an exhaustive election code, *Whitehead* has been overtaken by the Federal Court of Appeal's decision in *Orr*" (at para 80). In my view and contrary to the Respondents' assertions, this is not a mischaracterization. The Federal Court of Appeal's decision in *Orr* was decided after *Whitehead*, is binding authority and confirms the clear line of authority finding that when an

election code exhaustively covers the topic of removals then there is no residual or continuing custom authority. To the extent that this differs from the finding in *Whitehead*, that decision is no longer good law. In my view, this matter is on all fours with *Orr*, *Prince*, *Lafond* and *Whalen*.

[82] In conclusion, I agree with the Applicants that s 15 of the Election Regulations is, in these circumstances, exhaustive and occupies the field with respect to councillor removals and indefinite suspensions. There is no residual or continuing custom authority. Accordingly, as the Chief and Council did not suspend the Applicant Councillors in accordance with s 15, Chief and Council acted without authority.

Issue 2: If Chief and Council had the authority to suspend the Applicants, was the process by which they were suspended procedurally fair?

[83] Given my finding that Chief and Council did not have the authority to enact the Suspension BCR, it is not necessary to address the issue of whether that process was procedurally fair and reasonable. However, I will briefly address the issue of procedural fairness, as it is clear in my view that the Respondents obligations to the Applicants were breached.

Applicants' position

[84] On this issue, the Applicants submit, in the alternative, that if Chief and Council had the power to suspend them, then the Applicants were not provided with notice that a motion was being made to suspend them, advised of the particulars of the allegations against them or, afforded a fair hearing (*Tourangeau*). They submit that there is no evidence that they were given notice of the intention to discuss their suspension, even though the Suspension BCR appears to

have been prepared in advance of the December 11, 2018 afternoon meeting held at the Chief's home at which the Suspension BCR was passed by the Respondents. Further, that their evidence is that they were not advised of the December 11, 2018 afternoon meeting. In short, they were also denied procedural fairness.

Respondents' position

[85] The Respondents acknowledge that the Applicants are owed a duty of procedural fairness but submit that any duty owed was satisfied "during the conflict resolution process". And, based on their analysis of the *Baker* factors (*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 [*Baker*]), the Respondents submit that any duty owed by them to the Applicants falls on the lower end of the spectrum.

[86] During the hearing of this matter, counsel for the Respondents emphasized that it was clear to the Respondents when they issued the Suspension BCR that the Applicants' actions were inappropriate. In support of validity of that view, counsel pointed to the fact that Mr. Mercredi subsequently signed the letter of Acknowledgment of Unethical Conduct and Apology; to Ms. McKenzie's subsequent admission on cross-examination that her behaviour violated the Ethical Guidelines of Conduct for Members of Council; and to counsel's view that Ms. Shirley's subsequent evidence on cross-examination was disingenuous. Counsel for the Respondents also submitted that case law does not support that providing notice of the intention to issue the Suspension BCR and giving the Applicants an opportunity to make submissions on the issue was necessary in these circumstances, which did not warrant such protections. And, because the Applicants were advised of, but chose not to attend, the meeting at which the Suspension BCR

was passed, the Respondents had no choice but to proceed with the suspensions without a hearing. According to counsel for the Respondents, this situation is no different from a police officer pulling over an intoxicated driver and immediately suspending the driver's licence.

Analysis

[87] Where election regulations establish a procedure for removing councillors, the removal will not be valid if Council fails to follow those procedures (*Prince* at para 47; *Lafond* at para 30). In this case, because the suspension was indefinite – amounting to removal – and the procedure prescribed by s 15 of the Election Regulations was not followed, the duty of procedural fairness owed to the Applicants was breached.

[88] Further, while the level and content of the duty of fairness varies and is determined by context, as the Respondents submit, it is well established that in the context of councillor suspensions procedural fairness requires the right to be heard and the right to make representations (*Tourangeau* at para 57; *Beardy* at paras 128 – 129). Indeed, even where only minimal procedural rights are required, those rights include notice and an opportunity to make representations (see, for example, *Peguis First Nation v. Bear*, 2017 FC 179 at para 62; *Minde v. Ermineskin Cree Nation*, 2006 FC 1311, at para 44; *Orr v Fort McKay First Nation*, 2011 FC 37 at para 12; *Blois v Onion Lake Cree Nation*, 2020 FC 953 at para 73). And, even if the decision to suspend a councillor is well-founded or reasonable, the decision will be set aside if the procedure was unfair (*Laboucan* v *Little Red River # 447 First Nation*, 2010 FC 722 at para 37 [*Laboucan*]).

[89] It is also well established that First Nations custom cannot override principles of natural justice or procedural fairness (*Beardy* at para 126, citing *Felix v Sturgeon Lake First Nation*, 2014 FC 911 at para 76 and *Sparvier v Cowessess Indian Band No 73*, [1993] 3 FC 142 at para 47 (WL); *Laboucan* at para 36).

[90] In this matter, the facts are in dispute as to whether the Applicants were advised of the continuation of, or the second, December 11, 2018 meeting held in the afternoon at Chief Waquan's house.

[91] The Respondents assert that the Applicants were advised of but refused to attend the December 11, 2018 meeting. In that regard, I note that the Cardinal Affidavit states only that the Applicants were advised the meeting would reconvene at the Chief's home, it does not indicate that the Applicants were advised the Respondents would then be considering the suspension of the Applicants. The Respondents submit that the motion to suspend was included in the meeting agenda found at Tab 12 of the Applicants' Record. However, that the agenda simply lists ten agenda items, including BCR's #037, 034, 031 and 032, without any further description of the contents of those BCRs. Agenda item number six, BCR #037, is the Suspension BCR. There is no evidence in the record before me that the Applicants were provided with the agenda in advance of the meeting or that they were aware of the content of proposed BCR #037, provided with a copy of the BCR, or advised that their suspensions would be discussed at the meeting.

[92] Ms. Shirley and Ms. McKenzie state in their affidavits that they were not given notice of the meeting and were not aware of it. In my view, given the importance of the issue to the

Applicants, clear notice of the intention to make a determination as to whether the Applicants were to be suspended was required and the Respondents have not established this was given. Accordingly, if there was notice, it was not adequate (*Tourangeau* at paras 59 – 62).

[93] Further, although it is not in dispute that the Applicants were not in attendance at the December 11, 2018 afternoon meeting, the Respondents proceeded to consider and vote on the motion. The Applicants therefore were also denied the right to know the case against them and to make representations. The Respondents rely on the fact that the Applicants had, in the Respondents' view, clearly violated the Ethical Guidelines of Conduct for Council Members in order to distinguish this case from *Tourangeau*, where the Court found that Mr. Tourangeau was not provided with the evidence used against him and therefore was denied an opportunity to respond (para 60). However, the potential reasonableness of the rationale underlying the suspension does not vitiate the requirements of procedural fairness, including the opportunity to know and respond to the case against the party concerned.

[94] The bottom line of the Respondents' position in response to this application for judicial review appears to be that they were right, the Applicants were in the wrong, and that this, therefore, justifies the Respondents' actions. Further, if Ms. McKenzie and Ms. Shirley had only acknowledged that the Respondents were right, then they could have resumed office and litigation could have been avoided. In my view, this fails to acknowledge that, regardless of whether the Respondents' view was validly held, they lacked the authority to suspend the Applicants from office. Further, even if the Respondents had the authority to suspend, they failed to provide the Applicants with notice of their intention to discuss their suspension, to permit the

Applicants the opportunity to know the case against them and to make submissions responding to the allegations. These requirements are the most basic tenants of procedural fairness. They cannot be ignored simply because an administrative decision maker is of the view that its position is the correct one. Nor can the breach of procedural fairness later be justified because, after the decision has been made, a witness when cross-examined acknowledges some aspects of the allegation.

[95] Finally, while the Respondents maintain that Ms. McKenzie and Ms. Shirley had an ongoing opportunity to be heard and to negotiate the terms of their apology, this is not relevant. First, the decision to suspend had already been made – before the Applicants were afforded an opportunity to be heard. Further, while the Applicants may have been able to negotiate the apology letter, this does not change the fact that the original decision to suspend, the decision under review in this application, was procedurally unfair.

[96] For the reasons above, I find that the Respondents breached the duty of procedural fairness owed to the Applicants with respect to the decision to suspend them as Councillors. Accordingly, that decision must be set aside.

Conclusion

[97] While the Respondents' frustration with the Applicants' behaviour is entirely understandable and, based on the record before me, likely valid, this frustration does not justify the issuance of the Suspension BCR without authority for the indefinite suspension of the Applicants and without concern for the requirements of procedural fairness. Moreover, to the

extent that the Respondents were of the view that the Applicants' actions were causing immediate damage to the interests of the MCFN, they could, and did, seek injunctive relief.

Remedies

[98] As to remedies, in their Notice of Application the Applicants seek an order in the nature of *certiorari* that the decision to suspend them, as reflected in the Suspension BCR, be quashed; an order that they be paid all remuneration and expense payments that were withheld from them since the suspension came into effect; and an order that the Respondents jointly and severally pay the Applicants' costs on a solicitor-client basis. In their written submissions, Ms. McKenzie and Ms. Shirley state that they seek an order quashing the December 11, 2018 decision and reinstating them with full pay from December 11 to the day of the order. When appearing before me this was amended to the period from December 11, 2018 to September 12, 2020, the date that the new council was sworn in following the election held on August 27, 2020. As noted above, Mr. Mercredi previously indicated that he wished to discontinue his participation in this application and he resumed his Councillor duties on February 19, 2019.

[99] I will quash the Suspension BCR. In the normal course, it would follow that Ms. McKenzie and Ms. Shirley would resume their duties as elected Councillors (see *Whalen* at para 81). However, as the Applicants' term of office has expired, in this case they cannot do so. It also follows from the quashing of the Suspension BCR, which also explicitly suspended the Applicants' Councillor remuneration, that as the Applicants were never properly removed from office, they are accordingly entitled to receive any outstanding remuneration. For Ms. McKenzie and Ms. Shirley this would be from the date of the now quashed Suspension BCR, December

11, 2018 to September 12, 2020, the date that the new council was sworn in following the election held on August 27, 2020 (*Tourangeau* at para 68, *Parenteau v Badger*, 2016 FC 536; *Tsetta v. Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 43).

[100] As to costs, the Applicants make no substantive submissions in support of their written request for solicitor-client costs and point to no evidence to establish that the Respondents' conduct during the litigation as being reprehensible, scandalous, or outrageous so to attract costs on a solicitor-client basis (*Baker* at para 77; *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paragraph 67; see also *Whalen* at paras 12 -25).

[101] In these circumstances, I am exercising my discretion, pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106 and ordering a lump sum all inclusive cost award to the Applicants in the amount of $2000.

JUDGMENT IN T-66-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;

2. The Mikisew First Nation Band Council Resolution, dated December 11, 2018, suspending the Applicants as Mikisew First Nation Band Councillors is quashed;

3. The Mikisew First Nation shall pay to the Applicants Sherri McKenzie and Rubi Shirley the remuneration that would have been payable to them as Councillors from the date of their suspension from Council, December 11, 2018, to September 12, 2020, the date that the new council was sworn in following the election held on August 27, 2020; and

4. The Applicants shall have their costs in the all inclusive lump sum amount of $2000.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-66-19
STYLE OF CAUSE:	SHERRI MCKENZIE, DARREN MERCREDI, AND RUBI SHILEY v MIKISEW CREE FIRST NATION CHIEF AND COUNCIL ARCHIE WAQUAN, RAYMOND RANDY MARTEN, CALVIN WAQUAN, AND SALLY JOAN WHITEKNIFE
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	DECEMBER 10, 2020
JUDGMENT AND REASONS	STRICKLAND J.
DATED:	DECEMBER 23, 2020

APPEARANCES:

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Rath & Company Barristers and Solicitors Foothills, Alberta	FOR THE RESPONDENTS