

Federal Court



Cour fédérale

**Date: 20220308**

**Dockets: T-1382-20  
(T-1384-20)**

**Citation: 2022 FC 321**

**Ottawa, Ontario, March 8, 2022**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**ERIC SHIRT**

**Applicant**

**and**

**SADDLE LAKE CREE NATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Eric Shirt [Chief Shirt or Applicant], seeks judicial review of two decisions made by the Councillors of the Saddle Lake Cree Nation [SLCN]. The first decision is a motion carried at an October 26, 2020 Emergency Band Meeting purporting to remove the Applicant from his elected office of Chief of the SLCN, which motion was adopted by the SLCN band council [Council] by a Council Resolution dated November 5, 2020 [Removal Decision]. The Removal Decision is challenged by the Applicant in Court File T-1382-20. The second

decision is contained in a letter dated November 9, 2020 by which the SLCN Councillors purport to revoke all of the Applicant's administrative privileges and authority as Chief of SLCN [Suspension Decision]. The Suspension Decision is challenged by the Applicant in Court File T-1384-20. By Order of the Case Management Judge dated November 5, 2021, these matters were consolidated.

## **Background**

[2] The Applicant is a member of the SLCN. In an election held on June 12, 2019, he was elected Chief.

[3] The SLCN is a band as defined by the *Indian Act*, RSC 1985, c I-5. The SLCN has approximately 11,184 members. Of these, approximately 8000 members live on the SLCN reserve. SLCN elections are governed by the "Saddle Lake Tribal Customs Election Code" [Election Code] which was produced sometime around 1960. Pursuant to the Election Code, Chief and nine Councillors are elected for a three-year term. The Election Code, at best, is described as sparse. It is three pages long and contains only three sections: eligibility for nomination for office; voting regulations; and, election procedural regulations. It appears that following this Court's decision in *Shirt v Saddle Lake Cree Nation*, 2017 FC 364, an effort was made to update the Election Code. A document entitled Final Draft Amendments – February 2019 was produced, but there is no evidence that it has been ratified by the SLCN membership.

[4] Following the election, tensions arose between the Chief and the Councillors concerning issues of financial disclosure and accountability, the details of which are mostly not relevant to the issues arising in these applications for judicial review.

[5] However, what is relevant is that the evidence indicates that Canada, through Indigenous Service Canada [ISC], provides the SLCN with annual funding exceeding \$60 million. This is done by way of annual funding agreements which, by their terms, permit the auditing of SLCN accounts and records.

[6] By letter dated September 24, 2020 ISC advised Chief Shirt that ISC would be conducting a forensic audit [Audit] of funding provided to SLCN through funding agreements and reviewing expenditures related to all funding for the period April 1, 2016 to September 30, 2020. ISC advised that it had retained the services of Ernst & Young to conduct the Audit, that ISC would be in touch to schedule dates for the on-site visit and, that it looked forward to working collaboratively with Chief Shirt and his staff.

[7] By letter dated September 25, 2020, ISC requested Chief Shirt's authorization to send a team of auditors to SLCN to obtain the financial information required to conduct the Audit and requesting access to the premises where the physical and electronic information is located. The trip was anticipated to take place in October 2020 with no more than four auditors attending. The letter noted that the trip would occur in the context of the COVID-19 pandemic and that the audit team would strictly follow Public Health Agency requirements as well as any other requirements in place at SLCN. The letter asked that if the SLCN adopted additional health requirements

within the community that these be indicated on Annex A of the letter. And, if Chief Shirt agreed to receive the visit of the audit team on October 2020, that he sign page 2 of the letter, Annex A, Authorization to Travel, and return it to ISC. Annex A was signed by Chief Shirt; no additional COVID-19 safety measures were indicated.

[8] The Applicant's affidavit sworn on August 3, 2021 and filed in support of these applications [Shirt Affidavit] states that he was informed in advance of the Audit but was advised by ISC and the RCMP not to give advance notice of the Audit to the SLCN Council out of concern that records could be destroyed.

[9] On October 19, 2020 at a meeting of band members, a SLCN member made a motion to have a forensic audit conducted of SLCN's finances. The motion was not passed.

[10] On October 24, 2020, ISC and the auditors attended at the SLCN reserve to secure records in relation to the forensic audit. Chief Shirt left a letter of the same date for Ron Stone, SLCN Director of Finance, advising that ISC had initiated a forensic audit conducted in accordance with the March 2018 Funding Agreement. And, in that regard, ISC had attended at the SLCN offices and secured a range of financial records, including records removed from Mr. Stone's workplace. Chief Shirt indicated in this letter that he had been advised by ISC that the records would be returned when they had been copied.

[11] Although the Certified Tribunal Records [CTRs] do not contain any record of the meeting, it appears that Council convened a Special Council Meeting on October 24, 2020 in response to the conducting of the Audit.

[12] On October 25, 2020, Council issued a news release advising SLCN members that Chief Shirt, a group of young SLCN members and three non-SLCN members had entered the SLCN accounts office and had taken the main accounts server, several computer hard drives and various boxes, and had changed the locks on the doors. Further, that Chief Shirt had been provided with the September 24, 2020 correspondence from ISC, written to his personal email address, regarding the conducting of a forensic audit, but that Chief Shirt had not provided the letter or its content to Council at its weekly meetings. The news release stated that an emergency band meeting would be held on Monday, October 26, 2020 with details to follow.

[13] An email was sent to Chief Shirt at 9:44 p.m. on October 26, 2020 advising him that an attempt had been made to deliver an attached letter to him but that he was unavailable and that his sister had declined to accept the letter on his behalf. The attached letter states:

**Dear Sir:**

**Re: Saddle Lake Cree Nation ["SLCN"]**

**Unauthorized Entry and Removal of Property**

We have been informed that you have facilitated the unauthorized access to the SLCN Administration office for purposes of removing computers, servers and several boxes of files from the Finance Department. Your unilateral actions were undertaken without properly informing and seeking the consent of Council.

As a result, Council convened a Special Council Meeting on October 24, 2020 and a motion was passed directing you to discontinue all activity pending further review by Band

membership and have put a **Cease and Desist Order in place effective immediately.**

We demand that you return the property which was taken without permission, immediately. The ability to the Nation to meet its obligations will be severely affected if these items are not returned. Further, confidential information that was removed may result in liability to the Nation for which you will be answerable.

We have called an Emergency Band Meeting for 1 p.m. Monday, October 26, 2020 where your actions will be brought to the attention of the entire community. We respectfully request that you be in attendance to answer to the people for your actions.

[14] The letter is signed by all Councillors and is copied to the Minister of ISC.

[15] The Emergency Band Meeting was held on October 26, 2020. Chief Shirt was not in attendance. A Motion Summary indicates that two motions were moved and carried. The first (Motion #4) was that “Chief Eric Shirt be removed from office effective immediately”. One hundred and sixty six attending members voted in favour of this motion, 3 against and 25 abstained. The second motion (Motion #5) was that “That the Saddle Lake Cree Nation membership supports a quorum of council to sign any agreement, amendments, letters and documents on behalf of the Saddle Lake Cree Nation and any/all band businesses effectively immediately. Furthermore, we the people of Saddle Lake Cree Nation do not recognize Eric Shirt, as sole signing authority and all outside organizations including ISC be informed immediately. Anything Eric Shirt signed on behalf of the nation to be reviewed and investigated by the quorum of council”. This received 147 votes in favour, 0 against and 5 abstaining.

[16] On October 27, 2020, Chief Shirt wrote to Council advising that he had received the above letter only after the meeting had already taken place. He indicated that he had received no

formal notice of the meeting and that he took the position that the motions were unlawful and Council lacked any authority to remove him from office. He also stated he was prepared to attend a properly convened band meeting to discuss the Audit.

[17] The Council members responded by an undated letter stating that normally Council would be obliged to act on the wishes of the community, including the motion removing the Applicant as Chief, “however, in the interest of fairness, we believe you need to have the opportunity to address the Members regarding your actions”. Accordingly, the agenda for a previously scheduled Community Meeting to be held on October 29, 2020, had been amended to add time for the Applicant “to answer to the community Members for your actions and for them to consider whether the motion demanding your removal should stand”. The letter continued: “We believe you need to have this opportunity in the interest of fairness to you and to the Community. Please be advised, if you choose not to attend, the motion will be put to the Members in your absence and we will follow the will of the people”.

[18] The Applicant responded by letter of October 28, 2020. He noted that in his letter of October 27, 2020, he had indicated that he would be pleased to participate in a meeting of SLCN band members to discuss the forensic audit being undertaken by ISC. However, his prior letter had specifically stated that it had to be ensured that all SLCN members had a fair opportunity to participate. The Applicant questioned what accommodations had been made to ensure this would be possible for the meeting scheduled for the following day at 10:00 a.m., and what notice had been given to SLCN members, including off-reserve members. He noted that his October 27, 2020 letter also specifically expressed concern about the short notice regarding the meeting yet

Council had again scheduled a band meeting on less than 24 hours notice, which undermined the ability of band members to participate. Among other things, the Applicant requested that Council advise him in advance of the meeting what authority was being relied upon to advance a "motion" for his removal. He noted that the Election Regulations require a member of council to have engaged in "improper conduct" and for 60% of band members to sign a petition in support of their removal. The Applicant stated that he had not been provided with any such petition, nor had he been provided of particulars regarding any alleged improper conduct.

[19] Although there is no documentation of this in the Certified Tribunal Records, the Council members appear to have held a Special Council Meeting on October 29, 2020 at which a motion was carried to postpone the band meeting to November 18, 2020.

[20] On November 1, 2020, the Applicant again wrote to Council noting that he had not had a response to his October 28, 2020 letter and again raising concerns with his purported removal as Chief. He also states that the Emergency Band Meeting had been reckless in light of COVID-19 and that a significant number of homes on the SLCN reserve were now under lockdown. For that reason, an in-person meeting would be reckless and impractical. The Applicant indicated that the only way the meeting should proceed would be via Zoom or a similar platform and requested Council to engage a company that could facilitate a meeting for all SLCN members.

[21] By way of a Council Resolution which indicates that it was passed on November 5, 2020, Council reproduced in whole the two motions made and carried at the Emergency Band Meeting



on October 26, 2020 (the Motion Summary) and purported to agree and approve both motions.

This is the decision that is the subject of the Court File T-1382-20, the Removal Decision.

[22] On or about November 9, 2020 Council wrote to ISC, copying the Minister of ISC, stating, among other things that:

The Saddle Lake Cree Nation (SLCN) on a resolution by the people, and by way of motion of the SLCN membership, at a meeting duly called on Monday October 26th, 2020, and having resolved by the membership to have removed Mr. Ralph Eric Shirt from the office of Chief of the nation. It is therefore incumbent on the council as the duly elected leadership and as undersigned herein, to enact the removal of authorities as vested upon Ralph Eric Shirt as Chief of the Saddle Lake Cree Nation (see motion #4].

The egregious actions of Ralph Eric Shirt as exhibited on Saturday October 24th, 2020 having caused the unlawful removal of financial documents and equipment from the offices of the Finance and Accounts department at Saddle Lake Tribal Administration has created undue anguish and significant consternation in regard to the power of office. Therefore, the people of nation having expressed their resolve in regard to the abuse of office and to which Chief Eric Shirt having a willful disregard of his fiduciary obligation to the peoples of the nation, thus resulting in a resolution to effectively have revoked the responsibility and duty of chieftainship of Mr. Ralph Eric Shirt.

.....

The necessity to procure this notice is not without the expressed will of the peoples of Saddle Lake Cree Nation. Having been asserted through the vested authority of our peoples and to having the inherent right to practice customary and traditional governance, it is imperative that the observance of these resolutions be fully respected and maintained by the Crown as represented by the Department of Indigenous Services Canada and by all other concerns.

.....

[23] Copies of the Emergency Band Meeting Motion Summary and of the Council Resolution, dated November 5, 2020 purporting to adopt as a Council Resolution the motions passed at the Emergency Band Meeting, were attached.

[24] Despite having previously asserted that Chief Shirt had been removed from office, by letter of November 9, 2020, Council wrote to the Chief Shirt purporting to revoke his privileges and authority, stating:

Dear Mr. Eric Shirt

Re: Revocation of Administrative Privileges and Authority of Council

In regard to matters thus presented and insofar as you may have been notified, the Saddle Lake Council have been made aware an investigation by legal authorities is currently being conducted in regard to the circumstances occurring on Saturday, October 24th, 2020. As this may concern yourself directly, we have but no alternative than to inform you that all administrative privileges and authorities of council normally accorded to yourself are effectively revoked. This notice is current and in effect, pending outcomes of the examination and inquiry by lawful authorities and other legal matters as they arise. We find this necessary in order to maintain the integrity of leadership and in acquiescence to the will of the band membership.

We thank you for your cooperation in this matter and would urge your utmost attention and to conduct your person accordingly.

[25] This is the decision that is the subject of the Court File T-1384-20, the Suspension Decision.

[26] On November 16, 2020 SLCN wrote to a third party supplier to advise that the SLCN membership “have removed Eric Shirt as Chief” and that “he no longer has authority to speak on Saddle Lakes behalf in any of our partnering companies”.

[27] On September 21, 2021 at a regular Council Meeting, Council carried a “motion” stating “That Council remind members that Eric Shirt has been removed from office by the people and has no authority in decision-making for the Nation effective October 27, 2021” (presumably this was intended to refer to October 2020).

### **Certified Tribunal Records [CTR]**

[28] The CTR filed in T-1382-20 (Removal Decision) contains only one document, a copy of the October 24, 2020 letter to Mr. Ron Stone from Chief Shirt. The CTR is certified by counsel for the SLCN, Robert R. Roddick, as containing all of the materials that were before the SLCN Council when it made the Removal Decision.

[29] The CTR filed in T-1384-20 (Suspension Decision) is also certified by Mr. Roddick and states that it contains all of the materials that were before Council when the decision to suspend Chief Shirt was made. This CTR contains only two documents. The first is a copy of the minutes of the Band Meeting held on October 19, 2020, which included the defeated motion to have a forensic audit conducted. The second document is the Motion Summary from the Emergency Band Meeting held on October 26, 2020.

## Saddle Lake Tribal Customs Election Code

Section (3)

### Election Procedural Regulations:

(f) A Councillor or Chief guilty of improper conduct who has had a petition requesting his/her removal, signed by 60% of the resident members of the Reserve, shall be so dismissed by the Encumbent [*sic*] Electoral Officer and a bi-election shall, be called to fill the vacancy.

## Issues

[30] In my view, the matters at issue in these applications for judicial review are as follows:

- i. Was there authority to make the decisions/were the decisions reasonable;
- ii. Was the Applicant was denied procedural fairness; and
- iii. What is the appropriate remedy?

## Standard of Review

[31] The parties submit, and I agree, that the reasonableness standard will apply to the review of the merits the decisions (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23-25).

[32] The parties also submit, and I agree, that issues of procedural fairness are to be reviewed on a correctness standard (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 [*CPR*] the Federal Court of Appeal held that although the required reviewing exercise may be best – albeit imperfectly – reflected in the

correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Rather, the Court is to determine whether the proceedings were fair in all of the circumstances. That is, “the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond” (*CPR* at paras 54-56; see also *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

### **Authority to make the decisions**

#### *Applicant’s position*

[33] The Applicant submits that the decisions to remove him from office were made without authority. The Election Code set out a process for the removal of a chief or councillor, which process requires a petition signed by 60% of the membership, however, this process was not followed. Council has no other power pursuant to the Election Code to remove a chief or councillor from office. Moreover, although couched as a suspension decision, the November 9, 2020 decision by Council to revoke Chief Shirt’s administrative privileges and authority is, in effect, a removal decision and should be assessed as such. Finally, as to any authority to remove him from office based on unwritten customary power, the Applicant submits that the burden is on the Respondent to prove that this custom exists, and it has failed to do so.

#### *Respondent’s position*

[34] The Respondent submits that the Election Code addresses only the removal of elected chief or councillors and is silent as to suspensions. Thus, it does not cover the field, nor is it a

complete code for managing the conduct of Chief and Council. The Respondent submits that courts have recognized that band custom may allow discipline or sanction of council members short of removal and that this is such a case. Further, it is distinguishable from cases where suspensions have been found to have been exercised without authority (such as *Lafond v. Muskeg Lake Cree Nation*, 2008 FC 726 [*Lafond*]; *McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 [*McKenzie*]; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732 [*Whalen*]).

[35] The Respondent submits that notwithstanding the “removal” terminology used in the Emergency Band Meeting motion and the Council Resolution adopting that motion, the “disciplinary actions” imposed on Chief Shirt have in reality taken the form of a suspension from office, rather than removal. This is demonstrated by the attempts of the Respondent to address and resolve the “misconduct” concerns, and by the fact that Chief Shirt continues to receive his salary and has continued to have the use of his cell phone and email address.

#### *Analysis*

[36] As the Applicant submits, “all exercises of power by public authorities must be authorized by law” (*Bell Canada v 7265921 Canada Ltd*, 2018 FCA 174 at para 46; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 111. See also *Vavilov* at para 109).

[37] It is also well established that a band council constitutes a federal board, commission or other tribunal pursuant to s 18 of the *Federal Courts Act*, RSC 1985, c F-7 (*Tourangeau v Smith’s Landing First Nation*, 2020 FC 184 [*Tourangeau*] at para 27; *Balfour v Norway House*

*Cree Nation*, 2006 FC 213 at para 20). Band council decisions are, therefore, reviewable by this Court, and they may be quashed, set aside, or declared invalid or unlawful pursuant to s 18.1(3) of the *Federal Courts Act* if made without authority.

[38] The Election Code provides the process to be followed for the removal of a chief or a councillor from office. Specifically, s 3(f) states that a chief or councillor “guilty of improper conduct who has had a petition requesting his/her removal, signed by 60% of the resident members of the Reserve” shall be dismissed by the electoral officer, and a by-election shall be held to fill the vacancy. However, this process was not followed by the SLCN band members in the removal of Chief Shirt from office.

[39] The Election Code did not provide SLCN band members with another process by which chief or council members could be removed from office. The Election Code also did not provide authority to Council to convene the Emergency Band Meeting for the purpose of facilitating the tabling of a motion, by a band member, removing the Applicant from office, nor did it provide authority for the subsequent adoption of that motion by Council Resolution. No provision of the Election Code afforded Council the authority to remove Chief Shirt from his duly elected office as Chief. The Respondent does not dispute this.

[40] Accordingly, the Removal Decision must be quashed. The decision to remove Chief Shirt from office was made without authority and was therefore invalid (*Lafond* at para 30; *Prince v Sucker Cree First Nation No. 150A*, 2008 FC 1268 [*Prince*] at para 47).

[41] That leaves the Suspension Decision. The question being whether Council had some other source of authority permitting it to remove Chief Shirt from office by suspension. The Respondent asserts that while the Election Code is silent as to suspensions of chief or councillors, that SLCN customary law fills this gap.

[42] As a starting point, the nature of the November 9, 2020 decision must be assessed. That is, whether it is a suspension decision as the Respondent asserts or whether it is, in reality, a removal decision (in this case, perhaps more accurately described as a continuation of the existing removal).

[43] It is unclear why Council, having taken the position that Chief Shirt had been removed from office on October 26, 2020, subsequently wrote the November 9, 2020 letter to Chief Shirt purporting to revoke his administrative privileges and council authority, i.e. to suspend him. Presumably, if Chief Shirt had been removed from his elected office, then all connected authority and privileges would have terminated at the time of removal.

[44] In that regard, the Respondent has filed the Affidavit of Eddy Makokis, a SLCN Councillor, sworn on August 30, 2021 [Makokis Affidavit]. When cross-examined on his affidavit Mr. Makokis was asked why, if Chief Shirt had already been removed from office, he was then also suspended. Mr. Makokis was unable to provide a coherent response to that question.



[45] When appearing before me, counsel for the Respondent submitted that, subsequent to the motion for removal being passed, Council realized that it needed to “walk back” that position in view of the lack of procedural fairness afforded to Chief Shirt, as demonstrated by Council’s undated letter (received by Chief Shirt on October 28, 2020) offering to permit Chief Shirt to address band members the following day at the previously scheduled October 29, 2020 band meeting. Counsel for the Respondent suggests that in reality there was only one decision, and that it was to suspend Chief Shirt.

[46] If there was only one decision, then I have difficulty with SLCN’s efforts to characterize it as a suspension.

[47] That is because, subsequent to the October 28, 2020 letter, Council has consistently represented to SLCN members and outside parties that Chief Shirt has been removed from office. The motion made at the Emergency Band Meeting, which the Council adopted in the Council Resolution of November 5, 2020, states “That Chief Eric Shirt be removed from office effective immediately”. In an undated letter (that Chief Shirt deposes was copied to him on November 9, 2020), Council informed the ISC Regional Director General for the Alberta Region, the Minister of Indigenous Services and, the Leader of the Opposition, that the membership had resolved “to have removed Mr. Ralph Eric Shirt from the office of Chief of the nation. It is therefore incumbent on the council as the duly elected leadership... to enact the removal of authorities as vested upon Ralph Eric Shirt as Chief”. Attached to the letter were the motion made at the Emergency Band Meeting and the November 5, 2020 Council Resolution. A letter sent by Council to Seven Lakes Oilfield Services, dated November 16, 2020, states that “the

Saddle Lake Membership have removed Eric Shirt as Chief of the Saddle Lake Cree Nation. Eric Shirt no longer has authority to speak on Saddle Lakes behalf in any of our partnering companies”. And, significantly, a Council Meeting held on September 21, 2021 produced a motion, carried unanimously by Council: “That Council remind members that Eric Shirt *has been removed* from office by the people and has no authority in decision making for the Nation *effective* October 27, 2021” (emphasis added). Again, this was presumably intended to refer to October 27, 2020, the day after the Emergency Band Meeting.

[48] Thus, while before this Court the Respondent asserts that Chief Shirt was merely suspended, in all other forums the Respondent is clearly communicating that Chief Shirt has been removed from office. Given this, I do not accept the Respondent’s submission that while the language of removal was used in council resolutions and correspondence, that this is “merely an imprecision of terminology, and that the true nature of the decision is that of suspension”.

[49] Further, the duration of the purported suspension is also a factor to be considered in the characterization of the November 5, 2020 decision. This Court has previously rejected a distinction between removal from elected office and what is essentially an indefinite suspension, holding that because the suspension was not time limited it effectively amounts to a removal (*Prince* at para 31; *Lafond* at paras 12-14; *McKenzie* at para 66).

[50] In this matter, the purported suspension occurred on November 5, 2020 by way of a letter from Council to Chief Shirt that states:

In regard to matters thus presented and insofar as you may have been notified, the Saddle Lake Council have been made aware an

investigation by legal authorities is currently being conducted in regard to the circumstances occurring on Saturday, October 24th, 2020. As this may concern yourself directly, we have but no alternative than to inform you that all administrative privileges and authorities of council normally accorded to yourself are effectively revoked. This notice is current and in effect, pending outcomes of the examination and inquiry by lawful authorities and other legal matters as they arise. We find this necessary in order to maintain the integrity of leadership and in acquiescence to the will of the band membership.

[51] Leaving aside the intelligibility of the letter, it appears to indicate that Chief Shirt would be suspended while investigations into the conduct of the Audit were being completed by the authorities.

[52] When cross-examined on his affidavit, Mr. Makokis deposed that the investigations referenced in the Suspension Decision were related to the “break-in” (Chief Shirt facilitating access to the SLCN Finance Department by way of a locksmith and accompanied by the ISC appointed auditors) and that Council had asked the RCMP to investigate. Mr. Makokis confirmed that by December 2020 or January 2021 the RCMP had completed its investigation and advised Council that they were not pursuing charges. He also confirmed that, despite being advised of this, Council did not reinstate Chief Shirt. No other outstanding “legal matters” are identified in Mr. Makokis’ evidence.

[53] Mr. Makokis also deposes that Council requested that the Applicant supply a copy of the “Complaint” and all of the other correspondence he had with ISC and RCMP but that Chief Shirt had refused to provide that information. The Makokis Affidavit goes on to state that Council suspended Chief Shirt with pay “until the information requested is supplied and the Applicant

agrees to respect SLCN policies with regard to privacy and access to SCLN financial records”.

When cross-examined on this point, Mr. Makokis deposed that the requests for these documents were not made until December 2020 or January 2021, after the November 9, 2020 suspension letter was issued.

[54] This testimony appears to indicate that the purported suspension has shifting goal posts. First, Council stated that it would be ended when the investigation was completed, but it was not. Instead, some months later, new requirements were effected, which were not time-related.

[55] In my view, this is a circumstance somewhat comparable to *McKenzie* in that the purported suspension is not for a defined period of time but is instead tied to Council’s demand that Chief Shirt provide it with correspondence pertaining to the conduct of the Audit and that he agree to respect certain SLCN policies – which policies Chief Shirt has never agreed that he breached. Nor has it been established that his conduct was in any way wrongful. I also point out that there is nothing in the CTRs to confirm that Council made a demand that communications be turned over to it or to indicate why, if they exist, the failure to disclose the communications supports an indefinite suspension.

[56] The Respondent also attempts to characterize Chief Shirt’s removal from office as a matter of internal discipline not provided for in the Election Code. The Respondent submits that because Chief Shirt has continued to be paid and is afforded email access and a cell phone, and because Council has made attempts to address and resolve its concerns, that this all mitigates towards the decision being characterized as a suspension.

[57] However, a similar argument was made in a factually similar circumstance but was rejected by Justice Grammond in *Whalen*. There the First Nation council suspended one of its councillors, with pay, for alleged wrongful conduct. Justice Grammond found that the council had no power under its election regulations to suspend a councillor and had also not established the existence of a customary practice of suspending councillors.

[58] In the course of reaching that conclusion, he pointed out that laws made by the membership, such as election codes, are paramount to laws and decisions made by band councils. Councils have no power to remove a councillor outside of the prevailing election regulations and:

[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)

[59] Justice Grammond found that that framing the issue as one of “discipline” did not assist the First Nation as a person holding public office is not an employee, and council “is not ‘the boss’ of the councillors” (*Whalen* at para 54).

[60] In my view, the fact that Chief Shirt continues to be paid does not establish that he has not been effectively removed from office and is merely suspended. The issue is whether he has indefinitely been prevented from exercising his powers and duties as the duly elected Chief of SLCN. There is no dispute that he has not been able to do so since the removal motion was passed on October 26, 2021.

[61] Similarly, and although the Respondent made much of it at the hearing before me, whether or not Chief Shirt continued to have a cell phone and email access (the evidence on the point is conflicting) is not a compelling factor with respect to the characterization of his removal from office. He has been unable to exercise any functions of his office as Chief and has been excluded from band governance.

[62] Finally, as to the Respondent's view that the characterization of Chief Shirt's removal from office as a suspension is demonstrated by the attempts that the Respondent has made to address and resolve the misconduct concerns, I do not agree. As seen from the chronology above, the only effort made by Council was to call a band meeting. This was last scheduled for November 18, 2020 but appears not to have proceeded. While the Makokis Affidavit states that Council had called a meeting for September 16, 2021, inviting Chief Shirt to address the membership at that time, there is no evidence of this intended meeting in the record before me. When appearing before me, counsel for the Respondent suggested that a meeting could not be held because of COVID restrictions. This may be so, but there is also no evidence before me to that effect nor that alternative efforts to meet, such as by Zoom, were considered. More

significantly, and as will be discussed further below, calling a band meeting would not cure a suspension that was made by Council without authority.

[63] For all of these reasons, I do not accept the Respondent's position that there is only one decision at issue and that it is a suspension decision, not a decision removing Chief Shirt from office. In my view the Suspension Decision is, in effect, a removal decision. As such, Council had no authority to effect it.

[64] However, even if I am wrong and the November 5, 2020 letter is properly characterised as a suspension decision, it still cannot stand because the Respondent has not established that such a suspension is grounded in SLCN customary law.

[65] I have previously addressed this in *McKenzie*:

[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).

[66] Thus, as acknowledged by the Respondent in its written submissions, the Respondent must show that the practice of suspending chief or councillors was “firmly established, generalized, and followed consistently and conscientiously by a majority of the community”.

[67] However, the Respondent offers no evidence speaking to this point. It refers only to paragraph 23 of the affidavit evidence of Mr. Makokis, which states that “Band Meetings have an extremely significant role in the governance of the SLCN. The authority to govern comes from the people and the people can provide direction to the Council on all matters”. The Respondent submits that this establishes the existence of an inherent power, based in SLCN custom, for band members to direct Council, through a vote, as to the imposition of disciplinary measure, including suspension.

[68] While band member meetings may indeed be very important, the affidavit evidence of Mr. Makokis does not establish that the practice of suspending chief or councillors by way of a motion passed at an Emergency Band Meeting and adopted by a Council Resolution – or any suspension – was “firmly established, generalized, and followed consistently and conscientiously by a majority of the community”. That is, that it was “a practice...that reflects a broad consensus of its membership and that would amount to a custom”. And while the Respondent refers to *Waquen v Mikisew Cree First Nation*, 2021 FC 1063 (at paras 35-37), this does not assist it, as there the Court found that there was uncontroverted evidence that the practice in issue (changing



the location of polling stations by resolution of Council) had taken place over many years and amounted to custom.

[69] When appearing before me the Respondent submitted that a circumstance like this has never previously occurred. To my mind it seems apparent that, if a SLCN chief or councillor has never before been suspended, this does not support the Respondent's argument that the suspension of Chief Shirt is authorized by SLCN customary law. In that circumstance, no such law would have developed.

[70] Before leaving this point I would observe that attached as an exhibit to the Shirt Affidavit is a printout from Indigenous and Northern Affairs Canada, titled Registered Population. This indicates that as of July 2021, SLCN has a total registered population of 11,184 of which 6721 members live on the SLCN reserve. The Emergency Band Meeting held on October 26, 2020 was attended by 194 members of which 166 voted in favour of the motion to immediately remove Chief Shirt from office. It is difficult to see how a vote taken at a hastily-convened meeting of a small proportion of the total band membership reflects the informed will and direction of the majority of band members. Indeed, if a small group of band members can simply pass a motion removing a duly elected chief or councillor from office this has the very real prospect of entirely undermining the democratic election process effected by the Election Code and destabilizing band governance.

[71] In sum, in this matter there is no evidence before me that any chief or council members have ever before been removed or suspended from elected office in this manner, or at all.

Accordingly, I find that Council did not have authority by way of SLCN customary law to suspend Chief Shirt from elected office. This renders its decision invalid, as well as unreasonable (*Vavilov* at paras 105, 109).

[72] Finally, I note that the whole of Council's actions are premised on its view that Chief Shirt facilitated the forensic audit without its prior authority and consent. Yet nothing in the record speaks to how this amounted to improper conduct warranting removal from office. To the extent that the Makokis Affidavit appears to attempt to fill this gap, the reasoning offered after the fact by Mr. Makokis is not reflected in the record as the reasoning of Council when it made the decisions. The absence of an evidentiary record concerning the impugned conduct essentially removes the Court's ability to assess the existence of justification, transparency and intelligibility within the decision-making process (*Okemow v Lucky Man Cree Nation*, 2017 FC 46 [*Okemow*] at para 58). On that basis, the Removal Decision and the Suspension Decision would also be unreasonable, had there been authority to make them.

[73] In summary, the Election Code sets out a process by which chief or councillors can be removed from office. Thus, the Code "covered the field", leaving SLCN band members and Council no authority to otherwise cause the removal of Chief Shirt from office. I also find, given the facts before me, that the November 9, 2020 suspension letter is not, in fact or in effect, a suspension decision. It is a removal decision. And, even if it were a suspension decision, the Respondent has failed to prove that there is an established SLCN custom permitting the suspension of chief and council members. Accordingly, Council also had no authority, grounded in custom, to suspend Chief Shirt from elected office.

[74] On this basis alone the applications for judicial review must be granted. However, I will also briefly address the issue of procedural fairness.

### **Procedural Fairness**

[75] The Applicant submits that the decisions were arrived at in a procedurally unfair manner, as he was not given sufficient notice of the decisions, nor was he provided a sufficient opportunity to know the case against him and make submissions to the decision maker.

[76] In its written submissions, the Respondent asserted that the duty of procedural fairness is lower for a suspension decision than for a removal (citing *Tourangeau*). Further, that Chief Shirt had notice of the October 26, 2020 Emergency Band Meeting but refused to attend; accordingly, he is not entitled to assert a breach of procedural fairness. The Respondent submits that it has continued to make “good faith efforts” to resolve the suspension but the Applicant has “generally” declined to do so.

[77] However, when appearing before me, counsel for the Respondent conceded that Chief Shirt had not been afforded procedural fairness as acknowledged by Council in its undated letter (received by the Applicant on October 28, 2010) which indicated that, in the interest of fairness, Council believed that Chief Shirt needed an opportunity “to address the Members regarding your actions”.

[78] Given the Respondent's concession on this point, I need only briefly address the requirements of procedural fairness. In that regard, I refer to my previous finding in *Morin v Enoch Cree First Nation*, 2020 FC 696:

[34] Significantly, notice and an opportunity to make representations have been characterized as the most basic requirements of the duty of fairness (*Orr v Fort McKay First Nation*, 2011 FC 37 at para 12; *Gadwa v Kehewin First Nation*, 2016 FC 597 at paras 48-53). Further, the Federal Court of Appeal has stated that, "No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (*Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 56).

(see also *Duckworth v Caldwell First Nation*, 2021 FC 648 at para 24, 39-42; *Parenteau v Badger*, 2016 FC 535 at para 49; *Okemow* at para 30.)

[79] These most basic requirements of procedural fairness apply regardless of whether the decisions were for removal or suspension.

[80] Based on the record before me there is no doubt that Chief Shirt was not afforded procedural fairness. He did not receive the October 25, 2020 letter advising that Council had convened (without notice to him) a Special Council Meeting the day before and scheduled an Emergency Band Meeting on October 26, 2020. Also unexplained is why Council was able to send him the letter via email to his personal account at 9:44 that night – after the meeting at which the removal motion was passed – but failed to do so when it was determined that he was unavailable for hand delivery of the letter. In any event, the letter itself makes no reference to an intention to seek to remove Chief Shirt from office. It was concerned with the conduct of the

Audit without the knowledge of the Council members. Thus, even if he had received the notice, it was inadequate as it did not alert Chief Shirt the case to be met (*Tourangeau* at para 59).

[81] Nor was Chief Shirt given notice of Council's intention to issue the November 9, 2020 letter purporting to suspend him. He was also not given notice of the November 5, 2020 Council Meeting at which the removal motion passed at the Emergency Band Meeting was adopted by Council.

[82] In sum, Chief Shirt was notified of the Emergency Band Meeting after the fact, he was not notified that his status as Chief was to be discussed at the Emergency Band Meeting, he was not informed of the allegations or evidence against him, and he was not provided a meaningful opportunity to respond to those allegations. Accordingly, he was not afforded procedural fairness.

[83] At no time prior to the removal decision or the suspension decision was Chief Shirt afforded an opportunity to respond to the allegations made against him. This breach of procedural fairness is not cured by offers to subsequently allow him to respond to the allegations that had already caused his removal from office.

[84] As to those subsequent opportunities, contrary to the Respondents submissions, the subsequent correspondence between Chief Shirt and Council makes it clear that Chief Shirt did not refuse to meet. He was willing to meet with the band membership to discuss the Audit but sought sufficient notice of a meeting, less than 24 hours notice being insufficient; that notice be

given to all members, including off-reserve members; that appropriate measures to respect COVID-19 public health protocols be effected; and, that Council advise in advance of the proposed meeting of the authority upon which it relied to advance the removal motion and the particulars of his alleged “improper conduct” so that Chief Shirt could prepare a response.

[85] For these reasons also, the decisions must be set aside.

### **Conclusion**

[86] For the reasons above, I find that the decision of Council to remove the Applicant from his elected office of Chief of SLCN was made without authority as the Election Code covered the field by providing a removal process for chief and council members, which process was not followed. The Election Code provides no other authority by which SLCN band members or Council could cause the removal of Chief Shirt from office. I also find that the facts of this case support that the Suspension Decision is properly characterized as a removal decision. As such, it too was not authorized by the Election Code. Even if it were properly characterized as a suspension, the Respondent failed to prove the existence of SLCN customary law that would provide authority for the suspension. The decisions are therefore invalid and unreasonable. The decisions are also unreasonable because they lack justification on the merits.

[87] The Applicant was also not afforded procedural fairness as he was not given adequate notice of the intention to discuss his removal or suspension from office, to know the case against him and a meaningful opportunity to respond to those allegations.

[88] For all of these reasons, the Removal Decision and the Suspension Decision will be quashed.

## **Remedies**

### *Applicant's position*

[89] Chief Shirt requests an order in the nature of *certiorari* setting aside the decisions; a declaration that he was not lawfully removed or suspended from his position as Chief of SLCN; and a declaration that he is still Chief.

### *Respondent's position*

[90] In its written submissions the Respondent asserts that in both applications the Applicant is seeking, amongst other things, an order for the injunctive relief. The Respondent submits that this is not appropriate, as the Applicant has not in fact been removed from his position. The Respondent submits that re-instating the Applicant would be equivalent to a mandatory injunction pending disposition of the judicial review application. However, when appearing before me, the Respondent acknowledged that Chief Shirt is not seeking injunctive relief and abandoned its arguments in that regard.

[91] The Respondent also submits that if the Court grants judicial review and quashes the Removal Decision then the Court should order that the matter be returned to a band meeting for a redetermination of Chief Shirt's status. Similarly, should this Court grant judicial review and

quash the Suspension Decision, then it should order that the matter be returned to Council for a redetermination of Chief Shirt's status.

*Analysis*

[92] The remedy of *certiorari* is the usual and appropriate remedy in circumstances such as this. Accordingly, the Removal Decision and the Suspension Decision will be set aside.

[93] The Election Code provided a process by which SLCN band members could cause the removal of Chief Shirt from office. That process was not followed. The Election Code did not afford band members, by the motion passed at the Emergency Band Meeting, or Council by the adopting of that motion, the authority to make the Removal Decision. Further, Council did not have the authority pursuant to SLCN customary law to make the Suspension Decision. It follows from this that those decisions are not valid. Accordingly, Chief Shirt was never validly removed from office, and in that sense, he continues to occupy office. On a more practical level, as he has been prevented by Council from performing his duties as Chief, he will be reinstated to his position (*Lafond* at para 30; *Whalen* at para 81).

[94] It also therefore follows that the Removal Decision and the Suspension Decision cannot be sent back for redetermination. In the absence of authority to remove Chief Shirt from office, sending the matters back for redetermination at a band meeting or by Council serves no purpose. The lack of authority remains.



[95] As to costs, in his written submissions Chief Shirt sought an order of costs on an elevated lump sum basis in the amount of \$40,000 (referencing the costs decision in *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 [*Whalen 2019*]). Alternatively, a solicitor-client cost award. In the further alternative, that written submissions as to costs be made after the substantive decision on the merits has been issued.

[96] The Respondent disagrees with the Applicant's submissions and submits, as the Applicant has not provided any supporting materials to justify the claimed costs, that the Court should deal with costs as a separate matter.

[97] At the hearing of these matters I advised counsel that brief written submissions on costs were to be filed with the Court. I have now received and reviewed those submissions.

[98] The Applicant seeks party and party costs in accordance with Column V of Tariff B, as set out in the enclosed draft bill of costs. Column V costs amount to \$25,201.02. Column III costs amount to \$13,501.02. In the alternative, the Applicant seeks lump sum costs fixed at \$20,000. The Applicant submits that an elevated costs award of this nature is justified for three reasons:

- i. The Court has repeatedly recognized that there is a power/resource imbalance between an applicant and their First Nation when litigating governance matters of this nature. This supports an elevated costs award.
- ii. The conduct by the SLCN's Council was clearly unlawful and they cannot credibly assert that they were not aware it was unlawful. They failed to rectify this and, instead, required the Applicant to bring this Court proceeding.

- iii. This case will assist in clarifying important questions at the SLCN regarding governance and the powers of the SLCN Council.

[99] The Respondent acknowledges that there is a power and resource imbalance between the Applicant and the Respondent and that this is a factor that may be taken into consideration when awarding costs. However, the Respondent asserts that it was the unlawful conduct of the Applicant that led to his suspension. Further, that the Respondent attempted to organize band meetings but was unable to do so either because of the shortness of notice or COVID 19 restrictions. The Respondent submits that the appropriate costs would be Tariff B, Colum III and that the conduct of the parties, taken as a whole, does not justify any variance.

[100] As I noted above, this matter has factual similarities to *Whalen*. There Justice Grammond separately addressed costs in *Whalen 2019*, including factors that may be considered in assessing costs in First Nation matters. He found that a lump sum award on an elevated basis was justified and awarded costs in the amount of \$40,000.00.

[101] I agree with the Applicant, as found in *Whalen 2019*, that the imbalance between his financial resources and those of SLCN is a relevant factor in this matter. I also agree with the Applicant that Council has known since the day after his removal from office that Chief Shirt's position was that there was no authority to permit his removal from office outside s 3(f) of the Election Code. Council also acknowledged within two days of the removal that the removal process had been procedurally unfair, yet it then repeated its error by rescheduling a band meeting on 24-hours notice and by failing to give the Applicant notice of the Council meeting in which Council purported to suspend the Applicant.

[102] In that regard, it is of note that Chief Shirt was elected on June 12, 2019 for a three-year term. He was removed from office on October 26, 2020 and since then has been unable to perform his role and duties as Chief. His term of office will end less than 4 months from now, on June 12, 2022. Contrary to the Respondent's submissions, there is little evidence that any real effort has been made by Council since October 29, 2020, when it cancelled the November 18, 2020 meeting, to address Chief Shirt's removal – or that there is any will to do so before his term of office lapses. Nor is there any evidence that over the last year and a half Council has actually considered the question of whether there was any improper conduct on the Applicant's part by permitting the Audit to be conducted without prior notice to Council.

[103] Accordingly, I agree with the Applicant that the Respondent's treatment of him was "an exercise of careless power" which must be discouraged by this Court (*Garner v Union Bar First Nation*, 2021 FC 657, at para 57 [*Garner*]).

[104] Further, and despite the apparent frailty of the Respondent's position, the Applicant was required to seek relief from this Court.

[105] Finally, in *Whalen 2019* Justice Grammond stated "While the matter did not involve issues of 'widespread societal interest' and Councillor Whalen was certainly pursuing a personal interest, my judgment may serve to clarify certain legal questions of general interest with respect to the interpretation of FMFN's Election Regulations or that of similarly-worded election codes. (See also, by way of analogy, *Papequash v Brass*, 2018 FC 977 at paragraph 10)". In my view,

in this matter my decision also serves to clarify band governance in the context of removal of SLCN chief and councillors from office.

[106] In conclusion, Rule 400 of the *Federal Courts Rules* affords this Court full discretionary power over the amount and allocation of costs and sets out factors that the Court may consider in exercising that discretion. In this matter, I am satisfied that the factors discussed above warrant the exercise of my discretion to award costs on an elevated lump sum basis.

[107] This Court has also held that the appropriate magnitude of a lump sum award typically falls within a range of 25% to 50% of actual legal costs of the successful party (*Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 17 [*Nova Chemicals*]; *Whalen 2019* at para 33; *Garner* at para 54). In this case, the Applicant does not indicate what his actual legal costs were. Instead, he proposes elevated costs based on Colum V of Tariff B or a lump sum of costs in the amount of \$20,000. I am satisfied that an elevated all-inclusive lump sum award in the amount of \$20,000 is justified – and not “plucked from thin air” (*Whalen 2019* at para 33 referencing *Nova Chemicals* at para 15) – based on the Column III and Column V bill of cost calculations provided by the Applicant.

**JUDGMENT IN T-1382-20**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is granted.
2. The October 26, 2020 motion to remove the Applicant from his elected office as Chief of SLCN, adopted and approved by the Council Resolution dated November 5, 2020, is hereby quashed and the Applicant is reinstated as Chief in accordance with his election to that office on June 12, 2019.
3. The Applicant shall have his costs in the all-inclusive lump sum amount of \$20,000. This amount encompasses costs for both applications.
4. A copy of these reasons will be placed in the Court File T-1384-20.

**JUDGMENT IN T-1384-20**

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is granted.
2. The November 9, 2020 decision suspending the Applicant from his elected office as Chief of SLCN is hereby quashed and the Applicant is reinstated as Chief in accordance with his election to that office on June 12, 2019.
3. The Applicant shall have his costs in the all-inclusive lump sum amount of \$20,000. This amount encompasses costs for both applications.

4. A copy of these reasons will be placed in the Court File T-1382-20.

"Cecily Y. Strickland"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKETS:** T-1382-20 (T-1384-20)

**STYLE OF CAUSE:** ERIC SHIRT v SADDLE LAKE CREE NATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE USING ZOOM

**DATE OF HEARING:** FEBRUARY 22, 2022

**JUDGMENT AND REASONS:** STRICKLAND J.

**DATED:** MARCH 8, 2022

**APPEARANCES:**

Evan C. Duffy FOR THE APPLICANT

Robert F. Roddick, Q.C. FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Bailey Wadden & Duffy LLP FOR THE APPLICANT  
Edmonton, Alberta

Robert F. Roddick Professional FOR THE RESPONDENT  
Corporation  
Edmonton, Alberta