

Federal Court



Cour fédérale

Date: 20240312

**Dockets: T-2206-22
T-2191-22**

Citation: 2024 FC 413

Ottawa, Ontario, March 12, 2024

PRESENT: The Honourable Mr. Justice Favel

Docket: T-2206-22

BETWEEN:

CECILIA (TONI) JOSEPHINE HERON

Applicant

and

SALT RIVER FIRST NATION NO. 195

Respondent

Docket: T-2191-22

AND BETWEEN:

SALT RIVER FIRST NATION NO. 195

Applicant

and

CECILIA (TONI) JOSEPHINE HERON

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Salt River First Nation No. 195 [SRFN] is the applicant in T-2191-22, where SRFN seeks judicial review of an October 18, 2022 decision [October 18, 2022 Decision] of Chief Cecilia (Toni) Josephine Heron [Chief Heron] purporting to exercise powers of the Chief to call a Special Meeting to remove Councillors Brad Laviolette and Kendra Bourke from office under section 156 of the Election Code. SRFN seeks orders quashing and setting aside the October 18, 2022 Decision and costs.

[2] Chief Heron, elected as Chief of SRFN on September 19, 2022, is the applicant in two matters: T-2206-22 and T-97-23. Pursuant to Associate Judge Coughlan's February 28, 2023 Order, T-2206-22 and T-97-23 are consolidated [Consolidated Proceedings] and the Court is hearing the SRFN Application at the same time as the Consolidated Proceedings.

[3] In the Consolidated Proceedings, Chief Heron seeks judicial review of: (1) SRFN's decision on October 13, 2022 to suspend her from her position as Chief for a period of 60 days without pay [Suspension Decision]; and (2) SRFN's decision on December 12, 2022 to continue her suspension and the subsequent extensions [Subsequent Suspension Decisions]. Chief Heron seeks orders quashing and setting aside the Suspension Decision and Subsequent Suspension Decisions, finding that she remains Chief of the SRFN, entitling her to her salary and remuneration that was withheld during the suspensions, and an order for costs.

[4] I am dismissing SRFN's application because the challenge to Chief Heron's October 18, 2022 Decision is premature and because the Council of SRFN has not sought out the approval of its membership as required by the Election Code. Even if SRFN had the authority to commence the application, the October 18, 2022 Decision is reasonable.

[5] I am allowing the application for judicial review in the Consolidated Proceedings due to lack of procedural fairness and due to the unreasonableness of both the Suspension Decision and Subsequent Suspension Decisions.

II. Background

[6] The parties generally agree on the background that follows, however, they do disagree on some points such as when notices or letters were given, when a meeting was called and the details discussed at such meetings. The Court has developed the background by reviewing the affidavits of Chief Heron, Councillor Brad Laviolette and Councillor Kendra Bourke. The affiants were not cross-examined on the contents of their respective affidavits.

[7] SRFN held an election on September 19, 2022, in which Chief Heron was elected as Chief. Six Councillors were previously elected by acclamation on or around August 17, 2022: Don Beaulieu, Kendra Bourke, Freda Emile, Brad Laviolette, Levi MacDonald, and Warren Sikyea. On October 3, 2022, SRFN held the swearing-in ceremony for Chief and Council and a Council meeting took place afterward. At the October 3, 2022 meeting, Chief and Council discussed SRFN's bid to build a new Fire Centre and to hold a membership meeting on the topic on October 13, 2022. On October 5, 2022, another Council meeting was held to discuss legal

matters that SRFN was involved in and it was agreed to continue SRFN's defence in those matters.

[8] At an October 6, 2022 Council meeting, a letter signed by all Councillors, except Chief Heron's grandson, Councillor MacDonald, was circulated and added to the agenda. The letter contained eight motions that were ultimately passed by the Council, including a motion to approve SRFN's Fire Centre bid and a motion not to have a membership meeting regarding the bid that was scheduled for October 18, 2022. This letter and the proposed motions removed some responsibilities from the Chief. Chief Heron takes issue with and disputes the inflammatory language contained in the letter, including that Chief Heron was not fulfilling her duty as Chief.

[9] On October 7, 2022, Chief Heron wrote letters to Councillors Bourke and Laviolette advising them that she was calling a Special Meeting for October 22, 2022 to remove them from office due to their conduct at the October 6, 2022 meeting. The Chief then gave notice of a Council meeting to be held on October 13, 2022 to discuss financial matters. On October 11, 2022, Councillors Bourke and Laviolette state that the Council provided Chief Heron with a letter disputing her authority to call the Special Meeting and stating that the Councillors would consider suspending Chief Heron at the October 13, 2022 Council Meeting.

III. The Decisions

A. *Suspension Decision*

[10] On the morning of October 13, 2022, the SRFN Chief Executive Officer informed the Councillors that the Council meeting scheduled that evening was cancelled because the Finance

Officer could not attend. Other than Councillor Bourke, who replied to the cancellation, it is unclear if all Councillors received this notification as they still showed up to the SRFN office that evening. Chief Heron arrived later with the RCMP, informing the Councillors that the Council Meeting was invalid. Chief Heron did not attend the Council Meeting and claimed to be unaware that the Council was proceeding to consider a suspension in her absence. At this meeting, the Council, with Councillor MacDonald abstaining, passed a Band Council Resolution [BCR] suspending Chief Heron for 60 days without pay, cancelling the October 22, 2022 Special Meeting to remove Councillors Laviolette and Bourke, and confirming that Councillor Laviolette will serve as Acting Chief during Chief Heron's suspension.

B. *October 18, 2022 Decision*

[11] On October 17, 2022, Chief Heron, while at the SRFN office and unaware of the suspension, was advised that Councillor Laviolette called the RCMP because she was trespassing. Councillor Laviolette then provided Chief Heron with a copy of the October 13, 2022 BCR suspending her and cancelling the October 22, 2022 Special Meeting. SRFN, in a letter signed by Councillor Laviolette, also notified Chief Heron of her actions of trespass and reminded her of her 60-day suspension.

[12] On October 18, 2022, Chief Heron, pursuant to section 155 of the Election Code, called for or rescheduled a Special Meeting to consider the removal of Councillors Laviolette and Bourke at 5:30 p.m. on October 23, 2022.

[13] On October 21, 2022, SRFN filed T-2191-22 challenging Chief Heron's authority to call the Special Meeting.

C. *Interlocutory Orders*

[14] On October 23, 2022, the Court, in addressing a motion brought by SRFN, upheld the terms of the October 13, 2022 BCR suspending Chief Heron, pending any further order of the Court and further prohibiting Chief Heron from exercising or performing any of the duties and powers of Chief until the 60-day suspension expired. Later that day on October 23, 2022, Chief Heron and others voted to remove Councillors Laviolette and Bourke from Council at the Special Meeting.

[15] On November 25, 2022, the Court, in addressing a motion brought by SRFN, stayed the removals of Councillors Laviolette and Bourke made on October 23, 2022 until the Court determines the proceedings on its merits. The Court further ordered that the decisions arising from the October 23, 2022 meeting are of no force and effect and that Acting Chief Brad Laviolette and Councillor Bourke may continue to carry on their roles as Councillors pending the resolution of the underlying judicial review application.

D. *Subsequent Suspensions Decisions*

[16] On December 4, 2022, Council voted to extend the suspension of Chief Heron for another 60 days on the grounds that the parties will benefit from a final decision in these proceedings before Chief Heron may return to office. Council passed further suspensions on February 2, 2023

and March 30, 2023 with similar reasons. Chief Heron continued to receive 60-day suspensions thereafter. After the hearing of the judicial review application on September 13, 2023, the Council has extended the suspensions each for an additional period of 60 days on several occasions by the issuance of BCRs.

IV. Issues and Standard of Review

[17] In the SRFN Application, this matter raises the following issues:

1. Is the judicial review application of the October 18, 2022 Decision premature?
2. Is the October 18, 2022 Decision reasonable?

[18] In the Consolidated Proceedings, this matter raises the following issues:

1. Are the Suspension Decision and Subsequent Suspension Decisions procedurally fair?
2. Are the Suspension Decision and Subsequent Suspension Decisions reasonable?

[19] In the SRFN Application, SRFN and Chief Heron submit that the standard of review for the merits of the October 18, 2022 Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). SRFN adds that the reasonableness of the October 18, 2022 Decision must consider the October 7, 2022 letter upon which it is based.

[20] Chief Heron and SRFN submits that the standard of review is reasonableness for reviewing the merits of the Suspension Decision and Subsequent Suspension Decisions.

[21] The merits of all of the decisions are reviewable under the reasonableness standard. A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at paras 13, 15, 99). The onus is on the applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). This may include instances where the decision-maker has failed to account for evidence before it (*Vavilov* at para 126). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within a range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

[22] Chief Heron submits that the procedural fairness questions are reviewable on the correctness standard (*Canada (Attorney General) v Eakin*, 2022 FCA 112).

[23] SRFN submits that this Court must ask itself whether the procedure was fair having regard to all of the circumstances and whether the party was given a right to be heard and the opportunity to know the case against them (*Therrien (Re)*, 2001 SCC 35; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC) [*Baker*]; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]). In the context of Indigenous law, the content of the duty of fairness must also be “tailored to the

particular circumstances and context of the [decision-maker]” (*Bruno v Samson Cree Nation*, 2006 FCA 249 at para 20).

[24] Issues of a breach of procedural fairness require a standard of review akin to correctness (*CP Railway* at para 54; *Mission Institution v Khela*, 2014 SCC 24 at para 79). On a correctness review, no deference is owed to the decision-maker (*Blois v Onion Lake Cree Nation*, 2020 FC 953 at para 26, citing *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57). Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing Court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Vavilov* at para 77; *Baker* at paras 21-28).

V. Relevant Provisions

[25] Section 153 of the Election Code sets out the grounds for disciplining a Chief or Councillor:

153. The removal of a Chief or Councillor from office may be determined by the Electors at a Special Meeting called under either Section 154 or Section 155 on the following grounds:

- a. they have been absent for three consecutive meetings of the First Nation or the Council for which they have been given verbal notice and for which no valid reason for their absence was provided to the Council; or
- b. they have been absent from an Annual General Meeting and no valid reason for their absence was provided to the Council; or
- c. they fail to act in accordance with the Rules of Conduct and Conflict of Interest provisions in Schedule “A” of these Regulations or with any policy or conduct guidelines, such as the *Salt River First Nation Chief & Council Code of Ethics* enacted by

Band Council Resolution on January 10, 2010, which Council may from time to time enact; or

d. they fail to reside in the vicinity of Fort Smith during their term of office.

[26] Sections 153A sets out Council's powers if there are grounds to discipline a Chief or Councillor:

153A. If Council at a Council Meeting determines that there are sufficient grounds under Section 153 for taking disciplinary action against the Chief or any Councillor, Council may:

- a. impose any restrictions or conditions on that member of Council's exercise of any or all duties as a member of Council as Council may, in Council's opinion, consider appropriate; or
- b. suspend that member of Council from the exercise of any or all duties as a member of Council for up to 60 days, with or without pay or honoraria, and impose any other restrictions or conditions as Council may, in Council's opinion, consider appropriate; or
- c. extend or renew or change any restriction or condition or suspension imposed under subsections (a) or (b); and
- d. impose any temporary restrictions or conditions or suspension on that member of Council pending Council's final determination that there are sufficient grounds to impose any restrictions or conditions or suspension under subsections (a) or (b) or (c).

[27] Sections 154 and 155 specify what actions shall be taken if Council or the Chief alone determine that there are grounds under section 153 for removal of Chief or a Councillor:

154. If Council at a Council Meeting determines that there are sufficient grounds under Section 153 for the removal of the Chief or a Councillor, Council shall call a Special Meeting of Electors within 24 hours of such determination. The Special Meeting shall be held not less than 14 days and not more than 30 days after such determination has been made. The notice of meeting shall set out the recommendation of Council to remove the Chief or the

Councillor from office and shall set out the grounds on which such recommendation is being made.

155. If the Chief alone determines that there are sufficient grounds under Section 153 for the removal of a Councillor, the Chief may at any time and notwithstanding Section 177 call a Special Meeting of Electors for that purpose. The notice of meeting shall set out the recommendation of the Chief to remove the Councillor from office and shall set out the grounds on which such recommendation is being made.

[28] Section 156 specifies that the affected Chief or Councillor will make representations at the Special Meeting and provides procedural instructions for removal if there are satisfactory grounds for it:

156. After permitting the affected Chief or Councillor to make representations at the Special Meeting called under either Section 154 or Section 155 the Electors may, at that Special Meeting, if they are satisfied there are satisfactory grounds for removal under Section 153, by Ordinary Resolution, remove the Chief or the Councillor whose removal is recommended in the notice of the meeting.

VI. Analysis

A. *Is the judicial review application of the October 18, 2022 Decision premature?*

[29] Chief Heron submits that there are no exceptional circumstances to permit SRFN proceeding with judicial review of a preliminary decision until the administrative process has run its course (*CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at para 31 [*CB Powell*]). The calling of the Special Meeting has no consequences for the two Councillors. This Court has dismissed premature applications of this nature in the context of First Nation governance, where the issues raised would result in the Court encroaching on the First Nation's

legislative sphere (*Michel v Adams Lake Indian Band Community Panel*, 2017 FC 835 at para 20 [*Michel*]; *Shirt v Saddle Lake Cree Nation*, 2018 FC 399 at paras 22, 23, 25 [*Saddle Lake 2018*]).

[30] Alternatively, SRFN has inappropriately brought this application because SRFN did not seek the requisite consent from its membership contrary to paragraph 3(a) of Schedule A of the Election Code:

Before commencing any court action or proceeding against a Member, including Federal Court applications and applications for judicial review and any collection actions or proceedings against a Member, Council shall obtain the approval of the Electors at the Annual General Meeting or at a Special Meeting.

[31] At the hearing, SRFN submitted that because Chief Heron did not have authority to call the Special Meeting, SRFN had to initiate the application (*Lac des Mille Lacs First Nation v Chapman*, 1998 CanLII 8004 (FC) [*Lac des Mille*]). SRFN would have no effective remedy if it had waited for the outcome of the Special Meeting (*Saddle Lake 2018* at para 23). Further, the requirement to obtain electoral approval is only a duty of individual councillors and not the Council as a whole, so if individual councillors breach this provision, it only results in a political penalty.

[32] I am persuaded by Chief Heron's submissions that the SRFN Application is both premature and that the SRFN did not properly seek the approval of its membership to bring the SRFN Application, as required in the Election Code.

[33] Turning first to prematurity, the jurisprudence cited by Chief Heron does confirm that judicial review is discretionary and "absent exceptional circumstances, Courts should not

interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted” (*CB Powell* at para 31). Furthermore, judicial intervention in Indigenous decision-making processes should be avoided whenever possible to encourage Indigenous self-government (*Pastion v Dene Tha’ First Nation*, 2018 FC 648; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 [*Whalen*]). As a result, there is a presumption against judicial intervention in administrative proceedings before the administrative recourses have been exhausted, particularly for interlocutory decisions in the Indigenous context (*Whalen* at para 19). I agree with Chief Heron that many of the objections to removing Councillors Laviolette and Bourke could have been raised at the Special Meeting, rather than by prematurely filing the application for judicial review of the October 18, 2022 Decision. The process only began by Chief Heron calling the Special Meeting and the process has not been completed. At this initial step in the process, there were no consequences to Councillors Laviolette and Bourke as SRFN’s membership had not yet voted on the matter at the Special Meeting.

[34] I am also persuaded by Chief Heron’s alternative submission that SRFN has not submitted evidence that it has either sought or obtained the approval of its electorate to commence the judicial review application against Chief Heron. Paragraph 3(a) of Schedule A of the Election Code is determinative of this matter.

[35] Given the interlocutory injunctions, the Special Meeting being held, and the interconnectedness of the SRFN Application and the Consolidated Proceedings, all of which I view cumulatively as exceptional circumstances, I will nevertheless assess the reasonableness of

the October 18, 2022 Decision below. It is in the interests of justice to provide further guidance on this point.

B. *Is the October 18, 2022 Decision reasonable?*

(1) SRFN's Position

[36] The October 18, 2022 Decision, which should be considered along with Chief Heron's October 7, 2022 letters to Councillors Laviolette and Bourke, is contrary to the Election Code and unreasonable. Concerning Chief Heron's letter to Councillor Laviolette, Chief Heron's basis for calling the Special Meeting does not comply with any of the grounds for removal set out in section 153 of the Election Code, including Schedule A, paragraph 4(vi)(b), which does not prohibit discussion outside of Council chambers. So neither the letter tabled at the October 6, 2022 Council Meeting nor asking to put the letter on the agenda can be a basis for a breach of the Election Code. As for the letter to Councillor Bourke, the motion not to hold a meeting with SRFN's membership concerning the Fire Centre bid does not deny membership transparency or regular communications in breach of paragraph 1(b) of Schedule A of the Election Code. Chief Heron made a decision based on personal and historical considerations by unreasonably singling out Councillors Laviolette and Bourke, rather than a decision based on the legal and factual constraints.

[37] Pursuant to section 155 of the Election Code, Chief Heron performs a gatekeeper function by being required to ensure there are proper grounds and a good faith rationale for her to refer a matter to a Special Meeting. This places a higher responsibility on Chief Heron to

ensure that there are valid grounds before calling a Special Meeting. In between her assessment of the proper grounds and the Special Meeting, Chief Heron must also speak to the affected Councillors and refer the matter for discussion at a Council meeting. This was not done.

[38] The Council had also suspended Chief Heron on October 13, 2022, therefore Chief Heron had no authority or powers pursuant to the Election Code on October 18, 2022 to call or reschedule the October 23, 2022 Special Meeting. If Chief Heron had no authority to make the October 18, 2022 Decision, then it is fatal to the decision and the October 23, 2022 Decision is a legal nullity (*Lac des Mille*).

(2) Chief Heron's Position

[39] SRFN's submissions are an example of how SRFN's application is premature because Councillors Laviolette's and Bourke's submissions should have been made at the Special Meeting. The preliminary nature of the administrative decision influences what is considered reasonable. As such, Chief Heron made a decision that was reasonable in light of the evidence in the certified tribunal record [CTR] in concluding that the conduct of Councillors Laviolette and Bourke was sufficient to meet the preliminary threshold to call a Special Meeting.

[40] Alternatively, if the Court is not satisfied that her decision was reasonable, then the Court should still decline to exercise its discretion to grant relief because SRFN does not have authority to bring this application. By bringing the application in SRFN's name, Councillors Laviolette and Bourke are authorizing the use of SRFN funds to pay legal fees to advance their interests and undermining the public interest in good government at the SRFN.

(3) Conclusion

[41] I find that the October 18, 2022 Decision was a reasonable exercise of Chief Heron's authority pursuant to section 155 of the Election Code.

[42] First, a plain reading of the relevant provisions of the Election Code indicate that the triggering provision for the calling of the meeting is section 155. That section indicates that it is the Chief alone who determines if there are sufficient grounds under section 153. Second, subsection 153(c), relied on by Chief Heron, simply provides a broad category of grounds related to failure "to act in accordance with the Rules of Conduct and Conflict of Interest provisions in Schedule "A" of these Regulations or with any policy or conduct guidelines...". I acknowledge SRFN's submission that these provisions suggest a gatekeeper function on the part of Chief Heron. When read together, these provisions place significant discretion on a SRFN Chief to determine if there are sufficient grounds to make a preliminary decision to refer any alleged improper conduct to the membership at a Special Meeting.

[43] Further, upon a review of the relevant provisions of the Election Code, there is no requirement for either the Chief, acting alone, or the Council, collectively, to speak to a Council member before referring a disciplinary matter to a Special Meeting. While that may be advisable, it is not a requirement.

[44] Chief Heron describes the following conduct as the basis for the Election Code breaches:

(1) Councillor Laviolette proposed a Motion that was developed prior to the October 6, 2022 whereby he approached Councillor members to sign it before the Council Meeting to strip Chief

Heron of her responsibilities; and (2) Councillor Bourke rescinded a Special Meeting concerning the Fire Centre bid information. Chief Heron provides that this conduct is a breach of paragraph 4(i)(b) of the Integrity provisions and paragraph 4(vi)(b) of the Responsibility to the Chief and Councillors Individually provisions of Schedule A of the Election Code. For reference, these provisions are as follows:

4(i)(b) The Chief and Council must look upon themselves as role models and treat their elected office with respect. They must discharge their duties without ill will toward any individual Member and refrain from any dishonorable conduct either in a public or private capacity, that will reflect adversely on their elected office.

4 (vi)(b) The Council chambers or designated area is a place where discussions and debate are encouraged. Debate is not encouraged outside this forum. Fair and courteous conduct towards other members of Council will contribute materially to effective decision-making.

[45] The Respondent is correct that the Election Code is the all-encompassing legal code of SRFN governing discipline and removal (*Martselos v Salt River Nation #195*, 2008 FC 8 [Martselos FC]). The Election Code contemplates that a Chief may make a preliminary discretionary decision that a Councillor is in breach of the Election Code or Schedule A. However, it is the SRFN members at a Special Meeting who will ultimately agree or disagree that there are grounds for removal of a Councillor. In short, the process for removing the two Councillors had run to completion.

[46] I note that section 155 of the Election Code, the basis for Chief Heron's calling of the Special Meeting, is similar to the "sufficient grounds" basis for the Council, acting as a collective, to refer a removal of a Councillor or Chief to the membership (section 154). I note

that Council ultimately has not sought to remove Chief Heron but also note that both provisions primarily address the notice that is required to be given to an impacted Council member. They do not set forth much detail other than this. The key part of the process is what the members who attend the Special Meeting determine. Of course, it was not likely the intention of the SRFN members in developing the Election Code to have matters routinely be placed before them at Special Meetings. However, due to the lack of additional guidance from either the customs or practices of SRFN or the express provisions of the Election Code, it is my view that the preliminary discretionary October 18, 2022 Decision of Chief Heron is reasonable.

[47] I also note that SRFN submitted that Chief Heron, being suspended on October 13, 2022, had no authority to make the October 18, 2022 Decision. I disagree with this submission because, as stated in the Overview, I find the Suspension Decision and Subsequent Suspension Decisions to be both procedurally unfair and unreasonable.

C. *Are the Suspension Decision and Subsequent Suspension Decisions procedurally fair?*

(1) Chief Heron's Position

(a) *Suspension Decision*

[48] The Suspension Decision is procedurally unfair due to a reasonable apprehension of bias on the part of Councillors Laviolette and Bourke, failure by the Council to disclose evidence, and inadequate notice. A duty of fairness is owed in respect of a discipline proceeding of an elected Chief or Councillor (*Duckworth v Caldwell First Nation*, 2021 FC 648 at paras 40-43

[*Duckworth*]), which includes a right to an impartial decision-making body (*Balfour v Norway*

House Cree Nation, 2006 FC 213). First, Councillors Laviolette and Bourke should have recused themselves as they had an interest in the outcome of Chief Heron's suspension since the Special Meeting, had it gone forward, may have had a bearing on their terms of office (*Labelle v Chiniki First Nation*, 2022 FC 456 at para 100 [*Chiniki*]).

[49] Second, a high degree of fairness is owed when a decision-maker is considering the removal or suspension of an elected leader of a First Nation, including is advance disclosure of all evidence that will be relied upon (*Tourangeau v Smith's Landing First Nation*, 2020 FC 184 at para 60 [*Tourangeau*]). The transcript of the Council Meeting discusses a range of evidence that has still not been disclosed to Chief Heron and the CTR does not produce all the relevant information from the transcript.

[50] Third, the notice leading to the Suspension Decision was inadequate to meet the high degree of fairness, which requires notice and full particulars of the allegations, that the allegations could result in the Chief's removal, and advance notice of any meeting where the removal decision will be considered (*Lower Nicola Indian Band v York*, 2013 FCA 26 [*Lower Nicola*]; *Tourangeau* at para 59). Chief Heron was not given notice that the Council Meeting would proceed despite being cancelled earlier or that the Council would proceed to consider a suspension. The Council made findings on a range of issues and evidence that were not disclosed to Chief Heron.

(b) *Subsequent Suspension Decisions*

[51] The Council did not provide Chief Heron with any notice or opportunity to make submissions for the Subsequent Suspension Decisions until August 2023, which is fatal

(*McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 94 [*Mikisew*]; *Duckworth* at para 40). By August 2023 several extensions were made without notice to Chief Heron.

[52] Furthermore, the Council relied on evidence (the single text message exchange in the CTR) that had not been disclosed to Chief Heron, which is a breach of Chief Heron's right to know the case to meet. Lastly, the recurring extensions are effectively an indefinite suspension or removal (*Lafond v Muskeg Lake First Nation*, 2008 FC 726 at para 12 [*Muskeg Lake*]). The only authority for removal is with the membership in accordance with the Election Code.

(2) SRFN's Position

(a) *Suspension Decision*

[53] First, the Council provided Chief Heron with at least 48 hours written notice of her right to be heard at the October 13, 2022 Council Meeting. Both Councillors Bourke and Laviolette swore that the Council provided Chief Heron with notice on October 11, 2022. Second, this is a similar situation to *Salt River First Nation #195 v Martselos*, 2008 FCA 221 in that Chief Heron waived her right to make representations by choosing not to attend the Council Meeting.

[54] The bias argument is without merit. The standard is what a reasonable person in SRFN would think of the situation, bearing in mind SRFN is a small community. Councillors Laviolette and Bourke could not recuse and cannot be required to recuse. Councillor MacDonald recused himself because he was Chief Heron's grandson, which left five Councillors remaining to consider the matter. If Councillors Laviolette and Bourke had also recused, there would have

been only three councillors remaining, frustrating the quorum requirements and decision-making ability. Accepting Chief Heron's argument would result in a scenario whereby any chief can frustrate the intention of the electors in enacting sections 153A and 154 by singling out enough councillors for removal, thereby preventing the Council from exercising disciplinary powers. The Election Code also does not require Councillors to recuse themselves when a suspension decision comes before Council. *Robert's Rules of Orders* also states that, although it is advisable for a member to abstain on matters affecting that member, the member cannot be compelled to abstain from voting, which is a similar principle that should apply when the SRFN exercises its power to discipline a member of Council.

(b) *Subsequent Suspension Decisions*

[55] The Council owed no duty of fairness to Chief Heron because these decisions were administrative and interlocutory decisions, not final decisions removing Chief Heron (*Knight v Indian Head School Division No 19*, 1990 CanLII 138 (SCC) [*Knight*]). Alternatively, if Council breached a duty of fairness, the Court should exercise its discretion to deny Chief Heron the remedies she seeks. Chief Heron's requested remedy would be unnecessarily disruptive of the statutory and constitutional process created by the Electors under the Election Code, so the Court should decline to issue the remedy. Otherwise, if a remedy is required, SRFN recommends the Court give a direction that the Subsequent Suspension Decisions will expire in 30 days after pronouncing judgment in SRFN's application.

(3) Conclusion on Procedural Fairness

[56] The Suspension Decision and Subsequent Suspension Decisions were rendered in a procedurally unfair manner. A suspension of an elected leader and an extension of such a suspension are serious matters which require a high degree of procedural fairness. SRFN did not discharge its duty.

[57] The Election Code does not refer to Robert's Rule of Order. As such, the Election Code, being the all encompassing legal code of SRFN, and this Court's jurisprudence, will guide my analysis.

[58] While Chief Heron cites *Lower Nicola* and *Tourangeau* in support of a high duty of procedural fairness being required for the Suspension Decision and Subsequent Suspension Decisions, she also makes these submissions to support her assertion that the Subsequent Decisions and continuous or recurring extensions were effectively a removal. I do not need to determine whether the Subsequent Suspension Decisions, considered cumulatively, are a removal. On the face of sections 153 and 153A, read together, the Election Code provides Council with the authority for issuing suspensions and extensions of those suspensions.

[59] Turning to the Suspension Decision, Chief Heron received a letter on or about October 11 or 12, 2022, setting out urgent matters, specific concerns about Chief Heron's conduct, and a list of agenda items for the proposed October 13, 2022 Council Meeting. Chief Heron submitted that she received the letter on October 12, 2022 while Councillors Laviolette and Bourke state that the Council gave Chief Heron the letter on October 11, 2022. Regardless of the date, a letter or

document was given to Chief Heron prior to the proposed October 13, 2022 meeting. The full contents of a letter do not appear in the record, just excerpts related to the grounds being relied on by the Council. As set out in the Overview, this meeting was cancelled on the morning of October 13, 2022.

[60] As for the contents of the letter, appended to the October 13, 2022 BCR, it set out the basic case against Chief Heron. The transcript of the October 13, 2022 meeting set out the discussion of the issues relating to Chief Heron. However, Chief Heron submits that she did not receive the social media communications, a memo from the Northwest Territories government concerning the Fire Centre bid, reports and requests from lawyers, and text messages with an individual named Nicole. Failure to provide extrinsic evidence that is used against Chief Heron effectively denied her the opportunity to respond meaningfully (*Tourangeau* at para 60).

Although SRFN submits that Chief Heron waived her right to be heard and make representations, the failure to provide evidence in the short timeframe between the letter and the October 13, 2022 Council meeting where the Suspension Decision was made, so that she *could* make representations in response, render the Suspension Decision procedurally unfair.

[61] Furthermore, Council's decision to proceed with the Council Meeting without Chief Heron is another violation of Chief Heron's right to procedural fairness. In the letter, Chief Heron was not provided with notice that the matter would be decided whether she attended or not (*Tourangeau* at para 61). While SRFN submits that Chief Heron waived her right to make representations by refusing to join the meeting, considering that it was cancelled earlier that day, Council did not inform Chief Heron that they would still consider a suspension in her absence.

Importantly, the letter did not set out when the Council would consider Chief Heron's suspension nor did it actually use the word suspension.

[62] SRFN acknowledges that it did not provide notice to Chief Heron for the Subsequent Suspension Decisions but submitted that notice was not required because it was an interlocutory or administrative decision (*Knight*). I am not persuaded by this submission. The failure to give notice of impending extensions renders the Subsequent Suspension Decisions just as procedurally unfair as the Suspension Decision, particularly when the Subsequent Suspension Decisions have a significant impact on Chief Heron.

[63] Turning now to whether a reasonable apprehension of bias existed, it is trite law that the test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude there is a reasonable apprehension of bias (*Committee for Justice and Liberty v Canada (National Energy Board)*, 1976 CanLII 2 (SCC)). The burden of proof is on Chief Heron as the party raising the allegation and the threshold for finding a bias is high (*Michel* at para 38). Although SRFN makes submissions that a Councillor cannot be required to recuse, if Chief Heron can meet this high threshold, then failure to recuse can render a decision procedurally unfair regardless.

[64] I am not persuaded by SRFN's submissions that Councillors Laviolette and Bourke were required to participate because a quorum would be frustrated. There is no evidence that other matters, other than the suspension of Chief Heron, would not have been able to be determined without quorum. The only guidance concerning quorum requirements are set out the Election

Code. Under section 158, the Election Code only provides for a quorum of less members if there is a resignation, death or resolution pursuant to section 156 (removal of a Chief or Councillor after a Special Meeting). The Election Code does not contemplate an emergency quorum prior to actual removal of a Chief or Councillor in the disciplinary process.

[65] Section 5 of Schedule A of the Election Code does contemplate conflicts of interest:

Members of Council must not allow themselves to be put into a position where their judgments may appear to be unduly influenced by personal considerations and shall not directly or indirectly engage in any personal or business activity which compete or conflicts with the interests of the First Nation or compromises the Councillor's ability to serve the interests of the First Nation with independence and integrity.

On its face, it is clear that the Suspension Decision was made, in part, in response to Chief Heron's stated intention to call a Special Meeting to address her own concerns with the conduct of Councillors Burke and Laviolette. As I have found above, there is also no guidance on how the determination to have Councillors Laviolette and Bourke removed should be made by Chief Heron. Without such guidance, one has to defer to Chief Heron's assessment of the grounds and leave it to the membership at the Special Meeting to determine whether the members agreed with Chief Heron. In light of the step taken by Chief Heron to call the Special Meeting in relation to Councillors Laviolette and Bourke, it then becomes apparent that Councillors Bourke and Laviolette had a personal consideration or interest and should not have participated in the Suspension Decision due to their conflicts of interest. I am satisfied that Chief Heron has satisfied her high onus of establishing that Councillors Laviolette and Bourke had an interest in having Chief Heron suspended and that both Councillors should not have participated in the vote to suspend Chief Heron (*Chiniki* at para 100).

D. *Are the Suspension Decision and Subsequent Suspension Decisions reasonable?*

(1) Chief Heron's Position

(a) *Suspension Decision*

[66] The Suspension Decision is unreasonable because there is insufficient evidence in the CTR justifying the suspension, particularly when Chief Heron was in office for only seven days. Rather, Council made the Suspension Decision in bad faith because they were motivated to quash the removal proceedings relating to Councillors Bourke and Laviolette.

(b) *Subsequent Suspension Decisions*

[67] The Subsequent Suspension Decisions are, in effect, an unlawful removal of Chief Heron. A Council cannot use a suspension power to effectively remove an elected leader (*Muskeg Lake* at para 12; *Mikisew* at para 66; *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 at paras 55, 63 [*Saddle Lake 2022*]). Also, Council has a limited ability to suspend an elected leader but the ultimate authority to decide whether a Chief should remain in office rests with the membership at the Special Meeting. The Election Code provides a time limited suspension power but if Council views that section 153 of the Election Code applies, the Council must refer the question of discipline to the membership. Council has violated its power and exceeded its authority by repeatedly and without justification invoking the 60-day suspension power.

[68] Furthermore, the inadequate evidentiary record renders the Subsequent Suspension Decisions unreasonable. First, the evidence cannot reasonably support a finding that justifies the

further suspensions of Chief Heron. The CTR, which was relied on to make the decision, only contains one text message exchange between two Councillors. In a similar situation, the Court set aside a decision because there the absence of an evidentiary record effectively removing the Court's ability to assess the reasonableness of the decision (*Okemow v Lucky Man Cree Nation*, 2017 FC 46 at para 58 [*Okemow*]).

[69] Second, the evidentiary record creates the impression that the Subsequent Suspension Decisions were arbitrary. Concerns about arbitrariness are particularly acute where the consequences for the affected party are particularly harsh and a decision may be unreasonable without grappling with these consequences (*Vavilov* at para 134). The decision had severe consequences for Chief Heron because it affectively removed her from her elected position and she has not been receiving remuneration, but the Subsequent Suspension Decisions fail to grapple with this consequence.

(2) SRFN's Position

(a) *Suspension Decision*

[70] SRFN has an express power to suspend the Chief under section 153A of the Election Code and the Council executed this power reasonably as demonstrated through the BCR, Suspension Decision, the notice informing Chief Heron of the Council Meeting, and the transcription of the recording of the Council Meeting. Council followed its restraints from both section 153A of the Election Code and the decisions concerning the removal of former Chief Frieda Martselos from SRFN (*Martselos FC; Salt River First Nation #195 v Martselos*, 2008

FCA 221). At the Council Meeting, members discussed each allegation and reached a decision that was in the range of possible decisions based on the facts before the Council.

(b) *Subsequent Suspension Decisions*

[71] First, Council has a power to “extend or renew or change any restriction or condition or suspension imposed under subsections (a) or (b)” under subsection 153A(c) of the Election Code. As such, there is no requirement for the Subsequent Suspension Decisions to be based on new grounds. The original grounds are sufficient to justify an extension of a suspension.

[72] Second, the BCRs for the Subsequent Suspension Decisions are reasonable and justified in relation to the factual and legal constraints. SRFN also continued to be constrained during the Subsequent Suspension Decisions by the SRFN Application which had not been resolved yet. Council met to discuss these constraints prior to each Subsequent Suspension Decisions, memorialized their reasons in BCRs, and came to decisions that were in the range of possible decisions.

[73] Third, the Subsequent Suspension Decisions are not removals because they are not for an unlimited time – the suspensions are only for 60 days and until this Court grants judgment in the SRFN Application. The situation here is also distinguishable from the cases that Chief Heron cites because none of the First Nations in *Muskeg Lake*, *Mikisew*, and *Saddle Lake 2022* had election laws that provided for suspensions. Here, SRFN expressly empowered Council to suspend a member of Council and extend that suspension, so exercising that power does not constitute a removal.

(3) Conclusions on Reasonableness

[74] Both the Suspension Decision and the Subsequent Suspension Decisions are unreasonable. The threshold question is whether the reasons cited in the Suspension Decision and the Subsequent Suspension Decisions comply with the permitted grounds for suspension in section 153 of the Election Code. As I have already stated above, sections 153 or 153A are not extensive.

[75] For the Suspension Decision, the BCR cites some of Chief Heron's conduct then states that the conduct is

prejudicial to the order and good governance of SRFN and is prejudicial to the economic best interests of SRFN and is contrary to the Duties and Responsibilities of Chief and Council set out in Schedule A of the Election Code and falls within the grounds for removal under section 153 of the Election Code[.]

[76] The only relevant removal ground in section 153 of the Election Code is if

c. they fail to act in accordance with the Rules of Conduct and Conflict of Interest provisions in Schedule "A" of these Regulations or with any policy or conduct guidelines, such as the *Salt River First Nation Chief & Council Code of Ethics* enacted by Band Council Resolution on January 10, 2010, which Council may from time to time enact[.]

[77] Neither party has provided the SRFN Chief & Council Code of Ethics mentioned in subsection 153(c) of the Election Code, so I am unable to assess the reasonableness of the decisions concerning this aspect of the ground. I can only address the reasonableness of the decisions concerning Schedule A of the Election Code. The wording of section 153 suggests that

only section 4 on Rules of Conduct and section 5 on Conflict of Interest in Schedule A to the Election Code may be grounds for discipline.

[78] The transcript of the October 13, 2022 meeting reveals discussions about the basis for Chief Heron's suspension but not all are tied to provisions in the Election Code, such as the discussion on Chief Heron's impugned grounds for removal of Councillor Bourke. Several other do reference Election Code provisions but do not engage with it beyond listing provisions, including the discussions on Chief Heron's alleged conflict of interest in the Fire Centre bid, her grounds for removal of Councillor Laviolette, and her conduct in communications. Discussion on the remaining grounds for suspension listed in the October 13, 2022 BCR were absent altogether.

[79] The Suspension Decision does not reference the specific provisions of the Rules of Conduct and Conflict of Interest Provisions in Schedule A of the Election Code, but the October 13, 2022 BCR refers to (i) a likely conflict of interest due to her brother-in-law's Fire Centre bid and the appearance of being unduly influenced by personal considerations; (ii) Chief Heron's calling of a public meeting to discuss the confidential Fire Centre bid; (iii) Chief Heron's competence or attention to SRFN business by not reading or responding to lawyers' reports; (iv) Chief Heron's decisions relating to the calling of a Special Meeting to consider the removals of Councillors Laviolette and Bourke; and (v) Chief Heron's conduct in communication with Councillors.

[80] I also note that Chief Heron was not in office for very long prior to the Suspension Decision. Accordingly, it is difficult to assess the reasonableness of the grounds for her

suspension without more detail being in the record (*Okemow* at para 58). The breach of procedural fairness also contributes to the insufficiency of information or evidence as Chief Heron was not able to reply to any of the allegations set out in the letter or document appended to the October 13, 2022 BCR or to the matters discussed at the October 13, 2022 Council Meeting, as set out in the transcript.

[81] The conduct allegations concerned Chief Heron's preliminary discretionary decisions to call a Special Meeting to consider removing Councillors Laviolette and Bourke appear to be the main reason for the Suspension Decision. The Suspension Decision simply states the allegations and, due to the breaches of procedural fairness, there was no engagement with any contrary evidence. Accordingly, the Subsequent Suspensions Decisions also suffer from the same lack of intelligibility and justification for the same reasons as the Suspension Decision.

[82] For example, in point (d) of the December 4, 2022 BCR, the reference to Chief Heron's alleged October 21, 2022 threat seems to come from a text from Councillor McDonald to Councillor Bourke in which Councillor MacDonald states that Chief Heron told him that "she's gonna let the members at this meeting determine what happens with us. Saying that if they want all 6 replaced that it'll happen." Although hearsay, it was information before the Council in making its decision. However, after reviewing the Election Code, Chief Heron's suspension is unreasonable because, as discussed above, Chief Heron can exercise her discretion and refer a disciplinary matter to a Special Meeting. Similarly, point (c) also incorrectly states that Chief Heron was removing Councillors Laviolette and Bourke when in fact only the SRFN membership can. It is in this section that the Council was of the view that this was sufficient

grounds to suspend her from office for 60-days (for breach of Schedule A, subsections 4(i) and (ii)). In my view, as paragraph (c) seems to be the main reason for the Subsequent Suspension Decisions under the Election Code, the reasonableness of it is tied to the finding of reasonableness in the SRFN Application.

[83] The December 4, 2022 BCR and February 2, 2023 BCRs, for the Subsequent Suspension Decisions, also unreasonably raise matters that occurred prior to October 13, 2022, such as matters occurring in 2007 and 2008. It is unclear how those prior events are relevant.

VII. Conclusions

[84] For the above reasons, the application for judicial review in the Consolidated Proceedings is allowed. Council failed to render the Suspension Decision and Subsequent Suspension Decisions in a procedurally fair and reasonable manner. However, I dismiss the SRFN's application for judicial review concerning Chief Heron's October 13, 2022 Decision because it is premature and because SRFN did not follow its Election Code in bringing its application forward. The October 13, 2022 Decision is also reasonable.

[85] Chief Heron seeks a declaration that she is entitled to all remuneration that would have been provided to her had she not been removed (*McKenzie v Mikisew Cree First Nation*, 2020 FC 1184 at para 99; *Testawich v Duncan's First Nation*, 2014 FC 1052 at para 42; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 43). SRFN made no submissions. I am persuaded by Chief Heron's submissions that, under these circumstances, she

is entitled to remuneration that should would have received had she not been suspended and had not the suspension been extended every two months. This is not an award of damages.

[86] Though submissions were not extensive, generally both parties seek costs concerning their respective applications. Chief Heron seeks full indemnity making reference to the power imbalance existing between her and SRFN. SRFN simply submitted that costs should follow the result. I note that neither party filed evidence of costs.

[87] Rule 400(1) of the *Federal Courts Rules*, SOR/98-106 [*Rules*] states that the trial judge has full discretion when awarding costs and that this discretion must be exercised judicially. Rule 400(3) sets out the various factors the Court to consider when exercising its discretion. As a general rule, costs are awarded to the successful party. Taking into account that Chief Heron has been entirely successful in the Consolidated Proceedings and in SRFN's application, that there exists a financial power imbalance and that there was no public interest at stake in the proceedings, I am exercising my discretion pursuant to Rule 400(1) to award all-inclusive lump sum costs to Chief Heron in the amount of \$12,000, payable forthwith. This is within the range of similar suspension matters (*Laboucan v Little Red River #447 First Nation*, 2010 FC 722; *Prince v Sucker Creek First Nation*, 2008 FC 1268).

JUDGMENT in T-2206-22 and T-2191-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in T-2191-22 is dismissed.
2. The application for judicial review in T-2206-22 is allowed.
3. Chief Heron is awarded remuneration for the salary she would have received had she not been suspended.
4. Chief Heron is awarded lump sum costs in the amount of \$12,000 payable by SRFN forthwith.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2206-22

STYLE OF CAUSE: CECILIA (TONI) JOSEPHINE HERON v SALT RIVER
FIRST NATION NO. 195

AND DOCKET: T-2191-22

STYLE OF CAUSE: SALT RIVER FIRST NATION NO. 195 v CECILIA
(TONI) JOSEPHINE HERON

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: SEPTEMBER 13, 2023

JUDGMENT AND REASONS: FAVEL J.

DATED: MARCH 12, 2024

APPEARANCES:

GLENN EPP	FOR THE APPLICANT IN T-2206-22
INEZ AGOVIC	FOR THE RESPONDENT IN T-2191-22
DAVID ROLF, K.C.	FOR THE RESPONDENT IN T-2206-22
CORINNA E. STEFFEN	FOR THE APPLICANT IN T-2191-22

SOLICITORS OF RECORD:

THOMPSON, LABOUCAN & EPP LLP EDMONTON AB	FOR THE APPLICANT IN T-2206-22 FOR THE RESPONDENT IN T-2191-22
MLT AIKINS LLP EDMONTON AB	FOR THE RESPONDENT IN T-2206-22 FOR THE APPLICANT IN T-2191-22