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TURTLE MOUNTAIN TRIBAL COURT OF APPEALS  
 TURTLE MOUNTAIN INDIAN RESERVATION IN THE COURT OF APPEALS  
 BELCOURT, NORTH DAKOTA

Melvin Mike Lenoir and  
 Turtle Mountain Tribal Council,  
 Petitioners-Appellants,

CIV-02-0039

vs.

MEMORANDUM DECISION

Richard Monette,  
 Respondent-Appellee.

PER CURIAM

The Acting Chairman of the Turtle Mountain Band of Chippewa Indians, Melvin Mike Lenoir, and the members of the Tribal Council appeal to this Court from a June 24, 2002 decision of the lower court, Honorable Eugene DeLorme<sup>1</sup> presiding, vacating a temporary restraining order entered by the Honorable Sharon Malaterre on May 15, enjoining Monette from conducting business as Chairman of the Band. The TRO was apparently entered pursuant to a request from the Tribal Council to judicially enforce a May 13, 2002 Tribal Council resolution, TMBC2157-05-02, purporting to remove Monette from his elected position for various reasons laid out in the resolution.<sup>2</sup> Oral argument was held before this Court on the 27<sup>th</sup> day of June 2002 with the Tribal Council appearing through Lynn Boughey, Attorney at Law, and the Chairman appearing through

<sup>1</sup> Judge DeLorme was a Special Judge appointed by the lower court to conduct a permanent restraining order pursuant to the order of this Court dated May 22, 2002.

<sup>2</sup> Among other things, the resolution cites to alleged "neglect of duties, malfeasance and omission of duties and responsibilities" as grounds for removal.

Jerilyn DeCoteau, Attorney at Law.<sup>3</sup> For the reasons stated herein, this Court affirms the decision below, although on slightly different grounds, vacates the temporary stay granted on June 25, 2002, and remands to the lower court with instructions.

On May 13, 2002 the Turtle Mountain Tribal Council, acting with a quorum, enacted a resolution purporting to remove the Chairman from his position as the Chairman of the Band and to replace him with Appellee, Melvin Mike Lenoir, the Tribal Vice-Chair, for the balance of the Chairman's term.<sup>4</sup> The Chairman was not present at the Council meeting where this resolution was passed, although it appears that he may have had some notice in the form of the topic being written on a board with other Council agenda items and his acknowledgment to persons at the Tribal Administration building that day that removal was a distinct possibility.<sup>5</sup> Attempts to procure his attendance at the meeting were unsuccessful, although he appeared to be in the building at the time so the Tribal Council proceeded with a removal hearing.<sup>6</sup> It is beyond peradventure that no

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<sup>3</sup> The Court appreciates the prompt filing of briefs and outstanding oral presentations made by both counsel on very short notice because of the expedited nature of this appeal.

<sup>4</sup> The Court notes that the record below contains two different versions of the resolution purporting to remove the Appellant, one version contains a veto by the Appellant and the other contains an affirmation by Appellee Lenoir. This issue was not addressed by the lower court and will therefore not be addressed by this Court.

<sup>5</sup> At hearing below, the Chairman acknowledged that he saw his removal as an item on the agenda, but asserted that the item had been there several other times and was never addressed.

<sup>6</sup> No transcript of the removal hearing has been provided to the Court. It appears that the principal complaints against the Chairman stemmed from his directing the Tribal Election Board to conduct a constitutional election in June of 2002, without a formal Council resolution approving of the same, and his serving as an Appellate Judge for another Tribal Judicial System. This Court takes no position on whether these allegations, if true, constitute grounds for removal as this issue is not before the Court.

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written notice of particularized charges was provided to the Chairman prior to May 13, 2002.<sup>7</sup>

Sometime after the enactment of this resolution, and the record below is not clear on this, the Tribal Council filed a request with the Tribal Court for a temporary restraining order to prevent Monette from conducting business as the Chairman of the Tribe. Initially, the Court below entered an ex parte temporary restraining order dated May 14, 2002 restraining Monette from conducting any business as the Chairman of the Tribe and scheduled the matter for hearing on a permanent injunction for May 24, 2002. That order was vacated on the same day and the Court below ordered the Chairman to show cause why he should not be restrained from conducting business as the Chairman on May 15, 2002. A hearing was conducted on May 15, 2002 on which date Monette appeared and participated. The Court below, as the result of that hearing, entered a temporary restraining order essentially recounting the same restrictions in the temporary restraining order entered the previous day. The May 15, 2002 order purported to be a temporary restraining order although it did not clarify the period of time the order would remain in effect and did not have a return date for a permanent restraining order hearing. From that May 15, 2002 order the Appellant filed an interlocutory appeal in which he asked this Court to step into this dispute and take jurisdiction over all issues involved. This Court declined to exercise jurisdiction over the dispute, but did order the lower court to conduct a permanent restraining order hearing with all "due haste" to address the issue of whether the Chairman's removal had been conducted in accordance with the Turtle

<sup>7</sup>There was some testimony below regarding the custom of putting topics on the Council agenda in the same manner that the removal topic was listed, but the Court below concluded that this "customary" method of notice did not comport with due process of law.

Mountain Tribal Constitution and the Indian Civil Rights Act, see 25 U.S.C. §1301 et seq.

All due haste turned out to be June 17, 2002 when a permanent restraining order hearing was held before the Tribal Court, pro-tem Judge Gene DeLorme presiding. At that hearing Judge DeLorme took testimony from both parties limited to the issue this Court restricted him to- whether the removal was effectuated in accordance with constitutional limitations and the ICRA. Judge DeLorme made no attempt to assess whether the grounds for removal urged by the Tribal Council were sufficient, but only whether procedural due process was complied with and whether the Constitution and By-Laws of the Turtle Mountain Band of Chippewa Indians permitted the Chairman to be removed by a "removal proceeding" instituted by the Tribal Council.

Judge DeLorme concluded that the method of removal utilized by the Council was permitted by the Constitution, Article VIII, Section 2, only if the Tribal Council had enacted an "ordinance prescribing regulations, charges and reasons for removal. . .". He concluded that the method utilized by the Council to remove the Chairman on May 13, 2002 did not comport with Article VIII, Section 2 and did not afford the Chairman sufficient notice and due process to comply with the Indian Civil Rights Act. He therefore vacated the temporary restraining order and denied the request for a permanent restraining order.

The Tribal Council then appealed to this Court and requested that the Court stay enforcement of Judge DeLorme's order pending appeal. This Court granted the appeal, expedited it, and stayed the enforcement of Judge DeLorme's order in order to maintain

the status quo created by Judge Malaterre's temporary restraining order on May 15, 2002.<sup>8</sup>

It is quite apparent to this Court that the all Parties to this dispute have been operating in a murky legal environment brought about by prior actions of previous tribal administrations where laws would be passed by one administration and repealed by the next administration. In such an environment, it is not unusual for disputes to arise regarding which law is applicable and for these disputes to be legitimate, good faith differences of opinion. This Court is going to attempt to step into the murky waters of the state of the law on the Turtle Mountain reservation in an attempt to resolve this instant dispute.

The Parties have a fundamental difference of opinion over whether the Turtle Mountain Tribal Council retains the constitutional right to "remove" the Chairman or whether that right has been delegated exclusively to the people through the enactment of Chapter 13 of the Turtle Mountain Tribal Code of Laws on August 29, 1996. Judge DeLorme did not decide this issue because he did not find it dispositive of the issues herein.<sup>9</sup> This Court believes the issue needs to be addressed, however, both for purposes

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<sup>8</sup> Although the Chairman did not file a cross-appeal from Judge DeLorme's decision, it is apparent from his brief and oral argument that he disagrees with the fundamental premise of Judge DeLorme's opinion that the right of the Council to remove him remains intact after enactment of Chapter 13 of the Turtle Mountain Tribal Code. This Court permitted him to argue this issue to it and will address it herein.

<sup>9</sup> Judge DeLorme found that there was sufficient customary evidence of the use of removal by the Tribal Council after 1976 to find that the Council's authority existed by reference to a removal proceeding in 1978. The Chairman's argument, however, is that the "removal power" was delegated exclusively to the people in 1996 when Chapter 13 was enacted, however, and thus it would be irrelevant what occurred in 1978 if this argument was persuasive.

of this appeal and a somewhat "companion" case, LeFountain v. Turtle Mountain Tribal Council, also argued on June 27, 2002.

The Tribal Council argues that Chapter 13, as amended in 1996, was repealed on November 21, 1996 by Resolution TM460R11-96. That resolution rescinded the actions of the former Tribal Council, which had enacted new Chapters 1-34 of the Tribal Code on November 1, 1996 and reverted back to the Tribal Code of 1976. This is relevant because Chapter 13 of the 1976 Tribal Code, at Chapter 13.1301, permits the "legal Council" to remove a Tribal Officer by majority vote for reasons specified in the section. This should be contrasted to the 1996 Code, which does not contain a section authorizing the Tribal Council to remove an officer, but only refers to the right of the people to recall an elected official. Thus, the Chairman argues that Chapter 13 of the 1996 Tribal Code prevents the Council from "removing", while the Council argues that the 1976 Chapter 13 is still intact and the Council has the authority to remove.

The Chairman, in his brief and oral argument, makes a creative argument for the survival of Chapter 13, as amended in 1996, which this Court finds correct. The amendments to Chapter 13 of the Tribal Code were enacted on August 29, 1996, separate and apart from the wholesale adoption of Chapters 1-34 of the proposed 1996 Code by the Council on November 1, 1996. The November 21, 1996 resolution only rescinded the adoption of the Code sections effected by the Council on November 1, 1996 and specifically reinstates the 1976 Code, including Chapter 13 and any additions or amendments thereto. (Emphasis added). The provisions of the amendments to Chapter 13 survive the November 21, 1996 resolution, therefore, to the extent they do not conflict with the Tribal Code of 1976 and the Tribal Constitution. In order to achieve this result,

however, Chapter 15, as passed in August of 1996, must be construed as an amendment to the Chapter 13 contained in the 1976 Code and not an express repeal of it. Otherwise, this Court would be vitiating the clear intent of the Council on November 21, 1996 to return to the law contained in the 1976 Code and its amendments.<sup>10</sup>

The Court disagrees, however, with the Chairman's further argument that the Tribal Council delegated exclusive authority to the people to both "remove and recall" tribal elected officials through passage of Chapter 13 in 1996. Although the Chapter 13 enacted in 1996 as an amendment to the 1976 Chapter 13 does not contain express provisions for the Tribal Council to remove elected officials, but only refers to the "recall" procedure, the Court believes that the Turtle Mountain Constitution clearly distinguishes between "removal" and "recall" at Article VIII, Section 2. Although Chapter 13.12 refers in its caption to "Recall, Removal, and Referendums", in its statement of purpose it refers only to the right of the voters to "recall any representative", and no reference is made to the right of removal which the Council is preserved the right to prescribe rules and regulations for under the Constitution. In essence, the Chairman is arguing that the Council, by failing to enact an ordinance governing removal procedures, has abdicated this right and the only method of removal is recall.<sup>11</sup>

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<sup>10</sup> Were this Court to literally adopt the argument that all legislation subsequent to the 1976 Code should be considered amendments, it would completely defeat the obvious intent of the Council to rescind parts of the 1996 amendments to the Code and to reinstate the 1976 Code.

<sup>11</sup> To the extent that the Chairman is arguing that the people vested the Council with the right of removal and the Council delegated that right back to the people through passage of Chapter 13, that argument is rejected because rights reserved the Council by the people cannot be delegated to other entities, including the people. See *Mistretta v. United States*, 488 U.S. 361 (1989). This does not mean, of course, that the people cannot take away the

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This is where this Court parts company with the Court's reasoning below. The Court below found the removal of the Chairman constitutionally deficient because it concluded that no ordinance was in place that "prescribe(d) regulations, charges, and reasons for removal..". This ruling ignores the existence of Chapter 13.1301, which clearly defines the grounds for removal. Judge DeLorme, without reaching the issue of whether 13.1301 survived the amendments to Chapter 13 in 1996, found this section wanting because it did not prescribe "regulations" for the removal. This Court disagrees with the lower court that an ordinance must lay out the exact procedure to be utilized by the Council in removing elected officials before a removal proceeding can be commenced. Courts should exercise caution in attempting to micro-manage the legislative removal process because such a proceeding is a "political" proceeding that does not implicate the same liberty and property interests as a courtroom proceeding. See Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe, 416 F. Supp. 655 (D. Minn. 1976). A Tribal Council need not have formal procedures, contained in an ordinance, governing the introduction of testimony, cross-examination, a written record, and written reasons for decision, in order to conform to the due process requirements of the Indian Civil Rights Act. As one Court has ruled in assessing what type of procedure must be utilized in a removal proceeding, the Chairman was entitled to the even-handed application of tribal customs, traditions and any

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power of removal through a constitutional amendment, but only that the Tribal Council cannot delegate it away through an ordinance or resolution.

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formalized rules relative to the impeachment proceeding itself," Stands Over Bull v. BIA, 442 F. Supp. 360, 376 (D. Mont. 1977).<sup>12</sup>

This Court concludes that Chapter 13.1301 of the 1976 Tribal Code remains intact as the method of Tribal Council removal of elected officials and that this section comports with the constitutional mandate of Article VIII, Section 2, of the Turtle Mountain Constitution that the Council enact ordinances governing removal proceedings. To the extent, therefore, that Judge DeLorme found that the Chairman was removed in violation of substantive due process, or the lack of applicable law, we disagree.

A decision of the lower court should be affirmed, however, if any ground relied upon by the trial court is upheld. Judge DeLorme also found that the Chairman was removed in violation of procedural due process and it is this ruling we now turn our attention to.

As Judge DeLorme correctly noted, the right to continue to hold elective office is a property right that cannot be taken without due process of law. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). (T)he process due in removal proceedings includes, at a minimum "oral or written notice, an explanation of the evidence, and an opportunity for an (elected official) to present his side of the story." Loudermill, at 546, 548. This includes the requirement that the allegations contained in a removal notice be specific enough to allow an elected official to respond. As one commentator has noted:

"The law has tended toward the requirement that, even where no particular procedure is prescribed whereby the power to expel an officer may be exercised, such proceedings should be had as will give the person charged an opportunity to

<sup>12</sup> It should be noted that the Stands Over Bull decision was issued prior to the United States Supreme Court decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), which severely proscribed the authority of the federal courts to review Indian Civil Rights Act cases.

be heard. See Art Jur 2d, Public Officers and Employees (1st ed B 215). The power to remove a public officer, considered by itself alone, has been characterized as executive in nature, when it is associated with the discretionary prerogatives of high executive office, at least. However, when, as essential prerequisites to the exercise of that power, there must be a formulation of charges, notice thereof, a hearing, and a decision. See Art Jur 2d, Public Officers and Employees (1st ed B 216), 115 ALR 3, 159 ALR 627.

See also Suro v. Padilla, 441 F. Supp. 14 (D.P.R. 1976)(in action by chief of selective service section of Puerto Rico national guard to prevent his removal from office, district court had jurisdiction to enjoin such removal, notwithstanding fact that military officers serve at pleasure of President of United States, where, inter alia, chief's property interest in office, although not identical with those of civil service employees, was so significant as to constitute protected right.) See also MacDonald v. Brooks, 387 SW2d 803 (1965).

Although this case presents a close call because of the natural hesitancy a Court should exercise in reviewing a political proceeding, the Court is not convinced that the lower court's decision was based upon clearly erroneous findings of fact or clear errors in interpretation of what process was due the Chairman. The most telling deficiency in the process provided the Chairman is the lack of specific, particularized, allegations of grounds for removal that were conveyed to the Chairman sufficiently in advance of the Council meeting to permit him to respond. This Court has not doubt that the Chairman was aware that an effort was underfoot to remove him by the Council and he consciously chose not to attend the meeting. There is also evidence below that the Chairman was aware of the rumblings of discontent regarding certain of his actions, including his directing the Election Board to hold a constitutional election without Council approval, and that he observed on the board the agenda item regarding his removal. He also had

apparently observed this item on the board on prior occasions. However, he apparently had been away from the reservation until the day before May 15, 2002 and never was notified in writing or orally the specific grounds his removal was being sought to enable him to muster a defense. This is the deficiency that leads this Court to believe that due process was not provided to Monette, who was after all the duly-elected Chairman that had been installed in office by the people of the Band.

We therefore affirm the ruling of the Court below that the Chairman was not provided procedural due process when he was removed and further affirm the order vacating the temporary restraining order.

The Tribal Council requested at oral argument that we maintain our stay of the lower court's order until such time as it could convene the Council for a removal hearing. Although we are sympathetic to avoiding the scenario the Council envisions as the result of the lower court's ruling, this Court has no authority to, in essence, suspend the Tribal Chairman pending an appropriate removal hearing.<sup>18</sup> There is no longer an active dispute before this Court or the lower court to justify maintaining jurisdiction over this matter. Any new action would have to be commenced in the lower court and addressed there.

If the Tribal Council wants to renew its attempts at removal, nothing in this order prevents it from doing so. Nor should the Council believe this ruling in any way intimates that this Court is advising that course. This dispute is a political one that the Court was invited into by the actions of the Parties and not out of some desire to make its opinions

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<sup>18</sup> This Court takes no position on the Council's authority to suspend, as that issue is not before the Court.

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on the subject known or to take sides. The Court will therefore vacate its stay effective July 1, 2002 at 8:00 a.m. at which time, absent any further action by the Court below, the Chairman may reassume his duties as Chairman.

LET THE MANDATE ISSUE ACCORDINGLY.

CHIEF JUSTICE JONES, JUSTICES JOHNSON, AND SWALLOW CONCUR

Dated this 28<sup>th</sup> day of June, 2002.

*B. J. Jones*

CHIEF JUSTICE BJ JONES

ATTEST:

*[Signature]*  
Clerk of Courts

<sup>14</sup> This Court rejects the insinuations in some of the briefs to the Court that the lower Court "took sides" on this dispute. Instead, it appears that the Court staff attempted to accommodate all parties while preserving the record for this Court and they acted in a professional manner in doing so.

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TURTLE MOUNTAIN TRIBAL COURT OF APPEALS  
TURTLE MOUNTAIN INDIAN RESERVATION IN THE COURT OF APPEALS  
BEL COURT, NORTH DAKOTA

Melvin Mike Lenoir and  
Turtle Mountain Tribal Council,  
Petitioners-Appellants,

CIV-02-0039

vs.

MANDATE

Richard Monette,  
Respondent-Appellee.

The Court having issued its memorandum decision and good cause having been shown it is hereby

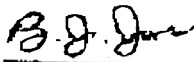
ORDERED, ADJUDGED, AND DECREED that the lower court's decision vacating the temporary restraining order and denying a permanent restraining order to the Petitioners-Appellants is AFFIRMED and the lower Court is instructed to dismiss the petition for a restraining order, and it is further

ORDERED, ADJUDGED AND DECREED that this Court's stay entered on June 25, 2002 shall be lifted effective July 1, 2002 at 8:00 a.m..

So ordered this 28<sup>th</sup> day of June 2002.

CHIEF JUSTICE JONES, JUSTICES JOHNSON, AND SWALLOW CONCUR

Dated this 28<sup>th</sup> day of June, 2002.



CHIEF JUSTICE BJ JONES

ATTEST: \_\_\_\_\_  
Clerk of Courts