

COURT OF APPEALS

in the SSM Chippewa Tribal Court of Appeals

Jan Achilles v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians

APP-2023-05

Decided: December 29, 2023

BEFORE: BIRON, BUTTS, CORBIERE, DIETZ, and DEMOORE Appellate Judges.

Opinion and Order

Biron, Karrie Chief Appellate Judge, who is joined by Appellate Judge Butts, Corbiere, Dietz, and DeMoore.

For the reasons explained below, the Sault Ste. Marie Tribe of Chippewa Indians Election Committee’s (Election Committee) April 10, 2023 decision entitled The Election Committee’s Written Decision, In the matter of Election Contests regarding the Special Advisory Election (“4/10 Decision”) is hereby reversed and vacated; and the Appellant’s appeal is dismissed. In reversing the Election Committee’s April 10, 2023 decision, as more fully explained below, this Court holds that the decision of the Election Committee to characterize a violation of the Election Ordinance as harmless error was in violation of Tribal law such that the Appellant was denied a substantive right or caused an unjust result. Nevertheless, the intervening action of the Board of Directors’ Resolution No. 2023-190 has afforded the Appellant a complete remedy by rendering the Special Advisory Election void; no further proceedings are required and her appeal is dismissed.

Facts and Procedural History

On January 6, 2023, the Election Committee published the Sault Ste. Marie Tribe of Chippewa Indians Notice of Special Advisory Election (“Election Notice”) for a vacant Unit One Director seat and set forth the following dates:

- Jan. 20thDeadline for voter registration. Last day to receive Letter of Intent for potential candidates. Roll of registered voters prepared and posted. Nomination petitions available.
- Jan. 27thNominating petition deadline.
- Feb. 1st List of eligible candidates available.
- Feb. 6th Deadline for contests relating to nominations and voter registration.
- Feb. 24thSpecial election ballots mailed to voters.
- Mar. 20thSpecial Advisory Election Day.
- Mar. 23rdDeadline for contest relating to vote count.

On March 20, 2023, the Election Committee concluded the Special Advisory Election by counting the ballots for the vacant Unit 1 seat.

On March 21, 2023, the Appellant submitted an election contest pursuant to STC §10.118 alleging:

Subject: Election Complaint

Date: Tuesday, March 21, 2023 at 8:42:41 PM Central Daylight Time

From: Jan

To: Benjamin Pachito, kleach@saulttribe.net

CC: ASchlehuber@saulttribe.net, lcausley@saulttribe.net, klee@saulttribe.net, bfreiheit@saulttribe.net, rmcrorie@saulttribe.net, tlaplaunt@saulttribe.net, imckechne@saulttribe.net, mmckerchie@saulttribe.net, dmorrow@saulttribe.net, sborowicz@saulttribe.net, alowes@saulttribe.net, bsorenson@saulttribe.net, khampton@saulttribe.net

In accordance with Section 10.118 Election Contests of the Sault Tribe Election Ordinance I am submitting a Contest of the Special Advisory Election held on March 20, 2023.

A member of the Election Committee and sister to candidate Joanne Carr was opening ballots and remained inside the count area throughout the election count.

This is in violation of the Election Ordinance Section 10.108 Tribal Election Committee:

(3) If an Immediate Family Member of an Election Committee member files as a Candidate, that Committee member shall be disqualified from participating in any action of the Election Committee relating to the office for which the Immediate Family Member has filed.

This election has been corrupted and should be voided.¹

On March 7th, 2023 there was a resolution placed on the board agenda and it was suddenly taken off, with no explanation. This was in regards to ballots being sent out nearly 2 weeks early. Whether it was actually an error still remains suspicious.

One candidate had already mailed her campaign flyers out while the other 2 candidate were waiting for when the ballots SHOULD have been out and the tribal paper sent, along with their campaign information. This also reeks suspicions.

This election should have been null and void as soon as it was realized the Election Committee had made the so called "error".

But to continue to see the whole events surrounding this election, (with nary a word from the BoD) is irresponsible. To remain silent throughout this whole ordeal is not being transparent as most of you campaign on.

Please do the right thing and leave the position open until everything is done correctly, according to the laws and procedures that you promised to follow.

Jan Achilles

*Administrative Record, May 11, 2023 at 006.*¹

¹ See May 11, 2023 *Order to Appellee to Prepare/Produce Record* defining the Administrative Record as “any complaints, correspondence, reports, investigation materials, video footage, emails, texts, notes, pleadings, testimony, deposition, notice, decision, judgment or other evidence (“Administrative Record”) used by the Election Committee to reach its April 10, 2023 written decision”

On March 29, 2023, the Election Committee issued and emailed a *Notice of Hearing* on April 5, 2023 (“4/5 *Notice*”) to the Appellant informing her that on March 27, 2023, the Election Committee voted to conduct further investigation into [her] allegations and convene a hearing on the matter. *Administrative Record* at 0029. The 4/5 *Notice* also informed the Appellant that the hearing would be a closed session where she would be permitted an opportunity to make an oral statement and present evidence, that witness statements would be accepted but no witnesses would be called or examined during the hearing. *Id.* The 4/5 *Notice* also informed Appellant that if she was unable to attend, a written statement and documentary evidence could be submitted to the Election Committee prior to the hearing for consideration. *Id.*

On April 4, 2023 the Appellant submitted a written statement to the Election Committee asserting that her “initial complaint should stand on its own merits” and raising new issues such as the timing of the posting of the notice for the Special Advisory Election and the timing of the printing and mailing of the ballots. *Administrative Record* at 0041. She alleges that the Special Advisory Election “has been corrupt from beginning to end...” calls for the Election Committee members to [recuse themselves] and indicates she cannot attend the meeting in person due to being “18 hours away an Elder, and on a fixed income.” *Id.*

On April 5, 2023, the Election Committee convened for a hearing on the Election Contests. *4/10 Decision* at 2.

On April 10, 2023, the Election Committee issued and delivered a written decision to the Appellant, and other Contestants, dismissing all Election contests finding:

1. Election Committee member Carol Pages-Montie is the sister of Special Advisory Election candidate Joanne Pavlat-Carr and, therefore, is an “immediate family member,” as defined by Section 10.103 of the Election Ordinance.
2. Ms. Pages-Montie did participate in the Special Advisory Election held on March 20, 2023 in the following manner: (i) Ms. Pages-Montie opened ballot envelopes and (ii) Ms. Pages-Montie did sit at the table where ballots were inserted into the electronic ballot counter and did monitor the tabulation process.
3. Ms. Pages-Montie’s participation in the Special Advisory Election did violate Section 10.108 of the Election Ordinance.
4. The Election Committee did not receive any evidence to substantiate any claim that the tabulation of ballots or election results were specifically impacted by Ms. Pages-Montie’s participation in the Special Advisory Election.
5. The Election Committee finds that the violation of tribal law resulting from Ms. Pages-Montie’s participation in the Special Advisory Election constitutes a harmless error and did not affect the legitimacy of the tabulation of votes or the results of the Special Advisory Election held on March 20, 2023.

6. The Election Committee finds that the actions of the Election Committee [Member] Carol Pages-Montie at the ballot count on March 20, 2023 did not corrupt the Special Advisory Election and does not warrant nullifying the Special Advisory Election or otherwise redoing the Special Advisory Election. *Id.* at 2 -3.

The *4/10 Decision* further attempted to address the Appellant’s additional contest assertions, holding:

- the issue of the timeliness of the posting of the Notice of Election was not clearly or timely raised; and,
- the issue of early mailing of the ballots was already litigated and decided by this Court and not properly before the Election Committee.

On April 17 2023, Appellant timely filed a Notice of Appeal of the Election Committee *4/10 Decision* dismissing her Election Contest. *Notice of Appeal*. Appellant argues that the Election Committee improperly dismissed her contest as harmless error which was “based on Ms. Pages-Montie, sister of candidate Joanne Pavlat-Carr, opening election ballots in violation of Election Ordinance [STC §] 10.108(3)...” *Id.* She asserts that the Election Committee “avoided the subject of the contest, failed to produce evidence of a harmless error and failed to afford those who contested a reasonable opportunity to present their case. *Id.* Appellant further takes issue with the resources² afforded to the Election Committee members versus those contesting alleged wrongdoing. *Id.*

On April 18, 2023, this Court issued a *Briefing Schedule Order* and set the matter for oral argument for May 5, 2023.

On April 21, 2023, Appellant filed her *Appellant Brief*. Appellant’s Brief varied little from her *Notice of Appeal* and requested this Court to void the Special Advisory Election and remove Ms. Pages-Montie from her position on the Election Committee.

On April 28, 2023, Appellee, the Election Committee, timely filed its *Brief in Opposition* arguing that Appellant’s submissions on appeal “are largely unresponsive to issues presented in the [*4/10 Decision*] and fail to provide any basis to find that the Election Committee abused its discretion or otherwise “act[ed] in an arbitrary or unreasonable way that result[ed] in [the] Appellant being unfairly denied a substantial right or being caused to suffer an unjust result.” *Brief in Opposition* at 2-3. The Appellee further argued that “all parties agree that Ms. Pages-

² The issue of resources allocated by the Board of Directors to independent regulatory bodies of the Tribe, Tribal Departments, and/or individual Tribal Members to litigate matters that may come before this Court, regardless of any allocation of blame or finding of fault is a matter solely within the purview of the Board of Directors and its control over the Tribal Treasury and hence, will not be addressed in this Opinion. Every litigant that appears before this Court may be represented by legal counsel but the funding of such representation is outside of this Court’s jurisdiction.

Montie's participation in the Special Advisory Election did violate Section 10.108 of the Election Ordinance and asserts that the issue before this Court is whether or not the Election Committee's decision that the violation of law constituted "harmless error" as it related to the Special Advisory Election was an abuse of discretion. *Id.* at 4. The Appellee contends that no abuse of discretion occurred and offers that its determination was supported by the following:

- A total lack of any evidence to substantiate any claim that the tabulation of ballots or election results were specifically impacted by Ms. Pages-Montie's participation in the Special Advisory Election;
- Review of all written materials and oral statements submitted by the Contestants;
- Review of video surveillance footage of the entire ballot count;
- Verbal responses from Ms. Pages-Montie to questions posed by legal counsel for the Election Committee;
- Review of the Election Committee's election day procedures from the moment the ballot box was retrieved to the conclusion of the count;
- Review of prior practice and history of similar violations of law; and
- The gravity of the requested remedy in light of the foregoing evidence and arguments.

Id. at 5.

The Appellee further asserts that the Appellant's "due process rights" were not violated given Appellee's decision to issue the *4/5 Notice* and provide Appellant the opportunity to be heard. *Id.* at 7. Appellee further asserts that the issue of whether or not Appellant's due process rights were violated, is "beyond the scope" of this Court's review. *Id.* Nevertheless, Appellee goes on in its brief to address the argument, asserting that: (1) "the Election Ordinance does not require a hearing to be provided;" (2) "the Election Ordinance permits the Election Committee to convene a hearing if in its discretion one would aid in its determination;" and (3) "no hearing was, in fact, requested"...but the Election Committee (in interpreting a Contestant's request for a date and time the Election Committee would hold a meeting regarding her contest as a request for hearing) did "grant the request because it believed the nature of the allegations" warranted an opportunity for the Contestants to provide further evidence "on how the tabulation of votes and results of the Election were impacted by Ms. Pages-Montie's participation" in the Special Advisory Election. *Id.* at 7-8, See also the *4/5 Notice*.

Finally, the Appellee argues that the Appellant's requested relief is extraordinary and threatens to cause greater harm than the violation at hand. Appellee asserts that "given the absolute lack of evidence that the violation of law impacted the tabulation of the votes or the results of the election," the remedy of nullifying the Special Advisory Election would be too severe. *Id.* at 9.

On May 5, 2023, oral arguments were held by this Court. Appellee was represented by counsel. Appellant was present via Zoom. Both parties' arguments were largely consistent with the papers filed.

On May 11, 2023, this Court entered an *Order to Appellee to Prepare/Produce Record* which required the Appellee to "identify[] and attach[] each item by type and date, including but not

limited to any complaints, correspondence, reports, investigation materials, video footage, emails, texts, notes, pleadings, testimony, deposition, notice, decision, judgment or other evidence (“*Administrative Record*”) used by the Election Committee to reach its April 10, 2023 written decision”.

On May 22, 2023, Appellee filed a *Motion to File Under Seal Or In The Alternative, Motion for Protective Order* requesting permission to file both a redacted and unredacted *Administrative Record* arguing that certain documents/communications within the *Administrative Record* are privileged communications between the Election Committee and its legal counsel.

On May 30, 2023, this Court denied the Appellee’s request to file under seal and granted the Appellee’s Motion for Protective Order.

On May 31, 2023, the Sault Tribe Board of Directors passed Resolution 2023-190 which resolved (in relevant part):

- (1) That the Board of Directors hereby declares the ongoing 2023 Special Election to be void and orders the Election Committee to within 30 days post a Notice of Election for a subsequent Special Election to fill the current vacant Unit 1 Board of Directors seat.
- (2) ...
- (3) That all candidates that participated in the ongoing 2023 Special Election shall be reimbursed for expenses incurred based upon their submitted receipts.

On June 7, 2023, this Court convened a status conference with the parties to determine their desire to proceed with the appeal after receipt of the *Administrative Record* and Resolution No. 2023-190. At the status conference, the Appellee informed the Court that all of the Election Committee members had formally resigned and orally motioned to dismiss the matter as moot (emphasis added) due to the Board of Directors intervening action to grant the Appellant her relief requested. The Appellant expressed a desire to continue with her appeal and for this Court to issue a formal written opinion. *June 8, 2023 Status Conference, Achilles*. No written Motion to Dismiss was ever filed by the Appellee.

On September 11, 2023, a Sault Ste. Marie Tribe of Chippewa Indians Referendum failed to receive the requisite number of votes necessary to effect Resolution 2023-190.

As a matter of law, the March 20, 2023 Special Advisory Election is void.

Jurisdiction and Standard of Review

Tribal Code § 10.120(7) allows for direct appeal to this Court in limited original circumstances. Under Tribal Code § 10.120(7) written decisions of the Election Committee “issued pursuant to subsection (2)(c) may be appealed to the Sault Tribe Chippewa Tribal Court of Appeals pursuant to Chapter 82.” Chapter 82 “establishe[s] the procedures by which appeals are taken from decisions of . . . the Election Committee.” (STC § 82.101). Section 82.201 establishes who may appeal the decision of the Election Committee and the limitations of such

an appeal: (1) a challenge to the decision of the Election Committee must allege that the Election Committee acted in a manner not consistent with Tribal law; and (2) the challenge must be personal to Appellant and not a generalized grievance. Section 82.202 sets forth that an appeal is proper before this Court if it “concerns a final decision of the Election Committee rendered pursuant to Tribal Code Chapter 10 at Section 10.120(c).” Accordingly, this Court has limited jurisdiction to hear appeals where an Appellant has filed a proper challenge or contest in accordance with § 10.118(1) and the Election Committee has rendered a decision in writing in accordance with § 10.120. (STC § 10.120(2)(c). “This Court will not substitute its judgment for the judgment of the Election Committee, unless the Election Committee’s actions were arbitrary or unreasonable.” *Catherine Hollowell v. Sault Ste. Marie Tribe of Chippewa Indians Election Committee*, APP 14-02 at 2 (May 28, 2014) and result “in an Appellant being unfairly denied a substantial right or being caused to suffer an unjust result.” (STC § 82.210). Furthermore, this Court will not entertain arguments that were not first the subject of an election contest from which a written decision resulted. *Isaac McKechnie v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-16-05 (July 15, 2016).

In every matter before this Court, our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi’idiwin* (practice absolute kindness), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) must guide this Court’s decision-making. *Payment v. The Election Committee of the Sault Ste Marie Tribe of Chippewa Indians*, APP-2022-02 (December 5, 2022).

Discussion

It is worth repeating that Tribal Elections are an integral part of self-governance and the task of administering a fair and impartial election is often daunting amidst the make-up of Tribal communities. *See Berger v. The Election Committee of the Sault Ste. Marie Tribe of Chippewa Indians*, APP-2023-02 (March 20, 2023). Tribal Elections are a process, not an event. Every election comprises numerous elements and multiple actors throughout the pre-election, Election Day and post-election periods, all of which affect the transparency, inclusiveness, accountability and competitiveness of a Tribal Election. Public confidence in each step of a Tribal Election is critical to the integrity of the election. Tribal Members not only have a right to participate in elections, they have a right to know for themselves whether the electoral process is valid. Public confidence of voters in the election process directly correlates with confidence in the resulting Tribal government.

This Court appreciates that the time it took to issue this decision further exacerbates and may frustrate the intentions of parties to find a rapid resolution to their grievances. However, delays flowed from protracted events on the present facts such as the necessity to cure procedural defects relative to the production of the *Administrative Record* for the Appellant. Further, intervening and simultaneous Board of Directors’ action in passing Resolution No. 2023-190, which carries with it the force of law and informs this Court’s decision, warranted *ayaangwaamizi* (careful and cautious consideration) and compelled the delay to ensure that this Court acted with *minadendmowin* (respect – act without harm) in an already emotionally charged situation.

As a threshold matter, this Court must address the standing of the Appellant to bring the matter before this Court. While the Appellee makes no argument as to the standing of the Appellant, standing limits participation in lawsuits and asks whether the person(s) bringing a lawsuit has enough cause to “stand” before the court and advocate, as not anyone can go to court for any reason. In Western society, to have standing, a party must show an “injury in fact” to their own legal interests, that such injury is the direct result of the issue being complained of, and that this Court can grant the relief requested – otherwise known as redressability. See *Lujan v. Defenders of Wildlife*, 504 US 555 (1992). Under Tribal law, related to Election matters, standing requires that an appeal from an Election Committee decision be personal to Appellant and not a generalized grievance “shared in equal measure by all or a large class of similarly situated parties.” (STC § 82.201).

This Court continues to rely on the Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense), *zaagi’idiwin* (practice absolute kindness), *minadendmowin* (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) to determine whether standing exists. This Court’s decisions have cast a wide net as to standing when it comes to Tribal Elections and can think of nothing more personal or individual in nature to a Tribal Member than to cast their ballot for their candidate of choice and have that vote counted in a fair and impartial election. *Sault Tribe Constitution*, Article V, Section 4 (“Any person eighteen (18) years of age or over who is a member of the tribe shall be eligible to vote in tribal elections.”). Tribal Members should be allowed to challenge the decisions of the Election Committee, as decisions of the Election Committee are fundamental to the internal governance of the Tribe.” *Liedel and Freiheit v. SMTCI Election Committee*, APP-08-05 (March 25, 2008); *Berger, supra* at 4. Therefore, guided by our Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense) and *ayaangwaamizi* (careful and cautious consideration)– derived from this Court’s previous decisions, as a threshold matter, we *sua sponte* find that a violation of the Election Ordinance is personal to the Appellant and not a mere generalized grievance where such violation has interfered with her expectation of a fair and impartial election and, ultimately, may have impacted her right to vote and the associated right to have her vote fairly and legally counted, without which the right to vote is rendered null. Moreover, there is no question that this Court, as a matter of law, possesses the ability to grant relief as requested by the Appellant to void the Special Advisory Election. (STC § 82.203)³.

Having found that standing exists, this Court is next tasked with reviewing the actions and decision of the Election Committee as those relate to Appellant’s contest to determine whether the Election Committee acted in a manner inconsistent with Tribal law such that the Appellant was denied a substantive right or suffered an unjust result. (STC § 82.210).

A Tribal Member’s right to vote in a Tribal Election is a fundamental Constitutional right afforded to all Sault Tribe members who have attained the age of majority. The Appellant argues that the Special Advisory Election was riddled with defects, errors and violations affecting public confidence. Appellant further argues that a violation of the Election Ordinance

³ STC § 82.203. Scope of Court’s Review. In reviewing a matter on appeal, and in strict compliance with Section 82.210, the Court of Appeals may affirm, modify, vacate, set aside or reverse any decision of the Election Committee or remand the matter and direct entry of a new decision or require such further proceedings as may be just and equitable under the circumstances.

is enough to void the entire Special Advisory Election and that imposition of the standard put forth by Appellee that the violation must affect the *outcome* (emphasis added) of the election is inconsistent with Tribal law. Appellant contends that the application of that standard by the Election Committee illegally impacted the Tribal Election, her right to vote and the associated right to have her vote fairly and legally counted. The Appellee counters that such a violation has occurred before which reinforces the Election Committee’s finding of “harmless error.” Appellee offers no basis for this argument other than it has happened before and Tribal Elections were certified. Appellee does not indicate whether those previous violations and subsequent certifications were the subject of a contest or complaint – just that they occurred. Appellee further argues that the relief requested is extraordinary and unwarranted, contending that the violation did not affect the outcome of the election.

Once again, this Court finds itself presented with arguments steeped in emotion, stress and suspicion in relation to the Special Advisory Election at issue that have disrupted the Sault Tribe communities’ *mino-bimaadiziwin* (“harmony in life, to live in balance with all of creation”). Early in the election process, this Court was called upon to address an “unintentional clerical error” in connection with this very election. See *Berger, supra*, generally. In that case, for the reasons explained in *Berger*, this Court declined to find that the Election Committee acted in a manner inconsistent with Tribal law that denied a substantive right or caused the Appellant to suffer an unjust result when it allowed the Special Advisory Election to proceed despite a clerical error which resulted in the early mailing of ballots. *Id.*

In our *Berger* Opinion, this Court cautioned that the Election Ordinance and the provisions thereof pose “meaningful requirements, which provide consistency and predictability in the Tribal Election process and must be followed by the Election Committee.” Unlike *Berger*, and despite this Court’s cautionary advice, an undisputed violation of STC §10.108(3) is present here, involving an Election Committee Member’s active participation in the election at the polling place by sorting and counting ballots when her immediate family member was a candidate in the Special Advisory Election.

It is worth noting that STC §10.108(3) is effective upon the filing of candidacy of an Immediate Family Member of an Election Committee Member. It is unknown if the Election Committee Member in question continued participation “in any action of the Election Committee relating to the office for which the Immediate Family Member has filed” after it was known that her sister was running for office. But, if her participation in the last stages of the Special Advisory Election on Election Day is indicative of the practice of the Election Committee throughout the Special Advisory Election, she may have participated in every step of the process in violation of the Election Ordinance.⁴ Note that this Court imputes no ill intent or nefarious

⁴ Appellant requested the removal of Ms. Carol Pages-Montie from the Election Committee in her filings and at oral argument. While this Court understands that she has already resigned, this Court notes that STC § 10.108(6) is instructive here and this Court would have no jurisdiction to grant such relief as it states when an Election Committee Member violates the Election Ordinance “[i]t shall be cause for removal from the Election Committee by the Board of Directors if any member violates this Chapter [10].” STC §§ 10.118 and 10.119, creating a right for “[a]ny [Tribal] Member to contest or file a complaint during the election process” may also serve as a check and balance on Election Committee member activity but ultimately removal is within the discretion of the Board of Directors, not this Court.

behavior to the Election Committee, Election Committee member or her participation in events of the Special Advisory Election – there is simply no evidence before this Court of that – but any continuing participation by her in actions of the Election Committee throughout the course of the Special Advisory Election would constitute continuing violations of the Election Ordinance.

In addition, the Appellant raises due process arguments related to the process employed by the Election Committee in disposing of her contest. Appellant claims she was denied the right to appear and be heard, and that the Appellee’s shifting of an “impossible burden for contestants to prove” (i.e. that the Election Committee Members’ violation of the Election Ordinance affected the outcome of the election) is not consistent with Tribal law. Citing *McKechnie, supra*, and STC § 82.202, the Appellee counters that the Appellant’s due process arguments are outside of the scope of this Court’s review as this issue was not raised in the Appellant’s original contest. Nevertheless, the Appellee goes on to address the Appellant’s due process arguments, so we will address them here, as well.

The Appellee proffers that the Election Committee scheduled a hearing on the Appellant’s contest (even though one was not required under Tribal law), provided notice of the hearing to the Appellant, and provided an alternate ability to submit evidence if the Appellant could not participate in person. Appellee further offers in a footnote that this election contest is fundamentally different than that of *Payment, supra* in that it is a contest related to an election rather than an election complaint brought against a specific individual. Such a conclusion is contrary to this Court’s responsibility to instill *nibwaakaawin* (wisdom-use of good sense), *minadendmowin*, (respect – act without harm) as well as *ayaangwaamizi* (careful and cautious consideration) in our actions and that of the Appellee. Moreover, this Court disagrees that the Appellant did not raise a due process concern in the initial filing of her contest. In fact, her written statement to the Appellee in advance of the April 5, 2023 Election Committee hearing referenced the barriers to her participation. *Administrative Record* at p 041.

Indeed, this Court is concerned that the Election Committee-neglected to apply *nibwaakaawin* (wisdom-use of good sense) in convening a hearing and then significantly limiting the method in which a party was able to appear when widely used electronic or telephonic options are frequently used by courts and tribunals when a party is unavailable in person - as well as the Election Committee’s lack of *minadendmowin* (respect- act without harm) in disallowing the calling or examining of witnesses during the proceedings. This Court is aware that Election Committee Hearing Procedures⁵ do exist and should have been followed in this instance and all instances in which STC § 10.120(2)(d) gives rise to the necessity of a hearing. This Court has also recently admonished the Election Committee for its apparent lack of due process considerations given individuals who come before the Election Committee. If a hearing is to be held, whether voluntary or not, the same rules must apply to parties that appear before the Election Committee unless otherwise authorized by law. The continued disregard of due process by the Election Committee needs immediate correction lest continued community unrest and widespread distrust in the Election process is further advanced.

⁵ See Attachment A, Election Committee Hearing Procedures.

Acknowledging a clear violation of a Tribal law but choosing to allow the Special Advisory Election to stand is an action this Court finds to be arbitrary and unreasonable. Hollowell, *supra*. Thus, this Court must continue to the second prong of the inquiry and determine whether the Election Committee's determination that the contested violation of the Election Ordinance constituted harmless error violated Tribal law *such that the Appellant was denied a substantive right or suffered an unjust result*. (emphasis added) (STC § 82.210). We find that it did.

To the best of this Court's knowledge, harmless error is a legal doctrine not defined by Tribal law and not found within the confines of the Election Ordinance. The Harmless Error Doctrine is defined as "[t]he doctrine that an unimportant mistake by a trial judge, or some minor irregularity at trial, will not result in a reversal on appeal. *Harmless Error Doctrine, Black's Law Dictionary* (11th ed. 2019). In *Berger*, this Court characterized the error of early mailing of the Special Advisory Election ballots as harmless in its affirmation of the Election Committee's decision to proceed with the Election. *Berger, supra* at 6. Here, the Appellee attempts to apply the same logic to determine that the Election Committee members continuing violation of the Election Ordinance constitutes harmless error. We disagree.

In *Berger*, no violation of the Election Ordinance occurred, and the error was technical in nature. Here, the Election Committee was not presented with a mere error – harmless or otherwise – they were presented with a clear violation of the Election Ordinance. The characterization of the violation that occurred during this Special Advisory Election by the Election Committee as harmless error does not make it so – it is not error (of any kind) *it is a violation of Tribal law*. This Court can find no authority within the Election Ordinance that allows the Election Committee to excuse a violation of law. While mistakes occur, *Berger, supra*, there is an expectation on the part of the Tribal government and the Tribal Membership that the election process be above reproach and that Tribal law will be followed. When it is not, and a clear violation of Tribal law is present, this Court may find an unjust result to be the outcome. Such is the case here with Ms. Pages-Montie's participation in the Special Advisory Election.

Further, it is clear that the Appellant was denied the substantive right of due process when the Election Committee's own Hearing Procedures were not followed. In addition, the Election Committee imposed an "impossible" burden of proof on the Appellant and other Contestants – not found anywhere in Tribal law - to establish that the actions of Ms. Pages-Montie adversely affected the outcome of the Special Advisory Election. This Court finds that imposition of this burden without any notice or basis in law as a condition precedent to granting the requested relief requested was arbitrary and unreasonable as well as a violation of Appellant's substantive due process rights.

Here, through the adoption of Resolution No. 2023-190, the Tribal Government agreed that the violation of Tribal law could not stand and voided the election. Despite Tribal Government action, this appeal remained, and this Court has a role to play in resolving the dispute between the parties regarding the question of mootness raised by the Appellee during the June 8, 2023 Status Conference. To the best of this Court's knowledge the legal doctrine of mootness, has yet to be addressed in this Court. It is not mentioned in the Tribe's Constitution,

Chapter 82 or Chapter 10 – the Tribal laws most relevant to this inquiry. Although Tribal law is silent on mootness, STC § 81.105, the Chapter of the Tribal Code that addresses Civil Jurisdiction and Procedure, sets forth the hierarchy of laws applicable to civil disputes, in pertinent part, as follows:

- (1) In all civil cases, the Tribal Court shall apply the laws of the Tribe, any laws of the United States that may apply.
- (2) In the absence of applicable federal or tribal law, the law of the State of Michigan.
- (3) ...

Therefore, looking to the United States Supreme Court for guidance, this Court is instructed that generally, a case becomes moot when the issues presented are no longer “live”.⁶ The mootness doctrine demands, basically, that the facts and circumstances that existed to start the lawsuit must remain throughout the lawsuit for the Court to issue a decision on the matter. However, the “capable of repetition” doctrine may apply as an exception to the mootness doctrine when there is a likelihood that a situation will continue to arise or become “ripe” yet again.⁷

The myriad of election matters that have made their way to this Court in recent months lead this Court to believe that the exception described above is applicable here. While the remedy requested by Appellant (i.e. voiding the Special Election) has been rendered moot by the intervening action of the Board of Director’s Resolution No. 2023-190, the issue on appeal, and root of the Appellant’s argument, that remains “live” after Tribal Government action to void the Special Advisory Election is the “harmless error” standard adopted by the Election Committee’s *4/10 Decision*. Applying the Anishinaabe teachings of *nibwaakaawin* (wisdom-use of good sense) after *ayaangwaamizi* (careful and cautious consideration), application of an incorrect standard cannot be left unaddressed. While the remedy requested by Appellant is moot, the issue on appeal - the legal impact of a violation of Tribal law on a Tribal Election is not - as it would persist beyond these facts to potentially affect Tribal Election cycles (i.e. there is a likelihood that a situation will continue to arise or become “ripe” yet again) moving forward. In that regard, this Court issues this Opinion as precedent in election related matters involving a violation of Tribal law and as additional guidance on this Court’s previous opinions relating to the substantive right of due process - rather than issue a simple dismissal of the matter as moot.

Therefore, after review of the materials presented to the Court both in writing and at oral argument, and in light of the events following oral argument, this Court finds that the decision of the Election Committee to characterize the Election Ordinance violation as “harmless error” was a violation of law that denied a substantive right or caused an unjust result to the Appellant. Notwithstanding this finding, the intervention of the Board of Directors while this Court was still trying to acquire the *Administrative Record* provided a complete remedy to the Appellant and no further proceedings in that regard are required.

⁶ See *Mills v. Green*, 159 U. S. 651, 653 (1895)

⁷ See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911)

Finally, this Court has noted before the gravity of the responsibilities undertaken by the Election Committee to carry out its duties under the STC, Chapter 10, Election Ordinance – an especially daunting task during the regular election cycle, let alone when such an election occurs outside of that cycle, as is the case with Special Advisory Elections. This Court also notes that the Election Ordinance is largely silent as to violations of the Election Ordinance leaving enforcement thereof within the purview of the Election Committee – another enormous task that, in most Tribal communities, can be thankless and lacking sufficient resources. It is incumbent on the Board of Directors to ensure proper training, administrative and legal support as well as financial resources to properly carry out the mandates of the Election Ordinance while balancing the due process rights afforded Tribal membership within the Sault Tribe Constitution. Perhaps, the plethora of election-related challenges in recent time will induce the Board of Directors not only to review and reform this process to provide necessary resources to the Election Committee but also to lend more transparency and inclusiveness to the election process to restore public confidence, support and *mino-bimaadiziwin* (“harmony in life, to live in balance with all of creation”).

ORDER

For the reasons specified above, the Appellee’s Election Committee Decision of April 10, 2023, is reversed and vacated. Appellant’s appeal is dismissed as no further proceedings are required in light of Resolution No. 2023-190 and the declaration of the Special Advisory Election as void.

It is SO ORDERED.

ELECTION COMMITTEE HEARING PROCEDURES

SECTION I - MISCELANIOUS

1.1 These Election Committee Hearing Procedures ("Procedures") are applicable to a hearing called pursuant to 10.120(2)(d).

1.2 These Procedures are intended minimally burdensome to enable parties to present their case to the Election Committee with as little procedural formality as is reasonably possible.

1.3 Upon the request of a party and upon an affirmative vote of the Election Committee the Chair may waive procedural matters herein where the imposition of the given procedure would impose undo hardship upon a party where the hardship is not the result of the requesting parties own actions.

SECTION II - HEARING PROCEDURES

2.1 General Procedures:

a. The Chair of the Election Committee shall convene the hearing at the designated time, date and place and shall schedule an additional meeting for the Election Committee should additional deliberations on the findings become necessary. The Chair will ensure that a collegial atmosphere prevails and enforce time limits, as necessary, for the presentation of arguments. During the hearing, parties to a the hearing shall have an opportunity to state their case, present evidence, designate witnesses, ask questions and present a rebuttal. The procedures may be taped upon a vote of the Election Committee.

b. To protect the confidentiality of the hearing's information, the Chair of the Election Committee may limit attendance at the hearing to the complainant, the respondent, witnesses for either party.

c. Witnesses called by either party shall be excluded from the proceedings except when testifying. Witnesses must confine their testimony to their own independent recollection and may not speak for others. The Election Committee may limit the number of witnesses.

d. Each party must present her/his own case.

e. An attorney for a party and the Election Committee may be present throughout the hearing but has no voice in the hearing unless granted permission by the Chair.

f. To assure orderly questioning, the Chair of the Election Committee must recognize individuals before they speak. All parties have the right to speak without interruption. Each party has the right to question the other party and to rebut any oral or written statements submitted to the Election Committee. The Chair of the Election Committee shall enforce announced time limits on each party to present its case and, if necessary, extend equal time to each party.

g. The burden of proof for all matters is “preponderance of the evidence.”

2.2 The hearing will proceed as follows:

a. The Chair introduces members of the Election Committee, the complainant, the respondent and attorneys, if any. The Chair reviews the hearing procedures, including time restraints, if any, for presentations by each party and witnesses. If the proceedings are to be taped, the Chair must inform the parties.

b. The Chair recognizes the complainant to present without interruption any statements relevant to the complainant’s case, including the redress sought. The Chair then recognizes questions directed at the complainant by the Election Committee and the respondent.

c. The Chair recognizes the complainant’s witnesses, if any, to present, without interruption, any statement relevant to the complainant’s case. The Chair then recognizes questions directed at the witnesses by the Election Committee and the respondent.

d. The Chair recognizes the respondent to present without interruption any statements relevant to the respondent’s case. The Chair then recognizes questions directed at the respondent by the Election Committee and the complainant.

e. The Chair recognizes the respondent’s witnesses, if any, to present, without interruption, any statement relevant to the respondent’s case. The Chair then recognizes questions directed at the witnesses by the Election Committee and the complainant.

f. The complainant may refute statements by the respondent and the respondent’s witnesses, if any, and present a summary statement.

g. The respondent may refute statements by the complainant and the complainant’s witnesses, if any, and present a summary statement

h. The Election Committee may ask questions of any of the participants in the hearing.

2.3 After all evidence has been presented, with full opportunity for explanations, questions, and rebuttal, the Chair of the Election Committee shall excuse all parties to the

hearing and convene the Election Committee to determine its findings in executive session. When possible, deliberations should take place directly following the hearing.

SECTION III - DECISIONS

3.1 When a majority of the Election Committee finds based on a preponderance of the evidence that a violation of the Election Ordinance has occurred and that redress is possible it shall render its findings including any imposed fines, penalties or other remedial action in writing. The written finding shall indicate the rationale for the decision and the major elements of evidence.

3.2 When a majority of the board finds, based on a “preponderance of the evidence,” that no violation of Tribal Code Chapter 10: Election Ordinance has occurred it shall render its findings in writing. The written finding shall indicate the rationale for the decision and the major elements of evidence, or lack thereof.

3.3 The written finding shall inform the parties of their right to appeal pursuant to 10.120(7).

3.4 The Chair shall forward copies of the written findings to the parties involved.

SECTION IV - RECONSIDERATION

If new evidence should arise, either party to a hearing may request the Election Committee to reconsider the case within 30 days upon receipt of the writing finding. The written request for reconsideration is to be sent to the Chair of the Election Committee, who shall promptly convene the Election Committee pursuant to 10.120(1) and (2) to review the new material and render a decision on a new hearing pursuant to 10.120(2)(d).