TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN TRIBAL COURT OF APPEALS

Turtle Mountain Judicial Board; Chairperson Debra Gourneau; Lou Ann Slater; Joyce Fandrick; and Terry Jerome, Defendants/Appellants. v. Turtle Mountain Band of Chippewa Indians, Plaintiff/Appellee.	)	TMAC No. 04-007 Civil No. 04-1126 **ORDER AND OPINION**

Before: Justices JERILYN DECOTEAU, MATTHEW L.M. FLETCHER and MONIQUE VONDALL.

Appearances: Donald G. Bruce, for the Defendant/Appellants;

Michael F. Daley, Wheeler Wolf Law Firm, for the Plaintiff/Appellee; and

Eugene L. DeLorme, as Amicus Curiae.

By Justice FLETCHER for a unanimous Court.

ORDER

For reasons stated in the opinion below, the lower court's June 29, 2004 Memorandum Decision and Order is AFFIRMED IN PART and REVERSED IN PART. This Court orders and declares the following:

1. Except as otherwise noted, the lower court's Memorandum Decision and Order of June 29, 2004 is AFFIRMED;
2. The Judicial Board has no authority to suspend tribal or appellate court judges without complying with the Rules of Judicial Board Regarding Investigation and Discipline of Judges, Court Personnel and Elected Officials, particularly as to the notice provisions of Rules 5 and 7;
3. The Judicial Board retains the authority to suspend tribal and appellate court judges but only in strict compliance with its own Rules and with the Turtle Mountain Band common law, particularly this Order and Opinion and the Memorandum Decision in *Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025. The lower court's order to the contrary is VACATED; and

4. Rule 22 of the Rules of Judicial Board Regarding Investigation and Discipline of Judges, Court Personnel and Elected Officials is unconstitutional. The Judicial Board is hereby permanently enjoined from invoking or enforcing Rule 22;
5. The lower court's order to the Judicial Board to draft new Rules and submit them to the tribal court and the Tribal Council is VACATED.

OPINION

I. Facts and Procedural History

On May 13, 2004, the Duly Elected and Certified Judicial Board of the Turtle Mountain Band of Chippewa Indians (hereinafter "Judicial Board") "immediately suspend[ed] Tribal Court Administrator/Special Tribal Judge Shirley Cain with pay during the impeachment investigation and impeachment proceedings beginning on May 17, 2004." Duly Elected and Certified Judicial Board of the Turtle Mountain Band of Chippewa Indians Resolution #04-05-101-JB at 1 (May 14, 2004) (hereinafter "Judicial Board Resolution"). The Judicial Board Resolution provided that Judge Cain would be provided with a "Summons and Complaint as her written notice." *Id*. This "Complaint" would "enumerate the impeachment charges against … Judge … Cain…." *Id*. The Judicial Board Resolution noted that Judge Cain "shall have twenty (20) days to provide the Judicial Board with her Answer." *Id*. In the record, there is no copy of a "Complaint" as contemplated by the Judicial Board Resolution and it appears likely that no such "Complaint" ever existed.

Instead of a "Complaint," the Judicial Board served the Judicial Board Resolution onto Judge Cain on May 17, 2004 at 4:31 p.m. *See* Defendants' Answer & Counterclaim at 2, ¶ 3. The Judicial Board Resolution itself, however, states that Judge Cain "is hereby notified that she is to cease and desist from attending work and the Turtle Mountain Tribal Court in any capacity." Judicial Board Resolution at 1. The Judicial Board Resolution further noted that the Judicial Board would hold Judge Cain in contempt if she "failed to obey." *Id*.

It appears that the Judicial Board anticipated that the twenty days allowed for Judge Cain to file her "Answer" would begin to run on May 17, 2004. Before the expiration of those twenty days, however, the Turtle Mountain Band of Chippewa Indians (hereinafter "Band") initiated this proceeding in Tribal Court on June 4, 2004.

The Band in its Complaint for Injunctive Relief (hereinafter "Band's Complaint") sought an injunction that would prohibit the Board from "the suspension of Tribal Court judges in violation of Judicial Board rules" and vacate the Judicial Board Resolution. *See* Band's Complaint at 3. The Band had initially hired Judge Cain on February 19, 2004, *see* Band's Complaint, Exhibit B[1] (hereinafter "Cain Contract"), in conjunction with a 638 contract between the Band the Bureau of Indian Affairs, *see id*., Exhibit A[2]

[1] Special Judge Consultant Contract Through Memorandum of Understanding: Turtle Mountain Band of Chippewa, Bureau of Indian Affairs, and Shirley M. Cain, Attorney at Law (Feb. 19, 2004).
[2] Turtle Mountain Band of Chippewa Indians and Bureau of Indian Affairs Memorandum of Agreement (Feb. 19, 2004) (hereinafter "638 Contract").

(hereinafter "638 Contract"). The Cain Contract presumably expired on February 23, 2005 in accordance with Article X (A) of the 638 Contract.[3]

After a June 23, 2004 hearing, Associate Special Judge El Marie Conklin issued a Memorandum Decision and Order on June 29, 2004 (hereinafter "Memorandum Decision and Order") substantially granting the relief requested by the Band. Specifically, the Tribal Court enjoined the Judicial Board "from any further suspensions of Tribal Court judges…." *See* Memorandum Decision and Order at 2. As to Judge Cain, the Tribal Court held that the Judicial Board "exceeded their authority" in suspending Judge Cain. *See id*. The Tribal Court made "a specific finding that the defendant Judicial Board has exceeded its authority insofar as it has acted to suspend judges without notice and without an opportunity to respond and defend against complaints which may be made against them." *Id*. at 1-2. The Court also made a finding of fact that "the Judicial Board has summarily suspended four Tribal Court judges in a short time frame." *Id*. at 3. Finally, the Tribal Court made the following ruling:

> The authority to suspend judges may be reinstated upon submission to this Court and the Tribal Council, acceptable rules and procedures that are found by the Court to comport with due process. The Court[']s approval can be accomplished by submission to this Judge or another special judge with legal training and judicial and administrative experience. The contemplated rules are to be approved by resolution after review and approval has been submitted to the Council by the Judicial Board. The rules must add to the stability of the Tribal Court, the Judicial Board and the Turtle Mountain Tribe as a whole. The Court finds that there will be irreparable harm to the Tribe is this action is not taken.

Id. at 2-3. The Tribal Court denied the Judicial Board's motion for a stay pending appeal. *See id*. at 4.

On or about July 1, 2004, the Judicial Board filed a request to appeal with this Court, along with a request for a stay of execution, and a brief in support.[4] The Band moved to dismiss the appeal on the basis that it had never been properly served with this pleading. *See* Plaintiff/Appellee's Motion to Dismiss Request and Notice of Appeal and To Dismiss Request for Stay of Execution (July 16, 2004). The Judicial Board filed a "Supplemental Brief on Appeal" on July 20, 2004 disputing the Band's allegations. Chief Justice Huma Ahsan issued an order granting the request for appeal, denying the stay of execution, and setting a briefing schedule on October 4, 2004.

The Judicial Board did not file a brief by November 4, 2004, the date required in the briefing schedule set by this Court. The Band filed a pleading suggesting to this Court that the Judicial Board had abandoned its appeal. *See* Appellee's Brief at 2 (Dec. 6, 2004). After oral arguments before a panel consisting of Chief Justice Ahsan and Justices

---

[3] Neither party has conclusively demonstrated to the Court whether the Band extended Judge Cain's contract beyond February 23, 2005. However, at oral argument, Counsel for the Judicial Board, Donald G. Bruce, implied that Judge Cain's contract was not renewed. This Court, for purposes of this opinion, assumes for the purposes of this Order and Opinion that Judge Cain is no longer affiliated with the Tribal Court.

[4] This pleading was filed July 2, 2004 and styled, "(1) Request & Notice of Appeal, (2) Request for a Stay of Execution on Trial Court Order, & [sic] (3) Facts, (4) Issues on Appeal and Brief."

Matthew L.M. Fletcher and Monique Vondall on January 7, 2005, this Court issued an "Order Granting Request for Continuance and Granting Leave for Third Party to Submit an Amicus Brief" on January 31, 2005. The Judicial Board had represented to this Court that Mr. Eugene L. DeLorme was a primary drafter of Article XIV and much of the tribal code. The Judicial Board also represented to this Court that it would ask Mr. DeLorme to file an Amicus Brief in this matter on the intent of the drafters of Article XIV. On or about May 10, 2005, the Judicial Board filed its Brief on Appeal and Mr. DeLorme filed an Amicus Brief.

On May 12, 2005, this Court heard oral argument in this matter.

II. Preliminary Justiciability Questions

Before reaching the merits of this appeal, we must first determine whether there is sufficient justiciability for this Court to decide this matter. As such, we must determine whether this case is moot and whether the Band has sufficient standing to bring this action in the first instance.

The authority of this Court to decide cases, part and parcel of the justiciability analysis, is a "cultural question, the resolution of which may or may not be consonant with Anglo-American traditions." *Pearsall v. Tribal Council for the Confederated Tribes of the Grand Ronde Community of Oregon*, 31 Indian L. Rptr. 6095, 6095-96 (Confederated Tribes of the Grand Ronde Community of Oregon Ct. App., Mar. 9, 2004); *cf. Rave v. Reynolds*, 23 Indian L. Rptr. 6150, 6157 (Winnebago Sup. Ct., July 9, 1996) ("Tribal customs and traditions should inform any tribal court standing analysis.") (citation omitted). The Turtle Mountain Band's "history and constitution began in time immemorial, a point that should not be forgotten…." JERILYN DECOTEAU, TURTLE MOUNTAIN BAND OF CHIPPEWA: CONSTITUTION CONVENTION AND REVISION PROCESS 2001-2002, at 9 (Turtle Mountain Community College Project Peacemaker 2002). As such, we must look to the law of the Turtle Mountain Band community, not to federal law, to decide the scope of this Court's authority.[5]

Whether a case is justiciable under Turtle Mountain Band law depends on whether there is an actual case and controversy. The Turtle Mountain Band Constitution outlines the scope of the judicial authority for this Court. It states, in relevant part, "The Judicial Branch of government of the Turtle Mountain Band of Chippewa Indians shall have jurisdiction … to adjudicate actual cases and controversies that arise under the Turtle Mountain Constitution…." TURTLE MOUNTAIN BAND CONST. art. XIV, § 3(a). Other tribal courts have noted that the "case and controversy" requirement appears in Article III of the United States Constitution. *E.g.*, *Burnette v. Rosebud Sioux Tribe*, 1 Tribal Court Rptr. A-51, A-55 (Rosebud Sioux Tribal Ct., April 22, 1978). As a result, these tribal courts have looked to federal court opinions to interpret the "case and controversy" requirement. *E.g.*, *Burnette*, *supra*, at A-55. In contrast, tribal courts reviewing tribal constitutions that do not contain the "case and controversy" language

[5] We note with disappointment that no party or amicus has utilized Turtle Mountain Band case law in support of their arguments, despite the fact that nearly all Turtle Mountain Band appellate court decisions are posted at http://www.turtle-mountain.cc.nd.us/cases.htm (last visited May 15, 2005). The lone exception is a cursory citation by the Band and the Judicial Board to *Parisien v. Turtle Mountain Judicial Board*.

tend to not rely upon federal cases to interpret their constitutions at all. *E.g.*, *Judy v. White*, No. SC-CV-35-02, 2004.NANN.0000007, at ¶ 24 (Navajo Sup. Ct., Aug. 2, 2004) (declining to adhere to American precedents on justiciability because, "[i]n its theoretical form, justiciability considers whether the dispute sought to be adjudicated can be presented in an adversarial context, in a form historically viewed as capable of judicial resolution by English/American courts"); *Rave*, *supra*, at 6158 ("In light of the traditions of openness to the healing of disputes which long characterized traditional Indian dispute resolution, this court expressly declines to follow this limiting federal rule of standing.").

This Court acknowledges the requirement of the Turtle Mountain Constitution that it can only entertain "actual cases and controversies," a concept that "has its origins in federal law," *Judy*, *supra* at ¶ 24, while also acknowledging that "this Court will endeavor 'to infuse and tribal [court] system with our own concepts of justice which more closely reflect our societal beliefs,'" *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 4 (Turtle Mountain Band Ct. App., Feb. 1, 2005) (quoting Christine Zuni, *Strengthening What Remains*, *in* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 114, 119 (2004)). As a result, where Turtle Mountain Band law is silent, this Court draws from both federal law and the law of other tribes when interpreting the "actual cases and controversies" language contained within Article XIV of the Turtle Mountain Band Constitution. *See Herrera v. Decoteau*, No. TMAC 03-004, at 2 (Turtle Mountain Band Ct. App., Nov. 30, 2004); *see also Whiteeagle v. Cloud*, 32 Indian L. Rptr. 6024, 6026-27 (Ho-Chunk Nation Sup. Ct., Jan. 3, 2005) (applying similar methodology).

A. Mootness

Given that Judge Cain's employment has ended, this Court raises on its own motion whether this action is moot.[6] *See Rave*, *supra*, at 6156 (holding that issues of justiciability can be raised at any time by a party or even the court). An action is moot where "a controversy no longer exists…." BLACK'S LAW DICTIONARY 1029 (8th ed. 2004). No actual controversy exists if events have occurred that make it impossible for this Court to issue relief, or when the lapse of time has made the issue moot. *See Komalestewa v. Hopi Tribe*, No. AP-004-90, 1996.NAHT.0000008 (Hopi Ct. App., March 29, 1996); *see also Howard Dana and Associates v. Navajo Housing Authority*, No. A-CV-04-81, 1982.NANN.0000008, at ¶ 11 (Navajo Ct. App., April 22, 1982) (dismissing appeal as moot where lower court issued order giving plaintiff adequate remedy at law). It appears that the relief the Band requests – vacature of the Resolution – would not actually result in the restoration of Judge Cain to the bench because the Band did not renew her contract in February of this year. Despite this seeming mootness, our inquiry does not end there.

There is a critical exception to the mootness doctrine. We have adopted a rule that a case otherwise moot, but is "capable of repetition yet evading review," remains a live controversy. *See Tribal Council Majority Membership v. Bennett*, No. [TMAC docket no. not available], at 4 (Turtle Mountain Band Ct. App., July __, 1996); *see also Benally v. John*, No. A-CV-27-81, 1983.NANN.0000042, at ¶ 17 (Navajo Ct. App., May 5, 1983)

[6] Counsel for the Judicial Board also raised the question of mootness during oral argument, but did not brief the issue.

(same). The Colville Confederated Tribes Court of Appeals adopted a series of criteria to consider when determining if an apparently moot case should not be dismissed:

> (1) "Public or private nature of the question presented;
>
> (2) "The desirability of an authoritative determination which will provide future guidance to public officers;
>
> (3) "The likelihood that the question will recur; and
>
> (4) "The likelihood that the question will never be decided by a court due to the short-lived nature of the case."

L.S.-L. v. Colville Confederated Tribes, No. AP00-004, 2001 NACC.0000003, at ¶¶ 18-21 (Colville Confederated Tribes Ct. App., March 5, 2001) (citation omitted). These four criteria are merely factors to be applied; although in nearly all instances there should be some showing that the case implicates all four. These principles, adopted by at least two other tribal courts, are consistent with the Turtle Mountain Band Constitution's "actual cases and controversies" requirement.

Applying these criteria, this Court holds that this matter should not be dismissed as moot. This matter, relating to the independence of the tribal judiciary and to the fundamental meaning of Article XIV of the Turtle Mountain Band Constitution, easily meets the first criterion established by the *L.S.-L.* Court – a public matter of great importance. The second criterion is satisfied by the likelihood that the Judicial Board, the tribal court judges, and the other branches of the Turtle Mountain Band government require guidance as to how to proceed in cases where the Judicial Board begins an investigation of a tribal court judge. And, given that both the Judicial Board and the Tribal Council have alleged a history that both have acted several times to remove tribal judges without due process, *see* Memorandum Decision and Order at 2 (finding a "pattern of conduct" by the Judicial Board in suspending tribal judges without due process); Oral Argument of Donald G. Bruce, Counsel for Judicial Board (May 12, 2005) (asserting that the Tribal Chairman and Tribal Council had once removed the entire Turtle Mountain Band Appellate Court); Judicial Board's Brief on Appeal at 1 (asserting that a former Turtle Mountain Band chairman once removed the appellate court); Band's Complaint, at 2, ¶ 9 (alleging that the Judicial Board has also suspended Chief Judge MaDonna Marcellais), this Court finds that it is likely this situation will recur. Hence, this matter meets the third criterion.

In addition to the importance of these constitutional issues and the likelihood that they will recur, it also appears that the Tribal Court might never again have the opportunity to hear and decide a similar case. The record, as well as previous cases reported by this Court, indicates that when judges are removed by either the Judicial Board or the Band, they are unlikely to contest their removal. *See Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025, at 1-2 (Turtle Mountain Band Ct. App., October __, 1996) (exemplifying a case where the Judicial Board had previously suspended a sitting tribal judge who subsequently did not challenge the suspension); Oral Argument of Donald G. Bruce, Counsel for Judicial Board (May 12, 2005) (alleging that when the Band removed former Chief Appellate Judge B.J. Jones, he would not contest the removal). The fact that Judge Cain is not a party to this action, apparently because she chose not to file suit, also supports this conclusion. Other tribal courts facing important constitutional cases capable of repetition but evading review have also declined to

dismiss an apparently moot case. *E.g.*, *Council of Elders of the Mohegan Tribe v. Mohegan Tribal Employment Rights Commission*, No. CV-01-0006, 2001.NAMT.0000001, at ¶16 (Mohegan Ct. App., Nov. 26, 2001) (declining to dismiss case where tribal administrative agency revoked its orders in order to avoid judicial review); *Burnette*, *supra*, 1 Tribal Court Rptr. at A-54 (declining to dismiss election challenge merely because election victors had already been seated on tribal council). We also note, finally, "in view of th[is case's] impact on the Tribal Judiciary, vindication of the principles at stake in th[ese] proceedings should not depend on the Tribal Judges' ability to hire private lawyers to figure out how to proceed in these extraordinary circumstances." *In re Matter of CLB 0201*, No. CIV-APP 02-01, 2002.NACT.0000004, at ¶ 61 (Crow Ct. App., March 5, 2002). In sum, this case meets the fourth criterion as well.

B. The Band's Standing to Bring this Action

The Judicial Board argues that the Band has no standing to bring forth this action. Specifically, the Judicial Board argues that the Band has only "conjectured hypothetically that [they] could be injured by [the Judicial Board's] actions suspending Shirley Cain[,] pending impeachment." Judicial Board's Brief on Appeal at 8. The Judicial Board also points to the Amicus Brief, which notes that that Band "alleges and seeks relief for a violation of due process on the part of a third party, a party who has not been named as such in the pleadings." Amicus Brief of Eugene L. DeLorme at 4 (hereinafter "Amicus Brief"). In short, the Judicial Board argues that (1) the Band has not been injured; and (2) this Court cannot order relief in a case where the allegedly aggrieved person is not a party to this matter.

In *Herrera v. DeCoteau*, this Court recently had the opportunity to adopt extensive rules relating to the standing of a party under the "actual cases and controversies" language of Article XIV. *See* No. TMAC 03-004, at 2 (Turtle Mountain Band Ct. App., Nov. 30, 2004). We held that a plaintiff has standing where it "asserts some actual or threatened injury that is logically related to the legal claim it seeks to present to the tribal court." *Herrera*, *supra*, at 2 (citing *Village of Mishongnovi v. Humeyestewa*, No. 96AP000008, 1998.NAHT.0000017, at ¶ 54 (Hopi Ct. App., March 20, 1998); *Mashantucket Pequot Tribal Nation v. Kenneth Castellucci & Assoc., Inc.*, No. MPTC-CV-2001-163, 2002.NAMP.0000015, at ¶ 20 (Mashantucket Pequot Tribal Ct., Sept. 12, 2002)); *see also* Letter from Gene DeLorme to Paul W. Picotte, BIA, at 2 (May 17, 1995) (hereinafter "DeLorme Letter") ("It was also the intent that the court should not provide any advisory opinions to prevent the court from becoming a legislative body. In addition, the court was not intended to oversee the tribal council but rather to be reactive in nature and wait for a case to actually appear before the court could actually take any action. This would discourage the court from itself participating actively in the political system of the tribe.").[7] *Village of Mishongnovi*, in particular, explicitly rejected the

[7] We are mindful of the interpretation of the "actual cases and controversies" language given by Eugene L. DeLorme, our Amicus Curiae, on Amendment XI to the Turtle Mountain Band Constitution, approved on November 3, 1992 and codified as Article XIV in the mid-1990s. *See* DECOTEAU, *supra*, at 116 (reprinting the amendment). Mr. DeLorme wrote this letter after the amendment had already been approved and, as such, we do not and cannot consider his interpretation to be the definitive legislative history of Article XIV, but this Court gives his opinion some deference as persuasive authority.

federal common law of standing in favor of more "open and consensual dispute resolution." *Village of Mishongnovi*, *supra*, at ¶ 49.

Moreover, distinguished commentators on tribal court jurisprudence have criticized a rigid reading of the standing doctrine that would dramatically reduce the ability of people and entities from Indian communities to bring suit. One such commentator, Dean Nell Jessup Newton, wrote:

> Standing doctrines, particularly, have made their way into tribal court, probably because these doctrines also embody prudential and process concerns appealing to the tribal judiciary.
>
> ***
>
> [T]he application of federal standing doctrines in a particular tribal context may be unnecessary and may unduly restrict the opportunity for someone to air grievances.

Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 334, 335 (1998). The Navajo Nation Supreme Court is in accord with this criticism, noting, "For our courts to close their doors to legislative review based on standing, either as a matter of convenience or to avoid considering sensitive political issues, is an abrogation of our judicial responsibilities and abhorrent to Diné concepts of participatory governance and due process." *Judy*, *supra*, at ¶ 26. *Accord Village of Mishongnovi*, *supra*, at ¶ 48 ("The exclusionary and highly formalistic operation of federal standing doctrine is a poor fit in the Hopi tribal court system, which exists in a radically different cultural and institutional context."). We have also stated, "[T]his Court strongly supports a policy of providing access to the courts." *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 4 (Turtle Mountain Band Ct. App., Feb. 1, 2005). Though we were speaking in terms of the standing of an individual as a party, we think these principles apply in equal measure to the Band, particularly here, in a case of utmost public importance.

This Court's decisions in *Herrera* and also in *LaFountain v. Members of the Tribal Council*, [No TMAC docket number known], at 3-4 (Turtle Mountain Band Ct. App., Aug. 9, 2002),[8] exemplify these principles. In *Herrera*, a co-defendant (DeCoteau) sought to appeal the dismissal of his cross-claim against his co-defendant (LaVallie) in a tort claim regarding a car accident. *See id*. at 1. After LaVallie and the plaintiff settled their dispute, the tribal court dismissed that portion of the action. *See id*. DeCoteau sought to appeal the dismissal of the LaVallie dispute pursuant to the settlement, but this Court held that he had no standing to challenge the settlement of third parties. *See id*. at 2. In short, we ruled that DeCoteau had suffered no injury when the two other parties to the underlying dispute reached a settlement; at least, no injury sufficient to seek appellate review of a settlement reached by two other parties.

In *LaFountain*, the plaintiffs, individual members of the Band, brought suit against the Tribal Council over the Council's action in discharging the Election Board. *See LaFountain*, *supra*, at 3. The tribal court dismissed the action because none of the plaintiffs were members of the Election Board, *see id*., but we reversed, holding that, as Band members, the individual plaintiffs had sufficiently alleged that the actions of the

[8] This opinion is reproduced at DECOTEAU, *supra*, at 177-87.

Tribal Council could "potentially dilute the strength" of the plaintiffs' vote, *id*. at 3-4 (citations omitted). In short, we ruled that the individual Band members could bring suit to challenge any action that potentially diluted their vote, certainly an injury of true constitutional significance.

We note, however, that this Court, without deciding the matter, strongly questioned whether an individual – neither representing the Band or an aggrieved party – would have standing to challenge a Judicial Board decision to suspend a tribal court judge. *See Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025, at 4 (Turtle Mountain Band Ct. App., October __, 1996). In *Parisien*, a tribal member brought suit to challenge the decision of the Judicial Board to suspend a tribal court judge on the theory that the Judicial Board, elected and seated two years previously, had not been properly elected. *See id*. at 1. We expressed difficulty in believing that the individual tribal member "possesse[d] standing to raise this issue as he has offered no proof that the suspension affected him personally or legally." *Id*. at 4. The Judicial Board declined to attack the individual's standing, *see id*., allowing this Court to leave the question open for another day.

We hold, though the "actual cases and controversies" language of Article XIV contains a substantial limitation on the capability of certain parties to bring suit in certain instances, those limitations do not serve to deny the standing of the Band to bring suit in this matter. Reviewing the allegations made by the Band in its complaint, we find that the Band has alleged sufficient injury in fact to withstand the Judicial Board's challenge to its standing. The Band alleged that the Judicial Board's:

> action is a threat to the continuation of the P.L. 93-638 Self-Determination Contract with the Bureau of Indian Affairs for the provision of Judicial Court Services and the Tribe will suffer irreparable harm if the actions of the defendants to suspend Tribal Court judges without due process and in violation of its own rules are not immediately halted.

Band's Complaint at 3, ¶ 12. The Band's allegation that its 638 contract with the Bureau of Indian Affairs (hereinafter "Bureau") is threatened is backed by the further allegation that the Bureau refused to accept the Resolution on its face. *Id*. at ¶ 11. Indeed, it appears that the Band and the Bureau had previously agreed that the tribal court "is/was unable to fulfill its agreed-upon level of performance," 638 Contract at 1; *see* Cain Contract at 1, meriting Judge Cain's hire in the first instance. The 638 Contract was a "final attempt" by the Band and the Bureau to provide the technical assistance necessary to ensure the continuing viability of the tribal court. 638 Contract at 1. Federal law would allow the Secretary of Interior to "suspend, withhold, or delay" the Band's 638 contract funds in the event the tribal court "failed to substantially carry out the contract without good cause." 25 U.S.C. § 450j-1(*l*)(1). In short, the Band's allegation that the Bureau was in a position to "suspend, withhold, or delay" contracting funds under the 638 contract is an "actual or threatened injury that is logically related to the legal claim it seeks to present to the tribal court." *Herrera*, *supra*, at 2.

Given that we hold that this case is not moot and that the Band has standing to bring suit, we now proceed to decide the merits of the Band's request for injunctive relief and the Judicial Board's appeal of the injunctive relief issued by the lower court.

III. The Validity of the Judicial Board's Actions

A. Standard of Reviewing the Issuance of Injunctive Relief

This Court must first determine the appropriate standard of review in this matter. Since the Band sought and received an injunction from the tribal court, we must review whether the tribal court's issuance of injunctive relief was appropriate. The issuance of injunctive relief is a question of law. *Cf. Youvella v. Dallas*, No. 99AP000008, 2000.NAHT.0000004, at ¶ 20 (Hopi Ct. App., Nov. 6, 2000) (holding that the issuance of a writ of mandamus is a question of law). Tribal appellate courts generally review a tribal court's conclusions of law under a *de novo* standard. *See LaFountaine-Gladue v. Ojibwe Indian School*, No. 94-003, at 3 (Turtle Mountain Band Ct. App., Aug. __, 1996) ("This Court reviews the grant of summary judgment *de novo*…."); *Rose v. Adams*, No. CIV-APP 95-27, 2000.NACT.0000005, at ¶ 14 (Crow Ct. App., Jan. 11, 2000). The *Rose* Court conducts an "independent review" of questions of law. *Id*. We concur with these conclusions. As such, this Court holds that it will conduct an independent review of the tribal court's issuance of injunctive relief under a *de novo* standard, granting no special deference to the tribal court's conclusions of law.

B. The Judicial Board's Actions are Unconstitutional

We hold today that the Judicial Board's actions in attempting to summarily suspend Judge Cain are not on sound constitutional footing. We therefore affirm the ruling of the tribal court that the Judicial Board could not suspend Judge Cain without first providing her adequate notice and a meaningful opportunity to be heard.

1. Due Process Rights of Sitting Tribal Court Judges

The purpose of the enactment of Article XIV by the People of the Turtle Mountain Band community was "[t]o provide for a separate branch of government free from political interference and conflicts of interest for the development and enhancement of the fair administration of justice." TURTLE MOUNTAIN BAND CONST. art. XIV, § 1. The Judicial Branch of the Turtle Mountain Band government consists of "the Turtle Mountain Appellate Court, the Tribal Court, the Judicial Board and the elected officials, appointees and employees of said courts." TURTLE MOUNTAIN BAND CONST. art. XIV, § 2. Given that the Turtle Mountain Band Constitution did not contain an enumerated listing of individual rights, it appears that one of the purposes of amending the Constitution to include Article XIV was to expressly incorporate notions of due process, equal protection, and other individual rights exemplified by the Indian Civil Rights Act (25 U.S.C. § 1302). *See* TURTLE MOUNTAIN BAND CONST. art. XIV, § 3(a) ("The Judicial Branch of government … shall have jurisdiction … to ensure due process, equal protection, and protection of rights arising under the Indian Civil Rights Act of 1968…."); *see also* DeLorme Letter, *supra*, at 2 (noting that the intent of Article XIV was to incorporate the individual rights protections of the Indian Civil Rights Act into the Constitution).

Given this Court's mandate under Article XIV, we have repeatedly held inviolate the notion that individuals are entitled to due process prior to the taking of their liberty or property by the Turtle Mountain Band government. *E.g.*, *Monette v. Schlenvogt*, No. TMAC 04-2021, at 3-4 (Turtle Mountain Band Ct. App., March 31, 2005) (holding that an individual is entitled to notice of court proceedings prior to being evicted from her home); *St. Germain v. PKG Contracting, Inc.*, No. TMAC 03-005, at 3 (Turtle Mountain

Band Ct. App., [no date]) (holding that a notice of appeal must be dismissed for violation of procedural due process if the notice is not served on the opposing party); *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 10-12 (Turtle Mountain Band Ct. App., Feb. 1, 2005) (holding that the tribal court is obligated to provide "notice and an opportunity to be heard" before issuing a judgment against a party); *Lenoir v. Monette*, No. CIV-02-0039, at 9-10 (Turtle Mountain Band Ct. App., July 2, 2002) (holding that elected officials of the Turtle Mountain Band are entitled to due process prior to being removed for cause); *Monette v. Lenoir*, No. [TMAC docket no. not available], at 4 (Turtle Mountain Band Ct. App., May 22, 2002) (same); *Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025, at 4 (Turtle Mountain Band Ct. App., Oct. __, 1996) (holding that the Judicial Board may not suspend a tribal judge without providing due process).

Following this line of authority, this Court has already made a clear statement that the Judicial Board must provide due process to sitting tribal court judges before taking action to suspend those judges. *See Parisien*, *supra*, at 4. This Court has held, "[T]he Judicial Board has the constitutional authority to suspend tribal judges *provided due process of law is provided*." *Id*. (emphasis added). Other tribal courts faced with the question of whether tribal judges should be afforded due process prior to being suspended agree. *E.g.*, *In re Matter of CLB 0201*, No. 02-01, 2002.NACT.0000004, at ¶¶ 67-68 (Crow Ct. App., March 5, 2002).

We hold that the process due a tribal court judge facing suspension or any other disciplinary action, including impeachment, must be extensive and comprehensive and must be strictly complied with by the prosecuting authority. As one other tribal court noted, "It is axiomatic that as the consequences of harm increase, the burden of *strict compliance* with procedural and substantive form likewise increases." *Chitimacha Housing Authority v. Martin*, No. CV-93-0006, 1994.NACH.0000002, at ¶ 18 (Chitimacha Ct. App., Sept. 1, 1994) (emphasis added). The protection of the Turtle Mountain Band's Judicial Branch from the political machinations of the tribal government, be it Tribal Chairman, Tribal Council, Judicial Board, or whatever, is paramount. As Article XIV expressly states, the primary purpose of Article XIV is "[t]o provide for a separate branch of government *free from political interference*…." TURTLE MOUNTAIN BAND CONST. art. XIV, § 1 (emphasis added). *Cf*. DeLorme Letter, *supra*, at 2 (discussing Article XIV, § 3(b), which authorizes the Judicial Branch to develop an independent operating budget, and opining that "[t]he purpose of this section and the associated intent was to truly establish a [sic] independent tribal court. This section was adamantly added by the tribal council in that they recognized that if they controlled the purse strings, you would never have a *truly independent judicial branch of government*.") (emphasis added). And, although we recognize that the Judicial Board – and only the Judicial Board – is empowered by the Turtle Mountain Band Constitution to oversee the tribal and appellate courts, we must also acknowledge that the Judicial Board is an elected, political body. *See* TURTLE MOUNTAIN BAND CONST. art. XIV, § 6(c). In order to give meaning to both Section 1, which demands that the Judicial Branch remain free from political interference, and to Section 6, which authorizes an elected body to oversee the tribal and appellate courts, we will therefore require that the Judicial Board strictly comply with its own procedures *and* with the Constitution's procedural due process requirements.

2. The Judicial Board Rules

The next we question we must answer, then, is what process is due a sitting judge facing suspension by the Judicial Board. The Judicial Board itself, in accordance with its authority to "develop and implement a code of judicial and professional ethics" for judges, *see* TURTLE MOUNTAIN BAND CONST. art. XIV, § 6(b), has provided a partial answer in its "Rules of Judicial Board Regarding Investigation and Discipline of Judges, Court Personnel and Elected Officials" (hereinafter "Judicial Board Rules").

The very extensive and complicated procedure for suspending a sitting judge under the Judicial Board Rules is as follows:

- **Initiation of Preliminary Investigation:** The Judicial Board, either upon receipt of a written complaint "alleging facts that censure, removal, retirement, suspension, or other disciplinary action should be considered" or upon its own motion, "may make inquiry and a preliminary investigation with respect to whether … a judge is guilty of misconduct in office…." Judicial Board Rule 5(a). "All complaints to the Judicial Board must be verified under penalty of perjury and be accompanied by a $50.00 filing fee to the Judicial Board." Judicial Board Rule 23.
- **Notice to Judge of Preliminary Investigation:** During the course of the preliminary investigation, the Judicial Board must notify the judge about "the investigation, the nature of the charge, and the name of the person making the written complaint or that the investigation is on the Judicial Board's own motion…." Judicial Board Rule 5(b).
- **Opportunity of Judge to Submit Answer to the Notice of Preliminary Investigation:** The judge may submit an answer to the Rule 5(b) notice. Judicial Board Rule 6.
- **Opportunity of Judge to Present "Matters":** The judge is to be "afforded reasonable opportunity in the course of the preliminary investigation to present such matters as he or she may choose." Judicial Board Rule 5(b).
- **Judicial Board Decision on Whether to Institute Formal Proceedings:** Upon the close of the preliminary investigation and after review of the judge's answer, the Judicial Board may terminate the investigation or, if there is "sufficient cause to warrant institution of formal proceedings," institute formal proceedings. Judicial Board Rule 5(c); Rule 5(c)(1).
- **Institution of Formal Proceedings:** If the Judicial Board decides to institute formal proceedings against the judge, the Judicial Board must "issue a written notice to the judge … advising him or her of the institution of formal proceedings to inquire into the charges against him or her." Judicial Board Rule 7(A).
- **Contents of Notice to Judge of the Institution of Formal Proceedings:** "The notice shall specify in ordinary and concise language the charges against the judge … and the alleged facts upon which those charges are based, and shall advise the party of his or her right to file a written answer to the charges against him or her within 20 days after service of the notice upon him or her." Judicial Board Rule 7(C).
- **Judge's Responsive Answer:** The judge has 20 days to file a "responsive answer;" the "notice of formal proceedings and answer shall constitute the

pleadings and no further pleadings shall be filed, except amendments, and no motion challenging the adequacy of the pleadings shall be allowed." Judicial Board Rule 8.

- **Setting of Hearing Before Impeachment Judge or Judicial Board:** Either the Judicial Board, an Impeachment Judge, or "other appropriate authority" must "set a time and place for a hearing…." Judicial Board Rule 9.
- **Thirty Days Notice of Hearing to Judge:** The judge is entitled to at least 30 days notice of the hearing. Judicial Board Rule 9.
- **Hearing Procedures:** The Judicial Board Rules provide extensive detail on the details of the hearing itself, *see* Rule 10; evidence admissible, *see* Rule 11; procedural rights of the judge to introduce evidence and witnesses, to be represented by counsel, to cross-examine witnesses, and to discovery tools, *see* Rule 12(a); and reasons to order an additional hearing or hearings, *see* Rule 15.
- **Ruling of Impeachment Judge or "Other Appropriate Authority":** Upon the conclusion of the hearing or hearings, the Impeachment Judge, the Judicial Board, or the "Other Appropriate Authority" must "make written findings of fact, conclusions or law, order for judgment[,] and judgement [sic] with respect to the issues of fact and law in the proceedings." Judicial Board Rule 17.
- **Judgment:** If the Impeachment Judge, the Judicial Board, or the "Other Appropriate Authority finds good cause, based upon clear and convincing evidence, her or she may … suspend … the judge…." Judicial Board Rule 16.
- **Appellate Review:** This Court has authority to review the judgment of the Impeachment Judge, the Judicial Board, or the "Other Appropriate Authority." Judicial Board Rules 18 & 19.
- **Alternative Route to Suspension:** "If the Judicial Board deems there is probable cause to believe that it is in the best interests of the Tribe to suspend a judge … while an investigation and/or disciplinary action is pending, it may suspend the accused judge … with pay." Judicial Board Rule 22.

At this time, this Court will not thoroughly review these Rules to determine their constitutional validity on their face. Our inquiry is limited to whether the process afforded Judge Cain met the requirements of the Turtle Mountain Band Constitution and other relevant tribal law. We note that no party has asked this Court to review the validity of the Judicial Board Rules. As such, we must review the actual process afforded Judge Cain and, in that progression, we may have the opportunity to pass on whether certain rules are constitutional on their face or as applied.

Given this analysis and the procedural posture of this case, we vacate the lower court's order to re-write the Judicial Board Rules and to submit the revised Rules to the tribal court and to the Tribal Council.

3. The Process Provided to Judge Cain upon Her Suspension Was Insufficient to Meet Constitutional Requirements

The Judicial Board Resolution purporting to suspend Judge Cain failed to meet the due process required under the Turtle Mountain Band Constitution and must be declared invalid insofar as it purports to operate as a summary suspension of Judge Cain. As this Court has continuously reaffirmed, "The basic tenants of due process of law are notice and an opportunity to be heard." *Mathiason*, *supra*, at 10 (citing *Smith v. Belcourt*

School District #7, No. 02-10155, at 2 (Turtle Mountain Band Ct. App., Nov. 30, 2004)). We have held that the notice must be "adequate or reasonable," sufficient "to apprise interested parties of the pendency of the action…." *Monette v. Schlenvogt*, *supra*, at 3 (citation and quotation marks omitted); *see Chitimacha Housing Authority*, *supra*, at ¶¶ 99-105. Moreover, "[r]easonable notice must be given at each new step in the proceedings." *Monette v. Schlenvogt*, *supra*, at 3 (citation omitted). The Judicial Board Rules on notice, contained in Rule 5(b) (notice of preliminary investigation); Rule 7 (notice of institution of formal proceedings); and Rule 9 (notice of setting of time and place for hearing), meet these constitutional requirements on their face. For example, Rule 5(a) requires the Judicial Board to provide notice to the judge "of the investigation, the nature of the charge, and the name of the [accuser];" and Rule 7 requires the Judicial Board to provide a notice "specify[ing] in ordinary and concise language the charges against the judge … and the alleged facts upon which those charges are based…." If the Judicial Board complies with these Rules, then the judge likely will be given adequate due process.

In this matter, however, we hold that the Judicial Board did not comply with these constitutional requirements. Initially, we hold that the Judicial Board's Resolution suspending Judge Cain does not meet the constitutional requirements for reasonable notice articulated in our *Monette v. Schlenvogt* opinion. The Judicial Board Resolution merely states that Judge Cain is "immediately suspend[ed]" and offers nothing to show why. *See* Judicial Board Resolution at 1. Moreover, the resolution promises that a "Summons and Complaint" that "will enumerate the impeachment charges" would follow. *See id*. No such "Summons and Complaint" is to be found in the record. As such, the Judicial Board did not provide adequate or reasonable notice to Judge Cain of the charges against her.

Moreover, the Judicial Board did not follow its own Rules, further supporting our finding that the Judicial Board violated Judge Cain's due process rights. An agency's violation of its own procedural rules is presumptive evidence that the agency has violated the due process rights of an accused. *See Chitimacha Housing Authority*, *supra*, at ¶ 94 ("At a minimum, due process … requires the [tribal agency] to follow its own rules and regulations."). Judicial Board Rule 5(a) requires the Judicial Board to provide notice to the judge "of the investigation, the nature of the charge, and the name of the [accuser]." None of this information is present in the Judicial Board Resolution or any other document served on Judge Cain. As such, we find that the Judicial Board's actions violated Judge Cain's right to due process.

4. Judicial Board Rule 22 is Unconstitutional

We reach one other question that neither party has explicitly addressed – whether the Judicial Board acted in compliance with Judicial Board Rule 22 and, if so, whether Rule 22 is constitutionally sound. We grant the benefit of the doubt to the Judicial Board where it apparently assumed that it had authority to suspend Judge Cain "immediately." *See* Judicial Board Resolution at 1. Judicial Board Rule 22 appears to operate as an attempt by the Judicial Board to exert the authority to suspend a judge "while an investigation and/or disciplinary action is pending" if the Judicial Board "deems there is probable cause to believe that it is in the best interests of the Tribe…."

We hold that Judicial Board Rule 22 is facially invalid under the Turtle Mountain Band's constitutional law. This Court has already ruled in *Parisien* that, *prior* to suspending a tribal court judge, the Judicial Board must provide due process of law. After proper notice is given, we have made clear in this context that, at a bare minimum, a judge should be provided with "ample opportunity to call witnesses and cross-examine the Board's witnesses…." *Parisien*, *supra*, at 4; *see also Hoopa Valley Indian Housing Authority v. Gerstner*, 22 Indian L. Rptr. 6002, 6005 (Hoopa Valley Ct. App., Sept. 27, 1992) (holding that a meaningful opportunity to be heard includes four minimum rights: "(1) adequate notice; (2) a hearing decision by [an] independent arbiter; (3) an initial burden of proof imposed on the [accuser]; and (4) the right to confront and cross-examine those witnesses used against the [accused]"). Even assuming the Judicial Board complied with the terms of Judicial Board Rule 22, which is doubtful given that no valid investigation had begun in accordance with Judicial Band Rule 5 when the Judicial Board suspended Judge Cain, we find that Rule 22 does not provide "ample" opportunity to call witnesses and cross-examine the Judicial Board's witnesses. In fact, it provides no opportunity to respond at all prior to being suspended.

Moreover, we find that the Judicial Board has no constitutional authority to summarily suspend tribal court judges. We have previously so held in *Parisien*, *supra*, at 4, but we reiterate our holding to emphasize certain constitutional limitations on the Judicial Board. We note first that there is nothing in Article XIV that grants the Judicial Board the authority to suspend sitting judges.[9] As such, the authority that the Judicial Board exerts in this area is authority that is implied from the Constitution. *See Parisien*, *supra*, at 4 (finding that the authority of the Judicial Board to "implement" the Judicial Board Rules is sufficient to authorize the Judicial Board to suspend tribal judges) (citing TURTLE MOUNTAIN BAND CONST. art. XIV, § 6(b)). We note further that the Judicial Board is not authorized to "regulate the day-to-day activities of the court … or to interfere with the administration of justice." TURTLE MOUNTAIN BAND CONST. art. XIV, § 6(b). And, because we must interpret the Constitution in light of the express purpose of Article XIV – to protect the judicial branch from "political interference" – we hold that

[9] In fact, our Amicus expressly repudiated in very strong language the notion that the Judicial Board would have the authority to suspend judges under Article XIV, § 6:

> [T]here was also no intended grant of authority by this constitutional amendment to grant the judicial board the ability to suspend judges. *The power to suspend interferes with the day to day operation of the tribal court and creates the opportunity to have judges rendered ineffective for political purposes.* This constitutional amendment was intended to grant the judges tremendous authority and autonomy. At the same time, this amendment provided a safety valve in the people by allowing impeachment. *Impeachment, however, was the only intended vehicle for the removal of judges. Again, I must point out that the intent of Article 14 was to remove political influence from the judicial system.* In order to accomplish this, the judges were intended to be granted independence. The impeachment process was intended to be difficult by requiring a formal hearing process with an enhanced burden of proof.

DeLorme Letter, *supra*, at 4 (emphasis added).

This Court strongly suspects that the actual intent of the Turtle Mountain Band community was to deny the Judicial Board the power to suspend tribal judges for the reasons our Amicus suggests, but no party has asked us to revisit our holding in *Parisien*, where we upheld the authority to Judicial Board to suspend judges upon due process. As such, we make no ruling on that question at this time.

Judicial Board Rule 22 is an unconstitutional exercise of authority by the Judicial Board. The Constitution does not empower the Judicial Board to summarily suspend tribal court judges.

Given that we have declared the Judicial Board's actions in suspending Judge Cain to be violation of her due process rights and therefore invalid, we must determine next what remedy is available for the Band.

C. Partial Affirmance of Tribal Court's Order for Injunctive Relief

The Band makes two relevant requests for relief in its complaint. First, the Band requested injunctive relief precluding the Judicial Board from suspending "Tribal Court judges in violation of Judicial Board rules…." Band's Complaint, at 3. Second, the Band requested vacature of Judicial Board Resolution No. 04-05-101-JB. *See id*. The lower court, per Special Judge Conklin, granted, for all practical purposes, the relief the Band requested. To the extent the lower court's Memorandum Decision and Order is consistent with this Order and Opinion, we affirm that ruling.

As to the Band's request for an injunction, we deny that request at this time, except as relating to Judicial Board Rule 22. We note first that this Court appears to not have had the opportunity to develop doctrinal rules relating to the issuance of injunctive relief that are consistent with the laws and values of the Turtle Mountain Band community. We decline to develop that doctrine at this time because we find that the injunction that the Band requests is superfluous. It is unnecessary to enjoin the Judicial Board from violating the law. No injunction is necessary, except as to Rule 22.

As to the Band's request for vacature of the Resolution, we hold that the provisions of the Resolution that assert the Judicial Board's authority to summarily suspend Judge Cain are unconstitutional. However, the Judicial Board is free to begin proceedings against tribal judges in the future if the Board, but only in *strict compliance* with its own Rules and with the Turtle Mountain Band common law, particularly this Order and Opinion and the Memorandum Decision in *Parisien v. Turtle Mountain Judicial Board*, No. TMAC-96-025.

IV. Additional Matters

For the first time and on appeal, the Judicial Board brings forth a shotgun blast of additional arguments in its brief. Many of these arguments are wholly undeveloped by the Judicial Board and our Amicus, raising facts never before asserted in this matter, and we dismiss them as waived. *See In the Matter of R.W.*, 9 SWITCA Rptr. 11, 12 (S.W. Intertribal Ct. App., March 24, 1997) ("Issues raised for the first time on appeal, except for a claim of lack of jurisdiction, will not be considered.") (citation omitted); *Riggs v. Riggs*, No. A-CV-20-90, 1991.NANN.0000010, at ¶ 27 (Navajo Nation Sup. Ct., March 5, 1991) (noting that issues not raised at the trial level are "waived on appeal"). *Cf. PC&M Constr., Inc. v. Navajo Nation*, No. A-CV-05-93, 1993.NANN.0000003, at ¶ 15 (Navajo Nation Sup. Ct., Nov. 16, 1993) (holding that party cannot introduce evidence on appeal after waiving right to do so at trial). These arguments include the Judicial Board's allegations that the lower court violated the Indian Civil Rights Act, *see* Judicial Board's Brief on Appeal at 7 (Issue III); that the lower court violated Turtle Mountain Band Code § 2.0404(2) and Turtle Mountain Band Constitution, Article IX, § 5, *see id*. (Issue IV); that the lower court violated Turtle Mountain Band Constitution, Article XII, *see id*. at

10-11 (Issue VIII); that the lower court violated Turtle Mountain Band Constitution, Article IX, § 2, *see id*. at 11 (Issue IX); and that the lower court judge, Judge Conklin, was biased, *see id*. at 12-13 (Issues XI, XII, and XIII). The Judicial Board's attempts to expand the scope of this Court's review to include these numerous and disparate allegations, most of which appear to be based in conjecture, are not well taken. The Judicial Board or other Turtle Mountain Band citizens are free to bring suit in the tribal court to make these claims, or to file formal motions on the matter of disqualifying a tribal judge, *see Marion v. Turtle Mountain Band of Chippewa Indians*, No. TMAC A11-02-92, at 2-4 (Turtle Mountain Band Ct. App., Feb. 4, 2005), but our review is limited to the claims brought by the Band in its Complaint.

Other arguments made by the Judicial Board and our Amicus raise matters with sufficient clarity and timeliness. They are not arguments on the merits of the Judicial Board's actions in this matter, but rather are prudential arguments that we should decline to decide this case at all. We address them each in turn, keeping in mind the maxim that prominent Indian law commentator, professor, and tribal court justice Frank Pommersheim has noted, "This Court has an unflagging duty to interpret the Constitution." *Snowden v. Saginaw Chippewa Indian Tribe of Michigan*, No. 04-CA-1017, at 12 (Saginaw Chippewa Indian Tribe Ct. App., Jan. 5, 2005).

A. Judicial Board's "Unclean Hands Doctrine" Argument

The Judicial Board implicitly argues that the Band should be equitably estopped from "maintain[ing] an action when the Plaintiff Tribe has caused the problem of people bringing issues to the Judicial Board by terminating the Tribal Court of Appeals; which in turn leaves no forum for litigants to bring the misapplication of justice from the Tribal Court [sic]." Judicial Board's Brief on Appeal at 4; *see also* Amicus Brief at 3-4 (encouraging this Court "to consider whether or not the immediate issue was created or at least significantly contributed to by the fact that the Turtle Mountain people were deprived of access to the Turtle Mountain Judicial system and whether or not Plaintiff contributed to the filing of this complaint"). Neither the Judicial Board nor our Amicus cite any authority for the proposition that the Band, a sovereign entity, can be precluded from bringing suit in this or an analogous circumstance.

There are no relevant facts to support these allegations in the record. The Judicial Board's brief, supplemented by our Amicus, includes few allegations at all in support of this argument. Essentially, the Board and our Amicus assert that the Band's former Chairman once removed the judges sitting on the Appellate Court and the Band's Tribal Council refused to reappoint a new appellate court for nearly two years. *See* Judicial Board's Brief on Appeal at 6-7; Amicus Brief at 3. These facts appear to be irrelevant to the issue at hand – whether the *Band* can bring forth an action to reverse the summary suspension of the *Band*'*s* employee/appointee, Judge Cain. In other words, the Judicial Board's argument relating to whether this Court has a sufficient number of judges appears to be a wholly separate case that perhaps the Board or other Turtle Mountain Band citizens could have brought. Now that this Court is in full operation, the argument is even weaker.

Moreover, the Judicial Board's reliance on the so-called "unclean hands doctrine" is fundamentally misplaced. The unclean hands doctrine typically is a defense to a breach of contract claim, almost always applied in a commercial context. *E.g.*, *National*

Collection Services, Inc. v. Adams, No. 145, 1992.NAFP.0000013, at ¶ 49 (Fort Peck Ct. App., June 10, 1992) (repossession); *In re Estate of Jumbo*, No. A-CV-22-88, 1990.NANN.0000014, at ¶ 29 (Navajo Nation Sup. Ct., Feb. 23, 1990) (life insurance proceeds); Amicus Brief at 3 (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945) (breach of contract and patent infringement)). The doctrine is not intended to apply to circumstances such as the case at bar, where two separate branches of government have engaged in several political battles relating to separation of powers and judicial independence. Moreover, distinguished commentators have criticized the unthinking application by tribal courts of Anglo-American jurisprudential concepts such as the unclean hands doctrine because they are not grounded in Indigenous jurisprudence. *See* Russel Lawrence Barsh, *Putting the Tribe in Tribal Court: Possible? Desirable?*, 8 KAN. J. L. & PUB. POL'Y, Winter 1999, at 74, 81 (citing *Simplot v. Ho-Chunk Nation Dept. of Health*, 23 Indian L. Rptr. 6235, 6243 (Ho-Chunk Nation Tribal Ct., Aug. 29, 1996), as an example). The Judicial Board has not indicated to this Court a persuasive reason to invoke this Anglo-American doctrine in this purely tribal affair. This is not to say that this Court will never adopt the doctrine of unclean hands, but the instant matter is not conducive to that adoption at this time.

Finally, to apply the unclean hands doctrine in favor of the Judicial Board in this matter could bring disrepute upon this Court. Assuming that we did choose to adopt this doctrine in this context *and* assuming the allegations of both sides in this matter are true, we would be holding, in effect, that one entity guilty of allegedly playing dirty politics could prevent another entity guilty of allegedly playing dirty politics from filing suit to protect its interests. This matter is, after all, over the culmination of numerous alleged suspensions and removals of tribal court and appellate court judges by *both* the Band and the Judicial Board. If the Band has unclean hands, then so too does the Judicial Board. In other words, if we were to weigh the equities, they would be in equipoise. Neither party has any special equitable high ground from which to attack the other. As one tribal court noted, "[A]lthough the Court can ensure fairness in tribal law and its application, it cannot make politics fair." *Yellowbank v. Chingwa*, No. C-018-0300, at 2 (Little Traverse Bay Bands of Odawa Indians Tribal Ct., June 19, 2000) (quoted in Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J. L. REF. 273, 308 n. 140 (2005)). We decline at this time to explicitly endorse the doctrine of unclean hands and to apply it to this matter.

B. Sovereign Immunity of Judicial Board

Our Amicus argues that the Band should not be allowed to sue the Judicial Board because the Judicial Board "is just as much the tribal sovereign as is the Tribal Council." Amicus Brief at 2. As such, our Amicus continues, because Indian tribes are immune from suit, so too should the Judicial Board possess that immunity. *See id*. (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). Our Amicus concludes by asserting that "[t]he final ruling of this Court can and will likely be used by future litigants to stand for the proposition that tribal sovereignty and its protections are now waived by any and all branches of this Tribal Government." *Id*.

Our Amicus is mistaken. The Judicial Board is not entitled to immunity from suit by the Band. The Turtle Mountain Band retains sovereign immunity from suit, as the

Turtle Mountain Band Constitution implies. *See* Article XIV, § 8 ("Nothing within this amendment is or shall be construed as a waiver of the sovereignty currently *enjoyed by the Turtle Mountain Tribe*.") (emphasis added). This Court has frequently and recently upheld the doctrine of *tribal* sovereign immunity. *E.g.*, *Gourneau v. Turtle Mountain Chippewa Tribe*, No. TMAC-02-011, at 1 (Turtle Mountain Band Ct. App., Nov. 30, 2004); *Tribal Council Majority Membership v. Bennett*, No. [TMAC docket no. not available], at 6 (Turtle Mountain Band Ct. App., July __, 1996); *Leonard v. Turtle Mountain Band of Chippewa Indians*, No. [TMAC docket no. not available], at 6-7 (Turtle Mountain Band Ct. App., June 28, 1990). The way tribal sovereign immunity operates, for example, is where an individual or non-tribal entity sues the Band, the Tribal Council, the Chairman, or a Judicial Branch entity, then it is the *Turtle Mountain Band of Chippewa Indians* that is being sued. *See Rave v. Reynolds*, 23 Indian L. Rptr. 6150, 6161-64 (Winnebago Sup. Ct., July 9, 1996). The Band, through its executive and legislative branches (the Chairman's office and the Tribal Council) will then defend and may bring forth the jurisdictional defense that the Band is immune from suit and the court has no jurisdiction to hear the dispute. *See* Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 581 (2003) ("[S]overeign immunity acts a bar to the court's exercise of jurisdiction.") (footnote omitted). Or, where an individual employee, agent, or officer of the Band, the Tribal Council, the Chairman, or the Judicial Branch is sued, the Band again may defend, asserting the affirmative defense that the individual acted within the scope of his or her authority and therefore has official immunity from suit. *See Tribal Council Majority Membership*, *supra*, at 6 (citations omitted); *Rave*, *supra*, 23 Indian L. Rptr. at 6161. However, an individual acting outside the scope of his or her authority may be sued in an attempt to obtain injunctive relief. *See Tribal Council Majority Membership*, *supra*, at 6-7 (citations omitted). As our Amicus admits, the Band does name the individual members of the Judicial Board, ostensibly invoking the exception to the doctrine of tribal sovereign immunity, which is that individual employees, agents, or officers of a constitutional unit of government such as the Judicial Board may be sued for injunctive relief where they have acted outside the scope of their authority. *See id.* at 6. However, since our Amicus raises additional constitutional matters, we decline to rely exclusively on this exception in this instance.

The open question, then, that our Amicus raises is whether a constitutional governmental unit, such as the Judicial Board, retains that tribal sovereign immunity where it is being sued, not by an individual or non-tribal entity, but by another constitutional governmental unit, in this case the Band itself. Initially, it must be noted that the Turtle Mountain Band of Chippewa Indians has brought suit. The Band includes within its structure the Chairman, the Tribal Council, the Judicial Board and the Tribal Judiciary, the Band's departments, authorities, and agencies, and, most importantly, the Band's citizenry. *See* TURTLE MOUNTAIN BAND CONST. art. I. The Band operates as a democratically elected republican government, where the Band acts in its day-to-day operations through its elected representatives in the Tribal Council and the Chairman's office, *see* TURTLE MOUNTAIN BAND CONST. art. VI, § 2 ("[The Chairman] shall exercise general supervision of all other officers and employees and see that their respective duties

are performed. He shall be the Chief Executive Officer of the Tribe"); art. IX, § 2 (noting that the Tribal Council has the power "[t]o employ legal counsel…."'); and not through the Judicial Board, *see* art. XIV, § 6(b) ("Nothing within this policy shall be construed to grant the Judicial Board authority to regulate the day-to-day activities of the court, develop the court's budget or to interfere with the administration of justice."). Perhaps it appears that the circumstance of the Band suing one of its own components is highly irregular if one were to view it through the lens of the federal or state constitutional structures. As our Amicus has acknowledged, however, this tribe's government is a "unique structure…." Amicus Brief at 2. We have already held that the Judicial Board has acted outside the scope of its authority, that the Band has no other viable remedy, and that the Band has standing to bring this type of claim in these circumstances. This matter is unusual and perhaps unfortunate, but to hold that the Judicial Board maintains an immunity from suit by the Band *as a whole* is to turn the Constitution on its head, elevating the Judicial Board to a position equal to (or even above) the entire Turtle Mountain Band itself. This we cannot hold.

Our Amicus raises the point that if we hold the Judicial Board has no immunity from suit from the Band, then the entire doctrine of tribal sovereign immunity is destroyed. As the above analysis demonstrates, nothing could be further from the truth. Our holding is limited to the very narrow situation where the Band as a whole sues one of the constitutional units of government where that unit is clearly acting outside the scope of its authority *and* where there is no other viable political remedy under the Constitution. The Band and the constitutional units of government such as the Judicial Board retain sovereign immunity from suit by all others. Our Amicus' fear of a parade of horribles, *see* Amicus Brief at 2 ("[T]he implications of allowing this case to proceed … are far-reaching."), is vastly overstated.

C. Political Question Doctrine

Related to the question of whether the Judicial Board is immune from suit by the Band is whether this Court should refrain from hearing this case because it is a "political question." Specifically, the Judicial Board argues that this Court "should not decide issues affecting allocation of power between … branches of government." Judicial Board's Brief on Appeal at 10 (citing *Goldwater v. Carter*, 444 U.S. 996 (1979)). Like our Amicus, the Judicial Board asserts incorrectly that the Judicial Board is constitutionally on par with the entire Turtle Mountain Band. *See id*. ("Is this not a perfect defense for an 'equal branch' of tribal government such as the Judicial Branch of Government?").

We decline to adopt the "political question doctrine" as advocated by the Judicial Board in this matter. Once again, the Judicial Board relies exclusively on *federal* court cases in its attempt to persuade this Court. *See id*. (citing *Goldwater*, *supra*, and *Coleman v. Miller*, 307 U.S. 433 (1939)). We choose, instead, to adopt the analysis undertaken by the Hopi Tribe Court of Appeals in *Village of Mishongnovi v. Humeyestewa*, No. 96AP000008, 1998.NAHT.0000017 (Hopi Ct. App., March 20, 1998). The *Village of Mishongnovi* Court noted that the political question doctrine is derived from the federal constitutional structure that explicitly limits the jurisdiction of federal courts. *See id*. at ¶ 65 ("[The f]ederal political question doctrine very specifically evolved out of a constitutional scheme that granted the federal judiciary only limited jurisdiction.").

Moreover, the Hopi tribal courts were courts of general jurisdiction, empowered with "broad jurisdiction to resolve issues that may arise from the Hopi system of government." *Id*. Finally, that Court noted that adoption of the political question doctrine "may restrain the Tribal Court's authority to resolve disputes…." *Id*. Given that the Turtle Mountain Tribal Judiciary is similarly empowered, *see* TURTLE MOUNTAIN BAND CONST. art. XIV, § 2 ("All judicial powers of the Turtle Mountain Band of Chippewa Indians shall be vested in the Judicial Branch of government…."), we hold that the federal political question doctrine does not and cannot apply in this matter, especially given that the political process to resolve this case has either stalled or is non-existent. *Cf. Monette v. Lenoir*, No. [TMAC docket no. unavailable], at 3 (Turtle Mountain Band Ct. App., May 22, 2002) ("This Court is not inclined to resolve by appellate judicial fiat political disputes that have not been fully developed before the trial court, *especially when such intervention may circumvent a political process still running its course*.") (emphasis added). We reserve judgment as to whether in the future a Turtle Mountain Band "political question doctrine" tailored to our Constitution may be advisable.

D. United States Bureau of Indian Affairs as Indispensable Party

The final point we address is whether the United States Bureau of Indian Affairs is an indispensable party to this matter. We hold that it is not.

Our Amicus raises this point, theorizing that, since Judge Cain's employment is based on a special judge contract between the Band and the Bureau and that the Bureau could be obligated to establish a CFR court in Belcourt depending on our ruling, the Bureau has an interest in this matter. Amicus Brief at 3. While we agree that the Bureau may have a theoretical interest in whether the tribal court remains a viable 638 court and in the special judge contract, we find that the Bureau's interest does not rise to the interest required to make the Bureau an indispensable party, which would mandate the dismissal of this action absent failure of the Band to join the Bureau.

The doctrine of compulsory joinder from which the concepts of "indispensable parties" and "necessary parties" arise is a federal court doctrine. Our Amicus asks us to apply this doctrine as a justification for dismissing this case. The critical purpose of the compulsory joinder rule is "to ensure that a lawsuit will not proceed absent a party that has an interest in the litigation." Matthew L.M. Fletcher, *Comparative Rights of Indispensable Sovereigns*, 40 GONZAGA L. REV. 1, 6 (2004-2005) (footnote omitted); *see also* Amicus Brief at 3 (quoting *Shields v. Barrow*, 58 U.S. 130, 139 (1854)).

> Under the federal rule…, the court must order these absent persons joined "if feasible." If joinder is not "feasible," then the court must decide if it should allow the case to proceed "in equity and good conscience." The purpose of the compulsory joinder rule is to protect several interests: "'There are three classes of interests which may be served by requiring the presence of additional parties in an action: (1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice.'" The "basic concept of due process" requires that each interested party, joined or absent, must be allowed the opportunity to defend their respective interests.

> A fourth interest is … the interest of the plaintiff in a forum in which to bring her suit. …

Fletcher, *Indispensable Sovereigns*, *supra*, at 6-7 (footnotes omitted). We find these principles to be persuasive and consistent with the common law of the Turtle Mountain Band. As such, we hold that if an absent party is found to be "indispensable" in accordance with these principles, we would order the dismissal of the underlying action.

Given that there are no Turtle Mountain Band cases on the subject and that the compulsory joinder rule is fundamentally ambiguous, we must locate other authority for guidance. As other tribal courts have done, we will look to federal law for assistance in this area in the absence of tribal case law. *E.g.*, *Jenkins v. Puyallup Tribe Health Authority*, No. 94-3154, 1995.NAPU.0000003, at ¶¶ 18-36 (Puyallup Tribal Ct., Nov. 20, 1995) (adopting Federal Rule of Civil Procedure 19 in absence of tribal rule of procedure on compulsory joinder); *cf. Econo Lumber Yards, Inc. v. Fort Peck Housing Authority*, No. 179, 1993.NAFP.0000002, at ¶ 31 (Fort Peck Ct. App., June 30, 1993) (interpreting tribal compulsory joinder rule in accordance with federal law); *Stensen & Sons Constr. v. Fort Peck Housing Authority*, No. 111, 1990.NAFP.0000017, at ¶¶ 36-39 (Fort Peck Ct. App., July 5, 1990) (same); *Billie v. Abbott*, No. A-CV-34-87, 1988.NANN.0000012, at ¶¶ 58-61 (Navajo Nation Sup. Ct., Nov. 10, 1988) (same). The federal government will be an indispensable party in federal courts, for example, where it may lose protected property rights to land. *See Econo Lumber Yards, Inc.*, *supra*, at ¶ 31; Fletcher, *Indispensable Sovereigns*, *supra*, at 44-48 (citations to federal cases omitted). In these cases, the federal government has a specific property interest that would be jeopardized if the case proceeded in its absence. No such analogous federal interest is present in this case. Indeed, if our Amicus is correct, then virtually every tribal court case heard by the Turtle Mountain Band judiciary involving the expenditure of federal dollars would implicate the interest of the federal government and mandate dismissal for failure to join the Bureau.

Our Amicus argues that if the Judicial Board prevails in its argument that it has authority to summarily suspend tribal court judges, then the Bureau could cancel the special judge contract or even the 638 contract. *See* Amicus Brief at 3. We agree that the Bureau may *theoretically* have an interest if numerous factors come into play, but only after the conclusion of this suit. Since we have already held that the Judicial Board does *not* have the constitutional authority to summarily suspend tribal court judges, we find that even the Bureau's theoretical interest in this matter is not implicated.

As such, we hold that the federal interest in this case is merely theoretical and insufficient to classify the Bureau as an indispensable party. The Bureau's interest is too attenuated to justify dismissal of this action. The Bureau could be compelled to begin the operation of a CFR court, as our Amicus fears, but at its *own* discretion. *See* 25 U.S.C. § 450j-1(*l*)(1). In other words, the Bureau's interest is not permanently affected by the outcome of this action – it retains the right to terminate the 638 contract and impose a CFR court regardless of the outcome of this case. The only way the Bureau could be an indispensable party is if this Court were to adjudicate its rights under § 450j-1(*l*)(1), which we are not doing. This is the type of case where there is a "political difficulty that must be redressed, if at all, through tribal political processes or the tribal courts." *Pembina Treaty Committee v. Lujan*, 980 F.2d 543, 546 (8th Cir. 1992).

V. Conclusion

We note that this is a matter of fundamental constitutional importance to the Turtle Mountain Band, as the parties and our Amicus have thoroughly demonstrated. We urge the parties, as other tribal courts have done in such critical matters, to "place themselves in the heart of Native American jurisprudence by 'healing, restoring balance and harmony, accomplishing reconciliation, and making social relations whole again.'" *Snowden*, *supra*, at 12-13 (quoting *Chamberlain v. Peters*, 27 Indian L. Rptr. 6085, 6097 (Saginaw Chippewa Indian Tribe Ct. App., Jan. 5, 2000)). It appears that this dispute is a symptom of a basic lack of communication and understanding between the parties that could easily have been resolved before reaching this forum. We sincerely hope in the future that the parties attempt to resolve their disputes in a non-adversarial forum and manner.

Date: _____

_____

Justice MATTHEW L.M. FLETCHER

Justices DECOTEAU and VONDALL concur.