

**IN THE COURT OF INDIAN APPEALS
FOR THE EASTERN OKLAHOMA REGION
MIAMI, OKLAHOMA**

COURT OF INDIAN APPEALS
FILED In The
Office Of The Court clerk
MIAMI FIELD OFFICE

In the Matter of the Seneca-Cayuga Nation,)
)
William L. Fisher, Jerry Crow,)
Sarah S. Channing, Sallie White,)
Lisa Spano, Calvin Cassidy, and)
Geneva Fletcher,)

Appellants/Plaintiffs,)

vs.)

Paul Barton, Scott B. Goode,)
Hoyit Bacon, Cynthia Donohue,)
Diana Baker, Tonya Blackfox, and)
TeNona Kuhn,)

Appellee/Defendants.)

JUN 02 2017

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Deputy Court Clerk

Appeal Case No. APP-16-M02P

Appeal Case No. APP-16-M03P

Trial Case No. CIV-16-M04

DECISION AND ORDER

This appeal concerns two sets of parties, each of which asserts that they are the proper holders of the seven offices of the Business Committee of the Seneca-Cayuga Nation. The controversy is an outgrowth of the conduct of the 2016 annual meeting of the Seneca-Cayuga General Council. The parties requested that the Court of Indian Offenses resolve the controversy, each requesting that they be declared by the court to be the proper office holders. The trial court conducted a bench trial and issued an order declaring that Plaintiffs were the proper office holders of the Seneca-Cayuga Business Committee. Additionally, the trial court entered orders that the annual meeting of the Seneca-Cayuga General Council be reconvened on a date certain, that the written agenda for the annual meeting be

amended in certain respects, that elections of officers be conducted at the annual meeting, that voting be conducted in a certain manner, that candidacy be restricted to already declared candidates, that a special master would be appointed by the Court to report the propriety and results of the election to the Court, and that the election special master would be paid from the treasury of the Seneca-Cayuga Nation in an amount to be set by the court.

Defendants appeal the trial court's order declaring Plaintiffs to be the proper office holders, along with other portions of the court's rulings. Plaintiffs appeal those orders of the trial court that went beyond the court's declaration of Plaintiffs as the proper holders of office on the Seneca-Cayuga Business Committee.

We affirm the trial court's order declaring Plaintiffs to be the proper office holders on the Seneca-Cayuga Business Committee. We affirm the trial court's order that actions of those who remained after adjournment of the 2016 annual meeting of the Seneca-Cayuga General Council were not authorized by the Nation's Constitution and are null. We vacate the orders of the trial court that went beyond these determinations.

I. Facts and Procedural Background

A. Annual Meeting of Nation's General Council on June 4, 2016

The Seneca-Cayuga Nation is a federally recognized Indian tribe with headquarters in Grove, Oklahoma. The Nation's organizing document is its Constitution, the *Constitution and By-Laws of the Seneca-Cayuga Nation*, approved and ratified in 1937 and last amended in May, 2014. The supreme governing body of the Nation is the Seneca-Cayuga General Council.¹ The membership of the General Council is comprised of all adult members of the Nation.² Annual meetings of the General Council are on the first Saturday of June of each year.³ It is the duty of the Nation's Chief to preside at the annual General Council meeting.⁴ The Chief serves as one of seven officers of the Nation, the

Chief, Second Chief, Secretary-Treasurer and four (4) Council Persons.⁵ The officers and council persons comprise the Business Committee of the Nation, which has “. . . power to transact business and otherwise speak or act on behalf of the Seneca-Cayuga Nation in all matters on which the Nation is empowered to act.”⁶ Election of the Nation’s officers is to be held, on a staggered basis, at the annual General Council meetings.⁷

On June 4, 2016, the annual meeting of the Seneca-Cayuga General Council was called and presided over by the Nation’s Chief, William L. Fisher. Election of officers was not on the annual meeting’s agenda, due to a temporary order of restraint having been issued in separate litigation regarding a pending candidacy eligibility issue. A quorum for the meeting was verified. The meeting was called to order by Chief Fisher and, though the agenda for the meeting was not initially approved by members assembled, some agenda items were considered and voted upon. Points of order were then raised by some members in a manner that was considered by the Chief to be hostile, disruptive and potentially posing a safety risk. The Chief thereupon abruptly adjourned the meeting without motion or approval of the members assembled. Upon adjournment, the Nation’s officers and council persons exited the building, as did some general council members. Other members remained (a new quorum count was not done) and elected a chairman pro tem to preside. A meeting was thereafter conducted by the chairman pro tem. A new agenda was adopted and actions thereon were taken by vote of members remaining. Post-adjournment actions so taken included purported disenrollment of the Nation’s officers and council persons (Appellants/Plaintiffs herein), declaration of their offices as vacant, and nomination and purported election of new officers and council persons (Defendant/Appellees herein), purportedly pursuant to Article IX of the Constitution providing that vacancies in any elective office shall be filled at any regular or special meeting of the Seneca-Cayuga Council.

B. Court action and pleadings

On June 6, 2016, Appellants/Plaintiffs (Fisher, et al.), in Case Number CIV-16-M04, filed their Complaint for Declaratory Judgment, Preliminary Restraining Order, Preliminary Injunction, and Permanent Injunction praying that (a) Defendants (Barton, et al.) be prohibited from claiming that Defendants hold those offices to which Plaintiffs have been elected, from interfering with Plaintiffs' discharge of those duties and from violating the Nation's Constitution as to Removal of Officers and Bill of Rights, and (b) a declaratory judgment be entered declaring Plaintiffs to be the holders of the offices to which they have been elected and that Defendants have no right, claim or title to any such offices.

Later on June 6, 2016, Defendants/Appellees (Barton, et al.), as Plaintiffs in Case Number CIV-116-M05, filed their Request for Temporary and Permanent Injunction and Restraining Order praying that Fisher, et al., be restrained from blocking Barton, et al., from access to the Tribal Offices and access and control of all tribal financial accounts and all tribal enterprises and further praying that the court recognize the elections of Barton, et al.

Each set of plaintiffs sued in their alleged official capacities as office holders of the Seneca-Cayuga Nation. On June 9, 2016, Barton, et al., filed their Request for Immediate Emergency Relief.

C. Trial proceedings

On June 21, 2016, trial upon the pleadings was conducted by the court. At commencement of the hearing, the court combined and restyled the two cases as *Fisher, et al., Plaintiffs, as individuals, versus Barton, et al., Defendants, as individuals*. The court granted the request of individual members of the Nation's Election Committee to intervene as parties, in that their elected offices had also been purportedly vacated by action of the post-adjudgment meeting.

Prior to testimony and submission of evidence, Defendants, through counsel, withdrew their allegation that disenrollment of Plaintiffs by the post-adjudgment meeting was proper or valid. At the same preliminary stage, Defendants, through counsel, indicated that the case was “a quo warranto action” for the Court to decide who were the proper parties to the elected officials seats or positions on the Seneca-Cayuga Business Committee. This statement of the nature of the case by Defendants, at commencement of trial, is consistent with the prayer for relief by Plaintiffs in their Complaint requesting declaratory judgment that Plaintiffs were the proper office holders of the Seneca-Cayuga Business Committee.

Several witnesses testified regarding the conduct of the annual meeting, its adjournment by Fisher, and its reconvening and actions taken thereafter purportedly in conformance with Robert’s Rules of Order. The trial court viewed a video of part of the annual meeting, including events leading to adjournment by Fisher, the exit of Plaintiffs, and the immediate reconvening by those who remained, including Defendants.

D. Findings and Orders of Trial Court

At the conclusion of the trial, the court announced its decision from the bench. The court entered its journal entry Order on July 6, 2016. The findings and orders of the court fall into three general categories: 1) the determination of the proper holders of the offices in dispute and 2) the conduct of the annual meeting of the Seneca-Cayuga General Council and 3) the conduct of the Seneca-Cayuga Nation’s elections.

1. Trial court findings and conclusions regarding proper holders of offices.

The trial court made findings and conclusions, in part, as follows: William L. Fisher, as Chief of the Nation and presiding officer of the June 4, 2016 meeting of the Nation’s General Council, was without authority to adjourn the meeting under

the circumstances then existing . . . The decision of Chief Fisher, while acting as the presiding officer of the meeting, to not permit members of the General Council to raise points of order was improper . . . the actions of those who remained and purportedly continued to conduct the business of the Nation after William L. Fisher improperly adjourned the June 4, 2016 meeting of the General Council were not authorized by the Nation's Constitution and are null.

Based on these findings and conclusions, the court ordered that all officers of the Nation holding office as of the time the June 4, 2016 General Council convened, but were later purportedly removed post-adjournment, are reinstated.

2. Trial court findings and conclusions regarding Nation's conduct of annual meeting, election of officials and disenrollment of members.

The court made additional findings and conclusions that "(A)ny purported disenrollment of a member or members of the Nation from and after the 2015 meeting of the General Council was invalid" and that "(A)ny election of officers of the Nation by the General Council other than by an in-person ballot, cast at a meeting of the General Council, is invalid."

The court entered additional orders as follows:

- a. The General Council of the Seneca-Cayuga Nation will reconvene on July 23, 2016, or as soon thereafter as may be authorized by this Court, and will give notice of said reconvened meeting in the manner required by constitution and ordinance . . .
- b. The agenda of the June meeting of the General Council will be amended to include the election of officers whose terms are expiring this year . . .
- c. The Business Committee will add to the agenda of the reconvened meeting a report from the secretary-treasurer on the general financial condition of the Nation . . .
- d. The agenda of the June meeting will otherwise remain in effect . . . No additional declarations of candidacy will be permitted . . .

- e. The election of officers at the reconvened meeting of the Nation's General Council will be by in-person ballot, cast at said meeting . . .
- f. The Court will appoint a special master to monitor the election of officers to be conducted at the reconvened 2016 General Council meeting and said monitor will report to the Court the propriety of said election and its results . . .
- g. The expense of said monitor will be paid from the treasury of the Seneca-Cayuga Nation in an amount set by this Court . . .
- h. The costs of those persons who occupied the offices of Second Chief, Second Council Person and Fourth Council Person . . . are taxed to the individual defendants in equal shares, and said persons may submit a request to include his or her attorney fee in the taxation of costs.

3. Appeals by parties

a. Plaintiffs appeal all trial court orders made in addition to the court's orders reinstating Plaintiffs to their offices and nullifying all actions of those who remained and purportedly continued to conduct the business of the Nation after William L. Fisher adjourned the June 4, 2016 General Council meeting. Plaintiffs contend that the election issues addressed and ruled upon by the court, with accompanying court injunctions and directives for a reconvened General Council meeting, amending the agenda, ordering an election, determining candidacy, and decreeing the election process and type of voting, were not pled or joined for judicial determination by either party and were sua sponte actions by the trial court lacking notice, due process or opportunity to be heard for the parties and third parties significantly affected thereby and without full evidentiary foundation. Plaintiffs additionally contend that the trial court's order setting bonds as conditions of stay of judgment pending appeal is in error.

b. Defendants appeal the trial court order reinstating Plaintiffs to their offices and nullifying the actions of those who remained after William L. Fisher purportedly adjourned the June 4, 2016 General Council meeting. Defendants

claim said post-adjudgment actions to be procedurally valid pursuant to Robert's Rules of Order as adopted by a 2006 General Council Resolution. Defendants also appeal those parts of the trial court's orders disallowing additional declarations of candidacy for office for election at the ordered reconvened General Council meeting and that in-person balloting for Business Committee offices is not required. Defendants additionally contend that the trial court's order taxing costs and attorney fees against Defendants is in error and that the trial court improperly failed to address Defendants' oral motion to disqualify one of opposing counsel as attorney for Plaintiffs.

II. Jurisdiction

A. General Jurisdiction of Courts of Indian Offenses

Courts of Indian Offenses are established, pursuant to the authority of the Secretary of the Interior, by rules and regulations codified at Title 25 of the Code of Federal Regulations at Part 11, and with the purpose "to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction." 25 C.F.R. 11.102. The Court of Indian Offenses is established for such purpose for the Seneca-Cayuga Nation. 25 C.F.R. 11.100 (c)(5).

The general authority and scope of the jurisdiction of the Court of Indian Offenses regarding civil actions is provided at 25 C.F.R. 11.116. The Court has jurisdiction to hear civil actions "arising within the territorial jurisdiction of the court" regarding claims "in which (1) the defendant is an Indian; or (2) other claims, provided at least one party is an Indian." For purposes of this jurisdictional regulation, 25 C.F.R. 11.106 provides that "... an Indian is defined as a person who is a member of an Indian tribe which is recognized by the Federal Government as eligible for services from the BIA, and any other individual who is an 'Indian' for

the purposes of 18 U.S.C. 1152-1153.” All parties in this case, plaintiffs and defendants, are members of the Seneca-Cayuga Nation and each is an “Indian” for purposes of 25 C.F.R. 11.116. This civil action arose within the territorial jurisdiction of this court. The Court of Indian Offenses may exercise jurisdiction of this civil action pursuant to 25 C.F.R. 11.116.

B. Jurisdiction of Court of Indian Offenses regarding an Indian tribe.

The jurisdiction of the Court of Indian Offenses regarding an Indian tribe is limited. 25 C.F.R. 11.118 (b) provides as follows: “A Court of Indian Offenses may not adjudicate an election dispute, take jurisdiction over a suit against a tribe, or adjudicate any internal tribal government dispute, unless the relevant tribal governing body passes a resolution, ordinance, or referendum granting the court jurisdiction. 25 C.F.R. 11.118 (d) provides as follows: “A tribe may not be sued in a Court of Indian Offenses unless its tribal governing body explicitly waives its tribal immunity by tribal resolution or ordinance.” Consistent with the recognition of and respect for the sovereign immunity of tribes as long upheld in federal law, the Code of Federal Regulations, in its provision for Courts of Indian Offenses, does not operate by inference to abrogate tribal sovereignty, nor does it contain, explicitly or implicitly, any waiver of sovereign immunity by Indian tribes.

C. Grant of jurisdiction by Seneca-Cayuga Nation regarding internal tribal governmental disputes or election disputes.

On June 2, 2012, the General Council of the Seneca-Cayuga Nation, by Resolution #69-060212, entitled “Jurisdiction Given to the Court of Indian Offenses,” resolved that “the Bureau of Indian Affairs, Court of Indian Offenses is the proper forum to hear governmental disputes of the Seneca-Cayuga Tribe of Oklahoma to include election disputes, effective immediately.”

This Court finds, pursuant to 25 C.F.R. 11.118 (b), that the General Council of the Seneca-Cayuga Nation is the relevant governing body of the tribe for

purposes of said regulation and that the General Council has by Resolution #69-060212 granted jurisdiction to the Court of Indian Offenses to adjudicate internal tribal governmental disputes and elections disputes.

This Court finds that this matter, as originally pled by the parties in their purported official capacities as members of the Seneca-Cayuga Business Committee seeking injunctive relief regarding actions taken at the Nation's general council meeting, was at its inception a suit regarding an internal tribal government dispute, regarding which the Court of Indian Offenses has authority to exercise jurisdiction pursuant to the Nation's specific grant of jurisdiction. The trial court's re-designation of the parties, at the commencement of trial, as appearing in their individual capacities did not otherwise affect the trial court's authority to exercise jurisdiction over the suit, in that all parties are "Indian" for purposes of 25 C.F.R. 11.116.

III. Standard of Review

The parties sought injunctive and declaratory relief. Injunctive and declaratory actions and relief are equitable in nature, and this Court reviews the granting or denial of such relief for abuse of discretion. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F. 3d 507, 523 (5th Cir. 2016) (determination of whether to grant declaratory relief is within the district court's discretion, and a decision to deny declaratory relief is thus reviewed only for abuse of that discretion); *Concise Oil & Gas PSHP. v. Louisiana Intrastate Gas Corp.*, 986 F. 2d 1463, 1471 (5th Cir. 1993) (court reviews the denial of declaratory relief for abuse of discretion).

A trial court may abuse its discretion if it issues injunctive relief based on an erroneous view of the law or without due regard for the procedural requirements for orders for such relief. *Community Communications Co. v. City of Boulder*, 630

F. 2d 704, 708-09 (10th Cir. 1980) (entry of restraining order an abuse of discretion where based on error of law), rev'd on other grounds, 455 U.S. 40 (1982).

Questions of law are reviewed de novo. *Allison v. Bank One - Denver*, 289 F. 3d 1223 (2002) (“we apply a de novo standard of review to questions of law decided by the district court”).

IV. Analysis

A. Issue of validity of post-adjournment actions

The crux of the case is the determination of whether the post-adjournment actions taken by remaining members at the June 4, 2016 General Council annual meeting were valid or of legal effect. The trial court determined that such post-adjournment actions, including election of new members of the Business Committee, were not authorized by the Seneca-Cayuga Constitution and were null and of no legal effect. Following from this determination, the trial court declared that the persons who comprised the Seneca-Cayuga Business Committee at the commencement of the annual meeting remained in their offices.

Defendants assert that Robert's Rules of Order, in the event of an improperly adjourned meeting, authorizes the continuation of the meeting and the election of a chairman pro tem to preside at the continued meeting.⁸ Defendants further assert that Robert's Rules of Order are applicable to the circumstances of this case and are controlling by virtue of the 2006 General Council Resolution #25-060306, which provides that the “. . . General Council does hereby adopt Robert's Rules of Order in conducting orderly Business Committee and General Council Meetings.” Defendants reason that because the meeting was adjourned improperly, its continuation as presided over by a post-adjournment selected chairman pro tem gives authority and validity to the actions taken by those remaining, including election of new officers.

The Constitution and By-Laws of the Seneca-Cayuga Nation provide that “It shall be the duty of the chief to preside at all meetings . . .” and that “[i]n the absence of the chief, the second chief shall perform all the duties of that officer . . .” and that “. . . in the absence of the chief and second chief, (the Secretary-Treasurer) shall call the meetings to order until a chairman pro tem is selected . . .” *By-Laws, Article I - Duties of Officers, Sections 1, 2 and 3.*

The Constitution and By-Laws do not otherwise provide guidance regarding the conduct or conclusion of general council meetings, nor has the Constitution and By-Laws been amended to so provide. The By-Laws provide for the selection of a chairman pro tem only in the contingency of the absence of both the chief and second chief, and only upon the Secretary-Treasurer calling the meeting to order. The Constitution and By-Laws do not provide for the contingency of improper or unreasonable adjournment of a meeting by a chief present and presiding.

The General Council’s adoption of Robert’s Rules of Order “in conducting orderly Business Committee and General Council Meetings” provides parliamentary rules and procedures for the presiding officer to utilize in conducting council meetings. However, rules adopted by resolution of a governing body do not control or impinge upon a constitutional delegation of duty and grant of authority. The resolution must conform to the constitution. Tribal governing body resolutions in conflict or partial conflict with the tribal constitution must yield to it. The constitution does not yield to the resolution. In this case, the Seneca-Cayuga Constitution and By-Laws delegates the duty and authority to the Nation’s Chief to preside at meetings of its General Council. The Chief, as presiding officer, had inherent authorities in the conduct of General Council meetings by virtue of his constitutionally delegated duty prior to the adoption of the council resolution, and those inherent authorities remain. Robert’s Rules of Order is not contained in the Nation’s Constitution or By-Laws, and its adoption by council resolution does not

have constitutional import. The Court notes that Robert's Rules of Order itself recommends inclusion of Robert's Rules of Order as "Parliamentary Authority" in the By-Laws of an organization in order to have controlling effect.⁹ The annual meeting of the General Council was concluded by adjournment by its presiding officer. Even if the adjournment is found to be improper under parliamentary rules, the meeting was nonetheless concluded by its presiding officer exercising his constitutional grant of authority to preside.

Tribal law offers other means by which circumstances and actions as present in this case may be addressed by concerned council members. If an officer abuses his or her authority or does not properly or reasonably perform his or her constitutional duties, including presiding at council or committee meetings, remedy regarding that officer is available by constitutional means.¹⁰ If a General Council meeting is improperly or unreasonably adjourned by the presiding officer, remedy regarding conducting the General Council's unfinished business is available by constitutional means.¹¹ If the circumstances of such breakdown in the conduct of the Nation's business amounts to an "internal tribal government dispute," and the dispute is not resolved by and within the Nation, recourse may be sought through judicial resolution pursuant to 25 C.F.R. 11.116.

This Court therefore agrees with the conclusions of the trial court that actions taken by persons present after the Chief's adjournment of the June 4, 2016 General Council annual meeting, including disenrollment of members of the Business Committee, declaration of offices as vacant and election of new members of the Business Committee, were not authorized by the Seneca-Cayuga Constitution and were null and of no legal effect and that the persons who comprised the Seneca-Cayuga Business Committee at the commencement of the annual meeting continued to hold their offices.

The above order of the trial court is declaratory in nature. “The two principle criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and setting the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. *Env’t Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F. 3d 507, 523 (5th Cir. 2016), citing *Concise Oil & Gas PSHP. v. Louisiana Intrastate Gas Corp.*, 986 F. 2d 1463, 1471 (5th Cir. 1993) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure*, Sec. 2758 at 647-648).

The Court of Indian Offenses is authorized to grant injunctive relief and issue declaratory judgments. 25 C.F.R. 11.501, Judgements in Civil Actions,

This Court finds that the criteria for issuance of a declaratory judgment are present in this case and are met by the order of the trial court declaring post-adjudgment actions to be null as not constitutionally authorized and further declaring Plaintiffs to be the holders of the offices of the Business Committee.

B. Issues regarding additional orders of trial court

This case is roughly one in the nature of quo warranto, an action by claimants to an office seeking court determination of who has right to hold the office. However, in the circumstances present here and under applicable law and regulation, this is further a case of an internal tribal government dispute seeking resolution. This is not a case of an election dispute, though a purported election was conducted post-adjudgment of the General Council annual meeting. The actual election prescribed by the Seneca-Cayuga Constitution had, prior to the annual meeting, been postponed and litigation in its regard was before another judge of the court in a separate case involving several of the same parties.¹² A future date to hold the postponed election had been provisionally set by the

Business Committee, though not publicly posted, at the time of the June 4, 2016 General Council annual meeting.¹³

The trial court's conclusion and order, that post-adjudgment actions were violative of the Seneca-Cayuga Constitution and By-Laws and therefore null and that Plaintiffs therefore continued to hold their offices on the Seneca-Cayuga Business Committee, addressed, resolved and fully remedied the constitutional issue raised by the parties in their pleadings and as presented and made of record by the adversaries at trial and in this litigation.

The trial court entered additional orders, as detailed at Section I. D. 2, pp. 6-7 herein, that directed the reconvening of the General Council annual meeting and further directed a meeting agenda, elections, candidacies, manner of voting, and election monitoring by a special master with payment from the Nation's treasurer. The court further acted to invalidate any disenrollments since June, 2015 (the previous year).

The trial court's order that the annual meeting be reconvened at the point of adjournment, given the original posture of the case as an internal tribal government dispute seeking resolution, may reasonably be viewed as within the discretion of the court in equity to remedy what the court determined to be an improper adjournment by a tribal official followed by unauthorized actions by those remaining. However, the order reconvening was accompanied and intertwined with overreaching court directives regarding the reconvened meeting, elections and other matters. This Court recognizes and understands the trial court's motive to benefit the tribal process. However, this Court finds that the additional orders so entered do not comport with the law in two general respects.

1. Equitable remedial orders must relate to the constitutionally violative conduct and must respect the interests of the sovereign in managing its own affairs.

Injunctive relief is equitable in nature. The Supreme Court has articulated a three-part framework to guide district courts in the exercise of their equitable remedial authority. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

“In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 16 (1971). The remedy must therefore be related to “the condition alleged to offend the Constitution” *Milliken I*, 418 U.S. 717, 738 (1974). Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.” *Id.*, at 746. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.” *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977) (*Milliken II*). The Court in *Milliken II* added that the “principle that the nature and scope of the remedy are to be determined by the violation means simply that federal court decrees must directly address and relate to the constitutional violation itself.” *Id.*, at 281-281.

This Court finds that “the condition alleged to offend the Constitution” in this case is comprised of the actions taken post-adjudgment at the General Council meeting that culminated in the purported election of new Business Committee officers (Defendants). This Court further finds that the trial court’s declaratory judgment that Plaintiffs are and remain the lawful Business Committee officers is a “remedy . . . related to the condition alleged to offend the Constitution,” based on the conclusion that the post-adjudgment actions of Defendants and others at the annual meeting of the General Council were invalid and null. This Court further finds that such declaratory judgment is a remedy “designed as nearly as possible to restore the victims of discriminatory (or violative) conduct to the position they would have occupied in the absence of such conduct.” This Court further finds that such declaratory judgment, as so limited, is a remedy that “take(s) into account the interests of (tribal) authorities in managing their own affairs, consistent with the Constitution.” This Court finds that such declaratory order meets the criteria for exercise of equitable remedial authority by the trial court in the facts and

circumstances of this case. This Court finds that such declaratory judgment, as so limited and entered as partial judgment by the trial court, is proper and that the trial court did not abuse its discretion in said regard.

This Court finds, as a matter of law, that the orders entered in addition to the declaratory judgment do not meet criteria of the law and are not in conformance with the three-part framework established by the Supreme Court for judicial exercise of equitable remedial authority. The “nature and scope” of the additional orders of the trial court do not “directly address and relate to the constitutional violation itself.”

This Court finds that the additional injunctive orders are based on an erroneous view of the law, and as such their entry constitutes an abuse of discretion based on error of law. See *Community Communications Co. v. City of Boulder* at 708-09. The additional orders must therefore be vacated.

2. Due process of law required

The trial record does not contain findings of fact and conclusions of law regarding the additional injunctive orders. The issues related to these orders were not pled by the parties nor fully litigated at trial, nor is there a full record regarding these issues for this Court to examine. The parties to the case were not provided notice by the trial court that factual and legal issues related to these orders were being treated by the court as being in controversy in this case. Adequate opportunity to prepare and be fully heard regarding these was not provided the parties. The additional orders have significant effect upon the rights of non-parties to this suit, including the Seneca-Cayuga Nation and the tribal membership, and notice and opportunity to be heard was not provided to such non-parties. The court’s orders implicate the sovereign right of the Seneca-Cayuga Nation in “managing (its) own affairs, consistent with the Constitution.” The Seneca-Cayuga Nation has not been joined as a party or afforded opportunity to object to joinder or

to be heard regarding the import and enforcement of orders regarding the Nation.

This Court finds the additional orders so entered to be violative of fundamental guarantees of due process of law. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“the fundamental requisite of due process of law is the opportunity to be heard”) (quoting from *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); and see Constitution of Seneca-Cayuga Nation, Article XII - Bill of Rights.

This Court finds that, in addition to being based on an erroneous view of the law, the additional injunctive orders were entered without due regard for the procedural requirements for orders for such relief, and on such secondary basis their entry constitutes an abuse of discretion based on error of law and subjects them to vacation. See *Community Communications Co. v. City of Boulder* at 708-09.

C. Post-Trial proceedings and related appellate issues

On July 11, 2016, Plaintiffs filed their Notice of Intent to Appeal. On July 14, 2016, Plaintiffs filed their Motion for Stay Pending Appeal, to which Defendants filed their Objection.

On July 20, 2016, hearing was held on Plaintiffs’ Motion for Stay Pending Appeal. The court ordered the postponement of the election as ordered at the conclusion of the June 21, 2016 trial, and the court took the decision on the motion for stay under advisement.

On August 2, 2016, the trial court filed a Decision and Order in which the court: 1) Corrected the court’s decision at trial to omit the requirement of in-person balloting for the Business Committee at the ordered reconvened General Council meeting, but leaving in place the requirement for in-person balloting for the Grievance Committee, 2) Granted the motion for stay pending appeal, but, citing Rule 62 (c) of the Federal Rules of Civil Procedure, conditioned the stay on

posting of bonds in amounts of \$8,200.00 to secure payment of fees and costs incurred by Defendants, \$50,000.00 to secure reimbursement to the Nation for salaries and expenses paid by the Nation from and after July 23, 2016 to officers whose terms expired as of the 2016 session of the Nation's General Council, and \$2,750.00 to secure payment of interest on salaries and expenses lost from and after July 23, 2016 by those defendants who might be elected to replace the officers whose terms expired as of the 2016 session of the Nation's General Council, and 3) Vacated the order entered on July 20, 2016 postponing the election as ordered on June 21, 2016, absent the posting of bond as directed.

Plaintiffs contend on appeal that the trial court's order setting bonds as conditions of stay of judgment pending appeal is in error.

In the setting of bonds, the trial court cited Rule 62 (c), Federal Rules of Civil Procedure. Rule 62 (c) regards injunctions pending appeal and provides for the setting of bond or "terms that secure the opposing party's rights." The Seneca-Cayuga Nation was not a party to the case, and the bonds of \$50,000.00 and \$2,750.00 respectively to secure reimbursement for postulated consequential expenses to the Nation do not appear to fall within the scope of Rule 62 (c). The order regarding the third bond set of \$8,200.00 to secure payment of fees and costs incurred by Defendants does not indicate what fees and costs those are or what rights of Defendants would be secured thereby. Plaintiffs counsel propounds that the court was referencing potential attorney fees by Defendants/Appellees if successful on appeal. This Court does not find the basis in the record. This Court finds that a basis for the setting of bonds pursuant to Federal Rule 62 (c) is not demonstrated in the record.

25 C.F.R. 11.801, Procedure on Appeal, at subsection (d) provides as follows:

"In civil cases, the appellant may request the trial division to stay the judgment pending action on the notice of appeal, and, if the appeal is allowed,

either party may request the trial division to grant or stay an injunction pending appeal. The trial division may condition a stay or injunction pending appeal on the depositing of cash or bond sufficient *to cover damages awarded by the court together with interest.*

The trial court had not awarded damages in this action. The nature and purposes of the stay bonds set by the trial court are not authorized or provided for pursuant to applicable regulation, 25 C.F.R. 11.801 (d).

This Court finds that the trial court's order setting bonds as conditions of stay of judgment pending appeal is in error.

D. Attorney fees

The issue of the propriety of the taxing of attorney fees for certain of the Plaintiffs to the individual Defendants has been raised and argued on appeal.

The July 6, 2016 journal entry Order of the trial court orders that “[t]he costs of those plaintiffs who occupied the offices of Second Chief, Second Council Person and Fourth Council Person at the commencement of the June 4, 2016 meeting of the Seneca-Cayuga Nation General Council are taxed to the individual defendants in equal shares.” The court then orders that [w]ithin 15 days, the said plaintiffs who occupied the offices of Second Chief, Second Council Person and Fourth Council Person may submit a request to include her or his attorney fee in the taxation of costs. Within 15 days after receiving a copy of said request the defendants may file a response. Any party may request a hearing.”

The record before this Court does not reflect that a request for attorney fee has been submitted to the trial court by any plaintiff, nor that a response thereto has been filed by any defendant, nor that a request for hearing has been made or a hearing conducted or an order issued thereon.

This Court finds that there is not an order of attorney fees in the record upon which an appeal could lie and that the issue of attorney fees is not properly before this Court.

E. Disqualification of Attorney for Plaintiffs

Defendants made an oral motion to the court prior to commencement of trial on June 21, 2016 requesting the disqualification of one of Plaintiffs' attorneys. The basis for the motion was a 2007 Seneca-Cayuga General Council resolution that "forever banned" the attorney "from representing the Seneca-Cayuga Tribe of Oklahoma or any of its Corporations, businesses or Tribal Officials in their official capacities," in the language of the resolution. The motion was oral, not written. No showing of prior notice of the motion to the attorney or the plaintiffs was shown. The trial court did not hear the motion, nor does the record reflect that a separate hearing was requested by Defendants. The named attorney was present at trial, but did not question witnesses or address the court during the hearing. The trial court redesignated the parties, including Plaintiffs, as appearing as individuals and not in their "official capacity." The record does not demonstrate that the named attorney has represented a party in his or her official capacity in this case thereafter. Defendants do not assert or show prejudice based upon the attorney's representation of the individual Plaintiffs. There is a presumption that a party has a right to counsel of his or her choice.

This Court finds that there is not an order or journal entry of the trial court upon which an appeal has been brought on the issue of attorney disqualification and that the issue is not properly before this Court.

IV. Summary

The order of the trial court declaring Plaintiffs to be the proper office holders on the Seneca-Cayuga Business Committee is affirmed. The order of the trial court that the actions of those who remained after adjournment of the 2016 Seneca-Cayuga General Council annual meeting were not authorized by the Seneca-Cayuga Constitution and are null is affirmed. The orders of the trial court that went beyond these determinations are reversed and ordered vacated.

Entered this 2nd day of June, 2017.

/s/Albert Ghezzi

Albert Ghezzi, Appellate Magistrate

Concurring: Lisa B. Otipoby Herbert, Appellate Magistrate
O. Ronald McGee, Appellate Magistrate

¹ Seneca-Cayuga Constitution, Article IV

² Seneca-Cayuga Constitution, Article IV

³ Seneca-Cayuga Constitution, Article VIII

⁴ Seneca-Cayuga By-Laws, Article I

⁵ Seneca-Cayuga Constitution, Article V.

⁶ Seneca-Cayuga Constitution, Article VI

⁷ Seneca-Cayuga Constitution, Article VIII

⁸ The section of Robert's Rules of Order, 10th ed. (2000), Section 8, I, 3, pp. 436-437, cited by Defendants regards the temporary absence of the chairman from a meeting or a circumstance when it is necessary for the chairman to vacate the chair during a meeting, circumstances not present in this case. Even were Robert's Rules of Order found to be generally applicable to the conduct of General Council meetings, this Court would not find applicable this cited section as authority to elect a chairman pro tem in the circumstances of this case.

⁹ Robert's Rules of Order Newly Revised (11th Ed.), at Chapter XV, page 450, recommends that "At each meeting . . . presiding officer should have at hand . . . a copy of its parliamentary authority (that is, this book, *if it is prescribed in the by-laws*);" and at Chapter XVIII, pages 565 and 588, combines the constitution and by-laws of a society and recommends that an Article be included in an organization's By-Laws entitled "Parliamentary Authority" establishing parliamentary rules governing the organization in all cases.

¹⁰ Seneca-Cayuga Constitution, Article X - Removal of Officers provides a process for removal of members of the Business Committee for misconduct or other acts and election of a successor.

¹¹ Seneca-Cayuga By-Laws, Article III - Regular and Special Meetings provides for the calling of special meetings of the General Council for a stated object and for the transaction of other business that may be presented.

¹² The trial court record contains a May 19, 2016 Court Minute order entered upon hearing in the separate candidacy litigation finding and ordering that “. . . Seneca-Cayuga Business Committee to complete its administrative process regarding the candidacy of the Plaintiff . . . Election Committee will suspend Seneca-Cayuga election pending administrative process completion . . .”

¹³ Plaintiff Sarah S. Channing, Secretary-Treasurer, testified that the Business Committee had earlier decided to postpone the election of officials beyond the date of the General Council’s annual meeting due to litigation in a pending separate case before another judge involving qualifications of a candidate. Plaintiff Channing further testified that an April 26, 2016 Notice of the election postponement was posted by her as Secretary-Treasurer and that the election of officials was later reset by the Business Committee for July 23, 2016, but not publicly posted because of court process.