



Court File No. T-2757-23

**IN THE FEDERAL COURT**

MARIAH BIGSKY and BAND MEMBERS ALLIANCE  
AND ADVOCACY ASSOCIATION OF CANADA

Applicants

-and-

MUSKOWEKWAN FIRST NATION, AS REPRESENTED BY ITS CHIEF AND  
COUNCILLORS

Respondents

**NOTICE OF APPLICATION**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicants. The relief claimed by the Applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at The Court House, 2425 Victoria Avenue, Regina, Saskatchewan, S4P 4W6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the *Federal Courts Rules*, SOR/98-106 and serve it on the Applicants' solicitor, or where the Applicants are self-represented, on the Applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, SOR/98-106, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: ~~December 27, 2023~~ December 28th, 2023

Issued by: (Robert) Buye M'VONDO  
(Registry Officer)

Address of local office: The Court House  
2425 Victoria Avenue  
Regina, Saskatchewan  
S4P 4W6

**TO:** **Muskowekwan First Nation, as Represented by its Chief and Councillors**  
P.O. Box 249, Lestock, Saskatchewan S0A 2G0  
Attention: Chief Jamie Wolfe, and Councillors Vernetta Campeau, Cynthia Desjarlais, Michael Hunter, Julius Manitopyes, Dory Oochoo, William Pinacie Jr., Calvin Wolfe, and Vanessa Wolfe  
Email: [Jamie7wolfe@gmail.com](mailto:Jamie7wolfe@gmail.com)  
(pursuant to Rule 304(1)(b)(i))

**AND TO:** **The Attorney General of Canada**  
Department of Justice Canada  
Prairie Regional Office - Saskatoon  
Saskatoon Square  
410 – 22nd Street East, Suite 410  
Saskatoon, SK S7K 5T6  
Attention: Deputy Regional Director General  
Telephone: 306-518-0800  
Fax: 306-975-4030  
Email: [AGC\\_PGC\\_SASKATOON@JUSTICE.GC.CA](mailto:AGC_PGC_SASKATOON@JUSTICE.GC.CA)  
(pursuant to Rule 304(1)(b)(iii))



## APPLICATION

1. This is an application for judicial review under s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, of a decision by the Muskowekwan First Nation (the “**MFN**” or “**Nation**”) as represented by its Chief and Councillors (the “**Council**”) on or about December 20, 2023, to unilaterally fix low *per capita* distributions to the Nation’s member (the “**Decision**”) arising from the Mismanagement Claims Settlement funds (the “**Funds**”) which was a specific land claim for the wrongful taking of Indian Reserve lands by the Government of Canada (the “**Settlement**”), and did so without broad community consensus by the membership of the MFN.

## RELIEF SOUGHT

2. The Applicants seek an Order:
  - (a) In the nature of *certiorari*, quashing and/or setting aside the Decision;
  - (b) In the nature of *mandamus*, directing the Council to comply with its customary and public legal duty to administer a robust and procedurally fair process forthwith to allow the Nation’s members to exercise their communal rights to become informed on, deliberate on, and decide on the time and amount of Settlement *per capita* distributions by means of a ratification vote;
  - (c) Declaring that:
    - (i) the Nation members, as beneficiaries of the Settlement Funds, are entitled to receive information regarding the Settlement, and to deliberate upon *per capita* distributions prior to exercising the Nation members’ communal right to decide the time and amount of Settlement *per capita* distributions by means of a ratification vote;
    - (ii) the Council has a public legal duty to administer a sufficiently robust and procedurally fair process, culminating in a ratification vote for the time and amount of Settlement *per capita* distributions, to meet the requirements of the MFN’s customary laws and the common law;
    - (iii) the Decision was made unlawfully, and that Council lacks authority to make the Decision;
    - (iv) the Decision was unconstitutional for having disenfranchised Mariah Bigsky (“**Bigsky**”) and other MFN members of their fundamental freedoms, democratic and Aboriginal rights enshrined in sections 2(b) and 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the “**Constitution**”);

- (v) the Council breached its duty of fairness to the Applicant, Bigsky, by giving no or inadequate reasons supporting the Decision, and by depriving her of her rights to be heard and knowing the case to meet relative to the Decision;
  - (vi) the Decision was motivated by reasonable apprehension of bias arising from the Chief having publicly discussed or decided the Decision before Bigsky and other MFN members had the opportunity to be heard;
  - (vii) the Decision was motivated by irrelevant considerations that involved in whole or in part, the personal or financial interests of the Chief or Councillors;
  - (viii) the Councillors impermissibly or unreasonably fettered their discretion by blindly following the result desired or demanded by the Chief; and
  - (ix) all Nation members are entitled to an equal distribution of the Settlement Funds.
- (d) For costs of this Application in such amount as the Court deems just; and
  - (e) For such other relief as the Court deems just.

### **GROUND FOR THE APPLICATION**

#### **The Parties**

3. Bigsky, is a registered member of MFN and has been so her entire life.
4. The Applicant Bigsky originates this proceeding in her capacity as a MFN member directly and adversely affected by the Decision. Further, Bigsky brings this Application before the Court with the knowledge and support of numerous other MFN members who were inadequately consulted and disenfranchised of exercising their communal right to vote on the Settlement Fund distribution.
5. Bigsky is an Aboriginal person within the meaning of section 35 of the *Constitution Act, 1982*. She asserts private interest standing and public interest standing in the Court.
6. The Applicant, Band Members Alliance and Advocacy Association of Canada (“**BMAAAC**”, pronounced “bee mack”), is a national not-for-profit society incorporated under the *Canada Not-for-Profit Corporations Act*. BMAAAC’s mission is to assist band members in obtaining access to justice and ensuring good governance and financial accountability for First Nations in Canada.
7. BMAAAC asserts public interest standing in the Court, and supports Bigsky’s desire to ensure that Council respects the individual and communal rights of all MFN members under the *Constitution*, legislation, and customary and common laws. These matters transcend the rights, interests and privileges of Bigsky alone, and BMAAAC’s evidence

and submissions will focus on the implications of Council denying Indigenous peoples decision-making authority over *per capita* distributions of compensation monies, including the Decision's impact on the rights and interests of all Nation members.

8. The Respondent is a band as defined in the *Indian Act*, R.S.C. 1985, c. I-5. The MFN is located in south-eastern Saskatchewan, in Treaty 4 territory.
9. The Council is comprised of Chief Jamie Wolfe, and Councillors Vernetta Campeau, Cynthia Desjarlais, Michael Hunter, Julius Manitopyes, Dory Ochoo, William Pinacie Jr., Calvin Wolfe, and Vanessa Wolfe.
10. At all material times, the Council was subject to the Nation's customary laws, the *Constitution Act, 1982*, and applicable common laws when exercising its powers and authorities of public office.
11. The Respondent Nation, as represented by Council, acted in this case a federal board, commission or other tribunal within the meaning of section 2 of the *Federal Courts Act*.
12. The Respondent was legally obligated to act relative to Bigsky in accordance with the *Constitution Act, 1982*.

### **The Council's Meeting**

13. To Bigsky's knowledge, the Council or its delegates approached some MFN members to invite them to attend an informal meeting on December 20, 2023, by Zoom and possibly also by personal appearance, to discuss distributing the Settlement Funds (the "**Meeting**").
14. On or about November 27, 2023, an electronic information session notice was made available to one or more Nation members. The notice read in material part:

"To Muskowekwan Voters. Mismanagement Claims Information Session. ... Leaderships proposed idea: ... Message from your Chief Jamie Wolfe ... Notice to Vote on this issue at a further date. Proposed idea of the Chief. 11/27/2023"
15. The notice of information session contemplated Nation members voting on the distribution of Settlement Funds, as is Muskowekwan custom.
16. Bigsky learned of the Meeting shortly before it was held, and was able to attend in part by Zoom.
17. On December 19, 2023, Bigsky became aware through a cryptic message posted on Facebook by a few MFN members that the Meeting may be held on December 20, 2023. Bigsky could find no written notice of meeting located at any prominent areas of the community, such as the administration building or community gathering areas.

18. Bigsky learned through Facebook posts to a few Nation members that MFN Councillor Vernetta Campeau referred on her personal Facebook page to a meeting to be held on December 20, 2023 at 11:00 AM local time. Councillor Campeau provided a Zoom link for MFN members to attend the Meeting, which was, in effect, only 1 day's notice to the few MFN members who had received the notice.
19. Bigsky logged into the Meeting at 10:13 AM (11:13 AM Saskatchewan Time). Upon being admitted to the Meeting, the Bigsky asked in the Zoom chatroom if the Meeting would be recorded, whether there would be a time for questions and answers, and whether there would be an agenda for the Meeting.
20. After posing these questions, the Council removed Bigsky from the Zoom meeting. Despite repeated requests to be re-admitted to the Meeting, the Council did not re-admit her. Bigsky further attempted to join the Meeting by telephone, and Council refused to re-admit her to the Meeting by telephone.
21. To Bigsky's knowledge, Council also removed other MFN members from the Meeting so that they could not be heard.
22. Not all MFN members would have been able to attend the Meeting, even if the Council had given them notice to attend.
23. To Bigsky's knowledge, the Council had external legal counsel join the Meeting to speak to members, and Bigsky has no knowledge as to what was said and to whom.
24. Bigsky was not consulted in the conduct of the meeting. To Bigsky's knowledge, some three hundred or more Nation members wanted to vote upon how to distribute the Settlement Funds, or otherwise be consulted about the distribution in question. To Bigsky's knowledge, many Nation members were not given advance notice of the Meeting or consulted in the conduct of the Meeting.
25. Bigsky sought information from Council during the meeting regarding distributing the Settlement Funds to the Nation's members. Bigsky received no reply to her questions, and was excluded from the Zoom meeting upon seeking information. The Council did not re-admit Bigsky to the meeting, despite her repeated attempts to do so.
26. To Bigsky's knowledge, at the Meeting:
  - (a) the Council formed an opinion as to how the Settlement funds should be distributed;
  - (b) the Council gave no advance notice to all members on the question to be voted upon;
  - (c) the Council express no question that was clear and otherwise unassailable, to be voted upon;

- (d) the Council refused, neglected or failed to explain the purpose of a vote and the consequence arising from an affirmative or negative vote;
  - (e) the Council failed to establish a public meeting or meetings held in advance of the vote permitting all members to debate the merits of the question; and
  - (f) the Council refused, neglected or failed to permit all eligible members to vote on a question to distribute the Settlement Funds.
27. To Bigsky's knowledge, the Meeting also did not meet the Muskowekwan customary requirements to authorize a legal change in Muskowekwan custom.

### **The Decision**

28. There has been ongoing unrest at the MFN regarding allegations of financial misappropriation by some members of current and past leadership and other senior MFN employees and consultants. This has resulted in a longstanding protest at the MFN reserve, which has led to closures of the band office and interruption in services for the MFN members.
29. The Council's Decision to distribute the Settlement Funds was made without prior notice to Bigsky, was not communicated to Bigsky or the other Nation members in accordance with the law, but appears to have been made on or about December 20, 2023 as part of a course of conduct that continues to present day with regard to distributing the Settlement Funds.
30. The Council gave no reasons for the Decision to Bigsky, or so far as she knows, to the collective Nation members.
31. The Decision was referred to by word of mouth among some of the Nation members.
32. The Decision may also be reflected in a Band Council Resolution prepared without notice to Bigsky, or so far as she knows, to the collective Nation members.
33. Bigsky never received notice verbally or in writing from the Council, and so far as Bigsky knows, never sent her notice of the Decision.
34. When Bigsky heard that Council may have made the Decision, she attempted to contact the Chief to no avail, and none of the members of Council replied to Bigsky's requests for information.
35. Accordingly, the 30-day time limitation prescribed by subsection 18.1(2) of the *Federal Courts Act* has not been triggered.
36. In the alternative, the Decision is an ongoing course of the Council's conduct to refuse, neglect or otherwise fail to administer a ratification vote among the Nation members to

distribute the Settlement Funds in accordance with the Nation's custom, the *Constitution Act, 1982*, and any applicable common law.

37. In that event, Council's Decision comprises a course of continued unlawful conduct such that the time limited by subsection 18.1(2) of the *Federal Courts Act* does not apply. The Applicants invoke the principles established by the Federal Court of Appeal in the line of authorities emerging from *Krause v. Canada*, [1999] 2 F.C. 476.
38. In particular, the Decision reflects the Council's ongoing refusal, neglect, or failure to exercise its public legal powers and duties in accordance with customary law, constitutional and applicable common laws, including among others:
  - (a) failing to enact a Nation Band Council Resolution resolving to administer or otherwise govern the Nation members' individual and communal rights and interests to distribute the Settlement Funds;
  - (b) failing altogether to administer or otherwise govern the Nation members' individual and communal rights and interests to distribute the Settlement Funds;
  - (c) failing to schedule, post adequate notice of, and conduct general meetings for the Nation members, as beneficiaries of the Settlement Funds, to receive information regarding the Settlement, and to deliberate upon *per capita* distributions prior to exercising the members' communal right to decide the time and amount of Settlement *per capita* distributions by means of a ratification vote; and
  - (d) failing to schedule, post adequate notice of, and conduct polling stations for a ratification vote on distributing the Settlement Funds.
39. Council appeared to suggest to some MFN members that a financial distribution would be made to them via electronic money transfer (EMT) if they provided their bank account information to a "Gmail" electronic mail address, despite the Respondent maintaining a website using a Muskowekwan domain.
40. Nevertheless, Bigsky provided her bank account information to the Gmail address as Council appeared to suggest. Bigsky has become aware that Council has not distributed the Settlement Funds to other MFN members, and that members have been receiving distributions in different amounts that depend on the member's identity.
41. It appears that Council may have been distributing Settlement Funds to MFN members as follows: \$4,500 to elders; \$2,500 to other adult members; and \$500 for minor members with a purported intention to segregate funds for minors in a non-interest-bearing trust account. This unequal distribution was made without due process, and is unlawful as matters of Aboriginal customary law, Canadian constitutional law, and the common law, as contended in the grounds of review below.
42. At the time of filing this Notice of Application, the Council's most recent act or omission in distributing the Settlement Funds has been to distribute some of the Settlement Funds.



To Bigsky's knowledge, Council's most recent act or omission relative to her was a distribution of funds on or about December 26, 2023. Council did not provide Bigsky notice of this distribution, nor the reasons for it. Had Council communicated this act to Bigsky, which is denied, the 30-day time limited by subsection 18.1(2) of the *Federal Courts Act* could have been triggered on December 26, 2023.

### **Muskowekwan First Nation custom**

43. Muskowekwan First Nation custom provides that Settlement Funds be distributed as an exercise of the Nation members' communal rights as expressed in a vote held to ratify the members' intent.
44. Relative to a proposed distribution of settlement funds, Muskowekwan custom requires that:
  - (a) advance notice is given to all members on the question to be voted upon;
  - (b) the question must be clear and otherwise unassailable;
  - (c) the purpose of the vote and the consequence arising from an affirmative or negative vote is explained;
  - (d) a public meeting or meetings are held in advance of the vote permitting all members to debate the merits of the question; and
  - (e) all eligible members are permitted to vote on the question.
45. Muskowekwan custom to vote on distributing settlement funds has not been changed in accordance with custom, or at all.

### **The Council's Meeting**

46. To Bigsky's knowledge, the Council or its delegates approached some MFN members to invite them to attend an informal meeting on December 20, 2023, by Zoom and possibly also by personal appearance, to discuss distributing the Settlement Funds (the "**Meeting**").
47. On or about November 27, 2023, an electronic information session notice was made available to one or more Nation members. The notice read in material part:

"To Muskowekwan Voters. Mismanagement Claims Information Session. ... Leaderships proposed idea: ... Message from your Chief Jamie Wolfe ... Notice to Vote on this issue at a further date. Proposed idea of the Chief. 11/27/2023"
48. The notice of information session contemplated Nation members voting on the distribution of Settlement Funds, as is Muskowekwan custom.

49. Bigsky learned of the Meeting shortly before it was held, and was able to attend in part by Zoom.
50. Bigsky was not consulted in the conduct of the meeting. To Bigsky's knowledge, some three hundred or more Nation members wanted to vote upon how to distribute the Settlement Funds, or otherwise be consulted about the distribution in question. To Bigsky's knowledge, many Nation members were not given advance notice of the Meeting or consulted in the conduct of the Meeting.
51. Bigsky sought information from Council during the meeting regarding distributing the Settlement Funds to the Nation's members. Bigsky received no reply to her questions, and was excluded from the Zoom meeting upon seeking information. The Council did not re-admit Bigsky to the meeting, despite her repeated attempts to do so.
52. To Bigsky's knowledge, at the Meeting:
  - (a) the Council formed an opinion as to how the Settlement funds should be distributed;
  - (b) the Council gave no advance notice to all members on the question to be voted upon;
  - (c) the Council express no question that was clear and otherwise unassailable, to be voted upon;
  - (d) the Council refused, neglected or failed to explain the purpose of a vote and the consequence arising from an affirmative or negative vote;
  - (e) the Council failed to establish a public meeting or meetings held in advance of the vote permitting all members to debate the merits of the question; and
  - (f) the Council refused, neglected or failed to permit all eligible members to vote on a question to distribute the Settlement Funds.
53. To Bigsky's knowledge, the Meeting also did not meet the Muskowekwan customary requirements to authorize a legal change in Muskowekwan custom.

### **Constitutional law grounds**

54. The Decision under review at once denied Bigsky the right to vote in respect of a proposed change in custom (by failing to hold a referendum), and in respect of how to distribute the Settlement Funds themselves (by failing to hold a ratification vote).
55. The Decision deprived Bigsky and every other disenfranchised Nation member of their right to play a meaningful role in the distribution of the Settlement Funds in which they hold communal beneficial interests. It is well established in law that any cause of action against the Crown for breach of fiduciary duty in relation to Indian Reserve lands, such as those at issue before the Court, belongs to the members of the Nation collectively.

56. Participating in the ratification vote process has an intrinsic value independent of its impact on the outcome of distributing Settlement Funds, and the Decision completely annihilated that value.
57. The right to meaningful participation in the voting process to distribute Settlement Funds includes the right to exercise votes in an informed manner, and to be reasonably informed of all the possible choices open to them.
58. The Decision was made without a referendum to authorize Council to decide how to distribute funds in lieu of the collective Nation members. Such referendum, if conducted in accordance with custom, would have informed Bigsky of all possible choices open to her. The Respondent's failure to hold such referendum, to notify or meaningfully include Bigsky in the Meeting, and to notify Meeting participants of the legal consequence of their answers, deprived Bigsky and the collective Nation members of their right to vote in an informed manner.
59. Further, the Decision altogether disenfranchised many or all Nation members of their right to vote on the distribution of Settlement Funds.
60. The right to vote is a democratic right so strongly entrenched in the *Canadian Charter of Rights and Freedoms* (the "**Charter**") that it is not even subject to the override clause afforded by subsection 33(1). Accordingly, the right to vote is supremely protected under our Constitution, just as it is a protected aboriginal right in Muskowekwan custom.
61. Absent a change in custom and an amendment to the *Charter* within the *Constitution Act, 1982*, the Respondent could not lawfully refuse, neglect, or otherwise fail to hold a vote on distributing the Settlement Funds, or to delay or suspend the same, or to cancel such vote altogether.
62. The Decision under review is at once a flagrant breach of Muskowekwan custom, and the *Constitution Act, 1982* as the supreme law of Canada.

**Freedom of expression: Charter, s. 2(b)**

63. In particular, Bigsky's voting activities, both to change Muskowekwan custom and to authorize distributions of Settlement Funds, fall within the freedom of expression enshrined in paragraph 2(b) of the *Charter*. The Decision cancelled the vote and denied Bigsky the opportunity to exercise these voting rights. The purpose and effect of the impugned Decision was to restrict Bigsky's freedom of expression.
64. Unlike other contexts where the law may not guarantee a constitutional right to vote in a referendum, that right is guaranteed to Bigsky and the collective Nation members by Muskowekwan custom where legal authority for a change in custom is sought. All eligible members must be granted their right to vote in such referendum, and custom imposes a positive obligation on the Council to consult all eligible members through the particular mechanism of a referendum, even if the common law does not.

65. In this case, a referendum on a change in Muskowekwan custom as a platform of expression is a matter of Aboriginal right and constitutional law, not legislative or executive policy.
66. In this case, the Council apparently held the Meeting in a manner that did not even purport to provide a particular means of expression relative to legitimizing a change in custom. Section 2(b) of the *Charter* mandates that any such means of expression be provided in a manner that is consistent with the *Constitution Act, 1982*. The Meeting, which did not permit expression by way of a vote that accorded with Muskowekwan custom, and which was not extended to Bigsky at all, flagrantly falls short of constitutional validity.
67. The combined operation of section 2(b) of the *Charter* and section 35 of the *Constitution Act, 1982* confers Bigsky the right to vote for distributing the Settlement Funds in this case.
68. The Council's Decision cancelling any vote on the distribution of the Settlement Funds deprived Bigsky of her right to vote enshrined in section 2(b) of the *Charter*, as an Aboriginal customary right under section 35 of the *Constitution Act, 1982*, and deprived Bigsky of any opportunity to express any opinion about the formation of social policy and functioning of the Nation's institutions, notwithstanding it was her Aboriginal and constitutional right to do so.
69. Bigsky's constitutional right enacted in section 2(b) of the *Charter* has not been overridden by any act of Parliament or of the legislature of Saskatchewan to invoke the notwithstanding clause of subsection 33(1). Further, Bigsky's Aboriginal customary rights to vote on any change in Muskowekwan custom, and any distribution of the Settlement Funds, are elevated to protection under section 35 of the *Constitution Act, 1982*, which are not even subject to the overriding effect of subsection 33(1), had it been invoked.
70. Accordingly, subject only to obvious exclusions or incompetencies which are not before the Court, Bigsky's right to vote reigns supreme and cannot be overridden by any defence of law raised by the Respondent.
71. To Bigsky's knowledge, the Decision under review is the first occasion in which the Council has failed to give effect to the Nation members' customary and constitutional voting rights by cancelling a vote altogether and without due legal process.

### **Constitutional remedies**

72. To meaningfully vindicate Bigsky's fundamental freedom of expression, remedies under section 24 of the *Charter* are only responsive where they permit the Applicant to exercise her right to vote.
73. Accordingly, the Council must administer or otherwise hold a Nation-wide vote on distributing Settlement Funds without delay.
74. Further, if the Council truly seeks to modify or condition such customary right to vote, the Nation members must be afforded the right to vote on such change in custom.

75. Further, if the Council has enacted a law, whether by Band Council Resolution or otherwise, resolving to dispense, condition, or otherwise change customary voting rights, such enactment is inconsistent with the Nation members' Aboriginal right to vote in accordance with custom.
76. Accordingly, pursuant to subsection 52(1) of the *Constitution Act, 1982*, such enactment would be inconsistent with the provisions of section 2(b) and 35 of the supreme law of Canada, and would be of no force or effect.

### **Administrative law grounds**

77. The Respondent breached its duty of procedural fairness to Bigsky by providing no, or inadequate, reasons in support of the Decision. There were no reasons given in writing for cancelling the vote.
78. These facts alone warrant the Court's intervention on judicial review. However, the Applicants also rely on the following further grounds of review.
79. The electronic information session notice said to originate from the Chief does not explain why the Council denied the Nation members their right to vote on distributing the Settlement Funds, nor does the notice fulfill, even at a minimum, the purposes of fairness to Bigsky or justification, transparency and intelligibility. Fatally, the lack of reasons render it impossible for this supervisory Court to meaningfully review the Decision.
80. Due to the importance of the Decision cancelling the vote and depriving Bigsky of her right to vote, the Respondent were obliged to give reasons in support of its Decision. However, none were given or communicated to her, or to her knowledge, the other Nation members.
81. The Respondent simply cancelled the vote without giving Bigsky or the other Nation members advance notice that the Decision was contemplated, without hearing from them, and without disclosing to any factors which the Respondent considered relevant to the Decision so that Bigsky or the other Nation members could meaningfully make submissions or lead evidence before the Council made its Decision.
82. The Decision's lack of, or inadequate, reasons fail to disclose, even at a minimum level:
  - (a) an understanding of the substance of the Decision, along with why the Council decided as it did;
  - (b) a basis for Bigsky to decide whether to judicially review the Decision in this Court. While the Applicants have sought to engage the Court's supervisory jurisdiction, they are in any event prejudiced because the bases underlying the Decision are withheld, such that the Applicants may be in the unenviable position of having to file an Amended Notice of Application in the conduct of this application, which is otherwise intended by the Court to be summary in its conduct and disposition;

- (c) enough information about the Decision and its bases so that this Honourable Court can meaningfully assess whether the Council met minimum standards of legality, and whether the Decision is correct or falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law;
  - (d) enough information of the bases relied on by the Council to justify the Decision, and to enable observers, including the public, to scrutinize and understand what the Council has decided and why. The Decision discloses no findings and no explanations. This is procedural fairness denied and a failure to take into account relevant considerations.
83. The Council failed to consider a relevant consideration by ignoring, disregarding or being willfully blind to the existence of Muskowekwan custom and the notice of information session circulated before the Meeting, all requiring Nation members to vote on any distribution of Settlement Funds.
84. Conversely, the Council's lack of transparency leads the reasonable bystander to conclude that the Respondents took into account irrelevant considerations relating to their own personal or financial ambitions.
85. Having been deprived of adequate reasons for the Decision under review, the Applicants reserve the right to advance such further and other grounds of review of which counsel may advise and this Honourable Court permits.

**The Decision is *ultra vires* the Indian Act**

86. In the *Indian Act*, Parliament enacted powers conferred on the Council in subsection 2(3) as follows:
- Exercise of powers conferred on band or council:
- (3) Unless the context otherwise requires or this Act otherwise provides,
- (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and
  - (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.
87. The Decision was not made pursuant to the consent of a majority of the electors of the Nation. Accordingly, pursuant to s. 2(3)(a) of the *Indian Act*, the Decision is deemed not to have exercised a power conferred on the Council, and is of no legal force.

88. Further, the Meeting was not duly convened in accordance with Muskowekwan custom. Accordingly, pursuant to s. 2(3)(b) of the *Indian Act*, the Decision is deemed not to have exercised a power conferred on the Council, and is of no legal force.

**Other grounds of review**

89. The Applicants will rely such further and other grounds as counsel may advise and this Honourable Court may permit.

**Supporting Material**

90. This Application will be supported by affidavit evidence to be sworn by one or more affiants. The affidavits will likely include as documentary exhibits all documents referred to in this Application.

**Rule 317 Request**

91. The Applicants request that the Respondent sends, to the Court and to counsel for the Applicants, a certified copy of all material relevant to this Application in their possession, including without limitation the following:

- (a) any document of the Respondent, Chief, Councillor, officer or agent of the Respondent, which contains information relating to the Decision;
- (b) any physical or electronic records of communications, including without limitation emails, memoranda, telephone records and mobile telephone texts or instant messages, relating to the Decision;
- (c) material disclosing the existence of any communications between the members of Council related to the Decision;
- (d) any document containing information about who would be responsible for the Decision, who would or should be consulted before the Decision was made, and what information should be considered before making the Decision;
- (e) time entries reflecting the dates of meetings between the members of Council, their agents, employees or other persons, relating to the Decision; and
- (f) any of document or record which the Council believes justifies the Decision.

92. The Applicants respectfully request that the Respondents tab its Rule 317 production for ease of reference.

93. All of which is respectfully submitted.

(over page)

DATED at Calgary, Alberta, this 27<sup>th</sup> day of December, 2023.

**DLA PIPER (CANADA) LLP**

Per: \_\_\_\_\_



**Joshua A. Jantzi**  
Counsel for the Applicants,  
Mariah Bigsky, and Band Members  
Alliance and Advocacy Association  
of Canada

THE APPLICANTS' ADDRESS FOR SERVICE is in care of their solicitors at:

DLA PIPER (CANADA) LLP  
Barristers & Solicitors  
Suite 1000, Livingston Place West  
250 2nd St SW  
Calgary, AB T2P 0C1

Attention: Joshua A. Jantzi  
Telephone: +1 403.698.8717  
Fax: +1 403.296.4474  
Email: [josh.jantzi@dlapiper.com](mailto:josh.jantzi@dlapiper.com)

I HEREBY CERTIFY that the above document is a true copy of the original *issued out of* the Court and filed on December 28th, 2023.

Dated December 28th, 2023  
WPGRO05  
REGISTRY OFFICER