NHBP TRIBAL COURT
NOTTAWASEPPI HURON BAND OF THE POTAWATOMI
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SUPREME COURT CASE NO. 21-154-APP		Tribal Court Case No. 19-105-CV/ENR
PLAINTIFFS/APPELLANTS		DEFENDANTS/APPELLEES
STEPHANIE WRIGHT, ET AL, PAULA M. FISHER, Esq. Paula M. Fisher, Attorney at Law, P.C. Attorney for the Appellants The Ronan Building 201 So. University Avenue Mt. Pleasant, Michigan 48858 989-773-5978 989-779-8295 – Fax paula@paulafisherlawfirm.com	v.	NOTTAWASEPPI HURON BAND OF THE POTAWATOMI, ET AL, AMY WESAW, NHBP Senior Staff Attorney SARAH ZLOTNICKI, NHBP Staff Attorney NHBP Legal Department Attorneys for the Appellees 1485 MNO-Bmadzewen Way Fulton, Michigan 49052 269-704-8309 amy.wesaw@nhbp-nsn.gov sarah.zlotnicki@nhbp-nsn.gov

OPINION AND ORDER OF THE SUPREME COURT FOR THE NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

Before:

Hon. Gregory D. Smith, Chief Justice, Presiding

Hon. Holly T. Bird, Associate Justice

Hon. Matthew L.M. Fletcher, Associate Justice

Opinion by Fletcher, J.

MZEN'EGAN (OPINION) AND GKENO'MEWA (ORDER)

Mzen'egan (Opinion)

***Maji* (Introduction)**

This case involves tribal constitutionally mandated membership criteria, the import of a constitutional amendment on pending applications, and the power of the Tribal Council to suspend enrollment.

Under the Constitution of the Nottawaseppi Huron Band of the Potawatomi that governed until April 27, 2019, persons who were lineal descendants of any person listed on the Taggart Roll of 1904 and who were biological children of enrolled members were eligible for membership with the Tribe. After April 27, 2019 (when the membership criteria in the Constitution was amended), the only persons eligible for membership were those who could meet those criteria *and* were born after January 1, 2019 *and* were not older than 21 years.

Under both constitutional provisions, the Tribal Council may suspend the approval of enrollment petitions to preserve the health, safety, and welfare of the Tribe. In all years relevant to this appeal, 2013 to 2019, the Tribal Council suspended enrollment for categories of persons that included the plaintiffs. *See* Defendants' Motion for Summary Judgment at 7 (noting that enrollment had been "largely suspended since February 6, 2010").

Stephanie Wright is the lead plaintiff and appellant, part of a group of individuals who met the criteria that existed under the pre-2019 Constitution but not under the 2019 Constitution. The Wright group petitioned for enrollment (and brought this action) prior to the 2019 constitutional amendment, but the Tribal Council had suspended

enrollment. That suspension of enrollment lasted until the amendment of the Constitution in 2019 that changed the membership criteria, ostensibly ending the Wright petitioners' chances to be enrolled.

We must decide whether the Wright petitioners have a right to be enrolled that survived the 2019 amendment and, if so, whether the tribal judiciary has the power to order their enrollment. Because the trial court did not make critical findings of fact and conclusions of law, we **VACATE** the trial court's decision and **REMAND** with instructions to make relevant factual findings and conclusions of law.

Méméjekzewen (Facts)

On May 10, 2013, Stephanie Wright, who claims to be a child of a tribal member, petitioned the Tribe for membership, claiming Rash Kish Go Qua (Taggart Roll #123) as her ancestor. *See* Complaint, Exhibit 1. She also filed on behalf of her minor children. *See* Complaint, Exhibits 2 & 3. They were all born before January 1, 2019. *See id*., Exhibits 1-3. According to Wright's complaint, the tribal membership office informed her that the Tribe's enrollment was closed. *See* Complaint, ¶ 3. The other plaintiffs and appellants are similarly situated to Wright. *See id*. ¶¶ 4-14. (For purposes of this writing and for ease of description, we will describe the entire group of plaintiffs, petitioners, and appellants as the Wright plaintiffs, petitioners, or appellants.) It appears the membership office never processed any of the Wright petitioners' applications, nor denied them. *E.g.*, Complaint, Exhibit 14 (letter from the tribal

enrollment department notifying petitioner that enrollment was closed and that their application would be processed once enrollment opens). On occasion, the Tribal Council would open enrollment but only for minors. *E.g.*, Complaint, Exhibit 15 (notice of re-opening of enrollment from December 13, 2018 to April 26, 2019 for persons born after September 14, 2000). On February 27, 2019, a tribal enrollment specialist emailed Stephanie Wright, stating in the email that her and her children's enrollment "files are now considered closed." Wright Motion for Summary Judgment, Exhibit 1.

On April 25, 2019, the Wright petitioners filed a complaint seeking a writ of mandamus and a declaratory judgment, asserting that they were entitled to enrollment with the Tribe under the Constitution prior to its amendment. Complaint at ¶¶ 24-32. On April 27, 2019, the Tribe amended its Constitution. Answer at 6 (alleging the petitioners' claims are moot due to the 2019 amendment). The parties agree that the Wright petitioners are not eligible for enrollment under the amended Constitution. On May 28, 2021, the trial court, in an opinion by Chief Judge Melissa Pope, granted summary judgment to the Tribal Council ("Trial Court Opinion and Order").

Dbaknegewen Sweyajmo **(Legal Analysis)**

This court takes seriously and with great *Edbesendowen* (humility) and *Kejitwawenindowen* (respect) the role of interpreting and applying the *Dbaknegewen* (law) of the Nottawaseppi Huron Band of the

Potawatomi. One of the Constitution's Guiding Principles is to "Promote the preservation and revitalization of *Bodéwadmimen* and *Bodéwadmi* culture. . . ." Const. art. II, § 2(b)(1). In the act of interpreting the Constitution, this court has from its beginnings invoked *Mno Bmadzewen* as a guide. *See Spurr v. Tribal Council*, No. 12-005APP, at 3-6 (2013). *See also Rios v. Election Board*, No. 21-181-APP, at 2 (2022) ("[W]e uplift the concepts of achieving harmony and living in balance with all creation under the principles of *Mno-Bmadzewen*."); *In re Election Board Decision, Dispute 2021-2*, No. 21-111-APP at 3, n. 3 (2021) (defining *Mno Bimadzewen* as "the good path for living life").

From *Mno Bmadzewen*, *Bodéwadmi* people derive *Noeg Meshomsenanek Kenomagewenen* (Seven Grandfather Teachings):

Bwakawen — Wisdom

Debanawen — Love

Kejitwawenindowen — Respect

Wedasewen — Bravery

Gwekwadzewen — Honesty

Edbesendowen — Humility

Debwewin — Truth

Rios, *supra*, at 7-8 (quoting 7 NHBPTC § 7.3-6). *See Spurr v. Spurr*, No. 17-287-App, at 6-7 (2018); *Spurr v. Tribal Council*, No. 12-005APP, at 4-6 (2012). *See also* Defendants' Motion for Summary Judgment at 1-2 (noting that the Tribal Council is tasked to implement the enrollment

criteria in accordance with the Constitution and the "Seven Grand Father Teachings"). As we noted in *Rios*, "The principles of [*Mno Bmadzewen*] as a fundamental law of the Anishinaabe are achieved through the application of the seven sacred laws of creation—the Seven Grandfather Teachings." *Rios*, *supra* at 7 (quoting Ojibwe scholar Kekek Jason Stark, *Anishinaabe Inakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 Mont. L. Rev. 293, 295 (2021)). *Mno Bmadzewen* "governs human relations as well, stressing the type of conduct appropriate between individuals, and the manner in which social life is to be conducted." Lawrence W. Gross, *Bimaadiziwin, or the "Good Life," as a Unifying Concept of Anishinaabe Religion*, 26:1 Am. Indian Culture & Research J. 15, 19 (2002).

Bodéwadmi people understand that *Mno Bmadzewen* begins with kinship. "For the Anishinaabe, the idea of kinship relations is contained in the concept *indinawemaaganidog*. This concept is defined as all my relations." Stark, 82 Mont. L. Rev. at 319 (citations omitted). "*Anishnaabe inawendiwin* is a way of relating to spirit and to one another that honors the interconnectedness of all our relations—*kina enwemgik*." Nicholas J. Reo, *Inawendiwin and Relational Accountability in Anishnaabeg Studies: The Crux of the Biscuit*, 39(1) J. Ethnobiology 65, 68 (2019). *Ndénwemagnek* is a *Bodéwadmi* concept that is defined as "all my relations."[1] *Ggaténmamen Gdankobthegnanek* is a *Bodéwadmi*

[1] Citizen Potawatomi Nation, Potawatomi Dictionary, *available at* http://potawatomidictionary.com/Dictionary.

concept that is defined as "we are honoring our ancestors."[2] Anishinaabe connectedness is instilled at childhood, where they "learn governance, power, decision making and our political cultures" as channeled through their observations as children. Leanne Simpson, *Dancing on Our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emer*gence 122 (2011). "The value of social harmony was instilled in an individual from birth. . . ." Donald Joseph Auger, *The Northern Ojibwe and Their Family Law* 118 (2001) (unpublished dissertation, Osgoode Hall Law School).

In significant ways, colonization complicates modern American tribal membership and citizenship questions. At one time, Anishinaabe belonging was rooted in the *doodem* tradition. Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance through Alliance* 57 (2020); Gross, *supra* at 20. Now, the membership criteria of the Nottawaseppi Huron Band of the Potawatomi originate with the Taggart Roll of 1904, which was created to establish a list of *Bodéwadmi* persons eligible to receive a judgment award arising from a lawsuit filed under the leadership of Phineas Pamptopee. *See* Bureau of Indian Affairs, Proposed Finding for Federal Acknowledgment of Huron Potawatomi, Inc., 60 Fed. Reg. 28,426, 28,427 (May 31, 1995) (referencing the "1904 Taggart Roll, compiled by the Bureau of Indian Affairs in connection with the issuance of Potawatomi annuity payments under Federal treaties"). The clan tradition is no longer explicitly a part of the NHBP tribal membership

[2] Pokagon Band of Potawatomi Indians, Potawatomi Dictionary, *available at* https://wiwkwebthegen.com/dictionary.

criteria. It is axiomatic and tragic that any list of *Bodéwadmi* persons is likely to exclude at least some biological and clan relatives. It is especially difficult given that the NHBP is dedicated to *Mno Bmadzewen* and *Ndénwemagnek*.

We start our analysis with the text of the Constitution. Article III, Section 1(a) of the Constitution of the Nottawaseppi Huron Band of the Potawatomi provides:

> The membership of the Nottawaseppi Huron Band of the Potawatomi shall consist of all persons meeting the following criteria who:
>
> 1. Is a lineal descendant of any person listed on the Taggart Roll of 1904; and
>
> 2. Is the biological child of an enrolled member of the Nottawaseppi Huron of the Potawatomi, whether that member is living or deceased, provided that if the biological parent member is deceased, he/she was a member of the Nottawaseppi Huron Band of the Potawatomi at the time of his/her death; and
>
> 3. Was born on or after January 1, 2019; and
>
> 4. Is not more than 21 years of age as of the date his/her application for enrollment is submitted; and
>
> 5. Is not a member of any other Indian tribe of the United States or Canada whether federally recognized or not.

Subsections 3 and 4 are products of the April 27, 2019 referendum that amended the Constitution to include age restrictions on tribal membership.[3] Going forward from the amendment date, no one born before 2019 is eligible to be enrolled as a member of the Tribe. These are bright-line rules that are relatively easy to administer and interpret, but they exclude many biological and clan relatives.

Additionally, petitioners for tribal membership must also contend with periods when tribal enrollment is closed. The tribal council possesses the power "to temporarily suspend the approval of new requests for enrollment when such action is determined to be necessary to preserve the health, safety and welfare of the Band." Const. art. III, § 2(b).

The Wright petitioners, at least some of whom waited nearly six years without a decision from the Tribe, claim that their applications for membership should be processed by the Tribe and that those applications should be approved under the Constitution as it existed prior to the 2019 amendment.

The Tribal Council claims that the Wright petitioners, as nonmembers, have no right to enrollment because the 2019 amendments

[3] Taken literally, these constitutional provisions mean that no person born before 2019 can be a member of the Tribe. Of course, as of this writing anyway, the vast majority of tribal members presumably were born before 2019. One could say that the body of tribal members who voted to amend the Constitution in 2019 voted themselves out of the Tribe, but they are protected from disenrollment by another provision in the Constitution, Art. III, § 6(a), which prohibits removal from the Membership Roll except in cases of error, fraud, dual enrollment, and criminal treason.

to the Constitution prohibit them all from becoming members – they are too old. The Tribal Council's primary arguments on appeal are procedural and jurisdictional defenses, so we address them first. Then we will begin to address the merits of the case to the extent that we can on this record.

I. Procedural and Jurisdictional Matters

Article VII, § 1(a)(8) of the Constitution provides that "The Band, in exercising the powers of self-government, shall not . . . [d]eny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" In *Spurr v. Tribal Council*, No. 12-005APP (2013), we addressed a "due process" claim from a tribal citizen challenging tribal election procedures. At that time, Article VII's listing of individual rights was not yet part of the Constitution.[4] We assessed the "due process" claim through the interpretive lens of Mno Bmadzewen, which we called a form of "fundamental law." *Spurr v. Tribal Council*, *supra*, at 6. Having no "due process" clause to interpret at that time, we introduced the principle of "fundamental fairness" to stand in for due process. *Id.* Borrowing from the common law decisions of prominent Michigan Anishinaabe judiciaries, we wrote, "After all, government is a human institution and the maxim 'to err is human' is undisputed. Fundamental fairness requires that there be an opportunity for redress, surely, in everyone's

[4] It is ironic, perhaps, that the election procedures challenged in *Spurr* involved the same election that amended the Constitution, which prior to that election was last amended in 2006, to include the bill of rights now contained in Article VII.

book." *Id*. at 7 (quoting *Deckrow v. Little Traverse Bay Bands of Odawa Indians*, 1998 WL 35301007, at *2 (Little Traverse Bay Bands of Odawa Indians Tribal Appellate Court, Oct. 22, 1998)). The tribal judiciary possesses the power to interpret the Constitution. *See generally* Const. Art. XI, §§ 3(a), (b) (describing the jurisdiction of the tribal judiciary). Tribal courts need not apply state and federal court precedents on individual rights to tribal contexts in order "to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978). "Due process" in federal and state courts, on the other hand, too often means nothing more than the bare minimum. Generally speaking, tribal courts throughout all of Indian country are more protective of individual rights, as two federal circuits have noted. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 943-44 (9th Cir. 2019); *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1259 (10th Cir. 2017).

"Fundamental fairness," on the other hand, backed by *Mno Bmadzewen*, requires this court to do justice. Recently, we concluded that tenets of procedural fairness in trial setting require, at minimum, advance notice of the evidence to be presented at a hearing, the right to cross-examine witnesses, and the right to view evidence. *Rios*, *supra* at 12-15. We concluded, "It is especially important for people in positions of power or authority over others to strictly ensure that fundamental fairness occurs in all [of the Tribe's] interactions with the Tribal public." *Id*. at 14.

We assess the Tribal Council's procedural and jurisdictional defenses with these principles in mind. The Tribal Council focuses its defenses on procedure, namely, (1) that the Wright petitioners' suit is barred by tribal immunity, (2) that the *Chivis v. Tribal Council* decision on the law of mandamus forecloses this matter, (3) that they waited too long to sue, and (4) that they procedurally defaulted on their merits claim. We are not persuaded.

A. Tribal Sovereign Immunity

The Wright petitioners' claims may proceed under Article X, § 2(a) of the Constitution. The Tribe has waived immunity in tribal court for certain claims, if:

> 1. The suit is brought in the Band's Tribal Court.
>
> 2. The suit is against such officials or employees in their official capacity;
>
> 3. The suit seeks only prospective injunctive relief, and does not seek monetary damages or any other form of retroactive relief;
>
> 4. The suit seeks to enforce legal rights and duties established by this Constitution and by the laws of the Band.

The Wright petitioners sued the Tribe and the individual members of the Tribal Council. While the suit against the Tribe itself is barred by the Constitution, *see* Const. Art. X, § 1(a) ("The Nottawaseppi Huron Band of the Potawatomi, as a sovereign Indian Nation, is immune from suit in all

forums. . . ."), the plaintiffs named the individual members of the Tribal Council. The suit asks for a writ of mandamus and a declaratory judgment (that is, prospective injunctive relief) only and does not seek monetary damages. Finally, the suit seeks to enforce legal rights under the Constitution, albeit the 2013 version of the Constitution. This suit is exactly the type of suit authorized by Article X.

We must reject the Tribal Council's claim that since the Wright petitioners are nonmembers, they have no right to sue. First, the Constitution's authorization of suits against tribal officials does not limit the right to sue to tribal members. It states, "Officials and employees of the Band shall be subject to suit" if certain conditions are met. Const. Art. X, § 2(a). There is no limitation on the membership status of the potential plaintiffs in the plain text of the authorization.

Second, the plaintiffs are attempting to prove that they possess enforceable legal rights under the Constitution. If they are successful in showing as a matter of law that they, even as nonmembers, have enforceable "legal rights," Const. Art. X, § 2(a)(4), then the authorization to sue applies. The plaintiffs allege that, under the 2013 Constitution at least, that they are among the class of persons who constitute the membership of the Tribe. *See* Const. Art. III, § 1(a) ("The membership of the Nottawaseppi Huron Band of the Potawatomi shall consist of *all persons* meeting the following criteria. . . .") (emphasis added). If plaintiffs allege they are among a class of persons eligible for membership, then they surely have the right to sue under Article X.

Third, the concept of *Debwewin* (truth), one of the *Noeg Meshomsenanek Kenomagewenen* (Seven Grandfather Teachings), strongly compels the judiciary to reach the merits. *Debwewin* asks us to seek the truth of the matter, which can be "detected through the beat of the heart and through the voice of the person and how the person speaks." Mark F. Ruml, *The Indigenous Knowledge Documentation Project—Morrison Sessions: Gagige Inaakonige, The Eternal Natural Laws*, 30(2) Religious Studies and Theology 155, 164 (2011). The Tribal Council's invocation of sovereign immunity is a demand to silence the Wright petitioners before they can speak on the merits of their claims. Silencing the petitioners prevents us from knowing who they are and, ultimately, prevents us from discovering the truth of this matter. While this court could not and would not override the plain language of the Constitution's authorization to sue the tribe or tribal officials, the plain language does not explicitly forbid this suit.

B. Mandamus

The Wright petitioners' complaint alleges facts that are adequate to compel the court to issue a writ of mandamus, if appropriate. In *Chivis v. Tribal Council*, No. 12-292-CR (2013), we affirmed the power of the tribal judiciary to issue writs of mandamus as a function of the inherent judicial power contained in Article XI, § 3 of the Constitution. *Id.* at 5-6. Under *Chivis*:

> To obtain a writ of mandamus, the petitioner must establish the following: 1) the petitioner must have a clear legal right established by the Constitution and laws of the NHBP to the

> performance of a specific duty; 2) the respondent must have a clear legal duty established by the Constitution and laws of the NHBP; 3) the specific duty sought to be performed can only be in the form of injunctive relief, rather than retroactive or monetary relief; and 4) the petitioner must have no other adequate legal or equitable remedy.

Id. at 6. In *Chivis*, the petitioners demanded a copy of an enrollment audit generated by the Tribal Council, demanded that the Tribal Council perform another audit to the satisfaction of the petitioners, and initiate disenrollment proceedings based on the second audit. *Id.* at 7. The petitioners pointed to a provision in the Constitution that allowed for the disenrollment of tribal members who were enrolled by fraud or mistake, Article III, § 6(a). *Id.* However, that provision required the Tribal Council to do nothing it chose not to do; the Council's decision to initiate disenrollment proceedings under Article III, § 6(a) was discretionary on the Council. *Id.* And the *Chivis* petitioners cited no law compelling the Council to release its enrollment audit or to conduct an additional audit. *Id.* We held in *Chivis* that the Council's discretion prohibited the possibility of a writ of mandamus.

This matter is much different. First, potentially there is a clear legal right inuring to a petitioner. Article III, § 1(a) states that a person who meets the membership criteria "shall" be a tribal member. Petitioners allege they meet the criteria. Second, there is a clear legal duty on the Tribal Council. "Shall" is a mandatory requirement. There is no discretion there. The Council *must* enroll persons who meet the

criteria.[5] Third, as we note in the sovereign immunity section, the petitioners do not seek money damages, they seek enrollment. Enrollment is an act that must be conducted, if at all, by government order. Finally, there appears to be no adequate remedy elsewhere.[6] The Wright petitioners allege that they pursued the procedure available to them by seeking enrollment through the enrollment office, but the Tribal Council had suspended enrollment, preventing the enrollment office from processing their applications. Now that the 2019 amendment is law, the petitioners cannot continue to pursue that avenue of relief. Thus, the petitioners meet all four requirements. We conclude that if the Wright petitioners prevail on their factual and legal claims, they are entitled to a writ of mandamus.

C. Laches

The Wright petitioners' claims may proceed despite the possible tardiness of their complaint, or what non-Anishinaabe courts refer to as "laches." "There are two elements to establish a laches claim: Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Alexander v. Confederated Tribes of Grand Ronde Community*, 13 Am. Tribal Law 353, 362 (Confederated Tribes of Grand Ronde Community Ct. App. 2016) (citation and quotation marks omitted). The trial court

[5] The Tribal Council suggests that there is no right because there is no Constitutional obligation to process the petitioners' enrollment applications in a timely manner. We reject this contention in the merits section.

[6] We note that the trial court suggested that the Wright petitioners could seek relief through the political branches of government, a claim we reject in the laches section.

applied the laches doctrine, holding that the Wright petitioners were guilty of "slumbering on their rights," Trial Court Opinion and Order at 15, despite reservations about adopting and applying a doctrine that "is not a theory favored by this Court, in part because it has been used against Native Nations during periods when access to the agencies needed to exercise rights in a 'timely' fashion was not available in a meaningful way historically to Native Nations." *Id.* at 13. The origins of laches are in equity. Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 Geo. Mason L. Rev. 357, 364-69 (2009). For centuries, courts have analyzed the timeliness of complaints through the lens of "conscience, good faith, and reasonable diligence." *Id.* at 372 (quoting *Smith v. Clay*, 29 Eng. Rep. 743, 744 (1767)). On that level of very high generality, laches is a neutral doctrine. However, American legal scholars have noted that the laches analysis involves "elastic tendencies" that allow judges to exercise "unprincipled discretion." *Id.* at 371 (quotation omitted). The laches defense is a dangerous one to apply.

In this case, the concepts of *Kejitwawenindowen* (respect) and *Gwekwadzewen* (honesty), two of the *Noeg Meshomsenanek Kenomagewenen*, compels us to reject the Tribal Council's laches defense at this time. *Kejitwawenindowen* means "to act in a certain manner with thoughts of respect and honor upon it, to act in a certain manner with the perception of respectful thoughts upon it, and act in a certain manner with the feeling of respect in the mind." Stark, 82 Mont. L. Rev. at 312. *Gwekwadzewen* literally means "to live life in a correct manner, to live with a correct character, and to exhibit a correct nature." *Id.* at 314

(citations omitted). The Wright petitioners began applying for tribal membership in 2013. The complaint alleges, and the Tribe does not dispute the allegations here, that at the time the membership applications were filed, the Tribe's officials and employees refused to process those applications due to the tribal council's suspension of enrollment. The complaint alleges, and again the Tribal Council does not dispute, that the Wright petitioners regularly contacted the enrollment office for updates and that each time they were told that enrollment was closed, that nothing could be done. Assuming the allegations to be true, as we must at this stage, the Wright petitioners acted correctly and in good faith. They applied for membership, they waited as instructed, and when they learned of the impending election that perhaps would amend the Constitution in a manner that would potentially disqualify them from eligibility for membership, they took the only act they had left – they sued under Articles III and X of the Constitution. The Wright petitioners behaved respectfully to the tribal government and acted correctly by following the rules and processes established and articulated by the Tribe. Following a key principle of *Kejitwawenindowen*, reciprocity or mutuality, *id.* at 312, the plaintiffs acted and reacted in an uncertain legal environment by "trusting" in the tribal government. Taking the plaintiffs' allegations to be true, which we must do for purposes of a summary judgment motion, we find this behavior comports with *Kejitwawenindowen* and *Gwekwadzewen*.

The Tribe's actions, on the other hand, did not comport with *Kejitwawenindowen* and *Gwekwadzewen*. According to the complaint, the

Tribal Council suspended enrollment permanently, occasionally reopening enrollment but only for certain age groups that excluded the Wright petitioners. The Tribe never acted on the Wright petitioners' applications for membership, forcing some petitioners to wait nearly six years.[7] The petitioners alleged that tribal officials instructed the petitioners to wait; in the words of the trial court, "Plaintiffs trusted their Tribal Government in saying to be patient as their time would come." Trial Court Opinion and Order at 14. The failure to act, most especially the failure to issue a final decision, robbed the Wright petitioners of a clear procedure to appeal.[8] The Tribal Council argued here and below, where the trial court agreed, that the Wright petitioners "fail[ed] to file a timely action to seek the processing of their enrollment applications[.]" Trial Court Opinion and Order at 15. The trial court admonished the

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[7] At the trial court level, the Tribal Council alleged that the Wright petitioners' complaint should be dismissed because they did not bring suit within the 60-day limitations period of 2 NHBPTC § 2.1-27. The trial court did not appear to rule on this question and the Tribal Council abandoned the argument on appeal. However, even if the defense remained extant, we would reject the defense. The limitations period does not begin to run until a "decision" of the enrollment office is made, which means "rejection." § 2.1-25 ("Any person, including the parent or legal guardian of a minor or incompetent, who has been *rejected* for enrollment by either the Enrollment Committee or the Tribal Council, . . . has a right to appeal the decision of the Tribal Council to the Tribal Court.") (emphasis added). As the record shows, the application files were closed, not rejected.

[8] One can imagine that if the Wright petitioners did sue earlier, the tribe's defense might then have been that the petitioners failed to exhaust their administrative remedies; tribal law does require, after all, that membership applicants navigate a complex bureaucratic structure, *see* 2 NHBPTC §§ 2.1-10 — 2.1-15, *and* receive a rejection, § 2.1-27, before they may invoke their right to appeal, § 2.1-24. Had the Wright petitioners sued prior to a final decision from the tribe, they arguably would not have exhausted their tribal remedies. While that case is not before us, this hypothetical is intended to show that the tribe's defenses put the petitioners in an impossible situation, which is the antithesis of fundamental fairness.

plaintiffs because the plaintiffs did not sue tribal officials each of the three times the tribal council effectuated a limited reopening of enrollment. *Id*. The trial court admonished the plaintiffs again for failing to "oppose consideration" of the 2019 amendment. *Id*. at 15. The trial court finally admonished the plaintiffs for failing to sue to stop the 2019 election. *Id*. The trial court seems to suggest that the plaintiffs' hypothetical prosecution of these potential suits or pursuit of these political activities would have eroded the diligence claim against the plaintiffs. That may be so, but if it is, then we would have to find, as the trial court did, *see id*. at 14-15, that the Wright petitioners are to be condemned for trusting the Tribe when its officials said to wait. We should not forget that at the time of the plaintiffs' applications for enrollment, assuming the allegations are correct, *they were indubitably eligible for membership*. Given that the plaintiffs have offered to show they are descendants of persons on the Taggart Roll, we have to assume under *Mno Bmadzewen* and *Ndénwemagnek* that these persons are relatives until it is proven they are not. We doubt the Tribal Council's actions in raising barrier after barrier to the Wright petitioners' applications comports with *Kejitwawenindowen* and *Gwekwadzewen*.

As to the second element of laches, the trial court committed legal error in imposing the burden of proof on the Wright petitioners. To sustain a laches defense, "the proponent of laches [must] present evidence that they were 'harmed, either by being hampered in his ability to defend or by incurring some other detriment.' . . . 'Prejudice is never presumed; rather it must be affirmatively demonstrated by the defendant

in order to sustain his burdens of proof and the production of evidence on the issue.'" *Alexander*, 13 Am. Tribal Law at 362 (citations omitted). The Tribal Council claims that granting the plaintiffs relief "would cause instability in the Tribe's enrollment system and impose great financial and logistical burdens." Response Brief at 25. Additionally, the Tribal Council claims that it would suffer economic harms and "expectation-based prejudice." *Id.* at 24. However, at this stage of litigation, the trial court has not required the Tribal Council to prove these harms – and so the Council has not met its burden. We could locate no finding of fact on the prejudice suffered by the Tribe by allowing this suit to proceed. Instead, the trial court erroneously imposed the burden of proof on the plaintiffs when it concluded that the plaintiffs' failure to "provide legal arguments sufficient to hold that the theory of laches does not apply" justified summary judgment for the Tribal Council. *Id.* at 15. The Tribal Council's conclusory allegations of prejudice, offered at this time without the production of proof, does not meet the burden imposed on the proponent of laches.

Finally, the Tribal Council owes a duty of fundamental fairness to the Wright petitioners. As we noted in *Rios*, "It is especially important for people in positions of power or authority over others to strictly ensure that fundamental fairness occurs in all [of the Tribe's] interactions with the Tribal public." *Rios*, *supra* at 14. As between the Wright petitioners, who are nonmembers claiming to be relatives of the Tribal public close enough for enrollment as tribal members, and NHBP, the power imbalance is considerable. It is the Tribal Council and the tribal

government that decides the fate of the petitioners' applications for membership and can decline to even review their applications by deciding to suspend enrollment. *Mno Bmadzewen* and *Ndénwemagnek* requires more of an opportunity to establish the Wright petitioners' eligibility.

On remand, assuming the Tribal Council chooses to proceed with the laches defense, the parties should present evidence on both elements of the laches question, diligence on the part of the plaintiffs and prejudice on the defendants. The Tribal Council's laches defense should be analyzed by the trial court in light of *Kejitwawenindowen* and *Gwekwadzewen*.

D. Procedural Default

Fundamental fairness, as seen through the lens of *Mno Bmadzewen*, requires the judiciary to provide the Wright petitioners with significant leeway in presenting legal arguments and fact development in this difficult case. *Edbesendowen* (humility), in this context, is the recognition and honoring of the parties' and court's "inherent autonomy, dignity, freedom, and equality." James Dumont, *Justice and Aboriginal People*, in *Aboriginal Peoples and the Justice System* 42, 57 (Royal Commission on Aboriginal Peoples 1993). *Edbesendowen* is "an act of kindness or generosity." Stark, 82 Mont. L. Rev. at 317. *Bwakawen* (wisdom) is the "respect for that quality of knowing and gift of vision in others . . . that encompasses the holistic view . . . and is expressed in the experiential breadth and depth of life." Dumont, *supra*, at 57. More broadly, *Mno Bmadzewen* stands for "vision[,] . . . the interconnectedness of all things and the totality of its interrelatedness." *Id.* at 54.

Procedural default – for our purposes here we mean the rejection of a legal argument for lack of development below, lack of legal support such as persuasive caselaw, or failure to raise an argument below – is a feature of the state and federal courts and, indeed, many tribal courts. It is a limited field of vision (as understood through the lens of *Mno Bmadzewen*), compartmentalizing and narrowing claims, a tool often utilized by those with superior power to deny access to justice for the underprivileged, antithetical to our dictum in *Rios*. *Cf.* Deborah McGregor, *Indigenous Women, Water Justice and Zaagidowin (Love)*, 30:2,3 Canadian Women's Studies 71, 73 (2015) (defining "vision" as including "*loving responsibility* to future generations") (emphasis in original). It is routine for parties to lose arguments in state or federal court because their attorneys did not choose to raise or develop them early on in litigation. In state and federal courts, there are literally millions of cases and hundreds of secondary sources for lawyers to rely on when preparing a case. It may be fair in that context to punish a party for the actions of their legal representative who fails to raise an argument due to incompetence or for strategic purposes. But in the tribal context, there is very little legal authority; researching tribal law is just different. *See generally* Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5:1 Am. Indian L.J., art. 2, 101, 127-38 (2017) (surveying strategies for researching tribal law). In the even more specific context of the Nottawaseppi Huron Band of the Potawatomi, there is a small corpus of cases. And where state and federal governments and constitutions and statutes are well-known and oft-litigated, the

NHBP Constitution and Code is not. Even more, NHBP law is unique. Every case this court has heard so far primarily involves questions of first impression. *Edbesendowen* and *Bwakawen* counsel us to be wary of efforts to punish lawyers and their clients for not raising arguments in a timely fashion. That doesn't mean a party can never waive or drop an argument, but we are wary of doing so unless there is a very good reason for doing so, such as a clear case of prejudice to the opposing party. Here, the Wright plaintiffs have brought a case of first impression challenging the closing of the tribal membership rolls, overlapped with significant amendments to the Constitution affecting the plaintiffs' applications. This court can find little relevant authority on the issues in from *any* tribal court, except for one case, *Ballini v. Confederated Tribes of the Grand Ronde Community*, 4 Am. Tribal Law 107 (Confederated Tribes of the Grand Ronde Community Ct. App. 2003), which itself is partially distinguishable. Neither party briefed that case to us. We are hard pressed to find, given our obligation to adhere to *Mno Bmadzewen* and our "loving responsibility" to future generations that may be affected by what happens here, that the Wright petitioners have defaulted or waived any argument at this point in the litigation.

We first reject the Tribal Council's argument that the Wright petitioners defaulted on the request for a writ of mandamus. *Edbesendowen* and *Bwakawen* counsels against dismissing an argument or action in a case of first impression where the offending party's actions or inactions do little or no injury to the opposing party. The Tribal Council argues, defending the trial court's finding below, that the Wright

petitioners defaulted on their mandamus claims because they did not file a motion for a writ of mandamus until after the 2019 constitutional amendment became law. *See* Response Brief at 11. *See also* Trial Court Opinion and Order at 12 ("While the Plaintiffs filed their Complaint on April 25, 2019, two days before the 2019 election, they did not file any other motion or request with their Complaint."). Count I of the Complaint, however, is a request for a writ of mandamus, citing to our decision in *Chivis v. Tribal Council*, No. 12-1920-CR (2013). This seems sufficient at least to preserve the possibility of a writ of mandamus (we address the mandamus question later). The Tribal Council alleges no prejudice or surprise in allowing the plaintiffs to proceed.

We further reject the Tribal Council's claim that the petitioners have defaulted on the issue of standing. *Edbesendowen* and *Bwakawen* compel us to disfavor procedural defaults absent injury to the opposing party. The Tribal Council here argues that the petitioners abandoned the standing issue by mentioning the issue only superficially in their opening brief. *See* Response Brief at 13. The issue of standing in a mandamus action is directly tied to the merits of the question, whether the petitioner has a clear right established by the Constitution. *Chivis*, *supra* at 6. To say that the petitioners abandoned the argument here is incorrect; the petitioners have adequately raised the merits of the primary legal question here, which is whether the petitioners have a legal right to membership and, if so, whether this court is authorized to grant the petitioners' request for relief. It is true the Wright petitioners' brief focuses only on three areas, the constitutionality of the closing of

enrollment prior to the 2019 amendment, laches, and sovereign immunity, *see* Opening Brief at 4-9, but the general thrust of the brief is adequate to preserve the primary issue. Again, the Tribal Council alleges no prejudice or surprise. *Edbesendowen* and *Bwakawen* are not advanced by dismissing this action because of a formalistic, narrow reading of the Wright petitioners' brief.

Finally, we reject the Tribal Council's argument that the Wright petitioners cannot raise constitutional claims at all, primarily to a lack of citation to supportive legal authorities. *Edbesendowen* and *Bwakawen* stand for the propositions that *Bodéwadmi* people will generously view a problem through a holistic lens. *See* Dumont, *supra*, at 57. The Tribal Council argues that the Wright plaintiffs' lack of citations to adequate precedents means that they "failed to provide an adequate legal argument with which Respondents could argue contrary positions." Response Brief at 16. Here, at last, the Tribal Council alleges some injury based on the petitioners' briefing. Still, while the issues in this case are complex and original, they are plain to all to see. Again, this is a case of first impression in this court and perhaps in any tribal court in the country. The trial court's Opinion and Order rested mostly on the overlapping issues of laches, procedural default, sovereign immunity, and the merits; there were no obvious headings or other indicators of clear decision points. *See generally* Trial Court Opinion and Order 3-19. We are aware that the petitioners opened their appellate argument by focusing on the Tribal Council's pre-2019 amendment suspension of enrollment. *See* Opening Brief at 4-7. We doubt it was strategic choice or

gamesmanship to not directly and continually demand enrollment at that time, which is of course the petitioners' ultimate goal. That goal is articulated in the complaint. The only reason for petitioners' counsel to make that argument is to allow for the later argument that petitioners are entitled to enrollment. *Edbesendowen* and *Bwakawen* are holistic and inclusive principles, not formalistic and exclusive principles. We decline to hold the Wright plaintiffs have defaulted on their primary claims.

With the procedural and jurisdictional matters concluded, we now turn to the substantive merits of the Wright petitioners' claims.[9]

II. Merits

Article VII, § 1(a)(8) of the Constitution provides that "The Band, in exercising the powers of self-government, shall not . . . [d]eny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.]" The tribal judiciary possesses the power to interpret the Constitution. *See generally* Const. Art. XI, § 3(a), (b) (describing the jurisdiction of the tribal judiciary). As we noted above, this judiciary need not apply state and federal court precedents on individual rights to tribal contexts in order "to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62. We also noted that

[9] In accordance with 9 NHBPCR § 14, the Chief Justice GRANTS the Tribal Council's Motion for Leave to File a Motion to Strike Unresponsive Portions of Appellants' Reply Brief. For reasons expressed in this subsection, the Court DENIES the Tribal Council's motion to strike.

federal courts recognize that tribal courts effectively protect individual rights. *See FMC Corp.*, 942 F.3d at 943-44 (9th Cir. 2019); *Norton*, 862 F.3d at 1259.

We view Article X's equal protection guarantee through the lens of *Mno Bmadzewen* and the *Noeg Meshomsenanek Kenomagewenen*. The concept of equal protection originates in the Fourteenth Amendment of the United States Constitution. It is a mandate to state governments for correction and repair, or in the parlance of American history, reconstruction and the eradication of the badges of slavery. The mandate imposed on a government to guarantee equal protection assumes the state of horrendous and unequal protection rooted in a racial caste system. What a sad state of affairs! *Bodéwadmi* people, in contrast, hope to achieve harmony by living life correctly, which is the essence of *Mno Bmadzewen*. *Cf.* McGregor, *supra* at 75 (describing the Ojibwe word, "*Mnaamodzawin*," as "the total state of being well"). "Harmony" in Anishinaabe tribal governance starts with cooperation and mutual aid. *See* Aaron Mills, Karen Drake, and Tanya Muthusamipillai, *An Anishinaabe Constitutional Order*, in *Reconciliation in Canadian Courts: A Guide for Judges to Aboriginal and Indigenous Law, Context and Practice* 260, 276 (National Judicial Institute, 2017).[10] "Disharmony results from the closing off of someone taking more than he or she needs." *Id.*

[10] This publication is also available online: https://digitalcommons.osgoode.yorku.ca/scholarly_works/2695/.

We believe the leading principle of the *Noeg Meshomsenanek Kenomagewenen*, the teaching that best encapsulates the goal of harmony in this community, is *Debanawen* (love). *Debanawen* "is the capacity for caring and desire for harmony and well-being in interpersonal relationships and with the environment." McGregor, *supra* at 75 (quoting Nicole Bell, *Anishinaabe Bimaadiziwin: Living Spiritually with Respect, Relationships, Reciprocity, and Responsibility*, in *Environmental and Sustainability Education in Teacher Education* (2019)). *Debanawen* "transcends time and space; it links us inexplicably to our ancestors and future generations." *Id.* In times of great difficulty and even violence, *Bodéwadmi* people reacted with *Debanawen*, a great healing tool. Article X's guarantee of equal protection must be interpreted in light of the corrective and reparative principle of *Debanawen*.

Other tribal courts assessing equal protection claims tend to follow the state and federal court decisions. These decisions identify a valid equal protection claim as either (1) intentional discrimination against a protected class of persons by a government or (2) disparate treatment of similarly situated persons by a government. *E.g.*, *Whitewater v. Ho-Chunk Office of Tribal Enrollment*, 3 Am. Tribal Law 359, 378-79 (Ho-Chunk Nation Trial Court 2001) (finding a violation of equal protection where a tribe enrolled some persons prior to a change in the tribe's membership laws but not others); *Nissen v. Confederated Tribes of the Grand Ronde Community*, 3 Am. Tribal Law 273, 275-76 (Confederated Tribes of the Grand Ronde Community Trial Court 2001) (finding no violation of equal protection where new membership law applied equally

to all applicants). We find no issue with a general rule that the equal protection clause of Article X requires the tribal government to treat similarly situated persons the same. We impose the additional requirement that the tribal government comply with the teaching of *Debanawen*, the great healing principle of the *Noeg Meshomsenanek Kenomagewenen*.

The Wright petitioners in this case argue that they were entitled to enrollment under the membership criteria that existed prior to the 2019 amendment to the Constitution. A corollary to that point is that the 2019 amendment to the Constitution is not applicable to them because they submitted applications to the enrollment office (and brought suit) before the 2019 amendment. They additionally argue that the Tribal Council's decision to the suspend enrollment prior to the 2019 amendment was invalid. While we cannot assess whether the Wright petitioners are entitled to membership on this record, we can offer some guidance to the parties and the trial court on how to analyze these questions.

A. On Remand, the Trial Court Must Determine Whether the Pre-2019 Constitution Applies to the Wright Plaintiffs' Applications for Enrollment.

We remand to the trial court to determine whether the constitutional membership criteria that existed prior to April 27, 2019 apply to the Wright plaintiffs' applications. The parties largely agree that the plaintiffs were eligible for enrollment under the constitution as it existed prior to the 2019 amendment, which is when the petitioners applied. The Tribal Council's primary argument, adopted by the trial

court, is that the 2019 amendment exclusively to the Constitution applies to the Wright petitions. If that is so, the parties agree that the 2019 amendment retroactively strips the Wright petitioners of their legal entitlement to enrollment.

The retroactive application of a statutory or constitutional enactment implicates fundamental fairness where the changed law strips persons of a right or entitlement. *See Ballini v. Confederated Tribes of the Grand Ronde Community*, 4 Am. Tribal Law 107, 111 (Confederated Tribes of the Grand Ronde Community Ct. App. 2003) (noting that it could "be unfair to change the rules that apply to those applicants who submitted their applications before the effective date of the new amendment"). As we noted above, fundamental fairness requires us to do justice. For the People of the NHBP to strip persons of the legal rights of persons they possessed by altering the Constitution warrants an analysis of the fundamental fairness mandates of the Article X of the Constitution. *Cf. id.* at 112 ("[R]etroactive legislation may in some circumstances raise due process concerns."). We further note that while the Wright plaintiffs are not members of the Tribe, they are relatives to whom we are accountable through *Inawendiwin*: "Relationships based in inawendiwin teachings are respectful of the individual, as well as the integrity of the collective." Reo, *supra* at 68.

We find that *Edbesendowen* (humility), *Bwakawen* (wisdom), and *Debanawen* (love) are critically relevant teachings in the analysis of the retroactive application of statutes and constitutional provisions. *Edbesendowen* means "everything that comes to life happens for a reason

and we carry this whether we like it or not." Ruml, *supra* at 164. "[W]e can talk of humility, but until we can look at the squirrel sitting on the branch and know we are no greater and no less than her, it is only then that we have walked with humility." Lindsay Borrows, *Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape*, 33 Windsor Y.B. Access Just. 149, 153 (2016). *Bwakawen* means "everything that you have experienced in life, good and bad, is stored inside your bones, that's your wisdom." *Id*. *Debanawen* is a healing teaching that requires us to consider these decisions in the context of this and future generations. *See McGregor*, *supra* at 75. The decision of a tribal community to draw bright legal lines like it must do in the context of enrollment criteria is a sacred decision, leading to both good and bad outcomes in that *Bodéwadmi* relatives are inevitably excluded. *Bodéwadmi Dbaknegewen* (law) is the manifestation of that sacred effort. *Mno Bmadzewen* "is like good and bad being mixed together and dissolving itself to become a peace, a kindness, a balance in life." Ruml, *supra* at 164. We note that the sole legal difference between the Wright plaintiffs and the tribal members enrolled prior to the 2019 amendment is that current members applied for enrollment before the plaintiffs did. We do not know why the plaintiffs did not apply for membership until 2013 and beyond. Colonization had enormous impacts on *Bodéwadmi* people — some were adopted out and struggled to recover and understand their ancestry, while others might have been pressured into denying their *Bodéwadmi* ancestry, and still others may have at some point rejected their *Bodéwadmi* connections for other reasons. The

temporal limitation imposed by the 2019 amendment has enormous consequences on both the plaintiffs and their relatives who are members. *Debanawen* compels us to take that consideration seriously.

On the record before us, we would hold that the 2019 amendment is not retroactive to the Wright petitioners' applications, though we leave to the Tribal Council to show on remand whether the People of the NHBP *conclusively* chose to make the amendment retroactive. There is a strong presumption *against* the retroactive application of a new law, especially if the law creates negative consequences for relatives. *Debanawen* is a baseline requirement that the law treat relatives equally and fairly. Determining whether a law has retroactive applicability begins with determining "whether the statutory text or the legislative history manifests [the Peoples'] intent concerning the statute's temporal reach." *Ballini*, 4 Am. Tribal Law at 112. *Edbesendowen* and *Bwakawen* demand that the collective experiences and knowledge of the community inform and govern the adoption of new law given that the 2019 amendment has such potentially stark consequences for relatives. For the 2019 amendment to have retroactive effect on the Wright petitions, we hold that *Edbesendowen* and *Bwakawen* mandate that the People had *clear and explicit knowledge* that the amendment was intended to strip persons with pending applications of their eligibility for enrollment. On the record before us, the trial court made no findings of fact or conclusions of law on whether the People intended the 2019 amendment to have retroactive application. We find little to no evidence introduced into the record about the intent of the People when voting on the 2019

amendment. On remand, the trial court must engage in that fact-finding. If on remand the trial court determines that the People did not conclusively possess that intent, then the 2019 amendment presumptively does not apply. *Ballini*, 4 Am. Tribal Law at 117 (holding that where the legislature's intent to apply a statute retroactively was unclear, "we adopt the presumption against retroactive legislation"). If on remand the trial court determines that the People did conclusively possess the intent for the amendment to apply retroactively, then the Wright petitioners cannot prevail.

We hold that, absent a finding that the People conclusively intended the 2019 amendment to apply retroactively, then there is a presumption that the pre-2019 constitution applies to the Wright petitions. In the retroactivity analysis, the court must then determine "whether [retroactive application of the new law] would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ballini*, 4 Am. Tribal Law at 117. Fundamental fairness dictates that if any of these three factors are present, then the amendment cannot be applied retroactively. Here, the sole relevant factor is whether the amendment impairs the rights the Wright plaintiffs possessed at the time of the amendment. The text of the Constitution both before and after the 2019 amendment is clear and conclusive: "The membership of the Nottawaseppi Huron Band of the Potawatomi *shall* consist of all persons meeting the [enrollment] criteria. . . ." Const. Art. III, § 1(a) (emphasis added). There is no ambiguity in the Constitution's

text. If they can prove eligibility for membership, the Wright petitioners possessed a legal right that would be stripped by the 2019 amendment.

To reiterate, unless the trial court determines that the People of the NHBP *conclusively* intended for the 2019 amendment to apply retroactively and strip persons like the Wright plaintiffs of their membership rights, then the trial court must proceed to the next step — determining whether the plaintiffs were eligible for membership under the pre-2019 constitution.

B. On Remand, Assuming the Plaintiffs Prevail on the Retroactivity Question, the Plaintiffs Must Then Show Eligibility for Tribal Membership.

The Wright plaintiffs allege that they meet all relevant enrollment criteria; a quick review of the applications they filed seem to show that their allegations have merit. This is not a finding of fact; that remains for the trial court as fact finder to determine. *See In re Election Board Decision, Dispute No. 2021-2*, No. 2021-111-APP, at 8 (2021).

Assuming the Wright plaintiffs make that showing, then when they applied for membership, they are entitled to a writ of mandamus. The Constitution conclusively acknowledges persons who meet the membership criteria as members of the Tribe. Given the mandatory language of Article III, § 1(a), we hold that the Wright petitioners' right to enrollment can attach without formal action of the enrollment office in extraordinary circumstances. Enrollment applicants can show their eligibility to the enrollment office or to the tribal judiciary when the

enrollment office declines to act, as it has here. We find the decision in *Quayle v. Cantu*, No. 08-CA-1028 (Saginaw Chippewa Indian Tribe Ct. App. 2008), persuasive.[11] There, the court held that a 5-10 year delay in processing an application was deeply concerning. *Id.* at 3. As that court noted, Indigenous people "know better than anyone that justice delayed is justice denied." *Id.* This case is exactly the kind of case for which mandamus law developed.[12]

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[11] The *Ballini* case cited above was a decision of the appellate court of the Confederated Tribes of the Grand Ronde Community in Oregon. The court there ultimately determined that the intent of the voters to apply restrictive membership criteria retroactively was unclear, 4 Am. Tribal Law at 116, but that the applicants for membership did not possess a right to enrollment because they did not possess a vested right to membership until the tribal council there accepted their application for membership, *id.* at 117-18. In this context, we would disagree with that court's cramped view of the obligations of a tribal government to enroll eligible applicants.

[12] We assume given the record we have before us that the Tribal Council's suspension of enrollment ended on April 26, 2021. If, however, that conclusion is incorrect or if the Council again suspends enrollment, the trial court will then be called to determine whether the suspension was valid under the Constitution. Article III, Section 2(a) of the Constitution provides, "The Tribal Council shall have the power to temporarily suspend the approval of new requests for enrollment when such action is determined to be necessary to preserve the health, safety and welfare of the Band." The provision makes clear that (1) the Tribal Council possesses the sole power to suspend enrollment, (2) any suspension must be temporary, (3) suspensions are justified only to preserve the health, safety, and welfare of the Band. The judiciary presumably possesses the power and competence to determine whether the Tribal Council's suspension of enrollment is temporary and justified by the three factors annunciated in the Constitution. *See* Const. art. XI, § 3(a) (describing the jurisdiction of the tribal court system as including "all civil . . . cases arising under this Constitution [and] all legislative enactments of the Band").

In the Tribal Council's motion for summary judgment before the trial court, the Council invoked respect, or what the Council called "*Wdetanmowen*," Defendants' Motion for Summary Judgment at 7, and wisdom, or *Bwakawen*, *id.* at 10. This court agrees completely, so long as the decision to suspend is made in accordance with the Constitution, *Wdetanmowen*, or as we refer to it in accordance with tribal code, and *Kejitwawenindowen*. *Cf.* Wapshkaa Ma'iingan (Aaron Mills), *Aki, Anishinaabek, kaye tahsh Crown*, 9 Indigenous L.J. 107, 126 (2010) (asserting that the Anishinaabe law

Ékwak (Conclusion)

The Ojibwe and Dakota people tell an *aadizokaan* (sacred story) about the origin on the Big Drum, which is really a story about a little girl who ended the war between nations. The Dakota and Ojibwe nations had fought against each other for so long that they had forgotten why they warred. These nations had become so intertwined in war that even their languages were altered; the words for "warrior" became virtually the same: *akiçita* in Dakota and *ogichidaa* in Ojibwe. A small girl tired of war fasted for seven days, seeking guidance. A grandmother appeared and told the girl that the Dakota and Ojibwe warrior societies were too busy with war to remember their own heartbeats. The grandmother taught the girl about the drum, how the drum represents the sound that a heart makes, and how the beat of the drum can reconnect Indigenous people. The girl brought the teaching of the drum to her community and soon the warriors forgot about war. There was peace.[13]

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of respect in the context of limited resources requires "generational and community-centered thought"); Ruml, *supra* at 165 ("When we look at each other in darkness we are all the same because we can speak and communicate with one another."). On remand, assuming the trial court needs to reach this point, the Tribal Council bears the burden to show that its decisions to suspend enrollment comport with the limitations on the Council's suspension power in Article III, § 2(b); that is, the Council must show that the suspension is "necessary to preserve the health, safety and welfare of the Band" and in accordance with the Council's obligation to act in *Bwakawen* and with *Wdetanmowen/ Kejitwawenindowen* for all affected persons. If that showing is made the to satisfaction of the trial court, the Council's decision certainly is entitled to *Wdetanmowen/ Kejitwawenindowen*.

[13] For more on this story, see Nathon Breu, *Minowakiing Chibizhiwag Dewe'igan (In the Good Land, the Panthers Drum)*, unpublished manuscript at 3-4 (2018); Paul Cormier & Lana Ray, *A Tale of Two Drums: Kinoo'amaadawaad Megwaa Doodamawaad – "They Are Learning with Each Other While They Are Doing*, in

For many *Bodéwadmi* people, the *déwégen* (drum) also represents the beating of the human *dé* (heart). The *déwégen* brings the *Bodéwadmi* people together in *Mno Bmadzewen*. For many, many years, the *Bodéwadmi* lost their *déwégen*, their connection to each other and to their culture. There are many stories of Anishinaabe communities who had their drums taken and, after much time and effort, finally recovered those drums, those relatives.[14] The return of the *déwégen* is about healing and restoration. The tribal judiciary knows that healing and restoration is not about winners and losers, which what contested litigation over tribal membership like this case is all about. Even so, we hope this guidance can be helpful. We hope the Wright petitioners find their *déwégen*. Perhaps it is here at Nottawaseppi. Perhaps it is elsewhere.

Gkeno'mewa (Order)

On remand, the trial court must complete the following: (1) determine whether the People of the NHBP conclusively intended to make the 2019 amendment retroactive; (2) if the intent of the People is not conclusive, then the trial court must determine whether the Wright plaintiffs are eligible for membership; and (3) if the Wright plaintiffs are

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Indigenous Research: Theories, Practices, and Relationships 112, 112 (Deborah McGregor et al. eds. 2018); David Treuer, *"A Sadness I Can't Carry": The Story of the Drum*, N.Y. Times, Aug. 31, 2021.

[14] For examples, see Maureen Matthews, *Naamiwan's Drum: The Story of a Contested Repatriation of Anishinaabe Artefacts* (2016) (describing the story of the return of a waterdrum to a Canadian Ojibwe community), and Louise Erdrich, *The Painted Drum* (2005) (fictional story about how a woman steals a drum back to return to an Ojibwe community).

eligible, the trial court must issue a writ of mandamus ordering the enrollment office to enroll the plaintiffs.

In accordance with this opinion, we **VACATE** the trial court's order of May 28, 2021, and **REMAND** to the trial court for additional proceedings.

Signed:

June 3, 2022
Date

Gregory D. Smith
Hon. Gregory D. Smith, Chief Justice, With Permission HLC

June 3, 2022
Date

Hon. Holly T. Bird, Associate Justice

June 3, 2022
Date

Matthew L.M. Fletcher
Hon. Matthew L.M. Fletcher, Associate Justice
With Permission HLC