Federal Court  Cour fédérale

Date: 20240111

Dockets: T-2421-22
T-2153-22

Citation: 2024 FC 47

Ottawa, Ontario, January 11, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

SPENCE COUTLEE

Applicant

and

LOWER NICOLA INDIAN BAND AND
LOWER NICOLA INDIAN BAND
ELECTORAL OFFICER

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Spence Coutlee [Applicant], a member of the Lower Nicola Indian Band [LNIB], seeks judicial review of LNIB Chief and Council's [Respondent] September 28, 2022 decision removing the Applicant from the Office of Councillor and barring him from running in the October 22, 2022 election [Election] [Removal Decision]. Federal Court file T-2153-22

addresses the Removal Decision. In Federal Court file T-2421-22, the Applicant seeks judicial review of the Election itself.

[2] Pursuant to Associate Judge Coughlan's January 6, 2023 Order, the applications were heard on a single record and now form the present matter before the Court. However, the files were not consolidated into one matter.

[3] For the reasons that follow, the application for judicial review in T-2153-22, the Removal Decision, is allowed. The Chief and Council did not have the jurisdiction to remove the Applicant from his position as Councillor.

[4] However, I am dismissing the application for judicial review in T-2421-22 concerning the Applicant's challenge to the Election. The Applicant had an adequate alternative remedy that he did not pursue.

II. Background Facts

[5] While the parties' records are comprehensive, the essence of the issue in both applications turns on the applicable governing law concerning removals of elected officials and elections. Below, I will review the context, the legislative and policy regime, the events leading to the Removal Decision, and the Election.

A. *Context*

[6] LNIB is a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5 that is governed by one Chief and seven Councillors. The relevant laws and policy include the *Custom Election Rules*, approved by the membership and in force as of June 6, 2013 [*Rules*]; the Chief and Council Policy, including the Oath of Office, approved by the Chief and Council and in force as of September 13, 2016 [Policy]; the *Lower Nicola Indian Band Financial Administration Law, 2020* [*FAL*], approved by the Chief and Council pursuant to the *First Nations Fiscal Management Act*, SC 2005, c 9; and the Financial Governance Policy Authorization, in force as of September 17, 2019.

[7] The Applicant is the owner and operator of SCS Diamond Drilling Limited [SCS], a drilling company that pursues mining and energy contracts. In October 2019, the Applicant was elected as a Councillor of LNIB. Chief Stuart Jackson and Councillors William Bose, Robin Humphrey, Connie Joe, William Sandy, Lucinda Seward and Aaron Sumexheltza, were also elected to their respective offices.

[8] As Councillor, the Applicant was assigned to the Economic Development and Natural Resources portfolio. Pursuant to section 4.9 of the Policy, the Applicant was responsible for the high-level governance of his portfolio, not day-to-day management. The Applicant was also appointed to the board of directors of the LNIB Development Corporation [LNIBDC], an economic development arm of LNIB. The board of directors is responsible for negotiating relationship agreements and mutual benefit agreements with proponents and creating opportunities for LNIB members.

B. *Laws and Policies*

[9] For the purposes of these applications, the relevant provisions are set out below.

(1) Rules

[10] Sections 26 to 31 provide for an election appeal procedure [Appeal Procedure]:

> 26. Within 15 calendar days of an election any elector may appeal the results of the Election, on the grounds that, there had been a corrupt election practice or a violation of these Rules, by obtaining the signature of 30% of electors on the prescribed form and submitting it to the Electoral Officer along with a $1,500 non refundable filing fee. The appeal shall be in writing and shall clearly set out the grounds for the appeal and a summary of the evidence upon which it is based.
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> 27. Upon receipt of an appeal or appeals the Electoral Officer shall, immediately after the 15 day period described in Section 26 above, instruct the BC Arbitration and Mediation Institute ("BCAMI") or similar professional organization to appoint an Arbitrator with experience in First Nations issues to adjudicate the appeal and shall forward to it the required administrative filing fee, the appeal and any supporting documents. The Electoral Officer shall also provide each candidate in that election with a copy of the appeal or appeals. A copy of the appeal or appeals shall also be posted in the Band Office.
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> 28. The Arbitrator shall convene a hearing of the appeal or appeals in consultation with the parties but in any event within 30 days of his or her appointment unless a later date is agreed upon by the parties. The Arbitrator may receive submissions from any source he or she deems appropriate. The hearing of an appeal or appeals shall be in accordance with the principles of natural justice and procedural fairness.
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> 29. The Arbitrator shall render his or her decision in writing within 21 days of the end of the hearing by delivering a copy of that decision to the Electoral Officer, who shall forthwith implement that decision, which shall be final and binding on the parties. The Electoral Officer shall concurrently post a copy of the decision in the Band Office and deliver a copy of the decision to each candidate and each appellant.

> 30. The Arbitrator may make such order regarding costs of the appeal as he or she deems appropriate. The Arbitrator's fee and all reasonable expenses shall be the responsibility of the Band unless otherwise ordered by the Arbitrator.
>
> 31. The Arbitrator's decision is final and binding on all parties.

[11] Sections 35 to 44 provide for the impeachment of a Council Member, defined as both a Chief and a Councillor of LNIB:

> 35. A Council Member may be removed from office and be ineligible to stand for election to Council for a period of up to 6 years if he or she,
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> …
>
> (b) from the time of election until the end of his or her term of office:
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> i. violates the Council Oath of Office or refuses or fails to take the Council Oath of Office;
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> ii. violates this Code, the Lower Nicola Band Chief and Council Policy or Conflict of Interest Policy;
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> …
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> 36. A petition for the impeachment of a Council Member, may be commenced by:
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> …
>
> (b) Band Council upon the passing of a Band Council Resolution endorsed by a majority of all Council Members.
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> 37. A petition for the impeachment of a Council Member shall be in writing, clearly set out the grounds for the petition and a summary of the evidence upon which it is based, and shall be submitted to the Executive Director.
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> 38. Immediately upon receipt of a petition the Executive Director shall instruct the BC Arbitration and Mediation Institute

("BCAMI") or similar professional organization to appoint an Arbitrator with experience in First Nations issues to adjudicate the petition and shall forward to it the required administrative filing fee, the appeal and any supporting documents. The Executive Director shall also provide a copy of the petition to the Council Member in respect of whom the petition is brought and post a further copy of the petition in the Band Office.

39. The Arbitrator shall within 30 days of receipt of a petition for the impeachment of a Council Member convene a hearing of the petition unless a later date is agreed upon by the parties.

40. The hearing of a petition for the impeachment of a Council Member shall be in accordance with the principles of natural justice and procedural fairness.

41. The decision of the Arbitrator shall include an Order that:

(a) the petition is denied; or

(b) the petition is granted, and the Council Member is forthwith removed from office and ineligible to stand for election to Council for a specified period of up to six years.

42. The Arbitrator shall make such order regarding costs of the petition as he or she deems appropriate. The Arbitrator's fee and all reasonable expenses shall be the responsibility of the Band unless otherwise ordered by the Arbitrator.

43. The Arbitrator's reasoned decision on the petition shall be in writing and shall be provided to the Executive Director, Band Council, the petitioner and the Council Member in respect of whom the Petition was brought within 21 days of the end of the hearing.

44. The Arbitrator's decision is final and binding on all parties.

(2) Policy

[12] Section 4.11 of the Policy provides for reasons for disqualification and removal:

1. Notwithstanding section 3.10, the Chief or any Councillor is disqualified from holding his/her office and will

immediately relinquish his/her position as the Chief or Councillor, if the Chief or Councillor:

2. Is absent from two (2) consecutive Chief and Council meetings without proper authorization and reasonable cause;

3. Is absent, in one year, from four (4) Chief and Council meetings without proper authorization and reasonable cause;

4. Uses his/her influence in contravention of Section 3.5;

5. Uses confidential information for his/her or others benefit in contravention of Section 3.6;

6. Exceeds authority, violates or contravenes section 4.7;

7. Is convicted of an indictable offence while in office;

8. He/[s]he dies or resigns;

9. If she/he is found to be a physically or mentally incompetent person or becomes of unsound mind.

…

If the Chief or any Councillor is removed from Office under this Policy she/he will be ineligible to run for either Chief or Council in the next election or by-election.

[13] Section 4.12 provides for penalties for Chief and Council:

Any member of Chief and Council who commits any substantial transgression or who has committed a violation under Section 4.11 may be subject to a penalty imposed by way of a valid Band Council Resolution. Such penalties are limited to:

1. Suspension from Chief and Council activities with or without pay or honorarium for a period of up to one (1) month;

2. Suspension from all Chief and Council activities without pay or honorarium for a period of up to three (3) months;

3. Removal of all or certain appointments;

4. Removal from Office;

5. Any decision of Chief and Council under Section 4.12 must be reported to the people of Lower Nicola Indian Band as soon as is reasonably possible.

[Emphasis in original.]

C. *Events Leading to the Removal Decision*

[14] As I have found that lack of jurisdiction is the determinative issue in Federal Court file T-2153-22, I will only provide a general overview of the events leading to the Removal Decision. In early 2020, the Applicant learned of various allegations against him concerning whether he used his position as Councillor to further his own business interests, and whether he engaged with LNIB's business partners contrary to the Policy and his high-level oversight role.

[15] On March 3, 2020, Chief Jackson wrote to the Applicant raising two allegations concerning the Applicant's conduct, the relevant one concerning his deficient disclosure of conflicts of interest pursuant to the *FAL*. Chief Jackson explained that the Applicant would have an opportunity to provide oral and written submissions at a Chief and Council meeting scheduled for March 10, 2020, and that Chief and Council may wish to pursue further investigations following the meeting.

[16] At the March 10, 2020 meeting, Chief and Council discussed the conflict of interest disclosure requirements pursuant to the *FAL*. As an action item, the Applicant was required to provide an updated disclosure of his conflicts of interest. The Applicant provided a revised

disclosure on March 31, 2020. That same day, the Applicant provided a written response to Chief Jackson's March 3, 2020 correspondence denying all allegations.

[17] What followed was a series of correspondence between LNIB's legal counsel and the Applicant between May 27, 2020 and July 31, 2020 concerning various allegations against the Applicant. The Applicant requested an in-person special meeting with Chief and Council.

[18] On August 19, 2020, Chief and Council wrote to the Applicant reiterating the allegations set out in previous "cease and desist" correspondence from LNIB's legal counsel. On September 18, 2020, the Applicant replied raising procedural fairness concerns and reiterating his request to meet "in person, in camera, and without prejudice" to resolve matters.

[19] In summary, the allegations against the Applicant were as follows:

1. the Applicant failed to provide a written disclosure of the information in the form required in section 5 of the *FAL* Schedule A – Avoiding and Mitigating Conflicts of Interest;

2. the Applicant attended meetings that did not require his attendance;

3. the Applicant contacted the LNIB referral and field technician requesting a list of all mining referrals in the LNIB traditional territory;

4. the Applicant attended the Vancouver Resource Investment Conference and the Association for Mineral Exploration Roundup Conference without approval by Chief and Council by way of a valid motion;

5. the Applicant advised the LNIB referral and field technician that a corporation was looking for contracting opportunities, with the implication that the Applicant was seeking information for his own use;

6. the Applicant contacted the Economic Development Coordinator at Highland Valley Copper, introduced himself as the primary contact for LNIB and engaged in conversations related to drilling business and contracting opportunities;

7. the Applicant advised the LNIB Executive Director that she was not invited to attend a meeting with Highland Valley Copper, even though her attendance was required;

8. the Applicant emailed Chief and Council to influence or attempt to influence discussions surrounding the circumstances in which he was alleged to have a conflict of interest;

9. the Applicant unilaterally revised the Contractor/Supplier Information List; and

10. the Applicant wrote to Trans Mountain Corporation [TMX], holding himself out as having authority to communicate on behalf of LNIB Chief and Council regarding LNIB and LNIBDC's business relationship with TMX absent Chief and Council's approval.

[20] On December 1, 2020, Chief and Council passed a Band Council Resolution [BCR] authorizing Chief and Council to conduct or direct a formal investigation into the allegations pursuant to section 3.1.6 of the Policy [December 1 BCR]. The December 1 BCR noted that, "Chief and Council have conducted a preliminary, confidential review of [the allegations]."

[21] On March 30, 2021, LNIB's legal counsel retained an investigator [Investigator] to conduct the investigation. The Investigator was asked to arrange interviews and provide a written report addressing:

1. a summary description of the allegations that have been made against the Applicant;
2. a summary of the evidence provided by witnesses and the Applicant;
3. a determination as to whether the allegations have been substantiated on the balance of probabilities and their reasons and/or evidentiary basis for their conclusions in this regard; and
4. whether any of the allegations can be substantiated and whether any of the alleged conduct constitutes a breach of the relevant policies.

[22] A series of written exchanges occurred between the Investigator and the Applicant between May 7, 2021 and March 23, 2022. In short, the Investigator wrote to the Applicant on several occasions requesting his availability for an interview to address the allegations and seek his directions about possible witnesses. In response, the Applicant sought clarification regarding the Investigator's mandate, scope of investigation, impartiality, witnesses, allegations, and materials. The Applicant never met with the Investigator.

[23] The Investigator provided the Applicant with a preliminary report and its accompanying attachments on May 6, 2022 [Preliminary Report]. The Investigator invited the Applicant to

provide comments on the Preliminary Report by June 2, 2022. The Investigator later extended the deadline to June 10, 2022. The Applicant never provided a written response.

[24] The Investigator issued her 54-page final report on June 30, 2022 [Final Report]. The Investigator concluded that the Applicant engaged in a conflict of interest and breached his fiduciary duties, contrary to the Policy, the Oath of Office, and the *FAL*. The Applicant received the Final Report in early July 2022. In an August 31, 2022 letter, Chief and Council invited the Applicant to provide a written response to the Final Report and allegation letters, along with any additional materials that the Applicant believed to be relevant, by September 14, 2022. The Applicant did not respond.

[25] On September 13, 2022, Chief and Council received a memorandum from LNIB's legal counsel recommending the Applicant's removal from Office and ineligibility to run in the Election pursuant to sections 4.11 and 4.12 of the Policy.

D. *Applicant's Nomination for Chief*

[26] On September 19, 2022, LNIB's Chief Electoral Officer [CEO] notified LNIB membership that an Election had been called for the Offices of Chief and Council for October 22, 2022 [Notice]. The Notice provided that votes could be cast by electronic ballot, mail-in ballot, or in-person at the advance poll or regular poll. The CEO also provided a final candidates list, which identified the Applicant as a candidate for Chief. The incumbent, Chief Jackson, was also a candidate for Chief, along with two other individuals.

E. *The September 28, 2022 Band Council Meeting*

[27] On September 24, 2022, Chief and Council received a meeting notice with call-in details for a Chief and Council meeting scheduled for September 28, 2022. The agenda included an item entitled “Potential Discipline of [Councillor] Spence Coutlee”. Attached to the agenda was a draft BCR setting out Chief and Council’s determination that the Applicant engaged in a conflict of interest, breached his fiduciary duties, and violated LNIB policies. The draft BCR further resolved to remove the Applicant from Office and deem him ineligible to run for Chief in the Election.

[28] On September 28, 2022, the Applicant drove from Kamloops to the LNIB Band Council Office in Meritt and discovered that the doors to the Band Council Office were locked. The Applicant phoned into the meeting from the parking lot.

[29] At the beginning of the meeting, the Applicant requested an adjournment of the disciplinary matter against him so he could properly present his submissions and provide Chief and Council with all the relevant evidence. He explained his understanding that the meeting would be in-person in the Band Council Office where he would have internet access. Chief and Council refused the Applicant’s request.

[30] The Applicant also requested that Chief Jackson declare a conflict of interest, given that both the Applicant and Chief Jackson were running for Chief in the Election. Chief Jackson declined to recuse himself.

[31] The Applicant proceeded to provide submissions over a four-hour period, wherein he denied each of the allegations and submitted that in the alternative, the allegations would not justify his removal from the position of Councillor.

[32] Following the Applicant's submissions, Chief and Council went into "in camera", or confidential, deliberations. The Applicant was required to leave the deliberations due to his conflict of interest. Chief and Council passed the BCR by way of a 4-3 majority vote. The Applicant received reasons for the Removal Decision on or around October 5, 2022.

F. *The Election*

[33] On October 3, 2022, Chief and Council circulated a notice to LNIB members announcing that the Applicant was removed from Office effective immediately, and ineligible to run for Chief in the Election. All in-person ballots and electronic ballots were updated to reflect this change but any mail-in ballot would be spoiled. LNIB administration recommended that those who already sent in a mail-in ballot vote electronically or in-person. Alternatively, members could contact the CEO for another mail-in ballot package.

[34] On October 19, 2022, the Applicant's counsel sought an injunction before this Court to stay the Election for Chief. The motion was dismissed.

[35] The Election proceeded on October 22, 2022. As set out in the CEO's final report [Election Report], 381 of the 1148 eligible electors (33%) voted in the Election. Chief Jackson was elected to the Office of Chief with 182 votes. Three ballots were spoiled or rejected. The

Election Report further states that mail-in ballots accounted for none of the votes cast. While voters were sent an updated replacement mail-in ballot, none were received prior to the close of polls given the timelines involved. The Certified Tribunal Record [CTR] does not indicate how many mail-in ballots were impacted.

III. The Removal Decision

[36] The Removal Decision stated that the Applicant engaged in a conflict of interest; breached his fiduciary duties; and violated the Policy, the Oath of Office, and the *FAL*. The Removal Decision resolved to remove the Applicant from Office effective immediately pursuant to section 4.12 of the Policy and deem him ineligible to run for Chief in the Election pursuant to section 4.11 of the Policy.

[37] Chief and Council provided reasons for the Removal Decision on October 5, 2022. Chief and Council began by explaining that in rending the Removal Decision, Chief and Council considered the ten aforementioned allegations; the Applicant's written and oral responses to the allegations; and the Final Report, including its numerous attachments.

[38] Based on this review, Chief and Council found that the events that occurred prior to March 2020 were not contrary to the Applicant's fiduciary duty or the LNIB policies, or were a minor breach that did not warrant disciplinary conduct. As for the events following March 2020, at which point the Applicant was informed of concerns with his conduct. Chief and Council adopted the Investigator's findings.

[39] Chief and Council highlighted two main issues with the Applicant's conduct. First, the Applicant was not forthcoming about the extent of his modifications to the Contractor/Supplier Information List. Second, the Applicant sent an unauthorized letter to the President of TMX, wherein the Applicant misrepresented himself as speaking on behalf of Chief and Council and employed an adversarial position to advance his own self-interests. Chief and Council noted that this approach could have significantly damaged LNIB's relationship with TMX and therefore the interests of LNIB members.

[40] Chief and Council found that the Applicant committed a "substantial transgression" justifying his removal from Office pursuant to section 4.12 of the Policy. Therefore, the Applicant was ineligible to run for Chief in the Election pursuant to section 4.11 of the Policy. In Chief and Council's view, this penalty was reasonable in light of the purposes of the provision and the Applicant's failure to cooperate with the Investigator.

IV. Evidence

[41] In the present matter, the Applicant filed affidavit evidence from himself, a Councillor, and an Elder, the contents of which relate in part to LNIB's practices. The Respondent filed affidavit evidence from Chief Jackson, the Investigator, the LNIB Executive Director, and an Elder addressing the same subject matter. While providing context, and with respect, the evidence was not particularly germane to the determinative issues set out in further detail below.

V. Preliminary Issue

[42] Prior to the hearing of these applications, Applicant's counsel sought to file supplementary material consisting of email correspondence dated February 16, 2023 to April 4, 2023 between counsel for the parties on an issue of privilege relating to the transcript of Chief and Council's September 28, 2022 in-camera meeting [Transcript]. The Transcript was listed in the CTR in Federal Court file T-2153-22 with a note indicating that it was to be included in a supplementary record. It was never submitted. The Applicant points to various instances where the Respondent's materials repeatedly reference the Transcript, namely the affidavit of Chief Jackson and several paragraphs of the Respondent's memorandum. The Applicant submits that the Court should either not consider those references or draw an adverse inference from the non-production of the Transcript.

[43] The Respondent's counsel previously refused to disclose the Transcript due to deliberative and solicitor-client privileges. In correspondence before the hearing, Respondent's counsel opposed the Applicant's informal request on several additional grounds. It is not necessary to delve into these submissions.

[44] On the second day of the hearing, counsel for the Respondent advised the Court that there was in fact no Transcript. Counsel advised Applicant's counsel after the first day of the hearing. They apologized for not discovering this.

[45] Suffice to say, this issue has been resolved. In any event, the Respondent's references to the Transcript have not impacted the Court's determination of the matters. The Applicant submitted that this issue may be relevant to an award of costs.

VI. Issues and Standard of Review

[46] After considering the parties' submissions, the issues are best characterized as:

1. Did Chief and Council have the authority under the Policy to remove the Applicant from his position as Councillor?
2. Was the Removal Decision procedurally fair?
3. Was the Removal Decision reasonable?
4. Is the application challenging the Election premature?
5. If no, is the Election void?
6. What are the appropriate remedies?

[47] The Applicant submits that the standard of review for jurisdictional questions and substantive errors is that of reasonableness, emphasizing that the latter must be framed by the context and impact of the Removal Decision (*Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 30 [*Whalen*]; *Canada (Minister of Citizenship and Immigration v Vavilov)*, 2019 SCC 65 at paras 16-17, 89, 109, 133 [*Vavilov*]). The Applicant further submits that procedural fairness issues are subject to a correctness review, and a breach of procedural fairness "voids the entire proceeding" (*Girouard v Canada (Attorney General)*, 2020 FCA 129 at para 38; *Clarke v Canada (Citizenship and Immigration)*, 2018 FC 267 at paras 8, 15; *Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9-10).

[48] The Respondent submits that the standard of review for the merits of the Removal Decision is reasonableness. The Respondent emphasizes that deference ought to be afforded to the Removal Decision and the Respondent's choice of procedure (Policy, s 3.9; *Lower Nicola Indian Band v Joe*, 2011 FC 1220 at para 28; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 10, 21-23, 28 [*Pastion*]). The Respondent further submits that issues of procedural fairness must be determined with regard to all of the circumstances, consistent with the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*] (*Vavilov* at paras 23, 77). Lastly, the Respondent submits that no standard of review applies to whether an adequate alternative remedy was available to the Applicant.

[49] Issues #1 and #3 attract a reasonableness standard of review (*Vavilov* at paras 16-17; *Whalen* at para 30; *Blois v Onion Lake Cree Nation*, 2020 FC 953 at paras 20-22 [*Blois*]; *Beeswax v Chippewas of the Thames First Nation*, 2023 FC 767 at para 14). A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 13, 15, 99). A decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). The onus is on the Applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100).

[50] Issue #2 attracts a standard of review akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CP Railway*]; *Mission*

Institution v Khela, 2014 SCC 24 at para 79). On a correctness review, no deference is owed to the decision-maker (*Blois* at para 26, citing *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31; *Connolly v Canada (National Revenue)*, 2019 FCA 161 at para 57). Rather, when evaluating whether there has been a breach of procedural fairness, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54; *Vavilov* at para 77; *Baker* at paras 21-28).

[51] The remaining issues do not attract a standard of review, as they call for this Court to act as the original decision-maker.

VII. Analysis

[52] The determinative issue in both matters is the parties' disregard for the *Rules*. The LNIB membership approved the *Rules* and it is the governing law. This finding affects the validity of the Removal Decision and the Applicant's challenge to the Election. I will briefly highlight the parties' submissions on the other issues.

A. *Did Chief and Council have the jurisdiction under the Policy to remove the Applicant from his position as Councillor?*

(1) Applicant's Position

[53] The Policy does not provide the necessary jurisdiction for Chief and Council to remove a Council Member or prevent them from running for Office. Rather, the comprehensive process is set out in sections 35 to 44 of the *Rules*, a quasi-constitutional document approved by two thirds

of LNIB's membership. The Chief and Council did not follow this process. Instead, they followed the Policy, an ordinary document passed by Council and that LNIB's membership did not approve.

[54] The Policy constitutes an unsanctioned amendment to the *Rules*, the latter of which already occupies the field. The Policy cannot trump a supreme law (*Whalen* at paras 2, 42, 48-49). As such, the removal process under the Policy is of no force of law (*Hall v Kwikwetlem First Nation*, 2020 FC 994 at para 59 [*Hall*]).

(2) Respondent's Position

[55] Sections 35 to 44 of the *Rules* provides for the impeachment of Councillors. The remedy under section 35 of the *Rules* is inflexible, unsuitable, and unduly harsh for many of the disciplinary situations addressed by Chief and Council. Conversely, the Policy was enacted to "provide a transparent and comprehensive Policy to Chief and Council" with progressive steps. It addresses all aspects of Chief and Council governance, including disciplinary provisions (Policy, ss 3.9, 4.11, 4.12).

[56] Two statutory provisions that deal with the same subject matter will both apply unless they conflict or one was meant to be exhaustive (Ruth Sullivan, *Statutory Interpretation*, 3d ed (Toronto: Irwin Law, 2016) at 317-31). Neither situation applies in the present matter. First, the *Rules* and the Policy do not conflict, as the discipline of a Council Member can occur under either the *Rules* or the Policy. Second, the *Rules* are not meant to be exhaustive. The discipline provisions are not sufficiently complete and comprehensive to stand alone, as they do not cover

all aspects of discipline. Rather, as noted above, they can only be applied in more serious cases of misconduct. This Court has utilized the Policy to justify the removal of Councillors, further demonstrating that the *Rules* are not exhaustive (*Basil v Moses*, 2009 FC 741 at paras 65, 131-32 [*Basil*]; *Lower Nicola Indian Band v York*, 2013 FCA 26 at para 5 [*York*]).

[57] Contrary to the Applicant's assertion, the *Rules* do not supersede other LNIB laws. Further, *Whalen* does not stand for the proposition that a law passed by the membership supersedes other duly enacted laws. Rather, the Court found that an unwritten custom or inherent power could not supersede the band's written laws (at paras 1-2, 42).

[58] Alternatively, if this Court finds that the *Rules* and the Policy conflict, the Respondent's interpretation and application of the Policy should prevail. LNIB Chief and Council, are best placed to understand the purpose and logic of the Policy and the *Rules* (*Pastion* at paras 45-46). As the governing body, they are responsible for creating and approving all laws, bylaws, regulations, rules, and codes. They also apply the Policy on a daily basis. For these reasons, the Respondent's use of the Policy's disciplinary provisions was reasonable.

(3) Conclusion

[59] The Policy does not provide the necessary jurisdiction for the Chief and Council to remove the Applicant from his position as Councillor and prohibit him from running as a candidate in the Election. The *Rules*, a foundational law approved by the LNIB membership, is the only law that contains a process for the removal of Chief and Council.

[60] The hierarchy of law dictates that "[l]aws made by the membership are analogous to constitutions – they are the supreme law of the First Nation in question, and they must be paramount to the laws and decisions made by the council" (*Whalen* at para 48, emphasis added; *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998] SCJ No 61 at paras 72-74). While I agree with the Respondent that *Whalen* arose in the context of an unwritten custom or inherent power, I nevertheless am of the view that this principle remains relevant to the present matter.

[61] The *Custom Election Rules* were first enacted in 1994. The amended *Rules* in effect at the time of the Removal Decision arose from a series of meetings held by Chief and Council among LNIB membership from January to March 2013. Certain amendments concerned the impeachment provisions in the *Rules*. Specifically, the amendments expanded the circumstances in which a Council Member may be removed from office and created a more comprehensive removal process, including the appointment of an arbitrator with experience in First Nations issues to adjudicate the matter. The *Rules* were ratified by a two-thirds majority vote of eligible electors on June 6, 2013. Notably, the *Custom Election Rules* in effect immediately prior to this amendment provided that a Council Member may be immediately removed from office by the passing of a BCR to that effect [*1998 Rules*].

[62] The Chief and Council Policy was first implemented in 1997. The Policy in effect at the time of the Removal Decision sets out good governance practices for Chief and Council, including disciplinary provisions. Notably, the same disciplinary provisions have been included in the Chief and Council Policy since 2012. The BCR passing the Policy provides that the Policy "shall be deemed to be in compliance with all applicable Band laws and policies. Compliance

with this Policy by all members of Chief and Council shall be required to the letter and this compliance is also to include and encompass the spirit of any additional applicable laws, policies, guidelines or other declarations."

[63] I appreciate the Respondent's oral submissions that the *Rules*, the Policy, the *FAL*, and other matters provide a framework for the good governance of the LNIB. I also note that the impeachment provisions of the *Rules* refer to violations of the *Rules*, the Policy, including the Oath of Office, and the Conflict of Interest Policy (s 35). On its face, it is possible for the *Rules* and the Policy to co-exist in terms of the circumstances that may be considered a breach of a Council Member's responsibilities. However, the *Rules* and the Policy diverge in the process for removal.

[64] As set out above, the *Rules* were amended in 2013 by a significant percentage of the LNIB electorate allowing for a comprehensive removal process. Unlike the *Rules*, the removal process set out in the Policy has no force of law because it has not been ratified by the community (*Hall* at para 59); rather, it was approved solely by Chief and Council. As such, the Policy could not form the basis of the Removal Decision. Absent the impeachment process set out in the *Rules*, as discussed in paragraph 11 above, the Applicant could not have been removed from his position as Councillor and precluded from running in the Election.

[65] As a final point, this Court has previously held that the impeachment provisions within the *1998 Rules* are thorough, well established, and cover the field adequately (*Basil* at para 65).

This case arose in the context of an alternative customary authority and was decided prior to the *Rules* at issue here, which provide for an even more thorough impeachment process.

[66] *Basil* and *York* do not support the Respondent's position. In *York*, the Federal Court of Appeal considered the impeachment provisions as set out in the *1998 Rules* (at para 4). *Basil* can be distinguished factually. In that case, there was no removal or impeachment process being considered directly as in the present situation, but whether certain resignations could be accepted in light of a policy. Rather, an Elders Investigation Committee [EIC] first impeached the former Chief and all but one former Councillor for breaching their fiduciary duties, contrary LNIB bylaws and policies. Justice Tremblay-Lamer found that the EIC did not have jurisdiction to impeach past and current Chief and Council members but that the EIC, based on evidence of custom, had a role in investigating wrongdoing by Chief and Council (at paras 69-74). In addition, the circumstances indicate that Chief and Council may not have been able to convene meetings due to the nature of the allegations and deemed resignation provisions of the applicable Oath of Office. Accordingly, pursuant to the Chief and Council Policy in effect from January 29, 1997 to December 21, 2010, and in light of the unique circumstances, the Chief was granted the power to accept the resignations (at paras 131-32).

[67] To summarize, in the case at hand, Chief and Council did not have the jurisdiction to remove the Applicant unilaterally pursuant to the Policy. Rather, they ought to have followed the impeachment process as set out in the *Rules*, the quasi-constitutional governance document approved by LNIB's membership.

B. *Was the Removal Decision procedurally fair?*

[68] The Applicant's submissions centered around four issues. First, a reasonable apprehension of bias arose from Chief Jackson's vote in the Removal Decision. Second, the September 28, 2022 meeting was pre-determined because the draft BCR circulated prior to the meeting was adopted verbatim. Third, the Applicant's rights to know the case against him and to make a full answer of defence, were plainly violated. Lastly, Chief and Council acted contrary to the Applicant's legitimate expectation that they would conduct an in-person oral hearing (*Baker* at para 26).

[69] The Respondent submits the Applicant received procedural fairness throughout. Chief Jackson was not acting in a conflict of interest and attempting to silence a political rival. Rather, the Removal Decision was the culmination of a 28-month long decision-making process that coincided with the Election. Second, Chief and Council did not predetermine the matter by including the draft BCR in the September 28, 2022 meeting package. Chief and Council considered all of the available information in rendering the Removal Decision, including the Applicant's oral submissions, the Final Report, and counsel's advice. Lastly, the Applicant was provided numerous meaningful opportunities to be heard, all of which he refused.

[70] In my view, and as stated above, the issue of jurisdiction is determinative. The submissions of both parties focus on whether the Applicant's rights to procedural fairness were breached by the "process" adopted by the Chief and Council, consisting of correspondence, an investigation, and a hearing before the Chief and Council. The *Rules* contain the only process for a Council Member's removal.

[71] I will add that decision-makers should be extra vigilant to avoid the perception of bias or conflicts of interests. This is particularly so when those decision-making bodies, whether it be Chief and Council or some other body recognized by quasi-constitutional laws such as an election law, are exercising powers that the electorate has bestowed on them.

C. *Was the Removal Decision reasonable?*

[72] As with the issue of procedural fairness outlined in paragraphs 70-71 of these reasons, there is no need to assess whether the Removal Decision was reasonable.

D. *Is the application challenging the Election premature?*

(1) Applicant's Position

[73] The Applicant acknowledges that he did not avail himself of the Appeal Procedure under sections 26 to 31 of the *Rules*. However, exceptional circumstances exist that warrant the Court's discretion to hear the judicial review (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, [1995] SCJ No 1 at para 37 [*Matsqui*]). The Appeal Procedure does not constitute an adequate alternative remedy because it is effectively impossible to trigger. Alternatively, it ought to be interpreted in the same manner as full privative clause (*Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 102).

[74] The Appeal Procedure was amended in 2013, to increase the requirements for LNIB members to petition for an election appeal. The intention of this amendment was to avoid frivolous election challenges. Presently, to appeal an election, the *Rules* require that an elector

submit the signature of 30% of all electors, or approximately 340 signatures, to the electoral officer with a $1,500 non-refundable fee within 15 days of the election. The electoral officer then instructs an arbitrator to adjudicate the appeal, and the arbitrator's decision would be final and binding on all parties (*Rules*, ss 27, 29).

[75] While the goal of minimizing frivolous election appeals is important, the Appeal Procedure is completely inaccessible and impossible to trigger. It effectively immunizes elections from any appeal, no matter how meritorious, thereby precluding an important aspect of democracy. To illustrate, an elector would need to obtain the required number of signatures without having access to any electors' contact information. Electors are located over a wide geographic area, with the majority residing off reserve. Further, the required number of signatures is nearly double the number of votes that elected the current Chief, and just shy of the total number of the votes cast in the Election. This high threshold must be satisfied just to have the elector's submissions considered.

[76] For these reasons, the Appeal Procedure does not constitute an adequate alternative remedy and, this Court's authority is not affected or ousted (*Brass v Key Band First Nation*, 2007 FC 581 at paras 17-19, 22-24 [*Brass*]). The *Rules* also do not purport to oust the Court's jurisdiction, as they limit the circumstances in which an internal appeal may be commenced. In other words, the *Rules* do not preclude an elector with a serious challenge from seeking recourse through the Federal Court. This Court should therefore exercise its discretion to hear the judicial review and determine the validity of the Election as an arbitrator would have. This preserves the

legislative intent of the *Rules*, while simultaneously vindicating the Applicant's constitutional guarantee of a judicial review.

[77] During the hearing, and in response to the Respondent's submissions, the Applicant added that any delay in having this judicial review heard was due to delays on the part of the Respondent.

(2) Respondent's Position

[78] It is trite law that judicial review remedies are discretionary and that a party may seek judicial review only after all adequate remedial recourses in the administrative process have been exhausted (*Strickland v Canada (Attorney General)*, 2015 SCC 37 at paras 37-38, 40, 42 [*Strickland*]). This does not necessitate a finding that the alternative recourse is better than the Court (*Matsqui* at para 56). These principles have been applied in the context of First Nations elections challenges (*Horseman v Horse Lake First Nation*, 2014 FC 758 at para 6 [*Horseman FC*], aff'd 2015 FCA 122 [*Horseman FCA*]; *Orr v Boucher*, 2011 FC 1035 at paras 58-60 [*Orr*], aff'd 2012 FCA 115; *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at paras 40-42 [*Potts*]).

[79] Here, the Applicant ought to have availed himself of the alternative process set out in the *Rules*. The *Rules*, adopted by LNIB and its members, provide for an expedient and cost efficient process to address adequately alleged violations in the course of a LNIB election, including the issues advanced in these proceedings. The Election was held on October 22, 2022. Had the Applicant brought an election appeal, the arbitrator's decision would have been released by January 2023 and resolved long before the Court decides this matter (*Orr* at para 66). Instead, the

Applicant commenced two judicial review applications. By the time they are heard and decided, Chief and Council will be well into their mandate. Directing a new election for Chief would significantly disrupt LNIB governance (*Ominayak v Lubicon Lake Indian Nation Election (Returning Officer)*, 2003 FCT 596 at para 55).

[80] Further, there are no exceptional circumstances in the present matter (*CB Powell Ltd v Canada (Border Services Agency)*, 2010 FCA 61 at para 33). The threshold for bringing an appeal under the *Rules* is not stringent. The *Rules* only require "that there had been a corrupt election practice or a violation of these Rules" and not the additional requirement that an error "might have affected the outcome of the election" as some other First Nations require (*Rules*, s 26; *Lewis v Gitxaala Nation*, 2015 FC 204 at para 6). Further, signature and fee requirements were implemented to avoid frivolous challenges to elections as well as to protect the electoral process and the Nation's stability.

[81] There is no evidence that the Applicant made any efforts to bring an election appeal through the *Rules*, so the Court cannot accept the Applicant's assertion that the appeal mechanism was unavailable to him (*Horseman FCA* at para 19). He did not attempt to contact any LNIB elector, secure the LNIB member email list, or take any other steps to obtain the required number of signatures. Rather, the Applicant attempted to challenge his removal from the ballot by bringing an unsuccessful interlocutory injunction before this Court.

(3) Conclusion

[82] The application challenging the Election is premature. The Applicant has not made any efforts to exhaust the Appeal Procedure set out in the *Rules*. It bears remembering that the *Rules*

were approved by the LNIB membership and reflect the broad consensus of the community. The Applicant submitted during the hearing for this matter that the fact that there has been no election appeals since the 2013 amendments should not be taken to mean that the Appeal Procedure is fair and reasonable. However, in my view, there needs to be an attempt to, at the very least, engage that process. It may be that it is too cumbersome, but the LNIB membership would be the body to change that in accordance with the amending provisions within the *Rules*. The Court's intervention at this stage would ignore its limited supervisory role in adjudicating election disputes (*Potts* at paras 38, 41).

[83] Judicial review is discretionary in nature (*Strickland* at paras 37-38, 40). As set out by the Federal Court of Appeal in *Peters First Nation Band Council v Peters*, 2019 FCA 197:

> [37] As a general rule, absent exceptional circumstances, a Court should refuse to hear a judicial review application unless all the administrative appeal processes have been exhausted (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paras. 30-33). In *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 101, this Court held, "[judicial review] is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought".
>
> [Emphasis added.]

[84] In order to determine the adequacy of an alternative remedy, the Court must consider several relevant factors (*Strickland* at para 42):

1. the convenience of the alternative remedy;

2. the nature of the error alleged;

3. the nature of the other forum which could deal with the issue, including its remedial capacity;

4. the existence of adequate and effective recourse in the forum in which litigation is already taking place;

5. expeditiousness;

6. the relative expertise of the alternative decision-maker;

7. economical use of judicial resources; and

8. costs.

[85] These factors are non-exhaustive and may be of varying relevance depending on the particular case (*Strickland* at para 43). In each case, the reviewing Court must ask whether the alternative remedy is adequate in all the circumstances (at para 42). Within these circumstances, "[i]f an alternative process rooted in Indigenous self-governance is available to adequately resolve the dispute, it would be inappropriate for this Court to intervene" (*Potts* at para 41).

[86] Here, the Applicant had recourse to the Appeal Procedure set out in the *Rules*. As acknowledged by both parties, the amendments to the *Rules* were made to protect the election process and the First Nation's stability. In my view, this Appeal Procedure is far more appropriate, expeditious, and cost-effective than applying for judicial review before this Court.

[87] Pursuant to section 26 of the *Rules*, any elector may appeal the Election results within 15 calendar days of the Election, on the grounds that, there was a violation of the *Rules*. The appeal must set out the grounds and evidence on which it is based. The elector also must submit the

signature of 30% of electors to the electoral officer with a $1,500 non-refundable filing fee. Once the deadline passes, the electoral officer must then immediately provide for the appointment of an arbitrator "with experience in First Nations issues to adjudicate the appeal" (*Rules*, s 27). The arbitrator must convene a hearing within 30 days of their appointment, unless the parties agree upon a later date, and render a decision 21 days thereafter (*Rules*, ss 28-29). As such, the Appeal Procedure would conclude within approximately two months of the Election, long before this matter has been decided. The unnecessary time, expense, and use of valuable judicial resources could have been avoided (*Orr* at para 66; *Horseman FC* at para 6).

[88] There is no evidence before this Court that the Applicant made any effort to at least engage, let alone exhaust, the Appeal Procedure before bringing the application for judicial review in T-2421-22. He took no steps in attempting to obtain the requisite number of signatures in order to appeal the Election (*Horseman FCA* at para 19) Accordingly, I do not accept the Applicant's assertion that the appeal mechanism under the Rules is effectively inaccessible or impossible to trigger.

[89] I also do not accept the Applicant's submission that notwithstanding the existence of the Appeal Procedure in the *Rules*, the *Rules* do not preclude an application being made to this Court. Rather, the importance of paying deference to Indigenous decision-makers and Indigenous laws has been recognized by this Court (*Pastion* at paras 20-28). Deference requires permitting such decision-making process to run its course. That has not occurred in the present matter.

[90] As a final note, *Brass* does not assist the Respondent, as it is distinguishable from this matter. *Brass* involved a challenge to a referendum approving a land claim settlement with the Federal Government (at paras 1, 4). The applicants did not invoke the remedy under section 22 of the *Indian Referendum Regulations*, CRC 1978, c 957, which provided a request for a review of a referendum to the Minister of Indian and Northern Development [Minister] within seven days (*Brass* at paras 19-20). Justice Phelan found that "given the importance of this referendum, the nature of the allegations and admitted errors, the procedural limitations such as shortness of time and the various and conflicting interests of the Minister, it is not so adequate an alternative remedy that it ought to displace the right to judicial review" (at para 25). The same circumstances do not apply here. Indeed, Justice Phelan himself acknowledged that "[t]he decisions on this issue turn significantly on their particular facts" (at para 26).

[91] For these reasons, the Court declines to entertain the Applicant's application for judicial review in T-2421-22 and determine the validity of the Election as an arbitrator would have (Potts at para 42).

E. *If no, is the Election void?*

[92] In light of my conclusion regarding the previous issue, I find it unnecessary to consider this issue.

F. *What are the appropriate remedies?*

(1) Applicant's Position

[93] The Removal Decision ought to be quashed. Further, there is no point in referring the matter back to Chief and Council (*Hall* at para 68; *Vavilov* at para 142). Chief and Council did not have any relevant evidence to rely on in making the Removal Decision, and it would fail to correct the *ultra vires* nature of the Removal Decision. The only reasonable outcome is to find that the Applicant has not breached the Policy, Oath of Office, or the *FAL*; this his removal from Office was unjustified; and that the proceeding were a nullity and may not be re-instated.

(2) Respondent's Position

[94] The Court should refuse to grant the relief requested by the Applicant. The remedies found in the *Federal Courts Act*, RSC 1985, c F-7 are discretionary, including the traditional prerogative writs (*Uniboard Surfaces Inc v Kronotex Fussboden GmbH and Co KG*, 2006 FCA 398 at paras 24, 48). Further, any errors in the investigation or the Removal Decision were not material and did not prejudice the Applicant. Rather, they were caused by the Applicant's attempts to frustrate the process.

[95] Should the Court determine that some form of relief is required, the matter should be remitted back for redetermination (*Cowessess First Nation No 73 v Pelletier*, 2017 FC 692 at paras 74-75, 80).

(3) Conclusion

[96] It is appropriate to quash the Removal Decision in light of Chief and Council's lack of jurisdiction to remove the Applicant under the Policy. While I acknowledge that the Applicant is

no longer an officeholder, I would also remit the matter back for redetermination by the Council, should they decide to proceed, in accordance with the impeachment process set out in the *Rules* and these reasons (*Redhead v Miles*, 2019 FC 1605 at paras 63-64). Unlike *Hall*, this would not be a matter of form over substance due to issues with the Nation's governance structure (at paras 68-69). Instead, it would allow for the process as adopted by LNIB membership to unfold. Should the newly elected Council commence a petition for the Applicant's impeachment by way of valid BCR, an arbitrator will be appointed to hear the matter afresh. It is hopeful the Applicant actively participates in this process.

G. *Costs*

[97] As neither party provided extensive submissions on costs, I directed the parties at the conclusion of the hearing to provide the Court with written submissions on costs not exceeding 10 pages.

(1) Applicant

[98] The Applicant seeks costs on a lump sum basis in the amount of $80,000; an amount determined by the Court; or costs pursuant to Tariff B of the *Federal Court Rules*, SOR/98-106 [*Federal Court Rules*]. If the Applicant is unsuccessful, the Applicant nevertheless should be awarded costs in the amount of $20,000; an amount payable to the Applicant to be determined by the Court; or, alternatively, each party should bear their own costs.

[99] Where the application of the tariff is inadequate, the Court may award lump sum costs in accordance with Rule 400(4). The discretion to award costs may be exercised according to various factors including the factors set out in Rule 400(3). Awarding costs to a successful party is a long-standing practice of the Courts (*Whalen v Fort McMurray No 468 First Nation, 2019 FC 1119* at para 2) (*Whalen II*). An award of costs encourages the rational use of scarce judicial resources and can facilitate access to justice (*Whalen II* at paras 3-5).

[100] This matter is analogous to the situation in *Whalen II*, which also dealt with a removal of a councillor. In *Whalen II*, the Court awarded elevated lump-sum costs bearing in mind the applicant sought to prevent the First Nation from acting contrary to its own laws; the applicant was entirely successful; there was a power imbalance between the applicant and the First Nation; the uncontested evidence was that the First Nation had the means to pay the elevated costs award; and the Court's judgment served to clarify the First Nation's electoral rules and the rules of other similarly worded laws (at para 32). In addition, the additional costs for the Applicant in this case involve the issues surrounding the purportedly privileged Transcript, which did not actually exist.

[101] Even if the Applicant is unsuccessful, he still should be awarded costs on an elevated lump sum basis since the issue of the interpretation of the *Rules* was in the interests of the LNIB's membership (*Coutlee v Lower Nicola First Nation*, 2015 FC 1305 at paras 23-24).

(2) Respondent

[102] If the Respondent is successful in both applications, in referring to the same principles outlined by the Applicant, it seeks costs in the amount of $10,862.80, in accordance with Tariff B of the *Federal Court Rules*; or that each party bears their own costs. If the Applicant is successful on both applications, each party should bear their own costs.

[103] In referring to the factors set out in Rule 400(3), the Respondent submits that no costs should be awarded to the Applicant because the applications are without merit, unnecessary or premature; the Respondent expended important resources in dealing with the Applicant's conduct and there were no novel issues nor was the public interest engaged; the Respondent had to respond to two applications and an interlocutory injunction; the interlocutory injunction was initiated without seeking leave and there was not undue costs arising from the inadvertent error concerning the Transcript; and the Applicant chose to bypass the Appeal Procedure in the *Rules*.

[104] If the Applicant is unsuccessful, he should not be awarded costs. There is no reason for the Court to depart from the principle that costs are awarded to the successful party and there were no novel issues that will benefit the LNIB as a whole. The Federal Court of Appeal has already recognized the Policy as a governing document (*York* at para 5). In any event, if the Court disagrees, any award of costs to the Applicant should be limited to the range of $2,500 to $5,000.

[105] If the Respondent is unsuccessful, the parties should bear their own costs. There is no reason to depart from Column III of Tariff B of the *Federal Court Rules*. In deciding the award-

increased costs, the Court must take into account all relevant factors set out in Rule 400(3) including whether there is a power imbalance or if the application clarified aspects of LNIB's governance. Only the power imbalance weighs in the Applicant's favour but that that alone is insufficient for an increased costs award (*Whalen II* at para 27). The Applicant's own conduct contributed to the circumstances of the matter, which necessitates a lower cost amount (*Duckworth v Caldwell First Nation*, 2021 FC 648 at para 46).

(3) Conclusion

[106] I am exercising my discretion to award costs to the Applicant in the amount of $9,744 pursuant to Tariff B of the *Federal Court Rules* for the following reasons. First, the Applicant was not entirely successful on both applications. As set out above, the Applicant did not attempt to utilize the appeal mechanism set forth in the *Rules*. This factor weighs in favour of both the Applicant and the Respondent. Second, in my view the matter was not particularly complicated or novel. While the Removal Decision is unreasonable for lack of jurisdiction, the matter did require some clarification for the LNIB concerning this Court's comments in *Basil*. This factor favours the Applicant. Third, while I agree with the parties that there was a resource imbalance, the Applicant did complicate some aspects of the applications by moving for an interlocutory injunction, which the Court denied summarily. In my view, this factor favours the Respondent.

[107] Overall, I am satisfied that the Applicant is entitled to costs but on the lower end of Tariff B considering the factors set out above.

VIII. Conclusion

[108] For the above reasons, I would allow the application for judicial review in T-2153-22. The Policy did not empower the Chief and Council to remove the Applicant from his position as Councillor.

[109] However, I would dismiss the application for judicial review in T-2421-22. The Applicant had an adequate alternative remedy that he did not pursue.

[110] The Applicant is awarded costs in the all-inclusive sum of $9,744, payable forthwith.

JUDGMENT in T-2421-22 and T-2153-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review in T-2153-22 is allowed.
2. The application for judicial review in T-2421-22 is dismissed.
3. Costs are granted to the Applicant in the all-inclusive sum of $9,744 payable forthwith.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2421-22 AND T-2153-22
STYLE OF CAUSE:	SPENCE COUTLEE v LOWER NICOLA INDIAN BAND CHIEF AND COUNCIL AND LOWER NICOLA INDIAN BAND ELECTORAL OFFICER
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 28-29, 2023
JUDGMENT AND REASONS:	FAVEL J.
DATED:	JANUARY 11, 2024

APPEARANCES:

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