Date: 20111025

Docket: T-2128-10

Citation: 2011 FC 1220

BETWEEN:

LOWER NICOLA INDIAN BAND

Applicant

and

CHARLENE JOE, MARCY GARCIA, DAVID CLAYTON, STUART JACKSON, ROBERT STERLING JR. and MARY JUNE COUTLEE

Respondents

and

COUNCIL OF ELDERS OF THE LOWER NICOLA INDIAN BAND

Intervener

Docket: T-2127-10

AND BETWEEN:

MARY JUNE COUTLEE

Applicant

and

COUNCIL OF ELDERS OF THE LOWER NICOLA INDIAN BAND and THE LOWER NICOLA INDIAN BAND

Respondents

REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision and order dated December 1, 2010, of an *ad hoc* Lower Nicola Indian Band Elders Council (the EAC) deciding two election appeals and finding three Councillors, Mary June Coutlee, Stuart Jackson and Robert Sterling Jr., to have been ineligible to run in a Lower Nicola Indian Band (LNIB) election held October 2, 2010 under the *Lower Nicola Indian Band Custom Election Rules* (CER). The EAC declared three unsuccessful Councillors, Charlene Joe, Marcy Garcia and David Clayton to have been retroactively elected to October 2, 2010 (the decision).

[2] There were two applications for judicial review filed in connection with this matter. The application for judicial review in Court file T-2128-10 was filed by the applicant, LNIB and the application for judicial review in Court file T-2127-10 was filed by the applicant, Mary June Coutlee, a respondent in Court file T-2128-10. Prothonotary Lafrenière ordered as follows:

> The applications for judicial review in Court file Nos. T-2127-10 and T-2128-10 shall continue as a consolidated proceeding under Court file No. T-2128-10 (consolidated proceeding).

[3] The applicant requests:

1. an order for *certiorari* quashing the decision, in particular, quashing paragraphs 2, 5 to 10 and 12 to 19;

2. an order declaring that the EAC has no jurisdiction or power under articles 25 to 30 of the CER, or at all, to override articles 12 and 22 of the CER and to declare any position on the LNIB Council vacant retroactively;

3. an order declaring that the EAC has no jurisdiction or power under articles 25 to 30 of the CER, or at all, to override article 24 of the CER and to fill any vacancy on the Lower Nicola Indian Band Council, whether or not created following a successful election appeal;

4. an order declaring that the jurisdiction and power of the EAC under articles 25 to 30 of the CER is limited to deciding whether the grounds actually alleged in the appeal(s) submitted to the electoral officer under article 25 of the CER are “corrupt election practices” or violations of the CER; and, that matters or persons not named in the appeal(s) submitted to the electoral officer under article 25 of the CER do not fall within the jurisdiction of the EAC for investigation or decision or comment and recommendations; and

5. costs.

[4] The respondent, Mary June Coutlee, requests:

1. a declaration that the EAC was invalidly constituted, in that one or more of its members failed to satisfy the requirement that he or she was “not in a conflict of interest”, as required by article 27 of the LNIB’s CER, and for that reason the EAC’s order and decision are of no effect;

2. in the alternative, an order that items 2 and 5 to 14 of the EAC’s order, be set aside in their entirety; and

3. costs in this proceeding, on a solicitor client basis.

[5] The respondents, Charlene Joe and David Clayton request:

1. that the EAC decision should stand;

2. or, alternatively, that the decision be remitted to the same EAC;

3. or, further alternatively, if remitted to a differently constituted EAC, the LNIB Chief should assume all power to perform necessary functions of the Band until the Councillors' eligibility is decided; and

4. their costs on a full indemnity basis against the individual(s) operating under the name of the LNIB and pursuing this litigation.

Background

[6] The LNIB is a Band that is exempt from section 74 of the *Indian Act*, RS 1985, c I-5 (*Indian Act*) as its CER trump the application of the *Indian Act* in regards to elections held.

[7] The LNIB has approximately 800 eligible voters. Elections for the LNIB Council are made pursuant to the CER. The Council is made up of the Chief and seven Councillors.

[8] The LNIB has previously been before this Court in legal proceedings. In 2008, an Elders' Investigative Committee (the EIC) was appointed by the former LNIB Chief Donald Moses to investigate the 2004 to 2007 Chief and Council. The EIC's 2009 decision to impeach Councillors Clyde Sam, Mary June Coutlee and Stuart Jackson and declare them ineligible for future election was the subject of the judicial review heard by Madam Justice Daniele Tremblay-Lamer in *Basil v Lower Nicola Indian Band*, 2009 FC 741, 96 Admin LR (4th) 17. Madam Justice Tremblay-Lamer allowed the judicial review in part finding that the EIC had an advisory and investigatory function but did not have an adjudicative function and that the impeachment of the Councillors was invalid.

Madam Justice Tremblay-Lamer recommended at paragraph 148 that the LNIB hold a referendum on the remaining issues. Such a referendum was not held.

[9] On October 2, 2010, the LNIB held an election for Chief and Council (the election). Following the election, the LNIB electoral officer (the electoral officer) declared Dick York elected as Chief of the LNIB. The electoral officer also declared Harold Joe, Mary June Coutlee, Lucinda Seward, Joanne Lafferty, Stuart Jackson, Robert Sterling Jr. and Molly Toodlican elected as Councillors of the LNIB.

[10] The unsuccessful candidates in the election were Charlene Joe, Marcy Garcia, Arthur Dick, David Clayton, Clyde Sam, Norma Hall, Robin Coutlee, Austin Sterling and Joshua Dick.

[11] Under article 25 of the CER, the unsuccessful candidate and respondent, Charlene Joe, submitted an election appeal petition on October 17, 2010. This petition was signed by Charlene Joe, Charlotte Joe, Gene Moses, John Isaac and Robert (Butch) Sahara (the Joe appeal). The Joe appeal alleged:

1. that Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam had violated article 34(b) of the CER by breaching fiduciary duty while serving on the 2004 to 2007 Council as found by the EIC in February 2009 and were, therefore, ineligible to have their names on the ballot;

2. that Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam had violated article 3(d) of the CER by failing to disclose to the electoral officer that they were indebted to the LNIB at the time of nomination and during the election; and

3. that the electoral officer erred in allowing the names of Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam to be on the ballot for the election.

[12] A second election appeal petition was submitted on October 18, 2010 by another LNIB member, Leesa Mike (the Mike appeal). The Mike appeal alleged that:

1. David Clayton and Victor York mailed their election pamphlets free of charge by NAIK News, an LNIB-owned company;

2. five unnamed candidates published an ad in the Meritt Herald using the LNIB logo;

3. a large sign for Victor York was set up near the poll on voting day;

4. former Chief Don Moses provided work for LNIB members "to build up his candidate's campaign platform";

4. former Chief Don Moses, Councillor Harold Joe, and former Councillor Connie Joe agreed on September 30, 2010 to pay out a former employee more than advised by the LNIB lawyer;

5. former Chief Don Moses and Victor York co-wrote a letter making false allegations against unsuccessful candidate for Chief, Aaron Sam and against Molly Toodlican;

6. former Chief Don Moses, Councillor Harold Joe and former Councillor Connie Joe attempted to secure votes for unnamed candidates by promoting a per capita distribution of $1,900 to all LNIB members; and

7. text messages were allegedly sent to LNIB members offering to pay $100 to each LNIB member if they voted for Victor York.

[13] The electoral officer convened a meeting of the Elders of the LNIB on November 1, 2010 to select at least five Elders to act as an *ad hoc* EAC to investigate the Joe and Mike appeals pursuant to article 26 of the CER. Eight Elders were selected through a draw. These were Joe Starrs, Len Stirling, John Isaac, Charlotte Joe, Robert (Butch) Sahara, Vonnet Hall, Donna Sterling and Gene Moses. Elders Gene Moses, Vonnet Hall and Donna Sterling resigned during early discussions.

[14] The EAC released its decision on the Mike and Joe appeals on December 1, 2010.

[15] This judicial review is of the procedural fairness of that investigation and decision, as several parties claim perceived and actual bias on the part of the EAC. The parties also raise issues concerning the jurisdiction of the EAC.

The EAC's Decision

[16] The EAC rejected the Mike appeal finding that it lacked sufficient evidence to substantiate the allegations.

[17] Concerning the Joe appeal, the EAC found that:

1. Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam violated article 34(b) of the CER, having been found by the Federal Court to have breached their *Oath of Office* and to have misused Band funds and breached LNIB laws and policies in 2004 to 2007;

2. Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam violated article 3(d) of the CER by failing to declare their debt to the LNIB;

3. the electoral officer erred in allowing the names of Stuart Jackson, Mary June Coutlee, Robert Sterling Jr., Arthur Dick and Clyde Sam onto the ballot and that those candidates should have acknowledged they owed LNIB money;

4. the elections of Stuart Jackson, Mary June Coutlee and Robert Sterling Jr. were "null and void" as of October 2, 2010 for dishonesty in signing their nomination declarations for the electoral officer and for practicing a corrupt election practice – being dishonest about their debts to the LNIB and for accepting their nominations to run in the election knowing of the financial findings of the EIC; and

5. the three unsuccessful Councillors with the next highest number of votes, namely, Charlene Joe, David Clayton and Marcy Garcia, were declared elected as Councillors of LNIB effective October 2, 2010.

[18] The EAC also made findings with respect to other successful Councillors – these findings were not addressed in the election appeal petitions.

[19] On February 8, 2011, Mr. Justice Simon Noël granted an interim order staying the operation of the decision made by the EAC until the hearing and determination of this application for judicial review (*Lower Nicola Indian Band v Joe*, 2011 FC 147, [2011] FCJ No 168). The order read:

> **THIS COURT ORDERS that**:
>
> 1. Matters such as day-to-day administration, the provision of essential services, ordinary payable accounts, management of administrative staff, urgent acts to safeguard the rights of the membership, subscribing of insurance, and like matters, shall be

decided upon by the Council, as elected on October 2, 2010 and in accordance with the *Lower Nicola Indian Band – Chief and Council Policy and Guidelines*;

2. The three (3) named "Councillors" shall receive advance notice of every Council meeting and be allowed to be present and free of harassment or persecution in their presence at Council meetings. They shall have a limited right of participation in these matters, but may not cast a vote in the matters noted above in paragraph 33 and like matters;

3. Important matters that address the LNIB membership's long-term interests are to be decided by a Special Council constituted of the Council elected on October 2, 2010, as well as the three (3) "Councillors" named by the EAC;

4. The matters that were determined by Council between October 2, 2010 and the present date are to be redetermined accordingly with the present Order;

5. The Respondents Charlene Joe and David Clayton be served through their e-mail addresses, as they appear on a letter from Mr. Rolf, dated February 2, 2011;

6. The present Reasons for Order and Order are to be publicized widely, in any manner deemed appropriate;

7. The proceeding shall continue as a specially managed proceeding;

8. The following schedule shall apply:

(a) The Application for Judicial Review is to be heard in Vancouver, British Columbia, on March 22 and March 23, 2011, on an expedited basis;

(b) The evidence filed in the motion for the interim stay and injunction shall be evidence applicable to the application for judicial review;

(c) The Applicant shall perfect its Rule 306 record by serving any further affidavits or documentary exhibits by Friday, February 11, 2011;

(d) The Intervener shall serve any affidavits or documentary exhibits in explanation of the Council of Elders' record by Wednesday, February 16, 2011;

(e) The Respondents shall each perfect their Rule 307 records by serving any further affidavits or documentary exhibits by Friday, February 18, 2011;

(f) Without further order of the Court, there shall be no cross-examinations on affidavits;

(g) The Applicant shall serve and file its Rule 309 record by Tuesday, February 22, 2011;

(h) The Respondent Coutlee shall serve and file her Rule 310 record by Wednesday, March 2, 2011, which record shall contain the written representations and any affidavits or documentary exhibits relied upon that are not already contained in the Applicant's record;

(i) The Respondents Clayton and Joe shall serve and file their Rule 310 records by Wednesday, March 9, 2011;

(j) The Intervener may serve and file an Intervener's record by Wednesday, March 16, 2011, which record shall contain its written representations in accordance with this Court's Order granting intervener status and any affidavits or documentary exhibits that it relies upon not already contained in the Applicant's or Respondents' records;

9. This Order may be amended by a judge of this Court or the person selected by the Chief Justice to case manage this proceeding; and

10. Costs to follow.

Paragraph 44 of the reasons for order and order states that costs shall be resolved with the underlying application for judicial review.

Issues

[20] The issues are as follows:

1. Is the LNIB an appropriate party before this Court?

2. What is the appropriate standard of review?

3. Did the EAC exhibit a reasonable apprehension of bias in making its order and decision?

4. What is the jurisdiction of a Council of Elders formed pursuant to article 27 of the CER?

5. Remedies.

Analysis and Decision

[21] **Issue 1**

Is the LNIB an appropriate party before this Court?

The respondents, David Clayton and Charlene Joe, submit that the LNIB is not a proper party to bring this application. These respondents submit that it is unclear whether a Chief and Council vote that took place on December 14, 2010 authorizes the LNIB to seek a judicial review. Further, they submit that even if it does, the injunctive order by Mr. Justice Simon Noël on February 8, 2011, created a Special Council of the LNIB to re-determine all LNIB Council decisions that were made after October 2, 2010 on important matters affecting the long-term interest of the LNIB. According to these respondents, since the Special Council did not re-determine the decision to seek a judicial review, the LNIB is not authorized to proceed in the current judicial review.

[22] First, the minutes of the LNIB Chief and Council meeting of December 14, 2010 appear to authorize the LNIB to seek legal action on the EAC decision. Motion #9 of the minutes reads:

> To retain David Rolf of the Parlee Law Firm: #1. To review the EAC decision and to advise on the validity of their decision, #2. To advise on remedies available to LNIB, #3. To bring any court action as may be necessary #4. To provide a written legal opinion on a point by point basis on the EAC decision.

The minutes further indicate that this motion was moved by Councillor Joanne Lafferty, seconded by Councillor Molly Toodlican and that the motion was carried.

[23] I see this as sufficient indication of the authorization of the LNIB Chief and Council to seek judicial review if so advised by Parlee Law Firm.

[24] Concerning the respondents' second point, they are correct in noting that on February 2, 2011, Mr. Justice Noël ordered that:

> 3. Important matters that address the LNIB membership's long-term interests are to be decided by a Special Council constituted of the Council elected on October 2, 2010, as well as the three (3) "Councillors" named by the Elders Council; …

However, the order also states in paragraph 8 that:

> The Application for Judicial Review is to be heard in Vancouver, British Columbia, on March 22 and March 23, 2011, on an expedited basis;

[25] Given this, it cannot be the case that Mr. Justice Noël intended to include the Chief and Council's decision to seek judicial review in the decisions to be re-determined by the Special Council.

[26] The respondents, David Clayton and Charlene Joe, submitted case law to support their position that the applicant had no standing to initiate this judicial review proceeding because in effect, the applicant was filing a judicial review of its own decision as the EAC was, for all practical purposes, the applicant. I have reviewed the decisions in *Bacheli v Alberta Securities Commision*, 2007 ABCA 166, [2007] AJ No 520 and *Watson v Catney*, 2007 ONCA 411, [2007] OJ No 231 (Ont CA), but I am not satisfied that these decisions assist the respondents. In both of these decisions, the Courts found that the applicants had in fact sought judicial review of what was in reality their own decisions. That is not the situation in the present case. The decision to elect the original Councillors was the decision of the members of the Band who voted for the original Councillors, not the decision of the applicant, LNIB.

[27] As such, I am going to proceed with the current style of cause and LNIB as a party.

[28] **Issue 2**

What is the appropriate standard of review?

As noted by Mr. Justice Noël in the injunctive order preceding this judicial review, the Court should tread cautiously when intervening in the political affairs of First Nations (see *Sweetgrass First Nation v Gollan*, 2006 FC 778, [2006] FCJ No 969).

[29] However, the LNIB Chief and Council or members of the LNIB have come before this Court on several occasions, asking for judicial intervention in relation to the political affairs and elections of the LNIB.

[30] In the case currently before the Court, several parties raise concerns about bias. Any existence of a reasonable apprehension of bias would result in a breach of natural justice or procedural fairness. No deference is required in evaluating procedural fairness of the EAC's decision and it will be reviewed on the standard of correctness (see *Canada (Attorney General) v Fetherston*, 2005 FCA 111, 332 NR 113 at paragraph 16).

[31] If the EAC was lawfully authorized in accordance with the CER, then as held by Madam Justice Tremblay-Lamer in *Basil* above, it would be interpreting LNIB law and making complex findings of mixed fact and law. This type of decision is reviewable on the reasonableness standard (see *Basil* at paragraphs 37 and 38):

> 37. …[F]indings of that investigation are questions of mixed fact and law reviewable on a standard of reasonableness; whether an investigation into Band Councillors is within the jurisdiction of the Band, however, is reviewed on a standard of correctness (*Martselos v. Salt River First Nation 195*, [2008] F.C.J. No. 1053, 2008 FCA 221 (F.C.A.); *Prince v. Sucker Creek First Nation No. 150A*, [2008] F.C.J. No. 1613, 2008 FC 1268 (F.C.)).
>
> 38. The EIC had to interpret LNIB law to determine the standards councillors should be held to, and make complicated factual findings based on LNIB records. As such, the questions on this application are of mixed fact and law and are reviewable on a reasonableness standard. …

[32] **Issue 3**

Did the EAC exhibit a reasonable apprehension of bias in making its order and decision?

The applicant and the respondent, Mary Jane Coutlee, submit that there was a reasonable apprehension of bias and actual bias in the investigation and decision by the EAC.

[33] The applicant submits that a number of family relationships between persons on the EAC and the unsuccessful Councillors created a conflict of interest. EAC Elder Charlotte Joe is the mother of unsuccessful Councillor and respondent, Charlene Joe. She is also the sister of the former Chief Don Moses whose activities during the election were challenged in the Mike appeal.

[34] In addition, the applicant submits that several members of the EAC were also in a conflict of interest by having signed the Joe appeal. EAC Elders, Charlotte Joe, Gene Moses, Robert (Butch) Sahara and John Isaac signed the Joe appeal which became the grounds for the formation of, and investigation by, the EAC.

[35] Further, the applicant takes issue with the fact that Len Stirling of the EAC had previously sat on the EIC and signed its February 2009 final report attempting to impeach respondents, Mary June Coutlee, Stuart Jackson and Robert Sterling from their position on the LNIB Council from 2007 to 2010.

[36] The applicant also submits that Sharon McIvor, the lawyer for the EAC, was also the lawyer for the EIC which created a conflict of interest.

[37] Finally, the applicant and respondent, Mary June Coutlee, submits that there is evidence of actual bias by Elder Charlotte Joe. At an EAC meeting on November 2, 2010, Charlotte Joe stated, “Look at our petition [the Joe appeal] it is so tidy and strong; and look at theirs – it is so petty and it is all about nothing”.

[38] The respondents, David Clayton and Charlene Joe, submit that the applicant’s submissions on bias are time-barred by subsection 18.1(2) of the *Federal Courts Act*, RS 1985, c F-7, or alternatively, that the test for reasonable apprehension of bias must take into account the circumstances in which the EAC operates. For example: there are approximately 800 eligible LNIB voters; the Elders must be over aged 60; and few Elders attended the meeting forming the EAC.

[39] The respondents, David Clayton and Charlene Joe, also submit that the fact that an Elder signed an election appeal petition does not demonstrate a reasonable apprehension of bias, as the petitions address matters that concern the LNIB as a whole.

[40] Further, these respondents submit that whether an Elder sat on the EIC does not give rise to a reasonable apprehension of bias. Given the size of the community and significant role of Elders in the community, it would be unreasonable to expect Elders not to have some past experience dealing with the difficult issues facing the LNIB. The respondents also contend that the allegations of bias for using the same lawyer on the EIC and EAC are irrelevant.

[41] Finally, the respondents, David Clayton and Charlene Joe, submit that there is no bias that Charlotte Joe sat on the EAC determining the Joe appeal submitted by Charlene Joe.

[42] First, the applicant's submissions are not time-barred. The EAC issued its decision on December 1, 2010. The applicant filed an application for judicial review on December 22, 2010. This puts the application well within the 30 day time limit under subsection 18.1(2) of the *Federal Courts Act*.

[43] The real concern is whether there was a reasonable apprehension of bias. The test for a reasonable apprehension of bias set out by the Supreme Court in *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at page 394 is:

> …[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [That] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...." Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

[44] This test was affirmed by the Supreme Court in *R v S (RD)*, [1997] 3 SCR 484 at paragraph 111:

> …This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case.

[45] This test will not necessarily be applied rigorously to the LNIB. The LNIB is a Band of approximately 800 electors. This, inevitably, will create difficulty in convening Council of Elders where familial and business relationships are not present.

[46] In *Sparvier v Cowessess Indian Band #73* (1993), [1994] 1 CNLR 182 (FCTD), the petitioner seeking judicial review of an election appeal tribunal alleged that the tribunal was biased because one of the members maintained a business relationship with the applicant who appeared before it. Mr. Justice Marshall Rothstein addressed this, noting that the test for bias could not be strictly applied to a small Band of 408 participating electors. Mr. Justice Rothstein stated at pages 198 to 199:

> ... it does not appear to me to be realistic to expect members of the Appeal Tribunal, if they are residents of the reservation, to be completely without social, family or business contacts with a candidate in an election. …
>
> If a rigorous test for reasonable apprehension of bias were applied, the membership of decision-making bodies such as the Appeal Tribunal, in Bands of small populations, would constantly be challenged on grounds of bias stemming from a connection that a member of the decision-making body had with one or another of the potential candidates. Such a rigorous application of principles relating to the apprehension of bias could potentially lead to situations where the election process would be frustrated under the weight of these assertions. Such procedural frustration could, as stated by counsel for the respondents, be a danger to the process of autonomous elections of band governments.

[47] In applying the test for reasonable apprehension of bias, this Court must be mindful of the LNIB context. This is particularly true in considering the importance and role of Elders in the LNIB community. I agree with the respondents, David Clayton and Charlene Joe, that it would be unreasonable to expect Elders not to have some past experience addressing the issues of the LNIB by sitting on previous Councils of Elders.

[48] However, the importance of maintaining a Council of Elders free from an apprehension of bias still remains. Moreover, article 27 of the CER explicitly states that Elders on a Council of Elders, such as the EAC, must not be in a conflict of interest.

[49] In the decision under review, the fact that the EAC Elder Charlotte Joe is the mother of the unsuccessful Councillor who filed the appeal petition, Charlene Joe, is enough alone to create a reasonable apprehension of bias on behalf of the EAC. The effect of the EAC decision was the removal of three Councillors who were replaced by those Councillors with the next highest number of votes. This included unsuccessful Councillor Charlene Joe. The respondents' argument that Charlene Joe's actions were not impugned in either election appeal is irrelevant. The result of the EAC decision benefited Charlene Joe and the relationship between the Elder Charlotte Joe and Charlene Joe created a reasonable apprehension of bias towards that decision.

[50] This problem is augmented by the fact that several other Elders on the EAC also signed the Joe appeal. By signing the Joe appeal, these Elders indicated their support of the allegations contained within which I find would create a reasonable apprehension of bias that they "whether consciously or unconsciously, would not decide fairly" (see *Committee for Justice and Liberty*, above at page 394). Charlotte Joe herself also took ownership of the Joe appeal stating at an EAC meeting on November 2, 2010, "Look at our petition [the Joe appeal] it is so tidy and strong; and look at theirs – it is so petty and it is all about nothing".

[51] Evidently, these compounding factors have created a reasonable apprehension of bias such that procedural fairness was breached in the investigation and in the decision of the EAC, and this decision can therefore not be allowed to stand.

[52] As a result, the application for judicial review must be allowed and the December 1, 2010 order of the EAC is set aside and in particular, paragraphs 2, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 of the order. The matter with respect to the Joe appeal is referred back for determination by a new Council of Elders. Costs will be determined. The issue of costs will be determined in accordance with my judgment of September 23, 2011.

[53] The respondent, Mary June Coutlee, takes issue with the fact that the EAC findings were not approved through secret ballot. I do not need to address this issue given the analysis on bias above and the need to remit the EAC decision on that ground.

[54] Because of my findings on Issue 3, I do not propose to deal with the remaining issues raised in the application.

"John A. O'Keefe"
Judge

October 25, 2011
Ottawa, Ontario

ANNEX

Relevant Statutory Provisions

Lower Nicola Indian Band Custom Election Rules

12: Elections will be held every three years on the first Saturday in October. The incumbent Chief and Council remain in office until a new Chief and Council is declared by the Electoral Officer pursuant to these Rules.

Following this declaration, all Chief and Council shall resign their position regardless of the remaining terms of their office.

24: Should a position for Chief or Councillor become vacant one year or more before the next scheduled Election, there shall be a by-election held within 90 days of the vacancy to fill that position for the balance of that term. In every other respect the by-election shall be conducted in accordance with these Rules.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2128-10
STYLE OF CAUSE:	LOWER NICOLA INDIAN BAND - and – COUNCIL OF ELDERS OF THE LOWER NICOLA BAND ET AL
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 22 and 23, 2011
REASONS FOR JUDGMENT OF:	O'KEEFE J.
DATED:	October 25, 2011

APPEARANCES:

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Jana McLean	FOR THE RESPONDENTS

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