Date: 20090722

Docket: T-394-09

Citation: 2009 FC 741

Ottawa, Ontario, July 22, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

**COUNCILLOR YVONNE BASIL, COUNCILLOR MARY JUNE COUTLEE,
COUNCILLOR STUART JACKSON,
FORMER COUNCILLOR SHANNON KILROY,
FORMER COUNCILLOR LORNE SAHARA,
COUNCILLOR AARON SAM, and COUNCILLOR CLYDE SAM**

Applicants

and

**CHIEF DONALD CYRIL MOSES,
THE ELDERS' INVESTIGATIVE COMMITTEE
PURPORTEDLY OF THE LOWER NICOLA INDIAN BAND, and
THE COUNCIL OF THE LOWER NICOLA INDIAN BAND**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for the judicial review of the following decisions, brought pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*), as amended on April 15, 2009:

T-394-09

(1) A decision by Chief Donald Cyril Moses (Chief Moses) that after November 28, 2008, Lower Nicola Indian Band (LNIB) administration would pay the expenses of the Elders Investigation Committee (EIC), believed to be about $60,000, out of LNIB funds, without the expense being approved by Lower Nicola Indian Band Council (the Council); and

(2) A decision by Chief Moses dated February 27, 2009 whereby Chief Moses determined Councillors Mary June Coutlee, Stuart Jackson, and Clyde Sam were impeached, accepted resignations from each, and expressed an intention to call a by-election as a result.

T-601-09

(1) A LNIB Band Council Resolution dated March 16, 2009 addressing the holding of a by-election to fill three vacancies on Council given the February 27, 2009 EIC report impeaching Councillors Sam, Coutlee, and Jackson, all three sitting on Council at the time of the EIC report;

(2) A LNIB Band Council Resolution dated March 16, 2009 stripping impeached Councillors Sam, Coutlee, and Jackson, all three sitting on Council at the time of the EIC report, of their honoraria and other privileges; and

(3) A LNIB Band Council Resolution dated March 16, 2009 authorizing the of spending $10,000 in legal fees to the law firm of Blake, Cassels & Graydon LLP of Vancouver to, among other things, enforce the EIC's February 27, 2009 decision to impeach Councillors Sam, Coutlee, and Jackson, all three sitting on Council at the time of the EIC report.

T-602-09

(1) A decision of the EIC dated February 27, 2009 to impeach Councillors Sam, Coutlee, and Jackson, and others, to declare them ineligible for future election, and to direct that a by-election be held.

[2] Previously, on March 10, 2009, the Applicants filed a motion for an interim injunction seeking their reinstatement as Councillors until a final determination could be made. The result of this motion was a consent order entered into by all parties, whereby the impeached Councillors were reinstated and allowed to function as Councillors, subject to a number of provisions, including, *inter alia*, that the Applicants not use their position as LNIB Councillors to interfere with the EIC process or the matters before the Court.

[3] Federal Court files T-394-09, T-601-09, and T-602-09 are separate Federal Court matters; however, by consent order dated May 6, 2009, my colleague Justice Eleanor Dawson, the case management judge in this matter, ordered that the three files be heard over the same period. The files have not been consolidated into one matter; however, given the interrelated

nature of the facts pertaining to the three files, Justice Dawson, by direction dated June 1, 2009, allowed for each party to submit one motion record covering all three files.

BACKGROUND FACTS

[4] The LNIB is made of about 1,050 members, and is governed by a chief and seven elected Councillors, with elections taking place every three years.

[5] From October 2004 to October 2007, the chief was Chief Arthur Dick, and the Councillors were Mary June Coutlee, Stuart Jackson, Harold Joe, Shannon Kilroy, Lorne Sahara, Clyde Sam, and Robert Sterling.

[6] From October 2007 to October 2010, following a January 2008 by-election, the Chief is Chief Moses (who has held the position of Chief or Councillor for about 24 of the last 35 years), and the Councillors are Yvonne Basil, Mary June Coutlee, Stuart Jackson, Connie Joe, Harold Joe, Aaron Sam, and Clyde Sam. No challenge was made to the four re-elections of Mary June Coutlee, Stuart Jackson, Harold Joe, and Clyde Sam.

[7] The LNIB is a custom or non-section 74 band, meaning s. 74 of the *Indian Act*, R.S., 1985, c. I-5 (*Indian Act*) does not apply, and it uses its own Custom Election Rules to select its Chief and Council.

[8] During the September 2007 election campaign, on September 24, 2007, the LNIB held a general band meeting at which the LNIB's financial statements for the fiscal year ending March 31, 2007 were presented to the community. At the meeting, LNIB's auditor raised monetary concerns, to the effect that the then Chief and several Councillors had received during the term, from LNIB, payments in excess of their honoraria. The auditor, according to the minutes of the meeting, described this "other remuneration for the Chief and Council" in excess of honoraria as "this could be a wage or money that has been earned by means of a contract."

[9] Councillors receive honoraria of about $15,600 annually. Councillors are, pursuant to the Custom Election Rules, prohibited from serving concurrently as employees of the LNIB and are, pursuant to the Lower Nicola Indian Band Chief and Council Policy and Guidelines (LNIB Chief and Council Policy and Guidelines), barred from entering into professional service contracts with the LNIB of over two months or over $5,000, unless the LNIB membership approves the contract at a band general meeting.

[10] At the meeting, it was asked whether there is information supporting the amounts received by the Chief and Council, to which the auditor, as reported in the minutes, replied there is, and it "can be found in the accounting department because every time a cheque is made to a person then a record is made of payments received and from which department is paying for that service."

[11] The minutes of the September 24, 2007 meeting state that "it is pointed out that the new Council should look at and to [*sic*] decide on what they are going to do about this breach of the election by laws." The orator of this statement is unknown. Chief Moses on cross-examination stated he did not recall who said this, and specifically could not recall whether he had said this. Those present at the meeting and therefore the possible orators were Chief Moses and four elders, Madeline Lanaro, Maggie Shuter, Gloria Moses, and George Coutlee. There were no motions made or passed at this meeting concerning the breach of election by-laws.

[12] Subsequent to this meeting, Chief Moses initiated a process for reviewing the receipt of funds by Chief Arthur Dick and the seven Councillors serving the October 2004 to October 2007 term in question.

[13] Chief Moses formed the EIC by extending an invitation to all elders, meaning community members aged 60 and over, to participate in the EIC, after which time the elders themselves selected EIC members. Elders are recognized under the Custom Election Rules as those who hear and determine appeals from band elections. Elders also play an important role in the customary governance structure of the LNIB by providing counsel and advice to Chiefs and Councillors.

[14] Eighteen of the 115 elders invited responded, and of those, five were selected to form the EIC. Chief Moses provided the EIC with a mandate and Terms of Reference at the EIC's first meeting.

[15] Four of the five elders selected were present at the September 24, 2007 meeting at which the LNIB's auditor raised the monetary concerns.

[16] Chief Moses did not place a motion to form and fund the EIC before the Council or general LNIB membership. Councillor Basil believes the cost of the EIC to be $60,000.

[17] Chief Moses determined that the Council was unable to consider the matter of forming and funding the EIC due to conflicts of interest, given of the seven Councillors sitting during the October 2007 to October 2010 term, four Councillors had served on the previous term's Council, and one, although new to Council, was the son of a Councillor from the previous term. Two Councillors would not have had any conflicts of interest.

[18] Chief Moses found unilateral authority to form and fund the EIC on the basis of first, the September 24, 2007 minutes stating "[…] the new Council should look at and decide on what they are going to do about this breach of the election by laws," and second, the authority granted via the LNIB Chief and Council Policy and Guidelines at s. 23(e) for good band governance, which sets out the authority to "make decisions when required on behalf of Council when such decisions are necessary for good government." Chief Moses indicated he has a responsibility for good band governance, collectively the Chief and Councillors have a duty to honour and respect the Oath of Office, and members of the previous Council are alleged to have violated their Oath of Office, which requires action.

[19] The Oath of Office sworn by the 2004 to 2007 Council included the following:

> 3. We will not allow our business or personal affairs to influence our decision-making and we will always consider the best interests of the Community;
>
> 4. We will uphold the laws of the Band as approved by the Band Council and as learned from general meetings and at large from Band Members, Elders and Youth;
>
> 5. We will strive to preserve and enhance our culture and heritage and strive to maintain a proper place for our Band Members in society;
>
> 6. We will resign from our elected position whenever we have been found to be in contravention of the Band's election rules and Chief and Council Policy & Procedures or of this oath of office.

[20] Council, not accepting the unilateral acts of Chief Moses, passed Motion #5 on October 14, 2008, indicating its non-acceptance of the EIC in the following terms: "that the 'investigation' stop as of October 14, 2008, and that no further expenditures be made on this exercise until it's discussed at a special meeting of council, or at the next band general meeting October 27, 2008." The EIC has not been discussed at a special Council meeting or at a general LNIB meeting, save for Motion #5.

[21] By memorandum dated October 30, 2008, Chief Moses advised Council that he considered the October 14, 2008 motion to be invalid, since two Councillors who voted for it were in his opinion in a conflict of interest, given the investigation the motion purported to halt directly implicated them as members of the previous Council. He further stated that this matter would be decided on using the authority he held as Chief to make decisions related to the good government of the LNIB, since four sitting Councillors were in a direct conflict as they were being investigated, and one was in a personal conflict as the son of a Councillor being investigated. He advised Council that he intended to proceed with the investigation.

[22] At a Council meeting on November 4, 2008, the Applicant Councillors purported to pass a motion terminating the authority of Chief Moses under s. 23(e) of the LNIB Chief and Council Policy and Guidelines, so as to terminate the EIC investigation. Chief Moses responded that the November 4, 2008 motion was invalid since the Councillors passing it were in a conflict of interest since they were the subjects of the investigation they were trying to quash.

[23] On November 10, 2008, five Councillors authored a letter indicating their refusal to recognize the EIC.

[24] On December 9, 2008, Chief Moses began an action for judicial review in the Supreme Court of British Columbia seeking to, among other things, have his decision to have the EIC investigated be declared *intra vires* his authority as Chief. The action was adjourned for jurisdictional reasons. Chief Moses sued in his name, and in the name of the LNIB, although no

motion to allow the action was put before Council. The Order made with respect to costs stated "in the event that proceedings are initiated in the Federal Court of Canada concerning the matters referred to in the Petition herein, then to the greatest extent possible this Court refers to the Federal Court of Canada the issue of costs in this proceeding."

[25] The EIC proceeded with its investigation, issuing its report on February 27, 2009. The Councillors were invited to appear before the EIC after it reached its preliminary conclusions, however only one chose to do so.

[26] The Terms of Reference created by Chief Moses indicated the following: the EIC panel of ten members was to do a neutral evaluation and fact finding, in order to make recommendations to the Chief and Council; civil or criminal proceedings could follow the EIC review process; and the EIC "may" present its findings to the LNIB generally and without identifying anyone found to be in breach.

[27] On February 23, 2009, the EIC sent its preliminary findings to Chief Moses informing him that the EIC had found each investigated Councillor to be in breach of fiduciary duties. The report was not finalized at that time since the EIC had invited the Councillors to make submissions before it for a period of 10 days, until February 25, 2009.

[28] The same day, Chief Moses issued letters to Councillors Jackman, Coutlee, and Sam, indicating each was suspended from their duties as Councillors of the LNIB "for breach of [their]

fiduciary duty to the Band and its membership in the taking of over $1,000,000 in band funds during [their] term of office, 2004-2007," "until the release of the Final Report and Decisions of the [EIC]." The same day Chief Moses issued a press release in the name of the LNIB indicating that all members of the prior Council had been found to have breached their fiduciary duties by illegally taking over $1 million in LNIB funds.

[29] On February 24, 2009, Chief Moses wrote to the RCMP indicating that the LNIB intended to lay criminal charges for criminal breach of trust against the former Chief and Councillors. He also wrote that the staff and he were "concerned that an attempt will be made by [Councillors Jackman, Coutlee, and Sam] to take over and occupy the administration of the [LNIB]" and "should they be successful in gaining control of the office, I fear they will use that opportunity to wrongfully access the [LNIB's] tax reserve held in our accounts." The same day he had the locks on the LNIB office changed and by the next day security guards were posted at the LNIB office, thereby preventing the entrance by LNIB employees and others.

[30] The EIC published its final report February 27, 2009. Chief Moses and several members of the EIC attended a press conference discussing the report, and the report was published on the LNIB's website.

[31] The EIC report states that the EIC is making both recommendations and imposing penalties. The EIC impeached the former Chief and all but one former Councillor with respect to the 2004 to 2007 term.

[32] The EIC report concluded that each of the eight Councillors of the prior Council had breached their fiduciary duties to the LNIB, and that various Councillors had failed to observe LNIB by-laws, policies, procedures, aided and abetted other Councillors in converting LNIB funds for their own uses, and failed to make financial choices in the interest of the LNIB membership, among other findings.

[33] The EIC's main complaint about the Councillors concerns the supply of services by Councillors to the LNIB, either as employees or contractors, and Councillors receiving payment for these services. The EIC cites non-compliance with certain procedural requirements of LNIB's by-laws and policies to justify finding a breach of fiduciary duty. The EIC held that the findings against each Councillor save for Councillor Joe warranted impeachment, and that the impeached Councillors must not in the future be allowed to run for political office, or serve as directors of any LNIB companies.

[34] Councillor Jackson was found to have taken employment as a school principal and then as an aboriginal rights and title officer, both in contravention of the Custom Election Rules. Councillor Sterling was found to have taken employment as LNIB's aboriginal rights and title co-ordinator, in contravention of the Custom Election Rules. Chief Dick was found to have received compensation for haying services contrary to the Custom Election Rules and the LNIB Chief and Council Policy and Guidelines. Councillor Clyde received "other remuneration" related to contracts that his Council colleagues awarded to him for heavy equipment work.

Councillors Kilroy, Joe, and Sahara received payment over their honoraria for reasons the EIC could not determine.

[35] On March 10, 2009, Chief Moses issued a letter to LNIB Councillors Sam, Basil, Connie Joe, and Harold Joe stating that he had cancelled Council meetings for a period of two weeks, and that decisions would be made by memorandum.

[36] Subsequently, three Band Council Resolutions (BCRs) were prepared and passed by Chief Moses and one Councillor, his niece, on March 16, 2009, addressing the holding of a by-election, accepting and implementing EIC's conclusions thereby stripping impeached Councillors of their honoraria and other privileges, and the authorization of spending $10,000 in legal fees to enforce the EIC's decision.

ISSUES

1. Did the EIC have the jurisdiction to impeach past and present members of the LNIB Council?
2. Were the Applicants afforded natural justice and procedural fairness in the EIC process?
3. Were the EIC's findings reasonable?
4. Were the three Band Council Resolutions validly passed?
5. Were the Councillors' resignations validly accepted?
6. Is the Applicants' challenge to the funding of the EIC time-barred?

STANDARD OF REVIEW

[37] Once it is determined that an investigation into Band Councillors is lawfully authorized, the findings 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 Nation #195*, [2008] F.C.J. No. 1053, 2008 FCA 221 (F.C.A.); *Prince v. Sucker Creek First Nation #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. Breaches of procedural fairness, however, must be reviewed on a standard of correctness (*Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404 (F.C.A.).

[39] When reviewing on a standard of reasonableness, the Court must consider, per paragraph 47 of *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.), "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ANALYSIS

1. Did the EIC have the jurisdiction to impeach past and present members of the LNIB Council?

[40] The LNIB's provisions on impeachment are set out in s. 34 and s. 35 of the Custom Election Rules, which state the following:

> 34. Should a Member of Council
>
> (a) be convicted of an indictable offence, except those of a political nature relating to the exercise or defense of aboriginal rights or title or be convicted of any sexual or assault offence while in office, or
>
> (b) should a legal proceeding recognized by the Council find that a member of Council has misused any Band funds or resources or has breached his fiduciary responsibilities, or
>
> (c) fail to fulfill his responsibilities as a member of Council for a period of more than 30 days after having received written notice to that effect from Council, then that member of Council may be immediately removed from office by the passing of a Band Council Resolution to that effect and a by-election shall be called immediately thereafter pursuant to Section 24 above.
>
> 35. For the purposes of Section 34(b) above, the responsibilities of a member of Council shall include but not be limited to:
> (a) the swearing of an oath of office and the signing of an agreement that he will work for the best interests of the Band as a whole and will enforce and protect the aboriginal rights and title of all Band members and
>
> (b) conducting or attending Council Meetings and special or General Band Meetings and
>
> (c) maintaining a presence on reserves of the Band and making himself available to address Band members' needs and interests.

[41] The Applicants argue that the above precursors to impeachment have not been satisfied, and any arguments supporting impeachment based in traditional authority must fail.

[42] The Applicants point out that Chief Moses on cross-examination does not say impeachment occurred pursuant to s. 34, and did not claim unilateral authority, as a Chief, to impeach. He rather stated that the EIC did the impeaching, and that the EIC has the authority to impeach independent of s. 34.

[43] The EIC report states impeachment is by reason of violations noted "contrary to the CER [Custom Election Rules], Article 34," which combined with Chief Moses' statements lead the Applicants to conclude that impeachment is based on a hybrid of s. 34 and unwritten traditional or customary authority. The Applicants submit there is even a conflict in the evidence as to what the traditional authority is, as the Applicants and Chief Moses agree Elders play the traditional role of giving advice and counsel, but the Respondents' Affidavits show the Elders' inherent right to meet out justice, with no concrete details on traditional justice.

[44] The Respondents submit that the EIC constitutes a "legal proceeding recognized by Council" as contemplated by s. 34 of the Custom Election Rules. As such, it was open to Chief Moses to rely on the EIC's findings when impeaching the Councillors.

[45] The term “legal proceeding” is not defined in the Custom Election Rules but there is nothing in the rules that disqualifies a committee made up of Elders from being considered a “legal proceeding.”

[46] The Respondents point to Part I of the Custom Election Rules, which recognizes that an *ad hoc* committee of Elders may play a formal investigative and decision-making role. Sections 26 to 30 mandate the appointment of a Council of Elders to investigate, adjudicate and issue binding decisions in respect of electoral appeals. These sections contemplate a committee that is to be funded by LNIB funds to independently resolve election disputes. The Respondents see this as a codification of the Elders’ traditional and customary role within the LNIB, and rely on the EIC’s submissions on this point.

[47] For the Respondents, the Elders’ important role as legal moderators within the community, and the codification in the Custom Election Rules of the role of Elders indicates that a council of Elders, acting as independent investigators, may be reasonably regarded as constituting a “legal proceeding” for the purposes of considering the impeachment of Councillors.

[48] Further, the EIC submits it has inherent jurisdiction, based on the customs of the LNIB, to have conducted the investigation, imposed penalties, and made the recommendations in its report. This jurisdiction comes from the ancient customs of the Lower Nicola people as part of the Nlaka’pamaz Nation and the role of the Elders in the community. If the EIC does not have

the inherent jurisdiction to impeach Councillors, the EIC submits it does have the jurisdiction to investigate alleged Councillor misconduct, and to make recommendations to the LNIB Council or Chief regarding that conduct.

[49] While the Custom Election Rules contain provisions for the "impeachment" of Councillors, these provisions do not "cover the field" for such impeachment. There remains, particularly within the scope of this case, a role for Elders to play in the customary governance of the LNIB. Specifically, the EIC submits that:

a) The Custom Elections Rules were not intended to, nor did they, oust the customary supervisory role of Elders in respect of Lower Nicola governance; and

b) In the alternative, insofar as the Custom Election Rules cover certain parts of the field regarding the impeachment of Councillors, they do not contemplate the present unique situation where five to eight sitting Councillors are subject to investigation and sanction or are otherwise in a conflict of interest. In this unique situation, the Custom Election Rules create a "gap" which is to be filled by other customs of the Band.

[50] The EIC highlights the active and important role Elders play in the governance of Nlaka'pamax communities. The customary role of Elders is said to be recognized in the Custom Election Rules, wherein an appeal of an election result is to be referred to a "Council of Elders." The Council of Elders is selected by "luck of the draw" from all LNIB members over the age of 60, and has the authority to make binding decisions on an election appeal. The Electoral Office must implement the decision of the Council of Elders.

[51] The EIC notes that the Custom Election Rules do not exhaustively set out the customs of the LNIB with regard to their governance, as noted in the Affidavit of Victor York, but there are explicit provisions that accept the Elders as a review body whose decisions can have a binding effect.

[52] It is not in dispute that it is a LNIB custom that Elders have a role in providing advice to elected members of the LNIB. The evidence establishes that Elders hold a customary adjudicative role in Nlaka'pamax communities based on:

a) the *xiλixstm*, which is an ancient custom of the Lower Nicola people;

b) the Custom Election Rules which expressly recognize the Elders as a customary legal body that makes binding decisions on election appeals; and

c) the Affidavit evidence of Joe, G. Sam, Shutter, York, and Toodlican.

[53] In the present case, the Custom Election Rules do not cover all matters relating to the impeachment of Councillors, and the Elders' customary authority to impose penalties on members of Council remains part of the customs of the LNIB and continues to apply.

[54] According to the EIC, there is a gap in the Custom Election Rules because they provide that a member of Council can be impeached in certain circumstances by the passing of a BCR. However, the Custom Election Rules do not contemplate the circumstance where, as here, Council is unable to pass a BCR because a quorum of Council cannot be convened in order to deal with the matter. The EIC submits this gap may be resolved by allowing for a reduced

quorum of Council, by exercise of the Chief's good governance authority under the LNIB Chief and Council Policy and Guidelines, or by applying LNIB customs that are not codified in the Custom Election Rules.

[55] In the alternative, if the Court finds that the Elders did not have the inherent authority to impeach Councillors, the EIC argues that the Elders do at least have the authority to investigate matters and make recommendations to Council or to the Chief regarding the conduct of Councillors. The Custom Election Rules recognize that the Elders' deliberation constitutes a legal proceeding within the customary law of the LNIB. The EIC's findings are thus a legal proceeding within the custom of the LNIB.

[56] The Respondents' arguments supporting the jurisdiction to impeach based on the EIC qualifying as a legal proceeding for the purposes of s. 34 of the Custom Election Rules must fail for the following reasons.

[57] First, it is important to note that the EIC Terms of Reference themselves indicate the EIC could not have envisaged itself as a legal proceeding. Term of Reference 4 states the following:

> 4. The panel will be expected to exercise their discretion in making recommendations regarding civil, criminal, or other legal proceedings which they feel should be undertaken to address any of the alleged breaches of LNIB laws, Policies and Guidelines, and oaths of office.

The reference to "other legal proceedings," on a plain reading and in the context of the sentence in which it appears, only makes sense if it is based on the assumption that the EIC is not a legal

proceeding itself. It would be illogical for the EIC to act as a legal proceeding, yet at the same time use its discretion to make recommendations for other legal proceedings.

[58] Second, the Respondents rely heavily on ss. 25 to 30 of the Custom Election Rules as codifying the Elders' traditional adjudicative role and customary ability to impeach. True, ss. 25 to 30 do codify a Council of Elders, however only in the very specific context of appeals of election results, and even more specifically, where there has been "a corrupt election practice or a violation of these Rules […]" (s. 25). I fail to see how the codification of a Council of Elders charged with adjudicating appeals of election results, not the situation before us, can be taken to mean a Council of Elders, acting as independent investigators, may be reasonably regarded as constituting a "legal proceeding" for the purposes of considering the impeachment of Councillors. Impeachment and elections appeals are two distinct scenarios, and there may well be reasons for specifically implicating a Council of Elders in one and not the other.

[59] I therefore find that the EIC was not a "legal proceeding" for the purposes of s. 34 of the Custom Election Rules.

[60] I now turn to the EIC's argument that a gap exists in the Custom Election Rules because they provide that a member of Council can be impeached in certain circumstances by the passing of a BCR, and the Custom Election Rules do not contemplate the circumstance here that Council is unable to pass a BCR because a quorum of council cannot be convened.

[61] The gap argument is tied entirely to s. 34 of the Custom Election Rules, which states that should a Councillor find him or herself in one of the situations mentioned in s. 34(a), (b), or (c), that Councillor may be immediately removed from office by the passing of a BCR to that effect. Specifically, in this situation it is tied to s. 34(b) - should a legal proceeding recognized by Council find that a member of Council has misused any LNIB funds or resources, or has breached his fiduciary responsibilities, then a Councilor can be impeached by the passing of a BCR.

[62] The EIC's gap argument becomes moot given I have found that the EIC impeachment process was not a legal proceeding for the purposes of s. 34 of the Custom Election Rules.

[63] The Respondents' arguments supporting impeachment based in traditional authority must also fail.

[64] While authority for custom bands to develop their own Custom Election Rules extends to the removal of Chiefs and Councillors and includes removal by impeachment (*Lafond v. Muskey Lake Cree Nation*, [2008] F.C.J. No. 923, 2008 FC 726 (F.C.)), rules of removal ought to be narrowly construed given the severity of removal (*Bugle v. Lameman*, [1997] F.C.J. No. 560, 71 A.C.W.S. (3d) 417 (T.D.) at para. 2; *Dene Tha' First Nation v. Didzena*, [2005] F.C.J. No. 1561, 2005 FC 1292 (F.C.) at para. 28). This Court has not accepted alternative provisions for impeachment such as customary or traditional authority where a band's Custom Election Rules have been found to have "covered the field" (*Prince, supra*), formed an "all-encompassing legal

code" (*Martselos v. Salt River First Nation #195*, [2008] F.C.J. No. 13, 2008 FC 8 (F.C.) at para. 32; *Bugle, supra* at para. 2), or to have contained "explicit discipline procedures" (*Lafond, supra* at para. 30).

[65] I find the LNIB's Custom Election Rules provisions on impeachment are thorough and well-established, and satisfy the case law so not as to allow for alternative provisions for impeachment founded in customary authority. I am satisfied they cover the field adequately.

[66] Further, there is no evidence of a broad community consensus supporting the Elders' impeachment powers. In *Catholique v. Band Council of Lutsel K'e First Nation*, [2005] F.C.J. No. 1782, 2005 FC 1430 (F.C.), removal outside of the process outlined in the band's draft written rules was successful in the removal of a Chief.

[67] My colleague, Justice Richard Mosley, in *Catholique, supra*, at paragraph 50 found that the band's custom included the "practice of removal of a Chief and Councillors from office by an expression of the consensus of the community through the vote of a special assembly." In determining what band custom was at the time, he held at paragraphs 44 and 45 that one must look to the "views of the community" to make the subjective determination of "whether the practices for choices of a council are 'generally acceptable' or enjoy a 'broad consensus' among members of the Band." The facts showed that this removal practice had been used previously.

[68] In the present case, I am not satisfied that the Affidavit evidence of Joe, G. Sam, Shutter, York, and Toodlican supports a broad community consensus that the Elders hold impeachment powers. While the deponents explain and it is not in dispute that the Elders have a customary judicial role within the Nlaka'pamax communities where the Elders can consider the wrongdoings of community members and penalize persons found responsible, none could point to an historical precedent for impeachment of a Councillor by a committee of Elders pursuant to traditional justice.

[69] I therefore find that the EIC did not have the jurisdiction to impeach past and present members of the LNIB Council.

[70] However, accepting there lacks a broad community consensus that the Elders have impeachment powers is not inconsistent with accepting Elders play an active and important role in the governance of Nlaka'pamax communities. Rightly, a five-page Custom Election Rules document likely does not exclusively and exhaustively set out in detail all LNIB customs.

[71] Where it is not feasible for all customs to have been codified, Justice Mosley's analysis in *Catholique, supra* to determine what is custom is helpful - the "views of the community" are to be examined to make the subjective determination of "whether the practices for choices of a council are 'generally acceptable' or enjoy a 'broad consensus' among members of the Band."

[72] The Affidavit evidence of Joe, G. Sam, Shutter, York, and Toodlican shows a community consensus that the Elders play a customary advisory and recommendation role in the LNIB community, essential guidance for which the Elders are revered. The capacity to advise and make recommendations, rather than impeachment powers, is more the tone of the Affidavit evidence.

[73] The Elders' customary advisory and recommendation role necessarily includes an investigative role and the ability to report findings to the LNIB Chief, as the ability to advise and recommend is given its fullest meaning when it includes the ability to investigate and report.

[74] For the above reasons, I find that the EIC had the jurisdiction to investigate the Councillors' alleged wrongdoing, was entitled to make the findings it did, and was allowed to subsequently report these findings to the LNIB Council.

2. Were the Applicants afforded natural justice and procedural fairness in the EIC process?

[75] The Applicants submit that they were entitled to, and did not receive, natural justice and procedural fairness. Also, they ought to have been afforded the right to be heard, as supported by *Prince, supra* at paragraphs 39 to 42. Further, they had a legitimate expectation that the EIC would only be making recommendations to Chief Moses and the Council.

[76] The Respondents submit the EIC's proceedings were procedurally fair and in accordance with natural justice for the following reasons: the EIC provided each member of the 2004-2007 Council with an opportunity to appear before the EIC and to make submissions; the EIC members were elected from the LNIB membership and were free of conflicts; the EIC obtained independent legal advice; the EIC undertook a thorough review of all documentation; and the EIC provided written reasons. The EIC submits the process of investigation and adjudication was fair and included an opportunity for the Applicants to be heard, an opportunity which the Applicants declined to take advantage of. I agree for the following reasons.

[77] In *Baker v. Canada*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) the Supreme Court of Canada stressed that the existence of a duty of fairness is flexible and variable**,** and its content is to be decided in the specific context of each case. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness. The more important the decision is to the lives of those affected, the more stringent the procedural protections that are required. There is no doubt that in the present case the seriousness of the implications of an adverse finding by the EIC required that the individuals affected be given the opportunity to present their case fully and fairly in an impartial, fair, and open process.

[78] I am satisfied that this high standard was met.

[79] First, as early as September 30, 2008, in a memorandum addressed to the LNIB Councillors, the impugned Councillors were put on notice by Chief Moses that he was moving

forward with the investigation and that “as the results of the investigation can be quite severe if there has been any breach of fiduciary duty or improper taking or use of Bands funds by those under investigation, each is entitled to hire a lawyer at their own expense to accompany their appearance before the Committee.**”**

[80] Second, the evidence demonstrates the following:

a) The EIC advised the impugned Councillors by letter delivered on or about February 11, 2009 of the results of the EIC’s investigation and the EIC’s findings, provided the impugned Councillors with a copy of the preliminary findings, and invited the impugned Councillors to arrange an appearance before the EIC to submit evidence or make submissions with respect to the EIC’s preliminary findings;

b) The impugned Councillors were warned that if they chose not to arrange an appearance before the EIC, the EIC would issue its final report, findings, and recommended penalties without their participation; and

c) Despite the above, the Applicants elected not to contact or appear before the EIC.

[81] Despite the EIC’s invitation and despite the caution expressed, the Applicants declined to appear before the EIC. It is therefore difficult for the Applicants to now claim that they were not afforded an opportunity to be heard.

[82] As for the Applicants' argument that they had a legitimate expectation that the EIC would not impose penalties, the EIC submits there is no Affidavit evidence that the Applicants expected the EIC to confine its conclusions to recommendations, or that if the Applicants had known impeachment was a possibility that they would have appeared before the EIC. In fact, the only evidence from the Applicants is that they did not acknowledge the legitimacy of the EIC, evidence adduced in the cross-examination of Stuart Jackson. The EIC submits that Mr. Jackson had no expectations whatsoever, and that he simply did not recognize the process. Again, I agree with the EIC.

[83] None of the Applicants state in their Affidavits that if they would have known of the activities undertaken by the EIC, that they would have appeared before the EIC. As pointed out by the EIC, the only evidence provided by the Applicants for declining to appear is that the Applicants did not recognize the process.

[84] In addition, as stated above, the Applicants were put on notice as early as September 30, 2008 of the seriousness of the implications of a finding of breach of fiduciary duty.

[85] More importantly, in light of the Oath of Office sworn by each Applicant that states "we will resign from our elected position whenever we have been found to be in contravention of the Band's election rules and Chief and Council Policy & Procedures or of this oath of office," I cannot accept the proposition that the Applicants did not expect that the results of the

investigation could seriously impact their positions as Councillors, and that their responses would have differed had they only known about the possibility of impeachment.

[86] I note the apt comment made by the Supreme Court of Canada in *Baker*, *supra* at paragraph 26 that the doctrine of legitimate expectations, as applied in Canada, "is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers" with respect to procedures, and that it would be unfair for administrative decision-makers to "backtrack on substantive promises without according significant procedural rights." This is clearly not the situation here.

[87] No representations or promises were made to the Applicants to the effect that a different process would take place, and that there would be a subsequent opportunity for them to make representations.

3. Were the EIC's findings reasonable?

[88] The Applicants submit that the EIC's findings are unreasonable. They complain mainly about the process but do not challenge the merits of the EIC decision in any detail.

[89] For the Applicants, the non-compliance with certain of the procedural requirements of the LNIB's by-laws and policies has been used to justify the finding of a breach of fiduciary duty. However, an assessment of whether a fiduciary duty was breached must involve an examination

of substantive issues, rather than only an assessment of whether there was compliance with procedural requirements, which the Applicants say was done by the EIC.

[90] Furthermore, they were entirely unaware of By-law 1987 #1 as it was not contained in their Councillor orientation book, and that portions of By-law 1987 #1 significant to this matter, such as contracts having to be tendered, have fallen into disuse. Also, the EIC is repeatedly concerned that LNIB cheques had been signed by two Councillors instead of one Councillor and one staff member, however this is of no concern since cheques are prepared by the LNIB administration in the first place.

[91] The Respondents submit that the EIC was entitled to make the findings that it did, and the Applicants have failed to fundamentally challenge the facts upon which the findings were based. As such, the EIC's findings fall within a range of reasonable outcomes.

[92] According to the Respondents, it is unclear exactly what is meant by the Applicants' statement that the EIC only found evidence of procedural irregularities and the investigation did not address substantive issues, but the statement suggests a severe misapprehension of the law concerning fiduciary obligations. The Respondents submit a breach of procedures that results in Councillors receiving contracts that they are not otherwise entitled to is clearly a breach of the fiduciary duty that each of the Councillors owes to the LNIB. The overriding concern is that election to a Councillor position should not be seen as an opportunity for personal enrichment, as the interests of the LNIB must be paramount.

[93] The EIC submits its findings fall within a range of reasonable outcomes. While the Applicants dismiss the contraventions of the Custom Election Rules and the LNIB Chief and Council Policy and Guidelines as non-compliance with procedural requirements, these are in fact substantive provisions that are aimed at protecting the interests of the LNIB membership as a whole. Accepting contracts at the expense of the LNIB was in breach of the impugned Councillors' fiduciary duties. Also, the Councillors were bound to the Oath of Office they signed to uphold the laws of the LNIB, and to resign if they were found to be in contravention of the LNIB's election rules and policies.

[94] I conclude that the EIC's findings with respect to the Councillors' breach of their fiduciary duties are reasonable, for the following reasons.

[95] Band Councillors are in a fiduciary relationship with band members, and hold a fiduciary obligation to manage their band's assets in the best interests of the band membership (*Toney v. Annapolis Valley First Nations Band*, [2004] F.C.J. No. 2107, 2004 FC 1728 (F.C.)).

[96] The law on fiduciary relationships as cited in *Toney, supra* at paragraph 28 indicates that "the fiduciary has a duty of utmost good faith to act in the best interests of the beneficiary and to avoid a conflict of interest."

[97] The very high standard that fiduciaries are held to is described in *Canadian Aero Service Ltd. v. O'Malley*, [1973] S.C.J. No. 97, 40 D.L.R. (3d) 371 (S.C.C.) at page 381-382 as "loyalty,

good faith and avoidance of a conflict of duty and self-interest," and in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] S.C.J. No. 99, 130 D.L.R. (4th) 193 (S.C.C.) at paragraph 55 as a "fiduciary is at very least bound to adhere to the terms of the instrument which bestows his powers and creates the trust."

[98] The beneficiary of the fiduciary duty owed by the Councillors was the LNIB membership as a whole.

[99] In determining whether the Councillors, in the position of fiduciaries, had fulfilled their obligations, according to *Toney*, *supra* at paragraph 29, "the central inquiry is not whether the fiduciary has been dishonest or acted in a fraudulent manner, but whether he has acted in the best interests of the beneficiary and without conflict of interest." It is therefore sufficient to show that the fiduciary acted inconsistently with the LNIB's best interests. I wish to emphasize that the EIC considered the standard set out in *Toney*, *supra* when examining the Councillors' conduct.

[100] The LNIB has developed rules, regulations, and procedures to ensure that Councillors do not receive inordinate financial benefits by virtue of their elected position. The EIC considered these when conducting its investigation. The rules, regulations, and procedures applicable to the complaint that the Councillors, as employees or contractors, improperly supplied and were paid for services by the LNIB, among others, are reproduced below.

[101] Rule 9.1 of the LNIB By-law 1987 #1 states the following:

9. Contracts and Tenders
9.1. Except in an emergency or as predestinated by the Band Council where the contract is expected to exceed $1,000.00, tenders shall be invited.

[102] Section 1 of the LNIB Chief and Council Conflict of Interest Policy states the following:

Duties of Chiefs and Councillors

1. Every Councillor of the Band, in exercising his or her powers and performing his or her functions, shall

(a) act honestly and in good faith and in the best interest of the members of the Band; and
(b) exercise the care, diligence and skill of a reasonably prudent person.

[103] Section 20 of the LNIB Chief and Council Policy and Guidelines states the following:

No Council member shall hold a paid administrative position within the LNIB operations or any departments thereunder unless otherwise consented to by a decision of council and approved by the community. Notwithstanding this, Council members are entitled to enter into short term professional service contracts with and as requested by Administration. Such contracts shall not exceed two (2) months in duration or $5,000 value at any given time.

[104] The Oath of Office sworn by the 2004 to 2007 Council included the following:

3. We will not allow our business or personal affairs to influence our decision making and we will always consider the best interests of the Community;

4. We will uphold the laws of the Band as approved by the Band Council and as learned form general meetings and at large from Band Members, Elders and Youth;

5. We will strive to preserve and enhance our culture and heritage and strive to maintain a proper place for our Band Members in society;

6. We will resign from our elected position whenever we have been found to be in contravention of the Band's election rules and Chief and Council Policy & Procedures or of this oath of office.

[105] The facts indicate that Councillors Jackson, Coutlee, and Sam acted contrary to the above, thereby exhibiting actions that fail to uphold their obligations as fiduciaries. Each, by way of Affidavit evidence, has given context to their breaches, but at no point have they provided evidence to the effect that the EIC's findings are unreasonable.

[106] With respect to the awarding of an employment contract to then sitting Councillor Robert Sterling Jr. (not an Applicant) whom the EIC found was in breach of s. 20 of the LNIB Chief and Council Policy and Guidelines, the EIC found this employment contract to be one where the sitting Councillors had breached their fiduciary duties. Councillors Jackson, Coutlee, and Sam did not provide any evidence to support Robert Sterling Jr.'s employment not being in breach of LNIB rules, regulations, and procedures on restrictions on sitting Councillors' employment.

[107] Councillors Jackson, Coutlee, and Sam indicated by way of Affidavit evidence that this was the only job applicant with the required archaeology degree. However, Councillor Sam in cross-examination on his Affidavit indicated that he did not remember whether the job was advertised at all, and that he knew that the contract was for a period of over two months, but the employment was never put to a vote at a general LNIB meeting. Similarly, in cross-examination on her Affidavit, Mary June Coutlee stated she knew Robert Sterling's contract with the LNIB would be for more than two months but was not approved at a general LNIB meeting.

[108] With respect to the awarding of an employment contract to then sitting Councillor Stuart Jackson, whom the EIC found was in breach of s. 20 of the LNIB Chief and Council Policy and Guidelines for accepting an employment contract without community approval, the EIC found

Councillors Jackson, Coutlee, and Sam breached their fiduciary duties by approving the employment contract of a fellow sitting Councillor. Councillors Jackson, Coutlee, and Sam by way of Affidavit evidence, in trying to dispute the EIC's findings on this issue, do not explain how Councillor Jackson was awarded the contract in issue.

[109] The Third Supplemental Affidavit of Chief Moses indicates that there were other LNIB members who had more teaching experience than Councillor Jackson and who were interested in the position. Upon cross-examination on his Affidavit, Councillor Jackson admitted that he had never held an administrative position in a school before becoming principal of the LNIB school, and that his teaching experience consisted solely of an eight-week teaching practicum. Also, the affiants stated that Councillor Jackson's hiring as a LNIB employee was never approved by the Community at a general LNIB meeting, despite the knowledge that it was for more than a two month term.

[110] The Applicants submit that in this case, the intent of the governing regulations was met since Councillor Jackson did not participate in the Council discussion or vote to approve his contract as interim principal. *Toney, supra* makes the following apt comment at paragraph 33, reasoning which I adopt:

> 33 Procedural safeguards, such as the one relied on by the respondent, are established to ensure that fiduciaries are not involved in decisions in which they have a personal interest. The rationale is that if the fiduciary is removed from the decision-making process, then the remaining "unbiased" fiduciaries will be able to make a decision that accords with the best interest of the beneficiary. The difficulty in the present case is that all the fiduciaries (the respondent, Mr. Copage and Ms. Toney) had an interest in the contracts.

> Although Mr. Copage and Ms. Toney may not have had a direct interest in the respondent's contract, it was in their best interest to award the respondent a favourable contract so that he would reciprocate on the same terms. Accordingly, it made no difference whether the respondent left the room when his contract was being discussed, since all of the Council members were tainted by self-interest. Moreover, the respondent put himself in a direct position of conflict when he signed the Band Council Resolution accepting and ratifying his own employment contract.

[111] With respect to Councillor Sam and the awarding of contracts to his backhoe business, while the Applicants have provided Affidavit evidence which states that Councillor Sam was diligent in declaring his own personal conflict concerning LNIB contracts, the evidence also shows there existed other qualified LNIB members capable of performing the contracts. The EIC found the contracts were awarded without following the proper procedures. The Applicants did not submit evidence that countered the EIC's findings on these contracts.

[112] In response to the Applicants' assertion that they were unaware of By-law 1987 #1 and that it has fallen into disuse, the Affidavit of Chief Moses reveals that Councillor Coutlee was a Councillor at the time this by-law was developed and that she signed it into law. Apart from Councillor Coutlee's participation, claiming an unawareness of this by-law does not change the facts which support the reasonableness of a finding that there was a contravention of the by-law**,** and the fact that the by-law is still on the books shows me its purpose and usefulness.

[113] The Applicants have not advanced any evidence to dispute the EIC's findings regarding the conduct of Lorne Sahara, Shannon Kilroy, and former Chief Arthur Dick. Consequently, all the EIC's findings on these three individuals are uncontested.

[114] Based on a review on the standard of reasonableness, I am satisfied that the EIC's findings fall within a range of possible and acceptable outcomes, defensible both in respect of the facts and the law.

4. Were the three Band Council Resolutions validly passed?

[115] The Applicants submit that even a custom band is subject to s. 2(3) of the *Indian Act*, which states the following:

> 2(3) Unless the context otherwise requires or this Act otherwise provides,
>
> …
>
> (b) A power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the Councillors of the band present at a meeting of the council duly convened.

[116] The Applicants highlight that the provision indicates that powers conferred on Council require a majority vote at a duly convened meeting, and that the three BCRs did not emanate from a duly convened meeting. *Première Nation Malecite de Viger v. Canada (Indian Affairs and Northern Development)*, [2006] F.C.J. No. 245, 2006 FC 187 (F.C.) at paragraph 31 supports the Applicants' point that even a custom band is subject to s. 2(3) of the *Indian Act*.

[117] Section 28 of the LNIB Chief and Council Policy and Guidelines states Council quorum must be five members in good standing, and s. 33 states Council decisions are made by consensus or a majority of quorum after a matter has been moved and seconded.

[118] The Applicants submit that the three BCRs wrongly presuppose quorum had become three. Council is usually made up of one Chief and seven Councillors, with quorum being five. Four of eight members of the new Council had also served on the previous Council, which Chief Moses sought to investigate. A fifth member was the son of one of the impeached. This left, according to Chief Moses, only three eligible members of Council – Chief Moses and two others were not in a position of conflict with respect to the actions of the previous Council, and could therefore form quorum.

[119] The Respondents agree that custom band councils are still constrained by s. 2(3) of the *Indian Act,* and submit that this provision was met.

[120] The March 16, 2009 BCRs were discussed, passed, and signed at a meeting of Chief Moses and Councillor Connie Joe. The BCRs could not be discussed at a meeting of all Councillors because the other Councillors other than Yvonne Basil were in conflict with the substance of the BCRs, namely adopting the EIC Report's recommendations. Yvonne Basil had a conflict of interest with respect to the EIC report because she was a named party in this application for judicial review. While Councillor Basil was absent from the meeting, she was

given an opportunity to object to the BCRs in writing within 7 days, and there is no evidence she provided any such objection (Conflict of Interest Policy, s. 3(3)).

[121] The Respondents point to the Chief's powers under s. 23(e) of the LNIB Chief and Council Policy and Guidelines to make decision "on behalf of Council" when those decisions are necessary for good government, and submit the circumstances of this case justify invoking this power to implement the sanctions recommended by the EIC.

[122] According to the Respondents, while the Applicants have argued that procedural requirements for the implementation of impeachment recommendations have to be rigidly followed, the Federal Court has held that the rationale behind a strict adherence to the procedural requirements for the implementation of impeachment recommendations is the protection of the Band in general, not the protection of a Chief or Councillors. See: *Qualicum First Nation v. Recalma-Clutesi*, [2006] F.C.J. No. 1097, 2006 FC 854 (F.C.) at paragraphs 36-37.

[123] In any event, the Respondents argue that s. 2(3) of the *Indian Act* contemplates that these procedural requirements only apply "unless the context otherwise requires." As such, the Respondents submit that the present unique context is one in which the procedural requirements do not strictly apply. The present situation is said to be extraordinary since sitting Councillors have been found to have breached LNIB laws, policies, and their fiduciary duties. However, the sitting Councillors refuse to declare their inherent conflict in regard to the implementation of the EIC's findings, findings which are largely uncontested. It is impossible for the Chief and Council

to pass a BCR implementing the recommendations in accordance with strictly construed procedural requirements, because the sitting Councillors who were impeached form a majority. According to the Respondents, this context justifies a reasonable departure from the strict procedural requirements. The BCRs should be allowed, despite technical deficiencies.

[124] I disagree with the Respondents for the following reasons.

[125] In my opinion, the Chief's power under s. 23(e) of the LNIB Chief and Council Policy and Guidelines to make decisions "on behalf of Council" when those decisions are necessary for good government was not validly engaged here. First, each of the three BCRs was premised on valid impeachments. I have found that the EIC had the jurisdiction to investigate and make the findings it did, but that it did not have the jurisdiction to impeach. Passing BCRs that are based on the acceptance of impeachments that resulted from a flawed process does not properly engage s. 23(e). I wish however to recognize Chief Moses' best intentions and good faith efforts in resolving a very serious and exceptional situation presented before him as the Chief of the LNIB as a whole.

[126] Further, the BCRs were technically deficient. Chief Moses, by instituting the memorandum process for passing BCRs, had in fact created a BCR procedure separate and apart from the proper procedure of holding a vote. He unilaterally made this change. As pointed out by the Applicants, and I agree, it could not be said that these BCRs emanated from a duly convened meeting. This is the result of a unique situation where Chief Moses could not refer the BCRs to a proper quorum of Council, since obtaining the required quorum was impossible due to the

inability of the impugned Councillors to participate in quorum, to vote on matters related to their own wrongdoings.

[127] The three BCRs dated March 16, 2009 were therefore not validly passed.

5. Were the Councillors' resignations validly accepted?

[128] According to the Respondents, the Oath of Office sworn by each Councillor on election to the LNIB Council, which states at s. 6 that Councillors will "resign from our elected position whenever we are found to be in contravention of the Band's election rules and Chief and Council Policy & Procedures or this oath of office," means Chief Moses could deem the Councillors to have resigned once found in contravention of the LNIB Chief and Council Policy and Guidelines or the Oath of Office, citing *Minde v. Ermineskin Cree Nation*, [2008] F.C.J. No. 203, 2008 FCA 52 (F.C.A.) in support.

[129] The Applicants state no resignations were ever given.

[130] In *Minde*, *supra* at paragraph 51, the Court of Appeal held that an Elders' Council could properly deem the office of the Chief to be vacated when the Chief was found to have breached Band laws and his fiduciary duties by misappropriating Band finances. The Chief had undertaken to vacate his office upon such a finding and the Court of Appeal held that an agreement of that nature was not purely ceremonial, and there was no basis for disregarding his promise to resign.

[131] In my opinion, s. 6 of the Oath of Office is clear that should findings be made that the Councillors who swore the Oath acted in contravention of the LNIB Custom Election Rules, the LNIB Chief and Council Policy and Guidelines, or the Oath of Office itself, the Councillors must be considered to have resigned. I have accepted, and found reasonable, the findings made by the EIC that the impugned Councillors have contravened the applicable rules, policies, and procedures.

[132] The Chief of the LNIB has the power, under s. 23(e) of the LNIB Chief and Council Policy and Guidelines, to "make decisions when required on behalf of Council when such decisions are necessary for good government." In my opinion, s. 23(e) grants Chief Moses the power to accept the resignations called for by s. 6 of the Oath of Office. These unique circumstances, combined with the strength of an Oath of Office that was signed by each Councillor and witnessed by four elders, allow for Chief Moses' acceptance of the resignations.

6. Is the Applicants' challenge to the funding of the EIC time-barred?

[133] I find the Applicants' challenge to the funding of the EIC is time-barred, for the following reasons.

[134] Section 18.1(2) of the *Federal Courts Act*, addressing time limitations with respect to bringing applications for judicial review, reads as follows:

> Time limitation

> 18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

[135] The Respondents correctly note that s. 18.1(2) of the *Federal Courts Act* requires applications for judicial review to be filed 30 days after the communication of a decision, and the Notice of Application filed by the Applicants on March 10, 2009 means only decisions made 30 days prior could be reviewed. I add that using April 16, 2009, the filing date of the amended Notice of Application, as the date from which to count backwards 30 days would not assist the Applicants in arguing they are not out of time.

[136] The questions therefore become do the provisions found in the Terms of Reference cause the LNIB to fund the EIC, and when was a decision to fund made and communicated to the Applicants?

[137] The Applicants do, but not in the context of this issue, indicate “the particulars of the payments to the EIC referred to in [this decision on funding under review] have not yet been communicated to the Applicants.” The particulars of funding, however, are separate and apart from learning of the decision to fund, and it is the timeline of the decision to fund that is important here.

[138] The Applicants would have at least by October 22, 2008 been made aware that the LNIB would be providing the funding. This was the date of the issuance of the Terms of Reference, and the Terms of Reference state the LNIB will fund the EIC panel members' honoraria and the solicitor who will assist the EIC.

[139] It was before this date, however, on October 14, 2008, that the then Council passed Motion #5 indicting its non-acceptance of the EIC, stating "that the 'investigation' stop as of October 14, 2008, and that no further expenditures be made on this exercise until it's discussed at a special meeting of council […]." Passing a motion to halt the EIC's exercise is one aspect, but Councillors specifically addressing funding presupposes they knew the LNIB is behind the funding. It would not be logical for Council to have specifically addressed funding without knowing the LNIB is the source.

[140] Either way, it is clear that the Applicants were by October 14, 2008 made aware of funding for the purposes of a decision being communicated to them, and if not, by October 22, 2008, when Terms of Reference indicated the intent to have the LNIB fund the EIC.

[141] The Respondents rightly point out that the Applicants have not presented evidence to show that further decisions to fund the EIC were made after November 28, 2008, the fluid date which the Applicants state in framing the funding issue to be reviewed.

[142] Since it is the communication of the decision that the LNIB will provide the funding and not the communication of the particulars of the monetary amounts to be provided that is key here, based on this timeline, I agree with Respondents that the Applicants' challenge to the funding of the EIC is time-barred.

CONCLUSION

[143] For the above reasons, this application for judicial review is allowed in part.

[144] While the EIC does have an advisory and investigatory function and therefore its findings and recommendations stand, the EIC does not have an adjudicative function with respect to impeachment proceedings, covered by the Custom Election Rules and reflected by the EIC's Terms of Reference. Thus, the impeachment of the Councillors by the EIC is invalid.

[145] Further, as stated above, the three BCRs of March 16, 2009 were premised on an invalid impeachment, and were passed based on a flawed process. Accordingly, the three BCRs must be set aside.

[146] Having accepted the EIC's findings, and subsequently having decided the Councillors are deemed to have resigned and their resignations can be validly accepted by Chief Moses, there are issues contained in the three March 16, 2009 BCRs which remain to be decided. I now turn to the appropriate remedy, one which can result in a broad community consensus given this unique situation in which the parties find themselves.

[147] Counsel for the Applicants has suggested that a vote by the LNIB general membership, held at a general band community meeting and resulting in the passing of general band motions reflecting the will of the electorate, would be one way to proceed. General band community meetings may be divisive and unpleasant. Counsel for the EIC cautioned that sending difficult and challenging issues like these back to the LNIB community membership as a whole for a community meeting and public vote is not a desirable option, for reasons including some LNIB members live off reserve and therefore could not easily participate, and others experience intimidation in such a setting as fellow community members witness how each votes.

[148] As was suggested by counsel for the EIC as a possible remedy, I find that the best resolution is for the LNIB to have a referendum on the issues remaining to be decided. This would be preferable to a community meeting and public vote, and would respect the wishes of the EIC.

[149] The three March 16, 2009 BCRs are hereby declared invalid. The BCRs are returned to Chief Moses and the LNIB community for the remaining issues contained therein to be voted on by way of referendum.

COSTS

[150] The Applicants seek to have the matter of costs deferred to a later hearing, following a decision in this matter. The Applicants submit that if successful on their application, they ought to receive full indemnity for their legal fees, given it would be unfair for the Applicants to

receive only partial indemnity when Chief Moses would receive full indemnity by having unilaterally claimed the right to act on behalf of LNIB Council, and the EIC would claim full indemnity due to the indemnity provision in its terms of reference.

[151] The Supreme Court of British Columbia in the related action discontinued in that jurisdiction indicated the Federal Court is to decide on costs with respect to the British Columbia proceeding.

[152] The Respondents support the Applicants' request to have the issue of costs dealt with after a determination of the application on its merits. They anticipate they will have significant issues to raise on costs.

[153] Thus, the issue of costs will be decided at a hearing on the matter, to be heard on a date to be determined by the administration.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review is allowed in part.
2. The findings and recommendations of the EIC are accepted and are found to be reasonable.
3. The impeachment of the impugned Councillors by the EIC is declared invalid.
4. The resignations of the Councillors are validly accepted by Chief Moses.
5. The three March 16, 2009 BCRs are declared invalid.
6. The BCRs are to be returned to Chief Moses and the LNIB community for the remaining issues contained therein to be voted on by way of referendum.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-394-09
STYLE OF CAUSE:	COUNCILLOR YVONNE BASIL, COUNCILLOR MARY JUNE COUTLEE, COUNCILLOR STUART JACKSON, FORMER COUNCILLOR SHANNON KILROY, FORMER COUNCILLOR LORNE SAHARA, COUNCILLOR AARON SAM, and COUNCILLOR CLYDE SAM v. CHIEF DONALD CYRIL MOSES, THE ELDERS' INVESTIGATIVE COMMITTEE PURPORTEDLY OF THE LOWER NICOLA INDIAN BAND, and COUNCIL OF THE LOWER NICOLA INDIAN BAND
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	June 23 and 24, 2009
REASONS FOR ORDER:	TREMBLAY-LAMER, J.
DATED:	July 22, 2009

APPEARANCES:

Mr. John Drayton	FOR THE APPLICANTS
Mr. Joseph C. McArthur	FOR THE RESPONDENTS (Chief Donald Cyril Moses and Council of the Lower Nicola Indian Band)
Mr. F. Matthew Kirchner	FOR THE RESPONDENT (The Elders' Investigative Committee)

SOLICITORS OF RECORD:

Gibraltar Law Group Kamloops, BC	FOR THE APPLICANTS
Blake, Cassels & Graydon Vancouver, BC	FOR THE RESPONDENTS (Chief Donald Cyril Moses and Council of the Lower Nicola Indian Band)
Ratcliff & Company North Vancouver, BC	FOR THE RESPONDENT (The Elders' Investigative Committee)