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Court File No. T-2153-22

FEDERAL COURT

BETWEEN:

SPENCE COUTLEE

FILED	FEDERAL COURT COUR FÉDÉRALE	DÉPOSÉ
	OCT 18 2022	
	FRANK FEDORAK (NF)	
VANCOUVER, BC		1

APPLICANT

AND

LOWER NICOLA INDIAN BAND AND
LOWER NICOLA INDIAN BAND ELECTORAL OFFICER

RESPONDENTS

APPLICATION UNDER SECTIONS 18, 18.1, and 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and Rule 301 of the *Federal Courts Rules*, S.O.R./98-106.

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-

represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

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

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

Date October 18, 2022 Issued by ORIGINAL SIGNED BY
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APPLICATION

1. This is an application by Councillor Spence Coutlee for judicial review of a decision of the respondents, Lower Nicola Indian Band (“**LNIB**”) Chief and Council and Electoral Officer, made September 28, 2022, purporting to remove Mr. Coutlee from the office of Councillor and barring him from running for Chief in the current LNIB election, scheduled to be completed on October 22, 2022 election, and purporting to remove Mr. Coutlee from the ballot in that election (“**Decision**”).
2. The Decision is plainly unlawful, on the following grounds:
 - (a) It did not follow the clear process set out for removal of a councillor and future prohibition from running for office, provided for and set out in the LNIB Custom Election Rules, approved by 2/3 of the membership of LNIB, which process requires, inter alia, that the matter be referred to binding arbitration by an independent arbitrator;
 - (b) Chief and Council purported to act pursuant to provisions of its Chief and Council Policy, which provisions amount to a purported amendment to the Custom Election Rules. Any such purported amendment, done without adhering to and in circumvention of the established community approval amendment process, is of no force and effect;
 - (c) Alternatively, the Decision is void on the following grounds:
 - (i) Chief Stuart Jackson, who cast the deciding vote to remove Mr. Coutlee from office, was plainly in a conflict of interest and should have recused himself from participating in the hearing and from voting to remove Mr. Coutlee. The effect of the Decision was to purport to remove from office a political rival currently running against Chief Jackson for the position of Chief, and to bar Mr. Coutlee from running for the very office Chief Jackson is also seeking at this very time. The effect of the Decision was to remove Mr. Coutlee from the

ballot for Chief and to annul any and all votes already cast in favour of Mr. Coutlee;

- (ii) The Decision was predetermined, having been drafted in advance of the hearing and ultimately approved verbatim following the hearing that was, itself, inadequate and was procedurally unfair. At minimum, this gave rise to a reasonable apprehension of bias;
- (iii) The Decision was rendered without providing Mr. Coutlee the ability to make full answer and defence;
- (iv) The Decision was unfounded and/or unreasonable; and
- (v) The punishment of removal from office (with a resulting inability to run in the election) cannot be supported by, and is grossly disproportionate to, the nature of the allegations and the evidence. The allegations and findings against Mr. Coutlee are mere pretexts for removing from office a political rival thereby usurping the democratic will of LNIB and upending its proper governance.

THE APPLICANT MAKES APPLICATION FOR:

- 3. An order quashing the Decision and/or a declaration that the LNIB Chief and Council did not have jurisdiction to remove Mr. Coutlee, on the basis that the the Decision and the steps leading up to it were made in breach of LNIB's *Custom Election Rules*, and that purporting to remove Mr. Coutlee in accordance with the Chief and Council Policy circumvents the legal and binding impeachment process set out in the *Custom Election Rules*.
- 4. An order quashing the Decision on the basis that the deciding vote cast by Chief Jackson in the removal and disqualification of Mr. Coutlee constitutes a flagrant conflict of interest, and/or gave rise to a reasonable apprehension of bias, and as such the vote is invalid and the resulting Decision should not be allowed to stand.

5. An order quashing the Decision and/or a declaration that the LNIB Chief and Council and Electoral Officer lost jurisdiction over the proceedings leading to the Decision due to uncured procedural fairness breaches, such that the Decision is a nullity, for the following reasons:
 - (a) Evidenced by the Band Council Resolution prepared in advance and appended to the agenda of the September 28, 2022 Band Council Meeting, Chief and Council – or some of them – had predetermined the outcome of the Decision before allowing Mr. Coutlee to defend himself against the allegations;, giving rise to a reasonable apprehension of bias;
 - (b) There was significant and undue delay and lack of transparency between the release of the investigation report on June 30, 2022 and the September 28, 2022 Band Council Meeting in which Chief and Council made the Decision;
 - (c) The Decision was unfair, breached Mr. Coutlee’s right to impartial decision-making, and gives rise to a reasonable apprehension of bias, based on the fact that Chief Jackson was in a clear conflict of interest and still cast the deciding vote to remove Mr. Coutlee from office;
 - (d) The lack of information provided to Mr. Coutlee and Chief and Council’s refusal to adjourn the September 28, 2022 Band Council Meeting breached Mr. Coutlee’s right to be heard; and
 - (e) Mr. Coutlee was assured that Chief and Council would conduct an in-person oral hearing, and he was therefore entitled to that procedure. Chief and Council’s failure to conduct an in-person oral hearing was a breach of Mr. Coutlee’s legitimate expectations.
6. An order quashing the Decision as unreasonable for the following reasons:
 - (a) The Decision and the steps leading up to it were breaches of LNIB’s *Custom Election Rules*;

- (b) Chief and Council did not have any of the relevant evidence in front of them when making the decision, and made the Decision without considering any evidence in support of Mr. Coutlee's submissions at the September 28, 2022 Band Council Meeting.
 - (c) The Decision on its face is unreasonable based on the available evidence;
 - (d) Even assuming the allegations are established (which is denied), the purported breaches do not warrant the extreme punishment of outright removal of an elected official over the democratic will of the electorate. The punishment is grossly disproportionate and unsupported by the allegations or the *Custom Election Rules*.
7. An interim and/or interlocutory injunction suspending and/or staying the Decision pending the determination of this application, including an interim and/or interlocutory injunction suspending and/or staying the election for office of Chief of LNIB on October 22, 2022, or on any other date, pending the determination of this application.
8. Costs of, and incidental to, the application, in favour of the applicant, including special costs against the respondents personally.
9. Such further and other relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

(a) *Background*

Mr. Coutlee's Position, Mandate, and Portfolio as Councillor

10. The applicant Mr. Coutlee was elected to office on October 5, 2019. He was elected with 182 votes, which was the third highest number of votes received for any of the Chief or Councillor positions. Mr. Coutlee was elected alongside Chief Stuart Jackson and Councillors William Bose, Robin Humphrey, Connie Joe, William Sandy, Lucinda Seward, and Aaron Sumexheltza. Chief Jackson is the only full time member of Chief and Council.

11. Mr. Coutlee was elected after campaigning on his background in business, and on a mandate of economic development and advancing business opportunities for LNIB. He was given the Economic Development and Natural Resources portfolio by Chief and Council, as a result of his prior and ongoing business experience.
12. Section 4.9 of the Chief and Council Policy provides that an individual Councillor who is given a portfolio is delegated a specified area of Chief and Council's jurisdiction or a Band department. Portfolio holders must acquire knowledge and understanding of that jurisdiction or department, meet with staff to discuss key issues concerning that jurisdiction or department (but not direct staff), and report on a monthly basis to Chief and Council.
13. A key responsibility of Mr. Coutlee's Economic Development and Natural Resources portfolio was engaging with business owners and proponents on LNIB's behalf to gather and review information relevant to LNIB's business interests. This engagement included liaising with community members to discuss matters related to his jurisdiction, which included members looking for work at the mines, members wanting to get involved in contracts, members wondering how contract delegation and distributed opportunities from impact benefit agreements took place, and more. Mr. Coutlee's portfolio also involved information seeking and relationship building activities with project proponents, to be able to report back to Council and the membership.

The Allegations

14. Shortly after Mr. Coutlee's election in late 2019, some members of Chief and Council began to make efforts to undermine him, in order to silence him and prevent him from executing his mandate and portfolio. There is a long history of rivalry and tension between Mr. Coutlee's family and others in the community (similarly to many other First Nation communities), and this may have been one of the factors driving the allegations.

15. In early 2020, Mr. Coutlee was informed by Chief Jackson in a phone call that allegations of conflict of interest had been made against him. At the next Band Council Meeting, these allegations were raised without notice to Mr. Coutlee, and without the allegations having been particularized.
16. On March 3, 2020, Mr. Coutlee received an email from Chief Jackson that set out the allegations Chief Jackson had referred to in their call. Mr. Coutlee was surprised to receive this email, because he was under the impression that the allegations had been resolved at the previous Band Council meeting.
17. On May 27, 2020, Mr. Coutlee received an email from David Wotherspoon of Dentons Canada LLP on behalf of Chief and Council, which attached a Complaint Summary and a number of related documents. The Complaint Summary repeated the allegations in the March 3, 2020 email from Chief Jackson, and set out a number of additional allegations of a similar nature.
18. In sum, the allegations, which Mr. Coutlee denies, are as follows:
 - (a) Mr. Coutlee is alleged to have breached LNIB conflict of interest laws and policies;
 - (b) Mr. Coutlee is alleged to have breached his fiduciary duty to LNIB;
 - (c) Mr. Coutlee is alleged to have improperly revised the LNIB Contractor and Supplier Information list;
 - (d) Mr. Coutlee is alleged to have communicated with Trans Mountain Corporation without authorization; and
 - (e) Mr. Coutlee is alleged to have improperly interfered with administrative staff and administrative operations.
19. On July 23, 2020, Mr. Coutlee received a “cease and desist” letter from Scott A. Dawson of Farris LLP which set out a number of additional allegations.

20. On August 19, 2020, Mr. Coutlee received a letter from Chief and Council reiterating the allegations that had been made in the July 23, 2020 letter from Mr. Dawson.
21. The language of these letters and emails was non-committal and guarded, and merely suggested that Mr. Coutlee “may have breached” his duties. Mr. Coutlee did not understand the gravity and potential consequences of the allegations. He certainly did not understand that the allegations could eventually result in his removal from office.

The Investigation

22. In or around May 2020, Chief and Council advised Mr. Coutlee that they had begun investigating the allegations. At that time, Chief and Council had not passed a Band Council Resolution authorizing an investigation, which is required under s. 3.1.6 of the Chief and Council Policy.
23. On December 1, 2020, Chief and Council passed a Band Council Resolution authorizing Chief and Council to conduct or direct an investigation into the allegations. This Band Council Resolution characterized the investigation to date as a “preliminary, confidential review of these allegations,” and retroactively authorized “all steps taken by Chief and Council in relation to these allegations prior to the date of this Band Council Resolution.”
24. On May 7, 2021, Mr. Coutlee received an email from the investigator, Nicole Price, advising that she had been retained to conduct an investigation according to the December 1, 2020 Band Council Resolution. Between May 7, 2021 and May 6, 2022, Mr. Coutlee made multiple requests for clarification regarding Ms. Price’s mandate, scope of instruction, impartiality, witnesses, and materials. Ms. Price did not provide such clarification.
25. Between May 7, 2021 and May 6, 2022 Ms. Price solicited Mr. Coutlee’s participation in the investigation. However, he was not comfortable participating in the investigation and was not able to do so effectively, due to Ms. Price’s refusal

to provide him with sufficient information. Further, Mr. Coutlee expected to have a fulsome opportunity to respond to the allegations and the results of the investigation at an in-person oral hearing conducted by Chief and Council.

26. On May 6, 2022, Mr. Coutlee received an email from Ms. Price that attached a preliminary report. The provision of the preliminary report was the first time that Ms. Coutlee received materials that Ms. Price was considering in her investigation.
27. The investigator completed the investigation and prepared a 54-page report which concluded that Mr. Coutlee had violated LNIB policies, engaged in a conflict of interest, and breached his fiduciary duties ("**Investigation Report**"). The Investigation Report was released to Chief and Council on June 30, 2022 and provided to Mr. Coutlee in early July.

Mr. Coutlee's Response to the Allegations

28. Mr. Coutlee's response to the allegations can briefly be summarized as follows:
 - (a) Mr. Coutlee denied all the allegations made against him, and submits that all the allegations are patently false. In the alternative, he submits that even if the allegations were true, they would not justify his removal from the position of Councillor.
 - (b) Regarding the allegation about his statement of disclosure, Mr. Coutlee submits that multiple Councillors had not completed the written disclosure "in the form required", because there was general confusion among Chief and Council about what information we were obligated to disclose and what form was actually required. Mr. Coutlee further submits that he eventually did provide written disclosure in the form required.
 - (c) Regarding the allegation about his phone call with Charlene Vandean at Highland Valley Copper ("**HVC**"), Mr. Coutlee submits that Mrs. Vandean initiated the phone call to SCS Diamond Drilling's office and had a mandate to update services from contractors who previously had worked at HVC and

conversation related to business and contracting opportunities was well within his mandate as the Councillor with the Economic Development and Natural Resources portfolio.

- (d) Regarding the Allegation about his meetings with LNIB, the LNIB Development Corporation, and Surerus Murphy Joint Venture, Mr. Coutlee submits that he had organized and participated in these meetings strictly in his capacity as an LNIB Councillor. These meetings were well within the mandate of his Economic Development and Natural Resources portfolio, because they involved informational updates related to contracts, employment, requests for proposals, and timelines.
- (e) Regarding the allegation about his request to Deanne Eustache for the list of all mining referrals in the LNIB traditional territory, Mr. Coutlee submits that an understanding of the referral system is crucial to understanding the opportunities for LNIB businesses and negotiating with government, which is part of his portfolio. He further submits that Chief and Council was aware that he was going to the mining conference, that it was his understanding that Chief and Council was aware that he had contacted Deanne, and that he had done similar work on behalf of LNIB on previous occasions. In addition, he submits that his request was for the sake building relationships in the area to further LNIB's economic development and business opportunities, and was only a matter of efficiency given that all of the information he requested is public and not confidential.
- (f) Regarding the allegation about his attendance at the Vancouver Resource Investment Conference and the AME Roundup Conference, Mr. Coutlee submits that Chief and Council had approved his attendance, that the Executive Director of LNIB had offered to book his accommodation and travel, and that he had only booked his own accommodation and travel to avoid the need to pass a Band Council Resolution.

- (g) Regarding the allegation about Don Gossoo and contracting opportunities with Bayshore Minerals Inc. and Westhaven Ventures Inc., Mr. Coutlee submits that Don Gossoo was indeed looking for contracting opportunities and that LNIB members ended up being successful in securing related employment opportunities.
- (h) Regarding the allegation that he told LNIB's Executive Director that she was not invited to a meeting with HVC, Mr. Coutlee submits that he had made no such representation and that the Executive Director had actually been the person that provided him with an invitation to the meeting.
- (i) Regarding the allegation about his March 31, 2020 email, Mr. Coutlee submits that it was commonplace at the time for conflict of interest allegations to be exchanged between the Chief and Councillors, and that he had met all his obligations in accordance with the LNIB *Financial Administration Law*.
- (j) Regarding the allegation that he unilaterally revised the LNIB Contractor/Supplier Information list for the Trans Mountain Expansion Project, Mr. Coutlee submits that the LNIB Contractor/Supplier Information list was managed by Kevin Ainsworth, the General Manager at the time of the LNIB Development Corporation. Mr. Coutlee submits that Mr. Ainsworth had solicited his feedback on the LNIB Contractor/Supplier Information list, and that he had added a number of businesses to the bottom of the list and refrained from otherwise editing the list in any way. Mr. Ainsworth has written a letter confirming that he requested Mr. Coutlee's additions to the LNIB Contractor/ Supplier Information list.
- (k) Regarding the allegation about his July 14, 2020 letter to representatives of Trans Mountain, Mr. Coutlee submitted that his communication with Trans Mountain Corporation was authorized, given that it is well within the mandate of his Economic Development and Natural Resources portfolio to be knowledgeable about major projects in LNIB traditional territory. Mr.

Coutlee submits that he did not believe he had breached any of LNIB's policy or procedures, and that the letter did not benefit him personally in any way. Mr. Coutlee submits that his intent behind the letter was to encourage Trans Mountain to negotiate further opportunities with LNIB, and that he had only reiterated concerns that the LNIB membership and business community had previously presented to Chief and Council in Band Council Meetings and letters.

The September 28, 2022 Band Council Meeting

29. Mr. Coutlee was not aware of any further steps that occurred after Chief and Council received the Investigation Report, and he received no communications regarding next steps.
30. Finally, Mr. Coutlee raised the issue of the Investigation Report at a duly convened Band Council meeting on September 6, 2022. He requested that Chief and Council conduct an in-person oral hearing regarding the allegations, and Chief and Council agreed to his request. Chief and Council assured him that they would conduct an in-person oral hearing with legal representation present before making a decision about the allegations.
31. On September 24, 2022, Mr. Coutlee received an email invitation to a Band Council Meeting to take place within 4 days, on September 28, 2022. The invitation enclosed an agenda which included the item "Potential Discipline of Councilor Spence Coutlee". Based on this item, previous discussions, and the practice in recent years to hold hybrid Band Council Meeting where some members would attend in person, Mr. Coutlee understood that this meeting would be the in-person oral hearing he had requested. However, the agenda also included an unsigned Band Council Resolution ("**Band Council Resolution**") already finding that he had engaged in a conflict of interest, breached his fiduciary duties, and violated LNIB policies, and determining that he should be removed from office and declared ineligible to run in the upcoming Chief and Council Election.

32. Based on the Band Council Resolution, it appeared that Chief and Council had already predetermined the outcome of the Band Council Meeting with respect to Mr. Coutlee's "potential discipline", despite not having yet given him the chance to be heard and to properly respond to the allegations.
33. On September 28, 2022, Mr. Coutlee drove from his residence in Kamloops to the Band Council Office in Merritt. When he arrived, he discovered that the doors to the Band Council Office were locked. He then realized that the Band Council Meeting was being conducted as a video conference. Upon this realization, he was forced to call in to the meeting using his cellphone while sitting in the Band Council Office parking lot in his truck. With no internet access, Mr. Coutlee had to call in by phone instead of joining with video. As a result of being forced to call in, he could not tell who else was present in the meeting.
34. This abrupt change in venue and method of participation significantly impacted Mr. Coutlee's ability to make his presentation and respond to the allegations, because he did not have access to internet and the documents he intended to refer to were on the cloud. When he connected to the meeting, Mr. Coutlee immediately requested an adjournment to ensure that he could properly present his submissions and to ensure that Chief and Council were provided with all the relevant evidence before making their decision. He explained that he had been expecting an in-person meeting where he would be able to access internet in the Band Council Office, so he would be unable to refer or send any of the evidence he had prepared. Chief and Council refused Mr. Coutlee's request for an adjournment.
35. Before beginning his submissions, Mr. Coutlee asked Chief Jackson to recuse himself from the Band Council Meeting and any decision-making process related to the allegations, given that he was also a candidate for the Office of Chief and was therefore in a direct conflict of interest. Chief Jackson refused to recuse himself, and none of the other Councillors, nor LNIB's legal counsel, acknowledged or took issue with Chief Jackson's conflict of interest.

36. Notwithstanding Chief and Council's unreasonable refusal to adjourn and despite Chief Jackson's unreasonable refusal to recuse himself, Mr. Coutlee proceeded with the Band Council Meeting in good faith and to the best of his (limited) ability. Mr. Coutlee denied each of the allegations and submitted that in the alternative, the allegations would not justify his removal from the position of Councillor.
37. Due to Chief and Council's unreasonable refusal to adjourn, Mr. Coutlee's ability to articulate his submissions was severely limited by the fact that he had to make his submissions by phone from his truck, without access to most of the documents he had intended to refer to. Mr. Coutlee was therefore unable to address each Allegation fully.
38. When he concluded his submissions, Chief and Council went into *in camera* deliberations. Chief and Council excluded Mr. Coutlee from these deliberations, alleging that he was in a conflict of interest.
39. Mr. Coutlee did not hear from Chief and Council for approximately two hours, during which time he drove back to Kamloops where he resides. Approximately two hours after Mr. Coutlee had disconnected from the Band Council Meeting, Chief and Council called him and advised that they would be discussing the Band Council Resolution that had been included in the meeting agenda. At that time, LNIB's legal counsel advised Mr. Coutlee that he was once again in a conflict of interest and could not be present while Chief and Council discussed the Band Council Resolution. Chief and Council agreed that Mr. Coutlee had a conflict of interest, so he disconnected.

The Decision

40. On September 29, 2022, LNIB's legal counsel called to advise Mr. Coutlee that Chief and Council had concluded he had violated the Chief and Council Policy, the Oath of Office, and the LNIB Financial Administration Law. LNIB's legal counsel further advised that Chief and Council had passed the Band Council Resolution that had been included with the agenda.

41. On September 29, 2022 Mr. Coutlee was told by Councillor Connie Joe that the Councillors were split on the vote 3-3, with Chief Jackson casting the deciding vote. Given that Chief Jackson was in a direct conflict of interest as a competing candidate for the Office of Chief, he should not have cast a vote or been present for the deliberations.
42. On October 3, 2022, a community notice posted on the LNIB website announced that Chief and Council had removed Mr. Coutlee from his office as Councillor, and declared that he was ineligible to run for Chief or Council in the upcoming Election. Prior to this community notice, Mr. Coutlee was unaware that his candidacy for the Office of Chief would be halted and that his name would be removed from the ballot.
43. Mr. Coutlee did not receive reasons for the Decision until October 6, 2022. As of the date of this Application, Mr. Coutlee has not been provided with a duly passed Band Council Resolution removing him from office.
44. After reviewing the reasons for the Decision, Mr. Coutlee considered his options and determined that he needed legal counsel. On or about October 10, 2022, he retained Gowling WLG (Canada) LLP as his legal representation.

The 2022 Election

45. On September 19, 2022, LNIB's Chief Electoral Officer gave notice that the LNIB had called an election for October 22, 2022. The Election Notice advised that votes could be cast by:
 - (a) electronic ballot between October 8, 2022 and October 22, 2022;
 - (b) in person at the advance poll on October 15, 2022 or regular poll on October 22, 2022; or
 - (c) mail in ballot.

46. Mr. Coutlee was nominated as a candidate for the Office of Chief and the Office of Councillor at the nomination meeting on September 3, 2022. He chose to run as a candidate for the Office of Chief, and was deemed eligible and approved as a candidate for Office of the Chief by LNIB's Electoral Officer.
47. Mr. Coutlee's name appeared under "Office of Chief – Candidates" on the Final Candidates List, which was signed by LNIB's Electoral Officer on September 19, 2022. Chief Jackson is also a candidate for the Office of Chief.
48. Mr. Coutlee's name appeared as a candidate for the Office of Chief on the mail-in ballots that LNIB sent to all electors not residing on a Band Reserve. A number of votes were cast for Mr. Coutlee using the mail-in ballots.
49. On October 12, 2022, a second Final Candidates List was posted on the LNIB website, removing Mr. Coutlee's name as a candidate for Chief. Despite its later origin and inconsistency with election timelines, there appears to have been an effort to backdate the document, which still reads as having been signed by LNIB's Electoral Officer on September 19, 2022.
50. Also on October 12, 2022 LNIB Administration distributed an election update for LNIB members. This election update advised that there had been a decision to remove a Candidate from the ballot, and that in-person ballots and electronic ballots had been updated to reflect the change. Notably, the election update indicated that all mail-in ballots would be spoiled.

(b) Grounds for review

51. Mr. Coutlee advances the following grounds for review in his notice of application:

(i) Lack of jurisdiction

52. The Decision and the steps leading up to it were made in breach of LNIB's *Custom Election Rules*. Chief and Council did not have jurisdiction to remove Mr. Coutlee under the *Custom Election Rules*, and purporting to do so in accordance with the Chief and Council Policy circumvents the legal and binding impeachment process

set out in the *Custom Election Rules*. Chief and Council's reliance on the Chief and Council Policy to remove Mr, Coutlee from office amounts to an unsanctioned and unlawful amendment of the *Custom Election Rules*.

53. The impeachment process under the *Custom Election Rules* sets out the rules for the removal of a member of council from office. It provides that Chief and Council may only commence the impeachment process by majority vote, at which point an independent arbitrator must be appointed to hear and decide the petition for impeachment. A member of council cannot be removed until this process has been completed. Chief and Council did not follow this process, and instead purported to remove Mr. Coutlee in accordance with the Chief and Council Policy, which ultimately requires only a majority vote of Council and makes no provision for neutral arbitration.
54. In making the Decision, Chief and Council failed to follow the impeachment process under the *Custom Election Rules*, despite their knowledge that the *Custom Election Rules* are legally binding and operate with supremacy in all election matters.
55. The provisions of the Chief and Council Policy relied on by Chief and Council are tantamount to unauthorized amendments to the *Custom Election Rules*, which would have required approval by a two-thirds vote of eligible electors to be legally effective.
56. Accordingly, Chief and Council did not have the jurisdiction to remove Mr. Coutlee from his office as Councillor and the Decision is unlawful.

(ii) Conflict of interest

57. The deciding vote (given the 3-3 split in Council) cast by Chief Jackson in the removal and disqualification of Mr. Coutlee constitutes a flagrant conflict of interest, and as such the vote is invalid and the resulting Decision should not be allowed to stand.

58. Chief Jackson, as another candidate for the Office of Chief, was in a direct conflict of interest. Deeming Mr. Coutlee ineligible to run in the Election directly benefitted Chief Jackson, because it eliminated one of his main competitors for the Office of Chief. Accordingly, Chief Jackson should not have participated in the deliberations leading up to the Decision, should have recused himself, and should not have cast a vote to determine the Decision. Without the improper vote of Chief Jackson, the vote stood at 3-3 and would not have passed. Had Chief Jackson not participated in the hearing and deliberations, it is also possible that others may not have voted in favour of removal.

(iii) Procedural fairness breaches

59. In the alternative, in the lead-up to, during, and after the Decision, the LNIB Chief and Council committed the following procedural fairness violations that caused them to lose jurisdiction, voiding the proceeding:

60. **Undue delay and lack of transparency:** There was significant and unnecessary delay and lack of transparency between the release of the investigation report on June 30, 2022 and the September 28, 2022 Band Council Meeting.

61. After receiving the Investigation Report in early July, Mr. Coutlee was not advised of any further procedural steps that would occur, and did not receive any communications related to the report. In fact, Mr. Coutlee had to raise the issue of the investigation report himself at Band Council meeting on or about August 30, 2022. The two months that passed after Chief and Council received the investigation report constitutes an undue procedural delay in which Mr. Coutlee was not informed of the further steps and timelines he could expect. After lengthy delays in which it was unclear how Council would proceed, he would only be afforded 4 days' notice of his opportunity to respond to the allegations at the September 28, 2022 Band Council Meeting.

62. **Unfair and partial decision-making:** As outlined above, Chief Jackson was in a conflict of interest. Accordingly, the deciding vote cast by Chief Jackson constitutes

a breach of Mr. Coutlee's right to fair and impartial decision-making. Chief Jackson's conflict of interest gives rise to a reasonable apprehension of bias, exacerbated by the fact that Chief Jackson cast the deciding vote.

63. **Pre-determination of the outcome/reasonable apprehension of bias:** Chief and Council – or some of them – had predetermined the outcome of the September 28, 2022 Band Council Meeting, before allowing Mr. Coutlee to defend himself against the allegations.
64. This is clear from the Band Council Resolution prepared in advance and appended to the agenda for the September 28, 2022 Band Council meeting, which stated that Mr. Coutlee had engaged in a conflict of interest, breached his fiduciary duties, and violated LNIB policies, and resolved to remove Mr. Coutlee from office and deem him ineligible to run for the Office of Chief. This BCR was ultimately adopted verbatim following the hearing.
65. **Breach of the right to be heard:** The lack of information provided to Mr. Coutlee and Chief and Council's refusal to adjourn the September 28, 2022 Band Council Meeting breached Mr. Coutlee's right to be heard.
66. Despite requests from Mr. Coutlee on more than one occasion, the investigator refused to provide information about her mandate, scope of instructions, her impartiality, the Allegation, the witnesses, and the materials she relied on. This refusal prevented Mr. Coutlee from understanding the concerns he was meant to address and the evidence he would need to gather, and ultimately denied Mr. Coutlee a meaningful opportunity to participate in the investigation and be heard.
67. Further, Chief and Council's refusal to adjourn the September 28, 2022 Band Council Meeting also denied Mr. Coutlee a meaningful opportunity to be heard. Mr. Coutlee had requested that Chief and Council conduct an in-person oral hearing on more than one occasion. Having been assured by Chief and Council that he would be granted an in-person oral hearing, Mr. Coutlee prepared his submissions and evidence under the impression that he would be presenting to Chief and

Council at the Band Council Office, with access to internet. When Mr. Coutlee was forced to call in by phone to the virtual meeting, severely limiting his ability to present the submissions and evidence he had prepared, Chief and Council's refusal to adjourn denied Mr. Coutlee his right to be given a fair opportunity to respond.

68. **Breach of Mr. Coutlee's legitimate expectations:** Mr. Coutlee was assured that Chief and Council would conduct an in-person oral hearing, and he was therefore entitled to that procedure.
69. On more than one occasion, Mr. Coutlee had requested an in-person oral hearing. On more than one occasion, Chief and Council had assured Mr. Coutlee that he would be allowed to present his counter arguments and evidence in an in-person oral hearing. In particular, Chief and Council explicitly assured Mr. Coutlee at the Band Council meeting on September 6, 2022 that they would hold an in-person oral hearing.
70. Chief and Council should not have made a Decision until they had conducted an in-person oral hearing, consistent with Mr. Coutlee's legitimate expectations.

(iv) Unreasonableness

71. The Decision is also unreasonable on the following grounds:
72. **Breach of the *Custom Election Rules*:** As outlined above, the Decision and the steps leading up to it were breaches of LNIB's *Custom Election Rules*.
73. **Chief and Council did not consider all the relevant evidence:** Chief and Council did not have any of the relevant evidence in front of them when making the decision, and made the Decision without considering any evidence in support of Mr. Coutlee's submissions at the September 28, 2022 Band Council Meeting.
74. Prior to the September 28, 2022 Band Council Meeting, several Councillors had requested for all relevant documents and evidence to be compiled and circulated by the Executive Director, who is responsible for preparing the meeting agenda

and all documents pertinent to the meeting, because Councillors were having difficulty locating materials that had been sent over a period of almost two years. A compilation of these documents was never circulated. The only document that Chief and Council had before the, during the September 28, 2022 Band Council Meeting was the unsigned Band Council Resolution.

75. When he called in to the September 28, 2022 Band Council Meeting, Mr. Coutlee advised Chief and Council that he would not be able to refer to his supporting evidence, or send it to Chief and Council. Mr. Coutlee requested an adjournment so that Chief and Council could be provided with all the relevant evidence before they made their Decision.
76. Chief and Council denied Mr. Coutlee's request for an adjournment, and Mr. Coutlee was forced to present his submissions over the phone from his truck, with limited access to the materials he prepared and limited ability to send evidence to Chief and Council.
77. During his submissions, Mr. Coutlee had told Chief and Council that he could send his supporting evidence to them once he had access to the internet. When Mr. Coutlee had concluded his submissions, Chief and Council did not solicit Mr. Coutlee's evidence and made the Decision before he had provided them with the evidence he had referenced in his submissions.
78. **Grossly disproportionate punishment unsupported by the allegations or the *Custom Election Rules*:** Even assuming the allegations are established (which is denied), the purported breaches do not warrant the extreme punishment of outright removal of an elected official, over the democratic will of the electorate.
79. Clearly, the highest sanction available under the Custom Election Rules – impeachment – must be reserved for only the most serious breaches and instances of misconduct. The effect of the Decision is highly significant not only for Mr. Coutlee, but also for the electorate that exercised their democratic right to elect

him into office. This drastic effect is compounded by the fact that a person so removed is barred from competing in the next election.

80. It must be assumed that removal of the Chief of a Councillor is reserved for only the most serious offences. Even if the allegations were established, which Mr. Coutlee denies, they would not constitute breaches serious enough to warrant Mr. Coutlee's removal from office and disqualification from the Election.

81. Such further and other grounds as counsel may advise and this Court may permit.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- (a) the affidavit of Spence Coutlee to be affirmed; and
- (b) such further and other material as counsel may advise and this Court may permit.

The applicant requests, pursuant to Rule 317(2), that the respondent transmit a certified copy of the following material that is not in the possession of the applicant but is in the possession of the respondent to the applicant and to the Registry:

- 1. Any material that was before the respondents or that they considered or relied on in issuing the Decision.

October 18, 2022



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Lawyers for the Applicant, Spence Coutlee

I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of OCT 18 2022 A.D. 20 _____

Dated this _____ day of OCT 18 2022 20 _____



SVETLANA DOBROTA
REGISTRY OFFICER
AGENT DU GREFFE