



B E T

FEDERAL COURT

SPENCE COUTLEE

JR  
101

Court File No. T-2421-22

F I L E D	FEDERAL COURT COUR FÉDÉRALE		D É P O S É
	NOV 21 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	<u>November 21, 2022</u>	Issued by	<u>ORIGINAL SIGNED BY JOYCE FAN A SIGNÉ L'ORIGINAL (Registry Officer)</u>
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## APPLICATION

### OVERVIEW:

1. This is an application by Spence Coutlee (“**the Applicant**”) for judicial review of the election for Lower Nicola Indian Band (“**LNIB**”) Chief and Council which concluded on October 22, 2022 (“**Election**”).
2. The Applicant asks the court to vacate the certification of the results of the Election, to declare the Election for the position of Chief to be null and void and to order the holding of a new election for the position of Chief.
3. The Applicant, Spence Coutlee, was a duly-nominated candidate for the position of Chief in the Election. His name appeared on the ballot, until he was wrongfully and unlawfully removed from the ballot while the Election was underway.
4. The wrongful removal of the Applicant followed an unlawful decision by the then-Chief and Council to remove him from the Office of Councillor and to bar him from running for Chief in the Election. This decision is the subject of a parallel, related application for judicial review, bearing Court File Number T-2153-22.
5. The Election for the position of Chief was plainly unlawful, on the following grounds:
  - (a) Pursuant to the LNIB *Custom Election Rules*, Chief and Council lacked the authority to remove the Applicant from Council and to bar him from running for office. The process for removal from office and disqualifying an office-holder from running in future elections as set out at ss. 35-44 of the *Custom Election Rules* was not followed or even engaged;
  - (b) That process requires, *inter alia*, that the matter be referred to an independent arbitrator. No such referral was made. Instead, then-Chief and Council unlawfully purported to arrogate to itself the authority to consider the removal of the Applicant and his disqualification from running

for office while the election was already underway and after the Applicant had been nominated for the position of Chief and had his name included on the ballot for election to that position;

- (c) In so doing, then-Chief and Council purported to follow and rely upon a “Chief and Council Policy.” This Policy would purport to amend the express provisions of the *Custom Election Rules*. Any such purported amendment, done without adhering to and in circumvention of the established community approval amendment process of the *Custom Election Rules* is of no force and effect;
- (d) Further, the decision to remove the Applicant from the ballot and to purport to bar him from running for the Office of Chief was unlawful and void, for the reasons set out in T-2153-22, including, *inter alia*:
  - (i) the fact that then-Chief Stuart Jackson failed to recuse himself from consideration of the matter and indeed cast the deciding vote to purport to remove the Applicant from Council and to disqualify him from running for the position of Chief, notwithstanding his clear conflict of interest and ensuing reasonable apprehension of bias in that regard, as a competing candidate for the position of Chief;
  - (ii) the result of the “hearing” was pre-determined, as evidenced, *inter alia*, by the fact that the BCR/decision purporting to remove the Applicant from office and to disqualify him was drafted in advance of the hearing and subsequently adopted without modification;
  - (iii) the Applicant was denied procedural fairness;
  - (iv) the decision was unreasonable; and
  - (v) the punishment was unreasonable and disproportionate; and
- (e) The Electoral Officer wrongfully annulled and failed to allow or count mail-in ballots, contrary to the requirements of the *Custom Election Rules*.

6. The Applicant further states that the election appeal mechanism under the *Custom Election Rules* is unlawful because it purports to exclude judicial oversight of the Election or, in the alternative, it is not an effective remedy and does not preclude judicial review of the Election.
7. Given their close connection and overlapping factual underpinning, the Applicant proposes that the present Application be heard concurrently with T-2153-22.

**THE APPLICANT MAKES APPLICATION FOR:**

8. A declaration that the removal of the Applicant from the 2022 LNIB Election for Chief was unlawful or invalid;
9. A declaration that the certification of the 2022 LNIB Election for Chief is unlawful or invalid;
10. An order vacating the certification of the 2022 LNIB Election for Chief and quashing the Election for Chief;
11. An order requiring a new LNIB Election for Chief to be held as soon as practicable, in which:
  - (a) The name of the Applicant as a candidate for Chief shall appear; and
  - (b) Mail-in ballots shall be accepted and counted.
12. An order invalidating the LNIB *Custom Election Rules* appeal procedure (“**the LNIB Election Appeal Procedure**”) or, in the alternative, a declaration that the LNIB Election Appeal Procedure does not constitute an effective remedy;
13. Costs of, and incidental to, the application, in favour of the applicant; and
14. 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*

15. The Applicant repeats and relies upon the facts as set out in T-2153-22.
16. In sum, the Applicant, Spence Coutlee, was elected to the position of LNIB Councillor 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. The Applicant 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.
17. The Applicant 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.

#### *Mr. Coutlee's Removal from the Office of Councillor*

18. In the course of the lawful and proper exercise of his functions, the Applicant became the target of a whisper campaign and eventually a concocted investigation for alleged "conflict of interest."
19. On September 24, 2022, Chief and Council advised the Applicant that an oral hearing would be held in four days' time to determine potential removal from office of the Applicant.
20. The hearing was purported to be called pursuant to a "Chief and Council Policy," and not pursuant to the provisions under the LNIB *Custom Election Rules* relating to removal from office and disqualification from running for office.
21. The hearing was held on September 28, 2022, and was beset by several serious procedural irregularities as set out in T-2153-22.

22. *Inter alia*, despite a request to do so, Chief Jackson refused to recuse himself from the hearing and/or the final decision, despite the fact that the hearing was considering the possible removal and disqualification of the Applicant, who was at that time a duly-nominated candidate for the Office of LNIB Chief, for which Chief Jackson was seeking re-election. To the contrary, Chief Jackson was an active and vocal participant in the hearing and, ultimately, cast the deciding, tie-breaking vote to remove the Applicant and to disqualify him from running in the 2022 LNIB Election that was then underway.
23. The decision to remove the Applicant from office and to disqualify him from running for office was prepared in advance of the "hearing" and adopted without modification.
24. The Applicant was otherwise denied a fair hearing and a reasonable opportunity to make full answer and defence.
25. On October 3, 2022, a community notice posted on the LNIB website announced that Chief and Council had removed the Applicant 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, the Applicant was unaware that his candidacy for the Office of Chief would be halted and that his name would be removed from the ballot.
26. The Applicant did not receive reasons for the Decision until October 6, 2022. As of the date of this Application, the Applicant has not been provided with a duly passed Band Council Resolution removing him from office.

#### *The Election*

27. On September 19, 2022, LNIB's Chief Electoral Officer gave notice that the LNIB had called the 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.
28. The Applicant was duly 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.
  29. The Applicant'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 was also a candidate for the Office of Chief.
  30. The Applicant'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.
  31. On October 12, 2022, a second Final Candidates List was posted on the LNIB website, removing the Applicant'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.
  32. 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, despite the fact that the September 19, 2022 Election Notice had advised that votes could be cast by mail-in ballots and the requirement in section 13(b) of the *Custom Election Rules* for mail-in ballots to be provided as a means "to ensure that all Electors have a fair opportunity to vote in the Election."



33. Polling for the Election was completed on October 22, 2022. The total number of voters was 381, which is 33% of the electors. There were 190 in-person ballots counted, 191 electronic ballots counted, and zero mail-in ballots counted.
34. Stuart Jackson was declared elected to the Office of Chief with 182 votes. The next highest number of votes for a candidate for Chief was 102 for Robert Sterling Jr. Three votes for Chief were spoiled.

**(b) Grounds for review**

35. The removal of the Applicant's name from the Final List of Candidates and the removal of his name from the ballot for the position of Chief was unlawful and invalid, and the resulting 2022 LNIB Election for Chief was unlawful and invalid, for the following reasons:

***(i) Lack of jurisdiction***

36. The removal of the Applicant's name from the Final List of Candidates and from the 2022 LNIB Election ballot for the position of Chief was unfounded, unlawful, invalid and without jurisdiction.
37. The process for impeachment/removal of Chief or a member of Council is set out at ss. 35-44 the *Custom Election Rules*, which provide 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.
38. This process was not engaged or followed.
39. In purporting to impeach/remove the Applicant from office and to disqualify him from running for office, Chief and Council purported to operate pursuant to a "Chief and Council Policy" that was not submitted for approval by the LNIB community and that did not received the requisite 2/3 majority approval required under the *Custom Election Rules* to effect any amendment to those *Rules*. Plainly, the "Chief and Council Policy" amounts to a purported amendment of the *Custom Election*

*Rules*, in seeking to displace and alter the explicit process required for removal from office and disqualification of an office-holder.

***(ii) Breach of the LNIB Custom Election Rules/Spoiling of and Failure to Provide for Mail-In Ballots***

40. The purported removal of the Applicant occurred after the 2022 LNIB Election had commenced, after his candidacy had been approved by the Electoral Officer, after his name had been included on the ballot for the Election for Chief, after mail-in ballots including his name had been sent out to members, and after a number of mail-in ballots had been cast and received by the Electoral Officer.
41. On October 12, 2022, the Electoral Officer announced that the Applicant's name was removed from the list of candidates to the Office of Chief, and that all mail-in ballots would be annulled/spoiled.
42. Section 13(b) of the *Custom Election Rules* provide that the Electoral Officer "shall" mail to each Elector not residing on a Band Reserve a mail-in ballot package consisting of the Election Notice, mail-in ballots, a voter declaration form, voting instructions, and "such further materials as may be required to ensure that all Electors have a fair opportunity to vote in the Election."
43. Mail-in ballots are essential to ensure that LNIB Electors have a full and meaningful opportunity to exercise their democratic right to vote for their leadership.
44. Such ballots are particularly essential to allow off-reserve and elderly members participate in the LNIB democratic process, and are relied upon to a great degree by those two groups of voters in particular.
45. The rendering of all mail-in ballots as spoiled had the effect of disenfranchising all Electors who cast a vote via a mail-in ballot and an indeterminate number of Electors who were deterred or precluded from voting in the 2022 LNIB Election by reason of the exclusion/annulment of mail-in ballots.

46. The spoiling and annulment of all mail-in ballots was a serious breach of LNIB's *Custom Election Rules*, and there is a substantial probability that this materially affected the result of the Election.

***(iii) The disqualification/removal of the Applicant from the ballot was unlawful, invalid and/or unreasonable on the following grounds (more fully set out in T-2153-22)***

***(a) Conflict of interest***

47. The deciding vote (given the 3-3 split in Council) cast by Chief Jackson in the removal and disqualification of the Applicant constitutes a flagrant conflict of interest, and/or gave rise to a reasonable apprehension of bias.
48. Chief Jackson, as another candidate for the Office of Chief, was in a direct conflict of interest. Deeming the Applicant 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.

***(b) Procedural fairness breaches***

49. In the lead-up to, during, and after the Decision, the LNIB Chief and Council committed the following procedural fairness violations (more fully set out in T-2153-22) which caused them to lose jurisdiction, voiding the proceeding:
50. **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. After lengthy delays in which it was unclear how Council would proceed, the Applicant would

only be afforded 4 days' notice of his opportunity to respond to the allegations at the September 28, 2022 Band Council Meeting.

51. **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 the Applicant'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.
52. **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 the Applicant to defend himself against the allegations. 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 resolved to remove the Applicant from office and deem him ineligible to run for the Office of Chief. This BCR was ultimately adopted verbatim following the hearing.
53. **Breach of the right to be heard:** The lack of information provided to the Applicant and Chief and Council's refusal to adjourn the September 28, 2022 Band Council Meeting breached the Applicant's right to be heard.
54. **Breach of Mr. Coutlee's legitimate expectations:** The Applicant was assured that Chief and Council would conduct an in-person oral hearing, and he was therefore entitled to that procedure. 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.

(c) Unreasonableness

55. The impeachment and disqualification were also unreasonable on the following grounds:

56. **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 the Applicant's submissions at the September 28, 2022 Band Council Meeting.
57. **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.
58. 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 the Applicant, 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.
59. 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 the Applicant denies, they would not constitute breaches serious enough to warrant his removal from office and disqualification from the Election.

***(iv) The LNIB Election Appeal Procedure is Invalid/Does Not Constitute An Adequate Alternative Remedy***

60. The election appeal mechanism set out at ss. 26 to 31 of the *Custom Election Rules* does not constitute an adequate alternative remedy and, to the extent that it operates to preclude election appeal and subsequent judicial review by setting up an impossible preliminary threshold, is legally invalid.
61. To appeal an election, these provisions purport to require that an Elector obtain the signature of 30% of all Electors on the prescribed form and submit these to the Electoral Officer with a \$1,500 non-refundable fee, all within 15 calendar days of an election occurring. The Electoral Officer would then instruct an Arbitrator to

adjudicate the appeal, and the Arbitrator's decision would be "final and binding on all parties."

62. These requirements render the election appeal mechanism completely inaccessible, as they are in practice all but impossible to meet. The net effect is to purport to immunize LNIB elections from any challenge or appeal, no matter how meritorious, through practical barriers that are unrelated to the merits of any such potential challenge or appeal.
63. In order to avail him or herself of the appeal mechanism, an Elector would need to obtain, within 15 days, the support signatures of approximately 340 LNIB Electors, without having access to a list of all LNIB Electors or their contact information. Electors are spread over a wide geographic area, with many Electors living off-reserve throughout British Columbia, Canada, and the United States. The required number of signatures is almost double the number of votes that elected the current Chief. In other words, an Elector or candidate for election who had evidence and/or grounds that the *Custom Election Rules* had been breached would be required to secure the support of twice the number of Electors who voted for the winning candidate, and do so within 15 calendar days, just to have his or her evidence and/or allegations/grounds of breach considered or heard.
64. It is clear that such a procedural requirement has the effect of precluding a potentially meritorious challenge to an LNIB election or excluding or precluding legal oversight of the election.
65. As a result, the *Custom Election Rules* appeal mechanism set out at ss. 26 to 31 does not constitute an adequate alternative remedy, and this Court's authority to ensure the lawfulness of the LNIB Election is not thereby affected or ousted.
66. Alternatively, to the extent ss. 26 to 31 of the LNIB *Custom Election Rules* purport, indirectly or directly, to preclude judicial oversight and review as to the lawfulness of LNIB elections, they are of no force and effect.
67. 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
- (a) 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.

November 21, 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 NOV 21 2022 A.D. 20\_\_\_\_  
Dated this \_\_\_\_\_ day of NOV 21 2022 20\_\_\_\_  
