

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ryan-Lewis v. Penticton Indian Band*,  
2024 BCSC 1968

Date: 20241028  
Docket: S119829  
Registry: Kelowna

Between:

**Brent Ryan-Lewis**

Plaintiff

And

**Penticton Indian Band**

Defendant

Before: The Honourable Justice Betton

## Reasons for Judgment

Counsel for the Plaintiff:

K.D. Darling

Counsel for the Defendant:

J.W.T. Robinson  
S.M. Lefebvre

Place and Dates of Trial/Hearing:

Kelowna, B.C.  
September 11–15 and  
September 18–22, 2023  
January 29–31, and  
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October 28, 2024

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**Introduction**

[1] The plaintiff began employment with the defendant on September 18, 2017, under a written contract of employment. The terms of that employment contract were varied on March 20, 2018, including a substantial increase in remuneration. A payment was made to the plaintiff on March 26, 2018, representing retroactive payment of the increased salary to the date of January 8, 2018.

[2] On May 4, 2018, the defendant made the decision to terminate the plaintiff's employment based on the process that led to and actions that followed the variation of the plaintiff's contract of employment.

[3] The plaintiff alleges that he was wrongfully dismissed from his employment by the defendant and denies the defendant's allegations of misconduct or breach of duties.

[4] The defendant alleges it had just cause to terminate the plaintiff's employment and advances a counterclaim on the basis that the plaintiff misled the defendant and/or breached his fiduciary duty.

**Background**

[5] The defendant is an Aboriginal First Nation as defined by the *Indian Act*. It is governed by a Chief and Council (the "Chief and Council").

[6] The Penticton Indian Band Development Corporation ("PIBDC") is an entity associated to the Penticton Indian Band ("PIB"). It carried out various business activities on PIB lands.

[7] Gary Benson served as legal counsel to both PIB and PIBDC as well as serving as a PIBDC director at all times material to this case.

[8] The PIB had in place a financial administrative law ("FAL") pursuant to the *First Nations Fiscal Management Act*. The FAL in place at all times material to these proceedings had been put in place by the Chief and Council in 2016 ("FAL 2016").

[9] There was an ongoing effort to update the FAL 2016. There is limited evidence on the subject and the details are not material. What is material is that the plaintiff was involved in that effort beginning in late 2017. Another involved individual was Ms. Russell. She had created a version of the FAL 2016 with editorial comments inserted into it.

[10] The FAL 2016 established a finance and audit committee (“FAC”). Section 12 of the FAL 2016 includes:

12. (1) The Committee of the Penticton Indian Band is established to provide Council with advice and recommendations in order to support Council’s decision-making process respecting the financial administration of the Penticton Indian Band.

(2) the Council must appoint not less than three (3) members of the Committee, a majority of whom must have financial competency and all of whom must be independent.

(3) For purposes of this section, an individual is considered to be independent if the individual does not have a direct or indirect financial relationship with the Penticton Indian Band government that could, in the opinion of Council, reasonably interfere with the exercise of independent judgment as a member of the Committee.

[11] The role of the FAC was advisory to the Chief and Council. The Chair of the FAC at the relevant times was Murray Swales. Clayton Harmon assumed that role after Mr. Swales passed away.

[12] The Chief at the relevant times to this action was Chad Eneas. He was elected as the Chief on October 19, 2016. In December 2016, PIB members elected its new council. It consisted of four new councillors and two returning councillors and the former Chief (the “Council”).

[13] Those elections came during a difficult period for the defendant. There was conflict within the elected Council. By spring of 2017, three of the seven recently elected councillors resigned. In September 2017, the former Chief and another returning counsellor also resigned from the PIB’s Council.

[14] The chief financial officer (“CFO”) at all relevant times was Barbara Carpenter. Ms. Carpenter was, however, new to the position having been hired in

November 2016. In the fall of 2016, the defendant's previous CFO had left the defendant. The new CFO, Ms. Carpenter, was unable to meet with the outgoing CFO before she assumed the role. Other employees in the finance department also left or went to other positions at about the same time.

[15] The CFO described the finance department as having been "gutted" at the time she began. In addition, it was her observation that the defendant's finances "were in chaos".

[16] Then in early 2017, the former band administrator of some 34 years retired. As a result, PIB published an online posting for the band administrator position on February 1, 2017. Ms. Falkus was, at the time, the human resources manager ("HR manager").

[17] The plaintiff responded to the posting by submitting a cover letter and résumé on February 18, 2017. Subsequent negotiations were fruitful. In early August 2017, the plaintiff accepted an offer from the PIB to assume the role of its band administrator. The parties entered into a written employment agreement dated August 24, 2017. The relevant terms are set out as part of an extensive agreed statement of facts (the "ASF") and include the following:

22. The terms of the Contract included, *inter alia*:
  - (a) probationary period of six consecutive months of employment (paragraph 2);
  - ...
  - (c) salary of \$95,000 per annum (\$45.67 per hour x 40 hours per week x 52 weeks per year) per PIB's classification and salary grid (paragraph 6);
  - (d) Mr. Ryan-Lewis is to abide by PIB's conflict of interest policy as amended from time to time (paragraph 15);
  - (e) Mr. Ryan-Lewis is required to read, understand, and sign the employee "Oath of Confidentiality" and to keep the PIB's business affairs and confidential information strictly confidential, and not disclose same during or after his employment (paragraph 16);
  - (f) PIB's confidential information included all client, staff and band information, economic development and marketing strategies, and program or project information (paragraph 17);

- (g) Mr. Ryan-Lewis is to abide by all policies adopted by PIB, as amended from time to time, including PIB's human resources policy and financial management policies (paragraph 18); and  
...

[18] The plaintiff started his employment on September 18, 2017.

[19] In November 2017, the PIB held a by-election for the five vacant council positions. Four of the five elected were first-time councillors. By the spring of 2018, a challenge to that by-election had been launched and remained outstanding.

[20] None of the Chief or any on the council who testified had financial backgrounds and indicated significant reliance on the FAC for guidance on financial matters.

[21] Again, the timing, scope and mandate is not clear from the evidence, but a process of mediation was commenced to address some of the PIB issues. Band members would appear to have had an ability to present grievances to the mediator.

[22] The CFO's responsibilities included drafting an annual budget. To prepare the budget, the CFO had acquired information from each department manager. Once drafted the CFO presents it to the FAC for input and it then goes to Chief and Council for approval.

[23] PIB's fiscal year is April 1 to March 31. The first budget prepared by the CFO was for the 2017/2018 fiscal year. The CFO described lack of control over expenditures and accounting procedures that prevented her from being able to have accurate information to give the FAC. Given the state of the defendant's affairs, the Chief and Council decided that it would not approve an annual budget but instead proceed with quarterly budgets even though this did not accord with its FAL 2016.

[24] The specific financial relationship between the defendant and PIBDC was not made clear in the evidence.

[25] The FAL 2016 required the defendant to maintain specific bank accounts, one of which was a trust account. The source of the trust monies is not clear from the

evidence. The CFO had an ability, with Chief and Council approval, to access those funds to meet at least some of the defendant's financial needs.

[26] Ms. Falkus took a medical leave at about the same time the plaintiff agreed to his contract terms.

[27] Beginning in September 2017, the plaintiff communicated with Dexter MacRae regarding the potential for Mr. MacRae to join the PIB in a human resources management capacity. The plaintiff had prior professional knowledge of Mr. MacRae. The communications evolved from discussion of a short-term contract to the potential for employment on a full-time basis. On October 4, 2017, Mr. MacRae signed a short-term contract to provide human resources services. The Chief and Council were not directly involved in the hiring of Mr. MacRae.

[28] Soon after he assumed his role, Mr. MacRae began the process of developing a revised wage grid for the defendant's employees. The wage grid concept was to identify a salary hierarchy for the various positions. The intention was to establish standardized wages and salaries within the PIB that were both competitive and consistent. Consistency with PIBDC positions was also part of the goal.

[29] That wage grid included all levels of employees within the PIB, including that of department managers and the plaintiff. The grid categorized positions by level and there were steps of pay within each level. The band administrator position was placed at level 16, which is the most senior level employees with the highest income. At the time the band administrator was the only position at that level within PIB.

[30] On November 9, 2017, Mr. MacRae sent an email to the plaintiff with the subject line, "Human Resources, Payroll & Benefits, Capacity Development Department". It attached several documents including a "Draft - Activities & Recommendations Report" which dealt with a number of initiatives by Mr. MacRae, including the wage grid. A draft of the wage grid was attached. Item 11 of the report included following:

Change Management

11. Conduct a review of job classification and wage grid schemes reporting on outcomes and recommendations where change is indicated;
  - *Effective hiring of qualified staff is severely curtailed due to a non-competitive, non-transparent and cumbersome wage grid system;*
  - *Staff (members and non-members) are under-valued in the current remuneration scheme;*
  - *A simplified yet robust wage grid sample has been provided to the Band Administrator for further development with potential implementation for the 2018-19 fiscal.*
  - *Position classification and grid placement will be completed for March 2018.*

[31] Level 16 of the attached wage grid had a salary at step 1 of \$129,244.06 and at step 3 of \$144,449.24. There were five steps in total.

[32] Also included was a recommended restructuring of the human resources function of the PIB that included creating a new position of “senior director”. Mr. MacRae indicated Ms. Falkus was not qualified for that position. The plaintiff testified that he sought and obtained Chief and Council approval for the creation of the position.

[33] At that time the documents including the wage grid were expected to go before Chief and Council at their meeting scheduled for November 21, 2017. The wage grid discussion was tabled at that meeting for the next meeting.

[34] On November 27, 2017, Mr. MacRae presented two additional proposed wage grids to the plaintiff. At 08:14 that day Mr. MacRae sent the following email:

Hi Brent,

As discussed:

1. PIB Wage Grid 2 that clearly shows an enhanced Level 16 to adequately reflect the Band Administrator placement. It can replace the current Level 16. Let me know your thoughts.
2. I have also attached my new contract with the changes in red to be signed anytime between now and Dec 20<sup>th</sup> and effective January 15,



2018. Again let me know if they reflect the will of PIB and I can prepare, sign and pass along to you.

[35] That wage grid still included the level 16 from the first but had an alternative level 16 where the salaries at steps 1 and 3 were increased to \$151,568.03 and \$169,339.57, respectively.

[36] The attached contract for Mr. MacRae was for the period January 15, 2018 to January 15, 2023, at an hourly rate of \$79.75. The rate he was receiving at the time of his short-term contract was \$55 per hour.

[37] At 15:32 hours on November 27, 2017, Mr. MacRae sent another version of the wage grid. The only difference from the version sent earlier that day was that the alternative (higher) level 16 wages were incorporated and the original level 16 wages were removed.

[38] Beginning on November 29, 2017, Mr. MacRae and the plaintiff exchanged emails regarding the plaintiff communicating with the Chief about changes to his employment contract. That included dialogue regarding a draft email from the plaintiff to the Chief. In basic terms, the plaintiff was seeking Mr. MacRae's input on how he should express his desire to amend his contract. The two collaborated on the content of the plaintiff's efforts to convey to the Chief that changes should be made.

[39] On November 30, 2017, the plaintiff emailed Chief Eneas on the subject, with content being essentially identical to that which had been discussed by the plaintiff with Mr. MacRae. On December 4, 2017, the plaintiff sent an email to Mr. MacRae attaching the document that had been previously sent to the Chief noting, "In a brief conversation with Tabitha last week it was advised that this should be forwarded to yourself for follow-up as the Chief may not." Tabitha Eneas had served as interim band administrator prior to the plaintiff being hired and was under the plaintiff's supervision.

[40] Between December 4 and December 12, 2017, the plaintiff and Mr. MacRae continued to have dialogue regarding proposed changes to the plaintiff's contract of employment.

[41] On December 12, 2017, the plaintiff, relying on the authority of his position, caused the PIB to enter into the long-term contract of employment with Mr. MacRae.

[42] Thereafter, Mr. MacRae continued to pursue efforts to have the plaintiff's contract amended and kept the plaintiff informed of any dialogue he had on the subject. This included some emails from Mr. MacRae's personal email. There is no evidence that the Chief and Council were aware of these communications between Mr. MacRae and the plaintiff.

[43] After assuming his role, one of the requirements the plaintiff put in place for Chief and Council meetings was that a briefing summary for any agenda items be prepared and then submitted to him for vetting. The briefing summaries were then to be presented to Chief and Council for their review in advance of the meeting.

[44] For the 2018/2019 budget, the input from department managers included the plaintiff as manager of the administration department. The plaintiff had additional broader involvement as the band administrator, although there is some conflicting evidence as to its extent of his role. I will address that in my analysis below.

[45] For the 2018/2019 fiscal year, the presentation of the budget to the FAC occurred over a two-day meeting on February 8 and 9, 2018. The plaintiff attended at least portions of both days of that meeting although there is some dispute over how much of the meeting he may have been absent for. Included within the administration department budget was a line item number 72500 referred to as "Miscellaneous/Contingency – Salary Bump Ups" with an appropriation of \$100,000. There is dispute as to what this appropriation could be used for.

[46] The Chief and Council had a meeting scheduled for February 20, 2018, at which time it was intended that a motion for the proposed changes or enhancements to the plaintiff's contract of employment would be addressed. Those proposed

changes included a pay increase to \$93.08 per hour (equivalent to \$169,399.57 or level 16 of step 3 on the wage grid being developed) and removal of the probationary period.

[47] Initially, Mr. Benson had directed that Julia Barber prepare the brief for that motion. Ms. Barber served as the PIB Council administrator. Mr. MacRae intervened indicating in an email to Mr. Benson that because Ms. Barber reported to the plaintiff, she would be in a conflict. Mr. MacRae then proceeded to prepare the brief on the motion for that meeting. When Mr. MacRae sent the brief to Mr. Benson, he advised, “Brent and Julia will need to leave the room for this piece.”

[48] Mr. MacRae provided a draft briefing summary to the plaintiff on February 16, 2018.

[49] At the February 20, 2018 Chief and Council meeting, a portion of the suggested changes to the plaintiff’s contract were approved and other proposed changes were put over to the next meeting scheduled for March 5, 2018. The latter included the proposed increase in pay. The Chief and Council sought, among other things, “support for the recommended wage increase” and an outline of a management plan. The changes that were approved included the removal of the probationary period.

[50] For the March 5, 2018 meeting, the plaintiff prepared a memo in response to the request for a management plan. It included the following:

Outlined below are parts of the management plan targets for Administration under the direction of the Band Administrator and their completion requires certain governance undertakings, exercises and formal acknowledgement of delegated authorities to administration. There is also the need for support from the PIB government in fulfilling priorities that are based upon commitment to the PIB governments annual forecast and plans. It is hoped that through collaboration on activities that goals will be achieved and effectively communicated.

...

3. New Wage Grid - Preparation for October 2018 Budget Adjustment
  - will reduce current 13 wage grids to one with levels and steps;
  - will provide for transparent and fair wage classifications;

- will require annual COLA to remain competitive and provide for staff growth;
- will reflect a competitive position for all PIB positions
- PIB entities will be encouraged to adopt reducing position competition between PIB and its entities.

[51] There was no mention of a proposed effective date for the new wage grid.

[52] On February 28, 2018, the plaintiff sent an email to Mr. MacRae as follows:

Hello,

Regarding the March 5, Council meeting, is there a presumption that a package is going to be presented? If so is it to approve the BA \$, or should we push the wage scale application?

The Work plan could be submitted on its own...

[53] On the same date, Mr. MacRae sent another email to the plaintiff attaching comparative wage information closing with the sentence, "Will wait now for your input [smiley emoji]".

[54] The motion was tabled at the March 5 meeting and was then to be before Chief and Council at their next meeting on March 20, 2018.

[55] At the March 20, 2018 Chief and Council meeting and *in camera*, the balance of the changes to his employment contract were approved. These are described in the ASF as follows:

1. PIB CC agrees to confirm the Band Administrator to the position of PIB Chief Administrative Officer (CAO), retaining all duties as identified in the FAL policies under Band Administrator, effective January 8, 2018;
2. PIB CC and the CAO agree to a new annual salary of \$169,399.67;
3. PIB CC and the CAO adopt the proposed Wage Grid.
4. PIB CC reserves the right to enter into discussions with the CEO regarding undertaking additional tasks for PIB CC as time and capacity allows.
5. PIB CC and the CAO agree to stringent adherence to an annual performance review process.

[56] As noted, the briefing package that had been presented to Council was silent with respect to the retroactivity of any proposed changes. The Chief and Council never specifically discussed or considered that topic.

[57] Also approved *in camera* was the revised proposed wage grid where level 16 step three was \$169,399.67.

[58] The budget that had been reviewed and recommended by the FAC on February 8 and 9, 2018, was approved in the regular portion of that March 20, 2018 meeting. The document presented to Chief and Council consisted of an amalgamation of departmental budgets without the line by line details for each department.

[59] On March 26, 2018, the PIB authorized the increase to the plaintiff's remuneration, specified an effective date of January 2018, and specifically identified that retroactive amounts were to be determined by payroll. This was done administratively and flowed from the March 20, 2018 Chief and Council resolution but the specific process of how it was generated is not clear from the evidence. It resulted in the plaintiff receiving \$17,067.60 for retroactive pay.

[60] On March 29, 2018, Mr. MacRae emailed the plaintiff information regarding the contract amendments.

[61] The CFO was away on holidays at the time of the March 20, 2018 Chief and Council meeting. She was not aware prior to her departure on holidays that changes to the plaintiff's employment contract were being proposed or pursued by Mr. MacRae and the plaintiff. The line 72500 \$100,000 allowance for miscellaneous/wage bump-ups in the budget was not put in place by her in anticipation of a retroactive increase to the plaintiff's salary.

[62] After the CFO returned from holidays, she communicated to the plaintiff that she had concern that a number of items dealt with at the March 20, 2018 Chief and Council meeting were not included in the approved budget, including the wage grid and the plaintiff's wage increase including the retroactivity.

[63] The CFO sought unsuccessfully to address her concerns with the plaintiff, Mr. MacRae and the Chief and Council. This included an effort to do so at the Chief and Council meeting on April 17, 2018.

[64] On April 19, 2018, the CFO provided her resignation letter to the plaintiff.

[65] The Chief requested a report from the plaintiff on the CFO's resignation. The plaintiff then sent an email to Mr. MacRae which provided his views. The email subject line indicated, "Draft on Barb Issue". That email essentially became the report provided to the Chief and Council on April 24, 2018, regarding the resignation of the CFO.

[66] On April 23, 2018, Chief Eneas and others of the PIB Council met with the CFO at a restaurant where the CFO shared the concerns she had about the amendments to the plaintiff's contract and the budget. That prompted the Chief to seek a further report from the plaintiff on the CFO's resignation.

[67] On May 1, 2018, the plaintiff emailed to the Chief and Council a response to the request for a report.

[68] On May 3, 2018, the plaintiff forwarded to his personal email an email thread referencing a development project of PIBDC with which the PIB was associated.

[69] The Chief and Council held a meeting on May 4, 2018. The plaintiff was advised that he would be called into the meeting at some point to address the Chief and Council. The plaintiff left the Band office in the early afternoon. At approximately 15:30, Chief and Council checked the Band office to invite the plaintiff to attend the meeting. On determining he was not there the meeting continued.

[70] At 6:05 pm the meeting was continuing and Chief Eneas sent a text to the plaintiff seeking his attendance at the Band office. When the plaintiff received the text, he responded that he was with his daughter shopping, at which point the Chief informed the plaintiff that he would be at the Band offices at 8:00 am on the following

Monday to meet the plaintiff. Chief and Council continued and approved a motion to terminate the plaintiff for just cause.

[71] On May 4, 2018, at 6:53 pm, the plaintiff emailed to his personal email address documents associated with the PIB and PIBDC. Additional documents were forwarded by the plaintiff to his personal email address at 7:04 pm that day.

[72] The plaintiff was informed of his termination on May 7, 2018, when he met the Chief and a councillor at the Band offices. At that time, he was provided with a termination letter dated May 4, 2018. That letter stated:

Brent Ryan-Lewis

I write with respect to your earlier advice to Council that your recent salary increase was accounted for in the approved budget. Council has since learned that your salary increase was in fact not in the approved budget.

Your advice to Council was intentionally misleading, and your conduct in orchestrating the increase in your salary, and providing yourself retroactive pay, is a fundamental breach of the terms of your employment with the Penticton Indian Band.

The Penticton Indian Band hereby terminates your employment, for cause, effectively immediately.

Be advised that all of your signing authority has been revoked.

Also note that all property belonging to the Penticton Indian Band, which includes but is not limited to all documents in electronic form, is to be returned to the Band administration office immediately.

[73] On June 3, the plaintiff sought to appeal the decision to terminate his employment. Counsel for the PIB responded, advising that the request for an appeal was refused.

[74] On June 20, 2018, Chief and Council dealt with a motion, which the FAC endorsed, to approve a new salary grid with immediate application of the grid for the CFO and CAO.

[75] On July 27, 2018, the PIB issued a press release regarding the counterclaim and response to plaintiff's notice of civil claim that had been filed. That press release referenced the allegations contained in those pleadings.

[76] In September 2018, Mr. Fries, a reporter with the *Penticton Herald*, received an anonymous package of documents and emails related to the PIB. On September 28, 2018, Mr. Fries engaged in an exchange of emails with the plaintiff where Mr. Fries was seeking authentication of some of the documents received in the anonymous package. The plaintiff agreed to Mr. Fries' request and did authenticate some of the documents.

[77] October 26, 2018, an anonymous individual emailed the Chief and Council, as well as Penticton area media outlets, with the subject line, "‘PIB’ the truth shall set you free’ ‘a good read’". Attached to that email were piecemeal sections of the FAL 2016. On December 26, 2018, Mr. Fries published in the *Penticton Herald* a news article entitled, "Leaked documents suggest PIB violated finance rules" and on December 27, a second article entitled, "Some PIB council meetings invalid, says whistleblower", and on December 28 published a third article entitled, "PIB chief dismisses financial concerns".

### **Issues and Analysis**

[78] The core issue is whether the defendant had just cause to terminate the plaintiff from his employment. Once that is determined, the specific suite of remaining issues to be determined can be identified.

#### **Just cause**

[79] The plaintiff summarizes the defendant's allegations of just cause in this way:

The Defendant terminated the Plaintiff on the basis of just cause. The just cause alleged by the Defendant distills down to three key claims:

- a. the Plaintiff colluded with the Defendant's Director of Human Resources to wrongfully gain a substantial increase to his remuneration which was a breach of his fiduciary duties;
- b. the Plaintiff misled the Defendant's Chief and Council about the proposed wage grid and amendments to his own contract being "in the budget" which was both a breach of fiduciary duty and a fraudulent misrepresentation; and
- c. the Plaintiff misled Chief and Council when asked to provide further information relating to the resignation of the Defendant's



Chief Financial Officer leading to an irreparable breakdown of the trust relationship.

The Defendant has also pleaded after acquired cause on the basis that the Plaintiff breached his duty of confidentiality by distributing confidential information belonging to the Defendant after the termination of his employment.

...

However, this trial really boils down to two simple questions:

- a. Did Mr. Ryan-Lewis intentionally mislead Chief and Council on March 20, 2018? and
- b. If so, did that dishonesty rise to the level of just cause at law?

[80] The defendant summarizes the issues on just cause in greater detail in this way:

1. This trial comes down to one question: Did PIB have just cause to lose faith that the plaintiff, Brent Ryan-Lewis, would serve the PIB honestly and loyally? The evidence shows conclusively that the answer is yes. The result is that PIB was entitled, and indeed its Council was duty bound, to dismiss Mr. Ryan-Lewis for cause.
2. Mr. Ryan-Lewis was the most senior non-elected official in PIB. Trust and loyalty were required from him, more than anyone. The evidence at this trial established that Mr. Ryan-Lewis was guilty of five transgressions, each of which was an independently sufficient cause for PIB to lose trust and faith in him.

[Note: I have added in bold a caption for each]

- (a) Mr. Ryan-Lewis acted in a position of conflict between his self-interest (in obtaining a higher wage) and his duty to exercise judgment in the interest of PIB (about how to meet PIB's need for long-term human resource leadership). At the same time that Mr. Ryan-Lewis's duty required him to decide whether to commit PIB to paying for Mr. Macrae's services at vastly increased cost (and correspondingly greater benefit to Mr. Macrae), Mr. Macrae invited Mr. Ryan-Lewis's input into the wage level for his own position that was to be recommended to Council and lobbied PIB to amend Mr. Ryan-Lewis's contract to pay him a higher wage. Mr. Ryan-Lewis failed to disclose and avoid the manifest conflict inherent in this opportunity for he and Mr. Macrae to simultaneously exercise reciprocal power over the other's self-interest at PIB's expense. **[Conflict of interest in developing the motions for the wage grid and amendments to the plaintiff's employment contract]**
- (b) Mr. Ryan-Lewis actively deceived PIB's chief and council ("Chief and Council") by falsely representing that a new wage grid and his proposed wage increase had been recommended for approval by PIB's Financial and Audit Committee ("FAC") and funded in PIB's

2018/2019 budget previously approved by Chief and Council;  
**[Fraudulent misrepresentations at March 20, 2018 Council meeting]**

(c) Mr. Ryan-Lewis acted a position of conflict between his self-interest (in being paid his retroactive wage increase (“Retro-Pay”) approved by council) and his duty to follow PIB’s Financial Administration Law (“FAL”) and expenditure control policies (as they related to payment of unbudgeted expenditures). At the same time that Mr. Ryan-Lewis’s duty required him to prevent payment of unbudgeted expenditures, he authorized and directed payment of his retroactive wage increase with wilful blindness to the fact that there was no budget allocation to pay it. **[Conflict of interest and breach of FAL 2016 in receiving the retroactive pay]**

(d) When payment of Mr. Ryan-Lewis’s retroactive wage increase caused a cash flow crisis, Mr. Ryan-Lewis attempted to cover-up his wrongdoing by blocking PIB’s Chief Financial Officer (“CFO”) when she attempted to learn what had happened. When Mr. Ryan-Lewis’s stonewalling pushed the CFO to resign, he actively concealed the reason for resignation from Chief and Council to protect himself **[Conduct toward CFO following March 20 Council meeting]**; and

(e) Anticipating that his misconduct would be discovered, Mr. Ryan-Lewis in his last days at PIB privately collected PIB’s confidential information with the disloyal intention of using it to embarrass Chief and Council in order to advance his private interests.**[Breach of confidentiality]**

[81] I will use my captions from the above for the structure of my analysis.

[82] One key assertion of the defendant that is not in dispute is the existence of a fiduciary relationship between the plaintiff and defendant. The plaintiff acknowledges his fiduciary relationship in his reply to counterclaim.

[83] In *Can. Aero v. O’Malley*, [1974] S.C.R. 592, the Supreme Court of Canada noted a fiduciary employee has duties of loyalty, honesty, candour and scrupulous avoidance of actual and potential conflicts of interest (p. 610).

[84] More recently, in *Louie v. Louie*, 2015 BCCA 247, Madam Justice Newbury stated as follows:

[23] I start with the two most fundamental and long standing obligations of fiduciaries – the “no conflict” rule and the “no profit” rule. These have been stated on many occasions over several centuries, but this passage from the judgment of the High Court of Australia in *Chan v. Zacharia* (1984) 154 C.L.R. 178, summarizes the historic approach succinctly:

The first is that which appropriates for the benefit of the person to whom the fiduciary is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. ... [T]he two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. [At 198-9.]

(Quoted with approval by the majority in *Strother v. 3464920 Canada Inc.* 2007 SCC 24 at para. 75; see also the discussion in L.I. Rotman, *Fiduciary Law* (2005) at ch. 6.) An even more succinct statement may be found in the words of Lord Herschell in *Bray v. Ford* [1896] AC 44 (H.L.): “It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.” (At 51.)

...

[26] As far as the “no conflict” rule is concerned, I have noted the “prophylactic” approach enunciated in cases such as *Bray v. Ford* and *Phipps v. Boardman* [1967] 2 A.C. 46 (H.L.). Under this rule, the subjective motivations of the fiduciary, the absence of actual harm to the beneficiary, and even whether the fiduciary in fact profited, are irrelevant. As Rotman, *supra*, states:

[The] objective standard of assessment does not concern itself with matters such as fiduciaries’ subjective motivations for their actions, whether they have acted in good or bad faith, if beneficiaries have suffered harm or loss, or whether the beneficiaries have earned profit from the actions in question. Fiduciaries’ subjective motivations may only come into play in determining appropriate measures of relief for breaches of fiduciary duty. [At 303.]

This approach has been applied by Canadian courts: see, e.g., the Court’s endorsement of the “strict ethic” in *Canadian Aero Service Ltd. v. O’Malley* [1974] S.C.R. 592 at 607, *per* Laskin J., as he then was; see also *Cdn. Metals Exploration Ltd. v. Wiese* 2007 BCCA 318 at para. 20.

[85] As noted in *Dunsmuir v. Royal Group, Inc.*, 2017 ONSC 4391 aff’d 2018 ONCA 773, a fiduciary also has a positive duty of disclosure:

75 ... It is no defence to a mandatory disclosure obligation to say that the people to whom a duty to disclose is owed ought to have figured it out for themselves. That just negates the duty itself.

...

147 An even more pointed statement of the strictness of the duty of full disclosure of conflicts of interest by fiduciaries was made by Arnup JA for the Court of Appeal in *Advanced Realty Funding Corp. v. Bannink*, 1979 CanLII 1681 (ON CA) at paras. 17 and 18:

So strict is the duty of disclosure that it has been said it is not enough to give notice to the principal that there is another commission, leaving the principal to inquire what it is and how much: *Fullwood v. Hurley*, [1928] 1 K.B. 498, per Scrutton, L.J., at pp. 503-4. There must be the "fullest disclosure" and an informed consent by the principal: *Anglo-African Merchants Ltd. et al. v. Bayley et al.*, [1970] 1 Q.B. 311 at p. 322.

Applying these principles to the present case, I am of the view that the plaintiff has not satisfied the onus upon it of showing full and complete disclosure to the defendant of the fact that it was going to be paid a finder's fee and how much that fee was. The plaintiff is, therefore, disentitled from receiving any remuneration from acting in the transaction of finding the defendant an acceptable mortgage. **On the authorities, the Court does not engage in speculation as to what the principal might have done if disclosure had been made, nor is it an essential part of the relevant principle that there must have been detriment to the principal as a result of the non-disclosure.** [Emphasis in original.]

[86] Included within what the Supreme Court of Canada in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, identified as the "hallmarks" of an *ad hoc* fiduciary relationship is that the "beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power".

[87] In my view, this makes recognition of the specific circumstances of the defendant and the state of its governance at the relevant times particularly relevant. The Chief and Council, as an entity, was experiencing turmoil and was seeking to emerge from a difficult period.

[88] It is also not disputed that the defendant's finances were not well organized. This is the reason the defendant proceeded with quarterly budgeting in the 2017/2018 fiscal year.

[89] The plaintiff's own description of the defendant was that it was in a state of disarray.

[90] Partly as a result of its state of affairs and partly as a result of the makeup of the Council, the Chief and Council were heavily reliant on the plaintiff, the CFO and the FAC in making any financial decisions.

[91] The defendant was “peculiarly vulnerable”.

***Conflict of interest in developing the motions for the wage grid and amendments to the plaintiff’s employment contract***

[92] A conflict of interest occurs when there is a clash between personal interests and professional duties or responsibilities. To identify any conflict of interest, one must first identify what the relevant interests, duties and responsibilities were.

[93] The plaintiff’s professional duties and responsibilities were defined generically by the fact that he was a fiduciary. More specifically, they were defined by the terms of his employment contract. The employment contract in evidence notes the duties are appended as a schedule but that schedule is not included. The ASF states the plaintiff’s duties are set out in the job posting for his position which is in evidence. Under the heading “Duties/Responsibilities” that document includes:

- Is responsible for the overall management, supervision and administration of the Penticton Indian Band programs and services and ensuring that all Council directives, policies, laws and by-laws are followed in the day to day operations.
- Supervises and manages immediate Administration staff, including Executive Assistant, Office Manager, Membership Administrator, Human Resources Manager, and Records Manager.

[94] The ASF also sets out the following duties and responsibilities:

25. Mr. Ryan-Lewis further had duties and responsibilities under the FAL.
26. As PIB’s band administrator, Mr. Ryan-Lewis’s duties included the supervision and management of PIB’s senior administrative staff.
27. As PIB’s band administrator and pursuant to the terms of the Contract, Mr. Ryan-Lewis was required to carry out his duties with a high level of trust and ethics.
28. As PIB’s band administrator, Mr. Ryan-Lewis owed PIB a duty of loyalty that required him to avoid conflicts between his duties to PIB and his own self-interest.

29. As PIB’s band administrator, Mr. Ryan-Lewis owed PIB a duty to make full disclosure of his self-interest and involvement in matters where his self-interest was in actual or potential conflict with the interest of PIB.

[95] The contract also incorporated and required the plaintiff to adhere to the PIB personnel policy and the FAL 2016.

[96] From the plaintiff’s perspective, I accept that he subjectively believed that his employment contract should be amended including an increase in pay. That was his personal financial interest.

[97] It is not disputed that both Mr. MacRae and the plaintiff made contributions to the development of the proposed wage grid and the proposed amendments to the plaintiff’s contract of employment. In that sense, each were a product of their collaborative effort. Where the parties disagree is how to characterize that collaboration.

[98] Within the plaintiff’s argument are two paragraphs that encapsulate his argument on this issue:

345. With respect to the claims that Mr. Ryan-Lewis was in breach of his fiduciary duties by colluding with Mr. MacRae to obtain an increased was for himself, it is submitted that essentially this allegation distills down to this: as a fiduciary Mr. Ryan-Lewis could not negotiate for a wage increase for himself.

. . .

351. In the case at bar Mr. Ryan-Lewis followed what can only be described as best practice for a fiduciary who wishes to re-negotiate his own contract. That sequence of events was as follows:

- a. he approached the Chief about making changes to his contract;
- b. after receiving no response from the Chief he approached the Director of HR;
- c. the Director of HR worked with Mr. Ryan-Lewis to develop a proposal to change Mr. Ryan-Lewis’ terms of employment;
- d. the communications between them were in the nature of Mr. MacRae acting as a liaison or conduit between Mr. Ryan-Lewis and the PIB for a contract negotiation;
- e. Mr. MacRae presented the proposal for amendments to the BA Contract to Chief and Council for consideration;

- f. Chief and Council asked for additional information to support the requested increase in pay and that information was provided; and
- g. Chief and Council exercised its decision making authority to approve the increase to Mr. Ryan-Lewis' salary.

[99] In my view, there are difficulties with the plaintiff's argument. Obviously, the plaintiff was not prohibited from pursuing enhancements to his employment contract. It is how he went about doing it that requires scrutiny.

[100] In the negotiation of his contract of employment, the plaintiff dealt, at least in part, with Ms. Falkus who was, at the time, the HR manager for the defendant. That was an arm's length negotiation that led to his contract of employment.

[101] When the plaintiff began his employment, he learned that Ms. Falkus had taken a medical leave. The plaintiff was familiar with Mr. MacRae. That prompted the plaintiff, on September 29, 2017, to reach out to Mr. MacRae, advising that the defendant was "in immediate need of HR support and expertise" and inquiring of Mr. MacRae's availability and interest in assisting.

[102] That communication led to the plaintiff, on behalf of the defendant, entering into a short-term agreement with Mr. MacRae beginning on October 9, 2017 and ending February 2, 2018.

[103] At the time the agreement was struck between the plaintiff on behalf of the defendant and Mr. MacRae, Mr. MacRae sent an email dated October 4, 2017, which included the following:

Good morning Brent,

This e-mail is to advise my understanding that while the role as Human Resources Specialist would commence as a contract to February 2, 2018 and under a contract hourly rate, it is understood that if and when the role should move to a full time staff position, it would be placed at the current PIB wage grid level of approximately \$90,000.

It is also understood that there is disparity with the current PIB wage grid requiring a professional HR review. Apart from an anticipated increase in the PIB wage grid, additional responsibilities are to be added to the Human Resources senior role suggesting an improved wage level upon completion and acceptance of the wage grid review and recommendation.

Trust this clarity works Brent allowing you and I to sign off on the contract and begin the HR work.

Thanks, and I will watch for paperwork from you.

[104] Thereafter, Mr. McCrae began the process of developing a new classification and salary grid or wage grid for the defendant. That wage grid included various levels of employees up to and including level 16.

[105] Concurrently, the plaintiff had begun efforts to alter his employment terms through communications with the Chief of the defendant.

[106] What followed were coincidental efforts by the plaintiff to modify the terms of his employment contract in consultation with Mr. MacRae while Mr. MacRae developed a wage grid proposal in consultation with the plaintiff that would substantially increase the pay rates for the senior human resources position and the plaintiff's position at level 16.

[107] The email dated November 27, 2017, referred to in para. 34 above is at least prima facie evidence of conflict. For ease of reference it stated as follows:

Hi Brent,

As discussed:

1. PIB Wage Grid 2 that clearly shows an enhanced Level 16 to adequately reflect the Band Administrator placement. It can replace the current Level 16. Let me know your thoughts.
2. I have also attached my new contract with the changes in red to be signed anytime between now and Dec 20<sup>th</sup> and effective January 15, 2018. Again let me know if they reflect the will of PIB and I can prepare, sign and pass along to you.

[108] The contract referred to for Mr. MacRae increased his hourly rate from \$55 per hour to \$79.75 per hour, a rate in excess of that contained within the existing grid for senior directors and at the top step for level 15 under the newly developed wage grid.



[109] As noted in paras. 31 and 35 above, the wage grid referred to would substantially increase the plaintiff's pay even beyond the level first put forward by Mr. MacRae.

[110] In cross-examination of the plaintiff, the question of how and why the new proposed wage rate included a higher level 16 salary was dealt with in the following question and answer sequence:

Q: So I'll suggest to you the reason why the wage grid that came to on the afternoon of November 27th and the higher level 16 wage scale was that you told DM to use the higher level 16 wage scale?

A: Presumably.

Q: And so, you understood that by DM [Mr. MacRae] sending you this email, he was showing you, if not the final draft, the next draft of the wage grid that in accordance with your direction used the higher level 16 wage scale, correct?

A: I presume so.

...

Q: You agree you read Nov 27 email from Mr. Macrae and knew he had followed your direction to implement the higher level 16 wage scale before you asked Mr. Macrae on November 29th to comment on text of the draft email you were writing to Chief Eneas?

Q: Again, this is a draft, so correct.

[111] It was that wage grid with the increased salary levels at level 16 that was ultimately presented to the Chief and Council at the March 20, 2018 meeting.

[112] Initially the plaintiff's efforts to obtain improvements to his contract was through direct discussion but when he perceived no action was resulting, he sent an email dated November 30, 2017. As the cross-examination noted above indicates, this email was the product of consultation between the plaintiff and Mr. MacRae. The plaintiff had sent a draft of the proposed email to Mr. MacRae for comment, who replied with some suggested changes. The email said this:

Good day Chief,

Further to the brief introduction on my employment arrangement we need to clarify a few things going forward as the work/job that was laid out to me has turned out to be completely different with greater expectations that required results prior to completing the work I was hired for.

In short I desire to have my agreement concluded ASAP and not at the end of the 6 month period, preferable before the upcoming break so I can set plans to relocate my family to the area. It is hope you understand the importance of them and the support they do provide for my personal being outside of work hours.

As an FYI, a 6 month probation period is not an appropriate gauge on performance, especially with senior positions. I have confirmed this understanding with our new HR Director who advises me on a 3 – 5 year term with annual reviews. The role of Band Administrator is central to the PIB government in its support to CC and all of the other government entities. Effective change and recognizable project outcome expectations cannot be accomplished in a first 6 months in such a senior role.

I am confident Tabitha and Dexter will confirm these facts for you and you may wish to have some discussions to assist with clarity with either or both of them.

I will leave this in your hands but urge you work with me on a plan moving forward that suits the needs of PIB and myself.

[113] The plaintiff confirmed that he expected the Chief would consult Mr. MacRae for “independent professional guidance on how to address [his] request”.

[114] The Chief did not provide a response satisfactory to the plaintiff. The Chief testified that it was not something he had the capacity to address independently as any such decisions would have to be made by the Chief and Council.

[115] On December 4, 2017, the plaintiff and Mr. MacRae exchanged emails on the subject of the plaintiff’s contract changes with Mr. MacRae indicating:

Hi Brent,

Ok. I will e-mail him on Wed when back in Penticton so he can meet up right away. I will suggest we follow-up on your email in person and will have a draft addendum to your current contract ready for him.

How goes the battle otherwise?

Cheers! Dexter.

[116] On December 6, Mr. MacRae emailed the plaintiff and indicated his proposed course of action including endeavouring to meet with the Chief to recommend he “take action” on the plaintiff’s contract changes and that he would be advising “that the current annual salary for the position is seriously inadequate”.

[117] On December 11, Mr. MacRae sent another email to the plaintiff attaching a draft email to the Chief stating “Here are the changes discussed this am.” The plaintiff responded early the next morning (December 12) stating, “Comments below – and possible title change in amending doc. Just seeing a stigma with CEO title. . . .” The document contained some text in red and some highlighted in yellow that showed the changes made “per [their] discussion” and those suggested by the plaintiff.

[118] In addition, the plaintiff on behalf of the defendant, did enter into the long-term contract with Mr. MacRae. This was signed on December 12, 2017. The plaintiff did so based on his authority as the band administrator and without specific approval or consideration of the Chief and Council and without posting the position.

[119] The plaintiff was aware of the personnel policy of the defendant, including its recruitment process and specifically items 7.1, 7.2, 8.1, 8.2 and 8.3:

#### **7.0 Job Postings**

7.1 Subject to sections 8.2 and 8.3, **all management and staff positions will be posted concurrently internally and externally for 10 working days.**

7.2 All job postings will

- a) be displayed on PIB bulletin boards for 10 working days and will be published in the PIB Newsletter;
- b) may be advertised in appropriate media for 10 working days;
- c) be advertised further as directed by the Administrator;
- d) be administered by the Administrator;
- e) comply with this Policy; and
- f) include: required qualifications, job duties, date of posting, application deadlines, anticipated interview date(s), and any other relevant information as determined by the Administrator or Personnel Committee, including whether a criminal record check is required and whether the successful candidate must be bonded.

#### **8.0 Screening of Candidates**

8.1 After a job posting has closed, the applicants will be screened as follows:

- a) **the Program Manager and/or Administrator will:**

- i. **screen each application** to assess whether the applicant meets the minimum qualifications for the position; and
    - ii. forward all applications from qualified applicants to the Personnel Committee; and
  - b) **the Personnel Committee will review all applications from qualified candidates**, and will:
    - i. select the candidate(s) to be interviewed; or
    - ii. decide not to fill the position, if there are no qualified candidates.
- 8.2 The Administrator may decide to fill a term position of three months duration or less without going through the normal posting and selection process set out at Part 3.
- 8.3 The Administrator may laterally transfer an employee without going through the normal posting and selection process set out at Part 3.

[Emphasis added]

[120] The plaintiff's contract changes were first formally brought to Chief and Council at their February 20, 2018 meeting. As noted, Mr. MacRae prepared the briefing summary and provided it to the plaintiff. It introduces the motion in this way:

On December 13, 2017 HR addressed an important e-mail from the Band Administrator(BA) Brent Ryan-Lewis regarding his employment agreement. From a professional HR opinion, the important points raised were determined to require immediate attention and amendment to the BA's employment agreement in order to ensure the continued momentum that is currently being experienced by the PIB Administration under his leadership. An amendment was provided.

[121] When Mr. MacRae was hired he became the plaintiff's subordinate. By directing his subordinate to prepare a wage grid that included his own pay scale and the pay for the HR manager position for which Mr. MacRae had indicated an interest, he created the environment of a conflict of interest. When he decided to approach Mr. MacRae to develop a strategy to pursue a pay increase and other enhancements to his own contract, he added to that environment.

[122] When Mr. MacRae was negotiating terms under which he would move from a short-term contract to a long term contract with the defendant at a substantially increased pay the conflict should have been apparent. For the negotiation, the

plaintiff was the sole point of contact and acted outside of the requirements of the personnel policy of the defendant.

[123] This was further aggravated by the effort to portray Mr. MacRae’s promotion of the changes to the plaintiff’s terms of employment as his own independent professional assessment of the band administrator position. The plaintiff’s argument referenced above included the propositions that Mr. MacRae “worked with the plaintiff to develop a proposal to change the plaintiff’s terms of employment” and that “the communications between them were in the nature of MacRae acting as a liaison or conduit between the plaintiff and the PIB for a contract negotiation”. In my view, the latter portion is entirely inaccurate.

[124] There is no evidence the plaintiff made the Chief and Council aware that these were not Mr. MacRae’s independent recommendations but were actually the plaintiff’s demands or, at a minimum, his wish list. Indeed the documentary evidence in the form of email and briefing summary all support the conclusion that this was hidden from Chief and Council. Even if Mr. MacRae believed the proposed amendments to be reasonable, they were not the product of his independent assessment.

[125] Lest there be any question of this or that it was deliberate, the plaintiff confirmed it in his cross-examination that his objective was to convey the impression that Mr. MacRae was providing Chief and Council independent advice. His confirmation came reluctantly and only after initially suggesting otherwise. His evidence ultimately was this:

Q: And so its true, that you and Mr. MacRae were attempting to convey to Chief Eneas the impression that you and Mr. Macrae were not working together on a solution to your concern but rather were only touching each other in terms of seeking process, correct ?

A: Correct.

[126] The plaintiff suggests that the defence arguments based on fiduciary duties effectively mean that “as a fiduciary Mr. Ryan-Lewis could not negotiate for a wage increase for himself”. I disagree. His obligations meant only that, in pursuing an

increase he had to avoid conflicts and be transparent and disclose relevant facts to the defendant.

[127] One can conceive of steps that could have altered the environment and removed the conflict or nullified its effect but none were taken.

[128] The plaintiff had the ability to control the agenda of the Chief and Council and could easily have brought the issue before them to obtain their direction on a process if he felt the Chief was not being appropriately responsive.

[129] In *Sonic Holdings Ltd. v. Savage*, 2021 BCCA 441, the Court of Appeal upheld the trial judge's decision and endorsed her observations regarding a corporate director's duty to avoid conflicts. Of particular relevance to the circumstances, here it was noted that "an important corollary of this principle is the obligation of directors to disclose material information and obtain informed consent where their own interests may conflict with their duty to the corporation", citing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 148.

[130] The plaintiff's summary of the sequence of events argues he followed "best practice for a fiduciary who wishes to re-negotiate his own contract." Best practices must be founded on the law and the law is clear regarding avoidance of conflicts of interest and making full disclosure.

[131] Having determined to approach the issue through his subordinate HR manager, he ought to have separated that function from the coincidental negotiation of a long-term contract for Mr. MacRae. Further, and at a minimum, he should have taken steps to disclose to Chief and Council at or before any presentation by Mr. MacRae of the wage grid and the proposed contract changes, the role he had in the development of each of those.

[132] The plaintiff placed himself in a conflict and deliberately failed to disclose this to the defendant.

[133] In argument, the plaintiff points out that the defendant did not call Mr. MacRae as a witness despite his being identified as a defence witness. The issue was not raised during the course of the evidence. The plaintiff's argument did not develop an argument for an adverse inference or other conclusion that the plaintiff was asking the Court to make.

[134] There was no evidence as to why Mr. MacRae was not called. I have no basis to comment on Mr. MacRae's availability to either party to call as a witness.

[135] The law in this area has been summarized by our Court of Appeal in two decisions, *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at paras. 1-5, and *Thomasson v. Moeller*, 2016 BCCA 14. In *Thomasson*, the Court noted at para. 35:

[35] The law relevant to adverse inferences was helpfully summarized in *Zawadski v. Calimoso*, 2011 BCSC 45, where Mr. Justice Voith stated:

[149] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound... The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established...

[136] As the authorities make clear, it is of no consequence to a finding of breach of fiduciary duty that the plaintiff subjectively believed he was entitled to enhancements of his terms of employment. Similarly, whether the salary recommendation was justified or reasonable, does not determine if the plaintiff did or did not act in a conflict of interest or breach his fiduciary duty of disclosure.

#### ***Fraudulent misrepresentations at March 20, 2018 Council meeting***

[137] The defendant's position is that the plaintiff made fraudulent representations to the Chief and Council related to the proposed wage grid and amendments to his contract. Its amended response to civil claim ("ARTCC") labels four specific representations leading up to and in the March 20, 2018 meeting, and says each was fraudulent. For simplicity, I will adopt those labels. I summarize them as follows:

1. The comparative wage information included in the submission of the briefing materials sent to Chief and Council by the plaintiff on March 16 for the March 20 meeting was false and misleading (the “Comparative Wage Representation”);
2. Comments by the plaintiff to Councillor Phillips just before the March 20 meeting conveyed that adoption of the wage grid would result in many staff receiving a raise and that those had been built into the 2018/2019 budget (the “Phillip Representation”);
3. Comments made during the *in camera* portion of the March 20 meeting repeating the Phillip Representation that there were funds in the 2018/2019 budget to cover the wage increases and the contract amendments and that the contract amendments and wage grid had been reviewed and approved by the FAC and CFO (the “*In Camera* Representations”); and
4. The plaintiff’s “statements and conduct” in the March 20 meeting created a false impression that PIB staff and advisors had concluded that PIB could afford to implement the wage grid (the “Affordability Representation”).

[138] The ARTCC also alleges that in making the representations, the plaintiff breached his good-faith duties and fiduciary duties set out above.

[139] The law is well settled:

17. In order to establish a claim in fraudulent misrepresentation, the plaintiff must prove that:
  - (a) the defendant made a representation of fact to the plaintiff;
  - (b) the representation was, in fact, false;
  - (c) the defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
  - (d) the defendant intended the plaintiff to act on the representation;and



- (e) the plaintiff relied upon the false representation and thereby suffered a detriment.

(See *Wang v. Shao*, 2018 BCSC 377 at para. 196; *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25).

[140] The first and foundational component of assessing whether any fraudulent misrepresentation has been established is determining what representations of fact were made by the plaintiff. The relevant evidence includes documents presented at or for the March 20 meeting, the *viva voce* evidence of those present at the meeting, minutes and recordings of the meeting and the band council resolutions (“BCR(s)”) that resulted.

[141] When the issue of the plaintiff’s contract was scheduled for a February 20, 2018 meeting, Mr. MacRae indicated in an email to Mr. Benson, “Brent and Julia will need to leave the room for this piece. Julia reports to Brent and there would be a conflict if she stays” This provides at least some support for a conclusion that the plaintiff may have been asked to step out of the meeting on March 20 for the *in camera* dealings with his contract issue but, as is discussed below, the evidence on the subject is not precise.

[142] In the email from the plaintiff to Council members dated March 16, 2018, there were a number of documents distributed for the meeting. One was the management plan referred to in para. 50 above with its reference to the new wage grid.

[143] Also attached was a collection of materials referred to as “Wage Information Support Docs”. These were in a response to a request from Council at the February 20, 2018 meeting for documentation supporting the proposed salary in the plaintiff’s contract amendment.

[144] Julia Barber was then a human resources coordinator for the defendant. Ms. Barber prepared the agenda for the meeting and the minutes of the meeting including the *in camera* portions. Neither are detailed. The minutes of the *in camera*

meeting show the plaintiff as being in attendance and do not contain any indication of the plaintiff leaving at any point. They do not purport to record anything said by any of the witnesses during the course of the March 20 meeting beyond identifying motioners and seconders.

[145] There is audio recording of the regular meeting. It is not transcribed and is over four hours in length. The parties took me to only very limited excerpts of this recording. For the most part, I am unable to identify speakers. As the meeting was going *in camera*, there is nothing discernible to indicate if and when the plaintiff exited the room.

[146] There is no recording of the *in-camera* portion of the meeting.

[147] The budget was dealt with and approved in the general open session of the meeting. The CFO was not present as she was on vacation at the time. The budget was presented by the FAC chair at the time, Murray Swales. The plaintiff made some additional comments on the subject but none were raised in the arguments of the parties as being relevant to the issues before me. Mr. Swales did not participate in the *in camera* portion of the meeting.

[148] In the BCR regarding the budget, there are several references to the role of the FAC:

. . .

**WHEREAS:** the Penticton Indian Band Program Managers presented their initial budgets and annual work plans to the Finance and Audit Committee (FAG) on February 8<sup>th</sup> and 9<sup>th</sup> 2018. The Finance and Audit Committee reviewed the detailed budgets and annual work plans;

. . .

**WHEREAS:** the Finance and Audit Committee reviewed the Trust Fund balances and expected contributions to be received the upcoming months;

**WHEREAS:** The Finance and Audit Committee has provided a copy of their meeting minutes to Chief and Council and have been received (attached) that provides additional detail related to their review and recommendations regarding the 2018-2019 initial budgets;

**WHEREAS:** The Finance and Audit Committee recommends the Chief and Council:

1. Approve the initial operating budget as presented to them on March 20, 2018.
2. Approve the transfer of up to \$1,714,162 from the Revenue Trust Account, and that the Chief Financial Officer of the Penticton Indian Band be authorized to transfer these funds from the Revenue Trust account to the Band's Operating Account and,
3. Approve the transfer of \$468,759 from the Capital Trust Account, and that the Chief Financial Officer of the Penticton Indian Band be authorized to transfer these funds from the Capital Trust account to the Band's operating account to offset the anticipated deficit.

[149] The draft resolutions and BCRs dealing with the wage grid and changes to the plaintiff's contract contain no references to any involvement of the FAC or the CFO.

[150] At the March 20 meeting, both the wage grid and the plaintiff's contract were dealt with *in camera*. The minutes appear to reference a single motion by Councillor Tonasket to make the changes to the plaintiff's contract and adopt the wage grid.

[151] The *viva voce* evidence relevant to the alleged misrepresentations came from councillors Joan Phillip, Elliot Tonasket and Kyle Alec, the plaintiff and Ms. Barber. As previously noted, Mr. MacRae did not testify.

[152] The plaintiff acknowledges remaining in the *in camera* meeting for the discussion regarding the wage grid. He testified that Mr. MacRae was the primary presenter and that he provided "input". He was unsure of the scope but also believes he spoke to at least some portion of the management plan where it dealt with the wage grid.

[153] He says that he had exited the *in camera* meeting for the discussion regarding the changes to his employment contract. That, he understood, was presented by Mr. MacRae.

[154] In direct evidence he stated that he did not make any comments about the wage grid being included in the budget. Given its importance and for precision, I insert these excerpts of the plaintiff's cross-examination on the subject. There is no certified transcript so this is my own transcription from the DARS recording:

Robinson: Your evidence about the March 20, 2018 meeting, is that you do not recall any councillors raising whether there was money in the budget to pay for the new wage grid. Do you recall that?

Ryan-Lewis: I believe so.

Robinson: And to be clear, you do not recall councillors asking questions like, is the wage grid in the budget or is there money in the budget for the wage grid or is there money built into the budget for the wage grid. You don't recall any questions along those lines?

Ryan-Lewis: I cannot recall.

Robinson: Do you deny that any questions along those lines were asked?

Ryan-Lewis: I cannot recall.

Robinson: You cannot confirm or deny – or just no recollection?

Ryan-Lewis: No, I cannot – yeah – it's been a while.

Robinson: Do you recall Councillor Innes Pierre or anyone else for that matter in the March 20, 2018 – I'll start that question again. Do you recall Innes Pierre in the March 20, 2018 meeting asking any questions along those lines? That is, is the wage grid in the budget or is there money in the budget for the wage grid or is there money built into the budget for the wage grid?

Ryan-Lewis: If so I believe I would have responded with the amendment process due for October.

Robinson: Do you recall answering any questions like that to the effect of saying – there is money in the budget for it?

Ryan-Lewis: No, they may have interpreted that.

Robinson: Do you deny saying words to that effect?

Ryan-Lewis: I cannot recall.

Robinson: You cannot deny that you may have said words to that effect?

Ryan-Lewis: I cannot confirm.

Robinson: And you cannot deny.

Ryan-Lewis: Yea.

Robinson: Do you recall at any point in the March 20, 2018 meeting, any councillor asking questions about whether your wage had been recommended or approved by the FAC? Sorry, let me be more precise in that question. Do you recall any councillor

at any point in the March 20, 2018 meeting asking questions about whether your new wage, that is the wage increase brought about by the amendment to your employment agreement had been recommended or approved by the FAC?

Ryan-Lewis: I don't recall that. I believe if that question was there it was in the in camera session when I wasn't present. If there was that question.

Robinson: Do you deny hearing a question to that effect during the March 20, 2018 Chief and Council meeting at any point in camera or otherwise?

Ryan-Lewis: I cannot recall.

Robinson: And do you recall any councillor asking questions about whether the wage grid had been recommended or approved by the FAC?

Ryan-Lewis: No. I do recall questions about other agenda items for approval by council if those were included in the budget and if they are included in the budget that requires an FAC review.

...

Robinson: So the question I asked was, do you recall Joan Phillip asking a question along the lines of "has the wage grid been approved by FAC?" Do you deny answering in the affirmative to a question like that from Joan Phillip?

Ryan-Lewis: Again, I don't recall a direct question like that.

Robinson: My question was, do you deny answering in the affirmative to a question like the one I just stated from Joan Phillip?

Ryan-Lewis: Do I deny in the affirmative? Is that –

Robinson: Do you deny answering in the affirmative. That is, giving an answer like, Yes, it is there... Uh uhh. The question – the question I am suggesting was asked while you were present in the March 20, 2018 meeting, was "has the wage grid been approved by FAC?" And I'm asking you, can you deny answering a question like that in the affirmative?

Ryan-Lewis: I don't recall that. And again my response would have been to direction to the March 5 memo on the process – the upcoming process.

Robinson: Okay, so I take your evidence that it's unlikely in your view that you answered in the affirmative to that question because you believed it was clear that there was not FAC approval, or there could not be FAC approval because there was to be a budget process later on.

Ryan-Lewis: Correct.

Robinson: Do you recall answering in the affirmative to a question like, "has the wage grid been approved by FAC" or a question like it from Councillor Innes Pierre?

Ryan-Lewis: Besides – I don't recall.

Robinson: Do you recall saying to Joan Phillip before the start of the March 20, 2018 meeting, words to the effect that you had ensured all the raises were built into the budget when the wage grid was approved.

Ryan-Lewis: No.

Robinson: And do you deny saying those words or words like them to Joan Phillip?

Ryan-Lewis: Yes. That's what she may have interpreted, but those words were not said.

[155] The reference to the March 5 memo is, to my understanding of his testimony, a reference to the memo referred to in paras. 47, 138 and 148.

[156] Generally, Mr. Tonasket's testimony gave the impression that his recall of the specifics of the presentation of the wage grid and contract variation motions was not clear.

[157] He testified that "to my recollection I believe it was [the plaintiff]" that presented the wage grid to Council." He said the salary for the plaintiff stood out to him as it was substantially higher but he was unclear if that caught his attention during the wage grid presentation or the presentation in relation to the plaintiff's contract. Further, he testified that he "believed [he] asked [the plaintiff] if it had gone through the CFO and FAC" and that the plaintiff advised they had "signed off on it". He took this to mean the CFO and FAC "had vetted" the wage grid.

[158] He "vaguely" recalled the presentation as to the plaintiff's contract and "he believed if [he] was not mistaken" that Mr. MacRae did that presentation. He could not recall if the plaintiff said anything on the matter.

[159] He did recall the plaintiff leaving the meeting for at least part of this presentation and could not recall if he returned.

[160] Although the minutes show he motioned for acceptance of the contract changes and adoption of the wage grid motion, he did not recall that or anything about the sequence of the motions.

[161] Mr. Alec’s memory was also somewhat spotty as to the full details of the *in camera* meeting. Mr. Alec testified that the proposed wage grid motion was presented primarily by the plaintiff but Mr. MacRae participated by adding some information.

[162] His evidence in direct examination regarding how the amendments to the plaintiff’s contract were addressed was unclear. He said the discussion of the wage grid “transitioned” to discussion about the plaintiff’s proposed contract changes. He recalled one councillor asking if the wage grid and contract changes were approved. He testified that the plaintiff advised that the wage grid and contract amendments were approved in the new budget. He said that motions for amendments to the plaintiff’s contract and the wage grid were dealt with together and that the votes on the motions proceeded “back to back”. He testified that the plaintiff only left the meeting when asked to get the CFO but that he returned without her.

[163] In cross-examination however, he confirmed that the motion and vote regarding the wage grid was dealt with before dealing with the contract changes. When the motion regarding the plaintiff’s contract was dealt with, the plaintiff left and was not present for that or the vote on it.

[164] Ms. Phillip chaired the March 20, 2018 meeting in the Chief’s absence. She indicated that just as she was entering the meeting room she spoke with the plaintiff. She testified he was very excited and stated that the new proposed wages for all employees “were within the budget so they were affordable”. She went on to testify his exact words were, “I am really excited because all the employees’ raises are built into the budget.” She understood “built into the budget” to mean they had been vetted by the CFO and FAC for the 2018/2019 fiscal year. For full context, I note that the examination that generated this evidence evoked several clarifications and modifications when clarity was sought. This is the Phillip Representation relied on by the defendant.

[165] She testified that during the presentation of the budget in the regular meeting, the plaintiff stated that the wages in the wage grid were “in the budget”. In cross-

examination it was suggested she may be confusing what occurred in the regular meeting where the budget was discussed with the dialogue in the *in camera* portion of the meeting where the wage grid was discussed. She rejected that suggestion and stood by her evidence indicating the wage grid was a part of the budget discussion in the regular meeting.

[166] She indicated that during the *in camera* meeting, the wage grid was dealt with first. Both the plaintiff and Mr. MacRae were involved in the presentations regarding the wage grid. Her evidence was that the plaintiff again advised the wage grid salaries had been built into the budget and that it was affordable. She testified that he confirmed it had been vetted and was supported by the FAC. She understood the plaintiff to be referring to the upcoming budget for 2018/2019. Further, she testified that she asked and was told it was “up to AFOA standards”. The AFOA is the Aboriginal Financial Officers Association. There was no additional evidence about that organization and what those “standards” are. She further testified that Mr. MacRae and/or the plaintiff pointed to the plaintiff being at level 16 on the proposed wage grid but she did not clearly state which of them.

[167] She testified that after the plaintiff made some comments justifying the changes that were being proposed to his contract he left the room, after which Council had further dialogue and ultimately voted on the changes.

[168] Ms. Barber’s evidence was that she exited the *in camera* portion of the meeting dealing with the wage grid and the plaintiff’s employment contract. She indicated that she returned to the meeting when she was invited to do so and as Council were wrapping up their conversation on the two matters. She indicated that the plaintiff was present when she returned to the meeting. After her return, she recalls hearing one of the councillors ask the plaintiff if the wage grid and contract changes had been approved by the FAC, and that the plaintiff replied in the affirmative. She recalls another councillor asking if the wage grid including his pay increase was in the budget and the plaintiff responded that they were. She remained for the votes on both the contract and the wage grid.



[169] The task is to determine whether this evidence supports the conclusions the defendant urges upon the Court.

[170] The first element of fraudulent misrepresentation is that a representation of fact was made. Precision in finding what the plaintiff said is crucial. A witness's interpretation of what was said may or may not be accurate. Any inaccuracy in such an interpretation makes the assessment of whether the actual representation of fact was in fact false (the second element), or any of the remaining elements, challenging, if not impossible.

[171] Here there are inconsistencies among the witnesses who testified as to what the plaintiff said and the specific circumstances in which it was said. I will begin with the former.

[172] Limited to the critical representations attributed to the plaintiff, the evidence of each of the defence witnesses can be distilled to the following:

- a) Tonasket: When asked if the FAC and CFO had gone through the wage grid the plaintiff responded they had signed off on it;
- b) Alec: When one councillor asked if the wage grid and contract changes were approved, the plaintiff advised that the wage grid and contract amendments were approved in the new budget;
- c) Phillip: Before and during the open meeting, the plaintiff advised the wage grid was built into the budget and affordable. *In camera*, the plaintiff indicated the wage grid was built into the budget and affordable, that it had been vetted by and was supported by the FAC and was up to AFOA standards; and
- d) Barber: The wage grid and increase to the plaintiff's pay were approved by the FAC and they were in the budget.

[173] It is difficult to find a basis to prefer one version over the other. One can extract a consistent underlying message from the different versions: that the CFO

and FAC had reviewed and were supportive of the two motions before Council, and/or that the wage grid and the plaintiff's contract amendments were built into the budget.

[174] That such a course of reasoning is required signals shortcomings in the evidence as to what was specifically said. Can it be sufficient to conclude that the plaintiff said things that were interpreted by each of the councillors as satisfying them that there had been FAC and/or CFO endorsement of the wage grid and that it was provided for in the budget? It highlights the distinction between what was actually said and the interpretation of what was said.

[175] I must also consider the evidence of these witnesses in the context of the preponderance of the evidence.

[176] The proposition that the plaintiff said all the salaries in the wage grid were in the 2018/2019 budget does not align with other evidence.

[177] First, there is nothing in any of the communications between Mr. MacRae and the plaintiff that suggests that was their understanding or that they intended to convey that message.

[178] In addition, the memo of March 5 referred to above authored by the plaintiff to Chief and Council regarding the motion that was being presented suggests otherwise. It introduces the reference to the wage grid with the line "New Wage Grid - Preparation for October 2018 Budget Adjustment". As pointed out by the plaintiff in his testimony, the wage grid, once adopted, required a process of review and placement of each employee to a level and step within the grid. None of that work had been done. This supports the plaintiff's evidence that he was anticipating budget amendments once the review process was underway.

[179] While I accept that the wage grid had not been approved by the CFO or FAC, it had been the subject of considerable discussion prior to March 20, 2018. The CFO described that in her testimony as follows:

- Lefebvre: I'm going to move to the wage grid and I will bring up Schedule 63 in Exhibit 1.
- Do you recognize this document?
- Carpenter: Yes.
- Lefebvre: And what is this document?
- Carpenter: It is the wage grid that was being discussed for several months.
- Lefebvre: Being discussed by who?
- Carpenter: It was being discussed with the band administrator, Brent Ryan-Lewis, the HR Manager, Dexter MacRae, myself as the CFO and the Finance and Audit Committee were also aware of it.
- Lefebvre: Did you prepare this wage grid?
- Carpenter: No.
- Lefebvre: Did you have any involvement in, or input in the figures in this wage grid?
- Carpenter: No.
- Lefebvre: So what was your involvement or knowledge of this wage grid when it was being discussed?
- Carpenter: The knowledge that I had about this wage grid is, when Brent was hired and started work, PIB had a – we had a difficult time of hiring people and a lot of people said our wages were not, they weren't competitive and we would lose people in the jobs over salary cause they were too low. When Brent came on board, it was a discussion – uh, that he would speak about it and Dexter in HR would also speak about it because for us to be competitive, get the positions filled that we needed filled, we were going to have to increase wages to attract these people.
- Lefebvre: And, when you say he and Dexter would speak about it, was that speaking to you about the wage grid?
- Carpenter: They would speak to me about it. There were a lot of general discussions. I do also recall them speaking about it at - to FAC.
- Lefebvre: And when you recall that they spoke about a wage grid to, was – sorry, when they spoke to FAC was it about a wage grid generally, or was it about this wage grid?
- Carpenter: It was, it may have been both. I remember it was a, a topic that was starting to be discussed more and more. FAC was interested in it, how it was coming along.
- Lefebvre: And, I do believe I asked you this before but I will ask you again, do you recall or do you know if the FAC reviewed this wage grid for recommendation to chief and council to approve.

Objection

- By Darling: I'm going to object to that. I think the witness can give evidence about whether it was discussed in her presence but I don't believe she can give any evidence about whether it was reviewed by the members of FAC outside of – of her presence.
- Lefebvre: Sure. I will rephrase. If it was reviewed by the FAC during an FAC meeting that you were in attendance?
- Carpenter: I do recall being in the FAC and this would have been put up on the screen. It would have been talked about. That was the extent of it.
- Lefebvre: Do you recall when it occurred that a wage grid was put up on the screen at the FAC meeting?
- Carpenter: I don't recall the date, no.
- Lefebvre: And, can, are you, was it – sorry, was the wage grid that was put up on a screen. And, I will start again. You said "would have been put up on a screen". Do you recall specifically if a wage grid was put up on a screen during an FAC meeting that you were in attendance with?
- Carpenter: I believe it was up on a screen so that everyone at FAC and myself could see it and, and what the vision was.
- Lefebvre: And, in your recollection of believing that it was up on a screen at an FAC meeting, do you recall or do you know if it was this particular wage grid that is in front of you?
- Carpenter: I'm not sure if it was this particular one.
- Lefebvre: And, at the meeting that you recall it was up on the screen during an FAC meeting, do you recall if the FAC made any motion to approve and recommend the wage grid to chief and council?
- Carpenter: Not that I am aware of.

[180] The fact of ongoing dialogue including with the CFO and FAC, in my view, highlights the importance of precision in determining what the plaintiff said as opposed to an interpretation of what was actually said. Could the actual words spoken have been a reference to these various discussions of the movement toward adoption of the new wage grid?

[181] In respect of the retroactive wage, the situation is somewhat different. The ASF states as follows:

140. The briefing package and briefing summary for the March 20, 2018 meeting of Council did not state that any particular amount of money

would be paid to Mr. Ryan-Lewis on account of remuneration that would apply retroactively (the “Retroactive Wage”).

141. The briefing package and briefing summary for the March 20, 2018 meeting of Council did not expressly mention Mr. Ryan-Lewis would receive the Retroactive Wage as a consequence of PIB’s adoption of the Contract Amendment Motion.
142. The Contract Amendment Motion did not state that any particular amount of money would be paid to Mr. Ryan-Lewis on account of the Retroactive Wage.
143. The Contract Amendment Motion did not expressly mention that Mr. Ryan-Lewis would receive the Retroactive Wage as a consequence of PIB’s adoption Contract Amendment Motion.
144. Chief and Council did not advise Mr. Ryan-Lewis or Mr. MacRae that the increase to Mr. Ryan-Lewis’ wage approved at the March 20 Meeting was not to be retroactive.
145. Chief and Council never specifically discussed or considered retroactive pay.
146. On March 26, 2018, PIB signed a salary increase and payment authorization form (the “**Salary Authorization**”) that authorized the increase in Mr. Ryan-Lewis’s remuneration provided by the Contract Amendment Motion. Attached as **Schedule 70** is a true copy of the Salary Authorization.
147. The Salary Authorization specified an effective date of January 8, 2018 and included an amount of “retroactive amounts TBD by payroll”.
148. The Salary Authorization directed a payment to Mr. Ryan-Lewis on account of the Retroactive Wage (the “Retroactive Payment”). Mr. Ryan-Lewis received \$17,067.60 for the Retroactive Payment.

[182] The only possible evidence that could be linked to retroactive pay are the fact that the plaintiff began his efforts to have his contract of employment amended in late 2017 and the motion and BCR referencing January 6, 2018. There is nothing in his dialogue with Mr. MacRae that refers to any specific effort to make the changes effective retroactively and none of the alleged representations contain date references.

[183] I find no basis to conclude there was any representation that related to the retroactive pay.

[184] There are other inconsistencies in the witnesses’ testimony as to the circumstance or points in time when the statements were said to be made.

[185] Ms. Phillips said similar statements were made in the regular and *in camera* portions of the meeting. There is no suggestion from the defence that this is accurate and they did not direct the Court to any portion of the recording of the regular meeting to support this. I infer it is because they found none. To be clear, I did not review the entire lengthy recording but did review the portion when the budget was discussed and found no such statements.

[186] No other witness indicated this had occurred.

[187] As to the *in camera* portion of the meeting, Ms. Phillips' evidence was that there was reference to AFOA standards. No other witness indicated this.

[188] In the circumstances, I reject as erroneous Ms. Phillips' evidence on that point.

[189] Mr. Alec indicated the plaintiff was out of the meeting for the presentation and vote in relation to his contract amendments. This is consistent with the plaintiff. Mr. Tonasket was less clear but not inconsistent. Ms. Phillips' evidence was generally consistent on this point but indicated the plaintiff may have made some comments on the issue before leaving. Ms. Barber, on the other hand, testified the plaintiff was in the room before the votes when the alleged representations were made. Then votes on both motions occurred.

[190] The minutes suggest there was only a single motion dealing with both the wage grid and the contract amendments.

[191] One may be able to loosely reconcile some of the witnesses' testimony as to the sequence but certainly not Ms. Barber's.

[192] One must look not only to consistencies but inconsistencies in the testimony of the witnesses.

[193] My impressions of both Mr. Alec and Mr. Tonasket is that they struggled to recall details of what was said in the meeting. I am not left with confidence as to their

reliability in distinguishing that which was spoken and the impression they were left with at whatever point in time they sought to recall the dialogue.

[194] Ms. Phillips' recall is directly contradicted by the absence of any evidence of the representations she alleges occurred during the open meeting. In addition, she is the only one who made reference to comments about AFOA standards.

[195] Ms. Barber presented as very confident in what the plaintiff's representations were but she contradicts all other witnesses on when the representations or at least that they were repeated before the vote(s) were made which calls into question her reliability.

[196] Still further, it must be noted that the decisions to approve the motions were by Council as a whole, not by the three councillors who testified. Did Council on the whole hear and rely on such representations if made? The BCRs, on their face, do not confirm the representations or reliance. There is no evidence as to what if any dialogue or debate occurred among the Council before the vote and if that may have influenced the recall or interpretation of any of those who testified. There is no evidence of what the other councillors in attendance heard or how they interpreted what they heard.

[197] As the plaintiff states in his written argument:

9.e. the evidence relating to what was actually said by Mr. Ryan-Lewis at the budget approval meeting on March 20, 2018 was less than consistent but in reconciling all of the witnesses testimony it is clear based on the evidence of the Council members that testified at trial that at some point (whether that was on March 20, 2018 or later) they believed that the increase to Mr. Ryan-Lewis' salary was represented to be "in the budget";

[198] The defendant says in its argument:

100. On the evidence, the Court should find that Mr. Ryan-Lewis made statements **to the effect** the FAC had vetted, supported, approved and gone through the wage, and he affirmatively responded to questions of it FAC had approved the wage grid when he knew the FAC had not recommended his wage increase for approval. The Court should further find that by making these statements and responses, Mr. Ryan-Lewis falsely misled Chief and Council at its meeting on March 20, 2018. [emphasis added]

[199] The ARTCC uses similar language to describe the representations as being “to the effect” (para. 51) and “calculated to create, and did in fact create, the impression”(para. 52).

[200] The argument quoted above sets out an inclusive list, “vetted, supported, approved and gone through the wage”, which I find did not occur. Even if it was intended as a list of alternative representations, it is important to recognize the differences between those alternatives. It appears the FAC had indeed “gone through” the wage grid. Although less clear on the evidence of the CFO, it does appear there was some consensus that the concept of a wage grid to make the defendant more competitive was reasonable such that the FAC and CFO supported at least the concept of the new wage grid.

[201] That there is commonality in the witnesses’ interpretation of the plaintiff’s presentation is not, in my view, sufficient. I find myself unable to reconcile the various versions of what the plaintiff’s representations were. These were not separate conversations.

[202] The defendant did not actively pursue the Comparative Wage Representation in its argument at trial. I assume that allegation was abandoned. If that was not the defendant’s intention, I would conclude that no such fraudulent misrepresentation was proved. There is no evidence to show the comparators that were presented in the briefing were inappropriate let alone false and misleading.

[203] On the whole I am not satisfied the representations alleged were made. Flowing from this I am unable to conclude that, whatever the plaintiff actually said was false.

***Conflict of interest and breach of FAL 2016 in receiving the retroactive pay***

[204] The FAL 2016 prohibits unbudgeted expenditures except for emergency purposes. The plaintiff was aware of this and that, as a result, PIB was precluded



from making expenditures unless there was a budget appropriation for the expense or a resolution of Council to pay the expense from an identified source.

[205] The plaintiff acknowledged that one of his responsibilities was to ensure Chief and Council adhered to the FAL 2016.

[206] The retroactive pay received by the plaintiff was an expense for the 2017/2018 budget year. The motion that was approved by Council on March 20, 2018, stated in part:

1. PIB CC agrees to confirm the Band Administrator to the position of PIB Chief Administrative Officer (CAO), retaining all duties identified in the FAL policies under Band Administrator, effective January 8, 2018.
2. PIB CC and the CAO agree to a new annual salary of \$169,399.67; . . .

[207] There is no evidence Council discussed or considered when the new wage would be effective or specifically considered retroactive pay. The plaintiff acknowledged that the BCR is ambiguous on the matter of whether the pay increase was retroactive or whether it was limited to the change in position. The ASF states:

- 140 The briefing package and briefing summary for the March 20, 2018 meeting of Council did not state that any particular amount of money would be paid to Mr. Ryan-Lewis on account of remuneration that would apply retroactively (the “Retroactive Wage”),  
 . . .
143. The Contract Amendment Motion did not expressly mention that Mr. Ryan-Lewis would receive the Retroactive Wage as a consequence of PIB’s adoption Contract Amendment Motion.
144. Chief and Council did not advise Mr. Ryan-Lewis or Mr. MacRae that the increase to Mr. Ryan-Lewis’ wage approved at the March 20 Meeting was not to be retroactive.

[208] The evidence is not clear on who prepared a “salary increase and payment authorization form” directing the retroactive wage payment of \$17,067.60 that was presented to the plaintiff and dated March 21, 2018. The plaintiff indicated it was from human resources. The form indicates the plaintiff is the “requestor”. It is also signed by Mr. MacRae in his capacity as “Director Human Resources” as “approved”. The ASF states:

146. On March 26, 2018, PIB signed a salary increase and payment authorization form (the “Salary Authorization”) that authorized the increase in Mr. Ryan-Lewis’s remuneration provided by the Contract Amendment Motion. Attached as Schedule 70 is a true copy of the Salary Authorization.

[209] As noted earlier, the defendant was operating on quarterly budgets in the 2017/2018 year. The fourth quarter budget had been approved on February 20, 2018. The details are not clear but the minutes state:

5.2 Q4 Approval - Chief and Council will sign these once the amendments are made.

**Moved by Joan Phillip, Seconded by Elliott Tonasket**

**THAT** the Council approve the revenue trust transfer of [redacted] for PIBDC and Capital Trust transfer of [redacted] and that the Chief Financial Officer of the Penticton Indian Band be authorized to transfer these funds from Revenue Trust and Capital trust account, to the Band’s operating account on a cash needed basis to offset the anticipated budget.

**MOTION CARRIED UNANIMOUSLV**

[redactions appear in the exhibit]

[210] The defendant argues that the plaintiff “acted in a position of conflict between his self-interest and his duty to follow PIB’s FAL and expenditure control policies” by pursuing and then authorizing the retroactive pay.

[211] The plaintiff testified that the revenue trust transfer authorized in conjunction with the fourth quarter budget could be available to pay expenses that had not been provided for in the budget, if approved by Council. This would include his retroactive pay. The plaintiff argues that, in all the circumstances, it cannot be said that the retroactive pay represented an unbudgeted expense.

[212] In argument, he says the defendant “uses the term “unbudgeted expense” very liberally and, it is submitted, not in a manner consistent with the FAL”. Further, he argues, in fact, the CFO was able to find available funds to pay the retractive pay from the funds made available on February 20, 2018, proving the funds were available within the budget.

[213] In my view, this submission is problematic. The plaintiff's own evidence is that it was part of his role to ensure the defendant followed the FAL 2016 and to point out violations. If the defendant was not viewing and dealing with unbudgeted expenses in a manner that was consistent with FAL 2016, his duty was to point that out, not obtain personal benefit from it. It is, at a minimum, disingenuous for him to rely on the defendant's non-compliance with FAL 2016 as a defence to the assertion of his breach of it.

[214] Even if I accept that vagueness of the purpose for which funds were made available to the CFO in February could provide a path to rationalize the payment, it is clear the monies were not placed into the budget to fund his retractive pay. The CFO had no knowledge of the possibility. There is no evidence that Chief and Council were authorizing it for that purpose. The plaintiff knew all of this. He ought to have brought it to the attention of the CFO and/or the Chief and Council, not taken cover with it.

[215] It becomes a breach of his duty to avoid conflicts when his failure to ensure compliance involves a payment of an expense to himself.

[216] The capacity within the 2018/2019 budget to accommodate his pay increase gives rise to similar concerns.

[217] The plaintiff points to the fact that the FAC endorsed and Chief and Council approved increases in pay for the CAO and CFO in June 2018 and says:

290. Notably, the FAC recommended immediate application of the Proposed Wage Grid for the CAO and CFO which conclusively disproves the PIB claim that Mr. Ryan-Lewis' increased salary was not provided for in the budget as claimed by Ms. Carpenter at the Edo Meeting and the May 4, 2018 meeting.

[218] There is simply inadequate evidence of the circumstances of the approval of that motion to support the plaintiff's conclusion. For example, the FAL 2016 allows for emergency expenditures.

[219] Even if it can be said the funds allocated to line 72500 could be used to fund that increase, that proposition misses the point. The plaintiff knew the CFO had no

idea of a potential increase for him and therefore it follows that he knew line 72500 was not inserted into the budget for that purpose. Indeed, the CFO's evidence was that it was for other specific staff whose salaries were to be reviewed. Equally important, she testified the plaintiff was well aware of that as he had been heavily involved in the budget preparation. Even if the plaintiff honestly held the belief that the appropriation could be redirected for his salary, his duty to avoid conflicts and make disclosure required him to act differently than he did.

***Conduct toward CFO following March 20, 2018 Council meeting***

[220] The defendant's allegation relates to the plaintiff's conduct toward the CFO or, perhaps more accurately, toward her expressed concerns when she returned from holidays and first learned of the changes to the plaintiff's contract. She was particularly troubled by the retroactive wage component.

[221] As set out above at para. 74, the defence summarized its position in this way:

When payment of Mr. Ryan-Lewis's retroactive wage increase caused a cash flow crisis, Mr. Ryan-Lewis attempted to cover-up his wrongdoing by blocking PIB's Chief Financial Officer ("CFO") when she attempted to learn what had happened. When Mr. Ryan-Lewis's stonewalling pushed the CFO to resign, he actively concealed the reason for resignation from Chief and Council to protect himself; and . . .

[222] As noted earlier, the concept of a revised wage grid and one or more drafts of the wage grid had been seen and discussed by the CFO during their development. Those discussions included the plaintiff, Mr. MacRae and the FAC. She knew nothing of the proposed changes to the plaintiff's contract and neither had been endorsed by her or the FAC.

[223] The CFO's testimony included her description of her interactions with the plaintiff after her return from holidays on April 2, 2018, and leading up to the May 4, 2018, Chief and Council meeting.

[224] The CFO sought documentation to satisfy her of the changes almost immediately after her return from holidays. She was concerned about how the

additional costs could be dealt with in the context of her efforts to normalize the defendant's finances.

[225] Mr. MacRae sent an email to the CFO on April 3, 2018, providing a history of the issue of changes to the plaintiff's contract. Mr. MacRae's email indicated that the documentation was being "managed" by the plaintiff and/or Ms. Barber.

[226] That was followed by another email from the plaintiff on April 5. The latter attached materials including the briefing materials presented to Chief and Council in the February and March meetings. The text of the email included the following:

Please see below and attachments for the background on the wage scale and the BA position. It is important to note that the Chief was dialoging through Garry on this matter as he was involved in the development of the wage scale and subsequently approved it for PIBDC.

Note that this has been ongoing since the end of November and had it of been properly addressed at the outset, any budget amendments would have been achieved as this was on the council agenda since December and I cannot apologize from my end I was not privy to the discussion as I removed myself due to the perceived conflict.

[227] The CFO testified that she repeatedly and forcefully insisted that she receive the documentation showing that the changes had been approved but it was not forthcoming from either Mr. MacRae or the plaintiff. The CFO described daily requests of both Mr. MacRae and the plaintiff.

[228] She questioned the plaintiff as to why she was unaware of the changes and that it had been dealt with in her absence.

[229] She then requested an immediate meeting in person with the Chief and Council. The plaintiff sometimes indicated he was trying to accommodate her request and other times appeared angry at her persistence.

[230] She testified that on April 4, 2018, the plaintiff advised that Chief and Council would hear from her the next day but no meeting occurred.

[231] Then on April 5, when she saw the Chief, she tried to speak to him informally as he was leaving the Band offices. The plaintiff was nearby and followed behind

her. The Chief had no time and no dialogue on her concerns occurred. She testified that later the plaintiff advised her that she could not go to Chief and Council on her own and doing so would be insubordination and grounds for dismissal.

[232] She continued her demands for documents from the plaintiff and Mr. MacRae. She testified that the lack of response was very upsetting to her and affected her health, leading to her threaten to resign. Her specific testimony was as follows:

- Lefebvre: Did you ever convey the impact on your personal life the concerns were having to either Mr. Ryan-Lewis or Mr. McCrae?
- Carpenter: Yes, I told both of them that this was very upsetting to me and I, there were no solutions. We were going back and forth. Nothing was being resolved and that I would resign over this.
- Lefebvre: When you say “over this” – what did you – did you ever explicitly say what you were considering to resign over?
- Carpenter: Yes. Brent, retro and wage that I knew nothing about. That did not go through the budget, did not go through FAC. I had no paperwork of any type of approval and I was not being allowed to speak to Chief and Council.
- Lefebvre: And you told both Mr. McCrae and Mr. Ryan-Lewis that you were considering resigning over the raise and retroactive concerns?
- Carpenter: Yes.

[233] She was advised by the plaintiff the week following April 5 that she could present her concerns to Chief and Council at a meeting on April 17, 2018. The day before that meeting, she learned the matter was not on the agenda but was told by the plaintiff he would bring her before Chief and Council. She denies ever being told by the plaintiff that she should be preparing a briefing note for the matter to be on the agenda. She was never invited into the meeting.

[234] Under cross-examination regarding the CFO’s evidence, the plaintiff could not recall if the CFO brought her concerns to him daily or if he had been dismissive of her concerns. He indicated if she had concerns she should have prepared a briefing note. When asked if he recalled being told by her that the issue of his retroactive pay was causing her to consider resigning, he said no.

[235] The plaintiff was defensive, vague and sometimes only tangentially responsive on this issue. Overall, he was unconvincing. I prefer the evidence of the CFO as to these events.

[236] The defendant says the plaintiff's response to the CFO's efforts "was an attempt to cover up his wrongdoing."

[237] The CFO resigned by way of a letter dated April 19, 2018, which stated:

Dear Mr. Brent Ryan-Lewis:

I am writing to inform you that I am resigning my position as CFO with Penticton Indian Band effective April 19, 2018.

Thank you for the opportunity to work for the Penticton Indian Band.

[238] That resignation prompted the plaintiff to meet with the CFO the next day. She testified the reasons for her resignation were not discussed but he did raise the prospect of a farewell gathering and whether she could assist with a transition to her replacement.

[239] After reflecting on those discussions, the CFO sent a text to the plaintiff the afternoon of April 20 that stated:

Hi Brent. Per my family and my doctor, I am not coming back. I will never bad mouth PIB or you. Lets be honest, the community and some PIB staff will be happy that I am gone. People will understand when u say that I resigned for personal reasons. Everyone is aware of the attacks to me personally and professionally. I want PIB and the community to win. I wish you luck with everything. I do believe in your vision. Barb.

[240] She testified this was not an explanation for her resignation. She was referring to some conflict with managers when she began her tenure.

[241] The plaintiff sent that text to Chief and Council as an attachment to an email that included this:

Please be advised that Barb has resigned her position (for personal reasons) effective immediately and will not be returning to PIB - see the attached message I received.

On a personal side, as most members of council knew Barb, we had discussions about situations and issues that have been affecting her for over

a year and in the end, it would seem it took an unfortunate toll on her personally and her health.

We wish her all the best and success in her future path and she has no ill will for anyone at PIB, or PIB itself.

...

[242] Following her resignation, the Chief instigated a meeting that included the CFO, Mr. Benson, Ms. Barber and Mr. Alec. They met at a restaurant on April 23, 2018, where the CFO explained her reasons for resigning. In essence, she stated that the plaintiff's wage increase and retroactive wage were not allocated in any budget and neither had been recommended for approval by the FAC. Further, that the approval of the increase and payment of the retroactive wage occurred while she was away. She expressed that she had ethical concerns about what had occurred.

[243] Shortly after, the Chief requested a report from the plaintiff as to the reasons and circumstances that led to the resignation of the CFO.

[244] The plaintiff sent a report by email on April 24. None of the reasons the CFO articulated in her meeting at the restaurant appeared directly in the report. The only possible correlation was a generic item that read "Budget process not implemented or followed".

[245] The Chief was not satisfied with the plaintiff's response, so another request was made on April 30, 2018, that read as follows:

As per our discussion last Monday afternoon regarding the position of CFO. I as the chief requested a detailed report of the resignation of the CFO to be presented to the council. I advised you that I offered Barb Carpenter, the CFO, a dispute resolution process, and that while the CFO was considering this offer that the position would be held for her until these requests have been considered by the council. Council does not consider the resignation of the CFO to be effective at this time. I asked for the resignation of the CFO to be held in confidence until we had full disclosure and resolve to this matter. In advance of our next duly convened PIB band council meeting ( May 4th) **to be provided[sic] with a comprehensive and detailed report regarding the CFO tendering her resignation, including all issues she raised and her requests for matters to be dealt with.**

[Emphasis added]



[246] It is difficult to summarize and capture the tone of the plaintiff's response to that request fairly, so I include the full text:

The message below comes as a surprise as there was a report sent out and this raises concern with the email received and its intent, perspectives and purposes. Regarding the comments below please be advised that out of courtesy a report/email was provided on April 24th to council - attached as "CFO Resignation" – that message was also attached to an email sent last Friday regarding unilateral decisions.

With all due respect, please also be advised that the CFO position reports to the Band Administrator (as per 19 (2) of the FAL) and as such is an employee of PIB, not Council. Alternatively, Council does appoint the CFO, but only after a successful employee (HR) recruitment/selection process is completed. We are currently in the process of attempting to fill the position on temporary basis and from there post.

Again, and out of courtesy and clarity, Barb submitted her resignation effective immediately to HR on April 19th. The CAO met with the CFO to determine if the CFO could return to work as her contract states 4 weeks written notice. The CFO later rejected returning to the position (via text and was attached to email) so the CAO accepted the resignation as of April 19th.

An impromptu dialogue happened between the Chief and the CAO regarding the CFO and a possible "dispute resolution" process – note details of the alleged dispute(s) were not discussed. Can council advise on the nature of the dispute(s) to be resolved as we have not been provided with written specifics? Note there are no briefing notes filled out by the CFO to add support to any one issue, nor are there any reports, grievances, etc. on record with HR. On the other hand, HR spent considerable time with Barb when she handed in her resignation letter but all that was discussed was generalities of unilateral decisions.

As the discussion topics with the Chief were not formally sanctioned by Council through the duly convened meeting process, the CAO, through the CFO Report email attempted to review the progression to date of what had transpired so clarity could be provided, here it is again:

- HR confirmed that proper process was followed, but did advise that there is a risk or potential issue with a possible "claim" on a health issue, but this seems to have been alleviated by Barb's text message that she will not be returning
- FAC Council Liaison was advised and opinion was sought and received that she has resigned
- FAC Chair was advised and commented that next steps to filling the position should start ASAP
- As per direction received at the last Council meeting on April 17th, financial issues, including the unilateral decisions listed and options are to be presented to the FAC, of which the FAC Liaison and FAC Chair have been advised - we await to set a meeting time for discussions In the end process was followed and completed, therefore, the CFO resignation was officially

finalized on April 19th - it is important to note that since the employee has formally resigned, why is a member of council contacting and discussing matters with them post employment (exit interview) – that is for the supervisor or HR which was achieved.

Finally, Administration would be more than happy to discuss ALL the unilateral decisions that have been made over the past year(s) with the FAC with hopes of clarity for process and direction forward. From there a detailed report should be considered and compiled for membership that discusses real solutions and remedies. On a related matter, there may have been discussions about changing how administration/departments report to Council, but this would require amendments to the FAL which more than likely would not receive approval due to the additional risk factors, it is recommended that the options be presented to FAC for review and consideration.

[247] The defendant says the reports are further evidence of the plaintiff's efforts to cover up his actions.

[248] I am satisfied that the plaintiff was well aware of the concerns the CFO had about the amendments to his contract and that she had threatened to resign over his handling of those concerns. The plaintiff did not satisfy those concerns and did not facilitate the CFO's efforts to bring her concerns directly to Chief and Council. In addition, his response to the Chief's requests for a report made no mention of them. On review of the whole of the evidence, it is clear the plaintiff did not in fact reveal to Chief and Council anything of those concerns despite the Chief's request. That request clearly called for disclosure of that knowledge regardless of his personal views of its merit.

[249] My finding above that the defendant has not proved fraudulent misrepresentation does not mean that the plaintiff did not know that there was no FAC or CFO approval or that he had no obligation to make the Chief and Council aware of that. In this section of the analysis, the issue is whether the plaintiff's actions support the defendant's assertion of an effort to hide facts from the Chief and Council and whether that is a ground for dismissal.

[250] The ARTCC allegations of cover-up can be broken down into two assertions.

[251] The first, as set out in para. 68 of the ARTCC, is that he “deliberately excluded the CFO and FAC from communications and discussions. . .” and “purposely refrained from having the CFO and FAC consider” the financial impacts regarding the wage grid and contract amendments.

[252] The second assertion is set out in para. 84 as follows:

84. In contriving to prevent the CFO from raising the CFO Concerns with Council, delaying in reporting the CFO’s resignation to Council, and providing a false account of the reasons for the CFO’s resignation, the Plaintiff breached his:
- (a) Good Faith Duties;
  - (b) fiduciary duty that required the Plaintiff to avoid conflicts between his duties to the Defendant (which, among other things, required him to provide an honest account of the reasons for the CFO’s resignation and allow the CFO Concerns to be presented to Council) and his own self-interest (which included, among other things, concealing his malfeasance from Council); and
  - (c) fiduciary duty to make full disclosure of his self-interest and involvement in matters where his self-interest is in actual or potential conflict with the interest of the Defendant.

[253] As I have found above, the plaintiff was in conflict in the development and presentation of level 16 of the wage grid and the contract amendments. When concerns of the CFO were inevitably going to lead to scrutiny on those matters, he again placed his own self-interest ahead of the defendant’s ability to make decisions equipped with all relevant information. He was not forthright in terms of his knowledge of the CFO’s stated reasons for resigning and frustrated the CFO’s efforts to communicate with Chief and Council.

[254] This was a breach of his fiduciary obligations.

***Breach of confidentiality***

[255] There are two components to the allegation made by the defendant in the ARTCC categorized as after-acquired cause for termination.

[256] First, on May 4, 2018, in anticipation of his termination, the plaintiff sent to his personal email “confidential and solicitor client privileged legal opinions prepared for the defendant by its legal counsel”.

[257] Second, following his termination, the defendant disclosed confidential information to third parties.

[258] The Friday, May 4, 2018 Chief and Council meeting was scheduled to address the information acquired regarding the CFO’s resignation and resulted in the decision to terminate. The issue was anonymized on the agenda and identified only by Mr. Benson’s name. The plaintiff was not informed of the intended subject matter.

[259] The timing of relevant events is important.

[260] At 08:46 that morning, the plaintiff had printed his April 24 report to the Chief. The plaintiff indicated he had done this as he wanted to be able to review it to be prepared for the meeting as he believed the CFO’s resignation was to be discussed.

[261] The meeting began at 09:30. The plaintiff was in attendance initially but all other agenda items were tabled. The plaintiff was then told by the Chief that he was not needed but would be located and called into the meeting when needed.

[262] When he was asked to leave the meeting, he expected the issue of his contract amendments was going to be discussed.

[263] At approximately 15:30 it was decided to invite the plaintiff to join the meeting. The plaintiff was not at the Band offices to join the meeting so discussions continued. At approximately 18:00 hours, the Chief tried calling and then sent a text to the plaintiff asking “Can you come to the band office right away”. The plaintiff responded that he was shopping with his daughter. Chief and Council continued the meeting and made the decision to terminate. The plaintiff was then advised to meet with the Chief at 08:00 on the following Monday, May 8.

[264] At 18:52, the plaintiff forwarded an email he had sent Mr. Benson in 2017 to his personal email address. The subject matter was concerns related to PIBDC executive. At 18:58, he did the same with another 2017 email he had sent to Mr. Benson regarding a request for a BCR and then at 19:05 another email to himself attaching eight earlier emails with the subject line “Legal opinions”.

[265] His explanation in cross-examination was that this was done in conjunction with an outstanding task Chief and Council had assigned to him related to the ongoing challenge to the November elections and to prepare himself to discuss matters that had arisen during the May 4 Chief and Council meeting.

[266] At the meeting on May 7, 2018, the plaintiff was informed of his termination.

[267] The ASF includes the following:

196. On or about May 7, 2018, Ms. Russell drafted notes onto a partial copy of the FAL (the “**Noted Up FAL**”). Attached as **Schedule 101** is a true copy of the Noted Up FAL.
197. On May 8, 2018 at 12:34 AM, Ms. Russell emailed Mr. Ryan-Lewis an email with the subject line: confidential mediator document (the “**Confidential Email**”). Attached as **Schedule 102** is a true copy of the Confidential Email.
198. Ms. Russell attached the Noted Up FAL to the Confidential Email.
199. Ms. Russell shared the Noted Up FAL with Mr. Ryan-Lewis, Ms. Eneas, and Michael Welsh, Q.C., in his capacity as mediator for PIB Community Mediation.

[268] The May 8 email referred to proposed content for an email to a PIB employee. That content referenced “mismanagement from the governance table”, whistleblower protections and moving “for an immediate injunction to have the Chief removed for his flagrant contravention of this law and governance practice”. In her concluding comments to the plaintiff, the email states “I would ask that you keep this in confidence and let me know if this is something you support?”

[269] On October 26, 2018, an anonymous email was sent to a large group including PIB Chief and councillors, FAC members and several others whose identities are not in evidence but include “newstips@pentictonwesternnews.com”.

There were two attachments which, collectively, are copies of numerous documents including emails many of which were originally to or from the plaintiff in his capacity as band administrator of the defendant. He acknowledged some of those are the same documents he emailed to himself on May 4. They also include the marked up FAL 2016 he received on May 8, 2018, from Ms. Russell.

[270] On December 26, 27 and 28, 2018, three serial stories were published in the Penticton Herald that referenced and relied on the documents included in the anonymous email.

[271] The defendant argues:

197. On this evidence, the Court should find that it is more likely than not Mr. Ryan-Lewis provided the emails he collected to a third-party that then disbursed them to the media and others.

198. Based on the timing of this collection and the nature of the documents collected, the Court should find that Mr. Ryan-Lewis collected these documents with the disloyal intention of using them to embarrass Chief and Council in order to advance his private interests

[272] It is entirely possible the plaintiff authored or contributed to the anonymous email. However, I am unable to infer from the circumstantial evidence that it was the plaintiff who did so and thus disclosed the information to the media. It is one inference but that is not sufficient.

[273] I do not imply that Ms. Russell may have been the author but her email included the draft she proposed to send to another PIB employee. I have no evidence if she did so. Her email also implies ongoing discontent with the Chief and Council. The scope of that discontent is unknown.

[274] The evidence is that there was an ongoing challenge to the November 2017 elections. The very recent history of the PIB reveals much turmoil among its council and members at large. I have no knowledge of the security of the PIB email or other servers.

[275] In relation to the plaintiff forwarding himself confidential information, he was at the time still the CAO of the defendant and properly able to have that information. He

had not been terminated. There was some evidence about the limitations of accessing PIB information offsite. While perhaps suspicious, I am unable to conclude the plaintiff breached any of his duties or obligations by sending himself the emails and attachments that he did.

***Conclusions as to Just Cause***

[276] The plaintiff placed himself in a conflict of interest in his interactions with Mr. MacRae.

[277] The defendant has not proved that the plaintiff made fraudulent misrepresentations during the March 20, 2018 meeting of Chief and Council.

[278] My finding that the defendant has not proved fraudulent misrepresentation does not mean that the plaintiff did not know that there was no FAC or CFO approval of the proposed changes to his contract and that he ought to have made sure the Chief and Council were aware of that. In my view his position requires that he do so.

[279] The plaintiff did not ensure compliance with the FAL 2016 or his duty to avoid conflicts when he signed for and accepted the retroactive pay. His obligations required that, rather than take advantage of ambiguity in the BCR, he point it out to ensure compliance with the FAL 2016 and clarify Council's intentions.

[280] The plaintiff did not breach his duty of confidentiality and therefore there is no basis for finding after-acquired cause.

[281] It is my view that the breaches of duties that I have found are, collectively, the basis for the employer/employee relationship having been irreparably damaged. The defendant need not prove all of its allegations. The defendant had just cause to terminate.

[282] This conclusion allows for the identification of the remaining issues to be determined and those which are determined by this conclusion.

[283] The plaintiff argues he was deprived of due process. More specifically:

- 14. a. the PIB Chief and Council made the decision to terminate his employment without providing him any opportunity to answer the allegations that he had misled Chief and Council for his own benefit;
- b. the PIB took no steps to investigate the allegations made by the former CFO that the Plaintiff misled Chief and Council before deciding to terminate his employment for just cause;
- c. the PIB Personnel Policy had a requirement that the Plaintiff be provided an opportunity to “defend his case” and the Defendant’s Chief and Council failed to provide such an opportunity;
- d. the PIB Personnel Policy contained an appeal mechanism for an employee who was terminated to appeal their termination to Chief and Council and when the Plaintiff sought an appeal under this provision, that request for an appeal was refused;

...

[284] Again, from the ASF is this relevant evidence:

200. On June 3, 2018, through a letter between counsel, Mr. Ryan-Lewis indicated his request to appeal the decision to terminate his employment pursuant to the PIB Personnel Policy. Attached as Schedule 103 is a true copy of Mr. Ryan-Lewis’s counsel’s letter to PIB’s counsel dated June 3, 2018.

201. On June 7, 2018 at 9:28 AM, through an email between counsel (the “PIB Response Email”), Mr. Schwartz, counsel for PIB, advised Mr. Ryan-Lewis that his request for an appeal was refused. Attached as Schedule 104 is a true copy of the PIB Response Email.

202. Mr. Schwartz also forewarned Mr. Ryan-Lewis in the PIB Response Email that it would counterclaim for repatriation of funds he took if he persisted with any form of claim against PIB.

[285] The defendant’s personnel policy under Part X “Disciplinary Measures” provides for progressive discipline and for appealing suspension or termination. Part XI “Termination of Employment”, provides in part that the defendant will not provide notice or severance pay if an employee is dismissed for cause.

[286] After his termination, the plaintiff’s counsel sought an appeal. The defendant’s counsel responded stating:

Due to the nature of Mr. Ryan-Lewis’s misconduct, the provisions of the Penticton Indian Band Personnel Policy dealing with a system of progressive and corrective discipline does not apply. Your client was terminated for cause, and no appeal to the Personnel Committee will be entertained.



Given the manner in which Mr. Ryan-Lewis improperly orchestrated the gross inflation of his salary, which was paid to him on a retroactive basis, my client will not consider any resolution that involves reinstatement. Moreover, given the amount of money that Mr. Ryan-Lewis improperly obtained from my client, the Penticton Indian Band is not prepared to pay anything to him by way of a settlement.

[287] As both parties have stressed, the primary issue here is whether the defendant had just cause. The plaintiff cites no authority indicating that, if just cause existed, a failure to hold an internal appeal in any way changes the ability of the employer to terminate without notice.

[288] Other issues in relation to the defendant's breach of its duty of good faith are raised in the context of arguments regarding punitive and aggravated damages. In light of my finding of just cause I will not address these.

**Damages for breach of fiduciary duties**

[289] The defendant seeks damages in the form of a return of the additional pay the plaintiff received as a result of the March 20, 2018, band council resolutions. I have concluded that the allegations of fraudulent misrepresentation have not been proved but that the plaintiff did fail to satisfy his fiduciary obligations to avoid conflicts of interest. Specifically, here, those conflicts were in relation to his own self-interest in obtaining an increase in pay. As previously noted whether the plaintiff believed or even was justified in his belief does not alter the fact of his failures to avoid conflicts and make appropriate disclosure.

[290] Given the challenges faced by the defendant at the time and the plaintiff's full knowledge of them, he should have been well aware of the importance of fulfilling his obligations.

[291] I conclude the claim for recovery is made out. The defendant is entitled to recover the retroactive pay as well as any increase in pay after the March 20, 2018 meeting of the Chief and Council.

**Conclusions**

[292] For the reasons above, I have concluded that the defendant had just cause to terminate the plaintiff's employment without notice.

[293] In addition, the defendant is entitled to recover the retroactive pay in the amount of \$17,067.60, as well as any other increase in pay the plaintiff received following the March 20, 2018 meeting of the Chief and Council as damages for the plaintiff's breach of his fiduciary duties.

[294] Counsel indicated that offers have been exchanged. In light of that, the parties wish to appear to argue the matter of costs. Counsel are to attend to the matter of scheduling that appearance within 45 days of the release of these reasons.

"Betton J."