

Federal Court



Cour fédérale

Date: 20260129

Docket: T-321-23

Citation: 2026 FC 135

Ottawa, Ontario, January 29, 2026

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

KWANTLEN FIRST NATION

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Applicant

and

**BRANDON GABRIEL, VICTOR BACK,
CHRISTOPHER THOMAS, ROBERT JAGO
AND ROBERT THOMAS**

Respondents

ORDER AND REASONS

I. Overview

[1] The approximately 375 members of Kwantlen First Nation [KFN or community]—about 218 of whom are adult voting members and 100 of whom actually live on KFN’s six reserves—are part of the Stó:lō people who share kinship, language and cultural ties with a number of nearby First Nation communities along the lower Fraser River in British Columbia.

[2] A governance dispute arose within the community when, at the behest of the respondents, a meeting was held on November 27, 2022 [November 2022 meeting], which resulted in four resolutions purportedly being passed [November 2022 resolutions]: the first, ousting Chief Marilyn Gabriel [Chief Gabriel] from band council while allowing her to retain the hereditary chieftainship of KFN [Resolution One]; the second, ordering band council to present the draft Governance Code it was in the process of finalizing and the calling of a referendum on the new Governance Code [Resolution Two]; the third, *inter alia*, temporarily expanding band council by three elected positions with the new vacancies to be filled in the event the resolution was passed [Resolution Three]; and the fourth, recognizing the creation of the Whonnock Reserve Local Authority [Whonnock Authority] to share along with band council and others in the governance of Whonnock—one of the six KFN reserves and the one for which the respondent Robert Thomas claims to be the hereditary chief—, but with the Whonnock Authority having exclusive jurisdiction on matters regarding the determination of membership, the assignment of residential and commercial lots, and the surrender of reserve lands on Whonnock [Resolution Four].

[3] With the passing of Resolution Three, the respondents Brandon Gabriel, Victor Back and Christopher Thomas were thereafter elected to fill the three newly created council seats and to sit alongside the two councillors already appointed by Chief Gabriel (Tumia Knott and Les Antone) so that the newly expanded band council of five members function without the hereditary chief being part thereof and with the said respondents forming the majority. Messrs. Gabriel, Back and Thomas would later proceed to suspend appointed councillors Knott and Antone until such time as those councillors attended before them to explain why they continued to support Chief

Gabriel, thereby leaving Messrs. Gabriel, Back and Thomas to, in their view, govern the community.

[4] In the underlying application, KFN—through its longstanding band council comprised of Chief Gabriel and councillors Knott and Antone [band council]—seeks declarations that the resolutions purportedly passed at the November 2022 meeting are invalid, that the legitimate band council continues to be comprised of Chief Gabriel and councillors Knott and Antone to the exclusion of Messrs. Gabriel, Back and Thomas, and that those respondents, as “rival council”, lack the lawful authority they purport to have to govern the community. KFN also seeks various forms of injunctive relief enjoining all respondents from representing that Messrs. Gabriel, Back and Thomas are so authorized.

[5] In order to ensure that the business of the community was not disrupted by the governance dispute that is being addressed before this Court, Justice Henneghan issued an Order on April 27, 2023, giving effect to the undertaking of the respondents to, *inter alia* and until final judgment in this matter, refrain from representing to external parties—including Federal, Provincial and local government agencies and departments, KFN business partners and other First Nations with which the community deals—that Messrs. Gabriel, Back and Thomas are authorized to speak for the community, and to confirm, when asked by such external parties, that such authority rests with the band council comprised of Chief Gabriel and councillors Knott and Antone.

[6] Many of the issues that the parties address in their material and before me relate to the determination of nature of the community's historic governance structure as expressed by band custom. In January 1952, the members of the community (then referred to as the Langley Band) sought to be exempted from the requirements of an elected band council under what is today section 74 of the *Indian Act*, RSC 1985, c I-5 [Indian Act], thus allowing the community to continue selecting its hereditary chief and councillors in accordance with band custom. Therefore, the "council of the band" for the purposes of section 2 of the *Indian Act* is comprised of (d): "the council chosen according to the custom of the band".

[7] The wider issue raised before me by the parties revolves around what constitutes "the custom of the band" in relation to the appointment of the hereditary chief and the other members of band council. The difficulty here is that what constitutes band custom in relation to the governance of KFN has never been written down. However during the hearing, the parties agreed that KFN band custom has traditionally involved a hereditary leadership system with governance by the hereditary chief who would appoint two councillors. consistent with the forms of leadership structure in other Stó:lō communities, and with any change to such governance structure or the removal of the hereditary chief and councillors within that structure being possible where there exists broad consensus within the community to do so.

[8] The parties agree that about 41% of bands in Canada are governed in accordance with band custom. As set out in the affidavit of Grand Chief Doug Kelly, First Nation communities often choose a hereditary governance model for a number of reasons, often because it was felt that "leadership is a gift that is bestowed on very few", with the role of the incumbent hereditary

chief being to identify, train, mentor and prepare the future chief for service; unlike “first past the post” municipal-style election systems imposed by section 74 of the *Indian Act*, it was felt that it is through training, learning ancestral teachings and history that leaders are groomed and developed to take on the responsibility of leadership within the community.

[9] Where the parties part ways, however, is on the question of whether it is an integral part of band custom that the appointment by the incumbent chief of the new hereditary chief and the latter’s appointment of the two councillors were subject to approval by way of a community-wide voting process. However, I need not address this issue of what constitutes band custom on governance because the respondents have not sought by way of application to challenge either Chief Gabriel’s appointment as hereditary chief or her appointment of councillors Knott and Antone on band council, the band custom which allowed them to govern the community for many years, or any decision which the band council may have made. Before me, the respondents confirmed that they are not challenging the legitimacy of Chief Gabriel nor the composition of band council prior to the November 2022 meeting. In fact, the actions of the respondents leading up to the November 2022 meeting and the resolutions which emanated therefrom seeking a change to the existing governance structure presupposes the legitimacy of the band council and the band custom upon which it was constituted. I am not here faced with the situation, as was Justice Strickland in *Da'naxda'xw First Nation v Peters*, 2021 FC 360 [*Da'naxda'xw*], of two competing applications, with each group seeking a declaration that the other lacked authority to govern the community, thereby necessitating a review of what constituted band custom.

[10] In addition, although not specifically requested in its Notice of Application, KFN seeks declaratory relief confirming the legitimacy of Chief Gabriel as hereditary chief and the band council; I should say now that this is something I will not grant. Although I accept that the situation in which Justice Strickland found herself in *Da'naxda'xw* when she refused to make a similar declaratory order was somewhat different from the present situation, here, there is an ongoing Governance Dialogue within the community to which all parties, it would seem, are committed and which is expected to lead to a new Governance Code for KFN. As such, I think it best that I limit any declaratory order that I may make to the issue of the legitimacy of Messrs. Gabriel, Back and Thomas to speak for or govern the community. As such, under the circumstances, I accept as a starting premise the legitimacy of the band council comprised of Chief Gabriel as hereditary chief and councillors Knott and Antone for the purposes of the underlying application, and assume that the governance structure which put into place the chief and council was reflective of a band custom that was “firmly established, generalized and followed consistently and conscientiously by a majority of the community, thus evidencing a broad consensus” (*Da'naxda'xw* at para 72).

[11] Nor does KFN, either in its materials or before me, challenge the right of the respondents to call the November 2022 meeting as being contrary to band custom. Although councillor Knott stated in her affidavit that traditional band custom does not include the ability for any member to convene a meeting to decide on band affairs, KFN does not claim that only band council can call a meeting of the community to remove the hereditary chief or to gage broad consensus for a change in governance. Before me KFN accepted that fundamental change in governance can be made, including the removal from office of the chief or councillors, where a fair process in

whatever guise it may take clearly establishes a broad consensus of the community to do so.

What KFN challenges is the fairness of the process that led to the November 2022 meeting and the passing of the November 2022 resolutions, and whether such a process allowed for the results to be seen as representing the broad consensus of the community.

[12] Therefore, for the purpose of deciding the underlying application, the only issue I need to address is whether the November 2022 meeting aimed at removing Chief Gabriel from band council in accordance with existing band custom, effecting fundamental change to band custom and KFN's system of governance by increasing the number of council seats to five, with three to be filled by way of an election, and restructuring the jurisdiction of band council by recognizing the Whonnock Authority, was procedurally fair and whether the November 2022 resolutions reflected a broad consensus within the community, with the onus being on the respondents to so establish as they themselves concede.

[13] Nor do the parties dispute that the determination of what constitutes broad consensus is highly contextual and that although, in general, consensus often means at least a majority of voting members, there may be circumstances whereby the vote of even a minority of community members creates, on account of the existing context, a reasonable inference that a broad consensus exists amongst the community at large; for example, when there is evidence of intimidation or active attempts to prevent people from participating in the process. In short, the determination of whether broad consensus exists cannot always be reduced to mere voting numbers and such determination must be looked at contextually.

[14] For the reasons that follow, I am granting KFN's application in part. In short, from my assessment of the evidence, not only was the November 2022 meeting procedurally unfair, but I am also not convinced that the November 2022 resolutions garnered broad consensus within the community to remove Chief Gabriel from band council and to effect the changes to band governance and custom sought by the respondents. The manner in which the respondents undertook their efforts could not have established a legitimate expression of a broad consensus as the process was riddled with statements and conduct which tainted the process down to its core, thereby rendering that process unreasonable. The procedural unfairness of the process undertaken by the respondents clearly undermined the legitimacy of any vote taken at the November 2022 meeting, and thus any resolution that emanated from such a process must be considered a nullity. As such, nothing that occurred during the November 2022 meeting affected the status and legitimacy of the band council comprised of Chief Gabriel and councillors Knott and Antone.

II. Preliminary matters

[15] KFN has filed a preliminary motion seeking to strike portions of the affidavits filed on behalf of the respondents. KFN argues that the problem with the portions it seeks to strike goes beyond whether the Court is able to weigh the evidence, consider its relevance or ignore improper evidence. Here, argues KFN, the evidence it seeks to strike is so egregious that it is fundamentally prejudicial to the community if allowed to stand; for my part, I am not entirely convinced. KFN has not articulated in what way the evidence causes prejudice other than, I suspect, that I may be induced to believe that these supposedly egregious statements were uncontested matters of fact. I echo the comments of Justice Favel in *Sawridge Band v Canada*,

2000 CanLII 14927 at para 6, when he states that this would ascribe to the Court “a degree of gullibility” which may not be warranted.

[16] In any event, what this Court has said on numerous occasions is that affidavits containing too much hearsay, opinion evidence or arguments may be struck in whole or in part (*Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at para 30). The Court’s appreciation may also go to the weight given by the Court to the affidavit evidence. In addition, as regards expert evidence on a band’s custom of governance, I agree with the respondents that expertise on the indigenous law of any community very often lies with its members, and thus members should be allowed to express their views on their understanding of Indigenous law matters as they pertain to band custom on matters of governance.

[17] Here, much of the impugned evidence relates to the issues of what constitutes band custom in relation to the appointment of the hereditary chief, whether the November 2022 resolutions garnered broad consensus as well as to an incident that purportedly took place at an Elders Advisory Table meeting on October 6, 2022 [October 2022 Elder’s meeting], where Chief Gabriel allegedly assaulted her sister Cheryl. Having reviewed the evidence, I have decided to exercise my discretion to not strike any of the impugned portions of the respondents’ affidavits, with the exception the affidavits of Veldon Coburn and Darryl Kipp in their entirety.

[18] For the reasons I have already set out, I need not determine what is band custom on governance or how change may be made to a previously accepted governance model. Consequently, I consider as irrelevant any of the evidence on either side regarding what may be

KFN's traditional band custom in relation to the appointment of the community's hereditary chief and councillors. Regarding the opinion evidence as to whether the November 2022 resolutions garnered broad consensus, that is an issue for the Court to determine, thus I give no weight to such opinions on either side. As regards the incident during the October 2022 Elder's meeting, I will be addressing much of that evidence as I deal with the issue of whether the November 2022 meeting was procedurally fair.

[19] That said, I think it nonetheless important to address Mr. Jago's affidavit which contains a broad mix of self-aggrandizing, personal opinion, legal conclusions, arguments and hearsay evidence, often in the same paragraph. I find Mr. Jago's evidence on what constitutes KFN's custom of governance to be selective and misleading. Although a self-professed journalist, during his cross-examination, Mr. Jago confirmed that he was only interpreting the legal publications and documents to which he referred at paragraphs 26 and 37 of his affidavit, thus supplying his own personal take on the selective portions he cited. From my reading of how Mr. Jago "interprets" the documents he cites, there is no reason to give any merit to any conclusion he draws. Without wishing to belabour the point, in particular given my decision on whether or not I need come to a determination of what constitutes KFN's custom on governance, suffice it to say that Mr. Jago's attempt at playing expert is unconvincing, and I would give his assertions as to what purportedly constitutes KFN custom regarding its governance no weight.

[20] As to the affidavits of Veldon Coburn and Darryl Kipp, they will be struck in their entirety, primarily because they are tantamount to expert evidence in the guise of factual evidence. Although I accept that the rules on expert evidence in matters such as this are not

always rigorously applied so that members of an Indigenous community may be heard on issues of traditional band custom, such evidence must still generally comply with Rule 52.2 of the *Federal Courts Rules*, SOR/98-106 [Rules] (see for example *Jim Shot Both Sides v Canada*, 2019 FC 789, [2020] 1 FCR 22, aff'd on other grounds 2024 SCC 12; *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517; *Shamattawa First Nation v Canada (Attorney General)*, 2025 FC 1927). Here, neither Dr. Coburn nor Mr. Kipp are members of KFN or even part of the larger Stó:lō people—although admittedly Dr. Coburn is a member of another Indigenous community and Mr. Kipp's common-law partner is a member of one. Also, in fairness, such membership may not be necessary for the matters upon which Dr. Coburn opines.

[21] The difficulty with Dr. Coburn's evidence is that his affidavit is not accompanied by a certificate in conformity with Rule 52.2(c). As such I am unable to ascertain whether he read and abided by the *Code of Conduct for Expert Witnesses* which explicitly mentions at section 1 that an expert witness "has an overriding duty to assist the Court impartially". This is important because the respondents concede that they did not put Dr. Coburn forward as a "formal expert" because he had been previously consulted by the respondents regarding some of the larger governance issues and the governance reform movement, and was thus "not independent". Why then did they elect to put him forward in the guise of an expert? Dr. Coburn's affidavit has all the trappings of an expert affidavit; it begins with a string of his accomplishments as a professor at three renowned Canadian universities, mentions how he has published peer-reviewed studies that entailed advanced quantitative data analysis, and sets out his expertise in applied quantitative methodologies. Stripped down to its essence, the affidavit of Dr. Coburn relates to an analysis of

data from a data set and the calculation of the mean and standard deviation of voter turnout from such data; this seems to me to be directly related to the expertise to which Dr. Coburn makes reference in his affidavit.

[22] Apart of the concession of the respondents regarding his lack of independence, Dr. Coburn's impartiality is very much suspect; in cross-examination, Dr. Coburn admitted having also been involved at the behest of the respondent Robert Jago in a petition initiated by respondents Brandon Gabriel and Robert Jago in March 2019 whereby those who purportedly signed the petition announced their withdrawal of support of KFN's hereditary system of governance and requested that band council begin work on the development of a new governance system. I also found it disturbing that Dr. Coburn, during his cross-examination, in particular questions 88 to 100, seemed to link Chief Gabriel with other Indigenous leaders who "cling" to power or "appoint themselves chief for life". His comments do not bode well for his impartiality.

[23] In any event, I do not see how Dr. Coburn's evidence would assist me in assessing the core issue in this case, *to wit*, whether the November 2022 resolutions were reflective of a broad consensus for change within the community, and thus such evidence does not meet the "helpful to the Court" test set out in *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 at 23, citing *R v Abbey*, 1982 CanLII 25 (SCC), [1982] 2 SCR 24.

[24] As for the affidavit of Mr. Kipp, it is again tantamount to expert and opinion evidence in the guise of factual evidence, and clearly not impartial when he states—based upon his knowledge and input gained "elsewhere in Stó:lō territory" and in "attending meetings and

listening to the Kwantlen reform group” (which I assume is a reference to the respondents and their followers)—that Chief Gabriel’s position as hereditary chief “is a manufactured position being defended by a minority self-interest”. That is an issue for the Court to assess, not Mr. Kipp. Neither is Mr. Kipp a member of an Indigenous community, let alone KFN. Consequently, he does not enjoy firsthand knowledge of the custom on which he purportedly opines, an opinion he seems to have garnered from the family into which he married and the respondents in particular. As was the case of the evidence of Dr. Coburn, an expert witness (as which these individuals are intended to be seen) is required to be impartial, independent, and be free of bias (*Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at paras 40–46).

III. Background

[25] I gather from the evidence that hostility between rival families—which may have found voice in the expression of animosity towards the traditional form of hereditary chieftainship and the governance of the community—has existed within KFN for some time. In particular, and as set out in the affidavit of councillor Knott, family feuds developed within the community particularly during the early 1990s, with violence, intimidation and mistrust between families building within the community during that time.

[26] In December 1989, Robert Thomas Sr. (grandfather of the respondent Robert Thomas) along with 18 other voting members of KFN sent a letter to the then Minister of Indian Affairs and Northern Development expressing “disagreement and dismay” with the manner in which the community was being run, pointing particularly to the housing policy on the reserve as well as

the lack of community consultation in respect of the band budget and spending policies, and challenging the legitimacy of the then hereditary chief, Chief Joe Gabriel, to hold office. On May 14, 1990, the Minister responded by essentially directing the individuals on behalf of whom the letter was written to the existing band council to find a resolution to their outstanding disputes.

[27] In October 1991, the respondent Robert Thomas along with his grandfather Robert Thomas Sr., George Antone and 12 other community members (of the then 79 members of KFN of which 57 were electors) took an action before this Court against the members of the then KFN band council (at the time composed of Chief Joe Gabriel and councillors Farley Antone and Chief Gabriel while she was a member of band council and prior to her being appointed chief of KFN) (Federal Court Docket T-2666-91). The plaintiffs claimed, *inter alia*, that the then band council breached its fiduciary duties towards the community, misused funds and, in any event, was not legitimate as it was never properly approved by the community. The plaintiffs sought relief which included, amongst other things, a declaration that Chief Joe Gabriel and the other members of band council were not properly selected as chief and councillors in accordance with band custom, an order for elections to take place for chief and councillors supervised by the Department of Indian and Northern Affairs Canada, and for an interlocutory order appointing a receiver for the community pending the outcome of the action.

[28] Nearly two years later, in June 1993, Chief Gabriel was appointed hereditary chief of KFN by her father, Chief Joe Gabriel, a celebrated Indigenous leader who was honoured with the title of Grand Chief by the leaders of the Stó:lō Nation at a same public ceremony where he also

chose, because of his failing health, to appoint Chief Gabriel as his successor; Grand Chief Joe Gabriel passed away in November of that year. In her affidavit, Chief Gabriel speaks of that ceremony and how her eldest sister, Cheryl Gabriel, the mother of the respondent, Brandon Gabriel, also attended and spoke at length about her process in coming to terms with her father passing her over in favour of her sister as hereditary chief. The transcript of the ceremony reflects the introductory statement of Grand Chief Steven Point, a highly respected and celebrated Stó:lō leader, who spoke of being honoured to be part of the event to commemorate “the important work of passing down the hereditary chieftainship” as well as comments from others on how the community must come together. The transcript also includes comments from Cheryl Gabriel herself, sharing her feelings about the challenges she faced in accepting her father’s decision not to have appointed her, as the eldest daughter, to the chieftainship, and that despite such difficulty, she ultimately made peace with his choice; Cheryl Gabriel expressed immense pride in her family, emphasizing that her sister, Chief Gabriel, “symbolizes the birth of new leadership”. Many years later, in his cross-examination in the context of the present application, the respondent Brandon Gabriel stated that he did not understand why his grandfather chose his aunt over his mother to be hereditary chief.

[29] Prior to naming his daughter as hereditary chief, Grand Chief Joe Gabriel served as chief of KFN for about 35 years, since the passing in May 1968 of his father Chief Alfred Gabriel who had served as chief of the Langley Band (today KFN) for about 30 years. Whether Chief Alfred Gabriel actually passed on the chieftainship to his son prior to his death or whether, as asserted by the respondents, Grand Chief Joe Gabriel was elected by the community to the position of chief in 1972 after four years of a leadership vacuum within the community following the death

of Chief Alfred Gabriel—thus supporting their argument that a community-wide confirmation vote was part of band custom—is of no moment given that, as mentioned, the respondents have not brought an application challenging Chief Gabriel’s appointment as hereditary chief.

[30] Although action T-2666-91 was issued two years earlier, shortly after the appointment of Chief Gabriel as hereditary chief, on October 5, 1993, Robert Thomas Sr. and the other plaintiffs in that action sought and obtained an *ex parte* order from this Court placing KFN into receivership. Upon challenge three days later, on October 8, 1993, a consent order was issued setting aside the *ex parte* order, with all community property which the receiver had by then taken into her possession being returned to Chief Gabriel. Ultimately, the action was dismissed for delay in November 1998 following the issuance of a Notice of Status Review.

[31] Shortly after the receivership order being set aside, a meeting of the community was organized by George Antone and Robert Thomas Sr. as a challenge to the system of hereditary governance and calling for a change in leadership [October 1993 meeting]. The best estimate suggests there were about 30 to 40 electors who attended the meeting—of the approximately 57 electors within the community at the time as mentioned in the proceedings in action T-2666-91. The meeting did not bring about a change to the system of hereditary governance. In fact, in his affidavit, Farley Antone stated the following:

Before the votes were counted, Marilyn put up her hand and she said 'Bob [addressing Robert Thomas Sr], what's it going to be - Do we come in here every two years to elect a Chief? Or do we stay hereditary?' Robert Thomas stood up and faced the people and said, 'from this day forward we will remain hereditary' and nobody said anything.

[Emphasis added.]

Farley Antone's recollection was confirmed by Fern Gabriel (Chief Gabriel's younger sister) during her cross-examination.

[32] For whatever reason, during the October 1993 meeting, the issue of who the community members in attendance would want to see as chief and councillors was put to a vote; the results confirmed the community's willingness to maintain the hereditary chieftainship system of governance with Chief Gabriel as chief, as well as the names of Tumia Knott and Les Antone who Chief Gabriel later appointed as band councillors in January 1994. Again, whether Chief Gabriel appointed councillors Knott and Antone as of right in accordance with band custom, or whether, as asserted by the respondents, she was compelled to appoint them as councillors in accordance with band custom on account of the vote that took place, is not an issue I need resolve, as the legitimacy of councillors Knott and Antone's appointment on band council in January 1994 is not being challenged.

[33] Around September 2009, the respondent Robert Thomas, in a direct challenge to the authority of band council, began to publicly claim to be Chief of the Whonnock, one of the six KFN reserves, and actively campaigned along with his mother for the creation of a Whonnock Local Authority as part of the remaining KFN community. The affidavit of councillor Knott describes how Mr. Thomas disrupted band governance by sending correspondence to local governments, businesses and agencies identifying himself as Chief and asking that they contact him for issues involving the Whonnock Reserve. A joint meeting of the band council and the KFN Elders Advisory Table took place in November 2009 at which Mr. Thomas and his mother attended. The meeting resulted in the Elders coming to the unanimous decision that Robert

Thomas had no claim to being Chief of Whonnock, however notwithstanding attempts at further dialogue to resolve the dispute, the conflict and strain such claims had put on the small community continued to fester.

[34] As mentioned earlier, in March 2019, band council received a petition [March 2019 petition] from the respondents Brandon Gabriel and Robert Jago—purportedly signed by 31 members of the community (15% of Kwantlen’s voting population by that time) although the document received did not identify any signatures—indicating that although those who purportedly signed the petition wished to “thank the chief and council for all their efforts at building and healing our nation”, they were withdrawing their support for the hereditary system of governance and requested that the band council begin work on the development of a new governance system.

[35] According to the affidavit of councillor Knott, Chief Gabriel and band council considered Mr. Jago and his supporters to represent a small fraction of the community’s membership, however decided that it may be time for band council to initiate a “community-driven approach” so as to engage the members of the community on the direction to be taken with respect to KFN’s governance and the ultimate drafting of a Governance Code [Governance Dialogue]. The consultants retained by band council held six community engagement sessions between October 2019 and October 2020 before the process was disrupted by the COVID-19 pandemic requiring the process to move to an on-line platform—a difficult transition for many of the community elderly members. The consultants also sent out three questionnaires on topics meant to inform the continued dialogue and process for the determination of the community’s new governance

model. It would seem that the answers to one of the questionnaires suggested the community favoured maintaining an unelected hereditary chief in some capacity but expanding the number of councillors.

[36] Along the way, the relationship between band council and the respondents, Brandon Gabriel and Robert Jago, continued to be fractious, with the vitriol towards band council continuing. According to councillor Knott, Messrs. Jago and Gabriel expressed a great deal of skepticism towards the Governance Dialogue largely through their social media posts in which they were highly critical of the hereditary system of governance and the efforts being made by band council to gage the will of the community for change. Councillor Knott also recalls that in the Spring of 2020, Brandon Gabriel began making unsubstantiated allegations of fraud against band council, claiming that \$4 million had been stolen from KFN's economic development corporation. In addition to an RCMP investigation commenced following an anonymous tip of alleged financial impropriety, band council launched its own independent investigation by way of a forensic audit which culminated after one year in a finding that there existed no evidence to support Mr. Gabriel's allegations. Consistent with such a finding by the outside auditors, the RCMP ultimately determined that no criminal activity was undertaken by band council.

[37] In any event, the Governance Dialogue continued and in December 2020, a formal presentation by the consultants was prepared for band council setting out four possible models of governance for the community, including one which was identified as the current model involving a hereditary chief appointing two councillors, as well as three other possible models

involving community involvement by way of an election process for either all members of council, including the chief, or simply for the councillors.

[38] In May 2021, the consultants issued their final report which reflected a desire within the community for reform of their governance model, but no clear direction as to which model was preferred. The affidavit of councillor Knott recounts the disappointment of council with the low “turn-out for the Governance Dialogue”, seemingly on account of anxiety within the community over the growing conflict that had arisen regarding its governance structure. Further discussions and an additional six meetings with the consultants took place between September 2021 and April 2022 culminating in a draft Governance Code being delivered in July 2022 “based on [the consultants’] estimation of where a new consensus on reform could potentially be located”.

[39] The copy of the Governance Code in the record is clearly a draft, with a number of areas requiring further discussion and completion. The draft Governance Code proposed to expand the size of council by adding two new elected positions, otherwise preserving the existing system of a hereditary chief and two councillors appointed by the chief. The parties agree that the next step would have been to put the final version of a Governance Code to a community-wide referendum, however given the status of the draft and the number of issues left out for discussion, band council felt that further rounds of community dialogue were needed prior to finalizing the draft and holding a formal referendum.

[40] It would seem as though scheduling issues delayed further meetings between band council and the consultants, with the meeting scheduled for November 2022 being cancelled by

the consultants. KFN contends that the continuation of the Governance Dialogue became nearly impossible, particularly within such a small community, due to ongoing bullying by Messrs. Jago and Gabriel, as well as intimidating statements, persistent accusations, and the disruptive actions by the respondents which began in October 2022 and which disrupted the community's governance; specifically, argues KFN, the emergence of Messrs. Gabriel, Back, and Thomas as a "rival council" looking to take over control the community further destabilizing the situation. The respondents take a different view, saying that the draft Governance Code should have been rolled out much earlier, putting the blame on Chief Gabriel and band council for delaying the process in order to, in their view, maintain the *status quo* of unchecked power.

[41] It seems to me that when there is a breakdown in trust, there comes a point where even justifiable delays caused by a pandemic may be considered unreasonable; the draft Governance Code was only received by band council in July 2022 although the Governance Dialogue had begun in 2019.

[42] As mentioned earlier, at the October 2022 Elder's meeting, a close encounter took place between Chief Gabriel and her sister Cheryl (the mother of the respondent Brandon Gabriel) with one side saying only words were exchanged while the other side accusing Chief Gabriel of physically assaulting her sister. According to the affidavit of Erin Marshall, after the meeting, she was advised that Cheryl Gabriel's husband Farley Antone and Brandon Gabriel filed a police complaint against Chief Gabriel for assault; Chief Gabriel confirms that she was contacted by the RCMP after the meeting to advise of the complaint that was filed against her. The RCMP attended the community later in October to investigate the incident and interview those in

attendance, approximately 30 KFN Elders and staff. According to Ms. Marshall, on October 26, 2022, the RCMP advised her that the investigation was concluded and that charges against Chief Marilyn were not being recommended to the Crown. The email from the RCMP stated that they were “concluding [their] assault file as [they] do not have any evidence to suggest that an assault took place”. On November 1, 2022, band council posted a statement to the members of the community that the RCMP had concluded their investigation with no charges being laid.

[43] Ms. Marshall continues by stating that sometime within the first week of November, the RCMP informed her that the respondent Brandon Gabriel had communicated with them, claiming that the RCMP did not conduct a proper investigation, and requesting that the investigation be reopened. Notwithstanding Mr. Gabriel’s request, on November 30, 2022, the RCMP issued a public statement that the investigation into the incident that took place during the October 2022 Elder’s meeting had concluded with no evidence of any assault; in their statement the RCMP recognized that reports of the incident had an impact on the community and concluded that after a thorough investigation, the matter was closed.

[44] From the record, I note five affidavits filed by KFN from individuals who were at the October 2022 Elder’s meeting and who clearly, unequivocally and with a detailed account of the incident, assert that at no point did Chief Gabriel touch her sister. Other than Chief Gabriel who remained steadfast as to what happened during her cross-examination, none of the other four affiants were cross-examined on this issue. The respondents have filed two affidavits from individuals at the meeting who claimed that an assault did take place, one of whom walked back his statement by admitting on cross-examination that he did not have a clear view of the incident.

The other account, by Gordon Thomas, states simply that he saw Chief Gabriel grab her sister's arm, and that he recorded the altercation. The audio recording, although confirming a heated verbal exchange between the two sisters, does not in any way confirm a physical altercation between them.

[45] No affidavit was submitted by Cheryl Gabriel, nor by Kim Savino (Robert Jago's aunt) who was also present at the October 2022 Elder's meeting and who, according to Mr. Jago, confirmed the assault. Nor does the affidavit evidence of Farley Antone, Cheryl Gabriel's partner who was in attendance, speak to the events surrounding the incident. However oddly enough, the affidavits of the respondents Brandon Gabriel and Robert Jago—who were not in attendance—continue to perpetuate the rumour of an assault by Chief Gabriel of her sister, notwithstanding the affidavits from many who attended and the conclusion of the RCMP investigation. Suffice it to say that on cross-examination, Mr. Gabriel and Mr. Jago were somewhat equivocal as to whether they actually believed such an assertion to be true.

[46] From my assessment of the affidavits and cross-examinations on this issue, the preponderance of the evidence confirms that any claim of an assault by Chief Gabriel upon her sister during the October 2022 Elder's meeting cannot stand; the respondents' perpetuation of such a rumour does not make it so, and only results in more tension, conflict and division within the small community, thereby inhibiting the healing process that must take place and, to echo the words of Cheryl Gabriel at the June 1993 ceremony during which Chief Gabriel was appointed hereditary chief, the "rebuild" of the community.

[47] That being said, it would seem that the incident during the October 2022 Elder's meeting became, as far as KFN was concerned, the supporting rationale for what was described before me as an attempted coup, indicative of the bad faith with which the respondents, in particular Brandon Gabriel and Robert Jago, seized on the idea of an assault by Chief Gabriel as the needed spark to proceed with the creation of their own alternative community government. From what I glean from the record, the allegation of an assault seems to have created the underlying premise to galvanize what support the respondents did have to orchestrate a barrage of attacks on Chief Gabriel and the governing council, tantamount to a call to action for those who opposed band council, leading up to the November 2022 meeting.

[48] During the afternoon following the October 2022 Elder's meeting—and following a telephone message left on the messaging service of the local Indigenous Services Canada governance officer—Brandon Gabriel and Robert Jago wrote to Indigenous Services Canada claiming that the democratic reform process undertaken by KFN to review their governance model has been “shut down by the chief, with no explanation why”. The letter goes on to underscore what the two called the “escalating series of erratic acts” of Chief Gabriel, “most recently in today's assault against Cheryl Gabriel, a member of our elder's council, during a meeting of that council. This was captured on video, and has been reported to the police, who are taking action now”. The letter continued by claiming that: “With this assault, the last shreds of that legitimacy are gone, and this chief cannot continue in her position” and that “[w]e fear that the chief may try to appoint her son Michael Gabriel as successor if she is forced to resign” [emphasis added].

[49] I should mention that contrary to the assertions of Messrs. Jago and Gabriel, there was no video of the incident; what existed was the audio recording of Gordon Thomas to which I referred earlier. In essence, Messrs. Jago and Gabriel seem to have been playing fast and loose with the truth at the expense of Chief Gabriel.

[50] Shortly after the October 2022 Elder's meeting, Robert Jago and Brandon Gabriel hosted a meeting on Facebook to which they invited members of the community, where they discussed what they had claimed to Indigenous Services Canada to be the assault of Cheryl Gabriel. According to the affidavit of Christine Loewen on behalf of KFN, the meeting was recorded, and the link was posted to Messrs. Jago and Gabriel's private Facebook group. Brandon Gabriel continued to fan the flames of discontent when he spoke publicly to the media about the incident, suggesting that the assault "was a symptom of a bigger issue" within the community. The reference to the larger issue was noted by the reporter who covered the story as being "the dissatisfaction with [the community's] hereditary chief and council that operate under a band custom code instead of an elected band council system under the Indian Act". Interestingly, the news story filed in the record states that Brandon Gabriel asserted that the March 2019 petition "saw 71 or half of the adults in the community ask for an elected system of government". From what I can tell, the record confirms only 31 individuals supposedly having signed the March 2019 petition; the record also confirms the voting members of the community stood at 218 in 2021.

[51] A year earlier, in September 2021, Mr. Jago's mother passed away; she had been living in rental housing provided by the community. A year later, in November 2022, the community's

housing development office attempted to reclaim the property as there existed a long list of KFN members waiting for rental housing. Mr. Jago demanded a public meeting to deal with the eviction notice delivered to his late mother's companion who, although not a member of KFN, continued to live in the rental unit. The request for a public meeting was denied by band council on November 21, 2022, on the grounds that the issue involved a tenancy matter governed by an agreement, the terms of which prevented non-KFN members from "holding possession of the homes".

IV. The lead up to the November 2022 meeting and the assessment of a broad consensus

A. *The concept of a broad consensus*

[52] I think it appropriate at this point to set out what is meant by a broad consensus, which is not in dispute; what is in dispute is whether such broad consensus was achieved.

[53] As stated, the determination of whether a broad consensus exists to support a change in governance structure is a contextual exercise. For example, even where there is a majority decision of the band members attending a general meeting convened with notice, one may possibly find there to be no broad consensus of the community where, for example, "the general meeting was held in a location or at a time when it was difficult for a number of members to attend, and there was no provision for proxy voting" or if "the notice was not adequate in not providing sufficient detail of what was proposed, or was not given sufficiently in advance of the meeting to allow people a realistic opportunity to attend then it would not be" (*McLeod Lake*

Indian Band v Chingee, 1998 CanLII 8267 (FC), 165 DLR (4th) 358; [1999] 1 CNLR 106; 153 FTR 257 (FCTD) [*McLeod Lake*] at para 18.

[54] On the other hand, there may also be “situations in which those who do not vote may be signalling a willingness to abide by the majority decision of those who do” (*McLeod Lake* at para 19). As stated by Justice Strickland in *Da'naxda'xw* at para 72: “The inquiry into whether a custom enjoys broad consensus is fact and context specific and the evidence may demonstrate that there is no consensus. Custom may be demonstrated by a one-time event like a referendum or majority vote, by a series of events, or possibly acquiescence” [citations omitted]. Also, where broad consensus is found to exist, “[i]ts effect will be to exclude from the equation an insignificant number of band members who persistently objected to the adoption of a particular rule governing band elections as a customary one”. (*Francis v Mohawk Council of Kanesatake*, 2003 FCT 115, [2003] 4 FC 1133 at para 36).

[55] On the whole, it seems to me that broad consensus on an issue may reasonably be inferred when the circumstances or context are such that a significant number of community members, the sufficiency of which will depend on context, either express agreement with a proposition or may harbour reservations which they consider insufficient to have them express opposition to it, thus being willing to acquiesce, without intimidation or fear of retribution or conflict.

[56] As to the importance of the relationship between process and determining whether a custom has legitimately been changed through broad consensus of the members of the

community, we look at *Beardy v Beardy*, 2016 FC 383 [*Beardy*], where Justice Strickland stated at paras 126 to 128, 148 and 149:

[126] The law is well established that custom cannot ignore or trump principles of natural justice and procedural fairness (*Felix v Sturgeon Lake First Nation*, 2014 FC 911 at para 76). In *Sparvier*, Justice Rothstein noted at paragraph 47:

47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[127] As stated by Justice Dawson (as she then was) in *Giroux v. Swan River First Nation*, 2006 FC 285:

[32] The content of the duty of fairness is not constant or absolute, but varies from situation to situation and must be decided in the specific context of each case. All of the circumstances must be considered in order to ascertain what the duty of procedural fairness requires in any particular case. As the majority of the Supreme Court of Canada observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 [*Baker*] at paragraph 22, the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made, so that those affected by a decision are able to put forward their position and evidence fully and have them considered by the decision-maker.

[33] In order to determine what in any case the duty of fairness requires, one must consider a number of factors, including:

- (a) the nature of the decision being made and the process followed in making it;
- (b) the nature of the statutory scheme and the terms of the statute pursuant to which the decision-maker operates;
- (c) the importance of the decision to the individual or individuals affected by the decision;
- (d) the legitimate expectations of the person challenging the decision; and
- (e) the choices of procedure made by the decision-maker.

See: *Baker*, cited above, at paragraphs 23 through 27.

[128] The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. This context can and should include judicial respect for relevant custom (*Samson* at para 20). In *Samson*, in one of the two complaints being dealt with, the trial judge concluded that the applicant, who had been disqualified from running for a council seat, had been denied natural justice as the appeal board had failed to provide him with an opportunity to be heard.

...

[148] Of greater concern is the conduct of the nomination meeting. As previously stated, while notice was provided of the September 11, 2015 nomination meeting, this notice did not include the fact that a vote on the eligibility of nominees who had previously resigned would be held. There is no evidence in the meeting minutes that those who attended the nomination meeting were advised that there would be a vote on this issue at the end of the meeting. Neither the fourteen people who attended this meeting nor the twelve people who voted against Gordon Beardy running in the election are representative of the majority of the community. Therefore, this process lacked procedural fairness.

[149] I believe that the following oft-cited quote from Justice Rothstein (as he then was) in *Long Lake Cree Nation* at para 31 is relevant and applies equally to election committees:

31 On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the Indian Act or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[Emphasis added.]

B. *The lead up to the November 2022 meeting and beyond*

[57] The conflict within this small community continued to mount after band council refused on November 21, 2022, to hold a public meeting in relation to Mr. Jago's tenancy matter, with the pressure by the respondents intensifying with what can only be described as a full court press against Chief Gabriel and band council. According to his affidavit, Robert Jago was the person responsible for organizing the November 2022 meeting, which "followed from [his] work earlier in the month and in October". The record shows that on the same day that council refused to hold a public meeting regarding Mr. Jago's tenancy matter, the respondent Robert Thomas circulated a letter [Meeting Notice] prepared with the assistance of Robert Jago and addressed: "To the Kwantlen First Nation Council and Elders" from "Whonnock Reserve Local Authority WRLA" [Whonnock Authority], with the letter signed by "Chief Robert Thomas, Whonnock Reserve Local Authority". Reference to the Whonnock Authority could only be seen as clear affront to the authority of band council, in particular given the unanimous decision of the Elders during the

meeting that took place in November 2009 to the effect that Mr. Thomas had no claim to being Chief of Whonnock.

[58] The subject matter of the letter was: “Announcement of band meeting and vote”. The logo on the letterhead which read “Kwantlen Government” was almost identical to the logo on KFN letterhead used for public communications. In addition, the Meeting Notice was issued only six days prior to the November 2022 meeting. KFN asserts that the use of the logo was an attempt by Messrs. Thomas, Jago and Gabriel to bring a sense of legitimacy to their actions as it made it look as though the meeting was being called by band council. The respondents say that the logo was a logo of the band, and that it is not in dispute that members of the community may call a meeting of the band for the purposes of removing from office the chief or councillors. In any event, the words “Kwantlen Government” also appeared on the letter and there is evidence in the record that the logo in conjunction with the Meeting Notice caused confusion in the community as some members did initially think that the meeting was being called by band council.

[59] Although the respondents assert that the Meeting Notice was widely disseminated, they provide no evidence as to whom it was sent, however they do accept that it is their burden to show that it was widely disseminated. Mr. Jago states in his affidavit that he “created a Facebook event invite for the meeting”, what he called “a chat space for community members”, and “also sent out email updates”. There is evidence by Christine Loewen which speaks to KFN’s official Community Members Page, a private Facebook group of 158 members and non-members of the community. However, what is not clear to me is whether the Meeting Notice was posted and

disseminated to all the members of the community's Facebook group, or whether solely to those who are part of Messrs. Jago and Gabriel's private Facebook group.

[60] The respondents concede that not everyone in the community received the Meeting Notice and do not show what efforts were made to disseminate the Meeting Notice; in fact the respondents do not even provide the number of community members who were associated with Messrs. Jago and Gabriel's private Facebook group; to be fair, they do state that the Meeting Notice was also sent out by email however without any details as to whom it was sent. It is not clear to me how many members of the community actually received the Meeting Notice and thus the respondents have not satisfied their burden to show that it was widely disseminated to the community. This alone weighs heavily against any finding of a broad consensus regarding the November 2022 resolutions.

[61] The respondents concede that the notice period for the November 2022 meeting could have been longer than six days and that although the Meeting Notice was not perfect, they raise what they call a sense of urgency given the incident during the October 2022 Elder's meeting. They also assert that in conducting the November 2022 meeting, they looked to emulate the process followed during the October 1993 meeting called by Robert Thomas Sr. and George Antone following Chief Gabriel's appointment as hereditary chief.

[62] I do not follow the respondents reasoning. First, by the time the Meeting Notice was circulated, the RCMP had already advised that their investigation was closed regarding the allegations of assault by Chief Gabriel; I fail to understand the sense of urgency that they claim

existed. Second, in October 1993 there were approximately 57 electors within the community, most of whom lived on the reserve. In 2022, there were approximately 375 members with only about 100 of whom actually live on KFN's six reserves. I must agree with KFN that six days notice was not enough lead time for the sizable number of members living off-reserve—assuming they received the Meeting Notice—to attend. The respondents say that demographics proved to be a challenge to the calling of the November 2022 meeting. No doubt it did, however if the respondents are seriously looking to establish that the November 2022 resolutions reflected a broad consensus within the community, it was for them to make certain that their “wide” dissemination of the Meeting Notice was properly ascertainable.

[63] The other difference with the October 1993 meeting is that, unlike the November 2022 meeting, it did not bring about a change to the system of hereditary governance, which the respondents say the November 2022 meeting did. In addition, as mentioned, the evidence suggests there were about 30 to 40 voters who attended that October 1993 meeting out of approximately 57 voters within the community: easily over 50% of the electors at the time. This is a far cry from the November 2022 meeting where, at best, 37 voters attended either in person or by proxy on a total of 218 voters with many of whom living off reserve thus, I would think, requiring a more formalized and structured process than may have been followed in 1993. Finally, what is clear is that what emanated from the October 1993 meeting garnered broad support from the community; for those who were looking to challenge the leadership of Chief Gabriel, the matter was settled, with Robert Thomas Sr. who organized the meeting accepting the results. As confirmed by Farley Antone during his cross-examination, after the October 1993 meeting, the whole community largely accepted that Chief Gabriel was chief. The same cannot

be said of the November 2022 meeting; in fact, there is no evidence that what Victor Back described as an attempt to cause controversy in the community was at any time generally accepted by the community after the November 2022 meeting.

[64] In any event the Meeting Notice indicated the time and place for the November 2022 meeting and set out the following:

During this meeting we will discuss:

1. The grievances of the Whonnock and Kwantlen peoples with their current Chief and Council

We will ask the people to decide upon the following:

1. Recognition of the Whonnock Reserve Local Authority
2. Removal of Marilyn Gabriel from the band council
3. The call for an election for 3 additional council members
4. An order to band council to immediately produce a custom governance code for a vote of the people - one with a hereditary chief and an elected council

The Meeting Notice provided that voting would take place by a show of hands. Given the importance of the vote that was to take place and the anxiety, conflict, intimidation and fear of possible retaliation felt within the community on this issue to which the affidavits speak, I must agree with KFN that open voting was not appropriate on such important issues.

[65] The Meeting Notice ends with the statement: “The list of harms committed by this chief and council is long and known by all, and we will give voice to it at the meeting on Sunday”.

During his cross-examination, Robert Jago confirmed that the “harms” referred to included the purported assault of Cheryl Gabriel and that the message was meant as a reminder to the

community of such an incident and to allow the members “to come to their senses”. To me, this provocative and inciteful statement alone would go to vitiating the legitimacy of the results that would have come out of the process envisaged for the November 2022 meeting.

[66] I also note that the letter skilfully referred to the purpose of the meeting being to decide upon, *inter alia*, “the call for an election for 3 additional council members”. This was misleading and does not constitute, in my mind, a clear indication that a vote for additional council members would take place during the meeting. In fairness, clarification of the possible voting for council membership seems to have been made the day prior to the November 2022 meeting with the publication of what was being referred to as the General Assembly Kit [Kit] to which I refer below, however it was somewhat too little, too late for those who may not have intended on participating but for the calling of a vote for council members.

[67] Reference in the Meeting Notice as well as the Kit to the untenable assertion that Chief Gabriel assaulted her sister as the first and main rationale for her removal from council is not only inflammatory but also rendered the entire process procedurally unfair. On the whole, I find that the calling of the November 2022 meeting to have been procedurally unfair: it looked to sway the vote by including inflammatory and highly prejudicial assertions regarding Chief Gabriel, it was issued with insufficient time for the general community to attend, it was confusing as to its purpose regarding the eventual voting for additional councillors, and there was no evidence other than the bald assertions of the respondents that it was widely disseminated.

[68] On the same day as the issuance of the Meeting Notice, a press release was issued on behalf of “Whonnock/KFN Hereditary Chief Robert Thomas-Xatsten”, The press release also contained a logo resembling KFN’s official logo that included the words “Kwantlen Government”. The press release headline read: “Hereditary Chief Robert Thomas of the Whonnock First Nation has today declared autonomy for the Whonnock Reserve in Maple Ridge, BC”. The assertion of Robert Thomas as chief of Whonnock received support from Robert Jago who, in his affidavit, stated that he met with Robert Thomas “and explained how his family’s interests could be addressed”. Mr. Jago goes on to say how he “negotiated with [Mr. Thomas] for a compromise where they would end their separatism, and instead advance their interests inside Kwantlen, with local autonomy on the Whonnock Reserve, with a few caveats to protect Kwantlen Band Interests”. The November 2022 meeting was to be the manner in which such a proposal was to be given life.

[69] As underscored by councillor Knott in her affidavit, the press release went on to incorrectly claim that a “third party mediator developed a consensus on a new government with a symbolic hereditary chief, and an all-elected council. However, the chief and council stopped the reform process, and have left the band in limbo for more than a year”. The press release was inflammatory to say the least when it stated that: “While the Kwantlen chief and her council busy themselves trying to hold on to power, the Whonnock people continue to suffer in poverty”. The press release also claimed that Chief Gabriel “has engaged in erratic behaviour, resulting in at least 1 lawsuit against her for her treatment of band employees, and an ongoing RCMP investigation into her physical confrontation with an elder”, and invited members of the media to take part in an organized tour of the Whonnock reserve. I must say that other than the bald

assertion in the press release, there is nothing in the record confirming a lawsuit against Chief Gabriel relating to her treatment of band employees. Here again, given the inflammatory remarks directed at Chief Gabriel and council, the dissemination of such statements just days before a vote on the removal of Chief Gabriel poisoned the waters and rendered any results that would emanate from the process envisaged for the November 2022 meeting highly suspect.

[70] As mentioned, the day before the November 2022 meeting, on November 26, 2022, Mr. Jago—who was responsible for organizing the meeting—posted the Kit for the meeting on Facebook. As was the case with the Meeting Notice, it is not clear to me whether it was shared with all the members of KFN’s Facebook group, or only those who were part of Messrs. Jago and Gabriel’s private Facebook group. In fact, Mr. Jago acknowledged during his cross-examination that not all members of the community were part of his private Facebook group; it is therefore uncertain how many members of the community actually received the Kit let alone the Meeting Notice. The Kit was also the first time those who received it were able to review the resolutions to be voted upon. That said, the Order of Events, as I alluded to earlier, seems to clarify that an election of three new councillors may take place at the November 2022 meeting. However as stated, I find this late clarification of a pending vote for council seats inadequate to provide sufficient notice for those who may not have initially intended to attend the meeting but who—having received the Kit and understanding that a vote for council positions may be conducted—now wish to do so; again, this is a procedural fairness issue.

[71] As stated, KFN does not argue that band custom does not include the ability of members of the community to call a general assembly to either remove the chief from office or to change

band custom; rather, what KFN is saying is that the process undertaken by the respondents to do so was fraught with irregularities and was procedurally unfair. The November 2022 meeting took place within the community with, as mentioned, the November 2022 resolutions being passed.

Of note, the recital to Resolution One includes reference to the incident at the October 2022

Elder's meeting, including the following:

WHEREAS

Marilyn Gabriel has used the band administration to fight her personal battles with her family, including engaging in a physical confrontation with one of them at a band meeting.

Marilyn Gabriel is under an ongoing police investigation into her physical confrontation with a band member (confirmed by APTN), and has used band communications to mislead people as to the status of her police investigation.

[72] I find both those recitals are misleading at best, and certainly inflammatory and provocative. As I have found, the continued assertion of an assault by Chief Gabriel upon her sister during the October 2022 Elder's meeting cannot stand. By November 27, 2022, the community, including Brandon Gabriel and Robert Jago, were aware that the RCMP had concluded their investigation with no charges being laid against Chief Gabriel; but for the intervention of Mr. Gabriel requesting that the investigation be reopened, RCMP involvement had ended. Perpetuating the claim does not make it so.

[73] The paucity of evidence regarding the number of community members who received the Meeting Notice may well have been rendered academic with a large turnout for the November 2022 meeting. However, the respondents assert that only 37 voters attended the November 2022 meeting (about 22 in person and 15 by way of proxy). There is reference to five or six people

following the meeting online, however there is no indication whether they were voting members of the community. This is consistent with the affidavit of Linda Mitchell on behalf of KFN who stated that although she did not attend the meeting, she watched a video recording of the meeting that was posted on Brandon Gabriel's Instagram account and "was able to identify approximately 20 Kwantlen members and at least 15 additional non-members". Ms. Mitchell was not cross-examined on this issue. This would also seem to be supported by the handwritten notation on Resolution One that is in the record which shows 19 "yes" votes and 2 "no" votes, plus 15 proxies held by Robert Jago and Brendon Gabriel on behalf of members who did not attend supposedly supporting the resolution. The handwritten notes on Resolutions Two and Three also seem to support the contention that approximately 20 to 22 voting members were present and participated in the voting process which, along with the proxy votes, totals at best 37 voting members of the community participating in the meeting.

[74] KFN argues that the validity of the proxy votes is suspect given that, on cross-examination, Mr. Jago indicated that no documentation existed in connection with the proxy votes, thus the respondents' very own process for proxy voting set out in the Kit was not followed. The respondents concede that the proxy process did not necessarily follow the process that was set out in the Kit, with the evidence identifying the names of only 10 of the 15 community members who provided proxies to Messrs. Jago and Gabriel. Even if we include the 15 proxy votes, a total of 37 voting members is a far cry from the 218 voting members that Robert Jago mentions in his affidavit to be the total number of voting members in the community. I am far from convinced that such a small percentage of voters could be reflective of a broad consensus for change within the community. Moreover, in his cross-examination, Victor

Back confirmed that the objective of the November 2022 meeting was indeed to cause controversy in the community and jump start community activism (Questions 157 to 162).

Again, that is hardly a solid foundation to support a claim for legitimacy and the existence of a broad consensus for change in community governance.

[75] Just as importantly, the Kit that was distributed provided rules on proper quorum for the meeting. Keeping in mind that the community consisted of 375 members in total, the material in the Kit provided, rightly or wrongly, as follows:

In order for a General Assembly to be considered official, some nations require quorum. Kwantlen has no rules about this. But at this meeting, we will use the Squamish Nation's quorum rules, as they are publicly available. They require 12% of the band to be participating for quorum. For Kwantlen this means 45 people are needed, in person, or by proxy. For band members below the age of 18, their parents may represent them for purposes of achieving quorum, and they may share their views, but they may not cast a vote.

[Emphasis added.]

Putting aside whether the 12% number is even proper or whether one can extract a broad consensus from a meeting of only 12% of the community—which I doubt—quorum for the November 2022 meeting does not look to have been met given the respondents' own evidence that only 37 people (rather than 45) out of a total of 375 participated either in person or by proxy. The only other evidence of attendance was from Linda Mitchell who noted from the video of the meeting 15 non-members of the community being present, however the respondents do not suggest that these unidentified individuals should be counted for the purpose of achieving quorum.

[76] On the whole, I find the November 2022 meeting itself to have been procedurally unfair: putting aside that the lack of quorum which would, on its own, invalidate the meeting, the resolutions themselves repeated the inflammatory and highly prejudicial language of the Meeting Notice and allowed voting by proxy for individuals who were only partially identified, with the respondents themselves conceding before me that the process of the proxy votes was not followed. However, again, even putting aside the failure by the respondents to follow their own procedural rules which would invalidate some if not all of the proxy votes, I find that the entire context of the November 2022 meeting falls short of allowing me to find that the votes of only 37 members having purportedly passed the November 2022 resolutions was reflective of a broad community consensus in favour of those resolutions. As was stated by Justice Strickland at para 126 of *Beardy*: “[t]he law is well established that custom cannot ignore or trump principles of natural justice and procedural fairness”.

[77] The day following the November 2022 meeting, and seemingly in response to band council’s refusal to hold a public meeting regarding his tenancy issue, on November 28, 2022, Mr. Jago and his late mother’s companion filed with Federal Court an application for judicial review of the refusal (T-2458-22), seeking to set aside the eviction notice. On December 20, 2022, this Court dismissed Mr. Jago’s notice of motion seeking an injunction to stay the operation of the notice of eviction. Eventually, and from KFN’s evidence, band council continued to work with both Mr. Jago and his late mother’s companion to arrive at a settlement that would allow the latter sufficient time to find another residence; KFN did not enforce its costs award against Mr. Jago.

[78] Notwithstanding the November 2022 meeting and the resolutions that emanated therefrom, band council continued with its running of the community. On November 29, 2022, two days after the November 2022 meeting, Chief Gabriel and band council sent a notice to the community which, in short, stated that the November 2022 meeting was not called by band council, that the November 2022 resolutions were invalid and that band council plans to continue its work on the Governance Code and in the running of the community.

[79] The gloves were off and the lawyers stepped in: holding to the validity of the November 2022 resolutions, on December 2, 2022, lawyers appointed by the “newly elected Council of the Kwantlen First Nation”, being Messrs. Gabriel, Back and Thomas as “KFN Council”, wrote to Chief Gabriel and councillors Knott and Antone in an attempt to arrange for an orderly transition of government. Band council did not engage with what it saw as an illegitimate rival group bullying their way into a position where they were now demanding recognition by the chief and councillors, and on December 8, 2022, lawyers for the band council responded to what they called the subversion of KFN’s governing structure and attempted to set the record straight. The letter from band council’s lawyers also insisted that Messrs. Gabriel, Back and Thomas cease and desist from, *inter alia*, representing themselves as KFN councillors and purporting to represent the community. In short, there was to be no transition of power. Further exchanges took place between the lawyers whereby the respondents proposed that the matter be settled at a KFN membership meeting to be held without delay, a process which was rejected by band council as only lending credence to what they saw as the illegitimate acts of Messrs. Gabriel, Thomas and Back.

[80] Without resolution, Messrs. Gabriel, Thomas and Back began running what can only be described as parallel band council to that comprised of Chief Gabriel and councillors Knot and Antone. According to the cross-examination of Mr. Back, they would hold monthly council meetings to attend to, as they saw it, community affairs, convene Elders Council meetings, issue letters as KFN's lawful council and issue band resolutions. As stated earlier, one of the first acts of Messrs. Gabriel, Back and Thomas as rival council was to issue, on December 13, 2022, a purported band resolution suspending councillors Antone and Knott from band council until such time as they appeared before them "to individually justify their actions in support of Marilyn Gabriel". Lawyers for the respondents continued with their exchanges, looking to entice Chief Gabriel and band council to advise what process would be acceptable to them so that a further meeting of the community could take place to vote on the same issues; again, no engagement from band council.

[81] In December 2022, Chief Gabriel and band council attempted to restart the Governance Dialogue, however according to them, this became increasingly impossible to sustain. Throughout December 2022 and through to February 2023, Messrs. Gabriel, Back and Thomas, with Robert Jago as their spokesmen, continued to run interference to Chief Gabriel and band council by holding themselves out not only within their community but also to the outside world, as the legitimate KFN band council; they would place on their website updates on governance transition, the notice of suspension of councillor Knott and Antone, news on their attendance at ceremonies and meetings with the mayors of local municipalities; they would publish reports on band council meetings and assert positions on such issues as political violence on behalf of the community. According to the affidavit of councillor Knott, the "rival council" would send out

letters to public institutions and other valued partners of the community such as the RCMP, local school boards and other First Nations with which KFN works to declare that the KFN government had changed and was being now run by Messrs. Gabriel, Back and Thomas. Once discovered, Chief Gabriel would need to set the matter straight with those valued partners; band council was forced to issue a further cease-and-desist letter in January 2023, but to no avail. Messrs. Gabriel, Back and Thomas hosted their own council meeting on Zoom in preparation for the referendum on Governance Code they were calling for January 22, 2023, and issued KFN Financial Report Explainers as part of a campaign to show that KFN finances are poorly managed.

[82] From the record, it seems to me that the actions of the respondents were calculated and systematic, and I have no difficulty finding that the confusion caused by their activities in relation to the community's outside partners and the level disruption that such activities had on the day-to-day running of the community cannot be understated. The record establishes that the unnecessary diversion of attention and limited resources of band council to deal with this constant barrage of disruption was highly prejudicial to the small First Nation community that had to deal with outside government and industry partners to survive.

[83] As mentioned, Resolution Four provided that the Whonnock Authority (with the respondent Robert Thomas claiming to be the hereditary chief) would be responsible, to the exclusion of the Chief Gabriel and band council, for the surrender of reserve lands on the Whonnock Reserve. The surrender of reserve land is a vital issue to small First Nation communities such as KFN, and notwithstanding the disruption caused by the respondents and the

purported passing of Resolution Four, Chief Gabriel and band council were successful in having Indigenous Services Canada hold a referendum on March 16, 2023 regarding the surrender a small slice of the Whonnock reserve which would allow for the expansion of a British Columbia highway, where 168 of the 171 voting members of the community (out of a total of 218) approved the surrender of a 3.65 acres strip of the Whonnock reserve land to the federal government. The settlement substantially contributed to the community's finances and ability to provide for needed services, in particular the improvement of infrastructure within the community.

[84] KFN argued that it cannot be that the November 2022 meeting and resolutions that emanated therefrom which went to fundamentally change the nature of KFN's governance had broad consensus within the community; the process was so egregiously unfair as it was tainted by inadequate notice of the proposed changes being provided to the community thus not allowing the members sufficient time to properly consider and discussion of the issues and a tainted presentation of information which promoted discredited claims of violence on the part of Chief Gabriel directly in the voting material. I agree, and would add that there exists nothing in the surrounding circumstances that would allow me to come to the determination that the attendance of about 20 to 22 members of the community, even accounting for the questionable proxy votes which would bring the total participation to about 37 voting members, in any way could possibly amount to a broad consensus of a community of 218 voters.

[85] Rather than proceeding to a referendum on the Governance Code as they had committed to doing during the November 2022 meeting, Messrs. Jago, Gabriel, Back and Thomas declared

that they would hold a “consultation vote” on January 27, 2023 to confirm the results of the November 2022 meeting. The respondents assert that retaining a third party independent electoral officer would have been expensive, so they proceeded to conduct the consultation vote by way of an online platform. From KFN’s perspective, the consultation vote was simply an attempt to give a veneer of legitimacy the respondents’ attempted coup. In essence, what we have here is Messrs. Gabriel, Back and Thomas giving all indication that they are the functioning council for the community and seeking a vote to confirm their own legitimacy.

[86] The respondents conceded before me that the issues that may have plagued the calling and handling of the November 2022 meeting needed to be corrected and given the intransigence of band council to move to a transition of power or to advise them of an acceptable process to conduct a further “legitimate” vote, the consultation vote was the mechanism of choice to do so. In fact, during the hearing, having conceded the shortcoming in the Meeting Notice and in the process followed at the November 2022 meeting, the respondents attempted to focus more on the consultation vote as confirmation of broad consensus within the community for the resolutions that emanated from that meeting. The respondents argue that any procedural fairness concerns I may have with the November 2022 meeting are cured by the consultation vote; from my perspective, they are not.

[87] A consultation vote information session was hosted by Robert Jago on February 1, 2023. Rival council’s website contained the six consultation questions to confirm the legitimacy of the November 2022 meeting as well as the resolutions that emanated therefrom. There is evidence of confusion within the community as to whether the messages being sent out by Messrs. Jago,

Gabriel, Back and Thomas, which had all the trappings of legitimate band council messages, are actually from Chief Gabriel and band council. More time and resources of Chief Gabriel and councillors Knott and Antone was needed to set the record straight.

[88] The respondents say that the notice for the consultation vote was disseminated in the same way as the Meeting Notice, although they also say that they were able to grow their voter list to 160 people to whom they sent out emails, out of the total voting population of 218 voter. There is no corroborating evidence for such a statement, however it seems reasonable that the entire community would be at least aware of the upcoming consultation vote given that on January 23, 2023, Chief Gabriel and band council issued an open letter to the members of the community urging them not to participate. That said, the voting process was certainly unconventional; according to the affidavit of Christine Loewen, access to the voting platform was provided by Mr. Jago when he sent around an email with a “unique access key” and password. Ms. Loewen’s evidence also includes an email from Mr. Jago confirming that not all members of the community may have been able to access the ballot login, and that remedial efforts were being undertaken.

[89] The uncorroborated evidence from Mr. Jago is that the consultation vote attracted 68 participants, more than those who participated in the November 2022 meeting, but still only just over 30% of the eligible voters in the community, even if accurate. The respondents argue that the online platform itself tabulated the votes, but the only evidence is Mr. Jago’s affidavit which provides that the respondents used a system called Election Buddy; there is no information on how the system operated, how the platform was set up by Mr. Jago as, I assume, the

administrator of the voting process, what prompts it was given or how voting credentials were verified, and what features were added or removed. I must say that the legitimacy of the consultation vote is further diluted by the fact that Messrs. Jago, Gabriel, Back and Thomas organized the consultation vote and even suggested how to vote while holding themselves (other than Mr. Jago) as being the legitimate KFN band council. According to the affidavit of Erin Marshall, below the voting instructions set up on their website, Messrs. Jago, Gabriel, Back and Thomas would include the “rationale” for voting to confirm the November 2022 resolutions, which again included defamatory comments regarding Chief Gabriel and repeating the by now discredited accusation of her having assaulted her sister.

[90] The process established by Messrs. Jago, Gabriel, Back and Thomas had become nothing short of a charade, much to the detriment of the community at large. The respondents argued before me that band council looked to poison the debate and suppress the consultation vote. I accept that Chief Gabriel and band council issued the January 23, 2023 letter mentioned earlier urging the community not to participate in the consultation vote as it was simply, in their view, an attempt by Messrs. Jago, Gabriel, Back and Thomas to find legitimacy; the letter went on to express concerns that the consultation vote “could deepen the crisis that is dividing our community”. From my perspective, the debate was already poisoned by the vitriol and accusations made by Messrs. Jago, Gabriel, Back and Thomas looking to incite the community to relieve Chief Gabriel of her duties on band council and render her but a titular leader. Having read the letter which spoke of community respect and of KFN being one family—a theme that was echoed by councillor Knott in her affidavit—as well as the need to conduct governance review in the way the community has always dealt with important decisions, the letter is not an

attempt at suppression but rather an attempt by the Chief Gabriel and band council to calm the waters and allow the Governance Dialogue to move forward without controversy.

[91] Putting aside the concerns I have expressed with the consultation vote, I accept that of those 68 members who participated in the consultation vote—some of whom voted not to approve the November 2022 resolutions or simply abstained from voting on certain issues—a large majority seemingly approved the resolutions regarding the removal of Chief Gabriel and the changes to band council. However, I would not have expected otherwise given the low number of participants and KFN’s recognition that the respondents did enjoy a small following within the community. On the whole, I find that there are no circumstances in this case that would allow me to find that even a large majority of a very small voting group somehow reflects the will of the community at large. To suggest that the consultation vote in any way lent credence to the November 2022 meeting and resolutions that emanated therefrom, or to argue that the result of these two processes somehow reflected a broad consensus within the community, strains credulity.

[92] On February 16, 2023, the underlying application for judicial review was filed.

C. *Final thoughts on the process undertaken by the respondents*

[93] The respondents urged me to be sensitive of the power imbalance between them and band council, and the fact that what they were trying to undertake was a grassroots initiative to move reform forward. That may be so, but the way to do it is not by false accusations, inciting anger, misleading campaigns and running a parallel council that only causes anxiety and grief for those

in a small community who must live within the conflict zone. The November 2022 resolutions do not relate to insignificant day to day matters, but rather to the core of the governance and make up of the community. The importance of issues such as community governance, the choice of a chief, the transformation of band council into a majority-elected council, and the administrative subdivision of KFN cannot be overstated. The level of procedural fairness in the process that would be needed would certainly be at the top end of the *Baker* framework.

[94] There is no doubt that members of the community have the right to be critical of the nature and speed at which the Governance Dialogue is taking place, and may wish for whatever model comes out of that community initiative to reflect how they see governance taking shape in the future. However, any process for change must be fair and transparent, and trusted by the community so that the results are broadly accepted. Here, under no reasonable standard within this context can it be said that the November 2022 meeting constituted a fair process by which the pulse of the community reflecting a broad consensus for change could be ascertained, nor that the consultation vote somehow corrected any deficiencies therein. As such, the respondents have not discharged their onus of establishing that the results of the November 2022 meeting were reflective a broad consensus for the fundamental changes to KFN's governance structure consistent with the November 2022 resolutions.

[95] KFN has painted the respondents as bad faith actors who were looking to take over the governance of the community. The respondents say they are loyal community members who only want to see reform and who were frustrated with the pace of such reform to the governance model of the community. I am certain that along the way, maybe there is some truth in both

versions, however I am convinced that the creation of anxiety and conflict through vitriolic language and false accusations is not the way to move forward in a small community. I urge band council to move forward with the Governance Dialogue at a pace which the community wishes so that eventually, the rift that has existed within this very small community may be allowed to heal.

[96] If the band council genuinely wishes to advance the Governance Dialogue and implement a Governance Code, they must take concrete steps to do so. Merely expressing their commitment is not enough; they must demonstrate their dedication and be visibly seen by the community to be serious about this process. Otherwise, the underlying issues will continue to fester, and the community will not heal. If progress stalls, the community may reach a point where sufficient concern amongst a sizable number of community members prompts them to call a community meeting to decide on the future governance model. Both parties agree that the members of the community have such a right as part of band custom, where the process is procedurally fair so that the question of whether the results reflect a broad consensus may be ascertained. Band council must support and facilitate such a process if it becomes necessary keeping in mind that ultimately, the band council represents the community and its interests.

[97] In the meantime, for the foregoing reasons, I find that the calling and running of the November 2022 meeting were procedurally unfair, with the November 2022 resolutions emanating therefrom unreasonable and to be considered a nullity.

V. Remedies

[98] As to remedies, KFN acknowledged at the commencement of the hearing that a finding in its favour may not in itself put an end to the political dispute within the community for all time. What the community seeks is for the Court to set out with some clarity what is required to change governance if that is desired. Given the ongoing Governance Dialogue, I am not inclined to do that, however I have tried to give a clear statement that the type of actions exhibited by the respondents do not and cannot allow for the determination of whether a broad consensus for change has been established. On issues as important as governance, any process established to gauge the level of consensus must provide for clarity in what is being decided and time for reflection and dialogue, free from intimidation, threats of retribution and partisan politics. In short, what must be discouraged are the antics leading up to the November 2022 meeting.

[99] I also do not feel it appropriate for me to order a community vote on the issue. The elements necessary for the clear determination of what comes out of that vote must be in place; such elements as what is meant by proper notice provisions, quorum, and who can be present must be put in place so that when there is a meeting and a vote by whatever means, there is no dispute what that vote means. Here, there is a draft Governance Code which is moving forward to a vote, thus the Court need to determine, as Justice Strickland did in *Da'naxda'xw*, the process to move forward, either by mediation or a court ordered general assembly meeting. It is best that the community establish through dialogue the necessary elements and it is not for this Court to delve into how the dialogue unfolds in the future.

[100] KFN argues that the declaratory remedies it seeks in the nature of *quo warranto* are appropriate under the circumstances and that a permanent injunction to prevent the respondents from continuing to hold themselves out as the lawful government of KFN is needed. I am satisfied that the test for issuing declarations in the nature of *quo warranto* set out in (*Jock v Canada* (TD), 1991 CanLII 13610 (FC), [1991] 2 FC 355 at 370–371 [*Jock*] has been met. In particular this case centers around the issue of lawful authority to hold office in the community; the constitution of band council is of a public nature for the purposes of meeting the test for issuing *quo warranto* (*Jock* at 371) and that in the underlying application for judicial review, KFN is challenging the authority by which Messrs. Gabriel, Back and Thomas were purporting to act in the place of the band council comprised of Chief Gabriel and councillors Knott and Antone (*Da'naxda'xw* at para 174; *Marie v Wanderingspirit*, 2003 FCA 385 at paras 17, 18 and 20).

[101] The respondents say that KFN should have sought *certiorari* of the November 2022 resolutions. I disagree that it was necessary to do so. Under the circumstances, I cannot see how the test set out in *Ewert v Canada*, 2018 SCC 30, is helpful to the respondents. In addition, seeking *certiorari* of the November 2022 resolutions, as the respondents claim KFN should have done, would not be an answer to the question of the fairness of the process underpinning the November 2022 meeting nor the legitimacy of rival council; in fact, seeking such relief may well presuppose such legitimacy. I do not see how the decision of *Shirt v Saddle Lake Cree Nation*, 2022 FC 321 cited by the respondents is helpful to their case. On the whole, I am satisfied that there is an absence of legal basis for Messrs. Gabriel, Back and Thomas to hold office (*Da'naxda'xw* at para 179).

[102] That said, and as was the case in *Da'naxda'xw* at para 176, I too do not consider it appropriate to issue a declaration in the form of *quo warranto* declaring that the band council comprised of Chief Gabriel and councillors Knott and Antone the lawful governing body; suffice it to say that it is not the council made up of Messrs. Gabriel, Back and Thomas.

[103] Nor am I convinced that the issuance of a permanent injunction is necessary to enjoin the respondents from passing themselves off as the lawful governing authority of KFN is necessary; they are not, and my reasons clearly set out why that is the case. I do not find any assistance in the decision of *Bruneau v Quinn*, 2023 ABKB 177 cited by KFN as the injunction set out therein was granted on an interim basis, similar to the Order of Justice Henneghan in this matter, and pending final determination. I am also conscious of the fact that the Order of Justice Henneghan has been in place since April 2023 which seems to have held back, at least as at the time of the hearing before me, any further interference by the respondents in the running of the community. I appreciate the words of the Federal Court of Appeal's decision in *Fond du Lac First Nation v Mercredi*, 2020 FCA 59 at para 5 and the need for creativity in the tailoring the remedy to fit the situation, however I am somewhat hesitant to go further than I have out of concern for influencing the Governance Dialogue that is presently taking place within the community, a dialogue that I must leave to the members of KFN. In the event that the respondents continue to hold themselves out as the lawful authority for the community notwithstanding the present reasons and judgment, KFN remains at liberty to seek an injunction at which time the issue of costs will no doubt be thoroughly and forcefully argued. I trust that matter will not get to that point.

[104] Finally, on costs, the parties made written representations following the hearing. Having reviewed the arguments of the parties and given the context in which the parties find themselves, I exercise my discretion to award lump sum costs in favour of Kwantlen First Nation in the amount of \$15,000.

ORDER in T-321-23

THIS COURT ORDERS that:

1. The applicant's motion to strike portions of the respondents' affidavits is allowed in part and the affidavits of Veldon Coburn and Darryl Kipp are to be struck from the record in their entirety.
2. The applicant's application for judicial review is allowed in part.
3. It is declared that all resolutions which emanated from the meeting held on November 27, 2022 lack broad consensus of the members of Kwantlen First Nation and thus have no legal effect.
4. It is declared that Brandon Gabriel, Victor Back and Christopher Thomas, or any combination of them, were not vested during the meeting of November 27, 2022 with any lawful authority as band councillors or to govern Kwantlen First Nation.
5. An Order in the nature of *quo warranto* removing Brandon Gabriel, Victor Back and Christopher Thomas from their purported office as members of band council is hereby granted.
6. Costs are to be paid by the respondents to the applicant in the lump sum amount of \$15,000.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-321-23

STYLE OF CAUSE: KWANTLEN FIRST NATION v BRANDON
GABRIEL, VICTOR BACK, CHRISTOPHER
THOMAS, ROBERT JAGO AND ROBERT THOMAS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JANUARY 18, 2024

ORDER AND REASONS: PAMEL J.

DATED: JANUARY 29, 2026

APPEARANCES:

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Louise Kyle

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