

SUPREME COURT OF NOVA SCOTIA

Citation: Maloney v. Eskasoni First Nation, 2009 NSSC 177

Date: 20090602

Docket: Pic No. 256278

Registry: Pictou

Between:

James Victor Maloney

Plaintiff

- and -

The Eskasoni Indian Band

Defendant

DECISION

Judge: The Honourable Justice Gerald R P Moir

Heard: January 3, 4, 8, 9, 10, 11, 2008 and October 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 2008 at Sydney

**Last Written
Submissions:** November 13, 2008

Counsel: Mr. Bruce T MacIntosh QC and Ms. Sarah MacIntosh
for the plaintiff
Mr. Christopher T Conohan and Ms. Dineta MacNeil for
the defendant

Moir, J:

Introduction

[1] James Victor Maloney claims a judgment against Eskasoni Indian Band for the balance owing on a prematurely terminated, written contract of employment that had a five-year term. Eskasoni First Nation defends the claim on the basis that the contract is not authorized and that, if authorized or otherwise binding, it is unconscionable. It is also said that Mr. Maloney's employment was with an entity separate from, though controlled by, Eskasoni.

[2] Mr. Maloney testified and he called three other witnesses, the Chief of Eskasoni during Mr. Maloney's employment, the Band Manager at the beginning of his employment, and the Band solicitor at the time. Eskasoni presented six witnesses, a chartered accountant who is the financial co-manager of Eskasoni, the Band Manager who took over after the beginning of Mr. Maloney's employment, the person who managed the building where Mr. Maloney had an office, a manager with the separate entity, and two Band Councillors. Also excerpts from transcripts of evidence given at discovery by several Councillors were tendered in rebuttal.

[3] Witnesses called by either side spoke well of Mr. Maloney. They described a colleague who was honourable, efficient, and gentle. He had a quiet calm despite his enforcement powers. He showed no animosity, but would not back down either. I found Mr. Maloney's way of testifying to be consistent with this description of him.

[4] Despite his interest in the outcome, Mr. Maloney was, not just an honest witness, but a fair witness during both direct and cross-examination. His testimony was deliberate, clear, usually precise, and well supported by a clear memory.

[5] Much of my fact-finding is founded on my general acceptance of the testimony of Mr. Maloney. I believe every witness was honest, but I am satisfied that Mr. Maloney had a keener perception of events and the greater motivation to keep an accurate memory. I resolve the few inconsistencies in favour of Mr. Maloney's perception and memory.

[6] The fact-finding is assisted by a substantial amount of documentary evidence, including minutes of Band Council meetings. I rely on those for what

they contain but the testimony makes it clear that the absence of a minute, or the absence in minutes of a reference to an important subject, does not mean it was not discussed, or a decision was not made.

[7] After setting out the facts, I will discuss the submissions made on behalf of the parties, explain my understanding of the applicable points of law, and give my reasons on the application of law to facts.

[8] I conclude that the contract is binding and enforceable.

Eskasoni's Decision to End Drug Use in Commercial Fishing

[9] Eskasoni First Nation is the largest Mi'kmaq community, with about four thousand members. It is ancient, beautiful, and isolated. The language and the culture are strong. Witnesses also described the community's long history of high unemployment and its struggle with alcohol abuse, other drug abuse, and associated violence.

[10] Eskasoni obtained a share of the fishing industry after the decision in *R. v. Marshall*, [1999] S.C.J. 55. By 2003, it operated a fleet of over a hundred vessels through its subsidiary, Eskasoni Fish and Wildlife Commission Incorporated. Over 120 captains and crew members from Eskasoni sailed out of ports as far away as Yarmouth. Another thirty-five people worked in support of the business. This alleviated unemployment and brought comfortable incomes to many families.

[11] As everyone knows, drugs and alcohol have no place in fishing on the open seas. However, of the 122 people on the 2003 list of active Eskasoni fishers, all but four were found to have problems with alcohol or other drugs. There was a large number of known drug dealers in the community.

[12] Alcohol and other drugs were affecting the Eskasoni fishery. Vessels disappeared for days at a time, and it was suspected they were being used to trade in drugs and to sell fish on the black market. Vessels were being damaged, and it was suspected that impairments were the cause. The Workers' Compensation Board called about injuries to crew members, and investigations by Eskasoni managers found associated drinking or other drug use. Concerns were expressed that lives would be lost because of the use of drugs and alcohol on the open seas, and because of the violence that goes with drug dealing.

[13] The Chief of Eskasoni First Nation called a meeting, not just of the Band Council, but of the entire First Nation. No doubt, the problem of drugs and alcohol in the fishery was the catalyst for people's concerns, but drug abuse in general was seen to harm the community. Members of the community were concerned about abuse by other workers, such as school bus drivers and heavy equipment operators. They were alarmed about the affects of drug and alcohol abuse on home life.

[14] The Chief received a strong mandate at the community meeting to implement a program to prevent drug and alcohol abuse in workplaces. It was expressed in terms of "zero tolerance".

[15] The present Band Manager, a person who was authorized to speak for the Eskasoni First Nation in this case, attended the community meeting. He testified that the community decided the "Chief in Council" must tackle the problems of drug and alcohol abuse in various workplaces and in the home. In cross-examination, he agreed that "the Chief" received the support of the whole community to deal with these problems.

[16] Subsequently, Band Council supported the Chief's efforts to implement and maintain a program to control drug and alcohol abuse in the workplace. There were many occasions when the Chief made decisions for the program without seeking Council's more specific approval.

[17] Mr. Blair Francis served Eskasoni as a band counsellor from 1992 until 1998. He was elected Chief in 2000. The Chief's position has a two-year term. Chief Francis was re-elected in November, 2002 and November, 2004.

[18] Eskasoni needed a workable program to implement the community's decision for elimination of drug and alcohol use in the workplaces controlled by it. Chief Francis turned to Mr. James Maloney.

James Victor Maloney

[19] Mr. Maloney's involvement with the Eskasoni First Nation developed in stages. In the beginning, he was hired as a short term contractor to start an

educational program and to develop a core of members capable of providing security for the community. He had little or no involvement with the Eskasoni First Nation before Chief Francis hired him for that contract.

[20] In 2003, he became an employee of the defendant. (I will explain later my finding that Mr. Maloney was, not exclusively, an employee of Eskasoni Fishery and Wildlife Commission Corporation.) His relationship to the community had developed so deeply that he resigned his life-long membership in the Shubenacadie First Nation, giving up the opportunity to continue supporting his brother as Chief of Shubenacadie, in order to become a member of the Eskasoni First Nation. This was not necessary to his employment. It was the result of a deepening relationship.

[21] It is necessary to understand Mr. Maloney's background in order to understand, not only why he was qualified for a comfortable income, but also why job security would be important to him. Understanding those issues is necessary because Mr. Maloney obtained a five year term contract, and Eskasoni now attacks the contract on separate grounds about authority and conscionability.

[22] Mr. Maloney was born in Indian Brook, Shubenacadie First Nation in 1945. From an early age, and for the rest of his life, he had strong views on the abuse of alcohol, poverty of Indian Brook, and forces for annihilation of native culture, such as the residential school system. At sixteen, he left Indian Brook for Boston to escape the affects of alcohol and poverty.

[23] In Boston, Mr. Maloney's life was, at first, not the best. He earned little and took no education, although he soon had a daughter to support. His break came through the martial arts. Eventually, he became well known. He received much publicity, including that which came from fights with Bruce Lee.

[24] He was the New England champion in free fighting and cement breaking from 1967 until 1973. He introduced the Okinawan variety of karate, known as Uechi Ryu, to Canada in 1970. He is the Canadian representative to the Japanese Uechi Ryu Karate Association. He was inducted into the Karate Hall of Fame at Boston in 1983. When the trial started, he was a ninth degree karate black belt.

[25] Mr. Maloney is also a teacher, not only of martial arts, but of subjects related to security, native spirituality, and native culture. He has taught karate to about sixteen thousand students, some of whom became champions. He also taught at

high schools, at the former Halifax School for the Blind, and in women's programs.

[26] Mr. Maloney's involvement in security seems a likely offshoot of a successful career in martial arts and the physical and spiritual discipline of karate. He took numerous courses at universities and other institutions in Canada and the United States. He holds numerous certificates from police academies in both countries.

[27] Mr. Maloney conducted investigations for the Saskatchewan Federation of Indian Nations, the Council of York First Nation, the Bridge River First Nation, and the Marshall Inquiry and other public inquiries. He assisted the RCMP and the CIA with investigations. He operated his own security company in Nova Scotia, with more than fifty employees.

[28] For quite a few years, Mr. Maloney worked in Western Canada performing investigations and teaching courses for the development and implementation of tribal peacekeeping and security. He organized seventeen courses, ranging between six and thirty-two weeks duration, in British Columbia, Alberta, and the Northwest Territories. His work always included emphasis on First Nations culture and spirituality. When he was in British Columbia for an extensive time he received many honours, including the honour of being adopted into the Killer Whale Family and receiving the name "Qufeastin" in addition to his Mi'kmaq name of "Sakej".

[29] Moving back East, Mr. Maloney provided security courses in Quebec, at Burnt Church after the well-known troubles with the fisheries there, similarly at Eel Graurel, and at his home, Indian Brook. He established his security firm and became much involved in public policy on First Nations policing. Then, Chief Francis approached Mr. Maloney to provide what was to be his twenty-first, and final, course on tribal peacekeeping and security services.

[30] I find that in 2001, when Eskasoni, through its Chief, retained Mr. Maloney to provide a training program, Mr. Maloney had a reputation as a person of integrity, as a person who possessed spiritual strength and discipline, and as a karate master, an investigator, and a teacher of martial arts, policing techniques, and native culture and spirituality. I find that, at that time Mr. Maloney had, by

virtue of his skills and reputation, the ability to earn a comfortable income. He also had a reputation worth protecting.

First Contract

[31] Mr. Maloney's first contract with Eskasoni First Nation was oral. It was negotiated with Chief Francis and the Band Manager, Leonard Denny. Band Council was not involved, and it does not appear that Band Council's consent was requested or given. No one questioned the Chief's authority to do this, although Band Council members were soon informed of his decision.

[32] The contract provided for a six-week program on security services. It was so successful that Mr. Maloney was asked to extend it by four weeks.

[33] Mr. Maloney's relationship with the Eskasoni community began to develop at this early stage. For example, he created a program for young people and volunteered two evenings a week for that. Also, he soon found himself in regular discussions with the Chief about the problems faced by Eskasoni, and possible solutions.

Second Contract

[34] Chief Francis asked Mr. Maloney to review a standard drug testing policy. Mr. Maloney found that the policy was one used for people who worked on the offshore oil rigs. It provided for automatic termination and future exclusion of workers who failed the test.

[35] Mr. Maloney advised that the offshore oil rig policy would not work for Eskasoni. He said that virtually all captains and crews would get fired, there would be no workers from Eskasoni in its own enterprise, and nothing would be accomplished towards solving the drug and alcohol problems.

[36] As far as Mr. Maloney was concerned, Eskasoni needed an indigenized Fit to Work program. The Chief asked him what he would charge to develop such a program. Mr. Maloney said five hundred dollars a day, and the Chief accepted.

[37] This contract was oral. The negotiations were exclusively with the Chief. Mr. Maloney did the work, and got paid by Eskasoni, on the Chief's say so. No

one questioned the Chief's authority to do this, although Band Council members were soon informed of his decision.

[38] Mr. Maloney brought in a colleague, Mr. Christopher Curtis, to assist with this project. They prepared a draft policy by May, 2003. It is titled "Eskasoni Band Council Commercial Fisheries Fit to Work (Drug and Alcohol) Program Policy".

[39] The policy is extensive, clearly written, and precise. It is premised on a commitment to help, rather than to abandon, workers who have alcohol or other drug problems.

[40] Under this policy, a worker who fails testing is not automatically fired. Work is, however, refused until the worker tests clean. To assist with that, the policy requires levels of response to failing tests. According to the policy, a first failure leads to suspension until the worker can prove sobriety, but assessment and treatment are offered. On a second failure, assessment is mandatory but treatment is voluntary. On a third failure, treatment is mandatory. Mr. Maloney referred to detoxification and rehabilitation programs as the likely required treatment in the third stage.

[41] Note that the draft policy was prepared for the Eskasoni Band Council, not the Eskasoni Fishery and Wildlife Commission Corporation. It was to be a "living document". Council needed to have the flexibility to make changes to the policy as the community gained experience with the program.

[42] The policy was approved by Council at a meeting held as the fall began in 2003. Arrangements to implement the Fit to Work program were already in place, and Mr. Maloney had been hired to run it. No one questioned the Chief's authority to hire Mr. Maloney to draft the policy, or to implement it before it was approved by Band Council.

[43] Mr. Maloney designed the Fit to Work program, with the assistance of his colleague. In the months before and after Council approval, he implemented the program against serious, and sometimes violent, opposition. The program has been adopted by some other First Nations. Despite the opposition, and the eventual termination of Mr. Maloney's employment, the program remains in effect at Eskasoni to this day.

[44] Mr. Leonard Denny was a credible and fair witness. He was the Eskasoni Band Manager from the fall of 2002 until the spring of 2004. After a hiatus in his employment, he returned as the Commercial Fishery Manager. He told me that the Fit to Work program operates very well to this day. He says the program has done a lot of good and he cannot see how the Eskasoni fishery could be run without it.

First Employment Contract

[45] Band Council passed a motion in September, 2003 approving the Fit to Work program “for EF&WC and Eskasoni Band Members”. Based on the quoted phrase, which is taken from the minutes, and based on the testimony of Chief Francis, I find that Band Council decided that the program should be extended to all Eskasoni workers and not just the captains and crew members hired through EF&WC.

[46] The decision to adopt the Fit to Work program necessitated significant expenditures. Drug and alcohol testing services had to be secured. Monitoring, security, and enforcement would be necessary, especially for testing at the docks, testing randomly, excluding those who failed, and taking control of a vessel from a captain or crew member who was in violation of the policy. Someone had to be hired to head up the administration of this program.

[47] Eskasoni’s position in this case is that it could not contract with the program administrator without Band Council approval, which, it says, was not obtained. We must look closely at the events surrounding Mr. Maloney’s employment at Eskasoni.

[48] Chief Francis testified that he first offered the job of implementing and administering the Fit to Work program to someone other than Mr. Maloney. That person declined the position, and the Chief then made the offer to Mr. Maloney. Mr. Denny, who was the Band Manager at the time, testified that “This was a project no one would want to take on.” He was emphatic about that. No other administrator had the backbone to do such a dangerous job. It came automatically with threats of violence, even death threats.

[49] Chief Francis and Mr. Maloney settled on \$80,000 a year for salary and payment of Mr. Maloney’s expenses. This salary was not paid directly by

Eskasoni First Nation. The Chief met with the Band's financial co-manager, Alan Sampson, who advised that the salary could not be paid out of general reserves without violating agreements Eskasoni had made with the federal government and Mr. Sampson's firm, KPMG, for reducing the Band's deficit. Mr. Maloney was put on the payroll of Eskasoni Fish and Wildlife Commission Incorporated.

[50] Eskasoni has, for over a decade, been under co-management to reduce a very large deficit it ran up in the 1980's and early 1990's. The agreements restrict expenditures and put in place an accounting firm to co-manage the finances. The restrictions on expenditures do not extend to EF&WC. It is required to contribute to Band revenues, but it is free to use the rest of its funds as it sees fit.

[51] On direct examination Chief Francis expressed the view that Mr. Maloney was an employee of EF&WC under his first employment contract and an employee of Eskasoni Band Council under the second. During cross-examination, he said he had been wrong and Mr. Maloney was always an employee of Eskasoni Band Council. Mr. Denny is of the view that Mr. Maloney was employed by both EF&WC and Band Council from the beginning. Mr. Sampson is of the view that Mr. Maloney was, at all times, an employee of EF&WC exclusively.

[52] I find that Mr. Maloney was hired by Chief Francis, who also saw himself as the chief executive officer of EF&WC. Mr. Maloney was paid by EF&WC, not the Band. He had an office near the Chief's in the Sarah Denny Cultural Centre. Several officials of EF&WC moved there later. He was not given directions by the EF&WC organization. Mr. Maloney's consultations with Chief Francis were as much, or more so, in his position as Chief. Mr. Maloney had people working under him, the "monitors" whom he had educated and hired for the Fit to Work program. These people took direction from Mr. Maloney and were paid by EF&WC. Finally, on a subject I shall discuss in detail later, EF&WC did not provide guidance or supervision for the program.

[53] No one questioned the Chief's authority to offer the position to Mr. Maloney or to authorize him to begin implementing the program before Council approved the policy. No one questioned the authority by which Mr. Maloney held his position. He continued to implement and administer the Fit to Work program. His work was public, open, noticeable, and controversial. Others looked to him for decision-making in this field.

[54] People with complaints about the program were referred to Mr. Maloney. He made the decisions and he handled the complaints. He hired and directed the monitors, and he contracted and organized the technologists who performed the testing. He decided when and where people would be tested, and what would be done to enforce the policy. When he announced the time and place for general testing, he did so on Eskasoni Band Council letterhead.

Second Employment Contract

[55] The Eskasoni fleet fishes year round, but the summer is the most intensive period and the period between Christmas and late spring is quiet. Most of the captains and crew are laid off then. They are called back before June.

[56] The Fit to Work program was active, and also still being developed, through the fall of 2003. It was controversial and Mr. Maloney had been the subject of serious threats of violence. However, Mr. Maloney expected more trouble in May of 2004 when the program would screen workers for the start up of the intense summer season.

[57] Mr. Maloney was expecting to have the support of Leonard Denny when that troublesome period arrived. He found Mr. Denny to be an ally of the program, and a person with the kind of backbone that would not weaken when the pressure increased. However, the Band Manager was fired.

[58] Mr. Denny testified that employees of a Band office are always vulnerable to attacks on their employment by Band councillors. Mr. Denny said that Chief Francis had tried to professionalize the Band administration by implementing measures for job security. And so, Mr. Denny obtained a written employment agreement that included a five year term starting in April 2002. It prohibited termination except for gross neglect. It even provided for payment of the balance of the five year's salary in the case of gross neglect. In Mr. Denny's view, this was necessary to allow him to do things that are right but unpopular. This way, his management would be protected from political interference.

[59] Chief Francis alone signed Mr. Denny's contract for "Eskasoni Band Council". The employer was "Eskasoni Band, as represented by its elected Council". The contract had not been specifically approved by Band Council.

[60] In his testimony, Chief Francis explained the contract in a way similar to Mr. Denny's explanation. He said that in April 2002, when Mr. Denny was made Band Manager, Eskasoni was involved in many things, including the operation of vessels and related property worth \$3.2 million. Getting the fishing business organized, and tending to other projects, needed to be protected against changes to personnel should the Chief be defeated in 2004. He gave instructions to the Band solicitor, Chuck Broderick, to prepare a contract with the sort of protection we now see in the Leonard Denny contract.

[61] Chief Francis said that the contract was not ratified by Band Council. Council had approved his plans for restructuring the administration and "Leonard Denny was part of the restructuring." Also, the councillors supported the Chief's hiring of Mr. Denny.

[62] I am not clear on the reasons for the termination of Mr. Denny's employment in March, 2004. What is important to this case is the similarity of Mr. Denny's 2002 contract to a contract soon to be signed by the Chief and Mr. Maloney, and the implications of the possible termination of the contract for the survival of the Fit to Work program.

[63] The minutes of the March 10, 2004 Council meeting record "discussion held [in] regard to Leonard Denny's contract." Approval of the annual budget was also on the agenda, and the co-manager, Mr. Sampson, was present. The provision for payment of Mr. Denny's salary for the balance of the term was referred to as the "60 day clause" because of the deadline for payment.

[64] Based on the minutes, and the testimony of Chief Francis, I find that the Band co-manager and all councillors were aware that the Chief had negotiated, and bound the Band to, the Denny contract without having Band Council's specific approval. No one objected to that state of affairs or voiced any opposition to the Chief binding the First Nation to such a contract. No one questioned the Chief's authority to execute the contract, to bind Eskasoni to the sixty-day clause, or to fire Mr. Denny, without specific Band Council approval.

[65] A motion was passed shortly after the discussion about Mr. Denny and approval of the budget: "Chief to hire anyone as he sees fit, acting as band manager. Added executed conditions on Leonard Denny's contract." So, Council

approved of the new Band Manager having similar protection to that given, without Council's specific approval, to Mr. Denny.

[66] Mr. Chuck Broderick became the Band solicitor shortly after Chief Francis' election. He prepared Mr. Denny's contract. Mr. Broderick provided an explanation similar to those of Chief Francis and Mr. Denny. He said there was one family, who were allied to former Chief Bernard, opposing Mr. Denny. Mr. Denny wanted job security and, to Mr. Broderick's understanding, Band Council wanted continuity. The contract was drafted so that allegations of gross neglect, inevitably to be made by those opposed to Mr. Denny, could be met with this reply: We may as well keep him because he has to be paid anyway.

[67] Mr. Maloney's second employment contract resulted from discussions between him and the Chief on Friday, May 14, 2004. It was finalized, with Mr. Broderick's assistance, in a written contract signed on the following Monday.

[68] I accept Mr. Maloney's testimony about the events of Friday, May 14, 2004 and the course of events after that day. There are only a few significant differences between Mr. Maloney's testimony and that of other witnesses, but, as I said in the introduction, to the extent there are conflicts I accept Mr. Maloney's recollection.

[69] By the spring of 2004, tremendous resentment had built up in a large segment of the Eskasoni community against the Fit to Work program, Mr. Maloney personally, and the Band administration. Band Councillors were fully supportive. Many wives, girlfriends, and mothers of Mr. Maloney's opponents were highly supportive.

[70] The opponents made various threats. Bullets were sent to Mr. Maloney. Fingers were pointed, in imitation of a handgun, by drivers-by. As the time for testing drew near, there was talk of spending \$500,000 just to buy Mr. Maloney off. He received violent telephone calls late at night. Threats were made to burn the Fisheries Building and vessels.

[71] Band members warned Mr. Maloney that some of the opponents were violent people. Security was increased around Mr. Maloney and the Chief.

[72] Chief Francis' testimony makes clear the level of violence and threats of violence at that time. Windows were smashed. Tires were slashed. One time, a

gun was pointed. His wife and children slept with him in the basement of their home for protection.

[73] Friday, May 14, 2004 was the last day for some seventy or eighty captains and crew members to be tested. All of the captains had decided to refuse to report for testing. Under the policy designed by Mr. Maloney they would be excluded from taking charge of their vessels. Trouble was expected. The RCMP sent reinforcements. A swat team was assembled nearby.

[74] The technicians, nurses from East Coast Medical, were present at the Fisheries Building. Some twenty-five or thirty people gathered for testing. Mr. Maloney and his monitors were present. Chief Francis was present. Some Councillors were present.

[75] About a hundred people came marching down the road. Some witnesses used the word “mob”, others “protesters”. Referring to the elections, some protesters screamed at Mr. Maloney, “Come November, you’re going to go.” Some cursed at him. The people who had showed up for testing, many of whom had previously been shut out from the Eskasoni fishery, started arguing with the protesters.

[76] The protesters wanted to meet with the Chief. RCMP members parked cars to create an area for a meeting. After a few minutes, the Chief announced that he would meet with some representatives in the Fisheries Building. Mr. Maloney voiced his opposition to that course.

[77] Although noisy, the protesting gradually settled down and the testing began as the meeting went on. Mr. Maloney was not at the meeting. He was pleased to see that even protesters started getting tested.

[78] When the meeting between the Chief and representatives of the protesters broke up, the representatives came out of the building with a sing-song refrain that included “you’re gone”, “you’re fired”.

[79] Mr. Maloney went inside. The Chief, Mr. Broderick, EF&WC officials, and about a half dozen councillors were there. Gerard Francis, the Band Manager, returned from a meeting in Sydney, and he joined the group about the same time as Mr. Maloney did. According to Mr. Francis, this took place at about two-thirty in

the afternoon. Thus, the protest and the negotiations had gone on for about six hours.

[80] The Chief told Mr. Maloney that he, the Chief, had had to compromise. He said, “You’re fired, but you’re hired.” The Chief said Mr. Maloney was being offered a more senior position.

[81] The Chief then explained the rest of the compromise. A captain who fails the test would be paid a thousand dollars a day while unable to work. Crew would receive \$750. Mr. Maloney asked, “Where’s the incentive to work?” The Chief said that he had had to compromise.

[82] The Chief also said that he was putting Mr. Maloney in charge of the Fit to Work program for the whole community, giving him a \$40,000 raise, and providing him with a five-year contract. I find that that offer was made in the presence of several Councillors, as well as EF&WL managers, Mr. Gerard Francis, and Mr. Broderick. I find that all would have understood the reference to a “contract” to mean a written contract like Mr. Denny’s.

[83] Mr. Maloney consulted with his monitors. He told them it was ridiculous to pay people who failed the test. However, the monitors asked him to stay, to accept the deal offered by the Chief. In my assessment, the program would likely have collapsed at that time had Mr. Maloney withdrawn.

[84] Mr. Maloney returned to the meeting with the Chief, solicitor, managers, and Councillors. He accepted the offer. The Chief said “Chuck will draw up a contract on Monday.”

[85] Chief Francis described what happened in the meeting with representatives. Most walked out after the Chief said, and every councillor agreed, that the Fit to Work program was going to continue. Two remained. They discussed legislated requirements for workplace health and safety, some tax problems the captains and crews were facing, and a solution the Chief was able to offer to help with the taxes. They discussed paying those who failed. The two representatives conferred with the others. Then, they demanded that Mr. Maloney not deal directly with the testing.

[86] The Chief then met with the Councillors. They said “handle it”; they said to put Mr. Maloney in a removed position. It was very clear to the Chief that the Councillors who were present for the negotiations approved of the proposed contract.

[87] Mr. Maloney felt let down. He was also very concerned for the future of the Eskasoni fishery. The Band leadership had shown weakness, and drug dealers had gotten a degree of control.

[88] On Saturday, Mr. Maloney was involved in putting down rumours that he was leaving. He also met with the Band Manager, Mr. Gerard Francis. He told Mr. Francis that he thought it a mistake to pay people who failed the testing.

[89] On Monday, Mr. Maloney met with Mr. Broderick, who had prepared a contract as discussed on the Friday. I find that Mr. Broderick acted for the Band exclusively. I reject the submission that he was also acting as Mr. Maloney’s lawyer.

[90] It was explained to Mr. Maloney that the contract would allow him to continue his work even if the Band leadership changed after the next election. His attitude was that he was going back into a hornet’s nest but without fearing the sting of another public humiliation.

[91] The contract is dated May 17, 2004. The parties are “Eskasoni Band, as represented by its elected Council” and “Jim Maloney”. The first clause provides “Council hereby appoints Maloney as Senior Advisor and Project Manager”. It includes a five-year term with one-year renewals. The provision against termination reads:

The employment relationship shall not be terminated for any reason other than gross negligence and if for any reason gross negligence is found and the contract is terminated, then the Band Council shall pay to Maloney the full amount of salary remaining in the contract immediately. The Council may give notice of its intention not to renew Maloney contract ninety (90) days prior to the expiration of the initial term and ninety (90) days prior to the expiration of the extended term.

[92] A number of terms are important to the question of whether Mr. Maloney’s duties changed. In addition to the title and the term, the contract provides for a job

description, which is described as “attached” but it is not attached. The contract provides a very broad discretion for “Council” to alter Mr. Maloney’s duties and responsibilities.

[93] A number of terms are important to the question of conscionability. In addition to the provision against termination, the contract provides for exclusive employment and for confidentiality. I find clause 4.2 contains a typographical error that would have been cured by an order for rectification, if that had ever become necessary. That is, Mr. Maloney was not entitled to four months of vacation. The Band agrees to contribute towards a private pension. Mr. Maloney’s expenses had to be approved. He would be subject to an annual evaluation.

[94] As I said, the contract was signed by Chief Francis for Eskasoni Band Council and by Mr. Maloney.

Additional Responsibilities

[95] The compromise offered by the Chief did not bring an end to the difficulties with the Fit to Work program at Eskasoni.

[96] The protesters did not retreat. Rather, they chained and padlocked the Fisheries Building. For a time, Eskasoni’s participation in the 2004 summer season seemed to be in jeopardy. Mr. Maloney was involved in resolving that during the days after May 14, 2004. This was not something a person who merely administered the Fit to Work program could be expected to do.

[97] Mr. Maloney took on assignments that had nothing to do with the affairs of EF&WC. The Chief was in negotiations with the Nova Scotia Gaming Commission. Mr. Maloney became involved with that. The captains and some crew had tax problems. They brought them to Mr. Maloney, who dealt with Mr. Broderick and others. He supervised the testing of workers who were not involved in the fishery. He participated in dealings with the provincial government on tobacco tax, gaming, and other subjects, and his contacts in the provincial government were used in Eskasoni’s interests. Mr. Maloney travelled extensively with the Chief for meetings unrelated to fishing.

[98] I find that, during the period between the protest and the end of 2004, Mr. Maloney never reported to, took instructions from, or was otherwise subordinate to anyone at EF&WC. I find that Mr. Maloney's reporting line was to the Chief in his capacity as Chief. His job was carried out much as the title suggests, "Senior Advisor and Project Manager".

Knowledge of the Maloney Contract

[99] The people present for the discussions that followed the Chief's negotiations with the protesters were aware of the offer made by the Chief, Mr. Maloney's acceptance of it, and the instruction to the Band solicitor to prepare a written contract on the next work day.

[100] The Band Manager was made aware of the written contract itself. Mr. Broderick and Chief Francis brought a draft to him. He says they asked him to sign it on behalf of the Band and he declined on the basis that he lacked the authority. I am satisfied that he is mistaken. At about the same time, an almost identical contract was signed between the Eskasoni Band Council and Mr. Gerard Francis. Chief Francis signed for the Band Council, Mr. Francis signed for himself, and Mr. Maloney witnessed the signatures. I find that Mr. Gerard Francis was invited to witness the Maloney contract, and he declined to do so. He was aware of the contract from the time it was executed, and he was specifically aware of the provisions for termination because they were the same as his.

[101] Although he recalls no specific discussion, Mr. Leonard Denny testified that the fact of Mr. Maloney's written contract was discussed in the community and it became a political issue in the 2004 election campaigns. He allowed in cross-examination that it was "possible" he first heard of the contract after Mr. Maloney's employment was terminated, but I take it that, to the best of Mr. Denny's recollection, the discussion occurred during the election campaigns.

[102] The discovery evidence of Councillor Barry Francis was admitted. Councillor Francis said, and I accept, that he found out Mr. Maloney had a contract about two months after the contract was executed. Councillor Francis said that Mr. Maloney's employment was an issue in the November 2006 election. A number of candidates attacked him, and others who were seen to be friends of Chief Francis. Councillor Francis was sufficiently aware of the terms of Mr. Maloney's contract

that he warned of possible contract obligations when termination was discussed after the election.

[103] Band Councillors Alan Jordon and John Frank Toney testified that they were unaware of Mr. Maloney's contract until after his employment was terminated. I accept their testimony in that regard. Chief Francis acted more and more independently of Council as his second term drew to an end. I find that the contract was not discussed with all Council members and was not brought up at meetings of Council, until after Mr. Maloney's employment was terminated. On the other hand, Mr. Maloney did not know all that was discussed or approved at Council meetings and had no reason to believe that Council did not approve of the contract.

[104] There was nothing secret about Mr. Maloney's contract. On the contrary, I find that many knew about it.

Maloney and EF&WC

[105] Mr. Thomas Johnson was the Director of Operations for EF&WC when Mr. Maloney was working for Eskasoni. He testified for the defendant.

[106] In 2002 or 2003, Mr. Johnson discussed with Chief Francis the need to look into drug testing as part of the fishery. Afterwards, the Chief mentioned Mr. Maloney as being the "ideal" person to head up a drug testing program. It appears Mr. Johnson agreed. He also said that no one at EF&WC was involved in negotiating Mr. Maloney's terms of employment.

[107] According to Mr. Johnson, EF&WC is a subsidiary of Eskasoni First Nation.

[108] The Band and EF&WC were integrated financially, although EF&WC income and expenses were separated from the Band's obligations under the Co-management Agreement. The EF&WC's financial department officials reported to the Band Manager or the co-manager. Ultimately, its profits went to the Band and were used for general Band purposes.

[109] EF&WC was also integrated politically. It had an ordinary corporate structure, with a board of directors. However, the Chief, who was not a director,

had the final say. Indeed, it is not clear when the directors were first formally elected or whether there were formal meetings when Mr. Maloney was on the EF&WC payroll.

[110] One part of Mr. Johnson's testimony illustrates how little the directors had to do with the Fit to Work program. When Mr. Johnson was asked whether the board approved Mr. Maloney's firing, Mr. Johnson replied negatively. He was able to refer only to one occasion when the board considered layoffs for the Fit to Work program. The directors looked into cutting back the number of monitors. That changed when they were informed about the actual duties of monitors.

[111] Mr. Johnson said that Mr. Maloney was put on the EF&WC payroll in 2003, and he remained on its payroll after May, 2004. From Mr. Johnson's perspective, Mr. Maloney was employed only to run the drug testing program for commercial fishing.

[112] Mr. Johnson does not recall Mr. Maloney having an office in the Fisheries Building, but he was in and out for meetings. He sometimes "mentioned" what he was doing, but he did not report to anyone in EF&WC.

[113] Mr. Johnson told us that Mr. Maloney's office was always in the Sarah Denny Cultural Centre. For a time some EF&WC people had their offices in the Centre, but Mr. Maloney was there before them. The Centre contains the political and administration offices of the Eskasoni First Nation. (The sign identifying Mr. Maloney's office said "Fit to Work Coordinator", and that does not appear to have changed after the written contract.)

[114] EF&WC did not have any control over records of the Fit to Work program or any others of Mr. Maloney's records. It does not appear that anyone at EF&WC had control over Mr. Maloney's activities.

[115] Mr. Jim Johnson also testified for the defendant. He performs various duties for Eskasoni, including managing the Sarah Denny Cultural Centre. He explained that Fisheries rented space in the Cultural Centre. Several EF&WC managers had offices there, and he regarded Mr. Maloney's to be one of them. The title on his office door said "Fit to Work Coordinator", and that did not change after May, 2004.

[116] In January of 2005, all Councillors, but not the Chief, signed a “Band Council Resolution”. It referred to Eskasoni Commercial Fisheries and EF&WC. It resolved:

1. BE IT RESOLVED THAT in order to maintain a Communal/Commercial Fisheries under the Eskasoni Band, the Council of the Eskasoni Band approves that the Chief will no longer represent, negotiate or give directions on behalf of these organizations;
2. BE IT RESOLVED THAT in order to eliminate conflict of interest, it is requested that the Chief and Council remove themselves as signing dignitaries within these organizations.

This shows that Chief Francis had been representing, negotiating for, and giving directions on behalf of EF&WC.

[117] Councillor John Frank Toney testified for the defendant. He has been on Band Council for over a decade. He sees the Band as the parent of EF&WC. The Band is the ultimate authority.

[118] Councillor Toney gave evidence about what led to the resolution in January of 2005. Chief Francis had entered negotiations with the Department of Fisheries and Oceans in which he usurped the role of managers of EF&WC. He had done other things that undermined the chain of command, and he had failed to take advice.

[119] I find that, before January of 2005, Chief Francis ultimately ran, and spoke for, EF&WC. I find that Mr. Maloney’s terms of employment were not negotiated by managers of EF&WC, nor were any of the offers of employment made by them. I also find that Mr. Maloney’s work was not controlled by managers of, or a board of directors of, EF&WC.

Termination

[120] The Fit to Work program was, I find, discussed publically during the election campaigns of November, 2004. That finding is based on the testimony of a number of witnesses as well as the evidence of some Band Councillors given at discovery and entered during the trial. Mr. Maloney heard that certain candidates,

who were not incumbents, would seek to have some five employees of Eskasoni fired.

[121] After the election, Mr. Maloney found that the Chief and the returning Band Councillors dealt with him as usual. He had yet to meet the new Band Councillors.

[122] Early in December, Chief Francis warned Mr. Maloney that some councillors had his “head on the block”. He advised Mr. Maloney to make sure that people knew about his contract. Mr. Broderick, the Band’s solicitor, told Mr. Maloney that he need not worry because “you have a contract.” Mr. Maloney spoke at length with the Band Manager, Gerard Francis, one day in mid-December. I find that Mr. Maloney asked Mr. Francis to let the Band Councillors know that he had a contract, and I find that Mr. Francis agreed to do so.

[123] On that day in mid-December, Mr. Maloney became confident that the subject of his contract would be put forward by the Chief, the Band Manager, and the Band’s solicitor. He was confident that a person who pushed for his dismissal would be told to forget about it because he had a contract. On that day, Mr. Maloney ceased to be concerned.

[124] Later in the month, Mr. Maloney went into the EF&WC office to wish everyone a Merry Christmas. He was planning to be with family in Halifax. He picked up his pay cheque and headed to Sydney to buy a gift.

[125] I accept Mr. Maloney’s evidence about how the termination was communicated to him and reject some speculative testimony otherwise. At about five o’clock, Ms. Florence Dennis, one of the clerks with EF&WC, reached Mr. Maloney on his cell phone. She was crying. She could not find a record of Mr. Maloney’s social insurance number, and she needed to get it from him. She had to explain, “You were let go.” She needed the number to prepare his record of employment.

[126] As far as Mr. Maloney is concerned, this showed that “the drug people could get what they wanted.” There may be more to it than that, but I do not accept the contrary explanation offered by witnesses on behalf of Eskasoni.

[127] It is the position of Eskasoni in this case that Mr. Maloney was an employee of EF&WC only, and he was laid off with numerous seasonal workers. The record of employment says he was laid off for lack of work.

[128] Witnesses who offered this explanation tied it to the fact that EF&WC was financially stressed at the time. EF&WC makes a substantial profit, but that gets turned over to the Band. In 2004, EF&WC subsidized a million dollar expense resulting from the Chief's promise of grants to all members for Christmas. By December in 2004, EF&WC had paid the Band \$2.8 million, it was out of cash, and it had about \$600,000 in unfunded payables. A \$2 million loan was needed to cover the payables and see the organization through to the profitable summer season. The explanation suggests that, by treating Mr. Maloney as a seasonal worker of EF&WC, a small saving could be achieved in order to help address the financial crisis.

[129] In fact, Mr. Maloney's work was not tied to the number of vessels in operation. If anything, he was becoming more involved with his work when his employment was terminated. The ground fishery remained. New captains were undergoing their training. New equipment for tracking vessels was being installed. Preparations for the intense season had to be undertaken before the captains and crews were called back. In short, the Fit to Work program, and other work assigned to Mr. Maloney, continued to be demanding. The person who now manages the program, Mr. Denny, is not subject to seasonal layoff.

[130] Further, there was never any suggestion by anyone to Mr. Maloney that he, unlike any other managers at EF&WC or the Eskasoni Band Office, would be subject to seasonal layoffs. Even if one did not know about the written contract, one would know that Mr. Maloney's terms were not to be equated to those who work seasonally.

[131] The decision to include Mr. Maloney with the laid-off seasonal workers made no financial sense. In light of the level of the position he held, his age, the consequences for him of termination, and the absence of any suggestion of just cause, Mr. Maloney would have been entitled to a long notice period even if he had not had a term contract. A proper notice period would likely have far exceeded the three or four month layoff period.

[132] I find that Eskasoni terminated Mr. Maloney's employment in December of 2004. I find that he was notified of the termination by the call from Ms. Dennis. (I am satisfied that a general notification posted in the Fisheries Building was not drawn to Mr. Maloney's attention.) I find Mr. Maloney had no reason to believe he would have been called back for the summer season.

[133] While I reject the general layoff as the true reason for Mr. Maloney's termination, I am not prepared to make any finding as to the true motivation or motivations. Some evidence suggests that the decision was made by the manager in charge of EF&WC, and it was acquiesced in by the Chief. Others suggest that the decision was made by Band Council, and there is even evidence of a meeting that possibly occurred in December, for which no minutes were kept. I am left in a state of doubt about how the decision was made, and I am therefore hesitant to make findings about what motivated it. Further, I can see that some would have different motives than others for terminating Mr. Maloney's employment.

[134] As I see it, a finding on this subject is unnecessary because Mr. Maloney is no longer claiming damages under *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. 94 as modified by *Honda Canada Inc. v. Keays*, [2008] S.C.J. 40.

[135] Similarly, some evidence was devoted to whether the Band Manager, or the co-manager, was aware of the termination provisions in Mr. Maloney's contract when his employment was terminated. The Band Manager was made aware of the contract when it was executed, but he took little interest in his own written contract and there is no reason to conclude that the termination provisions were in Mr. Francis' consciousness until after Mr. Maloney was laid off. I accept Mr. Sampson's evidence that he was unaware.

[136] For the same reason as with motivation, little turns on who knew what about the employment contract, except as background to the argument that Mr. Maloney failed to mitigate damages.

Offer of Re-employment

[137] Gerard Francis testified that managers at EF&WC decided to lay off Mr. Maloney because of the \$2 million shortfall. He said that there were discussions with Chief Francis. The Chief accepted that Mr. Maloney's employment was being terminated and said nothing about the contract. A day or two after the

termination he called to warn of the contract. The Band office was closed and Mr. Johnson was away, so there was nothing to be done until the new year.

[138] About a week later, Mr. Francis met with Mr. Maloney and Mr. Broderick about a human rights complaint. (Mr. Maloney gave much assistance to Eskasoni with its response to the complaint, despite his own claim.) During that particular meeting, Mr. Francis said to Mr. Maloney, “You should consider coming back to work.” According to Mr. Francis, Mr. Maloney rebutted this suggestion by saying that he did not want to be fired yet again, the experience was embarrassing, and the work was a hassle. The next Mr. Francis knew, Eskasoni was being sued. Mr. Maloney denies this conversation. I believe that Mr. Francis did not make his position clear enough that Mr. Maloney would have taken it as an offer. I believe that the statement quoted above was too soft even to be memorable.

[139] The discovery transcript of Councillor Barry Francis’ discovery shows he believed the decision to fire Mr. Maloney was made by Band Council and executed by the co-manager. He went to the co-manager to try to correct the wrong that the majority of Council had authorized. The co-manager said Mr. Maloney could return to work the next Monday. Councillor Francis met with Mr. Maloney and conveyed this offer. According to the transcript, Mr. Maloney said no, “I’m taking this to court.”

[140] Mr. Maloney testified that he called Chief Francis after being laid off. The Chief said “The bastards, they got you.” and “We’ll deal with it in January.” In the meantime, Councillor Barry Francis called and asked if Mr. Maloney would come back. He replied, “They have to guarantee this will never happen again.” Mr. Maloney had a similar conversation with Chief Francis. He felt that both conversations were personal, that the Band was not making an offer.

[141] As stated in the introduction, I accept the evidence of Mr. Maloney. I am sure he also explained to Gerard Francis and Barry Francis his embarrassment and frustration. Whether either fully understood that Mr. Maloney would consider coming back with another guarantee, I am satisfied that he said that to Councillor Francis and Chief Francis at least.

Band Council Resolutions

[142] Sometimes a record is made of a decision of a band council by a formal document known as a band council resolution, or BCR for short.

[143] The testimony and documentary evidence makes it clear that not every important decision is reduced to a resolution. For example, the employment contract of a band manager is not usually approved by resolution at Eskasoni. On the other hand, a BCR is often required by officials of the provincial or federal government to show the authority for an agreement or for some step that must be taken to qualify for funding.

[144] There is no BCR authorizing Mr. Maloney's employment contract with Eskasoni.

Remedial Management Plan and Co-Management

[145] Eskasoni asserts that the cost of Mr. Maloney's termination pay would lead to a breach of commitments made by Eskasoni to KPMG and the federal government. This may have some importance for analyzing the limits of authority given to Chief Francis.

[146] By 1995, Eskasoni had run up an unacceptably large deficit. The First Nation and the government of Canada agreed to a joint effort to get the deficit under control.

[147] A "Remedial Management Plan" was approved in 1995, replaced in 2001, and automatically renewed since then. Under this instrument, Band Council is required each year to approve a budget that produces a surplus approaching a million dollars. Education and welfare expenses are maintained, but if the surplus is compromised some transfers, such as those for new housing, are diverted to deficit reduction.

[148] Ultimately, the financial control is in Eskasoni's line of credit with its bankers. When the budget surplus is achieved, the line of credit is permanently reduced. When the 2001 Plan was agreed, the deficit was \$13.5 million. It is now under \$8.5 million.

[149] Originally the government proposed that the Plan be administered by an entity similar to a trustee in bankruptcy. Mr. Sampson's firm and Eskasoni

proposed something that would show greater respect for the continuing authority of Band Council. The parties agreed to a system of co-management.

[150] Various co-management agreements have been entered into between Council and an accounting firm, most frequently Mr. Sampson's firm. The co-manager has many responsibilities for overseeing the financial operation, in conjunction with Band Council and its administrators. The co-manager has joint control of banking.

[151] Eskasoni must approve, by BCR, each annual budget. The budget provides Mr. Sampson's authority for meeting the target surplus. Spending beyond the budget requires either a budget amendment or a source of funds outside budgeted revenues.

[152] Mr. Sampson agreed, during cross-examination, that the salary increase given to Mr. Maloney in May, 2004 did not put Eskasoni offside of its fiscal obligations. Eskasoni's position is that early termination and the cost of paying out the balance of the five-year term would put it in breach of the Co-management Agreement and the Remedial Management Plan, unless the cost could be covered outside the budgeted revenues. This is the reason for Mr. Sampson's position that Chief Francis had authority to hire Mr. Maloney, but not to give him a five-year term.

[153] I find that the May, 2004 contract itself did not put Eskasoni in breach of the Remedial Management Plan or the Co-management Agreement. The salary would not have had a significant impact on the budget, even if the salary was paid out of ordinary revenues, which it was not.

[154] I have confidence in Eskasoni's financial statements. They show that a payment in December, 2004 in the order of \$500,000 would have had a material, adverse impact on the deficit. Thus, either the budget would have had to be amended, and the Remedial Mediation Plan would have fallen into breach, or the money would have had to be raised outside budgeted revenues.

[155] It is not clear to me that Eskasoni could have raised the \$500,000 from extraordinary sources in a reasonable time after Christmas, 2004. It is, however, clear that it could have done so if the Christmas payments promised by Chief Francis had not been made.

[156] In light of the funding of the Christmas payments and Eskasoni's frequent success in raising large sums from extraordinary revenues, I find that there were solid reasons to believe, in May of 2004 when the contract was made, that Eskasoni had the ability to pay for a breach of the Maloney contract without amending its budget.

Chief's Authority

[157] Many witnesses gave evidence about their perceptions of the powers exercised by a First Nations Chief and their observations about the powers apparently exercised by Chief Francis. Of course, this evidence was not admitted to modify the powers of a Band Council under the *Indian Act*. Its relevance is threefold. It provides context in which to understand the operation of the *Indian Act*, which understanding is necessary to interpretation, it provides insight into the expectations of Eskasoni Band Councillors, which expectations help to inform the assessment of what Band Council authorized, or did not authorize, the chief to do, and, it assists the determination of ostensible authority.

[158] Mr. Maloney pointed out that the Band Chief, unlike most Band Councillors, is elected individually by the whole First Nation. Historically, such as in treaty negotiations and execution of treaties, the Chief is seen to be the head of a First Nation. Drawing on his experience of Bands across North America, he said that the Chief occupies a leadership position that is respected apart from Band Council.

[159] Mr. Maloney's understanding of Chief Francis' actual authority derived from a number of sources. He saw that the Chief hired him to implement the Fit to Work program well before Council approved the program. He understood, correctly, that the Chief hired and fired Leonard Denny, and he saw that Mr. Denny had a written contract and received termination pay under it. He saw that the Chief hired Mr. Denny's replacement, Gerard Francis. He witnessed the execution of Mr. Francis' contract by the Chief and Mr. Francis. He was present when the Chief announced, in the midst of dealing with the May, 2003 crisis and in the presence of several councillors, who did not then or later object, that "you're fired but you're hired," and when the Chief instructed the Band solicitor to draw up Mr. Maloney's new contract. Mr. Maloney said that Council and the Chief both wanted to assure him that "this would not happen again."

[160] Chief Francis is of the view that he had a broad mandate, after the general Band meeting, to do what was necessary to implement the zero tolerance policy. When Council passed its resolution in September, 2003 he referred to the policy approved by the Band generally and he explained the Band's legal responsibilities, after the implementation of certain Westray Inquiry recommendations for worker safety. He is of the view that adoption of the Fit to Work program, which Council approved, necessarily required the hiring of a person to run the program.

[161] In addition to the approval to hire an administrator implicit in the resolution adopting the Fit to Work program, in February of 2004 Chief Francis received from Council a mandate to negotiate for programs and implement a series of reforms or improvements. This included the fishery. This mandate was supposed to see the Band administration through to the next election in November of 2004.

[162] Mr. Leonard Denny agrees that the Chief performs traditional roles and functions. Chief Francis' predecessor was in office for twenty years, and he called all the shots. For the most part, Councillors left administration to the Chief. In his time, Chief Francis was closely involved in the day-to-day operations, and he was available six or seven days a week.

[163] Mr. Denny said that, in November of 2000, Council authorized the Chief to restructure the Band's administration. Lines of authority were not precise, but the Chief would report to Council on what had been done since it last met. Councillors would sometimes instruct the Chief or the Band Manager to do things, or they would ask for something, but, beyond that, they delegated authority.

[164] Mr. Broderick was able to give examples of the broad authority Chief Francis exercised, with the apparent acquiescence of Council. Despite authorization to settle for \$4 million, he rejected an offer of that amount and negotiated a \$16 million settlement with the province for the return of unauthorized provincial sales taxes. He did so unconditionally, and no one suggested he lacked authority. He did not go to Council for authority to hire Mr. Maloney or others before him.

[165] The co-manager, Mr. Sampson, said Chief Francis did not think he had to go to Council for authority to do anything, but he did go back to Council sometimes. Mr. Sampson allowed that the Chief was authorized by Council to hire Mr. Maloney as the Fit to Work Co-ordinator, but he expressed his view that the Chief

did not have authority to “do a five year deal.” In cross-examination, Mr. MacIntosh put to Mr. Sampson that the Band Councillors showed “passive acceptance of the Chief doing things on their behalf.” Mr. Sampson did not dispute this: “They expected to be informed.” Councillor Alan Jordon expressed a similar thought.

[166] Councillor Jordon said that the Chief’s position is strong, that respect for the Chief is part of the traditions and customs of Eskasoni, but the Chief should be able to take direction from Council. Council does not always approve what the Chief brings to Council. Chief Francis sometimes went ahead with a proposal although Council did not approve of it.

[167] On the list of projects approved by Council in February of 2004, Councillor Jordon said that he and the other councillors gave the Chief “the mandate to go ahead with this, but he had to report back to Council.” Also, some of the programs or improvements were already underway. The Councillor was asked what role Band Council was to play on the mandated programs, and he responded “He was supposed to report back to Council.” In cross-examination it was suggested to him that the Chief was given a great deal of authority, and his reply was “We always told him to report back to us.”

[168] Councillor John Frank Toney sees the Chief and Councillors as equals. Day-to-day decisions are made by the managers, and Council functions like a board of directors. Hiring is normally done by posting, but people are hired or promoted outside the policy. Other kinds of contracts are made by the Chief, but a big contract will go to Council and government contracts require a Band Council Resolution.

[169] In Councillor Toney’s view, Chief Francis did a good job in the beginning, and he accomplished a lot of good things. Along the way he stopped sharing much information with the Band Councillors. He was acting on his own.

[170] Councillor Toney said that the February, 2004 mandate allowed Chief Francis to continue what he was doing. Council’s approval armed him to make stronger arguments for funding. For Councillor Toney, the Chief was to return to Band Council for final consideration of a funded project after funding was secured.

[171] In cross-examination, Councillor Toney allowed that there were many times Chief Blair hired employees without Council's specific approval. He did not believe, though, that the Chief had authority to hire Mr. Maloney.

[172] I assess this testimony, and the minutes, as follows. There was never a specific approval by Band Council for Mr. Maloney's employment. The resolution made early in the fall of 2003 necessitated hiring a person to head up the Fit to Work program, and, to the knowledge of Council, Mr. Maloney had already been hired for that necessary position. Through various means, the Chief had been authorized to hire someone. These means included the decision for "zero tolerance" made at the general Band meeting, Council's acceptance of the zero tolerance decision, the resolution approving Fit to Work in the early fall of 2003, the confirmed mandate in February of 2004, and the discussions at Council that resulted from the May, 2004 crisis.

[173] I also find that the Chief disappointed Council, and may have shown disrespect for the authority of Council by not reporting sufficiently. However, he had been given very broad authority to do many things, although he was expected to keep Council informed. This authority included, I find, authority to hire Mr. Maloney.

[174] It is clear that Council left the exact terms of employment to the Chief, and set no limit on his authority in that regard. The Fit to Work program was experimental. Mr. Maloney's terms of employment could not be cast in stone. The policy adopted in September, 2003 was designed to evolve, and it is obvious that Mr. Maloney's authority would also have to evolve. It is, therefore, clear that Council expected the terms of employment to be changed as required.

[175] I also find that Mr. Maloney had no reason to think that the Chief was acting without authority when he negotiated, and appeared to bind the Band to, the first and second contracts. Further, no councillors gave Mr. Maloney any reason to think his contracts were not authorized by Council.

Consequences of the Termination

[176] As I said, I accept Mr. Maloney's evidence. That includes his evidence about the consequences to him of the termination of his employment contract. This evidence is relevant only to establish how important it may have been that Mr.

Maloney obtain the security of a term appointment after he was fired the first time. This, in turn, goes to conscionability.

[177] In his lifetime, Mr. Maloney seldom asked for a job. He had been sought out. That did not happen after Eskasoni.

[178] Despite his qualifications, Mr. Maloney was unable to get permanent employment. He applied for positions with various native organizations, but he was not hired and some would not even interview him. Mr. Maloney succeeded in obtaining some sporadic temporary contracts, such as with Eskasoni School Board doing nighttime security.

[179] In cross-examination, Mr. Maloney readily allowed that there may have been employment opportunities that he did not find. He says he suffered some depression, he did not want to travel the roads, and he wanted to remain in Cape Breton.

[180] Mr. Maloney fell into financial difficulty. He used his credit cards to the maximums, and they were cancelled. His vehicles were repossessed.

[181] In his time with Eskasoni, Mr. Maloney lost contact with customers of his investigation business. He feels that he gave everything working at Eskasoni.

Issues

[182] The main issues are:

- Whether Mr. Maloney was employed exclusively by EF&WC?
- Whether the contract is binding on Eskasoni?
- Whether the contract is unenforceable because it is unconscionable?

The second issue takes us to s. 2(3)(b) of the *Indian Act*, R.S.C. 1995, c I-5. It also raises the questions of Chief Francis' actual authority and ostensible authority. In addition to the main issues, Eskasoni contends that Mr. Maloney failed to mitigate his losses.

Who Employed Mr. Maloney?

[183] The fact that Mr. Maloney's written contract of employment was with Eskasoni Band Council, and not EF&WC, is a sufficient reason for concluding that the employer was Eskasoni Band Council, and not EF&WC. However, even if there was no contract expressly naming Eskasoni Band Council as the employer, I would find it was such, whether or not it was a joint employer with EF&WC.

[184] Eskasoni submits that I must find an agency between EF&WC, as employer, and Band Council for Band Council to be liable on Mr. Maloney's employment contract. Respectfully, this view is too narrow.

[185] The situation is explicable on the basis that Band Council was the employer, and EF&WC was the agent for paying salary. EF&WC was often used to cover Band Council expenses.

[186] Also, it is possible that EF&WC employed Mr. Maloney jointly with Eskasoni Band Council, which supports Mr. Denny's understanding that Mr. Malone was an employee of both. *Sinclair v. Dover Engineering Services Ltd.*, [1988] B.C.J. 265 (CA) was a case of joint employment in which an employee was hired by, and dealt with the public as representing, one of the joint employers but was paid by the other.

[187] Joint employment is also found in cases of simultaneous supervision and control, for example, *Muhlenfeld v. Northern Alberta Rapeseed Producers' Co-operative Ltd.*, [1980] A.J. 599 (QB). It may also be found in circumstances in which an employee works with more than one corporation in a conglomerate, for example, *McKeough v. H.B. Nickerson & Sons Ltd.*, [1985] N.S.J. 432 (SCTD), affirmed on other grounds [1986] N.S.J. 113 (SCAD).

[188] The situation in which Mr. Maloney found himself bears similarity to all of these cases of joint employment. First, he was paid by EF&WC, although he was retained by Chief Francis to work in a program approved by Band Council and although he used Band Council letterhead.

[189] Second, Mr. Maloney was not under any supervision or control of EF&WC managers, but he reported to Chief Francis who, to the knowledge of Council, acted as though he was the head of EF&WC. When Chief Francis said or did

something about Eskasoni's fishing business one could not necessarily tell whether he was speaking for EF&WC or Eskasoni Band Council. When he left others in doubt, the most reasonable inference is that he spoke for both.

[190] Third, Mr. Maloney did work in EF&WC's sphere and he did other work that had nothing to do with EF&WC. If Chief Francis was head of EF&WC on the subject of fisheries, the Chief dealt with Mr. Maloney as Chief of Eskasoni on other subjects. In the circumstances, the employment is within the principle of *McKeough*.

[191] So, for each of these three reasons Mr. Maloney's situation is explicable on the basis of joint employment. It is explicable, also, on the basis of a payroll agency of EF&WC for Eskasoni Band Council. The question of who employed Mr. Maloney does not turn on a finding that Band Council was made liable by agency law.

[192] Determining who is, and who is not, an employer depends on control, but determining control turns on the evidence in each case. The court is guided by factors considered in the past, such as the four factors referred to by Justice Scanlan in *Clark v. North 102 Developments Ltd.*, [1997] N.S.J. 432 (SC) at paras. 24 to 27:

- authority to control selection of the employee
- incidents of the employment relationship, such as payment of wages and benefits
- control of the method of work, that is, directing what work is to be done and how it is to be done
- authority to suspend or dismiss the employee.

[193] A list of factors was relied on by the P.E.I. Labour Relations Board in a decision reviewed in *Canadian Corps of Commissionaires, NB/PEI Division Inc. v. Prince Edward Island (Labour Relations Board)*, [2005] P.E.I.J. 35, see para. 35. The list is consistent with Justice Scanlan's, but it adds these: "the party who is perceived to be the employer by the employees" and, "the existence of intention to create the relationship of employer and employees."

[194] It is not always helpful to list a series of factors. One does not want to lose sight of central principles. Control of the employee is central to this inquiry. Before turning to the factors, it is remarkable that Mr. Maloney held a professional's position, one in which the employee is responsible for his own direction. No superior officer told him what to do or how to implement and administer the Fit to Work program. The same goes for other projects he undertook for Eskasoni and in his role as an adviser to the Chief.

[195] Mr. Maloney, in the main part of his employment, worked under the "Eskasoni Band Council Commercial Fisheries Fit to Work (Drug and Alcohol) Program Policy". This is a policy of Council, not the EF&WC. It was adopted by Council with the expectation that Council would let it evolve as the community gained experience with the program. In my view, the primary control over Mr. Maloney's employment was this policy of Council. In my assessment, that strongly suggests Council was his employer, or one of his employers.

[196] Control of selection is a factor. EF&WC managers had nothing to do with the hiring of Mr. Maloney.

[197] Responsibility for the financial aspects of the employment relationship is a factor. That rested with EF&WC, but the decision to pay Mr. Maloney out of EF&WC was made after he was first hired.

[198] Directing the employee is a factor. No one at EF&WC directed Mr. Maloney. As I said, Band Council policy was his primary source of direction. In this way, his primary work was directed by Band Council itself.

[199] Authority to suspend or dismiss is a factor. Beyond the facts that Chief Francis fired Mr. Maloney and offered him a new position in May of 2004 and that EF&WC terminated his employment in December of 2004 by including him in a general layoff, nothing tells us who had authority to fire him. As stated, I found the Chief was authorized by Council to make Mr. Maloney's employment contracts. EF&WC had the ability to terminate his employment because it had the ability to stop paying him. On this factor, joint employment is indicated.

[200] The employee's perceptions are a factor. Mr. Maloney used Band Council letterhead and saw himself as an employee of the Eskasoni First Nation.

[201] The intention to create an employer/employee relationship is a factor. Nothing suggests that managers of EF&WC formed an intention to hire Mr. Maloney. His employment was a necessary outcome of a policy adopted by Band Council. Chief Francis never suggested he was hiring Mr. Maloney for EF&WC.

[202] There are other points that touch on this question. They include the importance of the Fit to Work program to the community as a whole and the origin of it in a community meeting, Mr. Maloney's office in the Sarah Dennis Cultural Centre, his independence from EF&WC managers, the EF&WC's lack of control over his records, and the fact that Mr. Maloney did significant work for the Band outside the Fit to Work program.

[203] All things considered, I find that the plaintiff was the employee of the defendant when his employment was terminated in December of 2004.

Eskasoni's Position on Chief's Authority

[204] Eskasoni says the Chief lacked authority to bind it to the May, 2004 contract. The First Nation relies on several points of law in support of its position. It says that the authority is precluded by s. 2(3)(b) of the *Indian Act*. It says that the contract is a breach of the Remedial Management Plan and the Co-management Agreement. It says that the Chief lacked actual authority. And, it says that First Nation Bands cannot be bound through ostensible authority.

[205] The points of law relied on by Eskasoni are not isolated from one another. For example, interpretation of s. 2(3)(b) has an impact on the assessment of both actual and apparent authority, and the answer to the question of breach of the Remedial Management Plan may assist in answering the question about actual authority, although Eskasoni puts forward the breach as an independent reason for not enforcing the contract.

Indian Act, s. 2(3)(b)

[206] There is much authority for the proposition that a contract made by a First Nation without compliance with s. 2(3)(b) is invalid. Analogies are said to be made to municipal law, and contracts that would be enforced against an ordinary

corporation on the indoor management principle go unenforced. However, there are some important limits on how far this line of authority can be taken.

[207] Mr. Conohan referred me to *Heron Seismic Services Ltd. v. Peepeekisis Indian Band*, [1990] S.J. 495 (QB) affirmed by [1991] S.J. 553 (CA). In that case, a contractor claimed for the balance, after government funding, of the cost of drilling oil wells on a reserve. The court found that no contract had been made, but Justice Osborn also said, at para. 11:

Even if it could be found that there was some form of contract then such contract would have to be discussed at a properly called band council meeting with a quorum present followed by a resolution passed and signed by a majority of the band council members present as provided by s. 2(3)(b) of the *Indian Act*, R.S.C. 1985, c. I-5.

[208] Justice Osborn followed *Leonard v. Gottfriedson*, [1980] B.C.J. 551 (SC), which appears to be the seminal authority for the broad application of s. 2(3)(b) against contracts made without Band Council approval. Justice Osborn agreed with these passages in *Leonard* (see, para. 16):

It appears to me also that the position under the *Indian Act* is analogous to the exercise of powers of a municipal corporation. Such powers are, speaking generally, to be exercised in close conformity with the provisions of the incorporating statute. The rationale for such limitation with respect to the exercise of powers is that they are being exercised in the interests of the welfare of the inhabitants who are thus to be protected.

The *Act* is clearly of a tenor indicating the need and intent to benefit and protect the Indian Bands and their individual members coming under its provisions. It is to be read, interpreted and applied in that light. Just as the exercise of a power by a municipality is required to be exercised in strict accord with the statute, to protect the interests of the inhabitants, so, it seems to me, and on the same principle, the council's powers under the *Indian Act* are to be exercised strictly in accord with the *Act* in the interests of the benefit and protection of the Indians.

[209] Mr. Conohan also referred me to *Abénakis de Wôlinak Band Council v. Bernard*, [1998] F.C.J. 1639. Mr. Bernard had a home on a reserve. He applied to Band Council for permission to exchange that home for another. Council postponed consideration of his request to a later date, but in the meantime a major dispute broke out on Council and it stopped holding regular meetings. The Chief

signed a lease making Mr. Bernard the tenant at the new property. The Band later denied the validity of the lease, and it sued for possession.

[210] Justice Blais quoted from these translated passages of *Isolation Sept-Îsles Inc. v. Bande des Montagnais de Sept-Îsles et Maioltenam*, [1989] 2 C.N.L.R. 49 (QSC):

Thus, it appears settled that in municipal cases, and in school cases for that matter, the formal procedures prescribed by law are sine qua non conditions of the validity of contracts, and applying the civil law theory of apparent mandate seems out of the question.

Can these principles be applied to Indian bands? The functioning and powers of Indian bands and band councils have frequently been treated like those of municipalities, municipal councils and school boards. ...

Moreover, courts have unanimously held that non-compliance with formal requirements in municipal and school cases has adverse consequences because they are powers which the Assembly has delegated for the benefit and in the interest of citizens, and such delegated powers can only be exercised within the strict framework the law imposes on them.

All Indian band councils derive their powers from the same source. Those powers, and the terms and conditions within which they must be exercised, are delegated by the Indian Act.

Subsection 2(3) of the Act clearly requires the consent of a majority of councillors of a band present at a duly convened meeting of the council members, failing which “a power conferred on the council of a band shall be deemed not to be exercised.”

Justice Blais granted the Band’s motion for summary judgment, but there was no clear finding on the s. 2(3)(b) issue.

[211] Mr. MacIntosh referred me to *Basque v. Woodstock Indian Band*, [1996] N.B.J. 170 (CA). A builder continued to work for the Woodstock Band after special funding from the federal government dried up. The Band took the position that the building contract was void because Woodstock Band Council had never considered it.

[212] The trial judge found that the “Band did accept this contract at its June 1991 meeting and gave [Chief Tomah] complete authority to negotiate the terms he saw fit.” Chief Justice Hoyt referred to evidence supporting the trial judge’s finding in that regard, but he offered a second basis for upholding the contract.

[213] The Band had paid most of the invoices until the federal funding ended. The builder had been supervised by the Chief. The work was done to the Band’s satisfaction. Council subsequently ratified the contract by authorizing a request for government funding to pay the outstanding invoices.

[214] When discussing the second basis for upholding the validity of the contract, Chief Justice Hughes attempted to distinguish the *Heron Seismic* and *Leonard* decisions (para. 12 and 13). To me, *Basque* seems either to take us in a different direction than these earlier decisions or to emphasize that which is not clear in them: a band or council do not have to approve the specific terms of a contract. Either can authorize the chief, or others, to negotiate and conclude a contract on behalf of the band.

[215] Mr. MacIntosh also referred me to *McDonough v. Maliseet First Nation at Tobique*, [2001] N.B.J. 49 (QB). A First Nation appeared to enter into a contract without the approval of Council. Nevertheless, Justice Garnett upheld the validity of the contract. She did so on the basis of these findings (para. 17):

1. the Council authorized the Chief to negotiate contracts with McDonough;
2. the Council was aware of the existence of the contracts and did not object to them;
3. the Band paid McDonough to the end of August 1996 in accordance with the contractual terms (Exhibit J-1, page 20);
4. the Band did not normally pass Band Council Resolutions (BCR's) in conducting its business except when contracts related to land or federal funding;
5. the Band terminated the contract because of financial difficulties *not* because of McDonough's performance.

[216] Mr. MacIntosh also referred to *Nicholas v. Pictou Landing Band Council*, [2001] N.S.J. 134 (CA), but I read that decision as concerning the ordinary laws about formation of contracts.

[217] Both counsel referred to *Vollant v. Sioui*, [2006] F.C.J. 611, which follows the *Leonard v. Gottfriedson* line, as does *Balfour v. Norway House Cree Nation*, [2006] F.C.J. 360. *Jenkinson's Meat Market & Locker Plant Ltd. v. Red Sucker Lake Band*, [2001] M.J. 379 (QB) is more in line with *Basque v. Woodstock Indian Band*, as are cases about ostensible authority, which we will come to.

[218] None of these decisions takes a hard look at interpretation of s. 2(3)(b). Emphasizing its location in the Interpretation Part of the *Indian Act* and its opening words, “Unless the context otherwise requires or this Act otherwise provides”, Mr. MacIntosh argues that s. 2(3)(b) creates “a deeming presumption only”.

[219] Subsection 2(3) is to be read in accordance with the contextual approach to statutory interpretation required by *Rizzo and Rizzo Shoes Ltd.*, [1998] S.C.J. 2.

[220] Subsection 2(1) provides the definitions. Subsection 2(2) supplies a special meaning of “band” in connection with “reserve or surrendered lands”. Subsection 2(3) reads:

Unless the context otherwise requires or this Act otherwise provides,

(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and

(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

Mr. MacIntosh argues that “the context” is the factual context in which a power is exercised, rather than the textual context of the statute.

[221] The subsection is unchanged since the *Indian Act*, S.C. 1951, c. 29, which provided only a few reforms of the previous statute. Those reforms included a very modest step forward in the authority of native governments, and the *Act* is not mindful of the devolved powers exercised by First Nations today.

[222] Mr. Jack Woodward describes the “main effects” of s. 2(3)(b) this way at page 182.1 of J. Woodward, *Native Law* (Thompson Carswell, looseleaf, update 2007-3):

The main effects of this provision are, firstly, to disallow the conduct of business by resolution in writing without a meeting (as is common in corporations) and, secondly, to supersede any band custom which might require consensus or unanimity in decision-making.

This may assist us in understanding the purpose of the provision.

[223] The legislative scheme into which s. 2(3) fits has little to do with the first parts of the statute, which include registration, reserves, authority of the federal government over trading, disposition of reserve lands, descent of property, wills, intestacies, incompetency, property of children, management of reserve lands by the Minister, finance, and farming. These provisions do not provide much about the authority of bands or their councils. (Exceptions may be found in provisions such as sections 38, 52.1, 58, and 64.)

[224] The exceptions aside, the applicable legislative scheme begins at s. 74 with provisions for the elections of chiefs and band councils. The general powers of councils are provided in s. 81 to 86. I would describe the legislative scheme into which s. 2(3)(b) fits as one of providing authority to band councils over affairs of the reserves they represent to the extent that the statute does not give paramount authority to the Minister or the federal cabinet.

[225] The powers of councils include making by-laws on subjects one would expect in municipal by-laws. Band councils have the authority under s. 83(1)(c) to make by-laws for “the appointment of officials to conduct the business of the Council” and “prescribing their duties”. The Minister and the cabinet have ultimate control over the by-laws: ss. 83 and 84.

[226] As I read it, the statute does not expressly deal with the general laws of contract and it does not expressly authorize band councils to enter into contracts. It leaves unanswered the question of whether a contract must carry the authority of bands or band councils. It leaves that to inference.

[227] Against this description of the scheme of the statute as regards the authority of bands and band councils, a statement that Council's powers are "to be exercised in close conformity with the provisions of the incorporating statute" (*Heron Seismic*, para. 22) seems hollow. The statement suggests a statute, like we usually see with municipalities, that expressly creates a legal entity and closely provides for the exercise of its powers.

[228] I do not agree with Mr. MacIntosh's interesting submission on the opening phrase of s. 2(3). It seems to me confined to the text of the statute. "Unless . . . this Act otherwise provides" defers to an express provision allowing band councils to make a decision by other means. And, "Unless the context otherwise requires" defers to an implication in the text that band councils need not act by majority consent at a meeting. That is how I read the opening phrase, although I have not noticed any provision that would meet either exception.

[229] Otherwise, the text of s. 2(3) is not difficult. A power of a band may only be exercised "pursuant to the consent of a majority of the electors" and a power of council may only be exercised "pursuant to the consent of a majority of the councillors of the band present at a meeting". In my view, there is a strong consistency among the purpose of s. 2(3), the legislative scheme into which it fits, and the grammatical and ordinary meaning of its text.

[230] The plain meaning of these provisions captures both express and implied powers. However, the plain meaning does not justify the imposition of formalistic limits on how express or implied powers are exercised. The *Act* does not tell us how the implied power to contract is to be exercised, except that it must be done "pursuant to the consent of a majority of councillors of the band present at a meeting".

[231] The required consent can be given by approving a contract specifically tabled at a council meeting. But, equally, it can be given by authorizing, at a council meeting, someone to negotiate a contract and report the results. Such a contract is also "pursuant" to the required consent.

[232] Further, neither s. 2(3) nor any other provision in the *Act*, or in the regulations about the conduct of meetings, tells us how the consent is to be ascertained at the duly called meeting.

[233] The line of cases starting with the decision of the New Brunswick Court of Appeal in *Basque v. Woodstock Indian Band* is more consistent with the text of s. 2(3)(b) read in context. That is, the provision allows for Eskasoni Band Council to authorize the Chief to exercise the implied power to contract. It places no hold on the authority that Council can give to the Chief, and it does not require any formality for the expression of a majority consent at a duly convened Band Council meeting.

Compliance with Deficit Control Agreements

[234] Mr. Conohan writes that “actual authority is . . . constrained by the fact that Eskasoni is in co-management”. He argues that the second employment contract violates the deficit control agreements and asserts “no [five year] contract with the Plaintiff could be possible”. This is because the Band would have to “comply with the requirements of the management agreement as a prerequisite”. In oral submissions, it was put that the plaintiff must establish that the contract was authorized in the sense that it complies with the Remedial Management Plan and the Co-management Agreement.

[235] I agree that the Remedial Management Plan and the Co-management Agreement, and the fact of the restrictions imposed on Band Council by these agreements, must be considered, with all of the rest of the evidence on this point, in deciding whether Eskasoni Band Council authorized Chief Francis to make the second employment contract. If doing so amounted to a breach of the Co-management Agreement or the Remedial Management Plan, one would have to ask oneself whether Council intended to give such drastic authority.

[236] I have difficulty with the concept that Eskasoni could not make an enforceable contract that breaches the Co-management Agreement or the Remedial Management Plan. It would surprise me if the state of the law was that a person who contracts with a First Nation must, to ensure the contract is enforceable, study contracts to which the person is not privy. However, I find no significant breach of either agreement.

[237] Eskasoni says that Mr. Maloney’s second employment contract violates two provisions in the agreements. The Co-management Agreement contains a term that makes Council responsible for “Implementing and complying with the control measures identified in Appendix 1”. Appendix 1 includes “(F) Council

Decisions”: “All resolutions, decisions, minutes, by-laws and other proceedings of Council affecting First Nation staff and finances are to be recorded and filed.” One must not read (F) in isolation from (D):

Financial records will be maintained in an up-to-date manner and the First Nation will have in place a detailed accounting and reporting system for all First Nation operations. The financial management system will completely and accurately record every financial decision and transaction of the First Nation, its programs and agencies.

[238] These seem to me to be very ambitious targets for almost any organization, if they are meant literally. It is clear that Eskasoni, and its agency EF&WC, made many financial decisions without a complete and accurate record. It is also clear that Council made decisions about staff and finances that were not “recorded and filed”.

[239] The other party to the Co-management Agreement, KPMG LLP, was well aware of Council’s compliance, or lack of compliance, with these targets. It was specifically aware of Mr. Maloney having been hired, the amount agreed for his initial salary, and the amount of his final salary. I do not think that the degree of Council’s compliance with targets for making a record of decisions assists the assessment of the Chief’s authority.

[240] The other obligations relied on by Eskasoni for suggesting that Mr. Maloney’s employment contract is unauthorized involve requirements that Council adopt annual budgets and approve changes to the budget only by resolution. These requirements are found in both the Co-management Agreement and the Remedial Management Plan.

[241] In discussing the facts, I recorded my finding that, when the second Maloney contract was made, there were solid reasons to believe that Eskasoni had the ability to pay for its breach from EF&WC funds. So, there was no requirement for a budget amendment to support the agreement.

[242] Furthermore, the unbudgeted expense faced by Eskasoni did not arise when the contract was made but when Eskasoni breached it. Line items in budgets are not calculated on the basis that the organization will breach its contracts.

[243] The Remedial Management Plan and the Co-management Agreement tell us nothing about Chief Francis' authority when he executed the second employment agreement.

Chief's Actual Authority

[244] I have already discussed the evidence on Chief Francis' authority to make employment contracts with Mr. Maloney, and I provided my finding on his actual authority.

[245] I shall amplify a few points, but I refer generally to the record of my fact-finding. My finding has its major underpinnings in several meetings. First is the Eskasoni Band meeting, the meeting of the whole First Nation at which Chief Francis received a strong mandate to implement a "zero tolerance" program against drug and alcohol abuse in workplaces. That mandate could not possibly have been discharged without hiring people to develop, implement, administer, and enforce the program.

[246] Next is Council's support for Chief Francis' efforts, the depth of which support is evidenced by the Chief's further decision-making without seeking Council's approval for the details and Council's acceptance of that state of affairs. I have commented on the testimony of Councillor Jordon and Councillor Toney, who so clearly indicated that the Chief had authority but was expected to report back to Band Council.

[247] Next is the resolution in the early fall of 2003. This resolution necessitated the job Mr. Maloney had already, to the knowledge of Council, been hired to do. The resolution was more than a ratification of the authority to employ an administrator, and for the administrator to hire others. This resolution stood as the primary direction under which Mr. Maloney worked. It provided primary and direct control of Mr. Maloney as an employee.

[248] Then there is the consideration by Eskasoni Band Council of the Chief's platform for the remainder of his term, which included his intentions for the fishing industry. And, finally, Band Council met following the protest of May, 2004 and reaffirmed the program Mr. Maloney had been developing, implementing, administering, and enforcing for Eskasoni.

[249] Understood against the entire factual backdrop, these meetings of Council authorized Chief Francis to hire a person to discharge a necessary, unpopular, dangerous job that few would have the courage to undertake. Council clearly left the details to Chief Francis.

[250] That a band council resolution was used at only one of the meetings does not affect my finding on actual authority. Eskasoni seldom uses that formality to express its decisions on subjects not involving the federal or provincial government. Nothing requires it to do so.

Chief's Ostensible Authority

[251] A person may be bound by the words or deeds of an apparent agent. Ostensible agency is created by making a representation, through words or conduct, that leads another to believe that the apparent agent has actual authority: *Keddie v. Canada Life Assurance Co.*, [1999] B.C.J. 2165 (CA) at para. 28. According to *Hely-Hutchinson v. Brayhead Ltd.*, [1968] 1 Q.B. 549 (CA), in the case of a corporation, ostensible authority may be established:

...by inference from the conduct of the board of directors in the particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor.

Justice Hall put it this way in *Horne v. Capital District Health Authority*, [2005] N.S.J. 85 (SC) at para. 28:

First, there must be a representation or holding out by the principal by a statement or conduct indicating the agent's authority to act for him or her; second, there must be a reliance on the representation by the third party; and third, there must have been an alteration to the third party's position as a result of the reliance.

[252] Mr. MacIntosh referred me to cases in which First Nations are bound by an apparent agent. In *Chartrand v. Pine Creek First Nation*, [2003] M.J. 168 (QB) the plaintiff was hired by Pine Creek Education Authority to be the Director of Education at Pine Creek First Nation. The hiring was not approved by the Chief or Council. The power to hire Ms. Chartrand was shared jointly by the Education

Authority and the Council. The Band was liable on the employment contract because the Education Authority was the Band's ostensible agent: para. 42.

[253] In *Barren Lands Band v. Northlands Band*, [2003] M.J. 227 (QB) the Manitoba Queens Bench had to decide on the validity of a contract between Northlands First Nation and a construction company, which had made an assignment to its parent, Barren Lands First Nation. Barren Lands said the construction contract had not been authorized as required by s. 2(3) of the *Indian Act*. The construction contract was signed by the Northlands Chief and the members of Northland Band Council. It does not appear it was ever brought to Council. Following *Chartrand*, the Manitoba Queens Bench found ostensible authority.

[254] *Solomon v. Alexis Creek Indian Band*, [2007] B.C.J. 680 (SC) involved a wrongful dismissal claim by a program manager at Alexis Creek First Nation. The First Nation contested the validity of her contract on the basis that the Band Manager had given her an increase without following policy of Band Council. The British Columbia Supreme Court found that the policy was not always followed, and held "the band manager had ostensible authority to approve the plaintiff's salary" (para. 28).

[255] The Band Manager had been fired in *Chartrand v. Kwakiutl Indian Band*, [2003] B.C.J. 2257 (SC). Ms. Chartrand had a letter agreement signed by the Chief Councillor of Kwakiutl Band Council. It included a five year term. A few months later the contract was terminated. The Band asserted that the contract violated an unwritten rule about conflicts of interest. On a reconsideration of a motion for summary judgment, Justice Gray found there was a genuine issue about validity of the contract. However, she said (para. 40):

Unless the band establishes that Ms. Chartrand knew that she was hired in defiance of a rule, Ms. Chartrand would likely be entitled to rely on the actions of council and its chief councillor. The evidence suggests they had the ostensible authority to hire her.

[256] So, there is an emerging body of judicial authority for the proposition that a First Nation may be bound by ostensible authority. These authorities are somewhat inconsistent with the approach to s. 2(3) in the *Leonard v. Gottfriedson* line of cases and, as already noted, the ostensible authority cases support the

approach in *Basque v. Woodstock Indian Band*, which I see as being more consistent with the contextual interpretation of s. 2(3).

[257] These authorities on ostensible authority may contrast with the many decisions rejecting the application of the indoor management rule to First Nations. I am grateful to counsel for their assistance on those decisions, and I do not see it as necessary to review them here.

[258] One explanation for applying ostensible authority in a field where indoor management is rejected would be that ostensible authority engages principles of probity and fairness. Like promissory estoppel, it prevents a kind of misleading the law will not tolerate.

[259] Finally, both the rejection of indoor management and the *Leonard v. Gottfriedson* interpretation of s. 2(3) bring uncertainty to commercial dealings with First Nations. It is not for the courts to expand on provisions in the *Indian Act* that make First Nations people, or their governments, exceptional figures in the marketplace. The “objective of predictability and certainty in economic relations” stands in the way of expansive interpretations of the exceptional provisions in the *Indian Act: McDiarmid Lumber Ltd. v. God’s Lake First Nation*, [2006] S.C.J. 58, para. 48. See also, *Mitchell v. Peguis Indian Band*, [1990] S.C.J. 63 at para. 126.

[260] It is not for me to say whether the views expressed by the Supreme Court of Canada on different exceptions should prompt a review of the exclusion of the indoor management rule. Those views do suggest to me that, unless it is in the *Indian Act*, the courts should not be finding that First Nations governments are excepted from the common law of ostensible authority. I find nothing to that effect in the statute.

[261] In conclusion, the Eskasoni Band Council can be bound through ostensible authority.

[262] Mr. MacIntosh submits that the Band solicitor, Mr. Broderick, had ostensible authority to bind Eskasoni when he prepared and presented the May, 2004 contract to Mr. Maloney. I agree with that, but with a limit. In my assessment, Mr. Broderick was acting, and was seen to be acting on Chief Francis’ instruction. His apparent authority could be no greater than the authority that appeared to have been given by Eskasoni Band Council to Chief Francis.

[263] I find Eskasoni represented to Mr. Maloney that Chief Francis had the authority to hire Mr. Maloney and to set his terms of employment. The representations were not restricted to one hiring. They were consistent only with the notion that the terms would likely change and Chief Francis would be the person to agree to changes. The representations were by conduct.

[264] There was the course of conduct between Eskasoni and Mr. Maloney in the series of contracts he had with them. First, Mr. Maloney supplied the ten-week course on security. Then, he developed the drug testing policy. Then, he was hired as an employee for the first time. On each of these occasions, the contract was made by Chief Francis without any Councillor, the Band Manager, or the co-manager ever saying or doing anything to suggest the Chief lacked authority.

[265] It is, once again, remarkable that, to the knowledge of the Eskasoni Councillors and managers, Mr. Maloney was in office, doing his job, and being paid for it when Eskasoni Band Council adopted the policy that authorized and directed the work Chief Francis had hired him to do. That may have been a ratification of the Chief's authority. It is certainly a representation by Eskasoni Band Council that the Chief had the authority.

[266] There was the course of conduct between Eskasoni and other employees, much of which was known to Mr. Maloney, in which the Chief Francis hired and fired senior staff without anyone suggesting he lacked authority. Similarly, Chief Francis' dealings with government on tax and with contractors in the fishing business were widely known. No Councillor or manager said anything to Mr. Maloney to suggest the Chief lacked authority on those occasions.

[267] Events associated with the second, the written, employment contract similarly suggest representations about the Chief's authority. I refer to my record of fact finding and, especially, the presence of Councillors, the solicitor, and the Band Manager when Mr. Maloney was fired and offered a new position, their presence when Mr. Broderick was instructed to prepare a written contract, and the Band Manager's actual knowledge of the preparation and execution of the written contract. No one attempted to disabuse Mr. Maloney of the belief that the Chief had authority to do what he had done. Not then, not until after Mr. Maloney was hired.

[268] The quality of this conduct as representations is made the more clear by the respect for the position of the Chief in native communities. I heard evidence on this subject. Outside the *Indian Act*, and in the history, traditions, and culture of First Nations people, the Chief is regarded as authoritative.

[269] Mr. Maloney relied, to his detriment, on these representations. He undertook a job that no one else would do because it was dangerous and unpopular. After suffering a blow to his morale and self-esteem through the success the protestors had in temporarily removing him from office, Mr. Maloney undertook the same job, and other responsibilities, in the faith that the Chief had authority to execute a contract with a poison pill against further efforts at termination. Most of all, he put his reputation on the line.

[270] I am satisfied that, by conduct of its Chief, Councillors, and managers, Eskasoni First Nation represented to Mr. Maloney that Chief Francis had authority to enter into Mr. Maloney's employment contracts. I find he relied on those representations, and he altered his position as a result of that reliance. Therefore, the defendant is bound by the contract executed on May 17, 2004 even if Chief Francis did not have actual authority to sign it.

Conclusion

[271] The parties are agreed that the balance on the contract, including cost of living, is calculated at \$659,762.44.

[272] Mr. Maloney's damages are that amount less what he actually earned through employment before the end of the term. He earned about \$50,000 between termination and when he testified, and I project proportionate earnings from January, 2008 until the end of the term in May, 2009. That would be \$35,000. The parties have also agreed on a five percent rate for prejudgment interest after the date of termination.

[273] I will grant an order for judgment in the amount of \$575,000 plus interest at five percent from the date of termination until the date of my order.

[274] I request written submissions on costs. I suggest both parties deliver, and exchange, briefs by the end of June, with responses by mid-July. However, counsel are free to agree on other deadlines.

J.