

**IN THE MATTER OF AN ARBITRATION UNDER THE
LOWER KOOTENAY BAND CUSTOM ELECTION BY-LAW**

BETWEEN:

WAYNE LOUIE

PETITIONER

AND:

M. JASON LOUIE and SANDRA LUKE

RESPONDENTS

DECISION OF THE ARBITRATOR

March 7, 2017

I. INTRODUCTION

1. The petitioner, Wayne Louie (the “Petitioner”), filed a petition under section 29(b) of the Lower Kootenay Band Custom Election By-Law dated April 17, 2012 (the “Bylaw”) seeking the removal from office of Council members Chief Jason Louie and Councillor Sandra Luke (the “Respondents”). I was appointed by the Lower Kootenay Indian Band Council to act as arbitrator under the Bylaw to determine whether the Respondents should be confirmed in office or removed from office. This is my decision in the matter pursuant to section 31(j) of the Bylaw.
2. On January 16 and January 31, 2017, and in subsequent correspondence to the parties, I made preliminary directions pursuant to section 31(c) of the Bylaw concerning the procedure to be followed in this arbitration.
3. The parties presented their evidence in affidavit form in advance of the hearing. I received a total of seven affidavits from the Petitioner and 12 affidavits from the Respondents, sworn by various deponents. Each party also provided a brief, written summary of his or her position as to why the relief sought in the petition should or should not be granted.

4. The hearing of the arbitration occurred at the Ramada Hotel in Creston, British Columbia, on February 21, 2017, and was open to the Band membership and local media. The Petitioner and Robert Louie, Jr., who was one of the signatories to the petition, spoke in support of the petition. I will refer in this decision to their submissions collectively as being the submissions of the Petitioner. The Respondents each spoke on their own behalf in opposition to the petition, and submissions were made on their behalf by Rita Scott. Various Band members who signed the petition attended the hearing and confirmed their understanding of, and support for, the relief sought in the petition. I will refer to those who signed the petition as the “signatories”.

II. FACTS

5. The facts leading up to the filing of the petition are set out in the decisions of the British Columbia Supreme Court and Court of Appeal in *Louie v. Louie*, which are indexed at 2014 BCSC 133 and 2015 BCCA 247, respectively.
6. The Band has approximately 220 members, of whom 100 reside on the Band Reserve lands near Creston. It was clear from this arbitration that the community is deeply divided by fissures that do not spare even immediate families. The Petitioner, Wayne Louie, is Jason Louie’s uncle, and the petition is supported by Jason Louie’s own father and brother, Robert Louie, Sr. and Robert Louie, Jr.
7. The Honourable Madam Justice Newbury of the Court of Appeal provided the following summary of the background facts:

[1] In early September 2009, the Lower Kootenay Indian Band received \$125,000 from the Regional District of Central Kootenay as compensation for the District’s use of a road that crosses one of the Band’s reserves. The funds were deposited into the Band’s general operating account. A few days later, the Band Council held a meeting which was attended by the five personal defendants, who were elected councillors. Part of the meeting took part in camera. During the in camera session, they decided to pay themselves \$5,000 each as a “retroactive honorarium” for their work as members of the Council. The following day, five cheques for \$5,000 were duly issued, one to each of the five defendants, who took the precaution of signing each other’s cheques.

[2] The plaintiff Mr. Louie evidently became aware of the payments in late 2011. In July 2012, acting for himself and on behalf of the Band, he filed a Notice of Civil Claim against the defendants, alleging that the payments had been made in breach of their fiduciary duties and “without lawful authority or without juristic reason”. He also alleged that the defendants had “conspired together” by acting in bad faith in exercising their powers for an improper purpose and keeping the payments secret for over two years, and that they had failed to make proper disclosure and to follow “financial procedures pursuant to the Indian Act.” He sought a declaration that each of the defendants was guilty of breach of fiduciary duty and an order that each was individually liable to return \$5,000 to the Band. Last, he sought punitive damages.

[3] In their response, the defendants denied that the payments had been made secretly or that any fiduciary duty arose in respect of them. They asserted that their decision was “within the scope of the Council’s duties, done in accordance with the Handbook and the customs, procedures and/or obligations of LKB governance, and was in the best interests of the Band.” In summary, they denied breaching any legal or equitable duty.

8. Council discussed several times over the years a possible catch-up payment or increase to the honoraria paid to Council members to reflect an understanding that the amount they were receiving was too low and had to be addressed, but until the \$125,000 payment from the Regional District was received, it was agreed by Council that the necessary funds were not available for a catch-up payment.
9. The summary trial judge found that the claims of breach of fiduciary duty had not been proven and dismissed the action.
10. The Court of Appeal did not impugn the defendants' honesty or good faith, but found that they acted in a position of conflict of interest and benefitted personally from the payments and thus breached their fiduciary duties. The Court of Appeal allowed the appeal, granted a declaration that the defendants acted in breach of their fiduciary duties to the Band, and ordered that each is liable to disgorge the amount of \$5,000 to the Band.
11. The Court of Appeal has conclusively decided the issues raised in the *Louie v. Louie* case, and the parties did not re-argue those issues before me.
12. The petition that commenced this arbitration reads as follows:

We, the undersigned, hereby support and agree with the June 3, 2015 BC Court of Appeal decision known as "Louie v. Louie" that found Lower Kootenay Band Chief M. Jason Louie, Councillor Mary Basil and Councillor Sandra Luke guilty of breaching their fiduciary duty to the Lower Kootenay Band membership. These said individuals personally profited from Band money when they wrongfully took \$5,000 each from the Band's compensation fund, and in doing so, they breached their Oath of Office which says they are supposed to carry out their duties faithfully, honestly and impartially and to act in the best interest of the community when carrying out their duties. They now have to re-pay the Lower Kootenay Band. Our community is in crisis, as a result of their illegal actions. We have lost confidence in M. Jason Louie, Mary Basil and Sandra Luke. These individuals took Band money for their own personal benefit, and that was legally and morally wrong. Therefore, we, the undersigned, feel that these individuals have lost their privilege and right to govern us. With the aid of this Petition, we are exercising our Band custom and inherent power to remove M. Jason Louie, Mary Basil and Sandra Luke from the Lower Kootenay Band Council.

13. The Respondents filed evidence attacking the character of the Petitioner and those assisting him with this petition. They did so to explain what they allege is the larger context in which this petition was filed. The Petitioner objects to this evidence on the basis that it is inadmissible, argumentative, hearsay, prejudicial and immaterial to the issues to be decided. I agree with the Petitioner that this evidence is irrelevant and potentially prejudicial, and I have accordingly given it no weight or consideration in my analysis.

III. ANALYSIS

A. Applicable Provisions of the Bylaw

14. Section 29(a) of the Bylaw sets out the grounds on which a Council member may be removed from office. Section 29 provides as follows:

29) COUNCIL MEMBERS REMOVAL FROM OFFICE

- a) A Council member may be removed from office on one or more of the following grounds:
- (i) he or she has violated these regulations or other Lower Kootenay law; or
 - (ii) he or she has breached their oath of office; or

(iii) he or she has lost the confidence of the Band as evidenced by the filing of a petition under subsection 29(b); or

(iv) he or she has been convicted on an indictable offence since taking office.

b) Proceedings to remove a Council member shall be commenced by a Petition filed with the Arbitrator and signed by a minimum of 30 or more of the Electors determined as of the date the Petition is filed.

c) The Petition referred to in subsection 29(b) shall also set out the facts substantiating the grounds for removal from office of a Chief or Councillor and shall be accompanied by any supporting documentation.

d) Upon receipt of a Petition, the Arbitrator shall request Council to call a hearing meeting at which:

(i) the person or persons who initiated the Petition shall explain the reason for the Petition

(ii) the Councillor who is the subject of the petition shall be allowed to present their case

(iii) all persons who signed the Petition shall confirm their understanding of the Petition

(e) The Arbitrator shall make a decision within 15 days of the meeting.

15. In the present case, the Petitioner relies on subsections (i), (ii) and (iii) of section 29(a), though primarily on subsection (ii).

16. Section 31 of the Bylaw sets out the procedure to be followed when a petition is filed pursuant to section 29. Section 31 provides, in part, as follows:

(j) The Arbitrator shall issue a written decision together with reasons in every appeal or Petition.

...

(p) If the Petition is for removal of a Council member under section 29 the Arbitrator may:

(i) confirm the Council member in their office; or

(ii) remove the Council member from office and declare the office vacant.

...

(t) The decision of the Arbitrator is final and not subject to appeal.

17. Pursuant to section 30(g) of the Bylaw, if a candidate has been removed from office for just cause, he or she shall not be eligible for nomination or election to Band Council for a period of five years from the date of dismissal.

B. The Petition and its Signatories

18. The Respondents challenge whether the Petitioner has complied with the requirements of the Bylaw in terms of getting sufficient, valid signatures on the petition and having those individuals attend the hearing to confirm their understanding of the petition in accordance with section 29(d)(iii).
19. The petition bears the signatures of 32 Band members. At the start of the hearing, the Petitioner stated that he would not be relying on the signatures of Dionne Louie and Doreen White. With the removal of these two signatures, the petition bears the signatures of 30 members of the Band. The Respondents did not challenge the qualification of those individuals to sign the petition. I find that the Petitioner has complied with section 29(b) of the Bylaw in terms of filing a valid petition.
20. A further issue arose, however, because not all of those 30 signatories were present at the hearing in person or by telephone to confirm their understanding of the petition in accordance with section 29(d)(iii). In total, ten of the signatories appeared in person at the hearing to confirm their understanding, a further eight confirmed their understanding by telephone during the hearing, and one signatory confirmed his understanding via Facebook, for a total of 19 signatories.
21. Of those who were absent, seven lived off the reserve (including one or two who lived on Vancouver's Downtown East Side and were inaccessible by phone), were travelling abroad, or were said to be unwell. The remaining four absentees lived on the reserve, which is very near to the location of the arbitration hearing, and no explanation was offered for their absence. A toll-free telephone number was made available to the signatories to participate during the hearing by telephone.

22. On January 31, 2017, at the request of the parties, I provided some advance directions regarding the requirements of section 29(d)(iii) of the Bylaw and the potential consequences of non-compliance with that section. I confirm, as part of this decision, the following paragraphs from my preliminary directions:

8. I find that section 29(d)(iii) contemplates participation by those who support the petition (i.e., the signatories) in two distinct ways and at two distinct stages of the process: (1) signing the petition to initiate the process, and (2) attending the hearing to confirm their understanding of the petition. The expectation is that the Petitioner and those who support the petition will be available to participate at the hearing in some way or another. Compliance or non-compliance with section 29(d)(iii) is in that sense more than a mere “procedural irregularity”.

...

10. However, I also find that the failure to have each and every signatory participate at the hearing would not necessarily be fatal to the petition. The absence of some of the signatories, particularly if there is a good reason why they cannot attend, would not necessarily render the petition void or invalid or prevent me from granting relief in favour of the Petitioner under section 31(p)(ii). It cannot have been intended by the drafters of the Bylaw that the absence at the hearing of just a few signatories, for example, would invalidate the entire process and prevent the granting of relief where the circumstances might be shown to warrant it.

23. I find that the Petitioner has not complied with the requirements of section 29(d)(iii). Though some latitude is available to a petitioner, it is not sufficient to have 11 of 30 signatories absent, including four who live nearby with no reason offered for their absence. However, I prefer to dispose of this petition on its merits for the reasons set out below and would dismiss it for non-compliance with section 29(d)(iii) only as an alternative basis.

C. Oath of Office – Section 29(a)(ii)

24. I begin the analysis with the Petitioner’s primary ground for removal. The Petitioner argues that the Respondents should be removed from office because they have breached their oath of office (the “Oath”).

25. Section 27 of the Bylaw provides as follows with respect to the Oath:

27) OATH OF OFFICE

(a) All candidates who have been elected to office shall sign an oath of office before the Electoral Officer and Lower Kootenay Members, swearing to:

- (i) uphold and comply with Lower Kootenay by-laws; carry out their duties faithfully, honestly, impartially and to the best of their ability;
- (ii) fulfill the responsibilities of their office and serve the full term unless they have reasonable cause to vacate the position;
- (iii) keep confidential, both during and after their term of office, any matter or information which, under regulation or policy, is consider confidential; and
- (iv) always act in the best interest of the entire Lower Kootenay Community when carrying out their duties.

(b) No person elected shall be permitted to assume their office until they have sworn and filed with the Electoral Officer the oath of office required under subsection 27 (a).

26. Though there was evidence that members of Council sign a document entitled "Oath of Office" with similar, but slightly different content, I find that the provisions of section 27(a) are the relevant terms for the purpose of this analysis.
27. I agree with the Petitioner's submission that the Oath is more than a mere formality, as indicated by section 29(b) of the Bylaw.
28. The Petitioner submits that, if the Respondents are not removed from office in these circumstances, the Oath will be rendered meaningless. He concedes that removing a Chief and Band Councillor is an extraordinary measure, but he says this is an extraordinary situation.
29. The Petitioner submits that the contents of the Oath mirror a fiduciary's duties, and that a finding by a court that the Respondents breached their fiduciary duty is therefore tantamount to a finding that they breached the Oath.

30. I agree that the contents of the Oath embody the essential duties and obligations owed by a fiduciary. The Oath refers to Councillors fulfilling their duties “faithfully, honestly, impartially and to the best of their ability”, “keeping confidential” information that is entrusted to them, and acting always “in the best interest of the entire Lower Kootenay Community.” These are the hallmarks of a fiduciary’s duties.
31. The finding by the Court of Appeal that the Respondents breached their fiduciary duties is therefore *prima facie* grounds for their removal, but it is not the end of the enquiry. Due to the strict standard to which fiduciaries are held, there may be circumstances in which a court holds a fiduciary liable to account for a profit or gain even though the fiduciary acted honestly, openly, and in good faith. As the authors of *Snell’s Equity*, 23rd edition (2010), note at page 189:
- The honesty or otherwise of the fiduciary is also irrelevant: a breach of fiduciary duty “may be attended with perfect good faith.” The fiduciary conflict rule “might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.” This does *not* mean that the rule can be departed from where the fiduciary does not act immorally; it means that the rule applies irrespective of considerations of morality.
32. The Court of Appeal in *Louie v. Louie* made this very point, quoting at paragraph 26 the following passage from L.I. Rotman, *Fiduciary Law* (2005):
- [T]he objective standard of assessment does not concern itself with matters such as fiduciaries’ subjective motivations for their actions, whether they have acted in good or bad faith.
33. In contrast, I find that a breach of the Oath does concern itself with the fiduciary’s subjective motivations and whether he or she has acted in good or bad faith. In my view, a breach of the Oath requires some conscious or deliberate act by a Councillor that he or she knows, or ought to know, is contrary to what they have sworn to do.
34. In the present case, there was evidence before me, and findings made in the *Louie v. Louie* case,¹ that the Respondents honestly believed in 2009 that the Band Council was following the correct process and had the authority to make the payments, that the

¹ See, for example, BCSC at paras 9 and 38-39; and BCCA at paras 8 and 27.

Respondents were entitled to receive the \$5,000 payment, and that there was no effort to keep the payments secret from the Band membership. I accept that evidence.

35. The evidence before me indicates that procedures and administrative practices at the Band were in a state of some disarray in 2009 but have improved considerably since then and continue to improve. The summary trial judge made some findings to this effect. The Court of Appeal did not disturb those findings of fact; rather, it held that, because of the high standard imposed on fiduciaries, the Respondent had to repay the monies they received notwithstanding that they may have acted honestly and in good faith.
36. Throughout the Petitioner's written and oral submissions, he refers to the "finding of guilt by a court of law" and asserts that the Respondents "stole money" from the Band and were found guilty of "theft". These characterizations all convey the notion that the Respondents acted dishonestly and were found by the court to have done so. In my view, this submission overstates the findings made by the court and is not supported by the evidence before me with respect to what occurred in 2009.
37. However, I am troubled by the fact that in the 21 months that have passed since the Court of Appeal's decision, neither of the Respondents has repaid any of the money owing to the Band nor entered into any arrangements with the Band Council to satisfy the judgment in some manner. The Petitioner wrote several letters after the decision seeking payment to the Band of the amounts owing. The Petitioner submits that the Respondents have shown a cavalier attitude in response to the Court of Appeal's decision and a contempt and disregard for the law.
38. In response, the Respondents identify several factors that they say explain their failure to make payments thus far:
 - (a) After the Court of Appeal's decision was issued, a community meeting was held on August 26, 2015, to get direction from the community as to how they wanted the five defendants in the *Louie v. Louie* case to move forward. The meeting was advertised well in advance. Eleven community members and the five defendants attended the meeting. The unanimous decision of those present was to forgive the

debt owing by the five defendants to the Band. The Petitioner provided no evidence in reply as to why he or his supporters did not attend this meeting to express their views. A subsequent legal opinion appears to have complicated matters by calling into question the legal effect of the decision made at the meeting.

- (b) The Court of Appeal ordered that the defendants pay the plaintiff (Wayne Louie) costs in the amount of \$15,000. The plaintiff pursued the defendants for payment of his costs, as he was fully entitled to do. Payment of that sum seems to have become the priority in the months after the decision was rendered. The payment of costs was delayed by “internal friction” between the defendants who had to deal collectively with this joint liability. The defendants made the final payment on account of the cost award in December of 2016, with Jason Louie paying a disproportionate amount of those costs.
 - (c) For her part, Sandra Luke deposed that she is impecunious and that it was extremely difficult for her to contribute to the payment of the plaintiff’s costs. She earns only a \$900/month honorarium payment as a Councillor and an honorarium for attending meetings at the Ktunaxa Nation, leaving her just enough money to cover her living expenses.
39. On balance, I find that the Respondents have provided a sufficient explanation for why they have not yet discharged their debts to the Bands arising from the Court of Appeal’s judgment.
40. I also note that section 29(a) of the Bylaw does not list as a ground for removal the fact that a Councillor owes an outstanding monetary debt to the Band.
41. To be clear, however, nothing in this decision should be interpreted as affecting the Respondents’ obligation, legal and otherwise, to satisfy the judgment of the Court of Appeal and to discharge the debt they owe to the Band. That money remains owing and should be paid. Jason Louie stated on the record in this proceeding that he is prepared to sit down with the community and work out a plan for repayment of the \$5,000 to the

Band. The Respondents will face the electorate in two years, and the Band membership will have an opportunity then to assess for themselves the adequacy of the Respondents' efforts to repay the money if those amounts still remain unpaid.

D. Band's Custom Law – Section 29(a)(i)

42. The Petitioner argues that the Respondents should be removed from office because they have violated “other Lower Kootenay law” in the form of a custom law of the Band to the effect that elected officials who are found to have taken Band money for personal gain, if asked to resign, shall resign.

43. The Petitioner points to one incident in 1991 to establish this custom law. Robert Louie, Sr., describes the incident as follows:

In 1991, there was shocking news that Mary Basil, who was our Chief at that time, was taking the Band's lease money for herself. In other words, she was personally profiting using Band funds. Consequently, the Band told her that she had to step down as the Chief and she complied. Since then, there's been a custom that our Chief or Band Councillors cannot personally profit from Band funds.

44. For the reasons that follow, I find that the Petitioner has not established a custom law that would apply in the present case to justify the removal of the Respondents from office.

45. First, the evidence before me does not establish whether Mary Basil took the money in the honest, but mistaken, belief that she was entitled to do so or whether she knowingly misappropriated the money. Without that information, I cannot find that the current situation is comparable such that the custom law, if it existed, would apply. As discussed above with respect to the alleged breach of the Oath, the honesty and good faith (or lack thereof) of the Council member is significant. The evidence suggests that it was an accusation that she was “stealing lease money from the band” that prompted her to resign. If that allegation were true, it would be a quite different situation than the present case.

46. Second, the Band membership appears to have been essentially unanimous in 1991 in asking for the resignation of then Chief Mary Basil. As discussed below, I find that is not the case with the Band membership today.
47. Third, there has been a material change in circumstance since the 1991 incident. I find that the Bylaw, which was enacted in 2012, was intended to be a complete code governing the removal of members of Council. The rules in the Bylaw differ from the asserted custom law of 1991 in material respects. When Mary Basil resigned, she was free to seek re-election in the next election, and in fact she did so successfully. On the Petitioner's evidence, the custom law, if there is one, would be that a Council member would have to resign but then would be free to run again in the next election. Under that custom law, Band members would not be denied the right to vote for the person again in immediate response to his or her removal. Such a custom law can no longer be implemented given the restriction in section 30(g) of the Bylaw.
48. Finally, I am somewhat skeptical that one incident is sufficient to establish a binding custom law on the terms articulated by the Petitioner. The incident in 1991 could equally establish a custom law that a Chief must resign if, for any reason, the Band membership as a whole and the Band Council ask unanimously that he or she step down. Given my other findings, it is not necessary for me to decide that question.

E. Confidence of the Band – Section 29(a)(iii)

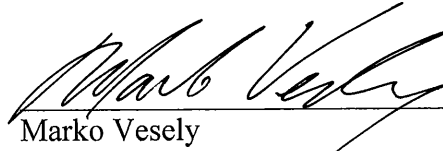
49. The Petitioner argues that the Respondents should be removed from office because they have lost the confidence of the Band as evidenced by the filing of this petition.
50. The Petitioner has not persuaded me that the Respondents have lost the confidence of the Band. I find that the Petitioner's failure to comply strictly with the requirement in section 29(d)(iii) weighs more heavily against him on this particular ground of removal. As noted above, no explanation was given for the failure of four signatories to attend and confirm their understanding either in person or by phone despite the fact that they all live in the nearby community.

51. During the 2014 election in which the Respondents were elected, it was well known to the Band membership that the Respondents and the other defendants in the *Louie v. Louie* case received \$5,000 each from the monies paid to the Band by the Regional District. The Petitioner and Robert Louie, Sr. made this issue the centrepiece of their election campaigns, which were unsuccessful. The Respondents were nevertheless elected to office. Of course, the Court of Appeal's decision was not rendered until after the election, but the evidence does not establish that the Court of Appeal's decision has caused the Band membership at large to lose confidence in those whom they elected in 2014.
52. The low turnout and the decision taken at the August 26, 2015 meeting (discussed above) provides further evidence that there has not been a widespread loss of confidence in the Respondents following the Court of Appeal's decision.
53. If the parties agree on anything it is that their shared community is deeply divided. As Robert Louie, Sr., stated in his affidavit, "I have a heavy heart here. Our Band is in a crisis. I've never seen the Band so dysfunctional and fractured." Jason Louie referred to the Band as a "divided community." I find that this division within the community runs deeper than the issue raised in this petition and should not be taken as evidence of a loss of confidence in the Respondents by the Band membership at large, as required by section 29(a)(iii).

CONCLUSION

54. I find that this case is close to the line in terms of the conduct that would warrant removal. I am troubled by aspects of the Respondents' conduct, in particular their failure to repay any of the money since the Court of Appeal's decision was issued. However, I find their explanation as to why they believed they could receive the money in 2009 and why they have not yet paid it back to be sufficient to satisfy me that their breach of fiduciary duty was not a conscious or willful one that would amount to a breach of their Oath or that would otherwise justify the extraordinary remedy of removing them from office and preventing them from running for re-election for five years. As an alternative ground for dismissing the petition, I find that the Petitioner has failed to comply with section 29(d)(iii) of the Bylaw.

55. Accordingly, pursuant to section 31(p)(i) of the Bylaw, I confirm Chief Jason Louie in his office and confirm Councillor Sandra Luke in her office.
56. The parties may make submissions in writing within 14 days regarding what order as to costs, if any, should be made pursuant to section 31(q) of the Bylaw.



Marko Vesely

March 7, 2017