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

RECONSIDERATION DECISION

September 26, 2018

I. INTRODUCTION

1. The petitioner, Wayne Louie, filed a petition under section 29(b) of the Lower Kootenay Band Custom Election By-Law dated April 17, 2012 (the "Bylaw") seeking to have the respondents, Chief Jason Louie and Councillor Sandra Luke, removed from office. 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.

2. On March 7, 2017, I issued a decision dismissing the petition. The petitioner applied for judicial review of that decision. On May 28, 2018, the Honourable Mr Justice Mason of the Federal Court granted the application for judicial review and referred the matter back to me for reconsideration in accordance with his decision and reasons for judgment (*Louie v. Louie*, 2018 FC 550).

3. Since my initial decision, counsel has been appointed for the petitioner and for Jason Louie, and they have provided new authorities and have made new submissions on the issues identified below.

4. The parties were given an opportunity to deliver written submissions prior to the hearing of the reconsideration. Counsel for the petitioner and counsel for Jason Louie delivered written submissions. The hearing of the reconsideration was conducted on September 11, 2018, by teleconference with the participation of all parties and counsel for the petitioner and Jason Louie. Interested members of the Band were able to listen to the proceedings by speakerphone at a facility located on the Lower Kootenay Band reserve.

5. In the petitioner's initial correspondence and written submissions on the reconsideration, he sought an order that a new party, Carol Louie, be added as a respondent and that she also be removed from her position as a Councillor. At the hearing of the reconsideration, the petitioner abandoned this claim.

6. These are my reasons for decision on a reconsideration of the petition in accordance with the decision and reasons for judgment of Justice Mason and based on the new submissions and authorities that were provided to me.

II. ISSUES

7. The parties agree that the following issues are to be determined on this reconsideration:

   (a) What is the consequence of the fact that not all 30 of those who signed the petition attended the hearing?

   (b) Should the respondents be removed from office as a result of their breach of their oath of office?

   (c) What award, if any, should be made regarding the costs of this arbitration?

III. ATTENDANCE OF SIGNATORIES AT THE HEARING

8. Section 29 of the Bylaw provides as follows:

> **29) COUNCIL MEMBERS REMOVAL FROM OFFICE**
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> a) A Council member may be removed from office on one or more of the following grounds:
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> (i) he or she has violated these regulations or other Lower Kootenay law; or
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> (ii) he or she has breached their oath of office; or
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> (iii) he or she has lost the confidence of the Band as evidenced by the filing of a petition under subsection 29(b); or
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> (iv) he or she has been convicted on an indictable offence since taking office.
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> 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.
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> 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.
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> d) Upon receipt of a Petition, the Arbitrator shall request Council to call a hearing meeting at which:
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> (i) the person or persons who initiated the Petition shall explain the reason for the Petition
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> (ii) the Councillor who is the subject of the petition shall be allowed to present their case
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> (iii) all persons who signed the Petition shall confirm their understanding of the Petition
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> (e) The Arbitrator shall make a decision within 15 days of the meeting.

9. The operative parts of section 29(d)(iii) provide that, "[u]pon receipt of a Petition, the Arbitrator shall request Council to call a hearing meeting at which … all persons who signed the Petition shall confirm their understanding of the Petition."

10. The petitioner submits that the Bylaw must be interpreted so as to give it practical effect, and that it is not practical to require all signatories to attend the hearing.

11. The petitioner submits that the signatories can meet the requirement of section 29(d)(iii) by confirming their understanding in writing, and that their signatures on the initial petition are sufficient for that purpose. He submits that their signatures on the petition are *prima facie* proof that they understand its contents, and the burden is then on the respondents to lead some evidence at the hearing to rebut the presumption arising from the signed petition. In response to a question at the hearing, counsel for the petitioner submitted that, once the signatories sign the petition, they do not need to attend the hearing at all; the respondents could be validly removed from office after a hearing at which only the petitioner attended. The petitioner further submits that the requirements of section 29(d)(iii) apply only when a petitioner relies on section 29(a)(iii) in seeking to remove a councillor.

12. Jason Louie submits that the procedures required by section 29(d) are clear. The use of the word "shall" in section 29(d)(iii) indicates that compliance with the provision is mandatory in all cases. The drafters of the Bylaw could have used less restrictive language or could have provided for exemptions or allowed for flexibility, as they did in other provisions of the Bylaw (*e.g.*, sections 20(c) and 27(d)). He submits that the requirements of section 29(d)(iii) are an aspect of the procedural fairness to which the respondents are entitled.

13. Jason Louie also notes that the consequences of removal for the respondents would be significant in this particular case. Pursuant to section 11(a)(v) of the Bylaw, the respondents would be ineligible to run for council for five years. Given the timing of the Band's election cycle, if Jason Louie was removed from office now, he would be prevented from running for office again until 2026.

14. The Federal Court has given guidance on interpreting provisions of this nature. Provisions of a custom election code that deal with the removal of a council member from office should be strictly construed because of their severe impacts. In *Bugle v. Lameman*, [1997] F.C.J. No. 560 (T.D.), at para. 2, Justice Campbell held as follows:

> First, I find that the Tribal Election Law is the all-encompassing code of legal authority to elect and remove a Chief and Council of the Beaver Lake First Nation. Thus, it is only within the words of this law itself that any authority can be found to remove Chief Lameman from his office. **I find that the words of the Tribal Election Law must be strictly construed; that is, I cannot be liberal in interpreting their meaning because, in my view, the results of removal from office are so severe that a strict interpretation is required**. [emphasis added]

15. Justice Manson cited this decision with approval in *Louie v. Louie*, 2018 FC 550, at para. 42.

16. In *Johnny v. Adams Lake Indian Band*, 2017 FCA 146 ("*Johnny #1*"), the Federal Court of Appeal explained that the duty of fairness to be applied when removing a democratically-elected councillor from office is at the robust end of the spectrum, given the effect of the decision on the councillor's reputation and remuneration and on the democratic choice of the electorate. Justice Dawson stated as follows at paragraphs 24 and 25:

> [24] The content of the duty of fairness to be applied when removing a duly elected councillor from office was considered by the Federal Court in *Testawich v. Duncan's First Nation*, 467 F.T.R. 38. The Federal Court concluded that application of the factors articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22 favoured a duty of fairness "on the more robust end of the spectrum." The Federal Court reasoned that:
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> > [34] In my view, the *Baker* factors weigh in favour of a duty on the more robust end of the spectrum. First, the Committee reached its decision through a process resembling that of a court, since it has the task of resolving complaints by reference to Regulations establishing rights and duties. The Supreme Court has stated that such decisions warrant a high degree of procedural fairness: *Baker*, above, at para 23. The fact that there is no internal appeal in the statutory scheme also militates in this direction: *Baker* at para 24.
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> > [35] The decision itself did not affect the applicant's liberty or security interests and is, therefore, of moderate importance. However, it has affected his reputation in the

> community and has also deprived the members of the First Nation of their elected representative. The applicant submits that his expectations were that the hearing would be procedurally fair and that the Committee would maintain a record of the proceedings and provide written reasons of its decision.
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> [25] I agree. To the analysis of the Federal Court I would only add with respect to the importance of the decision to the appellants that the position of Band Councillor is generally a remunerated position. The *First Nations Financial Transparency Act*, S.C. 2013, c. 7 requires that First Nations disclose and publish on the internet the remuneration and expenses paid to members of Band Councils. This disclosure is also to be published on the website of Indigenous and Northern Affairs Canada. Members of the Adams Lake Indian Band Council receive remuneration of approximately $4,000 per month. This heightens the importance of the decision to the appellants. Their tenure as a paid office holder is at stake.

17. I find that the petitioner's proposed interpretation of section 29(d)(iii) would be contrary to the express terms of the Bylaw and would be inconsistent with the interpretative principles cited above.

18. Section 29(d)(iii) contemplates participation by those who support the petition 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 in some manner to confirm their understanding of the petition.

19. The language of section 29(d)(iii) is mandatory – the Council will call a meeting "at which" "all persons who signed the Petition ***shall*** confirm their understanding of the Petition" (emphasis added). Contrary to other sections of the Bylaw, the language is not permissive and does not include express exemptions to the requirement.

20. At the initial hearing, I made arrangements to facilitate the attendance of the signatories and to be flexible as to the procedure in that respect, including making available a toll free telephone number for them to call if they could not attend the hearing in person. Several signatories called in to confirm their understanding at the hearing by telephone.

21. At the hearing, only 19 of 30 signatories confirmed their understanding of the petition or participated in any way. Two signatories resided on the reserve but were said to have health problems that prevented them from attending in person. No explanation was given for why they could not call the toll free telephone number, as others did. Three others were said to reside "off reserve", but no adequate explanation was given for why they could not telephone in.

22. Most importantly, four individuals resided on the reserve, were able to attend, and no explanation was given for why they did not attend or call in.

23. In my view, the petitioner has failed to meet the mandatory requirements of section 29(d)(iii), and I dismiss the petition on this basis. Even if there was some scope for relaxing the requirements of section 29(d)(iii) in extraordinary circumstances, the facts of the attendance in this case would not warrant relaxing those requirements. My conclusion on this point does not depend on my findings below with respect to how the discretion under section 29(a) would be exercised in this case if the requirements of section 29(d)(iii) were met.

IV. SHOULD THE RESPONDENTS BE REMOVED FROM OFFICE?

24. I have dismissed the petition based on the petitioner's failure to comply with the requirements of section 29(d)(iii). In the event I am wrong in that conclusion, and given that there was full argument at the reconsideration hearing, I will consider Issue (b) identified above.

25. The decision of the Federal Court of Appeal in *Johnny v. Adams Lake Indian Band*, 2017 FCA 147 ("*Johnny #2*") was not available at the time of my first decision. All parties agree that this case sets the applicable test, and that the question before me as to whether the respondents should be removed from office involves an exercise of discretion.

26. The Federal Court of Appeal in *Johnny #2* held as follows at paragraphs 17-20 and 22:

> [17] The Election Rules, in my view, recognize this need because they provide, among other things, that a Councillor may – not must – be removed for breach of their oath of office.

> [18] To illustrate, the oath of office requires Councillors to perform their duties "with dignity and respect." A regrettable, momentary breach of civility may well, with the benefit of hindsight outside of the heat of debate, lack dignity and respect, but at the same time fall far short of conduct that causes electors to lose faith or confidence in the judgment of their Councillor or to lose such respect for the Councillor so as to justify the Councillor's removal from office.
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> [19] At the other end of the spectrum, some conduct may be so repellent, undignified and disrespectful as to clearly evidence a Councillor's unfitness for elected office.
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> [20] **In every case it is for the elected Community Panel to determine whether impugned conduct rises to the level that warrants removing a democratically elected Councillor from their office.** This is a decision the Community Panel must make on the basis of its knowledge of the customs and norms of the Band, taking into account realistic expectations and a goodly measure of common sense in order to determine whether a Councillor has engaged in conduct that has caused electors to lose faith or confidence in the judgment of the Councillor or to so lose respect for the Councillor that the Councillor ought to be removed from office. Realistic expectations and common sense are required because a standard of conduct based upon unfailing perfection is one not likely to be met consistently, and one likely to lead to frequent petitions to remove Councillors.
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> ...
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> [22] **In the present case, missing from the reasons of the Community Panel is any consideration of whether the alleged misconduct rose to the level that warranted removing the appellant from office. Indeed, the reasoning of the Community Panel is consistent with the view that any and all breaches of the oath of office justify removal from office. However, this is an unreasonable interpretation of the Election Rules. If this was the intent of the Election Rules, Part 24.1 would require that Councillors "shall", not "may", be removed from office for a breach of their oath of office.** [emphasis added]

27. With the benefit of the decision of Justice Mason, it is clear that the respondents' conduct constituted a breach of their oath of office.

28. Accordingly, the question to be determined is whether the respondents' breach of their oath of office constitutes conduct that rises to the level that warrants their removal from office.

29. I have carefully considered the evidence tendered and the submissions made on this issue. I find that the following factors are important:

(a) Any taking or misapplication of Band money is a very serious matter. As noted by the B.C. Court of Appeal, the removal of $25,000 from the Band funds and the payment of $5,000 to each of the respondents constituted a clear and significant personal benefit to them and a corresponding detriment to the Band.

(b) It took some time and enforcement proceedings before the respondents finally repaid the money to the Band.

(c) However, the respondents honestly believed in 2009 that the Band Council was following the correct process and had the authority to make the payments, and that the respondents were entitled to receive their respective $5,000 payments.

(d) The procedures and administrative practices at the Band governing payments of this nature were in a state of some disarray in 2009 when the payments were made, though they have improved since then.

(e) The respondents made no effort to keep the payments secret from the Band membership. Among other things, the payments were disclosed in the Band's financial statements, which were publicly-available and were provided to Indian and Northern Affairs Canada.

(f) After the B.C. Court of Appeal issued its decision, a community meeting was held 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, and 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, though I understand that this decision did not

have the effect at law of extinguishing the debt. The petitioner provided no evidence as to why he or his supporters did not attend this meeting to express their views.

(g) The respondents have repaid the $25,000 in full to the Band and have paid the petitioner his costs of the civil action in full as awarded by the B.C. Court of Appeal.

(h) The respondents provided a sufficient explanation for why it took them some time to repay the money to the Band arising from the B.C. Court of Appeal's judgment.

30. Weighing these factors, I find that the respondents' breach of their oath of office did not constitute conduct that rises to the level that warrants their removal from office. Had I not dismissed the petition for a failure to comply with section 29(d)(iii), I would exercise my discretion under section 29(a) to dismiss the petition and affirm the respondents in their office.

V. COSTS

31. The petitioner submits that costs of this proceeding should be borne by the Lower Kootenay Band. He submits that the resolution of this matter is in the interest of the Band and thus the Band should pay the costs. He draws an analogy to the payment of costs from an estate in proceedings concerning the administration of the estate, as in *Re: Collett Estate*, 2005 BCCA 291.The petitioner seeks an order that the Band pay his reasonable costs on a full indemnity basis.

32. It would not be appropriate to order the Lower Kootenay Band to pay the full-indemnity costs of all parties. The petitioner did not give advance notice to the Band that he was seeking an order for costs against it. The Band is not a party to this proceeding and has not had the opportunity to be heard. Further, the Band membership at large should not be required to pay the cost of a petition brought and supported by only certain Band members, which was ultimately held to be unsuccessful.

33. Jason Louie submits that the petitioner should pay the respondents' costs. He submits that launching a petition to remove duly-elected council members from office is a draconian measure and should require careful consideration of the consequences. Excusing petitioners who are unsuccessful from paying costs would invite ill-considered petitions driven by personal grievances.

34. I agree that a cost award against an unsuccessful petitioner may be appropriate where a petition has been commenced frivolously, without careful consideration, or for personal grievances. But this is not such a case. One must recall that the respondents were found in this proceeding to have breached their oath of office. They are, in part, the authors of their own misfortunate. There was no evidence that the petitioner brought the petition in bad faith or for an improper purpose.

35. Accordingly, I order that each party shall bear their own costs of this arbitration, including the reconsideration hearing.

VI. CONCLUSION

36. I summarize my conclusions as follows:

(a) The respondents breached their oath of office in paying $25,000 to themselves from the funds received by the band;

(b) The petitioner failed to meet the mandatory requirements of section 29(d)(iii), and the petition is dismissed on that basis alone; and

(c) If I erred in my decision to dismiss the petition for non-compliance with section 29(d)(iii), then I would find that the respondents' breach of their oath of office does not constitute conduct that rises to the level that warrants their removal from office.

37. Accordingly, I make the following orders:

(a) the petition is dismissed;

(b) 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; and

(c) each party shall bear their own costs of this arbitration.

Marko Vesely

September 26, 2017