

Court File No. T-441-24
e-document

FEDERAL COURT

BETWEEN:

ROBERT LOUIE JR.

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|-----------------------|--------------------------------|----------------------------|
| F I L E D | FEDERAL COURT COUR FÉDÉRALE | D E P O S É |
| | February 29, 2024 | |
| Soraya Premji | | 1 |
| Vancouver, BC | | Applicant |

and

LOWER KOOTENAY INDIAN BAND

Respondent

APPLICATION UNDER Section 18.1 of the *Federal Courts Act* (R.S.C. 1985, c. F-7)

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Calgary, Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date February 29, 2024 Issued by Originally Signed:
Soraya Premji
(Registry Officer)

Address of
local office: Canadian Occidental Tower, 635
Eighth Avenue S.W., 3rd Floor
P.O. Box 14
Calgary AB T2P 3M3

TO: Lower Kootenay Indian Band
3425 Old Community Road
Creston, BC V0B 1G2

APPLICATION

Robert Louie Jr., a lifelong member of the Lower Kootenay Indian Band (“LKIB”), applies for judicial review, under Section 18.1 of the *Federal Courts Act* (R.S.C. 1985, c. F-7), as may be amended from time to time, of the decision of LKIB’s Chief and Council (collectively, “Council”) to not abide by or enforce the Lower Kootenay Indian Band *Financial Administration Law*, 2014 (“2014 FAL”), being a successor to the *Lower Kootenay Indian Band Financial Administration Law*, 2012 (“2012 FAL”), or alternatively to not abide by or enforce significant portions of the 2014 FAL or, as applicable, 2012 FAL. The 2014 FAL, and as applicable, the 2012 FAL, are important to LKIB’s financial governance, providing necessary accountability to LKIB’s members.

The Applicant makes Application for:

1. A declaration that the 2014 FAL (or in the alternative the 2012 FAL) is:
 - (a) in full force and effect; and
 - (b) a binding law of LKIB, and not a policy, guideline, or other similar discretionary directive.

2. An order:
 - (a) in the nature of mandamus, requiring Council to uphold and abide by the 2014 FAL, and to specifically:
 - (i) solicit LKIB membership, especially those with some financial competency, forthwith, to apply to join the Finance and Audit Committee, including by posting notice conspicuously on the LKIB Facebook page (<https://www.facebook.com/lowerkootenayband/>) (“Facebook Page”) and website (<https://lowerkootenay.com/>) (“Website”);

- (ii) appoint members of the Finance and Audit Committee established under section 12(1) of the 2014 FAL, as required by section 12(2) of the FAL no earlier than 2 weeks, and no later than 4 weeks, after posting notice for applications, and forthwith thereafter announce the membership of the Finance and Audit Committee to LKIB, including in a conspicuous place on the Facebook Page and Website;
 - (iii) convene a meeting of the Finance and Audit Committee, as required by section 14(6) of the 2014 FAL forthwith, and in no case later than 4 weeks after the members of the Finance and Audit Committee are appointed; and
 - (iv) direct the Council to establish policies or procedures or give directions for (a) the provision of information to members of the First Nation respecting capital projects; or (b) the involvement of members of the First Nation in consideration of capital projects, as required by section 92 of the 2014 FAL, within 4 weeks from the date of order, and to forthwith thereafter publish such information, including in a conspicuous place on the Facebook Page and Website;
- (b) alternately, in the nature of mandatory injunction, requiring the Respondents to immediately make effective, uphold and abide by the 2014 FAL, and to specifically perform all of the actions set out in subparagraph (a), immediately above;
 - (c) alternately, in the nature of certiorari, quashing or setting aside Council's decision to not adhere to the 2014 FAL generally, and in particular to sections 12, 14 and 92 of same.

3. Costs of this Application in favour of the Applicant in such amount as this Honourable Court deems just.

4. Any other relief as counsel for the Applicant may advance at the hearing of this Application and this Honourable Court deems just.

The Grounds for the Application Are:

A. The Parties

5. The Applicant Robert Louie Jr. is a LKIB member, and has been for his entire life.

6. LKIB, known in the Ktunaxa language as Yaqa Nukiy, is a band (as that term is used within the *Indian Act*), whose traditional territory is centred in the Kootenay region of southern British Columbia. LKIB has approximately 6000 acres in reserve lands immediately south of Creston, British Columbia and north of the Canada-United States border. LKIB is governed by a Chief and four Councillors who are elected in accordance with Band custom, as codified in the Lower Kootenay Band Custom Elections By-Law. The last election was in November, 2022.

B. Background

Financial Administration Laws

7. The Government of Canada enacted *First Nations Fiscal Management Act* (SC 2005, c 9) (“FNFMA”) to provide First Nations with tools to build their economies, strengthen their financial management systems, and advance economic reconciliation.

8. Band-level financial administration laws are an important part of the financial management framework set out in the FNFMA. They are designed to contain a set of governance and financial administration practices enabling good governance and providing a means for bands that opt to enact them to exercise greater autonomy over their financial affairs for the benefit of their members. According to the First Nations Financial Management Board (which must approve financial administration laws before they come into effect), “a Nation that lives by its FAL commits to good governance and finance practices over the long term”.

9. Bands that enact financial administration laws are, subject to certain applications and approvals prescribed in the FNFMA, eligible to become borrowing members of the First Nations Finance Authority, which yields access to significant funding opportunities that would not otherwise be available.

The 2012 Financial Administration Law

10. Council enacted the 2012 FAL on July 23, 2012.

11. The coming into force provision of the 2012 FAL (being section 106) states that:

(1) The following provisions of this Law come into force on the date of the resolution enacting this Law: sections 1 - 7, 26 - 30, 69 - 76, 81 and 106 [i.e., July 23, 2012].

(2) Subject to subsection (1), this Law comes into force on the date that is thirty-six (36) months after the date this Law is approved by the [First Nations Financial Management] Board under section 9 of the [First Nations Fiscal Management] Act.

12. To the best of the Applicant's knowledge, LKIB is a borrowing member of the First Nations Finance Authority, and has been for over 36 months.

13. The 2012 FAL contains many of the same provisions found in the 2014 FAL, and if this Honourable Court should find that the 2014 FAL is for any reason not in effect, wholly or in part (which is not the position of the Applicant, who submits that the 2014 is wholly in effect), then the Applicant submits in the alternative that that the 2012 FAL remains in effect, wholly or to the extent of any provisions dealing with matters in which the 2014 FAL is not in effect, as the case may be.

The 2014 Financial Administration Law

14. Council enacted the 2014 FAL on May 27, 2014.

15. The 2014 FAL (at section 103) purports to repeal the 2012 FAL in its entirety.
16. The 2014 FAL contains numerous provisions setting out roles, responsibilities, and expectations of the people responsible for managing LKIB's finances, requirements for how LKIB's finances, capital projects, and oil and gas monies are to be managed, and rules to avoid and deal with conflicts of interest, among other things.
17. The coming into force provision of the 2014 FAL (being section 104) states:
 - (1) This section and the operative portions of sections 1-7, 24, 26, 27, 29, 30, 68-76, 81 and 93 come into force the day after this Law is approved by the [First Nations Financial Management] Board under section 9 of the [First Nations Fiscal Management] Act.
 - (2) Subject to subsection (1), this Law comes into force on the day that is 36 months after the date when the First Nation becomes a borrowing member of the First Nations Finance Authority.
18. To the best of the Applicant's knowledge:
 - (a) The 2014 FAL has been approved by the First Nations Financial Management Board; and
 - (b) LKIB is a borrowing member of the First Nations Finance Authority, and has been for over 36 months.
19. The 2014 FAL contains a section requiring the establishment of a Financial and Audit Committee:
 - 12.(1) The Committee of the First Nation is established to provide Council with advice and recommendations in order to support Council's decision-making process respecting the financial administration of the First Nation.
 - (2) The Council must appoint not less than three (3) members of the Committee, a majority of whom must have financial competency and all of whom must be independent.

(3) The following individuals are not eligible to be members of the Committee:

- (a) an individual who is an employee of the First Nation;
- (b) an individual who has an immediate family member who is an officer of the First Nation;
- (c) an individual who provides consulting, advisory or other services to the First Nation or its related bodies as a contractor;
- (d) an individual who has a dependent who provides consulting, advisory or other services to the First Nation or its related bodies as a contractor; or
- (e) an individual who is a partner, owner or officer of an entity which provides accounting, consulting, legal or financial services to the First Nation or its related bodies.

(4) The Council must establish policies or procedures or give directions requiring

- (a) confirmation, before appointment, that each potential member of the Committee is eligible to be a member and is independent; and
- (b) each member of the Committee annually to sign a statement confirming that the member is independent.

13. (1) The Council must appoint a chair and a vice- chair of the Committee, one of whom must be a councillor.

20. The 2014 FAL also contains numerous sections regarding financial planning procedures for LKIB that include member involvement in the same:

27. (1) On or before January 31 of each year, the senior financial officer must prepare and submit to the Finance and Audit Committee for review a draft annual budget and a draft multi-year financial plan for the next fiscal year.

(2) On or before February 15 of each year, the Finance and Audit Committee must review

- (a) the draft annual budget and recommend an annual budget to the Council for approval; and
- (b) the draft multi-year financial plan and recommend a multi-year financial plan to the Council.

(3) On or before March 31 of each year, the Council must review and approve the annual budget for the First Nation for the next fiscal year.

(4) On or before June 15 of each year, the senior financial officer must prepare and submit to the Finance and Audit Committee for review a draft amendment of the component of the annual budget respecting the First Nation's local revenue account.

(5) On or before June 30 of each year, the Finance and Audit Committee must review the draft amendment of the component of the annual budget respecting the First Nation's local revenue account and recommend an amendment to the annual budget to the Council for approval.

(6) No later than July 15 of each year, the Council must approve the amendment of the component of the annual budget respecting the First Nation's local revenue account.

[...]

31.(1) The Council must establish policies or procedures or give directions respecting the means by which members of the First Nation must be informed about or involved in consideration of

(a) the annual budget, including any component of the annual budget respecting the First Nation's local revenue account;

(b) the multi-year financial plan; and

(c) budget deficits or extraordinary expenditures.

(2) The Council must post a public notice of each Council meeting when each of the following is presented for approval:

(a) the multi-year financial plan;

(b) the annual budget; and

(c) an amendment to the annual budget.

(3) Members of the First Nation may attend that part of the Council meeting when the matters referred to in subsection (2) are being considered.

[...]

55(1) The Council must establish policies or procedures or give directions respecting the means by which members of the First Nation must be informed about or involved in consideration of borrowing for new capital projects described in subsection 89(2).

(2) The Council must post a public notice of each Council meeting when borrowing for new capital projects described in subsection 89(2) is presented for approval.

(3) Members of the First Nation may attend that part of the Council meeting when the matters referred to in subsection (2) are being considered.

[...]

77(1) Not later than one hundred and eighty (180) days after the end of each fiscal year, the Council must prepare an annual report on the operations and financial performance of the First Nation for the previous fiscal year.

(2) The annual report referred to in subsection (1) must include the following:

- (a) a description of the services and operations of the First Nation;
- (b) a progress report on any established financial objectives and performance measures of the First Nation; and
- (c) the audited annual financial statements of the First Nation for the previous fiscal year, including special purpose reports.

(3) The senior manager must provide the annual report referred to in subsection (1)

- (a) to a member of the First Nation as soon as practicable after a request is made by the member;
- (b) to the Board as soon as practicable after the report's publication, if the First Nation has a certificate issued by the Board under section 50(3) of the Act; and
- (c) to the First Nations Finance Authority as soon as practicable after the report's publication, if the First Nation is a borrowing member.

(4) The Council must establish policies or procedures respecting, or give directions respecting, an accessible process and remedy available to First Nation members who have requested but have not been provided with the annual report of the First Nation including requiring

- (a) the maintenance of a register for the annual report that identifies all members who have requested a copy of the annual report, the date each request was received and the date the annual report was provided to the member; and

(b) the senior manager to report quarterly to the Finance and Audit Committee on the steps taken to ensure compliance with subsection (3) and council policy made under this subsection.

[...]

89.(1) On or before January 15 of each year, the Finance and Audit Committee must review the information, schedules and budget prepared under section 88 for the following purposes:

(a) to identify any means to reduce the costs of each rehabilitation or replacement project included in the proposed budgets;

(b) to know the effect that each rehabilitation or replacement project included in the proposed budgets will have on the annual operating costs and routine maintenance costs in future years; and

(c) to determine whether any significant savings might be effected by coordinating the scheduling of projects, deferring any projects or carrying out rehabilitation projects rather than replacement projects.

(2) On or before January 15 of each year, the Finance and Audit Committee must review any plans for new construction of the First Nation's tangible capital assets, including the proposed schedule, budget and impact on annual operating costs and routine maintenance costs in future years.

[...]

92. The Council must establish policies or procedures or give directions for

(a) the provision of information to members of the First Nation respecting capital projects; or

(b) the involvement of members of the First Nation in consideration of capital projects.

The impugned conduct and the Applicant's attempts at resolution

21. To the best of the Applicant's knowledge, Council has not complied with any of the above noted sections of the 2014 FAL.

22. The Applicant has made multiple demands for the duties owed under the 2014 FAL to be performed by the Respondent:

- (a) On January 30, 2023, the Applicant contacted the Chief and Council by email to confirm a meeting for February 3, 2023, to discuss the non-compliance with the 2014 FAL. The Applicant received a response the same day stating that no commitment had been made to schedule a meeting, and that there was no appointment available for the time requested. The Applicant then inquired if a different time was available, and was told in response that further information and discussion was needed prior to a meeting being set.
- (b) On November 28, 2023, the Applicant sent a letter, through counsel, to LKIB Chief and Council outlining the above noted sections of the 2014 FAL and demanding compliance with same.
- (c) On December 12, 2023, the Applicant, through counsel, received a letter in response from the Chief and Council stating that the non-compliance with the 2014 FAL was due to the fact that it was not yet in force.
- (d) On February 6, 2024, the Applicant sent a response to the December 12 letter stating that they did not agree that the 2014 FAL was not in force, and again demanded compliance with the relevant sections. The letter specifically requested LKIB to confirm by February 13, 2024 the current membership of the Finance and Audit Committee and that a senior financial officer submitted the draft annual budget and draft multi-year financial plan for the upcoming fiscal year to the Finance and Audit Committee prior to January 31, 2024. This information was not provided and the Respondent instead made a further decision to continue to not comply with its obligations under the 2014 FAL.

C. Grounds for review

23. The Council is under a public duty to abide by the 2014 FAL. This duty is owed to all members of LKIB, including the Applicant.

24. Council is a “federal board, commission or other tribunal” within the meaning of section 18.1(3) of the *Federal Courts Act* (RSC 1985, c F-7).

25. To date, Council has failed to comply with numerous obligations under the 2014 FAL. This includes without limitation failing to establish a Finance and Audit Committee and failing to submit a draft annual budget and a draft multi-year financial plan for the next fiscal year to the Finance and Audit Committee by January 31, 2024 (which was also required under the 2012 FAL). The Respondent also failed to convene a meeting of the Finance and Audit Committee (which it has yet to establish) before February 15, 2024 to review the draft annual budget and multi-year financial plan as required under the 2014 FAL.

26. The Applicant made numerous requests to Council to comply with the 2014 FAL, including by specific and particularized letters to the Chief and Council.

27. The decision of the Council to not abide by a valid and existing financial administration law is an ongoing breach of its obligations to comply with governance and finance practices that it agreed to adopt for the benefit of LKIB and its members. This is a matter of central importance to the members of LKIB and the legal system.

28. Council’s decision to not uphold the 2014 FAL (or at the very least many significant sections thereof), on an ongoing basis, and periodically at particular dates, is both incorrect and unreasonable.

29. Alternatively, if the 2014 FAL (or certain sections of it) never came into force because it was not approved by the First Nations Financial Management Board, or LKIB is not a borrowing member of the First Nations Finance Authority, then the decision of Council not to take adequate steps to meet these thresholds is both incorrect and unreasonable.

D. Venue

30. The Applicant requests that this Application be heard in Calgary, Alberta (or by videoconference).

E. Statutory provisions:

31. The Applicant relies on the following statutory provisions:
- (a) *Indian Act*, RSC 1985, c I-5;
 - (b) *First Nations Fiscal Management Act*, SC 2005, c 9;
 - (c) Lower Kootenay Indian Band *Financial Administration Law*, 2012;
 - (d) Lower Kootenay Indian Band *Financial Administration Law*, 2014;
 - (e) *Lower Kootenay Indian Band Borrowing Agreement Law – OR 2014*.
 - (f) *Lower Kootenay Band Custom Elections By-Law*.
 - (g) *Federal Courts Act*, R.S.C. 1985, c. F-7;
 - (h) *Federal Courts Rules*, SOR/98-106;
 - (i) such further and other provisions as counsel may advise and this Honourable Court may permit.

The Application will be supported by the following material:

32. The written submissions of the Applicant;
33. The affidavit(s) of the Applicant, to be filed in accordance with the *Federal Court Rules*, and there exhibits attached thereto; and
34. Such further and other affidavits and materials as counsel for the Applicant may advise and this Honourable Court may permit.
35. Per Rule 317 of the *Federal Courts Rules* (SOR/98-106), the Applicant requests Council to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Chief and Council to the Applicant and to the Registry:

- (a) all materials relating to the adoption of the Lower Kootenay Band Financial Administration Law (2014), including without limitation, meeting notes, minutes, emails, text messages, reports, and drafts;
- (b) all communications with the First Nations Financial Management Board with respect to submission or review or approval of the 2012 FAL or 2014 FAL, or as the case may be, any rescission of same;
- (c) all communications with the First Nations Finance Authority, including without limitations discussions on being or becoming a borrowing member thereof; and
- (d) any borrowing agreements with the First Nations Finance Authority,

in all cases, to the extent such materials are not privileged, and to the extent some or all of these materials are privileged, then a list of such materials over which privilege is claimed.

All of which is respectfully submitted,

February 29, 2024



MCCARTHY TÉTRAULT LLP
421 7th Avenue SW
Suite 4000
Calgary AB T2P 4K9

Attn: Kyle McMillan
kncmillan@mccarthy.ca
Tel: 403-260-3548

Solicitors for the Applicant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of filed in the Court on the 29th day of February 2024. Dated this 29th day of February 2024.

SOR/2021-151, s. 22