

KEEP YOUR (FIDUCIARY) HANDS OFF MY MONEY: LOUIE V. LOUIE, 2015 BCCA 247

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Background

A claimed aboriginal custom for the payment of honoraria to certain band council members did not pass judicial scrutiny in the recent decision of *Louie v. Louie*, 2015 BCCA 247.

In 2009, the Lower Kootenay Indian Band obtained \$125,000 from the Regional District of Central Kootenay. The payment was given to the Band to compensate it for the District's use of a road that crossed the Band's reserve. After the funds had been deposited into a general operating account for the Band, a total of \$25,000 was paid out to five elected Band Council members. These five members held a meeting and decided to give themselves lump sum payments of \$5,000 each as "retroactive honorarium" for their work as members of the Council."^[1]

Mr. Louie, a band member, discovered these payments in 2011 and in the following year filed a Notice of Civil Claim against the five council members. Mr. Louie alleged that these five council members had breached their fiduciary duties "without lawful authority or without juristic reason."^[2] Mr. Louie also alleged that the five council members 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*.'"^[3] Mr. Louie requisitioned a declaration outlining that each one of the defendants had breached their fiduciary duties owed to the Band and requiring each of them to return the \$5,000 in addition to punitive damages.

The defendants responded by denying that the payments had been "behind closed doors" and that they breached "any legal or equitable duty."^[4] The defendants claimed 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 interest of the Band.'"^[5]

The First Ruling

At the British Columbia Supreme Court level, the court dismissed the action and found that breach of fiduciary

duty had not been established. The court found that despite the Band`s lack of a constitution or financial administration bylaws, the Council's actions were aligned with the "custom and practices of prior Band Councils."^[6] As such, the court held that the breach of fiduciary duty was to be determined by the Band's practices over the past few decades. The court noted that none of the defendants signed their own cheques and that they all voted on the issue of receiving the payment. The court also held that since the payments were stated in the Band's financial statements from 2008 to 2010, they were not kept a secret.

The court further found that the \$125,000 paid by the Regional District of Central Kootenay to the Band was not subject to section 23 of the Indian Act. The court held that since the funds were "its own 'source revenues'" generated by the Band, the Band had control over the funds pursuant to section 69(1) of the *Indian Act*.^[7] In addition, the court established that the classification of the funds under the *Indian Act* was irrelevant, and that the use of the funds was material. It was held that the remuneration to Council members did not detrimentally affect the Band. With respect to fiduciary duty, the court held that because the Council did not act in bad faith, the Band was compelled by the Council's remuneration decision.

The Second Ruling

At the British Columbia Court of Appeal level, the court dismissed the first ground of appeal, the onus of proof on a balance of probabilities, and ruled on the second ground of appeal, breach of fiduciary duty. The court allowed the appeal and found that the defendants had breached their fiduciary duty even though the Council had an "informal and custom-based governance structure."^[8] The court determined that there was no evidence to conclude that the Council had received consent to exercise this type of power from the Band. Hence, the court concluded that the Council was not authorized to make these payments as required by section 2(3) of the *Indian Act*. Furthermore, the court, in deciding that the Band had breached its duty, took into consideration factors such as personal benefits, benefit to future members of the Council or of the Band, and detriment to the Band.

The court held that an "informal and custom-based governance structure" should not deny protection under fiduciary principles to members of the Band. Ultimately, Mr. Louie was granted the declaration he sought , the return of the \$25,000 to the Band and given the opportunity to pursue punitive damages in court.

Conclusion

Although the *Indian Act* confers powers to Band and Band Councils, there are limitations on those powers. The Band Council can only exercise power with the consent of a majority of the Band members. In this situation, even though the Band Council acted in accordance with the ordinary customs of the Council, the defendants' actions were found to have breached their fiduciary duties. Ultimately, the decision turned on the court's opinion that the decision they made was detrimental to the Band and advance consent was required from

Band members in order to make it lawful. Past custom was not a defence regardless of whether it was based on an aboriginal custom or other practice.

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1 *Louie v Louie*, 2015 BCCA 247 at para 1.

2 *Ibid* at para 2.

3 *Ibid*. Indian Act, RSC 1985, c I-5.

4 *Ibid* at para 3.

5 *Ibid*.

6 *Ibid* at para 5.

7 *Ibid* at para 10.

8 *Ibid* at para 29.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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