

News

Honours

■ The Law Society of Upper Canada has presented **Janet Stewart**, partner in the London, Ont., office of *Lerners LLP*, libel lawyer **Julian Porter**, and House of Commons Speaker **Peter Milliken** each with the degree of Doctor of Laws, *honoris causa* (LLD), at call to the bar ceremonies in London, Toronto and Ottawa in June.

Moves

■ Litigation lawyer **William McNamara** has joined *Torys LLP* as a partner practising in the areas of product liability, competition class actions, banking law and corporate disputes. McNamara was formerly at Norton Rose Fulbright.

■ **Erik Goldsilver** has joined the Toronto office of *Borden Ladner Gervais* as a partner in the firm's mining group. Goldsilver, formerly at Cassels Brock, practises business law with specific expertise in mining, natural resources and energy.

■ **Matthew Lawson** has joined the Calgary office of *Miller Thomson* as a partner practising in the areas of securities, private equity and natural resources. Lawson was formerly at McCarthy Tétrault. Also at Miller Thomson: In the firm's Montreal office, **Marco Rodrigues**, formerly at McMillan LLP, has joined as a partner in the practice areas of banking and financial service; **Boris Muchalov**, most recently at Blaney McMurtry, is associate counsel in the areas of financial services and insolvency; and associate **Lucie Lanctuit**, most recently at the Commission Charbonneau, joins as an administrative law practitioner. In the firm's Kitchener, Ont., office, **Farah Rohoman**, ex of Dale & Lessmann, joins as an associate with a practice in the areas of corporate commercial law.

B.C. appeal court orders return of honorarium

KIM ARNOTT

Customary governance practices don't exempt First Nation band councillors from their statutory and fiduciary obligations when making decisions about their own remuneration, the Court of Appeal for British Columbia has unanimously decided.

In *Lower Kootenay Indian Band v. Lower Kootenay Indian Band* [2015] B.C.J. No. 1119, the court on June 3 ordered the chief and four band councillors to each return a "retroactive honorarium" of \$5,000 that they had granted themselves from band funds in 2009.

The payments were made shortly after the band received \$125,000 from the local municipality as compensation for use of a road that crossed one of the band's reserves. At the time, councillors were receiving a monthly honorarium of \$360 for their services.

In 2012, band member Wayne Louie became aware of the payments and sued the councillors for breach of fiduciary duty. He claimed they had failed to make proper disclosure of the payments and hadn't followed financial procedures dictated by the *Indian Act*.

The action was dismissed by Justice Robert Punnett of the Supreme Court of British Columbia after band members argued that their decision was within the scope of their duties as councillors based on customary governance.

In allowing Louie's appeal of that decision, Justice Mary Newbury found "no evidence that s. 2(3) of the *Indian Act* had been complied with — i.e., that the consent of the majority of the Band had been obtained for the exercise of such power by the Council.

"While I agree that it is unrealistic to expect a band to comply



strictly with all the rules and regulations of a sophisticated corporation or council, I see no basis on which this very fundamental statutory provision could be effectively ignored."

She added that there was also "no evidence that the Band by its custom or practice, represented or held out that Council members could depart from a previously-set honorarium to grant themselves a significant 'bonus' from Band revenues."

Without express authorization to grant themselves such payments, the council failed in its duties to band members, Justice Newbury added.

"The conclusion seems to me inescapable that this was a breach of fiduciary duty, even in the context of a relatively informal and custom-based governance structure," she noted. "In my view, such a structure should not deprive members of the Band of the protection of the fiduciary principle. They were entitled to hold the defendants to the high standard to which other fiduciaries are held in this country."

The decision highlights the importance of transparency and good record-keeping, as well as the difficulties bands may face when relying on "custom governance" for justification of their actions, said Vancouver lawyer Kate Blomfield, an associate with Ratcliff and

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Kate Blomfield

Ratcliff and Company

Company specializing in First Nations governance matters.

"A key message is the advantages of bylaws or explicit guidelines that are developed by band councils in conjunction with their communities and in consultation with their communities regarding band governance," she said.

She added that the Court of Appeal decision could be interpreted to mean that absent the existence of an approved financial administration bylaw, councillors would be required to comply with s. 2(3) of the *Indian Act* and seek approval from a majority of band electors to make expenditures.

Maggie Wente, a lawyer specializing in aboriginal law and governance with Toronto-based Olthuis Kleer Townshend, said the decision will lead her to advise band councils to establish financial administration bylaws to "get themselves out of this weird statutory interpretation."

However, she expressed skepticism about viewing governance issues through the lens of a strict interpretation of the *Indian Act*, which she described as "one of the most neglected statutes in Canada."

"I suppose the lesson (of the decision) is that apparently the court is going to suggest that people operating according to their customary laws isn't good enough, they have to do it according to the *Indian Act*."

"I think a lot of my clients would say, 'Look, we have good governance mechanisms and they might not look like *Indian Act* governance mechanisms, and they might not look like white people governance mechanisms, but we have transparent and accountable governments.'"

Wente added that the case arises in the context of a picture being painted "stereotypically, and wrongly, I think" by the federal government of corrupt councils and chiefs.

"Anybody who works with chiefs and councils knows that these jobs can be extraordinarily labour-intensive and extraordinarily time-consuming," she said. "On the facts of this case, while (the court) says that by the letter of the *Indian Act* (the councillors) didn't do it appropriately, it's pretty hard to suggest that they shouldn't have gotten the money for their services."

Blomfield agreed, noting, "The situation here, as with many other band councils, is that the councillors receive very little remuneration for the work they do."

"Perhaps if there was better record-keeping about the work that they are putting in and the reasons for their decisions, in consultation with the members, then perhaps the payments would have been seen as OK in context of the work that they do and the remuneration they receive."

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