

Citation: ☀



Date:
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114041-1
Merritt

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
(Criminal Division)

COPY

**IN THE MATTER OF AN APPLICATION TO ISSUE
PROCESS ON A PRIVATE INFORMATION**

LOWER NICOLA INDIAN BAND

PRIVATE PROSECUTOR

AND:

BARB CALDWELL and MIKE POCKRANT

DEFENDANTS

**RULING ON APPLICATION
OF THE
HONOURABLE JUDGE R.D. PHILLIPS**

Private Prosecutor:

No appearance

Appearing for the Defendants:

No appearance

Appearing for Interested Party S. Jimmie:

J. Burns

Place of Hearing:

Merritt, B.C.

Date of Hearing:

February 13, 2024

Date of Judgment:

July 16, 2024

INTRODUCTION

[1] This is a private prosecution brought by the Lower Nicola Indian Band (LNIB).

[2] Lower Nicola Indian Band (“LNIB”) is a British Columbia First Nation that manages its own reserve lands (the “Lower Nicola Land”) and resources pursuant to the *Lower Nicola Indian Band Land Code* (the “*Land Code*”).

[3] On December 21, 2023, Stephen Jimmie (the “Informant”), Lands Manager for LNIB acting with the authorization of Lower Nicola Indian Band Chief and Council, laid an Information in writing before a justice of the peace pursuant to s. 507.1(1) and 788 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “Information”), alleging that Barb Caldwell and Mike Pockrant (the “Accused Parties”) are living on Lower Nicola Land – and specifically, living on Nicola Mameet Indian Reserve No. 1, Lot 326 (the “Trespassed Land”) – without a lawful residence or access right, in violation of s. 24.4 of the *Land Code*.

[4] I will deal firstly with the legislative framework supporting this application.

STATUTORY AUTHORITY FOR THE *LAND CODE*

[5] The ability to enact First Nation land codes flows from both the *Framework Agreement on First Nation Land Management* (the “*Framework Agreement*”) (i.e., a government-to-government agreement between Canada and various First Nations), and the subsequent *Framework Agreement on First Nations Land Management Act*, S.C. 2022, c. 19, s.121 (the “*FAFNLMA*”). The preamble of the *FAFNLMA* clarifies the relationship between the *Framework Agreement* and the *FAFNLMA*.

[6] Section 5 of the *Framework Agreement* sets out the ability of a First Nation to establish a *Land Code* and manage its reserve lands pursuant to that *Land Code*.

[7] Section 5(1) of *FAFNLMA* provides that the *Framework Agreement* has the force of law.

[8] The Lower Nicola Indian Band enacted the *Land Code*. More specifically, Lower Nicola Indian Band followed the verification, community ratification, and certification

process required under the *Framework Agreement*. Ultimately, the *Land Code* was certified on November 1, 2016, and in accordance with s. 47.2 of the *Land Code*, came into force on December 1, 2016:

[9] The *Framework Agreement* indicates at ss. 12.1, 12.2, and s. 18, that a First Nation who has enacted a *Land Code* has the power to create laws and manage its land, including use and occupation of its lands.

[10] The *Land Code* sets out Lower Nicola Indian Band's law-making authority at ss. 6.1 and 6.2, including the authority to make standalone laws regarding the use and occupation of Lower Nicola Land (including the Trespassed Land) and law enforcement. Specifically, the provision states:

6. Law-Making Powers

...

6.2 For greater certainty and without limiting the generality of 6.1, [*Council May Make Laws*] Council may make Laws relating to:

...

(f) regulation, control, authorization and prohibition of residency, access, occupation and development of LNIB land, and Interests therein;

...

[11] The *Land Code*, at section 24.4, establishes offences, and prescribes penalties for breaches of *Land Code* provisions, and states:

Trespass

24.4 Any Person who resides on, enters or remains on LNIB Land other than in accordance with a right of residence or access under this Land Code or an Interest or License granted in accordance with this Land Code is guilty of an offence and may, in addition to other remedies, be ordered evicted or removed by Resolution, enforceable by any peace officer or environment official designated by Council by Resolution.

APPLICATION OF THE *CRIMINAL CODE*, SUMMARY CONVICTION PROCESS TO *LAND CODE* OFFENCES

[12] The *Framework Agreement* also provides that a First Nation has the power to establish offences that are punishable on summary conviction, which follow the procedures for the same set out in the *Criminal Code*. Section 19.3 of the Framework Agreement states:

19.3 First Nation laws may adopt or incorporate by reference the summary conviction procedures of the Criminal Code for the purpose of enforcement.

[Emphasis added.]

[13] The relevant summary conviction process is set out in section 45.1 and 45.4 of the *Land Code* which states:

Application of the Criminal Code

45.1 Unless a different procedure is provided for by a Law, the summary conviction procedures of Part XXVII of the *Criminal Code* apply to offences under this Land Code or under a Law.

...

Courts

45.4 If no Justice of the Peace is appointed, or no applicable community justice process is established, this Land Code and Laws are to be enforced by a Court of competent jurisdiction.

[14] Summary conviction court appears in the *Criminal Code* at section 798 and reads as follows:

Jurisdiction

798 Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

[15] The definition of "summary conviction court" is set out in section 785 and reads:

Summary Convictions**Interpretation****Definitions****785 . . .**

summary conviction court means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

- (a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
- (b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
- (c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices; . . .

[16] The *Land Code* (i.e. the “enactment”) expressly gives jurisdiction to the provincial courts with respect to the enforcement of offences under the *Land Code* (provided the band council has not specially appointed its own justice of the peace). As such, s. 785 (a) is applicable.

[17] Read together, ss. 785(a) and 798 of the *Criminal Code* thus read:

Every [person who has jurisdiction in the territorial division where the subject matter of the proceedings is alleged to have arisen; and who is given jurisdiction over the proceedings by the enactment under which the proceedings are taken] has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

[18] Applying this statutory framework to the matter before this Court, every justice or judge who has jurisdiction in Lower Nicola, BC, and who also has jurisdiction as a result of that being set out in the *Land Code*, has jurisdiction to determine summary conviction proceedings in the territorial division in which the justice or judge has jurisdiction.

[19] Section 798 of the *Criminal Code*, when read together with the applicable provisions of the *Land Code*, provides that the provincial court is the proper mechanism for adjudicating and enforcing *Land Code* offences.

[20] In addition to the statutory framework, there is at least one applicable case in this province. In *K'omoks First Nation v. Ryan Thordarson and Amelia Sorbie*, 2018 BCPC 114, the court issued process and went on to convict the defendants of a trespass offense on the basis of K'omoks First Nation Land Code.

APPLICATION

[21] LNIB passed a Band Council Resolution on September 20, 2022 prohibiting persons from using RVs as residences on Lower Nicola Lands, unless the person receives authorization from the land manager. Despite this, the Accused Parties have resided in an RV trailer on Lower Nicola Lands, specifically on the Trespassed Land, without authority since at least October 5, 2023.

[22] LNIB passed a Band Council Resolution on November 14, 2023, removing any right the Accused Parties may have to reside on Lower Nicola Lands under section 24.1 of the *Land Code* and provided notice to the Accused Parties on November 15, 2023.

[23] The Accused Parties appealed the November 14, 2023 Band Council Resolution. LNIB considered the appeal and passed two additional Band Council Resolutions on December 5, 2023, affirming the November 14, 2023 Band Council Resolution, declaring that the Accused Parties are guilty of an offence under *Land Code* and resolving to prosecute. Notice of these Band Council Resolutions were further served on the Accused Parties on December 11, 2023. Despite the Accused Parties' lack of authority to reside on Lower Nicola Lands, and although the Accused Parties were informed they were committing an offence and would be prosecuted, the Accused Parties have remained on the Trespassed Land since receipt of notice on December 11, 2023.

[24] As a result, the LNIB allege that the Accused Parties remain on LNIB land without approval and are therefore considered by the band to be trespassers, and guilty of an offence under the *Land Code*. In breach of s. 24.4 of the *Land Code* and therefore in accordance with section 45.1 of the *Land Code*, the summary convictions procedures of Part XXVII of the *Criminal Code* apply.

[25] As I understand, both the federal and provincial prosecution service have declined to assist LNIB in this prosecution and LNIB has not appointed a justice of the peace. This leaves LNIB with a law that addresses trespass on their lands but without an ability to enforce the law without the cooperation and assistance of external authorities, unless it takes on the task of prosecution.

[26] I did hear one witness, Stephen Jimmie, the lands manager for LNIB who provided both viva voce and affidavit evidence. From his evidence, the band has been struggling to deal with trespassers on the reserve, who, like the Accused Persons, park their RV on the band's land, or as Mr. Jimmie states, dealing with individuals who dump garbage on their land. Mr. Jimmie also stated that LNIB has gone through considerable expense, time, and resources to bring this matter to court.

[27] Private prosecutions are permitted in this country. Essentially, anyone who, on reasonable and probable grounds, believes that a person has committed an offence, may lay an Information. Private prosecutions are rare however and for the most part arise when the police and Crown are not willing to proceed with charges, or in LNIB's case, cooperate or offer assistance.

[28] I am mindful of the comments of Judge P.M. Doherty in *K'omoks First Nation*, supra, where he states at para. 20:

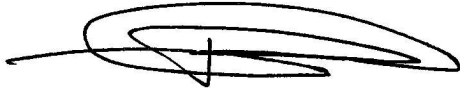
[20] In my respectful view, K'omoks First Nations is entitled to a remedy. It seems to me, one way to provide that remedy is to permit the laying of the Information . . .

[29] And at para. 21:

[21] I think what is contemplated here in the long term is a *Criminal Code* action that would, upon successful prosecution, permit the Court to make an order, perhaps by way of probation, to force these individuals off the property. That remedy would be available as well as other relief referred to in the *Land Code*.

[30] Based on the statutory framework, case law, and evidence before me, I am satisfied that the *Framework Agreement* and *Land Code* create valid and enforceable laws which are subject to the *Criminal Code* summary conviction process.

[31] Accordingly, I direct that the Information, accompanied by a summons with a return date, be served by a peace officer on the Accused Persons.



The Honourable Judge R.D. Phillips
Provincial Court of British Columbia