



**FEDERAL COURT**

**HANS McCARTHY**

e-document		T-1686-23-ID 1	
F	FEDERAL COURT COUR FÉDÉRALE  August 08, 2023 08 août 2023	D	É P O S É
I			
L			
E			
D			
Ginette Lischenski			
VAN		1	

Court File No.:

**APPLICANT**

AND:

**INDIGENOUS SERVICES CANADA, FROG LAKE FIRST NATION**

**RESPONDENTS**

**APPLICATION UNDER section 41 of the *Access to Information Act* (R.S.C., 1985, c. A-1)**

**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 the Vancouver Local Office of the Federal Court, located at 701 West Georgia Street, Vancouver, British Columbia.

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.

August 8, 2023

Issued by:

Address of local office:

Pacific Centre  
P.O. Box 10065  
701 West Georgia Street  
Vancouver, British Columbia  
V7Y 1B6

TO:

Indigenous Services Canada  
600 – 1138 Melville Street  
Vancouver, British Columbia  
V6E 4S3

AND TO:

Frog Lake First Nation  
General Delivery  
Frog Lake, Alberta,  
T0A 1M0

AND TO:

Office of the Deputy Attorney General of Canada  
284 Wellington Street  
Ottawa, Ontario  
K1A 0H8

AND TO:

Office of the Information Commissioner of Canada  
30 Victoria Street  
Gatineau, Quebec  
K1A 1H3

# Application

This is an application for judicial review of Indigenous Services Canada’s (“ISC”) decision to apply sections 19(1) and 20(1)(b) of the *Access to Information Act* (R.S.C., 1985, c. A-1) (the “*Act*”) to exempt the records requested under the access requests numbered A-2021-00347 and A-2021-00348 (the “**Application**”). This application is made as of right under section 41 of the *Act*, pursuant to two final reports issued by the Information Commissioner of Canada (the “**Commissioner**”) on June 20, 2023 finding that ISC’s application of sections 19(1) and 20(1)(b) of the *Act* to exempt the requested records from disclosure were justified and that the complaints therefrom were not well founded (the “**Reports**”).

The applicant, Hans McCarthy (the “**Applicant**”) makes application for:

1. A declaration that ISC is not authorized to refuse to disclose the records that were subject to the access requests numbered A-2021-00347 and A-2021-00348 (the “**Requested Records**”), or part thereof, to the Applicant;
2. An order under section 49 of the *Act* directing the head of ISC to disclose the Requested Records, or part thereof, to the Applicant;
3. Costs of this Application; and
4. Such further or other relief as the Applicant may require and as this Honourable Court may determine is just in the circumstances of this case.

The grounds for the Application are:

## **FACTUAL BASIS**

### **The Respondent: Indigenous Services Canada**

1. ISC is one of two departments in the Government of Canada with responsibility for policies relating to Indigenous peoples in Canada (the other being Crown–Indigenous Relations and Northern Affairs Canada).
2. ISC was created in 2019 following the dissolution of the Department of Indian Affairs and Northern Development (“INAC”). ISC is responsible to Parliament through the Minister of Indigenous Services.
3. ISC’s stated mandate is to work collaboratively with partners to improve access to high quality services for First Nations, Inuit and Métis, and to support and empower Indigenous peoples to independently deliver services and address the socio-economic conditions in their communities.

### **The Respondent: the Frog Lake First Nation**

4. The Frog Lake First Nation (the “**FLFN**”) is a Cree community, situated on the shores of Frog Lake, east of Edmonton in the Province of Alberta. The community consists of approximately 2,500 individuals, of which approximately 1,400 live on the reserve.

5. The FLFN's land is rich in oil. There are approximately 50 oil wells on the reserve, producing between 1,500 to 3,500 barrels per day, resulting in significant amounts of money flowing into Frog Lake Energy Resource Corporation ("**FLERC**") in recent years.
6. From 2009 to 2013, the turnover of FLERC was approximately \$30 million per year, and the company was debt-free. During this time, the FLFN was able to increase its reserves to \$191 million, including trust funds of \$102 million and long-term investments of \$50 million.
7. Following the collapse in the oil price in 2013, there was a decrease in the FLFN's net financial assets from approximately \$142 million in 2013 to \$19 million in 2019. The FLFN continued to spend between \$40 million and \$62 million per annum despite a reduction in income from approximately \$64 million to \$22 million per annum. Bands of a similar size were able to increase their assets during the same period.
8. The FLFN's trust funds have decreased from approximately \$102 million in 2013 to \$3 million in 2021. Long-term investments have also declined by half, i.e., from approximately \$50 million in 2013 to \$25 million in 2019.
9. From available records, the FLFN appears to have opened lines of credit with commercial banks to access funding, which were then repaid with trust funds authorized by various Band Council Resolutions ("**BCR**").
10. The salaries of the FLFN Chief and Council have only been reported for the years 2013 to 2019. Most of these salaries increased dramatically from 2014 to 2018. The salaries have not been reported for subsequent years and have not been made available to Band members on request. The reported remuneration of the FLFN is considerably higher than comparable bands in the region. Additionally, FLFN councillors routinely claim over \$100,000 in travel expenses. Chief Clifford Stanley alone spent approximately \$720,000 on travel expenses from 2014 to 2018.
11. The FLFN's investment income made an approximate loss of \$6.6 million from 2013 to 2021. A significant loss of \$4 million was incurred in 2016, which was primarily due to expenses of FLERC being well in excess of revenue. Despite requests from band members, the financial statements for FLERC have not been released.
12. The FLFN spent approximately \$54 million on capital housing projects from 2013 to 2019. \$38.6 million has been spent on repairs. The poor state of housing on the reserve indicates that the amounts incurred by the FLFN on community projects were not spent in a value for money way.
13. The FLFN spent approximately \$41 million on public works between 2013 and 2019, averaging \$6 million per annum. The average annual spending for bands of a similar size for the same period on public works was approximately \$2 million.

14. Additionally, the FLFN's spending on community services and education appears to be disproportionate to the value actually received by the community.

**The Applicant: Hans McCarthy**

15. The Applicant is an Indigenous activist, citizen of Canada and member of the FLFN, and resides in Pigeon Lake, Alberta. The Applicant has four dependent children, ages three, five, seven and eleven.
16. From March 10, 2014 to October 30, 2015, the Applicant was employed by the FLFN Band Office as a social services employee working in enhanced service delivery ("**ESD**") and income support.
17. In or about October of 2015, it came to the Applicant's attention that funds meant for ESD were being diverted to cover programs which only existed on paper and that his ESD clients had been assigned to these "programs" without his knowledge. Some of this funding was being provided to a private company named White Feather Janitorial Services ("**WFJS**"), on the basis that band members were recorded as being employed by WFJS.
18. WFJS was owned by Shirley Quinney, who was employed by the FLFN as a director in a separate office. Ms. S. Quinney's sister Lorraine Quinney was the Applicant's supervisor, in charge of ESD and income support.
19. The Applicant raised his concerns with his co-workers, including Ms. L. Quinney, who claimed not to have knowledge of this matter. Unsure of who should be notified of this irregularity, the Applicant attempted to contact Sheldon Cardinal of Indian Affairs, but his calls went unreturned. The Applicant also reported this to Band Manager Greg Carter and Band CFO Kevin Price, both of whom ignored him.
20. The Applicant contacted a lawyer, who told him to call the police. When he called the RCMP, they told him to speak to a lawyer.
21. At a meeting with Ms. L. Quinney, other ESD workers, representatives from Indian Affairs and Teresa Houle, who headed ESD, the Applicant again voiced his concerns with respect to how ESD funds were being spent and asked why Ms. S. Quinney and Ms. L. Quinney were not allowing him to use this money to help his ESD clients.
22. After the meeting with the representatives from Indian Affairs, on October 30, 2015 Ms. Houle confronted the Applicant in his office, pointing out a number of alleged mistakes in his ESD files and accusing him of jeopardizing the well-being of his clients. The Applicant again brought up the issue of ESD funding being misallocated and asked Ms. Houle to explain to him what was happening. This developed into a heated dispute, and the Applicant left his office.
23. The following Monday, November 2, 2015, the Applicant returned to his office and found a letter on his desk terminating his employment for cause, effective October 30, 2015, and alleging gross misconduct, insubordination and breach of faith (the "**Dismissal**"). The FLFN did not pay any severance to the Applicant on his Dismissal.
24. In or about December of 2015, the Applicant submitted a complaint to Employment and Social Development Canada ("**ESDC**") with respect to the Dismissal (the "**Dismissal Complaint**").

25. On or about April 28, 2016, the Applicant applied for welfare, but his application was denied because the welfare office had received a fax from the Band Office stating that he had received severance for the Dismissal.
26. During a phone conversation on or about May 3, 2016, the ESDC inspector assigned to the Dismissal Complaint, Julia Hinman, also told the Applicant that Mr. Carter and Mr. Price had said that they had provided him a severance payment.
27. On or about June 6, 2016, on the advice of Ms. Hinman, the Applicant requested that his Dismissal Complaint be referred to an adjudicator pursuant to subsection 241(3) of the *Canada Labour Code* (R.S.C., 1985, c. L-2).
28. On December 14, 2016, the FLFN offered the Applicant a lump sum payment of \$25,000 and a guarantee of a new house in settlement of his claim for the Dismissal. The Applicant accepted this offer and the parties signed an agreement to this effect.
29. Subsequently, the FLFN paid the Applicant \$25,000, but he was not assigned a new house. Instead, the Applicant was assigned a house built in 2011 in which mold was present and which was in a state of significant disrepair. At a later date, the staircase collapsed, resulting in the Applicant tearing the ligaments in his shoulder.
30. On February 21, 2022, the Applicant sent an email to the FLFN Chief and Council requesting a copy of the Schedule of Remuneration and Expenses, as required by sections 6 and 7 of the *First Nations Financial Transparency Act* (S.C. 2013, c. 7). This request was ignored.
31. On or about July 20, 2022, the Applicant submitted a complaint to the Respondent ISC (the “ISC Complaint”). On July 22, 2022, the Applicant submitted a number of documents to ISC analyst Andreanne Ruest in support of the ISC Complaint, including a report completed by Chartered Accountant Dave Oswald highlighting the apparent misuse of funds by the FLFN based on publicly available information.
32. Subsequently, Ms. Ruest phoned the Applicant and informed him that she would not be able to proceed with the ISC Complaint.
33. On or about January 26, 2023, the Applicant requested \$300 from the FLFN to record his father, an elder who resides at Frog Lake. The Applicant’s father speaks Cree and wished to make a recording discussing treaties and oral histories. This funding was denied. The Applicant was told by Councillor Jason Quinney that the denial was a result of his posts on the social media application Tik Tok about the ongoing misuse of band funds.
34. In or about February of 2023, the Applicant attended a meeting of the FLFN Council. At this meeting, the Applicant again raised the issue of the remuneration of the FLFN Chief and Council. Members of Council threatened to have the Applicant removed from the meeting, but this threat was not acted upon.
35. On or about May 19, 2023, the Applicant applied to a machine learning program at NorQuest College in Edmonton. When the Applicant applied to the FLFN for funding for his education and living allowance for his dependent children, he was told he was eligible for only \$1,100 to \$1,300 per month, but someone with four dependent children would normally be eligible for \$1,700 to \$1,800 per month.

### **The Applicant's Access to Information Requests**

36. On February 7, 2022, on the Applicant's behalf, Todd MacKay, Vice-President Communications of the Canadian Taxpayers Federation (the "CTF"), directed James Wood to make two requests under the *Act* for records under the control of ISC.

37. The request numbered A-2021-00347 was stated as follows:

On behalf of Frog Lake First Nation band member Hans McCarthy, please provide copies of all Band Council Resolutions (or equivalent records) allowing withdrawals from the trust fund detailed in this news story:

<https://www.aptnnews.ca/national-news/i-want-to-knowthe-truth-frog-lake-first-nation-members-concerned-after-120m-in-net-assets-goes-missing/>.

Limit records to those generated between Jan 1, 2008, to Jan 1, 2013.

**("Request A-2021-00347")**

38. The Request numbered A-2021-00348 was stated as follows:

On behalf of Frog Lake First Nation band member Hans McCarthy, please provide copies of all Band Council Resolutions (or equivalent records) allowing withdrawals from the trust fund detailed in this news story:

<https://www.aptnnews.ca/national-news/i-want-to-knowthe-truth-frog-lake-first-nation-members-concerned-after-120m-in-net-assets-goes-missing/>.

Limit records to those generated between Jan 1, 2013, to the date this request is received (February 7, 2022).

**("Request A-2021-00348")**

(collectively, the "Requests"; records defined above as the "Requested Records")

39. On or about May 30, 2022, Mr. Wood received two response letters from ISC stating that the Requested Records were being withheld pursuant to subsections 19(1) and 20(1)(b) of the *Act*. The letters stated that the FLFN had not consented to the release of the Requested Records, and they were therefore exempt as confidential information relating to a third party. However, it was clear that ISC had not informed the FLFN that the Requests were made on behalf of a member of the FLFN.

40. In response to Mr. Wood's request for an explanation of ISC's position, Celine Berchard, Processing Officer, responded on June 21, 2022, stating that ISC was unable to inform the FLFN of the Applicant's identity because they were responsible for protecting the identity of applicants. Ms. Berchard advised that if the Applicant were to provide valid consent from the FLFN Chief and Council they would be able to reprocess the information.

41. On June 27, 2022, Hannah Jateau, Team Lead for Access to Information at ISC sent an email to Mr. Wood confirming that she believed Ms. Berchard's interpretation was accurate and inviting Mr. Wood to reach out to the FLFN if he needed further details on consent to obtaining the requested information. Mr. Wood responded, asking if Ms. Jateau could inform the FLFN that a band member was requesting the Requested Records, to see if that would affect how the material was processed.

42. On June 28, 2022, Heather Descarie, Deputy Director for Access to Information at ISC sent an email to Mr. Wood, taking the position that the identity of the Applicant was protected under the *Act*, preventing ISC from disclosing his identity to the FLFN. Ms. Descarie reiterated that if the Applicant were to receive consent from Chief and Council the Requested Records would be provided to him. Finally, Ms. Descarie advised Mr. Wood that the Applicant had the right to submit a complaint to the Commissioner.
43. On July 22, 2022, Mr. Wood sent a letter to ISC, reiterating that he had made the Requests on behalf of the Applicant, who had approached the CTF after failing to receive information from the Band Office about withdrawals from the FLFN's trust fund. In his letter, Mr. Wood argued:
- a. that disclosure of the Requested Records was in the public interest;
  - b. that ISC had failed to assist the Applicant pursuant to subsection 4(2.1) of the *Act*; and
  - c. that the decision *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)*, [1997] F.C.J. No. 676 ("*Timiskaming*") should be followed in this case.
44. On July 25, 2022, Tammy Martin, Director of Access to Information at ISC responded to Mr. Wood informing him that ISC had reviewed his concerns listed in the July 22, 2022 letter and stood by their decisions to deny the Requests. Ms. Martin took the position that paragraph 20(1)(b) applied because the Requested Records were consistently treated in a confidential manner by the FLFN and were provided to ISC on a "Nation to Nation basis". She stated further that financial BCRs are never provided to the public at large or to band members.

#### **The Complaints to the Commissioner**

45. On July 27, 2022, Mr. Wood submitted two complaints to the OIC on the Applicant's behalf with respect to the Requests, numbered 5822-02966 and 5822-02967 (the "**Complaints**").
46. On August 23, 2022, Carmen Garrett, Office of the Information Commissioner (the "**OIC**") investigator contacted Mr. Wood to inform him that she had been assigned to the Complaints and would get back to him after a preliminary review.
47. On September 21, 2022, Mr. Wood asked Ms. Garrett if she could provide a rough timeline for processing the Complaints. Ms. Garrett responded, informing Mr. Wood that it would depend on ISC and how quickly they answered the OIC's questions. Ms. Garrett also noted that investigations relating to section 20 of the *Act* can be time consuming as the OIC may be compelled to seek representations from the third party. She also indicated that there were 275 pages of records for Request A-2021-00347 and 132 pages for Request A-2021-00348.
48. On September 26, 2022, Ms. Garrett emailed Mr. Wood asking him to clarify what he was looking for from the BCRs with respect to the FLFN trust fund, specifically whether he was seeking the reasons for the withdrawals, the amounts, or both. Ms. Garrett informed Mr. Wood that there is some financial information in the Requested Records that was already available to the public through the FLFN's consolidated financial statements,



which would mean some of it was not properly withheld. However, because she could not find anything that said the BCRs must be made public, she indicated that information related specifically to the trust fund may have been properly withheld. Mr. Wood responded to Ms. Garrett, clarifying that it was the Applicant seeking the Requested Records and not himself.

49. On September 27, 2022, Ms. Garrett asked Mr. Wood if he had included an authorization from the Applicant stating that he was making the Requests on the Applicant's behalf. Ms. Garrett noted that the ***Indian Band Council Procedure Regulations*** (C.R.C., c. 950) ("***IBCPR***") gave band members the right to be present at band council meetings, and that the BCRs are based on decisions made at such meetings, but she was unsure whether the BCRs in question fell into that category. She then indicated that these questions would need to be addressed to ISC and possibly the FLFN.
50. Mr. Wood responded, informing Ms. Garrett that he had attached the authorization from the Applicant and had noted it in the language of the Requests. Mr. Wood told Ms. Garrett that he could send her the authorization form signed by the Applicant if that would be helpful. Mr. Wood further informed Ms. Garrett that although the *IBCPR* gave band members the right to be present at band council meetings, the actual practice could differ by band; in the case of the BCRs in question, band members were not actually present at these meetings, and the FLFN had not been providing copies of the BCRs to band members.
51. Ms. Garrett responded to Mr. Wood, indicating that the authorization would be helpful and that ISC should have already provided that to the OIC. She told Mr. Wood that she could request the authorization from ISC but it would be faster if Mr. Wood could send it to her. Mr. Wood then sent her the authorization signed by the Applicant. Ms. Garrett asked if the authorization had been sent with both Requests, and Mr. Wood confirmed that it had.

### **The Commissioner's Reports**

52. On June 20, 2023, Allison Knight, Senior Director, Investigations of the OIC issued the Reports on behalf of the Commissioner. The OIC concluded in the Reports that the information contained in the Requested Records met the requirements for exemption under sections 19(1) and 20(1)(b) of the *Act*, and that the Complaints were not well founded.
53. The Reports also indicated that section 41 of the *Act* provided the right to the Applicant to apply to the Federal Court for review of ISC's decision to refuse access to the Requested Records.

### **LEGAL BASIS**

54. This Application is brought under Rules 300 and 301 of the ***Federal Courts Rules*** (SOR/98-106) and subsection 41(1) of the *Act*.
55. There are three prerequisites that must be met before a party may apply to the Federal Court under section 41 of the *Act*:
  - a. The applicant must have been "refused access" to a requested record.
  - b. The applicant must have complained to the Commissioner about the refusal.

- c. The applicant must have received a report of the Commissioner under subsection 37(2) of the *Act*.

***Statham v Canadian Broadcasting Corporation***, 2010 FCA 315 at para. 64.

- 56. Each of these prerequisites are met in this case.
- 57. There is a presumption that reasonableness is the standard of review where a court reviews the merits of an administrative decision. However, courts will apply a standard of correctness where required by a clear indication of legislative intent or by the rule of law.

***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 at para. 10.

- 58. Section 44.1 of the *Act* provides that an application under section 41 or 44 is to be heard and determined as a new proceeding. This is a clear indication that the legislature intended that the Court would owe no deference to ISC's decisions or actions. The standard of review to be applied on this Application is therefore correctness.
- 59. Upon an application for review under section 41 of the *Act*, the Court's function is to consider the matter *de novo*, including, if necessary, a detailed, document by document review of the records at issue.

***Air Atonabee Ltd. v. Canada (Minister of Transport)***, [1989] F.C.J. No. 453 ("***Air Atonabee***").

- 60. Section 2(1) of the *Act* states that the purpose of the *Act* is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.
- 61. Paragraph 4(1)(a) of the *Act* grants the right to every Canadian citizen to, on request, be given access to any record under the control of a government institution, subject only to Part 1 of the *Act*.
- 62. The Applicant is a Canadian citizen. The Respondent ISC is a government institution and the Requested Records are under its control. Therefore, unless an exemption is found to properly apply, the Applicant is entitled to be given access to the Requested Records.
- 63. ISC has cited subsection 19(1) of the *Act* to justify denying access to the Requested Records. This provision requires the government institution to refuse to disclose a record that contains personal information.
- 64. Section 3 of the *Act* provides that "personal information" has the same meaning as in section 3 of the ***Privacy Act*** (R.S.C., 1985, c. P-21) (the "***Privacy Act***"), which defines "personal information" as information about an identifiable individual that is recorded in any form, and enumerates nine examples of personal information. In the case of a name of an individual, this will be considered personal information where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about that individual.
- 65. The definition in section 3 of the *Privacy Act* also provides exceptions to this definition for the purposes of section 19, *inter alia*, of the *Act*. The Applicant concedes that none of these exceptions apply in this case.

66. To the extent that the “personal information” cited to justify ISC’s refusal of access to the Requested Records consists merely of the names of individuals, the Applicant denies that this constitutes personal information within the meaning of the *Privacy Act*, unless a name appears with other personal information relating to an individual or the disclosure of the name itself would reveal information about that individual.
67. Further, arguments that because the number of members of a band is known financial information concerning the band constitutes personal information have been rejected by this Court. While information about small groups may constitute personal information in some cases, “the mere fact that one can divide the group’s assets by the number of its members does not support such a finding.”

***Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)***, [1989] 1 F.C. 143 (“*Montana*”) at paras. 16 – 17.

68. In the alternative, subsection 19(2) of the *Act* gives the head of a government institution discretion to disclose a requested record that contains personal information if:
- a. the individual to whom it relates consents to the disclosure;
  - b. the information is publicly available; or
  - c. the disclosure is in accordance with section 8 of the *Privacy Act*.

69. Paragraph 8(2)(k) of the *Privacy Act* provides discretion to government institutions to disclose personal information under their control:

(k) to any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada; [Emphasis added]

70. The Applicant pleads that the words “or part thereof” should be applied to all of the groups enumerated in paragraph 8(2)(k), and that this should be interpreted to include an individual member of an Indian band, that is, the Applicant. Further, the Applicant has made his Request for the purpose of researching or validating a claim, dispute or grievance concerning aboriginal peoples.
71. This interpretation is supported by statements of the Federal Court of Appeal, which has found that paragraph 8(2)(k) of the *Act* provides that “members of Aboriginal bands, or persons acting on their behalf, may obtain [personal information] for the purpose of researching an Aboriginal claim”. [Emphasis added]

***Canada (Information Commissioner) v. Canada (Minister of Industry)***, 2007 FCA 212 at para. 87.

72. Disclosure of the Requested Records is therefore permitted under subsection 19(2) of the *Act* and paragraph 8(2)(k) of the *Privacy Act*. While subsection 8(2) is permissive and not mandatory, the Applicant pleads that ISC’s decision to deny access to the Requested Records under subsection 19(1) of the *Act* was nonetheless unjustified in the circumstances.
73. In the further alternative, if the Requested Records are found to contain personal information which cannot be released under paragraph 8(2)(k) of the *Privacy Act*, the

Applicant pleads that this information can and should be severed from the Requested Records, and ISC should be ordered to disclose any part of the Requested Records that does not contain such information, pursuant to section 25 of the *Act*.

74. ISC has also cited paragraph 20(1)(b) of the *Act* to justify denying access to the Requested Records. This provision requires the head of a government institution to refuse to disclose any record that contains financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party.
75. Exemption from disclosure under paragraph 20(1)(b) of the *Act* requires that each of the following criteria be met, that is, the information in question must be:
- a. financial, commercial, scientific or technical information;
  - b. confidential information;
  - c. supplied to a government institution by a third party; and
  - d. treated consistently in a confidential manner by the third party.

*Air Atonabee.*

76. The Applicant concedes that the Requested Records contain financial information and that they were supplied to ISC by the FLFN. The Applicant denies that the Requested Records constitute confidential information or were treated consistently in a confidential manner by the FLFN.
77. To be considered confidential information, “the information must be confidential in its nature by some objective standard which takes account of the content of information, its purposes and the conditions under which it was prepared and communicated”.

*Air Atonabee*, citing *Montana* at p. 25.

78. It is not sufficient that the third party state, without further evidence, that the information is confidential.

*Air Atonabee*, citing *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, [1988] F.C.J. No. 290.

79. Whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, specifically:
- a. that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own;
  - b. that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed; and
  - c. that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

*Air Atonabee*, citing *Montana*.

80. However, this Court has noted that “not every aspect of the relationship between fiduciary and trustee takes the form of a fiduciary obligation”, and access to information cases have turned more on the issue of confidentiality than on fiduciary obligation. The Requested Records must be of a confidential nature to be exempted from disclosure under the *Act*, notwithstanding the type of relationship the FLFN enjoys with the Crown.

*Timiskaming* at paras. 33, 35, citing *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

81. In *Timiskaming*, a portion of the documents that had been released by the Minister of Indian and Northern Affairs were BCRs. This decision was challenged by the band. The Court found that the BCRs were never published, but that they were accessible to any band member, with the only exception being for matters that were sensitive to the participants (e.g., those involving children). Because the information contained in the BCRs was already publicly available in the Indian Land Registry, the Court held that it was subject to disclosure.

*Timiskaming* at paras. 48, 62

82. The Federal Court of Appeal has held that information cannot be considered “confidential” for the purpose of paragraph 20(1)(b) of the *Act* vis-à-vis a requester who has a right to it under another legal provision.

*Sawridge Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2009 FCA 245 (“*Sawridge*”) at para. 5.

83. In *Sawridge*, a member of a band had made a request under the *Act* for the band’s audited consolidated financial statements. Paragraph 8(2)(a) of the *Indian Bands Revenue Moneys Regulations* (C.R.C. c. 953) (the “*IBRMR*”) required the band to provide a copy of the auditor’s annual reports for examination by members of the band. On appeal, it was held that a purposive interpretation of paragraph 8(2)(a) of the *IBRMR*, and subsection 69(2) of the *Indian Act* (R.S.C., 1985, c. I-5) under which the *IBRMR* were made, indicated that “Band members’ right to examine the financial statements must also include a right to use them for the purpose of holding the Band Chief and Council accountable for their management of the Band’s finances.”

*Sawridge* at para. 47.

84. As a consequence, the band’s consolidated financial statements were not “confidential” for the purpose of paragraph 20(1)(b) of the *Act* when the requester is a band member. INAC was therefore correct to conclude that it could not refuse the request for disclosure.

*Sawridge* at para. 50.

85. As the OIC investigator Ms. Garrett alluded, subsection 23(1) of the *IBCPR* requires that regular meetings of band councils must be open to members of the band, and no member may be excluded from meetings except for improper conduct.
86. The Applicant pleads that a purposive interpretation of this provision of the *IBCPR* necessarily includes a right to use information from band meetings for the purpose of

holding the Chief and Council accountable for their management of the FLFN's finances. This information includes the BCRs that were the subject of the Requests.

87. The request at issue in *Sawridge* was made before the enactment of ***Bill C-2, An Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability*** in December of 2006, which amended the *Act* to include subsection 4(2.1). This provision states:

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

88. Nonetheless, while the issue of whether a record is exempt from disclosure is *generally* not dependant on the identity of the requester, this Court has recently stated that if an applicant is a member of a third party First Nation this may trigger the “very unusual circumstances” found in *Sawridge*.

*Najm v. Canada (Minister of Indigenous Services)*, 2023 FC 744 at para. 33.

89. The Applicant pleads that a purposive interpretation of the *Act* requires that subsection 4(2.1) not be read as overruling the *ratio* in *Sawridge*, given that the purpose of this amendment was to expand access to information—not to restrict it. *Sawridge*, an appellate decision, remains binding on this Court.

This Application will be supported by the following material:

1. Affidavit #1 of Hans McCarthy
2. Affidavit #1 of Dave Oswald
3. Affidavit #1 of Todd MacKay

Date: August 8, 2023

*Spencer Evans*

Signature of Spencer C. J. Evans  
Lawyer for the Applicant

Applicant's address for service:

Crease Harman LLP  
800 – 1070 Douglas Street  
Victoria, BC  
P.O. Box 997, Victoria Main P.O.  
Victoria, BC V8W 2S8

Applicant's phone number: (250) 388-5421

Applicant's fax number for service: (250) 388-4294

**I HERBY CERTIFY that the  
above document is a true  
copy of the original *filed in*  
the Court on  
August 8, 2023**

**Dated August 11, 2023  
Ginette Lischenski**