

Court File No.

FEDERAL COURT

B E T W E E N:

BAND MEMBERS ALLIANCE AND ADVOCACY
ASSOCIATION OF CANADA

Applicant

-and-

LITTLE GRAND RAPIDS FIRST NATION

Respondent

NOTICE OF APPLICATION

APPLICATION UNDER sections 18(1) and 18.1 of the *Federal Courts Act* and Rule 301 of the *Federal Courts Rules*.

TO THE RESPONDENT:

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 635 8th Ave SW, Calgary.

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: _____

Issued by: *(Registry Officer)*

Address of local office:
635 8th Ave SW, 3rd Floor
Calgary, AB T2P 3M3

TO: Little Grand Rapids First Nation

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent

APPLICATION

1. The Applicant, the Band Members Alliance and Advocacy Association of Canada (“**BMAAAC**”), brings this application for judicial review of the *Bylaw Relating to Intoxicants* (“**the Bylaw**”), enacted by the Little Grand Rapids First Nation (“**LGRFN**”) under authority delegated by sections 81(1) and 85.1 of the *Indian Act*.
2. BMAAAC asserts that the Bylaw is *ultra vires*, as well as contrary to sections 6(1), 7, 8, 9, 11(h) and 12 of the *Canadian Charter of Rights and Freedoms* (“**the Charter**”).

RELIEF SOUGHT

3. BMAAAC seeks the following relief:
 - a. A Declaration that the Bylaw is *ultra vires* LGRFN’s authority;
 - b. A Declaration, pursuant to section 52(1) of the *Constitution Act, 1982*, that the Bylaw infringes sections 6(1), 7, 8, 9, 11(h) and 12 of the *Charter*, and that none of the infringements are saved by section 1;
 - c. An order that no costs of this proceeding be awarded to or against any party, regardless of the outcome;
 - d. Such further and other relief as counsel may advise and this Court considers appropriate.

STANDING

1. The law regarding public interest standing is well settled. An applicant may be granted public interest standing by the court if the following three conditions are fulfilled:
 - a. There is a serious issue to be tried;
 - b. The applicant has a real stake or a proven connection to the matter;
 - c. The lawsuit is a reasonable and effective means of bringing the case to court.

Serious justiciable issue

2. The constitutionality of delegated legislation enacted by Indigenous governing bodies is, by its nature, a serious issue, as would be the case with any level of government. For Indigenous Canadians who live on reserve, the issue is especially acute, as reserve residents are far less likely to have the legal sophistication or the resources to challenge their own governments that other Canadians enjoy. As such, Indigenous Canadians on reserve are at the mercy of their band councils to a greater degree than other Canadians are with their local governments. The scrutiny of *Indian Act* bylaws for constitutional compliance has an extra dimension of importance in this regard.
3. Apart from imprisonment for criminal or regulatory offences, there is likely no greater or more serious punishment that can be imposed on reserve residents than exile from their

homes, families and communities. Banishment is an extraordinary punishment that courts have deemed an extreme measure, justified only in exceptional circumstances. Wherever a statute or bylaw provides for banishment as a penalty, the need for robust procedural safeguards, as well as *Charter* compliance, is self-evident.

4. The threshold for this prong of the test is relatively low; it is sufficient that the issue not be frivolous. Banishment from First Nation reserves is self-evidently not a frivolous issue. This prong of the test is therefore satisfied.

Genuine interest

5. This factor seeks to screen out the “mere busybody”, and asks whether an applicant has a real stake in the proceedings or an engagement with the issues raised. The court looks to the applicant’s reputation, and to whether the applicant has an interest in, or link to, the claim.
6. BMAAAC is an incorporated, non-partisan, federal non-profit society, whose mandate is to facilitate access to justice on behalf of First Nation band members. It is, to the Applicant’s knowledge, the only national organization dedicated to assisting band members in demanding transparency and accountability from their Indigenous governments.
7. In the years since BMAAAC was incorporated in 2019, the organization has been at the forefront of Canadian jurisprudence involving Indigenous legal issues. It has been involved as an applicant in *McCarthy v Whitefish Lake First Nation #128*, 2023 FC 220, in which the applicants successfully overturned band election eligibility rules that discriminated on the basis of sex and marital status. BMAAAC has also intervened in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 525, in which the applicant successfully challenged the respondent’s extension of its term in office, as well as regulations allowing for the postponement of band elections due to COVID. Most significantly, BMAAAC intervened in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10, the landmark case establishing that the *Charter* applies to self-governing First Nations, subject to the narrow shield provided by section 25 of the *Charter* involving “Indigenous difference”. A full list of BMAAAC’s involvement in litigation is included in the affidavit of Robert Louie, filed in support of this Application.
8. BMAAAC’s litigation and intervention experience, and its mission as an advocate for ordinary Indigenous citizens to demand transparency and accountability from their Indigenous governments, give it a real connection and a genuine interest in this litigation. This prong of the test is therefore satisfied.

Reasonable and effective means

9. This factor considers whether the proposed lawsuit will promote access to justice, while being an efficient use of judicial resources. Indicia that the court may consider include:
 - a. The applicant’s capacity to bring the claim forward;

- b. Whether the case is of public interest;
 - c. Whether there are alternative means of resolving the issue;
 - d. The potential impact of the proceeding on others.
10. As discussed in the preceding section of this Application, the Applicant has been at the forefront of Indigenous legal matters, through its advocacy, litigation and intervention. The Applicant is supported in this matter by established constitutional litigators funded by the Justice Centre for Constitutional Freedoms. As such, the Applicant has both the resources and expertise to present a thorough case in the proposed proceedings.
 11. In considering whether a case is of public interest, courts are urged to take into account whether the proposed litigation provides access to justice for disadvantaged persons whose legal rights are affected. Reserve residents who are subjected to banishment orders by their Indigenous governments are among the most disadvantaged and marginalized people in Canadian society. This case goes directly to the interests of such people, and is consistent with the underlying purpose of public interest litigation.
 12. Finally, it is worth noting that the Bylaw at issue in this Application is not unique to LGRFN. The prohibitions, penalties and procedures contained within the Bylaw are similar to provisions contained in other drug bylaws enacted by other First Nations. This supports the inference that the Bylaw is drawn from a template being used by multiple First Nation band councils. As such, a ruling on the *vires* and the constitutionality of the Bylaw would have far-reaching effects among First Nations, and their members, nation-wide.
 13. Bringing this Application, on these facts, with this Applicant, is a reasonable and effective means of resolving this issue and promoting access to justice for those whose need for it is acute. As such, this prong of the test is satisfied.

Conclusion on public interest standing

14. The seriousness and justiciability of the issue of banishment from a reserve, the Applicant's genuine interest and capability of advancing the matter, and the far-reaching implications across the landscape of First Nation governance, all argue in favour of granting public interest standing to the Applicant, BMAAAC, for the purposes of this Application.

THE BYLAW

Prohibitions

15. Section 4.01 of the Bylaw prohibits all of the following:
 - a. Being intoxicated on reserve;
 - b. Possessing intoxicants on reserve;
 - c. Producing or manufacturing intoxicants on reserve;
 - d. Trafficking intoxicants on reserve;

- e. Operating a motor vehicle while intoxicated on reserve;
 - f. Harboursing an offender who has previously been removed or banished under the Bylaw.
- 16. Section 6.02 of the Bylaw contains an exception to the prohibitions in section 4.01, where the intoxicant is alcohol or cannabis within prescribed amounts and under other prescribed conditions.
- 17. Section 8.01 of the Bylaw prohibits the following for LGRFN employees:
 - a. To be intoxicated at work;
 - b. To refuse to participate in drug testing when requested by LGRFN.
- 18. Section 8.05 of the Bylaw makes it an offence to refuse to be searched pursuant to section 8.04 of the Bylaw.

Penalties

- 19. Sections 5.05 and 5.06 of the Bylaw make possession or intoxication on reserve punishable by a fine of up to \$100, or up to 3 months' imprisonment, or community service as Council deems appropriate, or a combination of all three.
- 20. Section 5.07 of the Bylaw makes trafficking, possession for the purpose of trafficking, or supplying intoxicants to a minor punishable by a fine of up to \$1000, or up to 6 months' imprisonment, or community service as Council deems appropriate, or a combination of all three.
- 21. Section 5.08 of the Bylaw makes harboursing a removed or banished person punishable by a fine of up to \$5000, or up to one year's imprisonment, or both.
- 22. Section 5.10 provides for supplementary sanctions that may be imposed, at Council's discretion, upon those convicted of an offence under the Bylaw. Section 5.10(f) provides for removal or banishment from the LGRFN reserve.

Banishment procedure

- 23. Section 5.11 of the Bylaw provides that prior to imposing supplementary sanctions under section 5.10, Council shall inform the offender in writing that those sanctions are being considered. The offender is given the opportunity to make written submissions, which Council must consider in making a decision.
- 24. Section 5.12 provides that any sanction under section 5.10 must be documented in a Band Council Resolution ("BCR") which must contain reasons for the decision. A copy of the BCR is to be provided to the offender.
- 25. Section 5.13 provides a list of factors that Council must consider in deciding whether to impose sanctions, including the severity of the offence, the number and frequency of any prior offences, the submissions of the offender, and any other consideration deemed relevant by Council.
- 26. Section 5.15 provides that banishment takes effect 30 days after the offender has been notified of the decision, unless the offender has appealed.

27. Section 5.16 authorizes Council to make BCRs respecting any matter that Council deems necessary, including “the imposition of additional or different penalties under this bylaw”.

Appeal procedure

28. Sections 5.14 and 9.01 provide that an offender who has been removed or banished has a right to appeal that decision. Section 9.02 provides that notice of an appeal must be given by the offender within 20 days of being notified of the banishment decision.
29. Section 9.03 provides that Council must strike a neutral and independent Appeal Committee within 10 days of receiving notice of an appeal.
30. Section 9.04 provides that the Appeal Committee shall consist of the following:
- a. One male elder who resides on the reserve;
 - b. One female elder who resides on the reserve;
 - c. One male reserve resident;
 - d. One female reserve resident;
 - e. One “youth” who resides on reserve and is at least 17 years old;
 - f. One individual “with an education/knowledge in law”.
31. Section 9.05 provides that an Appeal Committee member with a real or perceived conflict of interest must disclose the conflict to the Council, who then decides whether to recuse the member.
32. Section 9.06 provides that a hearing must be held before the Appeal Committee in which both the offender and Council shall plead their cases. Each side may present oral and/or written evidence, and may be represented by legal counsel.
33. Section 9.07 provides unfettered discretion to the Appeal Committee to uphold, overturn or vary the banishment order. Section 9.08 provides a list of factors that the Appeal Committee must consider, which include the nature and severity of the offence; attempts at rehabilitation or reparation made by the banished person; the banished person’s connection to the community, including the effect on any dependents; and whether the banishment is in the best interests of community safety.
34. Section 9.09 provides that the Appeal Committee shall notify the parties of their decision within 10 days of the hearing. In the event that the banishment is upheld, section 9.10 provides that it takes effect 10 days after the offender has been notified of the decision.
35. Section 9.11 provides that the decision of the Appeal Committee are final and are not subject to appeal before any court or tribunal.
36. Section 9.13 provides that banished persons may apply to Council for the banishment to be lifted after 5 years. It places an onus on the applicant to provide reasons to Council as to why the banishment should be lifted.
37. In the event of an application for readmission to the community, section 9.14 provides that readmission is at the discretion of Council. It further provides that a decision shall be

communicated in writing to the offender within 20 days of receipt of the application, and the decision “may or may not include written reasons”.

38. Section 9.15 provides that offenders may request, and Council may grant, temporary exceptions to banishment, such as allowing the offender to attend a funeral, or in any other circumstance that Council sees fit.

Search and detention procedures

39. Section 8.01 authorizes LGRFN to engage in drug testing of its employees if there are reasonable and probable grounds to believe that an employee has committed an offence under the Bylaw.
40. Section 8.02 authorizes First Nation Safety Officers (“FNSO”) and peace officers to search a person without a warrant, if the officer has reasonable and probable grounds to believe that a person is committed, has committed, or may commit an offence against the Bylaw, and the officer has reason to believe that a search of the person will reveal evidence to support the belief.
41. Section 8.03 authorizes Council to establish checkpoints on the reserve for the purpose of searching persons and vehicles for intoxicants.
42. Section 8.04 appears to require FNSOs and peace officers, “without discretion”, to search every person entering or exiting the reserve for intoxicants. The search is to include luggage, bags, packages and other containers as well as the person him or herself. Section 8.05 makes it an offence for any person to refuse to be searched.
43. Section 8.06 authorizes FNSOs and peace officers to conduct warrantless searches of any building on the reserve, including offices and dwelling houses, where the officer has reasonable grounds to believe that an offence under the Bylaw has been, will be, or is being committed.
44. Section 8.07 provides that any search conducted pursuant to section 8 of the Bylaw shall be conducted only using sight, hearing and smell, and shall not involve the touching, moving or manipulation of objects. It is unclear how this section of the Bylaw is reconciled with section 8.04, which provides for the search of persons and their baggage.
45. Section 8.08 authorizes any member of Council to assist a FNSO or peace officer to gain access to any building for the purposes of conducting a search.
46. Section 8.09 authorizes a FNSO or peace officer to seize goods or chattels if he believes on reasonable grounds that the goods or chattels are related to an offence has been, is being, or will be committed. Intoxicants taken in such a seizure are to be held as evidence until no longer required, and then disposed of.
47. Section 8.10 provides that any goods and chattels seized will be held for 3 months or until the conclusion of proceedings, and if the goods and chattels are not intoxicants and do not relate to an offence, will be returned to the owner upon request.
48. Section 8.11 authorizes a FNSO who witnesses a person apparently committing an offence to arrest and detain that person without warrant, but only if it is necessary to

establish the person's identity, or to secure or preserve evidence, or to prevent the continuation or repetition or further commission of an offence.

49. Section 8.12 requires a FNSO who has made a warrantless arrest to release the person as soon as it is no longer necessary to fulfill the purposes set out in section 8.11, or to deliver the person to a peace officer if the FNSO reasonably believes that continued detention is necessary for those purposes.

GROUND'S OF APPLICATION

50. BMAAAC challenges the Bylaw on the following grounds.

Jurisdiction

This court has jurisdiction over the subject matter of these proceedings

51. LGRFN is a body exercising delegated authority under the *Indian Act*. As such, it is a federal board, commission or other tribunal within the meaning of the *Federal Courts Act*, and falls under the exclusive original jurisdiction of this Court under section 18(1) of the *Federal Courts Act*.

Vires argument

Banishment is ultra vires LGRFN's authority

52. Sections 81(1) and 85.1 of the *Indian Act* authorize band councils, including LGRFN, to enact bylaws on a variety of subject areas, including the regulation or prohibition of intoxicants. However, neither section 81(1) nor 85.1, nor any other provision of the *Indian Act* permits a band council to enact a bylaw empowering the council to unilaterally banish a band member, effectively for a minimum of 5 years. Furthermore, neither section 81(1) nor 85.1 nor any other provision of the *Indian Act* permits a band council to do so without affording affected band members a sufficient degree of procedural fairness.
53. Further, neither section 81(1) nor 85.1 nor any other provision of the *Indian Act* permits band councils to enact unconstitutional bylaws.
54. For the reasons discussed below, sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw are procedurally unfair, administratively unreasonable, and unconstitutional.
55. Accordingly, LGRFN's enactment of sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw was, and remains, *ultra vires* its authority under sections 81(1) and 85.1 of the *Indian Act*.

Banishment unreasonably interferes with members' rights

56. LGRFN reserve lands were established pursuant to Treaty 5, with such lands being established in proportion to "each family".

57. LGRFN is a “band” under the *Indian Act*, which is defined as “a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart...”. Likewise, LGRFN reserve lands are a “reserve” under the *Indian Act*, which is defined as “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band...”.
58. The Bylaw, insofar as it provides for the removal or banishment of band members, is thus *ultra vires* the authority of LGRFN in that it purports to deprive members of their treaty and statutory rights to the use and benefit of reserve lands. Further, the Bylaw, insofar as it provides for the removal or banishment of band members, unreasonably interferes with these rights.

Administrative law argument

The Bylaw lacks sufficient procedural fairness

59. Given the serious nature of the decision to banish an individual, and its importance and detriment to the affected person, a high degree of procedural fairness is owed to the individual.
60. When an administrative decision by a governing body affects the rights or interests of an individual, natural justice requires, at a minimum, that the individual be given prior notice, and a chance to be heard, before the decision is taken. Often, fairness will require much more than this basic minimum.

The Bylaw does not require written reasons throughout

61. A person who has been banished under the Bylaw will receive up to three decisions through the course of the matter:
- a. The initial decision of the Council to banish;
 - b. The decision of the Appeal Committee if the person appeals;
 - c. The decision of the Council whether to reinstate after 5 years, if the person applies for reinstatement.
62. Of those three decisions, only one – the initial decision to banish – requires that the person be provided with written reasons for the decision. Given the importance of the decision, and its impact on the individual, this is insufficient. Written reasons should be provided with every decision throughout the process.

The Bylaw does not specify factors that must be considered throughout

63. Although the Bylaw provides for a list of factors that Council must consider in the context of an initial decision to banish, as well as factors that the Appeal Committee must consider in the context of an appeal, on an application for reinstatement the Bylaw is silent on specific factors. In such an application, the Council has the discretion to consider “anything [it] deems relevant”. Given the importance of the decision, and its impact on the individual, this is insufficient.

The Bylaw forecloses recourse to the courts

64. Section 9.11 of the Bylaw is an express privative clause, providing that banishment procedure is exhausted after the Appeal Committee decides the matter. LGRFN intends for banishment decisions to be completely unreviewable by any outside court or tribunal. This legislative choice, which was freely made by LGRFN, increases the degree of procedural fairness owed to affected individuals.

The Bylaw imposes a justificatory burden on the applicant

65. In applying for readmission to the reserve after serving a minimum 5-year term of banishment, section 9.13 requires that the applicant bear the onus of justifying his or her own reinstatement, and of proving to the Council that the applicant is no longer a threat to the community. At the same time, there is no requirement in the Bylaw that the banished person be provided with written reasons either for the dismissal of the earlier appeal, or for the application for reinstatement.
66. In such circumstances, an applicant for readmission bearing the burden of justification is not aware of the case he or she has to meet. This is not only procedurally unfair to the applicant for readmission, it is also contrary to the “culture of justification” at the heart of Canadian administrative law.

Banishment decisions merit the highest degree of procedural fairness

67. In sum, the nature of the decision, its importance to the individual, and the statutory scheme chosen by LGRFN all indicate that a very high degree of procedural fairness is owed to band members who are subject to banishment decisions under the Bylaw. As such, banishment under the Bylaw calls for safeguards such as:
- a. A fair hearing, with full disclosure, before a neutral decision-maker, before the initial decision to banish is taken;
 - b. Written reasons for the initial decision;
 - c. Right of appeal before a fully impartial appeal body, with written reasons for the appeal decision;
 - d. A statutory right of further appeal to a court of competent jurisdiction;
 - e. A clear and comprehensible right of reconsideration within a reasonable time, with an onus on the decision-maker to justify the continuation of a banishment.
68. The Bylaw, as it currently exists, incorporates some procedural safeguards, but does not fully conform to the specifications in the preceding paragraph.
69. As such, the Bylaw does not afford sufficient procedural fairness to band members subject to a banishment decision under section 5.10(f).

Conclusion on procedural fairness

70. No administrative or legislative body exercising delegated authority is authorized to enact bylaws or make decisions that afford insufficient procedural fairness to affected individuals. As such, sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw are *ultra vires* the authority of LGRFN.

Charter argument

The availability of Charter review in this proceeding

71. LGRFN is a “government” and is subject to the *Charter*, pursuant to section 32(1) of the *Charter*.
72. The Bylaw, having been duly enacted under delegated authority pursuant to the *Indian Act*, is subject to review under the *Charter*.

The Bylaw violates section 6(1) of the Charter

73. Section 6(1) of the *Charter* provides:

Every citizen of Canada has the right to enter, remain in and leave Canada.

74. A purposive interpretation of section 6(1) supports a general guaranteed right of mobility within Canada, including within provincial borders, without state restraint or a requirement for state authorization. Laws and government actions that limit the ability of Canadian citizens to move freely within Canada, or make such movement contingent on state authorization, infringe section 6(1) of the *Charter*.
75. Persons who are banished from LGRFN reserve lands under the Bylaw are restricted from moving freely within, or even entering, LGRFN territory. Such restriction remains in place for at least 5 years, and may endure indefinitely. This is a clear example of a law limiting a person’s ability to move freely within a particular territorial catchment, in a non-fleeting, non-trivial manner.
76. LGRFN has not demonstrated that sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
77. Accordingly, these provisions violate section 6(1) of the *Charter* and cannot be saved by section 1.

The Bylaw violates section 7 of the Charter

78. Section 7 of the *Charter* provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

79. The Bylaw provides that LGRFN Council may banish members from LGRFN reserve lands for a minimum of 5 years, which constitutes a significant interference with the liberty and security of the person of LGRFN members, by denying them access to their

homes, their families and their community. Such a mandatory minimum term of banishment for a person who has been convicted of contravening the Bylaw is overbroad, arbitrary and grossly disproportionate.

80. A member who has committed an offence under the Bylaw could very realistically, through rehabilitation or other personal or situational changes, pose no threat to the community in a far shorter time than 5 years.
81. Empowering the Council to banish a member for a minimum of 5 years if they are found to have engaged in harbouring, contrary section 4.01(f) of the Bylaw, may also be an inordinate length of time to achieve LGRFN's objectives of ensuring community safety and protection.
82. Notwithstanding the foregoing, banishment under the Bylaw endures for a minimum of 5 years, and absent an application for reinstatement by the banished individual, is permanent. There is no possibility for calibration of the banishment, either before or after it is ordered, to balance individual and communal rights and interests in a proportionate manner.
83. As such, banishment for a minimum 5-year term as contemplated by the Bylaw deprives a person of their liberty and security of the person, in manner not in accordance with the principles of fundamental justice.
84. LGRFN has not demonstrated that sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
85. Accordingly, those provisions violate section 7 of the *Charter* and cannot be saved by section 1.

The Bylaw violates section 8 of the Charter

86. Section 8 of the *Charter* provides:

Everyone has the right to be secure against unreasonable search or seizure.

87. A search within the meaning of section 8 is any state activity that interferes with a reasonable expectation of privacy. Whether a reasonable expectation of privacy exists is analyzed on a case-by-case basis in the totality of the circumstances, but it is indisputable that a high expectation of privacy exists in a person's dwelling and on their person. A reasonable expectation of privacy also exists in a person's vehicle, their office, and their baggage.
88. A seizure is the taking of a thing from a person by a public authority without that person's consent.
89. A search or seizure is reasonable if it is authorized by law, where the law is itself reasonable, and the search is carried out in a reasonable manner.
90. Warrantless searches, even where authorized by legislation, are presumptively unreasonable, and must be justified by the state actor as authorized by law, where the law is reasonable, and carried out in a reasonable manner.

91. Section 8 of the Bylaw authorizes warrantless search in a variety of contexts, including the following:
- a. Drug testing of LGRFN employees (8.01);
 - b. The search of persons on reserve by FNSOs and peace officers (8.02);
 - c. The search of persons, vehicles and baggage entering and exiting the reserve (8.03-8.04);
 - d. The search of any building on the reserve, including offices and dwelling houses (8.06).
92. The searches authorized by sections 8.01, 8.02 and 8.06 are triggered by reasonable and probable grounds to believe that an offence has been, is being, or will be committed. The searches authorized by sections 8.03 and 8.04 are related to a contemplated checkpoint or series of checkpoints established on the reserve and/or at entry points to the reserve. The checkpoint searches appear to be all-encompassing, ie. all persons and vehicles are intended to be searched indiscriminately and without exception.
93. Because these searches are authorized by the Bylaw, whether they are reasonable for the purposes of section 8 of the *Charter* depends on whether the Bylaw is a reasonable authorizing law.
94. While there is no “hard and fast” test for reasonableness under section 8 of the *Charter*, a reasonable authorizing law must strike a reasonable balance between the state interest that is pursued by the law on the one hand, and the individual privacy interest on the other. Considerations identified in case law include:
- a. The nature and purpose of the legislative scheme;
 - b. The mechanism employed, having regard for the degree of its potential intrusiveness and its reliability;
 - c. The availability of judicial supervision.
95. In the present case, the purpose of the legislative scheme is to promote public health and safety by regulating the presence of intoxicants on reserve. The Applicant concedes that this is a legitimate and substantial objective.
96. Regarding mechanism, a law authorizing a search or seizure should reflect the least intrusive means by which the state interest can be achieved. The mechanism chosen by Council – the warrantless search of persons, private homes, offices and vehicles, all of which attract a reasonable expectation of privacy, and some of which attract the highest expectation – is about as maximally intrusive as it is possible to imagine.
97. Another consideration relevant to the mechanism is the threshold on which the search may be conducted, and whether the power to search is narrowly targeted. In this case, some search powers are triggered by reasonable and probable grounds, and others are completely indiscriminate.
98. Reasonable and probable grounds is the threshold that must be met by a peace officer when applying to a judge for a search warrant. For maximally intrusive searches where a

high expectation of privacy is engaged, it is not a threshold that can sustain a reasonable search without a warrant.

99. Furthermore, checkpoints that target all persons and vehicles without exception is the polar opposite of narrowly targeted. A method of searching that captures an inordinate number of innocent individuals, as checkpoints surely must do, cannot be reasonable.
100. Finally, the Bylaw contains no provision for judicial oversight and no review mechanism, either before or after a search is executed. Given the high expectation of privacy that is engaged, and the intrusiveness of the search, this is unreasonable.
101. In sum, the Bylaw is an unreasonable authorizing law, and where it authorizes the warrantless search of persons, baggage, vehicles, offices and dwellings, those searches are unreasonable, contrary to section 8 of the *Charter*.
102. LGRFN has not demonstrated that sections 8.01, 8.02, 8.03, 8.04 or 8.06 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
103. Accordingly, these provisions violate section 8 of the *Charter* and cannot be saved by section 1.

The Bylaw violates section 9 of the Charter

104. Section 9 of the *Charter* provides:

Everyone has the right not to be arbitrarily detained or imprisoned.
105. A detention occurs when a person is placed under a significant form of physical or psychological restraint by the state.
106. A detention is arbitrary when it is not authorized by statute or common law, or when it is authorized by a law that is itself arbitrary. Generally, detention is not arbitrary where there are standards that are rationally related to the purpose of the power of detention. A law authorizing automatic detention without any standards is arbitrary. Similarly, a law that confers absolute discretion to detain will be arbitrary if there are no criteria, express or implied, which govern its exercise.
107. Section 8 of the Bylaw authorizes detention in the following contexts:
 - a. To search persons for evidence of an offence (8.02);
 - b. As part of a checkpoint to search persons and vehicles for intoxicants (8.03-8.04);
 - c. To arrest, without warrant, persons observed committing an offence by a FNSO (8.11-8.12).
108. The authorization contained in section 8.02 of the Bylaw, to search persons for evidence of an offence without a warrant, necessarily implies a detention in order to execute the search. As discussed elsewhere in this Application, that search is unreasonable and contrary to section 8 of the *Charter*. By extension, the power to detain in order to execute an unreasonable search must also be arbitrary and contrary to section 9.

109. Sections 8.03 and 8.04 of the Bylaw contemplate roadside checkpoints that detain and search all persons and vehicles for intoxicants. Supreme Court jurisprudence has long held that roadside checkstop programs are only permissible for very narrow purposes related to road safety, such as confirming the licencing, insurance and sobriety of motorists, and the roadworthiness of vehicles. The SCC has expressly stated that checkstop programs cannot and must never be expanded into a more general investigative, information-gathering or law enforcement tool. A checkstop program that searches all persons and vehicles for contraband, without discretion and without exception, is both contrary to SCC guidance and arbitrary within the meaning of section 9 of the *Charter*.
110. Section 8.11 of the Bylaw authorizes FNSOs to arrest, without warrant, a person whom the FNSO witnesses committing an offence. Section 2.01 of the Bylaw makes it clear that FNSOs do not have the powers or protections of peace officers when enforcing band bylaws, including the Bylaw. Furthermore, neither *The Police Services Act*, nor the *First Nation Safety Officers Regulation*, confers, or authorizes band councils to confer, arrest powers on FNSOs. Where arrest in enforcing a band bylaw is concerned, FNSOs are no different from ordinary citizens.
111. Per section 494(1) of the *Criminal Code*, which informs the law of arrest more generally, an ordinary citizen may only arrest without a warrant when:
- a. He observes a person committing an indictable (not summary) offence; or
 - b. He believes on reasonable grounds that a person:
 - i. has committed an offence; and
 - ii. is escaping from and is freshly pursued by persons who have lawful authority to arrest the person.
112. All of the offences in the Bylaw are summary offences. Authorizing FNSOs, who are not peace officers when enforcing band bylaws, to arrest without warrant a person who the FNSO has witnessed committing a summary offence is *ultra vires* the authority of LGRFN. As such, any arrest made under the authority of section 8.11 of the Bylaw is unlawful, and by extension arbitrary and contrary to section 9 of the *Charter*.
113. LGRFN has not demonstrated that sections 8.02, 8.03, 8.04, 8.11 or 8.12 amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
114. Accordingly, these provisions violate section 9 of the *Charter* and cannot be saved by section 1.

The Bylaw violates section 11(h) of the Charter

115. Section 11(h) of the *Charter* provides:
- Any person charged with an offence has the right, if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

116. Section 11(h) is engaged either when a person is tried twice for the same offence, or punished twice in respect of the same offence. An administrative sanction imposed as a supplement to the prescribed punishment for an offence may qualify as a second punishment if it fits the criteria as discussed below.
117. Sections 5.05, 5.06, 5.07 and 5.08 of the Bylaw provide the standard punishment for contraventions of the offences in section 4.01 upon summary conviction. An offence against section 4.01(a) or (b) is punishable by a fine of up to \$100 and/or imprisonment of up to 3 months and/or community service. An offence against section 4.01(d) or (e) is punishable by a fine of up to \$1000 and/or imprisonment of up to 6 months and/or community service. An offence against section 4.01(f) is punishable by a fine of up to \$5000 and/or imprisonment of up to a year.
118. Section 5.10 lists a number of additional “sanctions” to which a convicted offender may be subjected at Council’s discretion. The discretionary additional “sanctions” under section 5.10 include:
- a. Mandatory drug treatment in a program of Council’s choice (5.10(a));
 - b. Termination of employment with LGRFN (5.10(b));
 - c. Publication of the offender’s name, and identification as an offender (5.10(c));
 - d. Refusal by LGRFN to do business with an offender (5.10(d));
 - e. Denial of, or eviction from, housing on reserve (5.10(e));
 - f. Definite or indefinite banishment, with or without conditions (5.10(f)).
119. A “sanction” constitutes “punishment” within the meaning of sections 11(h), 11(i) and 12 of the *Charter* if it satisfies the following criteria:
- a. It is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence; and
 - b. It is either:
 - i. imposed in furtherance of the purpose and principles of sentencing, or
 - ii. it has a significant impact on an offender’s liberty or security interests.
120. A person convicted of an offence under section 4.01 of the Bylaw is liable to the corresponding punishment under section 5.05, 5.06, 5.07 or 5.08 of the Bylaw. As the Bylaw is written, such an offender is also liable to any or all of the additional sanctions under section 5.10 for the same offence, at Council’s discretion. The additional sanctions under 5.10 form part of the “arsenal of sanctions” to which an accused is liable in respect of the offence.
121. Removal or banishment from the reserve is intended to separate the offender from society, to denounce the offender’s conduct, and to achieve general deterrence, all of which are fundamental principles of sentencing.
122. Removal or banishment from the reserve has an obvious and self-evident impact on an offender’s liberty interests.

123. Accordingly, removal or banishment under section 5.10(f) of the Bylaw is not merely an additional sanction; it is a punishment within the meaning of section 11(h), 11(i) and 12 of the *Charter*.
124. A person convicted of an offence under section 4.01 is punished with the corresponding penalty in section 5.05, 5.06, 5.07 or 5.08. Removal or banishment under section 5.10(f) is a second punishment in respect of the same offence. As such, it infringes section 11(h) of the *Charter*.
125. LGRFN has not demonstrated that sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
126. Accordingly, those provisions violate section 11(h) of the *Charter* and cannot be saved by section 1.

The Bylaw violates section 12 of the Charter

127. Section 12 of the *Charter* provides:
Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.
128. A state-imposed treatment or punishment is cruel and unusual if it is grossly disproportionate to a judicially-determined fit treatment or punishment for a given instance of misconduct.
129. Section 9.13 provides that a banished person may apply for readmission to LGRFN reserve lands no earlier than 5 years from the date of banishment. Readmission is at the discretion of Council. Banishment decisions may have no inherent end point. If so, then absent an application for readmission, banishment is permanent. This is effectively a 5-year mandatory minimum sentence, which is grossly disproportionate to the scope of possible conduct that section 4.01 of the Bylaw may capture. As such, it is a cruel and unusual punishment, contrary to section 12 of the *Charter*.
130. LGRFN has not demonstrated that sections 5.10(f), 5.11 through 5.15, and 9.01 through 9.15 of the Bylaw amount to a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, and cannot do so.
131. Accordingly, those provisions violate section 12 of the *Charter* and cannot be saved by section 1.

The banishment provisions of the Bylaw, and the search and detention provisions of the Bylaw, are of no force or effect

132. In light of the above, and pursuant to section 52(1) of the *Constitution Act, 1982*, BMAAAC pleads that sections 5.10(f), 5.11 through 5.15, 8.01 through 8.12, and 9.01 through 9.15 of the Bylaw are of no force or effect.

No costs should be awarded

133. BMAAAC acts in this Application as a public interest litigant. Accordingly, it does not seek costs, and submits that no costs should be ordered against it, regardless of the outcome of these proceedings.

The Applicant relies on the following statutory provisions, rules and principles:

- a. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11, including the *Canadian Charter of Rights and Freedoms*.
- b. *Treaty No. 5 between Her Majesty the Queen and the Salteaux and Swampy Cree Tribes of Indians*, 20 September 1875.
- c. *Federal Courts Act*, RSC 1985, c F-7, ss 18, 18.1.
- d. *Federal Courts Rules*, SOR/98-106.
- e. *Indian Act*, RSC 1985, c I-5.
- f. *By-Law No. 1-2022 of Little Grand Rapids First Nation – Bylaw Relating to Intoxicants* (LGRFN).
- g. *The Police Services Act*, CCSM c P94.5.
- h. *First Nation Safety Officers Regulation*, Man Reg 229/2015.
- i. *Criminal Code*, RSC 1985, c C-46.
- j. *Controlled Drugs and Substances Act*, SC 1996, c 19.

This Application will be supported by the following material:

- a. The Affidavit of Robert Louie, to be filed;
- b. Such further and other affidavits and material as counsel may advise and this Court permits.

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicant requests that the Respondents send the following material that is not in the possession of the Applicant but in the Respondent's possession, to the Applicant and the Registry:

- a. All documents and other materials related to the adoption, review and continued utilization of sections sections 5.10(f), 5.11 through 5.15, 8.01 through 8.12, and 9.01 through 9.15 of the Bylaw;
- b. Such further and other material that may be in the possession, power or control of the Respondent and which may be relevant to these proceedings.

Date: 8 September 2026



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