Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

James Louie

- and -

Joyce Beattie

Complainants

- and -

Canadian Human Rights Commission

Commission

- and -

Indian and Northern Affairs Canada

Respondent

Decision

Member: Wallace G. Craig
Date: January 26, 2011
Citation: 2011 CHRT 2

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I. Introduction

[1] In the period July 19 to 22, 2010, I conducted an inquiry into allegations by the Complainants, James Louie and Joyce Beattie, that officials of Indian and Northern Affairs Canada (INAC) had engaged in discriminatory conduct in dealing with the Complainants' applications for a lease under s. 58(3) of the *Indian Act* (referred to as the *"Act").*

[2] Section 58(3) of the *Act* provides:

> The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated

[3] Section 5 of the *Canadian Human Rights Act* (*CHRA*) provides:

> It is a discriminatory practice in the provision of goods, services, facility or accommodation customarily available to the general public
>
> (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[4] Section 2 of the *CHRA* provides:

> The purpose of this act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

II. The Facts

[5] On the eve of the inquiry, the parties agreed to submit a joint book of 178 documents. During the inquiry, 82 of these documents were received into evidence by agreement or identification by witnesses. I am satisfied that this documentary evidence represents all pertinent dealings and communications between the Complainants and officials of INAC.

[6] Two witnesses testified: Bruce Beattie, husband of the Complainant Ms. Beattie, who acknowledged authoring or editing virtually all exhibits bearing the Complainants' signatures, and Sheila Craig, Acting Associate Director, Lands and Economic Development, INAC. Each provided cogent evidence explaining the manner in which Complainants' applications for a locatee lease was processed and why it was not granted by the Minister of INAC.

[7] Ms. Craig testified that it is standard practice on receipt of an application under s. 58(3) to send the applicant an information package – which she characterized as an onerous list of requirements – before INAC begins to craft an appropriate lease. She testified that these requirements are based on directives contained in INAC's Land Management Manual, a manual which reflects past experience and legal decisions, enabling INAC officials to speak with one voice to ensure that nothing is overlooked in creating a lease that produces the highest rental income for Indian land owners.

[8] Mr. Louie is an Indian as defined in the *Act*. Mr. Louie is a member of the Okanagan Indian Band residing within Okanagan Reserve No. 1 on lands allotted to him by the band council with approval of the Minister of INAC. Mr. Louie's right of lawful possession is evidenced by certificates of possession issued under s. 20 of the *Act*.

[9] On June 27, 2007, Mr. Louie entered into a joint venture agreement with Ms. Beattie, who is also an Indian as defined in the *Act.* They agreed to form a "business association to respectively prepare and submit an Application for Use of Land within an Indian reserve …

pursuant to s. 58(3) of the *Act* for a long term and pre-paid residential lease of (certain) lands to the developer (Ms. Beattie).” The proposed lease was to be for a term of 49 years with a nominal rent of $1. The joint venture agreement required that Ms. Beattie was to pay all the costs of building a house on the leased land, and then carry out the subsequent marketing and assigning of the lease, the residual proceeds of which were to be divided between Mr. Louie and Ms Beattie on a 2/3 and 1/3 basis respectively. Significantly, the agreement stipulated that Ms. Beattie not market or assign the lease to a third party unless it was at a price and on terms acceptable to Mr. Louie. (Ex. A-1.8)

[10] By letter dated June 29, 2007, Mr. Louie applied to the BC Region of INAC for a locatee lease under section 58(3) of the *Act* and submitted:

(a) an Application for Use of Land Within an Indian Reserve signed by Ms. Beattie;

(b) his own Application for Lease of Locatee Land; and

(c) a Band Council resolution dated June 26, 2007, granting permission for a survey of the land, together with a pending survey plan. The stated use of the leased land was construction of one single family residence not greater than 500 m2. Mr. Louie requested completion of his application by September 1, 2007 and closed his letter with a declaration that certain matters were non-negotiable.

> “As you will note from the attached documents, the total rent payable for the full term of the proposed lease is a nominal pre-paid amount of one dollar. Please be advised that rent to be paid under the proposed lease is not a matter which is open for re-consideration by either the lessee or myself and neither of us has any intention of allowing your officials to interfere in that regard. For that reason, it would be unreasonable and entirely unnecessary that there be any requirement that an appraisal be provided to you by anyone and I will instead provide you with any necessary release of liability in respect to the setting of the rent.” (Ex. A-1.9)

[11] Virtually all subsequent written and oral communication between the Complainants and INAC officials was conducted on the Complainants behalf by Ms. Beattie's husband, Bruce Beattie.

[12] By July 12, 2007, the Complainants' applications had been assigned to Daryl Adam, an INAC Land Management Officer. On August 14, 2007, Mr. Adam emailed Mr. Beattie stating that he was "waiting for a response from our legal counsel respecting the release of liability related to the nominal rent…" (Ex. A-1.20)

[13] On August 17, 2007, Mr. Beattie sent a draft release to Mr. Adam. (Ex. A-1.23)

[14] On September 19, 2007, Mr. Louie posted an executed release to Mr. Adam which declared his intention to determine his affairs as a self-sufficient and independent entrepreneur:

> "I have elected to independently determine the amount of rent that shall be paid pursuant to the Lease, based on what I consider to be sound business criteria and without regard to any fictional market rent derived from any appraisal or other arbitrary valuation of the Lands which officials acting on behalf of the Minister might favour or recommend to me." (Ex. A-1.26)

[15] On September 21, 2007, Mr. Adam emailed a response:

> "In order for us to proceed with the proposed locatee lease, we will require detailed information with respect to the purposes and the parties involved, seeing as a nominal rent is being requested. …
>
> "As we've explained before to Mr. Beattie, there are certain steps that need to be taken when issuing locatee leases on reserve, such as: obtaining a BCR from the Band Council, having an appraisal conducted to determine the market value of the land and all relevant information related to the transaction." (Ex. A-1.30)

[16] On September 24, 2007, Mr. Adam's supervisor, Tamara Davidson, the Assistant Manager of INAC's BC Land and Trust Services, emailed Mr. Louie stating:

> "Within our policy directive, it states that any deviation from fair market rent should be justified by the proposed lessee, approved in writing by the locatee and recommended for approval by the Lands Officer. The locatee should also be advised to seek independent legal or financial advice before accepting less than fair market rent. In this case, the proposed rent is far less than market rent and there does not appear to be any benefit from the lease going to the locatee. Daryl has asked for more information surrounding this arrangement before a decision can be made on setting the rent. …"
>
> "We provide a service to the First Nations in British Columbia and are more than willing to work through the process collaboratively and respectfully." (Ex. A-1.32)

[17] Mr. Louie replied on September 24, 2007, rejecting Ms. Davidson's response:

> "…it is obvious you are either unwilling or unable to understand the essential point of the issues raised in my message to you. As indicated previously, I require you to provide, before the end of today, both an apology and confirmation that you and your officials will from now on respect my right to determine my own interests, and without any more of your so called "protection", which is entirely self-serving and is a cruel affront to my human dignity." Ex A-1.34

[18] On September 25, 2007, Mr. Beattie wrote to Ken McDonald, Acting Director, Lands and Trust Services, BC Region:

> "… The locatee lease applied for is only a minor element in a private joint venture in which the locatee, the proposed lessee and myself have been involved as business partners over a period of years. The essential terms of the proposed lease (particularly the rent) were determined in the context of the overall business plan and were never intended to be open for renegotiation or change once the lease application was submitted to INAC.
>
> "…Unfortunately, (we) became aware this past Friday that management in your office no longer intend to honour a principal condition upon which we have been relying, and consequently, the lease may not be completed. Specifically at issue is

> that the proposed lease was conditioned upon a non-negotiable and nominal pre-paid rent covered by a suitable release of liability from the locatee in favour of the Crown in respect to the setting of the rent." (Ex. A-1.35)

[19] On October 1, 2007, Mr. Beattie emailed Assistant Deputy Minister Caroline Davis, informing her that he had yet to receive a response to his letter of September 25, 2007, sent to Mr. McDonald:

> " … In my view the principal matter in contention is not particularly complicated. The INAC administration either respects, or does not respect, the fundamental entitlement of Indian persons to be presumed to be competent human beings to determine their own economic self- interest in respect to their personal interest in reserve land. A positive and probably the only reasonable answer to that one question ought to be sufficient to resolve all of the matters in issue." (Ex. A-1.37)

[20] Mr. McDonald replied on October 11, 2007. After acknowledging that he was aware that the nominal rent related to a joint venture between Mr. Louie and the Beatties, Mr. McDonald rejected the release provided by Mr. Louie and stipulated that certain steps would have to be carried out by the Complainants:

> "-further information on why there would be nominal rent for this proposed project.
>
> "-an appraisal of the lands must also be taken, as stated in directive 7-3 clause 2.6.2 of the Land Management Manual:
>
> > "Among the terms which should be negotiated at an early stage are: the proposed rent based on an independent appraisal provided by the proposed lessee and approved by Public Works & Government Services Canada.
>
> "-we would also require a Certificate of Legal Advice from the locatee to ensure that he agrees with the terms of the lease and understands his rights."

[21] Mr. McDonald stated that INAC would continue to work with the Complainants in a respectful manner if all these requirements could be met. Then Mr. McDonald made a gratuitous observation:

> "Unfortunately, the Indian Act does not say that the Minister is to lease lands on the terms and at the direction of the locatee. In this instance, we have not placed any more requirements on the lessee or locatee, we have merely informed both of you on what the requirements are for leasing reserve lands." (Ex. A-1.45)

[22] By letter dated October 17, 2007, Mr. Louie sent a one-page document titled Declaration of Benefit, dated the same day and signed in the presence of a lawyer, in which Louie stated that he had obtained independent legal and financial advice concerning the terms of his proposed locatee lease, that he understood its terms and consequences, and "That I am entirely satisfied that the terms of the Lease, as specified in my aforesaid Application for Lease of Locatee Lands dated June 28, 2007, are for my benefit within the meaning of the word "benefit" as employed in s. 58(3) of the Indian Act." (Ex. A-1.46)

[23] On October 18, 2007, Mr. Beattie continued his debate with Mr. McDonald:

> "… Clearly, any lease of Mr. Louie's possessory interest in Lot 170-1, which is all that was ever applied for, has no possible effect whatsoever on the Crown's underlying title to that land. As we view it, the Department's role in a s. 58(3) application is confined to a reasonable interpretation of the actual wording of that provision. That provision does not expressly or by necessary implication include most of the administrative steps you apparently consider to be "requirements". Departmental policy and practice are not the law and place no "requirements" upon Mr. Louie except to the extent they can be shown to be consistent with the intent of the law and are reasonably necessary to achieve the statutory objective." (Ex. A-1.47)

[24] By letter dated October 22, 2007, Mr. McDonald stated "…we require certain steps be taken in order to proceed with the proposed nominal rent locatee lease that are not legal requirements as such, but policy requirements stemming from the interpretation of the legislation." (Ex. A-1.48)

[25] Over the next several months, Mr. Beattie continued dealing with Mr. Adam and Mr. McDonald. On January 16, 2008, Mr. Beattie emailed Mr. McDonald, complaining about the failure of INAC's legal advisors to complete a promised draft locatee lease that would accommodate Mr. Louie's right to determine his own economic self-interest:

> "We also became aware that preparation of the draft lease, which we have for at least five months been repeatedly assured was nearing completion, apparently by that same legal advisor, has not even been started and will likely not begin until after we have complied with whatever new requirements he/she might now wish to impose upon us." (Ex. A-1.67)

[26] By letter dated January 16, 2008, Mr. McDonald informed Mr. Beattie that a draft lease was being prepared and would be forwarded to Mr. Louie for review. He also informed Mr. Beattie that a Certificate of Independent Financial Advice would still be required that "ensures Canada has discharged its obligation to exercise ordinary diligence with regard to the transaction." (Ex. A-1.71)

[27] On January 31, 2008, Mr. Adam sent a letter to the Chief and Council of the Okanagan Indian Band, informing them of Mr. Louie's application for a locatee lease of Lot 170-1, Block 4 at Okanagan IR#1 to Ms. Beattie for a term of 49 years for the nominal pre-paid rent of $1:

> "Pursuant to INAC policy, Chief and Council have the opportunity to express their views on this land transaction, and whether it conforms to the Okanagan Indian Band's land use policies, zoning by-laws and development plans." (Ex. A-1.72)

[28] On February 5, 2008, Mr. Beattie emailed Mr. Adam, objecting to the disclosure to the Band and Council of the nominal amount of rent to be paid under the proposed lease. (Ex. A-1.73)

[29] On February 8, 2008, Mr. McDonald emailed Mr. Beattie and sent copies to Ms. Craig, Mr Adam and several other INAC officials. (Ex. A-1.81)

> "I have reviewed the file this morning. First of all I must apologize for the fact that a record of our telephone conversation, complete with time lines for the proposed leasing activities was not sent to you as was discussed during the call
>
> "My recollection of the call, based on Daryl Adams notes is the following:
>
> "We had a short discussion about the nature of this transaction, and that this was an emerging issue. Locatees are increasingly looking for ways in which to use their CP lands to lever financing for housing purposes. We also discussed that this is "cutting edge" and as such we will endeavour to work with you to find a lease model that meets Mr. Louie's needs and will also satisfy INAC's requirements.
>
> "…the confrontational nature of your communication with my staff and myself makes it very difficult to work in partnership with you. Your tone and attitude immediately put everyone on the defensive. This is not conducive to the risk management approach I would like to foster."

[30] On February 13, 2008, Mr. Beattie emailed Caroline Davis, Assistant Deputy Minister, Indian and Northern Affairs Lands and Trust Services, complaining that some of Mr. McDonald's officials:

> "…have repeatedly behaved as though their sole function is to obstruct and stifle any economic advancement that locatees might attempt to pursue. That such officials repeatedly resort to entirely arbitrary and racially demeaning demands makes their obstructive activities even more reprehensible."
>
> "Please advise us at your earliest opportunity whether there is any possibility of intervention on your part to have this matter finally and properly resolved. Clearly, if resolution is once again left entirely to the discretion of BC Region, as it was last October, we will have little confidence that any progress will be achieved." (Ex. A-1.84)

[31] Ms. Davis responded by letter dated March 5, 2008 informing Mr. Beattie that as part of its administrative due diligence, INAC would ensure that the proposed locatee lease was in compliance with band by-laws, that access and services were available, that no environmental conditions were being created and that proper insurance was in place. Then Ms. Davis explained how s. 58(3) was to be applied:

> "Canada has a special relationship with First Nations and their members so, consequently, these instruments create a trust responsibility once executed. We will, therefore, ensure informed consent before entering into a transaction where there is a risk to the beneficiary, Mr. James Louie. To ensure informed consent, we would insist that Mr. Louie understand what he is giving up when he consents to a 49 year pre-paid lease for $1.00." (Ex. A-1.97)

[32] By letter to Mr. Beattie dated March 6, 2008, Ms. Craig repeated the stipulations of Ms. Davis and added a basis for continuing the leasing process:

> "That being said, I understand that fair-market value may be waived in this case provided that Mr. Louie receives independent financial and legal advice once the lease is completed and the terms have been set. We have a draft Lease for Mr. Louie to consider, and will not finalize the terms without first meeting with him; you are most welcome to attend. (Ex. A-1.100)

[33] On March 19, 2008, Mr. Louie sent a three-page letter to the Minister of INAC, Hon. Chuck Strahl:

> "I am writing to you as the Minister of Indian Affairs, but also because you are reputed to be a person of considerable integrity and fair mindedness toward Indian people. My hope is that you will bring those qualities to bear on a serious case of dishonourable and abusive treatment which I have experienced in my dealings with certain INAC lands officials acting on your behalf.
>
> "I am a member of the Okanagan Indian Band and have been employed by the Band administration for more than 25 years. During the past several years I have also pursued some private business ventures involving contract electoral officer services and custom land leases. From that experience, I consider myself fully capable of independently managing my own private business and financial affairs,

including taking full personal responsibility for my own decisions in respect to my private interest in reserve land. Over the last decade I have acquired several parcels of undeveloped land on the Okanagan IR # 1 near Vernon, BC under Indian Act certificates of possession (CP). My long term goal is to have those parcels developed for the economic benefit of myself and our Okanagan community.

"In order to make better economic use of my CP lands, the Indian Act requires me to apply for s. 58(3) ministerial leases. Those leases are clearly intended to provide economic opportunity and benefits for CP holders, but my experience is that the locatee lease application process, as it is currently administered in the BC Region, has become so grossly inefficient and racially offensive that it is more likely to inhibit than facilitate economic development. It is quite obvious to me that most of the negative aspects of the existing lease application process derive from an archaic and entrenched racist mindset that perceives all Indians to be incompetent to determine their own economic self-interest and who are therefore inherently in need of the degrading paternalism that INAC officials euphemistically call a "special relationship". While I recognize that this perception exists among INAC officials and is incorporated in INAC administrative policies and practices, I do not accept that it has any factual or legal justification. I therefore do not accept that it should have any binding effect on me or how I choose to use my own lands.

"During the past year I submitted two separate s. 58(3) applications for very simple residential leases. The form of those applications was deliberately designed to avoid any "special relationship" arising between myself and INAC. Both were made conditional upon INAC assuming no responsibility whatsoever for the setting of the principal lease terms, in particular the rent. To achieve that result, each application specifically required INAC to acknowledge and respect my right to independently determine a non-negotiable lease rent that was not intended to reflect market value. In addition to the usual application requirements, each application included a formal release and declaration of benefit to protect the Crown from any possible legal or fiduciary liability in respect to the setting of the lease rent. To further affirm my commitment to insuring that these land transactions would be absolutely risk free for the Crown, I gave my undertaking to provide any additional releases that INAC officials might request from me at any stage of the application process. INAC officials were made fully aware that this was the basis upon which each of my s. 58(3) applications was submitted for their acceptance and processing.

"By October of 2007, when the subdivision surveys for the two residential lots had been completed and the first application process had reached the stage when a

promised draft lease was to be delivered to me, I was instead informed that some unidentified management official within BC Region had essentially decided that allowing a locatee applicant to set their own lease rent, without INAC's paternalistic supervision and control, was inconsistent with established policy and conventional practice and would therefore not be permitted. This represented a clear reversal of INAC's position from what existed when the application was accepted for processing and throughout the four months that INAC's acceptance was relied upon by both myself and INAC's own officials.

"This late in the process and bad faith reversal of INAC's position was apparently an attempt to turn an administrative process which was always intended to be absolutely risk free for the Crown, into one where INAC management was now insisting that the Crown be subjected to all the potential liability risks that would be incurred if I had assumed no personal responsibility for setting the lease rent and had provided no releases or declarations to protect the Crown. And all for no reason, other than to justify imposition of additional and offensive procedural requirements which clearly serve no purpose other than to mitigate the potential risks of the "special relationship" which is created whenever INAC reserves to itself the exclusive authority to set the lease rent on a locatee's behalf.

"The obviously absurd position taken by those particular management officials led to an impasse in the application process which was not resolved until the BC Director of Lands and Trust Services personally intervened. By simply agreeing to respect, as a fundamental human right, my personal freedom to choose not to become involved in any oppressive and legally unnecessary "special relationship" with the Crown, the Director was able to propose a mutually agreeable course of action, upon satisfaction of which, I was assured that the lease, as it was originally applied for would be completed. Relying upon the Director's absolutely clear assurance that he had the full authority to commit INAC to completion of the lease in accordance with this agreement, I diligently fulfilled all of my part of that agreement by mid November. Since then, I have been repeatedly assured by lands officials that the drafting of the promised lease was either nearing completion or had been completed, and that I could expect to receive a copy shortly.

"Four months have now passed and I still have seen nothing of the promised draft lease. It has also become increasingly apparent that management level officials are once again obstructing the application process to prevent the Director from honouring the October commitment he made to complete the lease. My second residential lease application was accepted by the Director and assigned to a lands officer for processing almost two months ago, but has since come to the same fate as the first one. Both applications are now being held up by entirely unjustified

obstruction by management level officials who demonstrate no commitment to reason, justice or integrity.

"I believe that this chain of events clearly demonstrates a level of administrative dysfunction at the BC Regional lands office that can only reflect badly on any commitment you and your ministry have to integrity and honourable treatment of individual Indian land holders. The situation is certainly not conducive to economic development of reserve land, especially where CP land holding is well established and provides the only available opportunity for viable and sustainable economic development.

"My hope is that you will see fit to have someone from your staff investigate the serious issues I have tried to describe as accurately as I am able. I expect that any proper investigation will show that there is no dispute that commitments were made on your behalf and they were intended to be relied upon and honoured. There can be no denying that those commitments have not yet been honoured and that there exists no reasonable justification for continued delay. The only important question left to be answered is whether your ministry has sufficient administrative integrity to honour the promises and commitments made under your authority and on your behalf.

"What I have described in this letter is well documented and I would be pleased to provide copies of my records or any other information that an investigator might require. I thank you for giving this matter your serious consideration."

"James Louie" (Ex. A-1.109)

[34] On May 15, 2008, Hon. Minister Chuck Strahl replied to Mr. Louie:

"This is in response to your correspondence of March 19, 2008 regarding your applications for locatee leases on Okanagan Indian Reserve No.1.

"As a matter of law, there is a special relationship between a Certificate of Possession holder and Canada. The underlying title to reserve lands remains with the federal Crown, while the benefit of those lands and the right to possess them belongs to the Certificate of Possession holder. This is not the usual case for a private landholder. This is a special circumstance, giving rise to a "special relationship." A fiduciary relationship is created between the Certificate of Possession holder and Canada when Canada enters into Certificate of Possession leases. This is based on Canada's unilateral discretion over the Certificate of

Possession holder's Indian interest. Nothing short of legislative reform can extinguish or alter this relationship.

"Consequently, with Canada as the first party on any instrument granting an interest in reserve land, careful review of the leasing details must be taken into consideration so that the appropriate terms and conditions can be fully set out in the lease.

"Under the Indian Act, the authority to establish the rent lies with Canada and cannot be extinguished by any means except legislative change. This authority extends beyond setting of the rent and a release will not alter Canada's unilateral authority to establish lease terms, which would also include, but is not limited to, environmental provisions.

"The leasing process on reserve land is consistent nationally and derived from policy and procedures that are currently in place. Certain requirements must be met before issuing a leasehold interest to any third party on reserve lands.

"Options to opt out of the Indian Act for the management of lands are available to First Nation communities through the First Nations Land Management Act, self-government and treaty. The Department encourages First Nation members and councils to work toward long-term regimes that meet their community's needs.

"On March 31, 2008 a draft lease was sent to you for your review. I would ask that you work with the British Columbia regional office so that it may assist you in meeting the requirements for a locatee lease on reserve lands. I will encourage my officials to consult you in the setting of a rent which is economically viable."

"Chuck Strahl" (Ex. A-1.125)

[35] The application process continued until the end of 2008, with further unproductive exchanges between the Complainants and INAC. Of note is an internal exchange at INAC between Mr. McDonald and Ms. Craig regarding Mr. Beattie. Ms. Craig had informed Mr. McDonald by email on November 7, 2008, of a lengthy telephone conversation she had with Mr. Beattie, in which she rejected his demand for the immediate granting of a lease under his terms. Paragraph 3 of the email is significant:

> "He (Mr. Beattie) stated that the leases that he sent us were essentially the same as ours, except that he deleted a number of things that he felt were none of our business. He stated that Mr. Louie wanted one lease to use for himself and the other to pay for his house. He stated that the property was only worth $10K. I asked him what it would be worth in his mind if it were fee simple; he said over $300K. I then told him that was the reason we need to ensure Mr. Louie's interest was addressed before he leased it for 49 + years and then lost it for default. Mr. Beattie seemed to think that the CP would revert back to Mr. Louie on default; I don't know who would grant a mortgage under those terms."

[36] She advised Mr. McDonald to "Send it all back to him, with a suggested meeting date, and then close the file if we are still at an impasse …" (Ex. A-1.164)

[37] On November 11, 2008, Mr. McDonald emailed Ms. Craig:

> "Sounds good Sheila. By the way at the time I was in contact with him he was told by me to keep a low profile and I would do what I could. You will recall the two releases etc. **When he started his letter writing campaign he was told that we had no option but to go by the book.**" (Ex. A-1.166) (emphasis added)

[38] The parties reached a stalemate, with Mr. Louie insisting on his right as an entrepreneurial status Indian and Canadian citizen, owning lands held under Certificates of Possession, to freely develop part of his land holdings under a joint venture agreement with Ms. Beattie, and INAC officials repeatedly and resolutely asserting that they had an unfettered right to determine all aspects of the proposed lease, including periodic rent based upon appraisal of the subject land.

[39] I am satisfied that the Complainants' joint venture agreement was either misunderstood by INAC officials or was never given adequate consideration by them. It is a simply crafted three page agreement which states that Mr. Louie and Ms. Beattie have formed a business association to submit an application under s. 58(3) "… for a long term and pre-paid residential lease … with the intention of eventually marketing and assigning the lease to a third party." Several stipulations in the joint venture agreement are relevant, and ought to have guided INAC officials in the processing the Complainants' applications for a locatee lease:

> "2. The duration of the proposed Crown lease shall be for forty-nine (49) years, or such longer period as the parties might mutually agree upon …
>
> "3. The Lands shall be leased for the purpose of a single family residence including any improvements and uses which are necessary or reasonably ancillary to that purpose.
>
> "4. The Developer (Beattie) shall pay a one time payment of one dollar ($1.00) in full and final satisfaction of all rent due and payable under the terms of the Crown Lease.
>
> "5. Subject to paragraph 6 below, the Developer shall pay all costs incurred in preparation of the Application for Use of Land within an Indian Reserve, including any necessary plans, surveys, appraisals, environmental impact assessments and registration of the Crown Lease and all cost of developing marketing and assigning the Crown Lease.
>
> "6. The Developer shall be entitled to (be) reimbursed for all costs referred to in paragraph 5 above and shall have first priority against the proceeds of any assignment of the Crown Lease, with the residual proceeds divided between the parties on the basis of two third (2/3) to the Locatee and one third (1/3) to the Developer.
>
> "7. The Developer shall not market or assign the Crown Lease to a third party except at a price and on such terms as are acceptable to the Locatee."

[40] The first acknowledgment by an INAC official of the joint venture agreement is in an October 11, 2007 letter to Mr. Beattie from Mr. McDonald, responding to Mr. Beattie's letter of

September 25, 2007: "You have indicated in your letter that there has been a proposal for nominal rent for this particular locatee lease. Further, that the nominal rent related to a joint venture between yourself, the locatee and the lessee." Mr. McDonald then stated several requirements before INAC would consider the nominal rent including "further information on why there would be nominal rent for this proposed project." I infer that Mr. McDonald had not read the joint venture agreement. If he had, it would have become immediately apparent to him that the nominal rent of $1 was not intended to produce a direct benefit to Mr. Louie. Rather, the proposed $1/49-year lease was to accomplish two things: first, it constituted Mr. Louie's contribution to the business venture, and, second, once Ms. Beattie had constructed a single family home on the land and marketed it, the sale would be completed by an assignment of Ms. Beattie's lessee interest to the purchaser, and Mr. Louie would receive the benefit of 2/3of the net sale proceeds.

[41] The concerns expressed by Ms. Craig in her November 7, 2008 email regarding the potential loss of Mr. Louie's CP interest for default do not make sense in the context of the joint venture.

III. Purpose of the *CHRA*

[42] The Supreme Court of Canada has consistently held that human rights legislation has a fundamental and quasi-constitutional status, and as such should be interpreted in a broad and liberal manner that advances its broad underlying policy considerations:

> *Ontario (Human Rights Commission v. Simpson-Sears Ltd* ("*O'Malley*") [1985] 2 S.C.R. 536 at 546-47
>
> (Referring to the preamble in the *Ontario Human Rights Code*)
>
> "There we find enunciated the broad policy of the Code and it is this policy which should have effect. It is not in my view a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of

> construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in Insurance Corporation of British Columbia v. Heerspink, [1982] 2 S.C.R.145, app.157-158), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory."

[43] *C.N.R. v Canada (Human Rights Commission),* [1987] 1 S.C.R. 1114 at para. 24 (*"Action Travail")*

> "24. Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact. Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained."

IV. Does INAC Provide "Services" Under S. 5 of the *CHRA*?

[44] Extracts from two decisions are pertinent to the question whether all government actions are "services" within the meaning of s. 5 of the *CHRA.*

[45] In *Canada (Attorney General) v. Watkin* [2008] F.C.J. No 710 (C.A.) at page 9, the Court made the following observation:

> "Addressing this question, I agree that because government actions are generally taken for the benefit of the public, the "customarily available to the general

> public" requirement in section 5 will usually be present in cases involving discrimination arising from government actions (see for example *Rosin, supra* at para.11, and *Saskatchewan Human Rights Commission v. Saskatchewan (Department of Social Services)* (1988, 52 D.L.R. (4th) 253 at 266-268). However, the first step to be performed in applying section 5 is to determine whether the actions complained of are "services" (see *Gould, supra*, per La Forest J., para.60)."

[46] In *Canada (Attorney General) v Rosin*, 1 F.C. 391 (paragraphs 8 and 11), the Federal Court of Appeal determined that a service does not have to be available to all members of the general public in order to be "customarily available to the general public":

> "In order for a service or facility to be publicly available, it is not required that all the members of the public have access to it. It is enough for a segment of the public to be able to avail themselves of the service or facility. Requiring that certain qualifications or conditions be met does not rob an activity of its public character. The cases have shown that "public" means "that which is not private," leaving outside the scope of the legislation very few activities indeed.
>
> " … It is difficult to contemplate any government or branch of government contending that a service it offered was a private one, not available or open to the public. Indeed, it may well be said that virtually everything government does is done for the public, is available to the public, and is open to the public."

[47] INAC is a government ministry which offers numerous services to Indians who have status under the *Act.* In her testimony in the matter of s. 58(3) locatee leases, Ms. Craig referred to applicants as "clients" and explained the many ways that INAC intercedes on behalf of locatees in arranging leases with potential lessees.

[48] That s. 58(3) entails provision of services to a segment of the public is admitted by INAC's Lands and Trust Services itself, as evidenced by Ms. Davidson's email sent to Mr. Louie on September 24, 2007:

> "I can assure you that Lands and Trust Services is willing and able to work through the locatee process with you. We provide a service to the First Nations in

> British Columbia and are more than willing to work through the process collaboratively and respectfully."

[49] I conclude that INAC does provide services that are "customarily available to the general public," namely that segment of the public who are status Indians, and that these are beneficial services being "held out" and "offered" to the public.

V. Interpretation of S. 58(3) of the *Act*

[50] I am satisfied that the interpretation of s. 58(3) by the Federal Court of Appeal in *Boyer v. R.* [1986] 2 F.C. 393, applies to the facts of this case:

> "15 … The right of a Band member in the piece of land which is allotted to him and of which he has lawful possession, although in principle irrevocable, is nevertheless subject to many formal limitations. The member is not entitled to dispose of his right to possession or lease his land to a non member (section 28), nor can he mortgage it, the land being immune from seizure under legal process (section 29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve (section 25). These are all undoubtedly limitations which make the right of the Indian in lawful possession very different from that of a common law owner in fee simple. But it must nevertheless be carefully noted that all of those limitations have the same goal: to prevent the purpose for which the lands have been set apart i.e. the use of the Band and its members, from being defeated. **None of them concerns the use to which the land may be put or the benefit that can be derived from it. The land being in the reserve, its use will, of course, always remain subject to provincial laws of general application and the zoning by-laws enacted by the Band council, as for any land in any municipality where zoning by-laws are in force, but otherwise I do not see how or why the Indian in lawful possession of a land in a reserve could be prevented from developing it as he wishes. There is nothing in the legislation that could be seen as "subjugating" his right to another right of the same type existing simultaneously in the Band council. To me, the "allotment" of a piece of land in a reserve shifts the right to use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in a technical and legal sense, has disappeared or is at least suspended. ….**
>
> "17 … But in any event, I simply do not think that the Crown, when acting under subsection 58(3), is under any fiduciary obligation to the Band. The Guerin case

> was concerned with unallotted reserve lands which had been surrendered to the Crown for the purpose of a long term lease or a sale under favourable conditions to the Band, and as I read the judgment it is because of all of these circumstances that a duty, in the nature of a fiduciary duty, could be said to have arisen: indeed, it was the very interest of the Band with which the Minister had been entrusted as a result of the surrender and it was that interest he was dealing with in alienating the lands. **When a lease is entered into pursuant to subsection 58(3), the circumstances are different altogether: no alienation is contemplated, the right to be transferred temporarily is the right to use which belongs to the individual Indian in possession ...**
>
> "18 The conclusion to me is clear. Bearing in mind the structure of the Indian Act and the clear wording of subsection 58(3) thereof, there is no basis for thinking that the Minister is required to secure the consent of the Band or the Band council before executing a lease such as the one here in question. **It seems that the Act which has been so much criticized for its paternalistic spirit has nevertheless seen fit to give the individual member of a Band, a certain autonomy, a relative independence from the dicta of his Band council, when it comes to the exercise of his entrepreneurship and the development of his land."**

VI. Complaint of Discrimination - Findings

[51] The Complainants' allege that INAC infringed s. 5 of the *CHRA* by denying them a service, or differentiating adversely in the provision of a service, on the basis of national or ethnic origin.

[52] In processing the Complainants' request for a locatee lease, INAC relied on criteria and procedures in its Land Management Manual in its attempt to determine if Mr. Louie's proposed transaction was viable and to his benefit. As part of this process, INAC demanded an independent appraisal to determine fair market value, without regard to the entrepreneurial joint venture agreement between the Complainants, and in November 2008, INAC demanded that Mr. Louie establish to INAC's satisfaction, proof of his "ability and competence to enter into the proposed transaction." (Ex. A-1.167)

[53] INAC attempted to impose unilateral authority over every aspect of the Complainants' proposal for a locatee lease. Throughout the processing of Mr. Louie's application, INAC's officials took the position that it was their "duty" to intervene to protect Mr. Louie's interests as a status Indian, and dictate the nature and terms of the sought-after locatee lease. In doing so, they demonstrated how the *Act* has become an anachronism that is out of harmony with the guaranteed individual liberty, freedom, and human rights enjoyed by all Canadians.

[54] INAC's paternalistic conduct toward Mr. Louie was unequivocally endorsed and supported by then Hon. Minister Chuck Strahl in his letter to Mr. Louie on May 18, 2008. The Minister bluntly pronounced that Mr. Louie could not dictate the terms of his sought-after locatee lease, and claimed that "a fiduciary relationship is created … when Canada enters into Certificate of Possession leases. …Under the Indian Act, the authority to establish the rent lies with Canada and cannot be extinguished by any means except legislative change. This authority extends beyond the setting of the rent and a release will not alter Canada's **unilateral authority** to establish the lease terms, which would also include but is not limited to environmental provisions." (emphasis added)

[55] The Hon. Minister was mistaken. There is no fiduciary obligation involved in the exercise of ministerial discretion under s. 58(3). Moreover, a unilateral exercise of discretion would be injudicious and negate the purpose of s. 58(3), which is intended to facilitate the leasing of land by individual Indian land owners who envision a benefit for themselves (See *Boyer*, supra).

[56] The Complainants' application for a ministerial lease was based upon a joint venture agreement under which Ms. Beattie would construct a single family home on the leased land and then sell it at a price and on terms acceptable to Mr. Louie and divide the net sale proceeds. The stipulated rent of $1 was not based on the actual value of the land, and was not the benefit that Mr. Louie sought to achieve through the joint venture. The benefit that both Mr. Louie and Ms. Beattie sought to achieve was by way of the development of a single family home on the

leased property, and its eventual sale. Rather than focussing on the application for a lease in the broader context of the joint venture agreement, and the benefit therein to Mr. Louie, INAC officials insisted that they would draw up a lease in compliance with all applicable Land Management Manual requirements, including a beneficial rental return over a 49-year period based on an appraisal of the land in its prospective improved state.

[57] INAC's refusal to accept that Mr. Louie had the right to determine the benefit that might accrue to him from the commercial enterprise that he and Ms. Beattie had undertaken brought the application process to a standstill. For all practical purposes the Complainants' application for a ministerial lease on the terms that they had agreed upon was rejected by the Minister in his May 15, 2008 letter to Mr. Louie. The Minister's letter exacerbated INAC's discriminatory treatment of the Complainants.

[58] While it was not raised in evidence before me it is noteworthy that on June 18, 2008, little more than a month after writing to Mr. Louie, the then Hon. Minister announced that legislation extending human rights protections to all First Nations communities had received Royal Assent. "Passage of Bill C-21, An Act to amend the *Canadian Human Rights Act* marks a significant turning point in the relationship between First nations and the Government of Canada," said Minster Strahl. "It underscores this government's strong commitment to protecting the human rights of all Canadians." The announcement, however, had no apparent effect on INAC's position regarding the complainants' applications. Nothing changed, and the complaint before me is the result.

[59] Since the *Act* is now subject to the *CHRA*, I conclude that the application process under s. 58(3) must become an enabling administrative function that recognizes and accepts status Indians (other than those who are minors or mentally incompetent) as personally responsible Canadians capable of making their own determinations of anticipated benefits to be derived from leasing their lands, and that ministerial discretion must not be exercised unilaterally.

VII. Decision

[60] The Complainants have substantiated their allegation of being subjected to a discriminatory practice, a denial of services, as described in s. 5 of the *CHRA.* They have established, *prima facie*, that they, as status Indians, have been denied by INAC officials, up to and including then Hon. Minister Strahl, the services properly available to them under s. 58(3) of the *Act*.

[61] The Complainants are entitled to relief in the absence of justification on the part of the INAC.

[62] Sections 15(1)(g) and (2) of the *CHRA* provide that it is not discriminatory practice if there is a *bona fide* justification for the denial of services. To have *bona fide* justification, INAC must establish that an accommodation of the Complainants' needs would impose undue hardship on INAC in accommodating those needs.

[63] INAC has failed to make out a *bona fide* justification under ss. 15(1)(g) and (2).

VIII. REMEDY

[64] Pursuant to section 53(2) (a) of the *CHRA*, the Respondent is to comply with the following orders:

(1) The Respondent shall reconsider the applications of the Complainants for a locatee lease in accordance with the Tribunal's decision and order;

(2) The Respondent shall cease its discriminatory practices and take measures, in consultation with the Canadian Human Rights Commission, to redress the practices or to prevent the same or similar practices from occurring;

(3) The Respondent shall amend its Land Management Manual and other policies to provide that where individual locatees (other than those determined to be mentally

incompetent or under the age of majority) have determined for themselves that a transaction is for their individual benefit, INAC will accept that determination and conduct the processing of requested lease on that basis;

(4) The Respondent shall comply with the foregoing orders within six months of the date of the Tribunal's decision in these proceedings;

(5) The Tribunal shall retain jurisdiction and remain seized of the matter for nine months from the date of its decision in this proceeding, in order to receive further evidence, hear additional arguments and/or make additional orders in the event that the parties disagree regarding the interpretation or implementation of the relief ordered.

Signed by

Wallace G. Craig
Tribunal Member

Ottawa, Ontario
January 26, 2011

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1441/6709

Style of Cause: Joyce Beattie and James Louie v. Indian and Northern Affairs Canada

Decision of the Tribunal Dated: January 26, 2011

Date and Place of Hearing: July 19 to 22, 2010

Kelowna, British Columbia

Appearances:

Bruce Beattie, for the Complainants

Brian Smith, for the Canadian Human Rights Commission

Fiona McFarlane, for the Respondent