Date: 19980702

Docket: T-1737-97

BETWEEN:

SIMON SMITH, DAVID PAUL, CHRIS TOM, VERN TOM, JOHN ELLIOTT, CURTIS OLSEN and JOE BARTLEMAN, on their own behalf as Chief and Council of the Tsartlip Indian Band and on behalf of the Tsartlip Indian Band

Applicants

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, CLYDESDALE ESTATE HOLDINGS LTD., BLAINE WILSON, TRACY WILSON, GENEVIEVE ELLIOTT, LAVINA OLSEN and GEORGE WILSON

Respondents

- and -

TROY AND SUSAN LANIGAN, DUANE AND JAELA FRANKLIN, RICHARD AND TAMARA NICHOLSON, WAYNE AND NICOLA OLSTEN, DWAYNE AND TARA FOSS, CLIFF AND LYUNN KETCHESON, CURTIS AND CARMEN GALE, CHARLES AND JEANNINE POWELL, WALLACE AND MARY LUMLEY, WARREN AND ARLENE REID, HAROLD AND LENORA HARKNESS, GARY AND LESLEY MCKNIGHT, MAURICE AND DOREEN FOORD, JOHN MCMURRAY AND FRANHARDER, SHAWN AND TREENA ARMITAGE, BOBBI AND ELDON SADLER, and JIM AND TERRI FOSS, collectively referred to as the *Clydesdale Estates Residents Association*

Intervenors

REASONS FOR ORDER

ROULEAU, J.

[1] This is an application for judicial review in which the applicants are seeking: a declaration that the Minister of Indian Affairs and Northern Development breached the fiduciary obligation which he owed to the Tsarlip Indian Band when, in April of 1997, he granted a lease to Clydesdale Estate Holdings Limited for a term commencing April 1, 1996 for lands which were part of the South Saanich Indian Reserve Number 1 in the Province of British Columbia; a declaration that in granting the lease the Minister acted contrary to the provisions of the *Indian Act*, R.S.C. 1985; and, a writ of *certiorari* quashing the lease and declaring it void and of no effect.

[2] The individual named respondents, Blaine Wilson, Tracy Wilson, Genevieve Elliott, Lavina Olsen and George Wilson, are all members of the Tsarlip Band. Collectively, they held certificates of possession for lots 5 and 5A, Block 6, South Saanich Indian Reserve Number 1, pursuant to section 20 of the *Indian Act*. In April of 1996, the respondents, who are also shareholders of the Clydesdale Estate Holdings Limited, requested the Minister to issue a lease to their corporation for the lands which they held under their certificates of possession, in accordance with subsection 58(3) of the *Indian Act*. The purpose was to pursue the ongoing development of a manufactured home subdivision and to legitimize the existing occupation by non-natives on the Reserve known collectively as the Clydesdale Estates Residents Association (the intervenors). During the previous several months, the latter had occupied part of the lands and were living in manufactured homes on the site pursuant to what is referred to in the vernacular as a "Buchshee" lease or right of occupation.

[3] A brief history of the events leading up to this application is essential in order to better

understand these proceedings. In early February of 1996, an official of the Department of Indian Affairs and Northern Development ("DIAND") was contacted by a group representing the intervenors seeking a way to regularize, as well as legalize, their occupation of manufactured homes on the Reserve. During this meeting it became evident that the Chief and Council of the Tsarlip Indian Band opposed the development. The Band was aware that certain steps had been initiated to regularize the occupancy of the reserve lands as it had observed an engineering firm retained by the locatees on Reserve lands for the purpose of initiating an environmental assessment.

[4] In April of 1996, the applicants submitted and application to the Minister seeking a lease under subsection 58(3) of the *Indian Act*, That provision reads as follows:

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.	Le Ministre peut louer au profit de tout Indien, à la demande de celui-ci, la terre dont ce dernier est en possession légitime sans que celle-ci soit désignée.

[5] When the request was communicated to the Band Council, it reiterated its opposition and requested DIAND to have the development stopped and the existing homes removed from the Tsarlip Reserve.

[6] A preliminary environmental screening report was provided to the Band in May, 1996. It responded by letter to the Minister and officials of DIAND restating its opposition to the development and again requesting that the homes be removed. Thereafter, correspondence was exchanged between officials of DIAND, the Minister and the Chief and Band Council suggesting the negotiation of an amicable solution.

[7] The Tsarlip Reserve, comprising approximately 460 acres, has a sewer and water system constructed between 1984 and 1988 which is linked to facilities owned by the District of Central Saanich. The Band's use of the sewage system is limited to 375 units pursuant to the existing agreement with the Provincial Minister and the District; 180 units on the Reserve had been connected.

[8] During the course of a preliminary meeting between the respondents and the Band Council no formal approval was conveyed but it was acknowledged by the latter that it had little power to oppose the development since one Arthur Cooper, a member of the Band, had a similar project of some 70 manufactured homes which had been in existence under "Buckshee" agreements. This status had

prevailed for some 10 years and had been tolerated by the Council. The Cooper development was not connected to the infrastructure facilities on the Reserve; as a matter of fact, Mr. Cooper did not even have a lease from the Minister under subsection 58(3) though by Certificate of Possession he was in lawful possession of the lands in question.

[9] During the next several months, while conducting environmental assessments, officials of DIAND continuously corresponded with the Band Council keeping it abreast of all developments and seeking its input.

[10] As a result of ongoing opposition, the manufactured homes that had already been connected to the Reserve sewage system were disconnected. This situation created additional delays before the execution of a lease by the Minister who had to be satisfied with the environmental assessment as well as other requirements pertaining to the new development. Of particular concern was the installation of a self-contained sewage treatment plant which had to conform to all statutory and regulatory exigencies. It was not until some time in 1997 that DIAND as well as Public Works Canada and Health Canada were satisfied with respect to the environmental assessment and compliance with the Indian Reserve Waste Disposal Regulations.

[11] Due to the many consultations concerning the engineering and technical assessments, it was not until late January of 1997 that approval was given to the Respondents and the Intervenors. Following the approval, certain lacunas were brought to the attention of DIAND by the Band Council, in particular concerns over storm water retention. After these issues and concerns had been either addressed or corrected, a satisfactory engineering and technical report was prepared and forwarded to the Band Council.

[12] In April, 1997, DIAND finally gave its approval and a lease pursuant to subsection 58(3) of the *Indian Act* for lots 5 and 5A was executed in favour of the corporate respondent company, Clydesdale Estate Holdings Ltd. The lease is retroactive to April 1, 1996 and terminates on the 30th day of September 1997. It also provides that the Minister has the option to extend it for a further period of up to a total of 24 years and 11 months upon approval of a continued adequate sewer infrastructure as well as compliance with the environmental assessment.

[13] Between July and December of 1996, there were numerous meetings between the Respondents and the Band Council. At a meeting on September 14, 1996, Mr. Blaine Wilson was told to be patient since someone else had submitted a request for 50 additional units and others within the Reserve were contemplating similar projects. These individuals were told that the Band Council wanted to first settle the Cooper subdivision as it was concerned that an expansion of the sewage system might bring about tax levies on the Reserve.

[14] A review of the Minutes of the Band Council meeting of September 14, 1996 reveals that one of the members, Samuel Sam, stated the following:

> There is no way we can stop you from doing anything. But one thing that stops us is the restraint. We have to charge you guys so we can later buy more capacity.

[15] In a letter of October 4, 1996, the Band Council, writing to Blaine Wilson, indicated that it was not prepared to allow the connection of services to proceed until some form of agreement has been reached on a number of other concerns. It acknowledged that water and sewer lines in the development had been laid and joined to the Reserve services and advised that trailer homes already

connected should be detached until agreement could be reached on the following:

1. Installation of meters to measure sewer and water
2. Visual inspection of water lines, that they are acceptable.
3. Agreement as to charges for Band water and sewer.
4. Agreement as to unit connection, costs.
5. Agreement regarding compensation or fees for services.

[16] At a meeting in October of 1996, the discussion centered on infrastructure maintenance costs; the Chief advised "we are currently in the red with our sewage repair bills". Mr. Wilson was then asked to put further development on hold until after the next Band Council elections, after which discussions were to be pursued. A member of the Council then suggested "we have not yet negotiated a price for each hook-up for the trailers. You gave a price, we have not accepted it. That is the key issue right now. We cannot stop you but the units have to pay for the hook-ups. We need the money to pay sewage capacity in the future. We want to negotiate dollars. Hold off until after the elections".

[17] By letter dated November 9, 1996, Council once again informed Mr. Wilson that he should suspend further development since it had not yet agreed on the water and sewer connection charges for the existing trailer homes.

[18] During a Band Council meeting on November 30, a letter from an officer of Indian Affairs was submitted confirming to the Band Council that the applicants were in lawful possession and reiterating that it should be aware of the pending lease agreement with Clydesdale Estate Holdings Ltd.

[19] Band Council elections were held in December 1996. The new group drafted a zoning By-law which sought to restrict development of Reserve land for commercial activities as well as impose the

condition that all developments on the Reserve must seek and obtain prior approval from the Council's Zoning Advisory Committee. The By-law was approved and passed by the Band Council on December 23, 1996 and forwarded to the Minister on the same day. In January of 1997, the Minister confirmed that the By-law was legally effective pursuant to section 82 of the *Indian Act* as of January 31, 1997.

[20] Thereafter, the Band refused to allow the respondents' development to be connected to the Band's sewer system. In addition, the Band made an application for injunctive relief to the provincial court of British Columbia seeking the removal of the unauthorized manufactured homes.

[21] The environmental assessment conducted by the Minister of Indian Affairs and Northern Development was concluded. Since the proposed development was no longer connected to the Reserve sewer system the named respondents, through their corporation Clydesdale Estate Holdings Ltd., installed a hydroxyl sewage disposal facility. It should be noted that with respect to the water system, the manufactured homes have been allowed to remain connected to the Band's source on a temporary basis.

[22] Throughout the discussions between the Band Council and the Respondents, the minutes of meetings never indicate that the Band wished to prohibit the development nor seek the removal of the existing manufactured homes. The discussions centered primarily on either the costs of sewer hook-ups or expansion of the existing system and the financial burden that this could impose on the Reserve. The concept of a By-law restricting development and requiring consent of the Band Council's Zoning Advisory Committee was never even alluded to until after the election of December 1996.

[23] At the hearing before me, counsel for the applicants argued that the Minister owes a fiduciary obligation to the Band Council. Though in *Boyer v. Canada* [1986] 4 C.N.L.R. 53, the Court of

Appeal held that the consent of the Band Council was not a prerequisite to the Minister granting a lease under subsection 58(3), the present application, it is submitted, raises issues which were not discussed in *Boyer*. The applicants suggest that the only legal matter determined in *Boyer* was whether or not a Band Council's consent was required when a request had been submitted to the Minister under subsection 58(3) of the *Act*. In these proceedings however, unlike in *Boyer*, the Indian Reserve Waste Disposal Regulations were not implicated.

[24] Further, the applicants suggest that in light of the decision in *Guerin v. R.*, [1984] 2 S.C.R. 335, the *Indian Act* vests substantial authority with the management of reserves in Band Councils and by corollary, they have implied authority over the matters at issue in these proceedings. Any allocation of the right of possession to a portion of a reserve, it is argued, does not change the purpose for which the reserve is held and managed.

[25] The applicants also argue that it is clear from the judgment of the Supreme Court of Canada in *R. v. Devereux* (1965) 51 D.L.R. (2d) 546, that eviction proceedings pursued by the Minister at the request of the Band Council was the procedure upheld by the Court. The eviction of a non-band member who is an overholder tenant on lands previously held by Certificate of Possession was acknowledged as conforming with the *Indian Act*. Similarly, the Minister should act as directed by the Band's wishes when they requested the removal of the manufactured homes.

[26] It is also maintained by the applicants that the Minister erred in law when he issued the lease to regularize the occupation and development which was prohibited by By-law. The By-law came into effect three months prior to the Minister issuing the lease and he was well aware that the development did not comply with the requirement of having first obtained consent of the Council's Zoning Advisory

Committee. The applicants rely on *The Corporation of the City of Ottawa et al v. Boyd Builders Limited* [1965] S.C.R. 408 as authority for this proposition.

[27] Finally, the applicants contend that the Court should set aside the Minister's approval of the environmental assessment since the consultant retained by the Band Council was suspect of the method for sewage disposal approved by the Minister.

[28] I have now reviewed the authorities referred to by the applicants and I am not prepared to accept their interpretation of what they consider to be the applicable jurisprudence.

[29] In *The Queen v. Devereux*, supra, the facts reveal that the Band Council did seek and receive the Minister's assistance to dispossess a non-Indian who was on reserve land initially allocated by lease pursuant to subsection 58(3) of the *Indian Act* to a member of the Indian Band. The non-Indian had assisted in working on the aboriginal farm since 1934; he had entered into a further leasing agreement with the widow of a member of the Sixth Nation Band. At her request the Crown granted a lease of the farm for a term of 10 years to Mr. Devereux. Upon expiry, two successive permits were granted to the defendant, allowing him to occupy the lands. When those permits expired he nevertheless remained in possession. He claimed rights by devise under the will of the deceased holder of the Certificate of Possession. Mr. Devereux was notified to vacate the property at the expiration of his permit and the Band Council passed a resolution alleging that the defendant was in unlawful possession of the lands and requested the Attorney General of Canada to pursue the eviction.

[30] The Court held that following the death of Mrs. Davis in 1958, though she had held the land under a certificate of possession dated 1954, issued under subsection 20(2) of the *Act*, the rights of the defendant had expired upon the termination of his permit, four years after the death. The Court

concluded that a non-Indian may only enjoy possession in one of two ways; he is in possession under a lease made by the Minister for the benefit of any Indian under section 58(3) or under a permit under section 28(2). There being no further lease arrangement between an Indian and the Minister and the permit having expired, the Band Council could require the Minister to evict the overholding tenant who was a non-Indian.

[31] In the present case, contrary to the fact situation in *Devereux*, the Wilsons and the Elliotts are Indians who have a valid right to lease under subsection 58(3) and the Minister has no power to interfere, let alone be directed by the Band Council to evict them.

[32] A careful reading of *Boyd Builders* also suggests that the application of the principles derived therefrom are not applicable nor are they consistent with the argument submitted by counsel for the applicants. In *Boyd Builders*, the plaintiff had acquired land in the City of Ottawa which was zoned permitting apartment houses. He proceeded to draft plans for an apartment building and applied for a building permit. The land was unaffected by restrictions at the time of the purchase. Some time later the City of Ottawa passed a new general zoning By-law and the particular lands were zoned in a category permitting the erection of apartments. Surrounding residents raised objections and recommended that the lands in question be re-zoned to prohibit the building of apartment houses. The planning Board then amended the By-law, allowing for the recommended variations.

[33] Following the refusal of the permit, Boyd Builders made an application to the courts for a mandatory order requesting the issuance of a building permit. The application was adjourned pending the hearing of the City's application to the Municipal Board to confirm the amendments to the zoning

By-law. The Court found that the By-law amendment was not in effect until approved by the Municipal Board and therefore when the respondent filed his application for a building permit and sought a mandatory order that a permit be issued, there was no valid By-law in existence prohibiting the grant of such permit. The Court concluded that Boyd Builders had a *prima facie* right to the permit and, upon its refusal, a *prima facie* right to a mandatory order that it should be granted. Most significantly, the Court held that these rights could only be defeated if the municipality could demonstrate that it had in existence, a clear plan for zoning the neighbourhood with which it was proceeding in good faith and with dispatch.

[34] Applying these principle to the case at bar, there is no evidence before this Court that the applicants had a clear intent to restrict or zone the respondents development before the request was made for the Minister to issue a lease. Indeed, in April of 1996, when the respondents requested the Minister to issue a lease since they were the valid holders of Certificates of Possession, no By-law had even been contemplated by the Saanich Band Council. The only impediment to the mandatory issuance was a environmental assessment which was eventually conducted and approved by the Minister. The first indication in the evidence of any intention by the Band Council to enact a zoning bylaw was in November of 1996. Accordingly, the respondents request for a lease preceded the Band Council's intent to enact a zoning bylaw by a period of at least seven months.

[35] It was the suggested by counsel for the applicants that the environmental assessment concluded and approved by the Minister should be subject to further review since the consultants hired by the Band Council alleged some deficiencies with the Hydroxyl sewage disposal system proposed and already in place. However, the evidence shows that the Minister was clearly aware of the water and sewage issues relating to the development and that these matters were thoroughly considered and reviewed prior to the grant of the lease.

[36] What the applicants are in effect asking the Court to do is to review the merits of the Minister's decision and determine whether he properly weighed the evidence before him regarding sewer and water services for the development and made the right decision in issuing the lease. However that is not the role of this Court in fulfilling its judicial review function. Rather, the Court must show deference to the exercise of the Minister's discretion and should not interfere unless it is established, on the facts, that he exercised his discretion based on irrelevant factors, in bad faith, failed to consider relevant facts or erred in law. I am not satisfied that any such error exists here and accordingly there is nothing to warrant my interference with the Minister's decision.

[37] In summary, I am convinced that this entire matter could have been resolved by simply relying on the decision of the Federal Court of Appeal in *Boyer v. The Queen*. Despite counsel for the applicants efforts to distinguish *Boyer*, the facts and the applicable legal principles are analogous to the case at bar.

[38] In *Boyer* an Indian Chief and the Band Council brought an application for a declaration that a lease of Reserve land entered into between Her Majesty and an Ontario Corporation was void and of no effect. As in this case, the shareholders of the Ontario corporation were aboriginals and holders of a Certificate of Possession of a parcel of land situate within the reserve which had been allocated to them in 1973 by the Band Council with the approval of the Minister. They then applied to the Minister for permission to lease the land for the purpose of development to a corporation of which Mr. Boyer and his wife held all the outstanding shares. There was a Band Council By-law imposing certain restrictions. The Band challenged the Minister's authority to enter into such a lease without its formal consent, adding a few objections regarding some aspects of the development project.

[39] The Minister nevertheless executed a lease in favour of the corporation on behalf of Mr. Boyer who had submitted the request. The Band suggested that the lease was invalid since it required the consent of the Band Council. The Court wrote at page 401, making particular references to subsection 58(3), as follows:

> ... subsection 58(3) only governs when there is a request by the Indian who is in lawful possession of the land ...

The Court continued at page 402:

> If one looks at the strict context in which the provision was enacted, one is certainly not easily led to believe that failure to refer to the consent of the Band in subsection 58(3) was due to an oversight...
>
> Under the scheme of the *Indian Act*, say the appellants, the interest of a locatee, such as Corbière, in his or her parcel of reserve land, is subordinate to the communal interest of the Band itself, and the allocation of possessory rights to Band members does not suppress the recognized interests of the Band in the development of allotted lands; besides, the rule is that non-Indians cannot have possession of reserve lands unless these lands have been surrendered by the Band and except for a few limited purposes set out in the Act ...

And at page 404 the Court continued:

> 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 the 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 the technical and legal sense, has disappeared or is at least suspended.

[40] With respect to the fiduciary obligations arising from the *Guerin* decision, the Court made the

following comments at page 405:

> 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 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 and no interest of the Band can be affected.
>
> ...he [the Minister] cannot let extraneous consideration enter into the exercise of his discretion, which would be the case if he was to take into account anything other than the benefit of the Indian in lawful possession of the land and at whose request he is acting. The duty of the Minister is simply not toward the Band.

[41] That reasoning is equally applicable to the case at bar. The decision of the Minister pursuant to subsection 58(3) of the *Indian Act* to grant a lease of Lots 5 and 5A to the applicants was reasonably open to him in light of the evidence and the applicants have failed to establish that in doing so, the Minister committed a reviewable error which would warrant the intervention of this Court.

[42] For these reasons, the application is denied.

JUDGE

OTTAWA, Ontario
July 2, 1998