Federal Court  Cour fédérale

Date: 20091126

Docket: T-645-09

Citation: 2009 FC 1214

Ottawa, Ontario, November 26, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

JORDIE PROVOST

Applicant

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, ALTALINK MANAGEMENT LIMITED AND PIIKANI BAND COUNCIL

Respondents

REASONS FOR ORDER AND ORDER

[1] AltaLink Management Limited has all the necessary Alberta and federal government approvals to construct a high-voltage electrical transmission line from Pincher Creek to Lethbridge. Because part of the intended route runs across the Piikani Indian Reserve No. 147, the necessary approvals include a permit from the Minister of Indian and Northern Affairs and a band council

resolution. The band council resolution consenting to the project was passed in June 2008 following which the Minister issued the permit the following month.

[2] Nine months later, Jordie Provost, a Band member, applied to this Court for orders setting aside both the permit and the supporting band council resolution. Broadly speaking, it is Mr. Provost's position that he was entitled to prior notice; that the Minister and the Band Council had a duty to consult with him, and indeed with the entire Band; that he was given no opportunity to make submissions or comments and that the Minister and the Band Council were obliged to consider the comments he would have made and to take them into account before deciding whether to pass a resolution and to issue the permit.

[3] The two applications, T-645-09 and T-646-09, which were later consolidated under court docket number T-645-09, are opposed by the Minister, the Piikani Band Council and AltaLink.

ISSUES

[4] The underlying legislation is section 28 of the *Indian Act* which provides:

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.	28. (1) Sous réserve du paragraphe (2), est nul un acte, bail, contrat, instrument, document ou accord de toute nature, écrit ou oral, par lequel une bande ou un membre d'une bande est censé permettre à une personne, autre qu'un membre de cette bande, d'occuper ou utiliser une réserve ou de résider ou autrement exercer des droits sur une réserve.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.	(2) Le ministre peut, au moyen d'un permis par écrit, autoriser toute personne, pour une période maximale d'un an, ou, avec le consentement du conseil de la bande, pour toute période plus longue, à occuper ou utiliser une réserve, ou à résider ou autrement exercer des droits sur une réserve.

[5] The applications give rise to the following issues:

a) Was the Minister under a legal duty to consult with Mr. Provost before issuing the permit? If so, was that duty satisfied?

b) Is the band council resolution a decision of a federal board, commission or other tribunal subject to judicial review by this Court?

c) Was the Band Council under a legal duty to consult with Mr. Provost before passing the resolution? If so, was that duty satisfied?

d) Does Mr. Provost have standing to make these applications? The normal rule is that only persons "directly affected" have standing. If Mr. Provost was not directly affected, should he be given public interest standing?

e) Were the applications filed within time? The normal delay is 30 days which begins to run from the date the decision was first communicated to the applicant. If not, should the Court, in its discretion, extend the delays?

f) In any event, should the Court, in its discretion, refuse to grant the relief sought by Mr. Provost considering the delays and that the respondents had begun to act on the permit before the applications for judicial review were filed?

DECISION

[6] In my opinion:

a) The Minister was under no legal duty to consult with Mr. Provost before issuing the permit. However, if he had such a duty, that duty was satisfied;

b) In passing the resolution favouring a permit, the Band Council was acting as a federal board, commission or tribunal, and the resolution is subject to judicial review;

c) The Band Council was under no legal duty to consult with Mr. Provost before passing the resolution. However, if it had such a duty, that duty was satisfied;

d) Mr. Provost has standing to make the specific allegations set out in his applications;

e) Given the answers above, it is not necessary to consider whether the applications were timely;

f) In any event, should holdings a) and c) be wrong, nevertheless, the Court, in its discretion, should refuse to grant Mr. Provost any remedy.

THE PROJECT

[7] The proposed 240 kilovolt (kV) transmission line is intended to address the need for additional wind power generation in southwest Alberta. The project involves the construction of a new substation, the expansion of two existing substations and the construction of over 80 km of double-circuit 240 kV transmission line. The planned right-of-way would cross federal land, including 26 kilometres of the Piikani Reserve, another reserve, the Canadian Food Inspection Agency's property at its Lethbridge laboratory, privately owned land and unoccupied Alberta Crown land.

[8] The Alberta Electric System Operator had determined that the project was needed. It was approved by the Alberta Energy and Utilities Board and assigned to AltaLink through regulations.

[9] The obvious route, which runs more or less in a straight line, crosses the Piikani Reserve from the southwest to the northeast. A lower voltage transmission line is already in place, and so the intention is, to the extent practical, to follow the existing right of way. However, AltaLink has always made it clear that if it could not conclude arrangements with the Piikani Nation, it was prepared to route the transmission line around the reserve.

THE EVIDENCE

[10] The sequence of events leading up to the impugned band council resolution and ministerial permit are not in controversy. What is in controversy is what Mr. Provost knew, or should have

known, at various times and whether his sanguinity until eight months after the requisite permit was issued was justified.

[11] Evidence in affidavit form was forthcoming from Mr. Provost; Derek Green who is the Alberta Regional Manager of Lands and Environment for Treaty 7 First Nations at Indian and Northern Affairs Canada ("INAC"); Kirby Smith, currently the Manager of Resource Development and formerly the Executive Coordinator of the Piikani Nation; Stephen Hodgkinson, AltaLink's Vice-President, Corporate Development and Business Partnership, and Conrad Journeault, AltaLink's right-of-way planner. All but Mr. Journeault were cross-examined.

[12] According to Mr. Provost, had he been given the opportunity he would have raised the following concerns:

a) The high-voltage overhead transmission line (HVOTL) project will be much larger in scale than the existing transmission line that runs across the Reserve;

b) Use of the existing right-of-way (ROW) where the other transmission line is located and information about what will happen to the old transmission line. The HVOTL project does not follow the existing transmission line ROW which results in the creation of a large utility corridor and the taking up of additional Reserve land;

c) The HVOTL project will significantly increase the voltage of electricity transmission beyond that of the existing transmission line;

d) The health effects on his family and himself from exposure to the electromagnetic fields (EMF) emitted by the HVOTL project and the existing transmission line;

e) The health effects on other Piikani members;

f) Whether the routing of the HVOTL project near his Residence and others on Reserve is appropriate given that there are a number of young children in homes and attending the Reserve school;

g) The location of the HVOTL project and the new ROW;

h) The stability and safety of the HVOTL structure itself;

i) The loss of use and enjoyment of his Residence, particularly, the view therefrom which will be obstructed by the project;

j) There is a serious housing shortage on the Reserve which makes it extremely difficult for him to find a new residence and he may not be able to relocate even if he wanted or needed to as a result of the ROW and the proposed HVOTL project. It is important to him that he continue to be able to reside in his Residence for several reasons:

(i) The location of the Residence allows him to live within close proximity to his family members, which is important to him;

(ii) He enjoys the Residence and its location generally, and does not want to leave; and

(iii) Over the course of the last twenty (20) years, he and his family have invested significant time and money into improving and maintaining the Residence.

k) There was no participation of the broader membership of the Piikani nation in a discussion of whether the HVOTL project is in the best interests of members of the Piikani nation and whether the land should be used for this purpose; and

l) Any additional comments he may have following a review of the HVOTL project.

[13] AltaLink's negotiations with the Chief and the Band Council were well underway in 2004 when a memorandum of understanding, which contemplated a joint venture with respect to a new

transmission line on Piikani land, was executed. It is noteworthy that at that time Mr. Provost was one of the 12 band councillors. He had been elected in early 2003 and remained in office until January 2007.

[14] Mr. Provost claims never to have seen this memorandum of understanding, that there was a split in the Band Council and that there had been some secret meetings to which he had not been invited. Mr. Green agrees that there was some dysfunction but says that only occurred later on in that Band Council's term when one councillor died and another resigned, making it difficult to obtain the required quorum of seven. Mr. Hodgkinson, who only came on board in 2006, was also of the view that the Council was dysfunctional until a new chief and slate of councillors were elected in 2007. Be that as it may, Mr. Provost admitted in cross-examination that contrary to his first affidavits, in which he said that the discussions during his term in office were preliminary in nature, they were more detailed than that. Indeed the discussions at that point were between AltaLink and Piikani Energy Corporation, a wholly-owned subsidiary of Piikani Investment Corporation, which in turn was owned by the band. Mr. Provost was a director of the Piikani Utilities Corporation, but appears to have paid no attention to what was going on. He said "things slip by me."

[15] In April 2005, the Band Council carried a motion approving a right-of-way for the proposed transmission line. Mr. Provost was not at that meeting and cannot recall whether he received notice thereof, but points out that no specific route was then mapped out.

[16] In August 2005, the Chief wrote to the Alberta Energy and Utilities Board confirming that the Band Council had approved a land corridor through the reserve and that they objected to any alternative route around the reserve. Again Mr. Provost professes no knowledge of this letter. One can well understand the Chief's point. Although the precise details were not yet worked out, in consideration of granting a right-of-way, the Piikani Nation would receive a considerable amount of money upfront, annual payments, jobs would be created and it would be given the opportunity to buy into a joint venture with AltaLink.

[17] On 27 January 2006, the Band Council passed a resolution with regard to the mandate of the Piikani Energy Corporation with respect to energy projects. In addition to the recital stating:

> Whereas pursuant to the inherent rights and powers granted under the *Indian Act*, R.S.c. I-6, the Chief and Council of the Piikani Nation are empowered to exercise decisions on behalf of the Piikani Nation;

reference was made a number of previous band council resolutions covering wind farm and hydro electric projects. It was resolved that Piikani Energy Corporation was authorized:

> …to take all steps necessary to negotiate with and reach agreement with Altalink Management Limited subject to approval by Chief and Council on an arrangement to construct and operate and finance a proposed 240kV transmission line on Piikani lands and involve the Piikani Nation in the ownership thereof.

[18] Mr. Provost signed that resolution.

[19] It seems that he did not then, nor at any previous time, nor at any subsequent time before March or April 2009, voice any concern. In cross-examination he said he had not objected to the

transmission line at that point in time. Yet, he had to be aware that the route as finalized could well be in close proximity to his house as there was already a transmission right-of-way nearby.

[20] He also concedes that he was at a meeting of the Band Council with representatives of INAC in October 2006. Again he was not concerned that the new line was considerably bigger than the existing line, and he was not aware of adverse health effects because of electromagnetic fields. He professes to be under the impression that that was neither the time nor the place to raise any concerns. Concerns ought only to be raised once the negotiations were essentially complete.

[21] During the more than two years from when his term of office expired until March 2009, he seems to be singularly unaware of ongoing discussions. In March 2007, approximately 600 notices of a proposed April meeting of the band were mailed to Piikani members living on the reserve within 800 metres of the project. In addition, AltaLink information packages were hand-delivered. Mr. Provost denies receiving the information package. He states he lived in unit 4B. AltaLink's Mr. Journeault, together with members of the band, was hand-delivering information packages. The list he had, which was prepared by the band, showed a unit 4A against which Mr. Provost's name appeared and a unit 4B with a question mark. Mr. Journeault checked off 4A meaning that he hand-delivered the information package to someone at that address. He cannot recall whether or not that person was Mr. Provost.

[22] Mr. Provost makes much of the fact that the scheduled band meeting in April was cancelled, but, consistent with his general lack of interest, there is no indication that he was aware of the meeting.

[23] A few months later the Band Council hosted an open house involving various booths and materials, including the AltaLink project.

[24] Following negotiations among the Band Council, AltaLink and INAC, the Band Council passed a requesting the Minister to grant a section 22 permit to AltaLink.

[25] In October 2007, a resource committee newsletter was published within the reserve which gave considerable detail of the project. Again Mr. Provost professes no knowledge of that newsletter, but in any event submits that since the newsletter stated that negotiations were ongoing, it was still premature to raise concerns.

[26] In addition, public notice was given of hearings of the Canadian Environmental Assessment Agency and the Alberta Utilities Commission, both of which concluded there was no evidence of health issues.

[27] According to Mr. Provost, during the period from January 2007 until early 2009, the HVOTL project occasionally came up in conversations he had with other band members. Their discussions consisted of speculation about when the project might be constructed and what jobs might possibly be created. Yet, when in the course of one of these conversations in March 2009 he was told that the project was going ahead, he contacted band officers and was readily provided with a copy of the permit, a permit which had already been registered.

THE MINISTER'S DUTY TO CONSULT

[28] It is not contested, and indeed following the decision of the Supreme Court in *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, it could hardly be contested, that the issuance of this right-of-way for 65 years or as long as required, even though subject to renewals, was of a temporary nature, so that the required approval was that contemplated by section 28(2) of the *Indian Act*. The Act contains a number of provisions relating to the acquiring of interests in reserve land by non-band members. Section 28(2) requires consent of the band council. Other sections dealing with approvals are 20(2), 35, 37, 38, 53(1)(b), 58(1) and 58(3). Some specifically require a band membership vote, such as an absolute surrender of reserve land which, in accordance with section 39, must be assented to by a majority of the electors of the band.

[29] This is not a case in which the Minister was under notice of a dispute within the band, or one in which more than one group claimed to be the band chief and council. The resolution was unanimous, and the Minister was under no obligation to pierce the corporate veil, so to speak.

[30] In this case, in line with *Opetchesaht*, above, collective consent was given by way of a resolution of the Band Council. Indeed, the British Columbia Court of Appeal noted in its earlier decision in *Opetchesaht,* (1994) 41 B.C.L.R. (2d) 145 at paragraph 30 (Q.L.), that section 28(2) is consistent with Parliament's intention to broaden the operation of representative government in band affairs.

[31] In the alternative, if the Minister was under a duty to consult, that duty was discharged. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Madam Justice

L'Heureux-Dubé set out a non-exhaustive list of five factors to aid in determining the scope of the duty to be procedurally fair in specific situations. The five factors are:

a) The nature of the decision being made and the procedure and process followed in making it;

b) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

c) The importance of the decision to the individual or individuals affected;

d) The legitimate expectations of the person challenging the decision; and

e) The choice of procedure made by the agency itself.

[32] The only procedural requirement was that imposed by section 28(2) of the Act, and that was satisfied by the band council resolution. The statutory scheme of the Act sets out various safeguards. Section 28(2) is clearly at the lower end of the spectrum. There is no evidence of legitimate expectations. There is no basis for Mr. Provost's position that he was entitled to a consultation.

[33] Membership, be it in a band, or as an ordinary resident or citizen, has both rights and obligations. Mr. Provost had ample opportunity to voice concerns years before the permit was issued. Indeed some concerns he expressed were covered in the environmental assessment report referred to above. Many of his concerns are inconsistent one with the other.

IS THE BAND A FEDERAL BOARD, COMMISSION OR TRIBUNAL?

[34] All parties assumed that the Band Council, in passing the resolution, was making a decision as a federal board, commission or tribunal. I agree that it was acting pursuant to statutory authority under the Indian Act. However, in terms of a checklist, it is important to keep in mind that not all band decisions are decisions subject to judicial review (*Devil's Gap Cottagers (1982) Ltd. v. Rat Portage Band No. 38B*, 2008 FC812, [2009] 2 F.C.R. 267).

[35] It is in this context that I have considered, and left aside, the Band Council's submissions that the decision was legislative in nature, and made on broad grounds of public policy, as the lands subject to the permit are being taken up for public purposes, and as the Piikani Nation is receiving an economic benefit therefrom. Many decisions of this nature are subject to judicial review.

THE BAND COUNCIL'S DUTY TO CONSULT

[36] I find that the Chief and the Band Council were under no legal duty to consult with Mr. Provost. It may have been politically wise to do so. This is an elected Chief and Band Council who always face the revenge of the ballot box. The same overall reasoning which led to my conclusion that the Minister owed no duty applies to the band as well.

[37] Mr. Provost certainly had no legitimate expectations that he would be consulted as an ordinary band member as one of the resolutions he signed as a band councillor clearly stated that it was the opinion of the Chief and the Band Council that they spoke for the nation.

[38] In any event, he had every opportunity to speak his mind, and chose not to do so. Whether or not he thought it premature to speak when he had the opportunity is not material. Although the final details were not worked out until 2008, the parameters were always obvious, and if the Band Council had a duty, it discharged it by sponsoring various meetings and by issuing newsletters.

DOES MR. PROVOST HAVE STANDING?

[39] Mr. Provost has standing to assert the specific allegations in his applications. He asserts that there was a duty to consult. Obviously if there were such a duty, he would have been "directly affected" by any failure do so. It is important to note that Mr. Provost does not assert that the decision of the Band Council to support the project and the Minister's decision to issue the permit were unreasonable. It is beyond the scope of these judicial reviews to comment as to whether he would have standing were he to have made such allegations.

SHOULD THE RELIEF BE GRANTED?

[40] The time cherished remedies of *mandamus*, *certiorari*, *quo warranto,* prohibition, injunction, declaratory and other relief lumped together in sections 18 and 18.1 of the *Federal Courts Act* are discretionary in nature. Section 18.1(4) of the Act provides that the Court may grant relief. This is consistent with the whole history of prerogative writs and extraordinary remedies (*Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at paragraph 30 and following, and 112).

[41] Had he been the least bit attentive, Mr. Provost not only could have addressed the Minister, and the Band Council, but other decision makers as well, decision makers whose approval was also necessary in order for the project to go forward. The project, from the very outset, always had the same parameters: the route, compensation to the band, job creation, business opportunities and time limits. Indeed if judicial review were granted, it might well turn out that Mr. Provost would agree that his concerns are groundless.

[42] "*There is a time for everything…A time to be silent and a time to speak…*" (Ecclesiastes). Mr. Provost's time has come and gone.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The applications for judicial review are dismissed, with costs.

2. A copy of this order, and accompanying reasons, shall be placed in court file number T-646-09.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-645-09
STYLE OF CAUSE:	Jordie Provost v. MIAND et al.
PLACE OF HEARING:	Calgary, Alberta
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