Federal Court

Cour fédérale

Date: 20130729

Docket: T-1112-12
T-1120-12

Citation: 2013 FC 825

Ottawa, Ontario, July 29, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JOE TOM SAYERS

Applicant

and

CHIEF AND COUNCIL OF BATCHEWANA FIRST NATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside two motions passed by the Chief and Council of the Batchewana First Nation Band regarding housing and community initiatives on one of its reserves.

[2] The first motion was passed on September 15, 2011 during a regular band council meeting:

> The Batchewana First Nation Chief and Council hereby motion to inform members that lots 6, 7, and 8 are reserved for community BFN initiatives and Lot 9 to 17 are available for housing

> development. Furthermore the name of the street will be called Waskonaywigamik Miikun meaning Lighthouse Road.

[3] The second motion was passed on December 20, 2011 during a special council meeting:

> The Batchewana First Nation Chief and Council hereby motion to approve the realignment of the entrance to Waskonaywigamik Miikun (Lighthouse Road) as motion by the Capital Projects Coordinator, Ed Dubois.

[4] The applicant claims to have an interest in the lots Lighthouse Road passes over. Additionally, he claims that the construction of homes and a community centre will affect ancestral burial mounds that he has cared for. Some of the mounds are on the land in which he claims an interest. He alleges that the decisions were made without satisfying the requirements of procedural fairness, in that these decisions were made without notice or regard to his interests, which were known to Council.

Background

[5] Batchewana First Nation has four reserve lands: i) Rankin, ii) Goulais Bay, iii) Whitefish Island and iv) Obadjiwon. This application relates to Obadjiwon, a community approximately 80 kilometres north of Sault Ste. Marie on the shore of Lake Superior. While comprising a single First Nation, the reserves have different characters. Rankin, due to its proximity to Sault Ste. Marie, is largely urban. Obadjiwon is less populated and developed. As we will see, however, population growth and development pressures face Obadjiwon as well, providing some of the context for this dispute.

[6] The applicant is a member of the respondent Band. He served as a member of its Council from 1988 to 1990 and again from 1999 to 2009. In or around 1994, he began living in an abandoned lighthouse on a portion of Obadjiwon, at the end of Corbeil Point Road. He does not have a certificate of possession nor has he applied for an allotment of land.

[7] The applicant states that his uncle, Chief Edward James "Nebenaigoching" Sayers, occupied the lighthouse in 1972 and marked the land surrounding it. At that time, the reserve was not yet subdivided into lots; band members simply marked the land that they would occupy. The applicant states that his uncle gave him the lighthouse and land in 1994. Since that time, the applicant states that he has improved the land and used it for cultural and spiritual purposes.

[8] Cathy Connor, the Chief Administrative Officer and a member of the Band, disputes this evidence, saying that the lighthouse had been abandoned from time to time and that various people have lived in it.

[9] In 1996, a capital plan was developed for the reserves, including Obadjiwon. The objective of the plan was to provide for orderly development, the creation of lots for much needed housing and the designation of land for a future community centre and other common uses. Consultants and surveyors were engaged to prepare a plan for subdivision. Around this time, the applicant found rock mounds near the lighthouse, which appeared to be grave sites. On the recommendation of the applicant, Council decided that construction of a planned road would be postponed so that an archaeological study could be conducted.

[10] At a public meeting on August 19, 1997, Band members met with the Chief to discuss the archaeological study and the proposed survey plan. The applicant and seven others expressed their concern regarding the capital plan and survey, stating that they had not been consulted. They also advised Council that the protection of the gravesites was their responsibility, and not that of the Band administration.

[11] On March 26, 2003, the Chief and Council passed a motion, moved by the applicant, "suspending" the capital plan in order to consult with the reserve residents.

[12] On June 4, 2003, Council passed a motion to retain Great Lakes Surveying Ltd. to proceed with a topographic survey and conceptual plan for the reserve. The applicant seconded this motion in his capacity as a councillor. On December 3, 2003, the Council met to discuss the rock mounds. The Council decided that there should be a radar scan to determine if the mounds were authentic burial sites. The applicant attended and opposed the motion to scan the sites, asserting that it was his responsibility to care for the graves.

[13] On November 20, 2006, a special working group in Council decided that Obadjiwon should be resurveyed, and that further research should be conducted regarding historical uses of the lands as part of a broader social history analysis of the Band. The surveyors were re-engaged.

[14] The minutes of the June 26, 2008 Council meeting are instructive. The issue of moving forward with housing was on the agenda. After a review of the history of the prior surveys by the Chief Administrative Officer, the minutes state:

> A very lengthy discussion took place between Chief and Council and all community members in attendance. There is a discrepancy in the survey dated 1996; several properties shown on this survey are incorrect. It is felt that this area should be re-surveyed and fix the problems.

[15] The minutes continue:

> Councillor Shaun Boyer stated that hopefully this process will resolve the issues. Whatever the outcome, not everyone will be satisfied with it, however, we will all have to live with the resolution. Councillor Joe Tom Sayers stated he felt everyone would give the process their best efforts. He also stated that this is the first time residents / landowners were given the opportunity to present their concerns.

[16] On November 23, 2008, Council met to discuss the report and survey. The applicant was absent from this meeting though some of his family members attended. The Council directed that a radar scan be conducted of the burial sites and undertook to protect those sites. Council also determined that the land located directly north adjacent to the lighthouse lots (lots 6 and 7) would be designated for the new community centre. The applicant had notice of the meeting as it was scheduled at a previous meeting which he attended. The applicant was also absent from the Council meeting of December 12, 2008, during which the contract for the radar scan was approved.

[17] In June of 2009, a company came to scan the mounds. The applicant considered this trespass and prevented it from taking place. The next day the company returned with a Band

constable. The scans were eventually conducted with the assistance of the police, revealing that two of the eleven mounds were likely burial sites.

[18] On September 11, 2009 the Chief wrote to the applicant stating that Council had decided to protect the burial mounds and that they were the responsibility of the community, not one person. Council decided that the community would have access to the area and it would be more formally protected in the future. Council had also decided to construct a community centre and park on lots 6, 7 and 8. The Chief informed the applicant that he did not have a certificate of possession or a recognized traditional land holding, but that he could continue living in the lighthouse on a temporary basis.

[19] The opening paragraph of the Chief's letter to the applicant is significant:

> It is unfortunate that you did not attend our Council meeting dated August 25, 2009 as per your verbal request to our Capital Projects Coordinator on August 18, 2009 to discuss the burial mound issue.

[20] Council's resolution of September 8, 2009 was confirmed at a meeting on September 22, 2009. Council declared that part of lot 6, all of lot 7 and all of lot 8 would be reserved for a playground, park and community centre in direct proximity to the lighthouse. Council also declared that the applicant had no authority to occupy the lighthouse.

[21] The applicant brought a motion for an interim injunction to prevent further work. This was dismissed by Order of Justice Sean Harrington on September 12, 2012. However, at present, the

only work that has been done has been to clear brush from Lighthouse Road and the removal of a fence.

Issues

[22] A band council must provide notice and an opportunity to be heard to those whose rights or interests are directly affected by its decisions: *Sparvier v Cowessess Indian Band No 73*, [1994] 1 CNLR 182. Justice Rothstein, then a member of this Court, wrote:

> While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[23] Therefore, there are three questions for this judicial review:

a. Whether the applicant has a right to or interest in the property at issue;

b. If so, whether that right or interest is directly affected by the motions under review; and

c. If so, whether the band provided him with procedural fairness.

Discussion

Interest

[24] The applicant asserts a traditional right of occupancy, relying on the practices of band members before the reserve was subdivided. This is contrary to the band’s land policy,

section 2000.14 of which provides, "No person shall hold any interest in a parcel of land on the Territories until it has been officially allotted to them by the Council or they acquire the land by devise or descent." If there was any traditional manner of acquiring land, this is superseded by the land use policy, in place since 1992. In this regard, the applicant's earliest claim to possession is in 1994.

[25] That said, for the time being, the lighthouse is the applicant's residence and the Chief and Council have consented to this in writing, though on a temporary basis. While he does not have a right to possession and may be evicted on reasonable notice, for now the community has sanctioned the *de facto* arrangement. In my view, the applicant has an interest in his continued occupation of the lighthouse.

[26] That said, the applicant has not demonstrated any legally recognizable interest in the disputed land. The objective of the *Indian Act*, (RSC, 1985, c I-5) and its provisions regarding use and occupation of reserve lands is to preserve the lands for the benefit of the Band as a collective whole, regardless of the wishes of any particular band member: *The Queen v Devereux*, [1965] SCR 567. Under the *Indian Act*, legal title to reserve land is vested in the Crown, for the use and benefit the band. No individual may possess reserve land without an allotment from the band council: *Indian Act*, s 20. This principle has been applied frequently, and in diverse settings: *Joe v Findlay*, [1978] BCJ No 1221 (BCSC). In consequence, the applicant does not have and cannot obtain rights to the lighthouse by way of adverse possession: *Bigstone Cree Nation v Boskoyous*, [1997] 2 CNLR 13 (ABQB). He cannot claim an entitlement to the property without a certificate of possession. Moreover, subject to the requirements of procedural fairness, a band may

withdraw a preliminary allotment. A right of occupation does not constitute a guarantee: *Parker v Okanagan Indian Band Council*, 2010 FC 1218.

[27] On December 5, 2006, Council approved the applicant's request to be reimbursed $3500.00 for the septic system he installed on the property in 1998. I do not accept the argument that this payment constitutes *de facto* or *de jure* recognition of the applicant's interest in the lands. This payment is equally consistent with Council's stewardship of its land and encouraging proper water management.

[28] Protection of the burial mounds and the survey are of course, related issues. The Band could not proceed with a survey for residential lots and community uses until the number and location of burial mounds were identified. The letter of September 11, 2009 from Chief Sayers to the applicant reflects this. It also indicates that the applicant was aware of Council's intentions. To repeat, the letter reads, in part:

> It is unfortunate that you did not attend our Council meeting dated August 25, 2009 as per your verbal request to our Capital Projects Coordinator on August 18, 2009 to discuss the burial mound issue.

[29] Chief Sayers' letter is evidence of two key events: first, that the applicant had a discussion with the Band official responsible for capital projects on August 18, 2009 and second that he did not attend the Council meeting of August 25, 2009, which he had requested and presumably been granted permission to attend, during which the survey would be considered.

[30] The applicant had been on notice that the land is not his and that the community as a whole is entitled to it. The applicant claimed that he is the protector of the burial mounds near the

lighthouse and believed he was entitled to exclude others from the property. The Chief corrected this misunderstanding in a letter dated September 11, 2009. Council confirmed this in a declaration on September 22, 2009.

[31] To conclude, I find that the applicant does not have a right to or an interest in the property at issue. Additionally, even if the applicant has a recognizable interest in the land he has not established that he is adversely affected by the development. The decisions at issue do not impinge on his residence at the lighthouse. In fact, one decision moved the road eight metres further from the lighthouse. The December 20, 2011 motion was to approve a slight realignment of the road eight metres north, actually taking it further away from the contested lands.

[32] The application fails at these threshold questions. I will, nevertheless, consider the procedural fairness issue, in the alternative.

Procedural Fairness

[33] The applicant asserts that he did not have notice of the meetings at which the impugned decisions were made.

[34] The motions at issue cannot be divorced from the consultations, investigations and motions which preceded them. When viewed in context, these are not new decisions, but minor variations on a plan first proposed in 1997. The applicant was on Council in 2003 when the decision was made to conduct radar scans of the burial mounds. The survey which was approved on September 15, 2011 is similar to the draft surveys from 2003 and 2006. The applicant has been

actively involved with the earlier surveys, to the point of engaging the surveyors and describing to the surveyors the lines of existing uses, including those lines which he had personally marked. The applicant was involved in commissioning the survey proposals and had knowledge of the proposed survey lines around lots 6, 7 and 8 in and around 2004. The applicant himself moved some of the key motions before Council. He voiced his concerns in June of 2008 at the Council meeting and was aware of the research conducted by Amy Boyer that year.

[35] The applicant was absent during three Council meetings in November and December of 2008 and in January of 2009, where he could have participated in further discussion about the development.

[36] Ms. Connor's evidence was that each month a newsletter is mailed to every Band member including the applicant. Council meetings are announced in the newsletter. Ms. Connor states that minutes of every Council meeting and copies of the motions are maintained in the office, open to all members. The applicant states that this book has not been kept updated. This book was not produced in evidence.

[37] The applicant stated that he was suspended from Council in October of 2008 and then was not re-elected in February 2009. The respondent denies that the applicant was suspended, and Ms. Connor has given evidence that he was not suspended. The Minutes note the applicant as absent. The applicant now qualifies his position by noting that he was effectively suspended because the Band would not allow his travel from Obadjiwon to Rankin and Goulais River. There is, however, no evidence of a policy to pay for travel nor of a request and denial for compensation.

I conclude that, as councillor, the applicant had effective notice of Band business at the meetings of October and November of 2008 and January 2009, and in particular had notice of the decisions to be taken by Council.

[38] As noted at the outset, the Batchewana First Nation is comprised of various reserves, separated by some 80 kilometres. This poses challenges to Council in ensuring continued and meaningful participation in Band affairs. Council seeks to address this by rotating Council meetings between the communities.

[39] The applicant's evidence is that he did not receive notice of the Council meetings though the Band administration's posting of Council meetings or agenda. Notice spread, at best, by word of mouth. When pressed, the respondent could not identify in the record an agenda providing notice of the intention to consider the survey and adopt the plan. The monthly mail-out is a 50-page document and does not contain any notice of the meetings, let alone of proposed topics to be determined. Had other individuals been directly affected by the meetings at issue, I would have concluded that no notice had been provided, and depending on the nature of their interest, concluded that procedural fairness was breached. Serious consideration should be given to separating the schedule of Council meetings and agenda from the more community events focus of the monthly mail-out. The current practice does not promote effective or reasonable notice.

[40] However, it is clear on the evidence that the applicant was aware of all elements of the decision making process. He had notice both by reason of his prior role as councillor and, secondly, by reason of his personal engagement in the issue of the burial mounds.

[41] To conclude, the applicant did not have a recognizable interest in the lands, over and above his interest as a band member. He had, in any event, actual notice of the Council meetings where the two motions were passed, and was personally aware of the plan of survey and of his opportunity to make his views known.

[42] Therefore, I do not accept that the applicant did not have notice or an opportunity to be heard. The motions at issue should not be artificially set apart from the lengthy discussions and consultations which preceded them. The plans for a community centre, park and road were not new or unexpected.

Conflict of Interest

[43] Prior to being elected Chief, Dean Sayers signed a declaration on August 19, 1997 stating that he occupied some of the same lands at issue. He declared that the survey had been completed without regard to the original markings. The applicant states that though the Chief no longer lives in the community or occupies any of the lands, this declaration places him in a conflict of interest.

[44] The declaration signed by Dean Sayers (now Chief) was prompted by the original 1997 survey plan. It reads:

> * The creation of the capital plan and survey for Batchawana Reserve was conducted without following our input.
>
> * The final plan was never been presented or willingly shared with us by the administration on Rankin reserve

> * The survey was completed and registered without any of us being approached regarding our original metes and bounds for our properties. The survey is therefore null and void.
>
> * The protection of the gravesites on the Batchawana Reserve from any disturbance, including any representative from the Rankin administration, is entirely our responsibility, and no viewing, photographing, videorecording, measuring, surveying or other technological methods of examination shall proceed without the express consensus of the undersigned. Under no circumstances shall the graves be desecrated by exhumation or test digs.

[45] The applicant notes that Chief Sayers never renounced his interest in the lands.

[46] The Band, for its part, observes that the Chief took no interest in the lands for over twelve years and took no steps to assert an interest in the land. Indeed the applicant has been operating a business out of a trailer on the lands without interference by the Band or Chief Sayers.

[47] Councillor Dorothy Elie Gingras is said to hold an animosity towards the applicant. In an email dated July 8, 2007, she stated that she would not participate at an event because the applicant's presence created a conflict for her. The applicant has made complaints to the police that members of her family have driven erratically on his cul-de-sac and that she and her family have taken photographs of his property. The applicant states that she opposes him living on the property because she wants to build a house there.

[48] However, the motions at issue affirm that the land over which the applicant claims an interest is to be held for the benefit of the community, providing Elie Gingras with no personal benefit. Her alleged ill-will towards the applicant may be relevant had the motion been to evict him

from the lighthouse, but as I have found, the applicant is not directly affected by the motions, which are general in nature.

[49] In my view, these allegations do not create a reasonable apprehension of bias or any conflict of interest. The applicant has not demonstrated that the motions at issue in any way benefit, or could be perceived to benefit, Chief Sayers and Councillor Elie Gingras.

[50] The test for a reasonable apprehension of bias is well established: *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at p 394, "… the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information."

[51] I do not believe that a reasonable person, fully informed of the long history and appraised of the facts, would conclude that Chief Sayers or Councillor Gingras were in a conflict of interest. Since 1996 the Band has been moving to address the problem of housing in a principled and fair manner. This included the approval of topographic plans, conceptual designs of the reserve (June 4, 2003), the historical survey, the radar scan (November 23, 2008) and surveys (September 22, 2009).

[52] The legal terms governing possession of reserve lands are clear, and Chief Sayers can have no special interest in the absence of a certificate of possession. There is no conflict of interest.

[53] It is important to place the bias allegation in its context. Band council members may in fact be predisposed to a certain view, whether it be over the pace and nature of development, band

priorities, or a wide range of other issues associated with running the affairs of the Band. Councillors may be diametrically opposed to other councillors and may not share the views of some of the band members. Personal animosity or deeply held but divergent views are common in all forms of governance, whether Band or municipal councils, provincial legislatures or Parliament. While not to be encouraged, personal animosity does not disqualify band council from decision making. In making these observations, it is important to note that there are important *caveats* and exceptions, such as where councillors may play a role in the administration or adjudication of elections, awarding certificates of possession, in any dealings they may have with individual issues or individual band members, band constables, or other appointed officials or other situations which may trigger the duty of procedural fairness. The language of Justice Rothstein in *Sparvier* is unequivocal on the obligation of Council to adhere to the principles of procedural fairness.

Conclusion

[54] At present, there is no specific dispute between the applicant and any other party, as the applicant has no right to or interest to the land in question. Council had already decided, as far back as 2003, that the land north of the lighthouse would be designated for a community centre and had notified him in 2009 that he did not have exclusive possession of the land.

[55] There is no evidence that the development will affect the applicant's residence in the lighthouse. If the band wishes to end the applicant's occupation of the lighthouse in the future, he has an entitlement to notice and full opportunity to be heard. However, it appears that his interest in the lighthouse is currently unaffected.

[56] Even if the applicant is directly affected by the motions at issue, he has had ample notice and many opportunities to be heard.

[57] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

The parties may make submissions on costs within twenty days of the date of this decision

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1112-12 T-1120-12
STYLE OF CAUSE:	**JOE TOM SAYERS v CHIEF AND COUNCIL OF BATCHEWANA FIRST NATION**
PLACE OF HEARING:	Sault Ste. Marie, ON
DATE OF HEARING:	April 16, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
DATED:	July 29, 2013

APPEARANCES:

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Ms. Jennifer Tremblay-Hall	FOR THE RESPONDENTS

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