

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20220524**

**Docket: A-184-21**

**Citation: 2022 FCA 90**

**CORAM: PELLETIER J.A.  
WEBB J.A.  
RIVOALEN J.A.**

**BETWEEN:**

**DENNIS CYR**

**Appellant**

**and**

**BATCHEWANA FIRST NATION OF OJIBWAYS  
AND  
BATCHEWANA FIRST NATION OF OJIBWAYS  
HOUSING AUTHORITY**

**Respondents**

Heard by online videoconference hosted by the Registry

on March 22, 2022.

Judgment delivered at Ottawa, Ontario, on May 24, 2022.

**REASONS FOR JUDGMENT BY:**

**RIVOALEN J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
WEBB J.A.**

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**REASONS FOR JUDGMENT**

**RIVOALEN J.A.**

**I. Introduction**

[1] The appellant, Mr. Dennis Cyr, appeals from a judgment of the Federal Court dated May 31, 2021 (2021 FC 512) (*per* McVeigh J.) (the Decision), in which the Federal Court dismissed

his application for judicial review for lack of jurisdiction on the basis that the matters it raised were of a private law nature.

[2] The underlying dispute is between Mr. Cyr and the Batchewana First Nation of the Ojibways (the BFN) and the Batchewana First Nation Housing Authority (the Housing Authority). Mr. Cyr is a member of the BFN. The dispute involves the decision to evict Mr. Cyr from his home on the reserve pursuant to the terms of the Sale Agreement he signed on December 27, 2002, with the BFN.

[3] This case touches on the provisions of the Sale Agreement signed between Mr. Cyr and the BFN, as well as the Housing Authority's power to evict Mr. Cyr from his home should he breach the terms of the Sale Agreement. It also concerns the BFN's overall land management. The issue here is whether the decision being challenged, the Housing Authority's conduct when it evicted Mr. Cyr, constituted an administrative action susceptible to judicial review. That is, was the Housing Authority acting in a public nature, as a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for the purpose of subsection 18(1)?

[4] Each First Nations territory is governed by one of three types of land management: the *Indian Act*, R.S.C. 1985, c. I-5 land management framework, the *First Nations Land Management Act*, S.C. 1999, c. 24 regime (the *FNLMA*), or a self-government arrangement as a stand-alone agreement or as part of a modern treaty (*Indigenous People in Canada*, Darion Boyington & John Roberts, 2017 Edmond Montgomery Publications Limited, p. 136).

[5] Under the *Indian Act*, there are different land tenure arrangements. Customary land holdings are the most common, in which individuals or families acquire tracts of land allotted by the band council. That individual or family can build and reside in a home but the home cannot be sold or disposed of since it belongs to the band. In some cases, land can be held under a Certificate of Possession, in accordance with section 20 of the *Indian Act*, which closely resembles a fee simple ownership. These Certificates of Possession are issued under the authority of the Minister of Indigenous Services after the band council grants its permission, but the band retains land ownership.

[6] The second type of land management is prescribed in the *FNLMA*. Under this Act, the First Nation must enact a land code in accordance with subsection 6(1) of that Act to include general rules and procedures in connection with all the land in the reserve set aside for the First Nation. The band has greater control over their lands and resources, and the First Nations using this framework can pass laws for the development and protection of lands, as well as issue licences and leases with community approval. In this land management framework, federal ministerial involvement and approval are reduced.

[7] The third type of land management is under a self-government arrangement. The First Nation has even greater control and power over their lands and resources. They enjoy extensive land management and law-making authority, further reducing federal ministerial approval processes.

[8] The land management arrangement in the case before us falls under the *Indian Act*.

II. Background

[9] The record before the Federal Court is far from clear. There are many disputed facts about Mr. Cyr's eviction. The role of Chief and Council and the role of the Housing Authority in the eviction are both unclear. The Notice of Application before the Federal Court did not identify the very decision in dispute. Neither party's counsel specified the administrative decision at issue during oral submissions before the Federal Court, despite the Court's enquiries.

[10] Mr. Cyr had been residing in the home since 2003 and had been making payments towards the purchase of the home since that time. It appears that the purchase price of \$72,000 was paid in full in 2019. There was no mention in the record or during submissions of a Certificate of Possession having been issued to Mr. Cyr under subsection 20(2) of the *Indian Act*.

[11] The respondents rely on a series of warning letters sent to Mr. Cyr in 2009, 2010, and 2011, from the Housing Director or the Tenant Liaison Worker. The letters advised Mr. Cyr of complaints from other members of the BFN concerning the condition of his yard, indicating that the garbage in his yard was a health and safety concern. The health and safety concerns were not sufficiently rectified, and the Housing Authority therefore sent Mr. Cyr more notices. These notices warned him that the complaints would be forwarded to a Chief and Council meeting to discuss further action should he fail to remove the garbage from his yard. Similar notices went out to Mr. Cyr in 2012, 2013, 2015 and 2017. On July 29, 2019, a notice to vacate signed by the Housing Authority Board was personally served on Mr. Cyr.

[12] The July 29, 2019 notice to vacate requested that Mr. Cyr vacate because he defaulted on his payment obligations and failed to comply with sections 3(a), (d), and (g) of the Sale Agreement. Those sections specify Mr. Cyr's obligation to maintain the lands and the premises in good, neat and clean condition of repair.

[13] Mr. Cyr denies having received most of the warning letters over the years, save for the notice to vacate dated July 29, 2019. Mr. Cyr says that he did not default on his payment obligations, owes no monies and in fact has paid the purchase price in full. It is not clear whether he disputes the state of the yard.

[14] On November 19, 2019, at the request of Mr. Cyr's sister, Chief and Council passed a motion approving an extension of six months to Mr. Cyr. During these six months, a plan of support was to be developed to ensure Mr. Cyr's needs were met, along with those of the Housing Authority Board.

[15] On May 20, 2020, a notice to vacate signed by the Housing Authority Board was personally served on Mr. Cyr. The letter stated that since he had not complied with the condition set out by the Band Council at the time the extension was granted - that he bring the house up to Code and clean up the yard - he was required to vacate the premises immediately. The letter directed Mr. Cyr to arrange to have the yard and home cleared of all personal belongings no later than May 29, 2020, failing which the locks would be changed and the house boarded up.

[16] On May 29, 2020, Mr. Cyr signed an extension agreement with the Housing Authority which provided that he would have until June 29, 2020, to collect his belongings and vacate the premises.

[17] On June 2, 2020, Mr. Cyr was personally served with a notice to vacate dated June 1, 2020. The notice confirmed that Mr. Cyr was to vacate the premises no later than 2 p.m. on June 29, 2020.

[18] On July 9, 2020, police removed Mr. Cyr from the home.

[19] In support of his argument before the Federal Court, Mr. Cyr relied on a draft Rent-to-Own Housing Program Policy that he says applies to his situation. The respondents say that the policy is indeed a draft and is not in force or in effect. The role of the Housing Authority, sometimes also referred to as the Housing Authority Board in the materials, is therefore unclear.

[20] Indeed, the application record has no explanation of the role of the Housing Authority. With this limited record, the Federal Court was tasked with determining whether the actions taken by the Housing Authority were of a public or private law nature.

### III. The Federal Court Decision

[21] In her reasons, the Federal Court Judge outlined the timeline of events that led to Mr. Cyr's eviction (Decision at paras. 2-8) and the parties' arguments before her (Decision at paras. 9-14). At section III of her decision, she described the issues before the Court as follows:

- A. Was the Batchewana First Nation of Ojibways and Batchewana First Nation Housing Authority acting as a “federal board, commission or other tribunal” when it engaged in the conduct of evicting Dennis Cyr?
- B. Is the contested evidence of the Applicant admissible?
- C. What is the proper standard of review?
- D. Was the Applicant denied procedural fairness?
- E. Was the decision of the [Batchewana First Nation of Ojibways] reasonable?

[22] At the outset, the Federal Court Judge noted that it was unclear from the parties’ pleadings and submissions which administrative decision was the subject of the application for judicial review. The Federal Court Judge surmised that it was the administrative action to evict (Decision at paras. 17-18).

[23] The Federal Court Judge noted that decisions of a band council are generally judicially reviewable for the purposes of section 18 of the *Federal Courts Act*, as they constitute “a federal board, commission or other tribunal”, but only if its actions are brought within the public law sphere (Decision at paras. 23-26). The Federal Court Judge considered jurisprudence dealing with the jurisdiction of the Court in cases involving evictions from Band housing (Decision at paras. 36-39). She then embarked on an analysis of the factors set out in this Court’s decision of *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131 [*Air Canada*] to determine the public or private law nature of Mr. Cyr’s eviction.



[24] After reviewing the factors set out in *Air Canada*, the Federal Court Judge concluded that the matters subject to the present review were of a private law nature and the BFN and the Housing Authority were not acting as a “federal board, commission or other tribunal”. Thus, the application was dismissed because it was not within the jurisdiction of the Federal Court (Decision at para. 59).

#### IV. Standard of Review and Issues

[25] The Decision under appeal deals with a question of law: does the Federal Court have jurisdiction to hear the judicial review? Therefore, the Decision is reviewable on a standard of correctness: (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8, [2002] 2 S.C.R. 235; *Canada (Judicial Council) v. Girouard*, 2019 FCA 148 at para. 30, [2019] 3 F.C.R. 503; *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137 at para. 26).

[26] That is, questions of law are reviewed on the standard of correctness, findings of fact are not to be reversed in the absence of palpable and overriding error and findings of mixed fact and law are reviewed on the standard of palpable and overriding error, unless there is an extricable question of law (which is reviewed on the correctness standard).

[27] In order to determine whether the matters under review are of a private or public law nature, the Federal Court Judge reviewed the factors set out in *Air Canada* and came to the conclusion that the matters were primarily of a private law nature. The Federal Court Judge’s application of the facts to the factors set out in *Air Canada* are findings of mixed fact and law and are reviewable on the standard of palpable and overriding error.

[28] The issue raised in this appeal is whether the Federal Court Judge erred in law when she concluded that the Federal Court does not have jurisdiction to hear the application for judicial review, because it raises matters that are of a private law nature.

[29] With this standard of review and issue in mind, I would dismiss the appeal for the following reasons.

V. Mr. Cyr's Position

[30] Mr. Cyr advances several arguments.

[31] Starting with the pleadings before this Court, counsel for Mr. Cyr relies on and refers to a "Fresh as Amended Notice of Appeal" included in the Appeal Book. Counsel for Mr. Cyr was advised during the hearing that the *Federal Courts Rules*, S.O.R./98-106 do not permit such a pleading unless leave to amend has been granted, which was not the case, and that as a result the Registry did not allow its filing. Therefore, the only Notice of Appeal before the Court is the original, filed on June 30, 2021.

[32] For the first time, Mr. Cyr argues that the administrative decision in dispute is the Chief and Council's motion dated November 19, 2019, which granted Mr. Cyr an extension of six months to live in the home in order create a plan and rectify the garbage complaints. This is not the position argued by Mr. Cyr before the Federal Court.

[33] Next, Mr. Cyr submits that the Federal Court Judge erred in law in her application of certain factors in *Air Canada* and, in particular that the Federal Court erred in finding that the source of the jurisdiction and powers of the respondents was of a private law nature.

[34] A further argument made by Mr. Cyr is that the Federal Court Judge misapplied the findings in *Jimmie v. Council of the Squiala First Nation*, 2018 FC 190 [*Jimmie*].

[35] Finally, also for the first time before this Court, Mr. Cyr alleges that the Federal Court Judge had preconceived ideas about his submissions and that she was biased against him. He also alleges that the manner in which his eviction was carried out violated his human rights and Charter rights.

## VI. Analysis

A. *Did the Housing Authority's conduct constitute a reviewable administrative action when it evicted Mr. Cyr? More specifically, was the Housing Authority acting as a "federal board, commission or other tribunal" for the purpose of subsection 18(1) of the Federal Courts Act?*

(1) What is the administrative decision under review, and who made that decision?

[36] First, I will deal with counsel's argument that the administrative decision under review is the Chief and Council's motion of November 19, 2019, which granted an extension of six months to Mr. Cyr to get a plan in place.

[37] I cannot accept this argument because it was never put before the Federal Court Judge, either in the Notice of Application or during oral submissions. After questions from this Court, counsel for Mr. Cyr was unable to explain how the administrative decision of November 19, 2019, resulted in the administrative decision to evict.

[38] In my view, the Federal Court Judge did not err when she surmised that the administrative decision to evict is the administrative decision under review (Decision at para. 18).

[39] In Mr. Cyr's affidavit, he refers to appealing his eviction (Affidavit of Dennis Cyr sworn November 2, 2020, Tab 2 of the Application Record, Tab 6 of the Appeal Book, para. 18). Mr. Cyr argued before the Federal Court that the eviction and the respondents' authority should be reviewed. However, he did not distinguish which of the two respondents, the BFN or the Housing Authority, made the decision (Applicant's Memorandum, Tab 9 of the Application Record, Tab 6 of the Appeal Book p. 641).

[40] A review of the documents reveals that the decision and reasons to evict are set out in the notice to vacate dated May 20, 2020. The November 19, 2019 decision from Chief and Council granted an extension of time to Mr. Cyr to remedy the breaches of the Sale Agreement. It is not the decision from which Mr. Cyr sought review in the Federal Court. The June 1, 2020 notice to vacate confirms that an extension of the time to evict is granted to June 29, 2020, following a signed extension agreement. Consequently, the November 19, 2019 decision gives an opportunity to Mr. Cyr to solve the problems so that he can be spared an eviction. All other

actions taken after the May 20, 2020 notice to vacate simply extend the time by which Mr. Cyr must leave his home. The decision to evict is therefore in the notice to vacate from May 20, 2020.

[41] Regarding who made that decision, I note that the May 20, 2020 notice to vacate is not in the form of a band council resolution. It is written on the BFN letterhead. It is signed by the Housing Manager on behalf of the Housing Authority. It explains that Mr. Cyr is being evicted due to his failure to remedy breaches of the Sale Agreement between himself and the BFN. The Sale Agreement is the source of the power to evict. Nothing in the record suggests that the Sale Agreement was ever transferred from BFN to a different vendor.

[42] In my view, although there are no documents on the record that clearly set out the powers of the Housing Authority, nonetheless it is apparent that it was acting at the direction of and as the agent for the BFN when it decided to evict Mr. Cyr. In these housing matters, the BFN and its Chief and Band Council maintain significant control over the Housing Authority. As agent for the BFN, the Housing Authority had the authority to affect the legal position of the BFN and acted to achieve the same results that would have been obtained if the BFN, through its Chief and Council, had acted on its own account (See *R. v. Kelly*, [1992] 2 S.C.R. 170, 137 N.R. 161 at paras. 28 and 29).

[43] I arrive at this conclusion by a close examination of the evidence on the record, in particular the many notices sent to Mr. Cyr over the years. I note the use of BFN letterhead for all correspondence; the Chief signed letters advising Mr. Cyr of his arrears (Appeal Book,

Exhibit E to the affidavit of Kim Lambert, Tab 4 of the Application Record); the Chief and Council are copied on some of the correspondence (Appeal Book, p. 387, Notice to Vacate, Exhibit M to the affidavit of Dee-Anna Hewson, Tab 4 of the Application Record); and the Chief and Council granted extensions to Mr. Cyr. There is also evidence that the Housing Director sometimes signs documents for the BFN (as landlord) (Appeal Book, p. 337, Exhibit C to the affidavit of Dee-Anna Hewson, Tab 4 of the Application Record).

[44] Consequently, the Housing Authority could not have made the decision to evict Mr. Cyr without the Chief and Council's approval. The Housing Authority was acting as the agent of the BFN, and its Chief and Council, when it evicted Mr. Cyr. Its role was akin to that of a property manager on behalf of the BFN and Council.

(2) The application of the *Air Canada* factors

[45] Next, I will review the Federal Court Judge's application of the eight factors set out in *Air Canada* to the facts before her. The factors are not exhaustive, and some may not apply to the matter before the Court. Nonetheless, in determining the public-private nature of an administrative decision, all of the circumstances must be weighed. Whether or not any one factor or a combination of a particular factor tips the balance and makes the matter "public" depends on the facts of the case and the overall impression registered upon the Court (*Air Canada* at para. 60).

[46] Of the eight factors she considered, the Federal Court Judge found that four favored a finding that the matter was of a private law nature, two favored a finding of public law, and two were not relevant to the matter before her.

[47] The four factors she determined that were favoring a finding that the matter was of a private law nature are the following:

- 1) The character of the matter for which the review was sought.
- 2) The extent to which a decision is found in and shaped by the law as opposed to private discretion;
- 3) The extent of a public entity's control of the administrative decision-maker; and
- 4) The public law remedies that are available on judicial review.

[48] With respect to the character of the matter for which the review was sought, the Federal Court Judge found that the breaches relied on by the Housing Authority for the eviction were contained in the Sale Agreement, implying that a breach of contract is the reason for the eviction (Decision at para. 42).

[49] The Federal Court Judge also determined that there was no band council resolution regarding the eviction notice, and that the authority to evict appears to be solely in the hands of the Housing Authority. The Federal Court Judge went on to note that there was no evidence that the matter is subject to a land code, or within the framework of the *First Nations Land Management Act*. In addition, all notices were from the Housing Authority. She concluded that

based on these facts, the Housing Authority was a separate entity with its own decision-making processes that deal with housing of Band members (Decision at paras. 25, 28 and 46). The Federal Court Judge found that “[o]verall, the factor is weighted to a private function of the day-to-day aspects of managing the Band’s housing, including arrears notices and other notices including the decision to evict based on a contract.” (Decision at para. 47).

[50] I disagree with the Federal Court Judge’s factual finding that the Housing Authority is separate from Band Council. As indicated in paragraphs 42 to 44 above, the overall evidence supports a factual finding that the Housing Authority is acting as the agent of the BFN and its Band Council. The Federal Court Judge’s conclusion that the Housing Authority dealt with the day-to-day aspects of managing the Band’s housing is accurate, but its decision to evict Mr. Cyr could not have been made without the Chief and Council’s approval.

[51] While the Federal Court erred, the error is inconsequential as I agree with the Federal Court Judge’s finding that the functions exercised by the Housing Authority are of a private law nature because they arise from the terms of the Sale Agreement. The Housing Authority managed the payment of the monthly installments, handled arrears, received complaints from members of the BFN regarding breaches, sent notices of breaches to the purchaser, and oversaw the eviction process. These activities are similar to those of a property manager.

[52] Regarding the second factor, the extent to which the decision is found in and shaped by the law, the Federal Court Judge determined that the Housing Authority finds its authority for the eviction in the Sale Agreement. No decisions were shaped by law but rather were at the



discretion of the BFN and the Housing Authority, subject to the provisions of the contract (Decision at para. 51).

[53] I see no palpable and overriding error.

[54] On the third factor at issue, the Federal Court Judge found that there was nothing on the record to suggest that the Housing Authority was influenced in any way by a public entity or is an agent of the government. She relied on the fact that it appears the Housing Authority exercises its own decision-making powers and discretion (Decision at para. 53).

[55] Again, I disagree with the Federal Court Judge findings on this third factor for the reasons given previously. The record supports a finding that the Housing Authority was acting as agent for the BFN, because it regularly represented the BFN in its contractual obligations.

[56] I must focus then on the BFN's role and whether it is influenced or acts as an agent of the Federal Government. In my view, decisions concerning Band housing, and whether the BFN should enter into a private agreement with one of its members to allow him to secure and purchase Band housing, are made independent of government. The Federal Government does not become involved until the BFN decides whether a Certificate of Possession should be issued to the purchaser. Here, so long as the terms of the Sale Agreement are complied with, the agreement refers to the transfer to the purchaser, by way of a bill of sale, title to the premises and taking all necessary proceedings to furnish the purchaser with a Certificate of Possession.

[57] The third factor leans towards a finding that the decision is of a private law nature.

[58] Finally, on the question of the remedies available on judicial review, the Federal Court Judge determined that this factor weighed heavily in favour of the matter being of a private law nature. The Federal Court Judge found that given the history between the parties and the attempts to have Mr. Cyr evicted, a redetermination from the Band Council would almost definitely return the same result. She also added that if Mr. Cyr was wrongfully evicted, he might have access in a different forum to damages for the value of the property, his expenses incurred outside his home and other potential remedies (Decision at paras. 54 and 55).

[59] The Federal Court Judge's statement that a redetermination would have to go before the Band Council, not the Housing Authority, is revealing. This statement supports the finding that the Housing Authority is acting as the agent of the BFN and is not independent of Band Council.

[60] Nevertheless, I agree with the Federal Court Judge that a redetermination would likely not provide Mr. Cyr with a different result. Given also that the remedy of damages is not available in a judicial review, this factor leans heavily towards the finding that the decision is of a private law nature.

[61] I have considered these four factors and agree with the Federal Court Judge's analysis of the character of the decision itself and her conclusion in law. The BFN Band Council exercised its private law contractual rights to evict Mr. Cyr, and therefore the Federal Court does not have

jurisdiction to hear the application for judicial review because it raises matters that are of a private law nature.

(3) The application of *Jimmie*

[62] Mr. Cyr contends that the Federal Court Judge misapplied *Jimmie* to the facts. I disagree.

[63] Regarding other relevant jurisprudence, the Federal Court Judge relied on the Federal Court decision of *Cottrell v. Chippewas of Rama Mnjknaning First Nation Band*, 2009 FC 261, 342 F.T.R. 295 [*Cottrell*] and distinguished this case from the Federal Court decision in *Jimmie*.

[64] In *Cottrell*, the Federal Court dealt with a somewhat similar matter where Mr. Cottrell was evicted from his rental accommodations on the reserve. The Federal Court found, at paragraph 81 of the decision, that although band council was a public body and its decision can be subject to judicial review, in this case, the parties entered into a private law contract dealing with Mr. Cottrell's right to occupy the house in question. The Court in *Cottrell* noted, at paragraph 82 of its decision, that Mr. Cottrell had the full range of contractual remedies available to him. *Cottrell* was decided before this Court rendered its guidance in *Air Canada*.

[65] The Federal Court Judge found that, as in *Cottrell*, Mr. Cyr signed a private law contract with the First Nation dealing with his right to live in the home (Decision at para. 38).

[66] Turning to *Jimmie*, the Federal Court examined the decision of the First Nation to evict Ms. Jimmie from her home. Similarly, Ms. Jimmie maintained that she had a substantial equity

interest in the home and the home was located on a reserve set aside for the First Nation. The Federal Court relied on *Air Canada*, and applied the factors to the facts before it. The Federal Court found that several factors weighed in favour of a conclusion that the decision should be viewed as an exercise of a public law power, rather than a private law power (*Jimmie* at para. 70). The Federal Court held that although the rental agreement was similar to rental agreements reached in the private sector, it was supplemented in important ways by the Land Code, which was relied upon by Council in making the Decision (*Jimmie* at para. 72).

[67] The Federal Court Judge found at paragraph 36 of her Decision that the case before her could be distinguished from *Jimmie* because Mr. Cyr's arrangements were not the result of a land code under the *FNLMA*.

[68] In contrast, the eviction in *Jimmie* was carried out pursuant to a band council resolution in reliance of its land code. According to subsection 12(1) of the *FNLMA*, a land code must be approved by the community. Further, the band council has the power to enact certain laws in accordance with its land code (subsection 20(1) of the *FNLMA*). Thus, the land code in *Jimmie* is certainly closer to a public law. In Mr. Cyr's case, he was evicted pursuant to the terms of the private contract between himself and the BFN. I see no error.

(4) Reasonable Apprehension of Bias

[69] Counsel for Mr. Cyr alleges that the Federal Court Judge had preconceived notions and was biased because she did not provide them with the opportunity to argue the *Air Canada* factors and did not properly consider their submissions. Before the Federal Court, Mr. Cyr had

alleged bias of the respondents and their lawyers, but never alleged that the Federal Court Judge herself was biased.

[70] Allegations of procedural fairness, such as allegations of bias, must be raised to the decision-maker before they can be entertained by this Court (*Nicole L. Tiessen Interior Design LTD. v. Canada*, 2022 FCA 53, citing *Athey v. Leonati* [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at paras. 51-52 and *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712 at paras. 36-39). In any event, a careful review of the transcript of the proceedings before the Federal Court Judge discloses no traces of bias or that the Judge had rushed counsel or had pre-judged the matter before her.

[71] This is not a situation where the Judge introduced a principle of law that was not raised by either party expressly or by necessary implication, or has taken the case on a substantially new and different analytical path (*Heron Bay Investments Ltd. v. Canada*, 2010 FCA 203, 405 N.R. 73). Rather, counsel were made aware of *Jimmie* in a previous appearance before Little J. on a preliminary motion (*Cyr v. Batchewana First Nations of Ojibways et al.*, 2020 FC 1001 at para. 50). In *Jimmie*, the Federal Court relied heavily on *Air Canada*.

[72] At the start of the hearing, the Federal Court Judge requested that counsel provide submissions on the application of *Air Canada* to determine the private law versus the public law nature of the decision. During their arguments in chief, counsel for Mr. Cyr failed to address the application of the factors set out in *Air Canada*. Counsel for the respondent did not address *Air Canada* in its submissions. The Federal Court Judge disallowed the attempt by counsel for Mr.

Cyr to do so in reply. It was within the Federal Court Judge's discretion to make such a call, having warned counsel at the outset.

[73] There is no merit to these allegations.

(5) Human Rights and Charter Violations

[74] In his Notice of Application before the Federal Court, Mr. Cyr alleged that his rights were violated under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the Charter). The Federal Court Judge noted in the applicant's Memorandum of Fact and Law he did not specify which Charter right was engaged or provide any detailed arguments regarding the alleged breaches.

[75] Before this Court, Mr. Cyr now alleges that his section 10(b) Charter rights were triggered when the police attended to evict him. In addition, he alleges that his human rights were violated. Once again, these specific arguments cannot succeed on appeal, because they were never raised before the Federal Court.

VII. Conclusion

[76] In conclusion, despite the Federal Court Judge's error in her factual findings, nothing warrants our intervention. I see no error of law in the Federal Court Judge's conclusion that the decision to evict Mr. Cyr was not an administrative action susceptible to judicial review. The

BFN and its agent the Housing Authority were not acting as a “federal board, commission or other tribunal” for the purpose of subsection 18(1) of the *Federal Courts Act*, therefore, the Federal Court does not have jurisdiction to review Mr. Cyr’s eviction.

[77] For these reasons, I would dismiss the appeal.

VIII. Costs

[78] Counsel for the respondents are relying on a Bill of Costs attached to their Memorandum of Fact and Law, in which they seek fees at Column III, and elevated costs of \$6,660 because they argue that the allegations of bias, human rights and Charter rights violations were all unfounded. They submit that Mr. Cyr’s materials are frivolous and vexatious in nature and that there was no merit to his appeal.

[79] Counsel for Mr. Cyr submits that costs in such an amount is prohibitive to Mr. Cyr.

[80] The allegations of bias against the respondent’s counsel and certain alleged Charter violations were already before the Federal Court Judge and therefore she had considered these arguments when she disposed of the issue of costs by awarding a lump sum of \$1,000 inclusive of disbursement and taxes against Mr. Cyr, payable forthwith.

[81] Although Mr. Cyr was unsuccessful in his appeal, I do not find that his arguments were frivolous or vexatious, or that his actions warranted elevated costs. The eviction from his home after it was paid in full, combined with the uncertainty of his ability to recover his equity and the

lack of Band housing requiring him to move off reserve, are obviously very serious matters to him. There was no evidence of bad faith on the part of the Chief and Council in the manner in which they treated Mr. Cyr. The respondents are entitled to costs because they were successful in their appeal, but their complaints lie more with the actions of counsel for Mr. Cyr rather than Mr. Cyr personally.

[82] I would therefore award costs in the amount of \$1,000 to the respondents, both for the Order to settle the terms of the Appeal Book and this appeal, inclusive of disbursements and taxes.

"Marianne Rivoalen"

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J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

Wyman W. Webb J.A."



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-184-21

**STYLE OF CAUSE:** DENNIS CYR v. BATCHEWANA  
FIRST NATION OF OJIBWAYS  
AND BATCHEWANA FIRST  
NATION OF OJIBWAYS  
HOUSING AUTHORITY

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MARCH 22, 2022

**REASONS FOR JUDGMENT BY:** RIVOALEN J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
WEBB J.A.

**DATED:** MAY 24, 2022

**APPEARANCES:**

Naomi Sayers FOR THE APPELLANT

Stacy R. Tijerina FOR THE RESPONDENTS  
Tahnee Carabello

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