Date: 2012 04 17
Docket: S-1-CV-2011- 000105

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

BEHDZI AHDA FIRST NATION

Applicant

- and -

BEVERLY CHAMBERLIN, DIRECTOR LANDS ADMINISTRATION, DEPARTMENT OF MUNICIPAL AND COMMUNITY AFFAIRS and ATTORNEY GENERAL FOR THE NORTHWEST TERRITORIES

Respondents

Application for judicial review of a decision of an administrative tribunal.

Heard at Yellowknife, NT, on April 10, 2012

Reasons filed: April 17, 2012.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for the Applicant: Loretta Bouwmeester

Counsel for the Respondents: Glen Rutland

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REASONS FOR JUDGMENT

[1] This is an application for judicial review of a decision of an administrative tribunal, on a point of law, under the *Commissioner's Land Regulations* R.R.N.W.T. 1990, c.C-13.

[2] In early 2011, Mr. and Mrs. Brown, residents of Colville Lake, NWT made application under the *Commissioner's Land Regulations* for a lease of certain "Commissioner's land" in Colville Lake, for residential purposes. The Browns had occupied these lands as their residence for many years, indeed since the 1960's, most of that time under a long-term lease issued by the federal government. (The lands had been transferred from the federal government to the Commissioner of the Northwest Territories in 2007). The Browns' application in early 2011 was received by a Lands Officer within the Department of Municipal and Community Affairs (MACA) of the Government of the Northwest Territories. Pursuant to departmental policy, the Lands Officer sent a copy of the Browns' lease application to the band

council of the Behdzi Ahda First Nation (BAFN) in Colville Lake for its review and comments. The band council sought more information and more information was provided by the Lands Officer. The band council subsequently expressed concerns about the size of the lands to be leased and the duration of the proposed lease, i.e., 30 years.

[3] On April 26, 2011 the Lands Officer made a decision authorizing the issuance of a lease to the Browns for a term of 30 years, and so notified the Browns and also BAFN.

[4] BAFN appealed the decision of the Lands Officer pursuant to s. 34(1) of the *Commissioner's Land Regulations*:

> 34(1) A person aggrieved by a decision made under these regulations by an authorized agent may appeal to the Director within 30 days after the decision is made.

[5] The Director (of Lands Administration of MACA) denied the appeal, with written reasons, on June 14, 2011.

[6] BAFN in the within proceedings in this Court seeks judicial review of the Director's denial of the appeal, pursuant to s. 35 of the *Commissioner's Land Regulations*:

> 35. An appellant who is dissatisfied with the decision of the Director under section 34 may, within 30 days after receiving a copy of the decision, apply to the Supreme Court for judicial review on a point of law.

[7] The applicant in these proceedings, in its filed Originating Notice and its filed brief, raises some very interesting issues concerning the Crown's duty to consult with Aboriginal peoples. Reference is made to recent decisions in the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* , 2005 SCC 69; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, and to the significant developments in Aboriginal law represented by those decision. Applicant's counsel invites this Court to provide guidance to the parties in this

developing area of the law, i.e. the duty to consult Aboriginal peoples in the present circumstances, i.e., when government is contemplating disposition of Commissioner's land which potentially may adversely affect an Aboriginal claim or an Aboriginal right.

[8] However, one of the responsibilities of a judge, including a chambers judge, is to recognize what issues are properly before the Court for adjudication, and which are not. As interesting a topic as it is, I find that the Crown's duty to consult Aboriginal peoples is not properly before this Court on this application for judicial review under s.35 of the Commissioner's Land Regulations.

[9] As the respondent's counsel points out, the genesis of this s.35 application for judicial review is the Director's decision on BAFN's appeal under s. 34. The Crown's duty to consult BAFN, whether founded in constitutional law, statute law, common law, or government policy, was not before the Director on the s.34 appeal. It was not a ground of appeal, explicit or implicit, on the s. 34 appeal by BAFN. This Court is unable to review the decision of the Director on an issue which she did not decide, was not asked to decide.

[10] On its s.34 appeal the applicant was disputing the Lands Officer's decision to issue a lease for 30 years (as opposed to a shorter term). In denying the s.34 appeal, the appeal tribunal (the Director) held that the Lands Officer did not err in setting the term of the lease at 30 years. The Crown's "duty to consult" was not raised in the appeal; hence was not part of the appeal tribunal's decision; hence it is not available as an issue, or "point of law" for review in this Court under s. 35 of the *Commissioner's Land Regulations*.

[11] The only possible issue, or point of law, that arises from the Director's decision, in denying the appeal, is the adherence to a departmental policy of issuing leases for a duration fo 30 years. This issue, though mentioned in the Originating Notice launching the within proceeding, is not well articulated as a point of law subject to judicial review.

[12] The *Commissioner's Land Act*, and the *Commissioner's Land Regulations* enacted thereunder, provide for the sale, lease or other disposition of Commissioner's land. Section 18 of the Regulations states that a lease is not to issue for a term exceeding 30 years:

> 18 (1) Every lease, other than a quarrying lease, shall be for a term not exceeding 30 years and in the form agreed to or provided by the Deputy Minister.
>
> (2) On the expiration of a lease referred to in subsection (1), the Deputy Minister may grant another lease to the lessee for a further term not exceeding 30 years upon such terms and conditions as the Deputy Minister deems fit.

[13] There is evidence before the Court that it is the long-standing practice of MACA to issue leases of Commissioner's land for residential use for terms of 30 years.

[14] Section 18 of the Regulations confers a statutory discretion on departmental officials to issue leases for any term, so long as the term does not exceed 30 years. It does not require a term of 30 years in each individual case.

[15] If MACA has an inflexible policy requiring a lease term of 30 years in each individual case, regardless of the merits of that case, that would constitute a fettering of the statutory discretion set forth in s.18. Any Lands Officer or Director who makes a decision in such a manner as to fetter his/her discretion commits a jurisdictional error. See *Braden-Burry Expediting Services Ltd. V. NWT Workers Compensation Board*, [1998] N.W.T.J. No. 174.

[16] This is not to say that the department cannot adopt a general policy. It is legally acceptable for an administrator, faced with a large volume of similar discretionary decisions, to adopt a standard rule of thumb, for reasons of consistency and efficiency. Such a practice is legally acceptable, provided the decision maker considers each individual case on its merits. The decision maker ought to disclose the existence of the general policy to an applicant or other interested party, and then allow that party to make representation as to why the decision maker ought to exercise his/her discretion in a different way in that party's particular or exceptional case. See Jones de Villars, *Principles of Administrative law*, 4th ed, at p.192-3.

[17] In the present case, the Lands Officer, upon receipt of the Browns' application for a lease of Commissioner's land, provided a copy of the application to BAFN for its review and comments. BAFN sought further information from the

Lands Officer, including information about the proposed term or duration of the proposed lease. The Lands Officer responded to the request for more information, and, in regards to this specific item, stated "MACA provides leases for a term of 30 years, unless there is good cause to substantiate a shorter term lease."

[18] The evidence before the Court indicates that the Lands Officer subsequently received and considered the representations of BAFN, and then exercised her statutory discretion to issue the lease for a term of 30 years.

[19] In these circumstances it cannot be said that the Lands Officer fettered her discretion.

[20] On the s.34 appeal, the appeal tribunal (the Director) stated, correctly, that the Lands Officer acted within her discretion in issuing a lease for a term of 30 years.

[21] On this judicial review under s.35 of the Regulations, the applicant has failed to establish any error on a point of law.

[22] Accordingly, the application is dismissed with costs.

J.E. Richard
J.S.C.

Dated this 17th day of April, 2012.

Counsel for the Applicant: Loretta Bouwmeester
Counsel for the Respondents: Glen Rutland

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