Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development) (C.A.), 1999 CanLII 9388 (F.C.A.)

Date:	1999-11-17
Docket:	A-568-98
Parallel citations:	(1999), [2000] 2 F.C. 314 • (1999), 181 D.L.R. (4th) 730 • (1999), [2000] 3 C.N.L.R. 386 • (1999), 23 Admin. L.R. (3d) 1 • (1999), 172 F.T.R. 160
URL:	http://www.canlii.org/en/ca/fca/doc/1999/1999canlii9388/1999canlii9388.html
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A-568-98

(T-1737-97)

Simon Smith, David Paul, Chris Tom, Vern Tom, John Elliott, Curtis Olsen and **Joe Bartleman, on their own behalf as Chief and Council of the Tsartlip Indian Band and on behalf of the Tsartlip Indian Band** (*Appellants*)

v.

The Minister of Indian Affairs and Northern Development, Clydesdale Estate Holdings Ltd., Blaine Wilson, Tracy Wilson, Genevieve Elliott, Lavina Olsen and **George Wilson** (*Respondents*)

Indexed as: Tsartlip Indian Bandv. Canada (Minister of Indian Affairs and Northern Development) (C.A.)

Court of Appeal, Décary, Robertson and Noël JJ.A."Vancouver, October 27; Ottawa, November 17, 1999.

Native peoples " Lands " Minister leasing land on Indian reserve under Indian Act, s. 58(3) " Respondents given rights of exclusive possession, occupation of two lots on reserve " Intending to develop manufactured home park on one lot for use of non-Indians " Band Council members opposing project " Lease issued to respondent corporation despite Band's opposition " No fiduciary obligation owed by Crown to Band " Standard of review of Minister's decision reasonableness " Decision unreasonable as Band's concerns discarded without proper consideration.

Administrative law " Judicial review " Certiorari " Appellants seeking to set aside Minister's decision to lease land on Indian reserve under Indian Act, s. 58(3) " Crown under no fiduciary obligation to Indian band when acting under s. 58(3) " Purpose of Act band-oriented when use of reserve land at issue " Factors determining standard of review of Minister's decision those outlined by S.C.C. in Pushpanathan " Reasonableness appropriate standard herein " Minister bound to give weight to band's concerns where lease detrimental to band " Minister granting lease to substantial detriment of Band without proper consideration of major concerns " Decision unreasonable.

This was an appeal from a Trial Division decision upholding a decision by the Minister of Indian Affairs and Northern Development to lease part of an Indian reserve land under subsection 58(3) of the *Indian Act*. The locatees, all members of the Tsartlip Indian Band, had exclusive possession and occupation of lots 5 and 5A in an Indian reserve on Vancouver Island pursuant to two Certificates of Possession issued under section 20 of the Act. Being shareholders of a corporation called Clydesdale Estate Holdings Ltd., they intended to develop, through it, a manufactured home park on Lot 5A for the use of non-Indians. Following Band meetings in 1995, they were advised to put their proposal on hold. Contrary to that advice, they arranged to have 25 manufactured homes

placed on Lot 5A, between December 1995 and the end of January 1996. On May 1, 1997, a lease was issued to Clydesdale Estate Holdings Ltd. retroactively from April 1, 1996 for a term of 18 months. The appellants, who were at the relevant times Chief and Council of the Tsartlip Indian Band, submitted that the Minister, in the exercise of his discretion under subsection 58(3), failed to take the Band's concerns into consideration and that as a result his decision was unreasonable. Two main issues were raised on appeal: (1) whether the Crown owed a fiduciary obligation to the Indian band and what is the standard of review for decisions made by the Minister under subsection 58(3) of the Act; (2) whether the decision was reasonable.

Held, the appeal should be allowed.

(1) This Court has already ruled that the Crown, when acting under subsection 58(3) of the Act, has no fiduciary obligation to an Indian band. In the present case as well, there was no authority for the proposition that there exists a fiduciary duty either to the band or to a member of the band or to both in cases of management by the Minister of land in a reserve. The Minister had no interest in the outcome of his decision. Whatever the decision, the lands will remain lands on the reserve. There was no adversarial relationship between the Crown and the band as a whole or the member of the band, and no legitimate public purpose to be advanced by the Minister which would be adverse to the interest of the Aboriginal people. The very remedy sought by the Band Council, namely a declaration that the lease is null and of no effect, is not a remedy available to sanction a breach of the fiduciary duty. The approach already followed in administrative law when competing interests are at issue before a decision maker is whether the Minister weighed the respective views of the persons affected by the decision and did so on the basis of proper considerations. As to the appropriate standard of review for decisions made under subsection 58(3) of the Act, there are four factors affecting the determination of that standard as outlined by the Supreme Court of Canada in *Pushpanathan*. Those factors are the privative clauses, the expertise of the decision maker, in this case the Minister, the purpose of the Act as a whole and the provision in particular and finally the nature of the problem (whether relating to a question of law or fact). Taking these factors into account, the Court concluded that considerable deference should be accorded the Minister and that the appropriate standard of review is that of reasonableness.

(2) The Minister, in deciding whether to lease or not, had a double duty, one to the individual holding the Certificate of Possession, the other to the band. The question is then what considerations in a given case should lead the Minister to exercise his discretion in favour of one rather than the other. The *Indian Act* is very much band-oriented where the use of lands in a reserve is at issue. The intent of Parliament was to require the consent of the band council whenever a non-member of the band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year. The mere fact that the Band has originally agreed to permit a locatee to occupy and use a lot on the reserve could not mean that the Band has implicitly abandoned the right it has under subsection 28(2) of the Act to control the use of the lot by a non-member of the Band. The Minister is bound to give more weight to the concerns of a band when dealing with a type of lease that would be subject to subsection 28(2). In this case, he failed to satisfy himself that the concerns of the Band with respect to the long-term development of a manufactured home subdivision were unwarranted or minimal. Those concerns were discarded without proper consideration. This was a fatal flaw in the Minister's decision. It was unreasonable for the Minister to rush to grant a lease, which was in any event retroactive, when the basic requirements for water and sewer services had not yet been met. The retroactivity of the lease in the circumstances of this case was another source of major concern. The Minister granted a lease that operated to the substantial detriment of the Band without proper consideration of the major concerns voiced by the Band. His decision was unreasonable.

statutes and regulations judicially considered

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35(1).

Indian Act, R.S.C., 1985, c. I-5 , ss. 20(1),(2), 24, , 28, 37(2) (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 2), 38(2) (as am. *idem*), 46(1), 58(3) (as am. *idem*, s. 8), 59(*a*) (as am. *idem*, s. 9), 60(1), 81 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 15), 82.

cases judicially considered

applied:

Boyer v. R., reflex, [1986] 2 F.C. 393; (1986), 26 D.L.R. (4th) 284; [1986] 4 C.N.L.R. 53; 65 N.R. 305 (C.A.); *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1999), 247 N.R. 350; 27 R.P.R. (3d) 157 (C.A.); *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2

S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982; (1998), 160 D.L.R. (4th) 193; 43 Imm. L.R. (2d) 117; 226 N.R. 201.

referred to:

Guerin et al. v. The Queen et al., 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344; (1995), 130 D.L.R. (4th) 193; [1996] 2 C.N.L.R. 25; 190 N.R. 89; *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3; (1997), 148 D.L.R. (4th) 523; [1998] 1 C.N.L.R. 250; 215 N.R. 241 (C.A.).

APPEAL from a Trial Division decision (reflex, (1998), 163 D.L.R. (4th) 353; [1999] 1 C.N.L.R. 258; 148 F.T.R. 142) upholding a decision by the Minister of Indian Affairs and Northern Development to grant a lease on an Indian reserve under subsection 58(3) of the *Indian Act* to develop a manufactured home park for the use of non-Indians. Appeal allowed.

appearances:

Arthur Pape for appellants.

Robert J. McDonell for respondents.

solicitors of record:

Pape & Salter, Vancouver, for appellants.

Farris, Vaughan, Wills & Murphy, Vancouver, for respondents.

The following are the reasons for judgment rendered in English by

[1]Décary J.A.: This is an appeal from a judgment of the Trial Division reported at reflex, (1998), 163 D.L.R. (4th) 353. The issue is the extent of the consideration that should be given by the Minister of Indian Affairs and Northern Development (the Minister) to the views and concerns of an Indian band when the Minister, under the authority of subsection 58(3) [as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 8] of the *Indian Act*, R.S.C., 1985, c. I-5 (the Act), leases for the benefit of an Indian the land of which that Indian is lawfully in possession.

[2]The appellants were Chief and Council of the Tsartlip Indian Band (the Band) at the times relevant to this appeal. They submit that the Minister, in the exercise of his discretion under subsection 58(3), owes a fiduciary duty both to the Indian who makes the application for lease (the locatee) and to the band and must, absent the consent of the band council, seek to "accommodate" both the interests of the locatee and those of the band, failing which he should refuse the application for lease. The "accommodation", presumably, is to occur through negotiation with the two adverse parties leading to a mutually acceptable compromise. In the alternative, the appellants submit that in the circumstances the Minister failed to take the Band's concerns into consideration and that as a result his decision is unreasonable.

[3]The Minister relies on the decision of this Court in *Boyer v. R.*, reflex, [1986] 2 F.C. 393 (C.A) to deny that any fiduciary duty is owed to the Band and submits that the Minister's discretion is to be directed to the interests of the locatee. The Minister does acknowledge that he must give some consideration to the views of the Band, but he argues that he is not obligated to give the Band the upper hand in its dispute and litigation with the locatee. In the Minister's view, the real point to all the Band's submissions is that the consent of the Band Council to the lease is required, the very argument that was dismissed by the Court in *Boyer*.

[4]The answer to these conflicting views in the circumstances of this case lies somewhere in between the two extremes: the solution, it seems to me, is short of a fiduciary duty but under administrative law principles, short of requiring the consent of the Band Council. The words "band", "band council" and "chief and council" are used interchangeably throughout these reasons as they are in the jurisprudence.

Relevant Statutory Provisions

[5]It will be useful at this stage to reproduce the text of the provision at issue, i.e. subsection 58(3):

58. . . .

(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

as well as the text of other provisions I will be referring to in the course of these reasons, i.e. subsections 20(1) and (2), sections 24, 28, subsections 37(2) [as am. *idem*, s. 2], 38(2) [as am. *idem*], 46(1), paragraph 59(*a*) [as am. *idem*, s. 9] and subsection 60(1):

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

. . .

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

. . .

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.

(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.

. . .

37. . . .

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

38. . . .

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

. . .

46. (1) The Minister may declare the will of an Indian to be void in whole or in part if he is satisfied that

. . .

(*d*) the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act;

. . .

59. The Minister may, with the consent of the council of a band,

(*a*) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; and

. . .

60. (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

The Facts

[6]The respondents Blaine Wilson, Tracy Wilson, Genevieve Elliott, Lavina Olsen and George Wilson (the locatees) are all members of the Tsartlip Indian Band. They share the right to possession of lots 5 and 5A in the South Saanich Indian Reserve No. 1 (the reserve) on Vancouver Island, pursuant to two Certificates of Possession issued under section 20 of the *Indian Act*. These Certificates were issued to the locatees by the Band with the approval of the Minister. They give the locatees rights of exclusive possession and occupation of the lots. The locatees are also shareholders of the respondent Clydesdale Estate Holdings Ltd. (Clydesdale Estate).

[7]The locatees intended to develop through Clydesdale Estate a manufactured home park on Lot 5A for the use of non-Indians. They came to the Band Council on July 27, 1995. Band Council members advised them of problems associated with such a proposal, including the shortage of land for Band members' own housing, limits on the reserve's water and sewer capacity, the need for overall land-use planning on the reserve, the dangers of setting a precedent with such developments on Certificate of Possession lands, and the longstanding opposition of Band members to this particular type of commercial development on their reserve.

[8]The locatees were advised to bring the matter to a Band meeting scheduled for August. They attended the Band meeting on August 9, 1995 and another Band Council meeting on September 14, 1995. They were advised not to proceed.

[9]Later on, first by a letter from Chief and Council dated October 4, 1995, then at a meeting of the Council on October 23, 1995, then by another letter of a newly elected Band Council on November 9, 1995 and finally at a meeting of that new Band Council on November 30, 1995, they were advised to put their proposal on hold.

[10]Contrary to this consistent advice, the locatees arranged to have 25 manufactured homes placed on Lot 5A, between December 1995 and the end of January 1996. The homes were placed without any permit or lease being granted under the Act, or any authorization for the storage, treatment or discharge of sewage. This type of arrangement does not appear to be unusual on a reserve; it is an unauthorized arrangement referred to as a buckshee arrangement. The uncontradicted evidence is to the effect that Clydesdale Estate was leasing or intending to lease the homes to non-Natives (see, *infra*, paragraph 58).

[11]In early February 1996, a relative of one of the locatees contacted Mr. Gailus, a senior land management and leasing officer with the Department of Indian Affairs and Northern Development (the Department). The relative was requesting a meeting to discuss the procedure for leasing land under subsection 58(3) of the Act.

[12]On February 15, 1996, Mr. Gailus met with the locatees and their legal counsel. The locatees advised Mr. Gailus that they wished to bring the development into compliance with the Act through a lease agreement with Clydesdale Estate under subsection 58(3). They also advised Mr. Gailus that the Chief and Council of the Band opposed the development of a manufactured home park on lots 5 and 5A. The locatees were then given materials which outline the necessary procedures for leasing locatee land.

[13]On March 19, 1996, counsel for the Band reminded Mr. Gailus of the Band's understanding that the Department's policy "is not to approve any application for development on reserve land without having first obtained the consent of the Council" and advised Mr. Gailus "that the Band wishes to be involved in the processing of this proposed development application" (A.B., Vol. 3, at page 570).

[14]On March 21, 1996, Mr. Gailus assured the Band that all factors, including the views of the Band Council, would be examined in determining whether to approve the application for lease.

[15]On April 3, 1996, the locatees filed their application for lease, noting that the lease was to commence April 5, 1996.

[16]On April 23, 1996, the Band Council adopted a resolution requesting the Department "to act in their legal capacity to have this mobile home park development stopped and forthwith removed from the Tsartlip Reserve" (A.B., Vol. 3, at page 588). The Band Council met the next day with Mr. Montour, the Department's Associate Regional Director of the B.C. Region.

[17]On May 6, 1996, Mr. Gailus wrote to the Band Council, stating his understanding "that there had been an on-going dispute between Chief and Council and the locatees" regarding the development and suggesting "that all the parties meet in person . . . in order that you might make representations regarding any concerns which you have with this proposal" (A.B., Vol. 3, at page 590).

[18]On May 23, 1996, the Band Council wrote to the Minister directly, apprising him of its opposition to the development.

[19]On July 16, 1996, the Minister, in his reply to the May 23, 1996, letter, acknowledged that "[i]n determining whether to enter into a lease with a developer, my department must examine all legitimate concerns, including those of Chief and Council" (A.B., Vol. 2, at page 343).

[20]Throughout this period, extensive work, study and analysis was dedicated by the Department to the lease and to the development generally and, in particular, to the environmental issues of sewer and water services. Officials of the Department continuously corresponded with the Band Council keeping it abreast of all developments and seeking its input.

[21]In the second week of November 1996, the locatees cleared brush and trees from Lot 5 and constructed a new gravel road into the property. This was done without any notice to the Band Council or any authorization under the Act.

[22]On December 5, 1996, the Band Council wrote again to Mr. Gailus, requesting that no leases be signed without its consent (A.B., Vol. 3, at page 683).

[23]Starting in November, 1996, the Band Council took steps to develop a zoning by-law that would ensure the orderly and well-planned development of the reserve. The Band Council had been advised for some 15 years by Department officials and various consultants that that would be the best way to proceed, but until then the Band Council had resisted the idea, being of the view, as was expressed by Chief Simon Smith at a meeting held on November 30, 1995, that "we do not have to have a by-law, we trust people and respect the land" (A.B., Vol. 2, at page 330).

[24]The Minister not having assisted in the removal of the unauthorized development when requested, the Band Council approved a zoning by-law on December 23, 1996, pursuant to section 81 [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 15] of the Act. The by-law was not disallowed by the Minister and therefore, pursuant to section 82 of the Act, it became legally effective on January 31, 1997 (A.B., Vol. 2, at page 429).

[25]The by-law essentially designates the reserve as a Special Development Zone, and prohibits the use or development of reserve land for commercial activities that would substantially change or impact on land in the reserve, unless the Band Council approves such use or development as an appropriate use of land, with or without terms and conditions, after receiving an application from the proponent and advice from a Zoning Advisory Committee. The by-law provides, *inter alia*, for non-conforming uses: a use of land that was lawful when the by-law came into force could be continued as a non-conforming use (A.B., Vol. 2, at page 427).

[26]There has been no legal challenge to the by-law. It is understood that "[t]he coming into force of [the] by-law pursuant to section 82 of the *Indian Act* is not an expression of opinion by the Minister that the by-law is valid" (A.B., Vol. 2, at page 430).

[27]The locatees did not apply for or receive approval under the by-law for their development.

[28]On March 21, 1997, the Band Council wrote to the Department summarizing the reasons why a lease should not be issued for the development:

First, the proponent have no secure arrangements in place for water or sewer services:

(1) As Wright Parry pointed out in the Report prepared for the Band, the proposed sewer treatment system is not acceptable: their conclusion of this agrees with the conclusion reached DPW officials.

(2) Wright Parry have also said that it would not be prudent to agree to a long-term connection to the Band's water system until we are certain that this will not increase existing problem, including the dangerously low pressure in some parts of the reserve. Therefore we will be writing to the proponents next week, advising them when they will be disconnected from the Band's water system. The proponents have no alternatives source of safe or reliable water.

(3) The proponents have not provided a detailed or reliable proposal for dealing with storm water disposal.

Second, in considering the requested lease, DIAND should be balancing whatever duty it owes to the [Certificate of Possession] holders with its fiduciary duties to the Band as a whole. This development is contrary to the interests of the Band as a whole:

(1) The development will cause harm to neighboring parts of the reserve, because of sewage and runoff problems.

(2) The proponents have known from the beginning that they were going ahead contrary to the wishes of the community and the Chief and Council.

(3) This development is not consistent with the Band's most recent proposed community plan. That plan is now being reviewed. This development is large, and will have a big impact on other parts of the reserve. It should not be authorized until it is clear that it is consistent with sound planning and management of the reserve as a whole.

(4) DIAND has for years been suggesting that the Band should be involved in planning and land management decisions for our reserve, through by-laws. We now have the Tsartlip Zoning By-law in place, which establishes a way to ensure that proposals like this one will be consistent with the interest of the whole Band. The proponents have not made application or received approval as required by that by-law. We want DIAND to respect and support our by-law.

(5) These last two matters are of special importance because our reserve was set aside under Treaty, as the village for the use of our Band's members.

Third, this whole development is the subject of litigation. An interlocutory injunction has been granted, but temporarily suspended. We suggest that DIAND should not consider granting a lease now, while this matter is before the Court, because the Band is asking the Supreme Court of British Columbia to grant a permanent injunction. [A.B., Vol. 2, at pp.485-486.]

[29]On April 10, 1997, the Department replied to the March 21, 1997, letter in the following terms:

Thank you for your letter of March 21, 1997 concerning the proposed lease of Lots 5 and 5A. Block 6 on the South Saanich reserve. We have read with interest the comments received from Wright Parry and will incorporate these comments and concerns into our assessment under the *Canadian Environmental Assessment Act (CEAA).*

In relation to the servicing issues raised in your letter, I have the following comments:

1) The proponent has submitted a modified proposal which has addressed those concerns outlined in the correspondence received from our engineers in Public Works. DIAND has proposed that the proponent demonstrate the feasibility of the proposed sewage treatment system prior to any decision regarding issuance of a

permit under the *Indian Reserve Waste Disposal Regulations* (IRWDR). I enclose for your reference, copies of subsequent correspondence related to that proposal.

2) In regard to water servicing issue, the proponents have been advised that it is their responsibility to ensure that potable water is provided to the subject site. Investigations have been carried out at the site, and have found sufficient water pressure. Our engineers are of the view that the addition of 41 manufactured homes to the Tsartlip band system would not lead to an increase in an already existing problem.

3) The issue of stormwater disposal also has been addressed. The proponents have presented a concept for dealing with increased stormwater which may result from their development. Before DIAND will execute a lease, as a matter of practice, we do not require a detailed plans. Detailed plans are however necessary prior to DIAND consenting to construction of such works.

I have difficulty accepting your premise that this development would be detrimental to the band as a whole. Section 58(3) of the *Indian Act* clearly allows the holder of a certificate of possession to lease his land, without the consent of the Council of the band. Recent jurisprudence has upheld this right. However, as a matter of policy, DIAND has sought the input of the Chief and Council to the proposed development on reserve.

Although DIAND does not condone the actions of the locatees in constructing a part of the proposed leasehold without the consent of either the council of the day or the department, we are of the view that the alternatives to this project are untenable. Specifically, the removal of the current development or continued existence of this development without a lease in place are not viable options. It is not the policy of the department to dictate the removal of what is considered to be a "buckshee" arrangement, where those individuals present are there with the consent of the locatees.

The issuance of a lease represents a positive step to the department in the protection of the environment and the interests of the First Nation as a whole. In consideration of the issuance of the lease, the department has sought to ensure that the proponent has considered all environmental impacts of the proposed development, as well as the current development.

The department acknowledges that this project is not supported by the Chief and Council of the First Nation. However, the department has sought through an open environmental assessment process to consider and, where appropriate, to have the proponent address, the concerns raised by Chief and Council. These concerns will be addressed in our screening decision under CEAA.

In reference to your position regarding your by-law, the proponent has been made aware that its development may contravene the zoning by-law. However, I bring to your attention the fact that the proposed lease has always been contemplated to be April 1, 1996; which preceded the enactment of the by-law. Moreover, DIAND is not in a position to enforce a by-law enacted by a First Nation.

Finally, the issue of the Douglas Treaty has been raised. To apply the wording of the Douglas Treaty as widely as you propose would not allow any economic ventures on many of the reserves on Vancouver Island, and would in fact lead to a nullification of the four existing leases that are in place on the South Saanich reserve. It has been the policy of DIAND to interpret the Douglas Treaty liberally in order to allow for economic ventures on reserve, which could not have been foreseen in 1852. [A.B., Vol. 2, at pp. 487-488.]

[30]On May 1, 1997, the lease for lots 5 and 5A was issued to Clydesdale Estate. The lease was made to operate retroactively from April 1, 1996 and it was granted for a term of 18 months, expiring September 30, 1997 (A.B., Vol. 1, at page 52).

[31]Clauses 2.2 and 2.3 of the lease provide:

2.2 The Minister shall have the option to extend the term for a further period, if the Minister has determined that there is adequate sewer and water service available to the Premises.

2.3 If the Minister has determined there is adequate sewer and water service available to the Premises, the term of the Lease shall not exceed 24 years, 11 months and will expire on February 28, 2021. [A.B., Vol. 1, at p. 53.]

and Clause 12.6 requires the lessee,

. . . within ninety (90) days of the execution of this Lease, [to] provide the Minister with a detailed stormwater management plan. [A.B., Vol. 1, at p. 61.]

[32]The sole use under the lease is that permitted by Clause 4.1:

. . . the operation of a manufactured home park for residential single family dwelling. . . . [A.B., Vol. 1, at p. 54.]

and Clause 14.1 ensures "compliance with laws" in the following terms:

The Lessee will at its expense observe and perform all of its obligations and all matters and things necessary or expedient to be observed or performed by it by virtue of any applicable law, statute, by-law, ordinance, regulation or lawful requirement of the federal, provincial or municipal government or authority, the Band Council or any public utility company lawfully acting under statutory power. [A.B., Vol. 1, at p. 62.]

Fiduciary obligation

[33]This Court, in *Boyer, supra*, has ruled that the Crown, when acting under subsection 58(3), is under no fiduciary obligation to the Band. The relevant passage from Marceau J.A.'s reasons is as follows (at pages 405-406):

I will say first that I have some difficulty in understanding how that submission can have a real role to play in the context of the action as instituted. The relief sought is not damages but a declaration that the lease is null and of no effect. I fail to see how the breach of a fiduciary duty on the part of the Minister in entering into a contract could have the effect of nullifying the contract itself when all legal requirements for its execution have been complied with. But in any event, I simply do not think that the Crown, when acting under subsection 58(3), is under any fiduciary obligation to the Band. The *Guerin* case was concerned with unallotted reserve lands which had been surrendered to the Crown for the purpose of a long term lease or a sale under favourable conditions to the Band, and as I read the judgment it is because of all of these circumstances that a duty, in the nature of a fiduciary duty, could be said to have arisen: indeed, it was the very interest of the Band with which the Minister had been entrusted as a result of the surrender and it was that interest he was dealing with in alienating the lands. When a lease is entered into pursuant to subsection 58(3), the circumstances are different altogether: no alienation is contemplated, the right to be transferred temporarily is the right to use which belongs to the individual Indian in possession and no interest of the Band can be affected (I repeat that of course I am talking about interest in a technical and legal sense; it is obvious that morally speaking the Band may always be concerned by the behaviour and attitude of its members). In my view, when he acts under subsection 58(3), the duty of the Minister is, so to speak, only toward the law: he cannot go beyond the power granted to him, which he would do if, under the guise of a lease, he was to proceed to what would be, for all practical purposes, an alienation of the land (certainly not the case here, the lease being for a term of 21 years with no special renewal clause); and he cannot let extraneous consideration enter into the exercise of his discretion, which would be the case if he was to take into account anything other than the benefit of the Indian in lawful possession of the land and at whose request he is acting. The duty of the Minister is simply not toward the Band. [My emphasis.]

[34]Counsel for the appellants was unable to refer the Court to any authority for his proposition that there exists a fiduciary duty, either to the band or to a member of the band or to both in cases concerning the management by the Minister of land in a reserve. Although the courts, and notably the Supreme Court of Canada, have made wide-ranging pronouncements regarding the special trust relationship between the Crown and the Aboriginal peoples of Canada, they have not as of yet extended this fiduciary obligation to circumstances beyond those arising directly from the surrender of land or the infringement of an Aboriginal right recognized under subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]].

[35]Should an extension of the application of the concept of fiduciary duty be warranted, it most certainly would not be in circumstances such as the present ones. As recently noted by this Court in *Wewayakum Indian Band v. Canada and Wewayakai Indian Band* (1999), 247 N.R. 350 (F.C.A.), McDonald J.A. at paragraph 120 [page 383]:

. . . a fiduciary duty does not arise in every facet of Crown-Native relations nor is the content of the fiduciary

responsibilities of the Crown identical in every transaction. . . .

The concept of fiduciary duty is remarkably unsuited, in my view, for the purpose of defining what is the role of the Minister when, in the exercise of his statutory duties with respect to the management of land in a reserve, he assesses the competing interests of a member of a band on the one hand, and of the band as a whole. The Minister has no interest in the outcome of his decision. The Crown does not stand to gain any benefit from the decision of the Minister. Whatever the decision, the lands will remain lands on the reserve. There is no adversarial relationship between the Crown and the band as a whole or the member of the band. There is no legitimate public purpose to be advanced by the Minister which would be adverse to the interest of the Aboriginal people. There is no "exploitation" by the Crown of the band's or the locatee's rights. (See *Guerin et al. v. The Queen et al.* , 1984 CanLII 25 (S.C.C.), [1984] 2 S.C.R. 335, at page 383; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344, at page 371 and *Semiahmoo Indian Band v. Canada*, 1997 CanLII 6347 (F.C.A.), [1998] 1 F.C. 3 (C.A.), at page 22.) Marceau J.A.'s conclusion in *Boyer* that there was no fiduciary duty to the band has withstood the passage of time.

[36]Furthermore, for the reasons given by Marceau J.A. in *Boyer*, it would be a futile exercise to embark into a long dissertation on fiduciary duty when the very remedy sought by the Band Council, i.e. a declaration that the lease is null and of no effect, is not a remedy available to sanction a breach of that duty. This Court expanded on the nature of the remedies available in *Semiahmoo*, *supra*, where the parties had agreed (at page 47) that the three main remedies available to the Court in order to remedy such a breach were: (1) the implementation of a constructive trust (which presumes some unjust enrichment on the part of the Crown), (2) an award of equitable damages, or (3) an accounting for profits (or a combination thereof).

[37]Counsel for the appellants is also obviously quite aware of the practical difficulties arising from the application of the concept of fiduciary duty in cases such as the present one. He is forced to argue (a) that if there is a fiduciary duty to a band, there is also one to the locatee, (b) that the Minister's fiduciary duty to both a band and a locatee consists in attempting to accommodate their conflicting interests and (c) that it is only where the issuance of a lease for the benefit of a locatee would be to the substantial detriment of a band as a whole, that the fiduciary duty to the band should prevail over the fiduciary duty to the locatee. It is not clear to me why counsel is insisting on having a ruling of this Court on the existence of a fiduciary duty when the circumstances of the case hardly invite such a ruling and when more traditional avenues are open to the appellants.

[38]What counsel is actually proposing under the label of fiduciary duty is the approach already followed in administrative law whenever competing interests are at issue before a decision maker, in this case the Minister: whether the Minister weighed the respective views of the persons affected by the decision and did so on the basis of proper considerations. While counsel did not concede the fragility and impracticability of his argument based on fiduciary duty, he nevertheless agreed that the Court could, if it wished, follow the more traditional route of applying administrative law principles.

[39]In order, however, to follow this more traditional route, the Court must dispel the impression left by the passages which I have underlined in paragraph 33 in Marceau J.A.'s reasons that as there is no duty of the Minister towards a band, there is no need for him to strike a balance between the interests of a band and those of the locatee when a lease is granted under subsection 58(3).

[40]The words I have underlined must be read in context. In *Boyer*, a band opposed the granting of the lease as a matter of principle, it being of the view that the Minister had no authority under subsection 58(3) to enter into the lease without its formal consent. As Marceau J.A. put it at page 400:

I have no doubt that the only question that has to be determined in order to dispose of the case is whether or not the validity of this lease depended on the consent of the Band or its council.

and it is in answering the argument raised by that Band that consent was required under subsection 58(3) "by necessary implication . . . as an effect of the fiduciary obligation of the Crown toward the Band" (at page 401), that Marceau J.A. made the impugned statement.

[41]In *Boyer*, the proposed lease was with respect to the development of a full service marina and tourist facility on the St. Mary's River. The question of allowing non-Indians to reside on the reserve was not raised. No by-law

was in issue. The sole question before the Court was a question of principle: whether the consent of the Band was required by the statute or as an effect of a fiduciary obligation. No mention was made of a possible prejudice to the Band and the idea of an administrative law duty on the Minister to weigh the conflicting interests of the Band and of the locatee was not mentioned nor explored. When Marceau J.A. at pages 405 and 406 stated that "no interest of the Band can be affected", that the Minister cannot "take into account anything other than the benefit of the Indian in lawful possession of the land and at whose request he is acting" and that "[t]he duty of the Minister is simply not toward the Band", he was merely addressing the situation where no interests of the Band were argued to be at stake. I find that the Court in *Boyer* did not rule out the need for balancing the interests at stake prior to granting a lease. The sole issue was whether the Band could veto a lease, and the answer was that it could not.

[42]My reading of *Boyer* is similar to that of the Minister as appears from the closing words of the analysis of the *Boyer* decision found in the Department's Land Management and Procedures Manual:

The department's policy of referring subsection 58(3) leases to the band council does not therefore give the band council a veto power. [Clause 6.3.1, A.B., Vol. 2, at p. 517.]

The evidence shows that as a matter of policy the Minister seeks the input of the Chief and Council with respect to any proposed development on a reserve (A.B., Vol. 2, at pages 343, 488 and 517), and goes so far as to request, where a proposed lease is for a term of 49 years or less, that "the band council should be asked to confirm that the proposed lease does not contravene approved land use plans or zoning by-laws" (at page 518).

Review of discretionary decision making

[43]The approach to review of discretionary decision making was recently canvassed by L'Heureux-Dubé J. in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817. She noted at paragraph 53 that:

. . . discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law . . . , in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* . . . .

[44]I must first determine, using the pragmatic and functional approach, the appropriate standard of review for decisions made under subsection 58(3) of the Act. Four factors affecting the determination of that standard are outlined in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (S.C.C.), [1998] 1 S.C.R. 982 and applied in *Baker*.

[45]The first factor is that of privative clauses. The absence of a privative clause, as is the case here, militates in favour of a lower standard of deference.

[46]The second factor is that of the expertise of the decision maker, in this case the Minister. This is the most important category and, as noted by Bastarache J. in *Pushpanathan, supra*, at page 1007, it is closely related to the fourth category, that of the nature of the problem. In deciding whether to lease or not and in balancing the social, cultural, economic, environmental etc. interests of a member of a band and those of the band as a whole, the Minister has a broad and specialized expertise. This factor militates in favour of a higher degree of deference.

[47]The third factor is the purpose of the Act as a whole, and the provision in particular. As noted by Bastarache J. in *Pushpanathan, supra*, at page 1008, purpose and expertise often overlap. The purpose of subsection 58(3), as found in *Boyer, supra*, at page 406 is "to give the individual member of a Band a certain autonomy, a relative independence from the *dicta* of his Band council, when it comes to the exercise of his entrepreneurship and the development of his land". The purpose of the Act, however, is generally more band-oriented and reserve-oriented when what is at issue is the use of land in a reserve (see sections 20, 24, 28 and 38). I shall come back to these sections when examining the considerations that should guide the Minister when exercising his discretion.

[48]In the case at bar, while it is true that the ultimate purpose achieved by the decision is that of establishing rights as between parties, the process, because it relates to the wider context of Aboriginal rights, is more akin to "a delicate balancing between different constituencies" (*Pushpanathan , supra*, at page 1008) which invites a greater

standard of deference. The administrative structure in place more closely resembles the polycentric model and calls for judicial restraint.

[49]The fourth factor is the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant a lease involves a considerable appreciation of the circumstances as they are viewed by the locatee and by a band respectively. No definite legal rules are to be applied or interpreted by the Minister. As in *Baker*, *supra*, at paragraph 61, "[g]iven the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference".

[50]Taking these factors together, I come to the conclusion that considerable deference should be accorded the Minister and that the appropriate standard of review is that of reasonableness.

Was the decision reasonable?

[51]The Minister, in deciding whether to lease or not, has a double duty, one to the individual holding the Certificate of Possession, the other to the band. There is no basis for the suggestion that one duty should necessarily prevail over the other in case of conflict. The question is to determine what considerations in a given case should lead the Minister to exercise his discretion in favour of one rather than in favour of the other.

[52]A reading of the Act as a whole suggests that the Minister is not at liberty to assess all applications for lease with the same considerations in mind. His "margin of manoeuvre", to use the words of L'Heureux-Dubé J. in *Baker* , *supra*, at paragraph 53, is not unlimited. We are dealing here with the use of land in a reserve by non-Indians and the Act contains enough provisions in this regard that dictate to a large extent the approach to be taken by the Minister.

[53]The basic principles are found in the part of the Act entitled "Possession of Lands in Reserves". According to section 20, no Indian (a locatee) can possess land in a reserve unless the band council and then the Minister agree. According to section 24, a locatee can transfer his right to the possession of the land to another member of the band with the approval of the Minister; the consent of the band council is not required. According to subsection 28 (1), a locatee cannot by lease or otherwise permit a non-band member to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve. Any such permit is void. The Minister, however, according to subsection 28(2), may authorize any person to so occupy or use a reserve for a period not exceeding one year; any longer period requires the consent of the band council.

[54]Reference may also be made to subsection 37(2), whereby, except where the Act otherwise provides, lands in a reserve shall not be leased until they have been surrendered to the Crown by the band pursuant to subsection 38(2); to paragraph 46(1)(*d*) which authorizes the Minister to declare the will of an Indian to be void if the Minister is satisfied that "the will purports to dispose of land in a reserve in a manner contrary to the interest of the band or contrary to this Act"; to subsection 60(1), which empowers the Governor in Council to grant a band "the right to exercise such control and management over lands in the reserve . . . as the Governor in Council considers desirable" and to paragraph 59(*a*) which, as I read it, requires the consent of the band council when the amount of the rent set out in a lease is to be reduced or adjusted.

[55]The Act is therefore very much band-oriented where use of lands in the reserve is at issue and that is particularly so where lands in the reserve are to be occupied for a period exceeding one year by non-members of the band. The intent of Parliament, clearly, is to require the consent of the band council whenever a non-member of the band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year.

[56]It seems to me that subsection 58(3), which is found in that part of the Act which deals with "management of reserves", has to be read and understood in such a way as not to conflict with the avowed intent of Parliament expressed in those parts of the Act which deal with the substantial rights of the Indians (as opposed to those parts which deal with the managerial rights of the Minister). The mere fact that the Band has originally agreed to let a locatee occupy and use a lot on the reserve cannot mean, in my understanding of the whole of the Act, that the Band has implicitly abandoned the right it has under subsection 28(2) to control the use of the lot by a non-member of the Band. To find otherwise could lead, theoretically, to the Minister granting, for example, a 99-year lease under subsection 58(3) to the benefits of non-Indians, thereby displacing the other provisions of the Act.

[57]While Parliament, as found in *Boyer*, stayed shy of giving a veto power to band councils with respect to leases granted under subsection 58(3), the Minister is bound, in my view, to give more weight to the concerns of a band as one gets closer to the type of lease that would be subject to subsection 28(2). The more a lease operates to the substantial detriment of the band as a whole the more the Minister must pay attention to the concerns expressed by the band.

[58]In the case at bar, the lease granted was for a period longer than one year and it gave the Minister the option to extend the term to 24 years and 11 months. The use permitted was "the operation of a manufactured home park for residential single family dwelling" and the uncontradicted evidence is to the effect that the lessee (an Indian corporation) did or would sublet to persons who are not members of the Band. Indeed, as recognized by the Trial Judge at paragraph 2 [page 355] of his reasons, the purpose of the lease "was to pursue the ongoing development of a manufactured home subdivision and to legitimize the existing occupation by non-natives on the Reserve known collectively as the Clydesdale Estates Residents Association". There is also evidence that one important ground for the opposition of the Band to the proposed lease was the very fact that the homes would be rented to non-Natives. For example, a member of Council, John Elliott, noted, at the Band Council meeting of September 14, 1995, that:

I have seen this happen on other reserves, there are more non-natives than natives living on reserves. These trailer courts cause development explosion. [A.B., Vol. 1, at p. 310.]

[59]In the circumstances, there was an obligation on the Minister to satisfy himself that the concerns of the Band with respect to that long-term development which, they said, threatened their way of life *qua* Indian on their reserve, were unwarranted or were so minimal as compared to the benefits to the locatees as to warrant a conclusion that the lease should go ahead. The Minister did not meet that burden. His officer, Mr. Howe, in his letter dated April 10, 1997"which letter, for all practical purposes, contains the reasons for the decision of the Minister"merely states that "I have difficulty accepting your premise that this development would be detrimental to the band as a whole" (A.B., Vol. 2, at page 488). Such a general and condescending statement which ignores the basic fact that the proposed development was not for the benefit of the band, but for the benefit of non-Indians, and had both short- and long-term ramifications for the band as a whole, is evidence that the concerns of the Band were discarded without proper consideration. This is a fatal flaw in the decision of the Minister.

[60]There are other flaws.

[61]Despite the grave concern expressed by the Band with respect to the water, sewer and stormwater systems and despite the fact that the terms of the lease itself (Clauses 2.2 and 2.3) reveal that the Minister knew that these concerns had not been met, the Minister nevertheless decided to go ahead on May 1, 1997 with a lease expiring (subject to extension) on September 30, 1997. The lease provided that an extension would only be granted if by then the Minister "has determined that there is adequate sewer and water service available to the Premises" and required the lessee to provide the Minister with a detailed stormwater management plan before August 1, 1997. It seems to me to be unreasonable for the Minister to rush to grant a lease, which is in any event retroactive, for an actual period of five months (May to September 1997) when the basic conditions of water and sewer services have not yet been met.

[62]The retroactivity of the lease in the circumstances of this case is another source of major concern. The Minister knew, when it executed the lease on May 1, 1997 retroactive to April 1, 1996, that a zoning by-law had been passed by the Band Council on December 23, 1996. The Minister not only knew of the by-law, he also had refrained from disallowing it (see subsection 82(2) of the Act). The Minister knew that under the by-law the proposed development would need to be scrutinized by a zoning advisory committee and then approved by the Band Council, which approval was an unlikely event. He had to have known that in making the lease retroactive to a point in time prior to the coming into force of the by-law, the locatees could avail themselves of the non-conforming use clause of the by-law and proceed without the approval of the Band Council. The Minister had a policy, prior to granting a lease, to ask a band council to confirm that a proposed lease does not contravene zoning by-laws (*supra*, paragraph 42). All the steps described in the documentation filed by the Minister with respect to applications for lease point to a prospective approach and counsel for the Minister recognized at the hearing that no reference was made in the documentation to retroactive leases. The lease, furthermore, is written in terms that do not provide for the retroactive compliance by the lessee with its obligations under the lease nor for the retroactive approval by the Minister of any building, structure or other improvement constructed on the premises prior to the execution of the lease on May 1, 1997.

[63]While I need not decide here whether the Minister is legally entitled to grant a retroactive lease, the fact is that in a case such as this one, where the Minister owes a particularly onerous duty to the Band, the very concept of a lease exempted from compliance with a by-law because of its retroactivity simply does not make sense.

[64]When looking at all the circumstances, one cannot but conclude that the Minister granted a lease that operates to the substantial detriment of the Band without proper consideration of the major concerns voiced by the Band. His decision is unreasonable.

Disposition

[65]The appeal will be allowed, the decision of the Trial Judge will be set aside, the application for judicial review of the decision of the Minister of Indian Affairs and Northern Development dated May 1, 1997 will be granted, the decision of the Minister will be set aside and the lease between Her Majesty the Queen in right of Canada and Clydesdale Estate Holdings Ltd., dated May 1, 1997 but effective April 1, 1996 will be declared void and of no effect.

[66]The appellants are entitled to their costs here and below against the Minister.

Robertson J.A.: I agree.

Noël J.A.: I agree.