Federal Court  Cour fédérale

Date: 20190326

Docket: T-546-17

Citation: 2019 FC 371

Ottawa, Ontario, March 26, 2019

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DR. LISA S. STERLING and FREDERICK STERLING

Applicants

and

THE LOWER NICOLA INDIAN BAND, LEONA ANTOINE, WILLIAM BOSE, JOE HAROLD, JOANNE LAFFERTY, LESLEY MANUEL and LUCINDA SEWARD, EACH BEING COUNCILLORS OF THE LOWER NICOLA INDIAN BAND, AARON SAM, CHIEF OF THE LOWER NICOLA INDIAN BAND

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision [Decision] of March 15, 2017, by the Lower Nicola Indian Band Council [Council] to cancel the Applicants' Certificate of Possession issued on October 31, 2017.

[2] The key events occurred over a period when the power of reserve land management was transferred from the Minister under the *Indian Act*, RSC 1985, c I-5 [*Indian Act*], to the Lower Nicola Indian Band [Band] operating under its Lower Nicola Indian Band Land Code [Land Code].

[3] The Decision was made under the Land Code and this judicial review raised issues as to the interpretation, scope and operation of the Land Code.

[4] However, independent of the Land Code issues, the Applicants raised procedural fairness issues, particularly as to lack of notice and opportunity to be heard which transcend the Land Code issues.

[5] Given the Court's conclusion on the procedural fairness issues, it is neither necessary nor appropriate for the Court to pre-determine what Council may decide when it conducts a procedurally fair process.

II. Background

[6] The Applicants, Dr. Lisa Sterling and her father, Fred Sterling, are members of the Band.

[7] The Respondents are the Band, and individual members of Council. Aaron Sam is the Chief of the Band.

[8] The Band has several reserves located near Merritt, British Columbia. One of those reserves is the Joeyaska Indian Reserve No. 2 [Joeyaska Reserve].

A. *Pre-Legislative Changes*

[9] Fred Sterling's family has allegedly lived on, occupied and used 320 acres on the Joeyaska Reserve for several generations. Without dealing with the minutia of devolution and division of the 320 acres, the land was purportedly divided and Dr. Sterling acquired a parcel (Parcel A-5) of 17.5 acres through her grandmother's estate. It was expected by the trustees of her grandmother's will that Dr. Sterling and other beneficiaries would obtain a Certificate of Possession to their respective parcels.

[10] Despite not having a Certificate of Possession, Dr. Sterling began constructing a house on her Parcel A-5 in 2012.

[11] Between September 2012 and December 2014, Dr. Sterling was granted a federal housing grant administered by the Band; Council consented to construction of a hydro connection to the

house; Dr. Sterling applied to Council for an allotment of approximately 25 acres; Dr. Sterling engaged a surveyor with the consent of Council to deal with the allotment requested; the Band signed off on the survey of what became known as Lot 11; and the survey was registered with the Canada Lands Survey.

[12] There is a significant dispute as to whether Council approved the allotment of Lot 11 sometime before 2016. The Applicants believe that a Band Council Resolution [BCR] approving the allotment may have been issued in late 2014 or early 2015. The Respondents deny that Council ever allotted Lot 11 in 2014 or 2015.

[13] Around June or July 2016, Dr. Sterling was informed that a BCR approving the allotment of Lot 11 may have been lost or misplaced and that a new BCR would be required.

[14] In July 2016, Dr. Sterling and her father applied to Council for a joint tenancy allotment of Lot 11. They viewed the matter as urgent in view of the pending Land Code, to come into effect in November, and how the Land Code would change how the Band would allot land. The approval of their application was not universally supported.

[15] In September 2016, Council adopted a new Chief and Council Policy, which included an appended Council meeting policy detailing requirements for notice, quorum, agenda, minutes and BCRs. According to this policy, BCRs had to be presented and signed at a duly convened Chief and Council meeting. A BCR could be rescinded at the next duly convened meeting.

[16] In addition to dealing with Council, Dr. Sterling inquired of Indigenous and Northern Affairs Canada [INAC] about the status of her Certificate of Possession and was told she needed to provide the original 2014 BCR or a new BCR to be issued a Certificate of Possession.

[17] In late September 2016, at least three emergency Council meetings were called to address the allotment of Lot 11 but in each case the required quorum could not be met.

[18] On October 1 or 2, 2016, a new Council was elected.

[19] Prior to the key October 28, 2016 Council meeting, Dr. Sterling met individually with four councillors who signed a BCR allotting Lot 11.

[20] In the morning of October 28, 2016, Dr. Sterling had Councillor Lucinda Seward [Seward] send invitations to six of the seven Council members – Dr. Sterling knew that the 7th member opposed her application.

[21] In the later afternoon of October 28, 2016, the Applicants attended a meeting with Councillor Harold Joe and by teleconference with Councillors Leona Antoine, William Bose, Lesley Manuel and Seward. Arguably this composition may have constituted a quorum of Council. At the meeting, the councillors passed the BCR allotting Lot 11 to the Applicants [Allotment BCR].

[22] A curious piece of the puzzle is the actions of Seward, without whose presence there would be no quorum. Seward denied having attended the special meeting, except for calling Dr. Sterling at the end of the meeting while the meeting was about to be adjourned. Seward specifically denied having adjourned a meeting at which she was not present.

[23] However, at the end of cross-examination on the issue of attendance, she said that she may have participated in the meeting and she admitted that she moved to adjourn the meeting. Those admissions followed a discussion, both on and off the record, concerning an audio tape of the meeting.

[24] Seward also signed a letter dated October 28, 2016, addressed to INAC knowing it was to be used for completion of the allotment process leading to a Certificate of Possession.

[25] On October 31, 2016, the Minister approved and registered the allotment of Lot 11 and issued the Certificate of Possession.

B. *Legislative Changes*

[26] Pursuant to the *Framework Agreement on First Nation Land Management*, 12 February 1996, online: First Nation Land Management Resource Centre <labrc.com> and the *First Nations Land Management Act*, SC 1999, c 24, the Band ratified its Land Code, which came into force December 1, 2016.

[27] On that date the Minister no longer had authority to grant or cancel Certificates of Possession. The Land Code gave the Band management authority over these issues.

[28] The pertinent provisions of the Land Code, in particular section 14.7, related to cancellation, are set out below:

> **Definitions**
>
> **2.1** The following definitions apply in this Land Code:
>
> "Allotment" means:
>
> a) lawful possession of [the Band] allotted to a Member by the Council and approved by the Minister pursuant to section 20(1) of the *Indian Act*,
>
> b) the Interest of a Member held pursuant to a location ticket issued under section 20(3) of the *Indian Act*, or
>
> c) equivalent tenure issued under this Land Code;
>
> …
>
> "Interest" means an interest in [Band] Land, and includes an Allotment, Leasehold, and Easement, but for greater certainty does not include title to the land;
>
> …
>
> **Cancellation of Interests and Licences**
>
> **14.7** Council may, subject to an applicable ruling under PART 8 or by a court of competent jurisdiction, cancel or correct any Interest or Licence issued or allotted in error, by mistake or by fraud.
>
> **15. Existing Interests**
>
> **Continuation of existing Interests**
>
> **15.1** Any Interest or Licence in [Band] Land that exists when this Land Code comes into effect will, subject to this Land Code, continue in force in accordance with its terms and conditions. Any renewals of any Interest or Licence in [Band] Land undertaken

> after this Land Code comes into effect will be in accordance with the terms and conditions of this Land Code.

[29] Section 14.7 of the Land Code gives authority to cancel or correct an Interest or Licence – subject to pre-conditions the interpretation of which is in dispute – in instances of error, mistake or fraud.

[30] Prior to the coming into effect of the Land Code, the Minister could cancel Certificates of Possession, Certificates of Occupation, and Location Tickets in instances of fraud or error only under section 27 of the *Indian Act*. Unlike Council's authority under section 14.7 of the Land Code, the Minister's discretion under section 27 was not subject to any conditions beyond a finding of error or fraud by the Minister.

C. *Decision – Cancellation of Certificate of Possession – March 15, 2017*

[31] Council first raised issues about the Allotment BCR on November 1, 2016, after concluding that the meeting of October 28, 2016, did not meet the requirements of a Council meeting under the Band's Chief and Council Policy. It concluded that the BCR had not been signed at a duly convened meeting. Council passed a BCR declaring the Allotment BCR registered with the Indian Lands Registry null and void.

[32] Neither Applicant was given notice of this meeting nor was either Applicant informed at this time that Council had concerns related to the October 28, 2016 meeting and the issuance of the Allotment BCR.

[33] Council apparently sent Dr. Sterling a letter about the cancellation and a possible two acre allotment in lieu in early November 2016, but Dr. Sterling did not receive this letter. Dr. Sterling was first informed of the problems with the Certificate of Possession after November 29, 2016.

[34] On November 29, 2016, the Band wrote a letter to INAC requesting that the Minister cancel the Certificate of Possession. It was a fulsome request which included statutory declarations and factual and legal submissions [INAC Submissions].

[35] INAC forwarded materials it received from the Band to Dr. Sterling. Dr. Sterling received the letter but there is doubt as to whether the attached submissions and affidavits were included.

[36] The Minister advised Council on March 3, 2017, that he could not revoke the Certificate of Possession as the Minister no longer had jurisdiction over the matter.

[37] Over the period from February to March 2017, various Council meetings were scheduled at which the Certificate of Possession was to be discussed. These meetings were either cancelled or the topic was not reached at the meeting.

[38] Dr. Sterling had made it clear in correspondence with Council that she challenged their jurisdiction to revoke the certificate. She also requested an opportunity to address Council.

[39] On March 15, 2017, the Council passed a BCR cancelling the Certificate of Possession in an *in camera* meeting; the BCR was signed by five councillors. Council concluded that there was a factual basis for cancellation based on "error, by mistake or by fraud".

[40] Critically, and despite Dr. Sterling's request to attend any Council meeting dealing with revocation, there is no evidence that she was given notice, actual or implied, of the March 15, 2017 meeting.

[41] Following the decision, legal counsel advised the Applicants that the Certificate had been cancelled because it was issued in error, rejected the Applicants' argument on Council's lack of jurisdiction, and reiterated the possibility of a two acre allotment in the location of the house on Lot 11.

[42] The Certified Tribunal Record [CTR] provided to the Applicants does not provide any details of what occurred at the March 15, 2017 meeting as 15 of the 16 pages of the CTR have been redacted as covered by solicitor-client privilege.

III. Issue

[43] The primary issue is whether there was a breach of procedural fairness which would be determinative of this judicial review.

[44] The issue of interpretation and application of the Land Code should await a full and proper hearing by Council.

IV. Analysis

[45] I accept the Applicants' argument that the standard of review for procedural fairness is correctness (see e.g. *Lower Nicola Indian Band v York*, 2013 FCA 26 at para 6, 226 ACWS (3d) 1).

[46] Council notified the Applicants that Council would discuss the cancellation of the Certificate of Possession at a Council meeting on February 28, 2017 and stated that the Applicants could make written submissions a day before the meeting. Through this action, Council acknowledged that the Applicants were to be notified of the hearing and the date by which to make submissions. The February 28, 2017 meeting was cancelled and the Applicants were not notified of the date of any subsequent meeting. Fairness would dictate that the Applicants were owed this minimal level of procedural fairness.

[47] Although the Applicants provided some written submissions after the February 28, 2017 meeting, it is evident that they expected to be able to attend and be heard at a Council meeting. In the circumstances, that was not an unreasonable expectation – whether or not it reached the level in law of a "legitimate expectation" described in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26, 174 DLR (4th) 193 [*Baker*].

[48] Taking into account the factors in *Baker* at paras 23-27, particularly the importance of the decision by depriving the Applicants' of an interest in land, the Applicants were entitled to a moderate level of fairness. In this respect Council was playing an adjudicative role, which also

merits a greater degree of procedural fairness (see *Crowchild v Tsuu T'ina Nation*, 2017 FC 861 at para 48, 285 ACWS (3d) 2; *Testawich v Duncan's First Nation Chief and Council*, 2014 FC 1052 at para 34, 246 ACWS (3d) 248). At a minimum, the Applicants were entitled to notice of the March 15, 2017 meeting, an explanation of the basis asserted by Council to warrant the revocation of the Certificate of Possession prior to the meeting, and a proper opportunity to address the grounds for revocation before the decision was made.

[49] The grounds asserted for revocation have not been clear. The Respondent contends that the Applicants knew the case they had to meet because they had a copy of the INAC Submissions.

[50] The INAC Submissions raised the spectre of error or fraud as reasons to cancel the Certificate of Possession. In subsequent material, the Council referred to error. The power of the Council to revoke can be on any of three bases – error, mistake or fraud.

[51] Error and mistake may in reality be the same but not necessarily so. Fraud, on the other hand, has a different and more sinister connotation. Given the Respondent's reliance on the Seward evidence, the issue of fraud still lurks in this case.

[52] The Applicants are entitled to detailed and specific notice of the grounds upon which Council relies and both the facts and law that it says are relevant to the issue of revocation.

[53] This detail is important both to the Applicants' rights to fairness but also potentially to the reasonableness of Council's decision. Grounds of moral turpitude or culpability by the Applicants may justify more draconian response than a response to technical mistakes by Council. The Applicants are entitled to know what Council interprets as reasonable exercises of their authority under s 14.7 of the Land Code and the reasonable remedies open to Council.

[54] The choice of procedure – hearing, oral submissions, questioning – are also influenced by the nature of the allegations made and the fairness of the procedural options may be assessed against those circumstances.

[55] The transfer to Council of the powers of the Minister did not lessen the requirements of procedural fairness.

[56] For these reasons, this judicial review will be granted with costs, and the Decision made by Council on March 15, 2017, will be quashed. If Council wishes to pursue revocation of the Certificate, it may commence those proceedings in a manner that is consistent with the principles of natural justice and procedural fairness. There is no need for further submissions on this point.

JUDGMENT in T-546-17

THIS COURT'S JUDGMENT is that the application for judicial review is granted with costs, and the Decision of March 15, 2017, made by the Lower Nicola Indian Band Council, is quashed.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-546-17
STYLE OF CAUSE:	DR. LISA S. STERLING and FREDERICK STERLING v THE LOWER NICOLA INDIAN BAND, LEONA ANTOINE, WILLIAM BOSE, JOE HAROLD, JOANNE LAFFERTY, LESLEY MANUEL and LUCINDA SEWARD, EACH BEING COUNCILLORS OF THE LOWER NICOLA INDIAN BAND, AARON SAM, CHIEF OF THE LOWER NICOLA INDIAN BAND
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DATED:	MARCH 26, 2019

APPEARANCES:

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