Date: 20060822

Docket: T-1492-04

Citation: 2006 FC 1009

Ottawa, Ontario, August 22, 2006

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

CHIEF ROBERT SAM,
COUNCILLOR NICK ALBANY,
COUNCILLOR NORMAN GEORGE,
COUNCILLOR FRANK E. GEORGE,
COUNCILLOR JOHN R. RICE on their own behalf as
COUNCIL OF THE SONGHEES INDIAN BAND
and on behalf of the SONGHEES INDIAN BAND

Applicants

and

THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT,
THE SUPERINTENDENT FOR THE SONGHEES INDIAN BAND,
SYLVIA ANN JOSEPH, ALICE LARGE,
ESTATE OF IRENE COOPER by her Administrators
HARVEY GEORGE, CHARLOTT THOMPSON
AND WILLIAM GOSSE and HARVEY GEORGE,
CHARLOTTE THOMPSON AND WILLAM GOSSE

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Minister of Indian Affairs and Northern Development (the Minister), dated July 15, 2004, approving the sale of nine lots in the

New Songhees Indian Reserve No. 1A (the CP Lots) pursuant to subsection 50(4) of the *Indian Act*, R.S.C. 1985 c. I-5 (the Act).

PRELIMINARY MATTER

[2] The respondent objects to the applicants' version of the facts on the basis that they refer extensively to the historical circumstances surrounding the case, as this evidence was not before the Minister when he made his decision.

[3] This issue was the subject of a motion before Prothonotary Tabib in which she held that the applicants could not amend their Notice of Application to include allegations first, that the testatrix Irene Cooper did not in fact have valid possession of the lands, and second, that the bids on the land were in fact funded and secured by lenders not entitled to reside on or benefit from Songhees reserve land. The prothonotary held that "such extrinsic evidence may not be adduced on a judicial review application". On appeal, her order was upheld by Justice Sean Harrington who held that although the applicants could not allude to facts which were not before the Minister when the decision to sell was made, the question of whether the Minister had a legal duty to "look behind" the Certificates of Possession (CPs) in order to determine their validity remained at issue.

[4] At the hearing, the issue of extrinsic evidence was raised again. I ruled that the applicants were precluded from raising the issue in light of the decision of Justice Harrington. Keeping the foregoing in mind, the relevant and admissible facts are as follows.

FACTS

[5] Irene Cooper died on April 26, 1996. At the time of her death, she held CPs in respect of the CP Lots. In her will, she devised the CP Lots to the respondents Harvey George, Charlotte Thompson and William Gosse (the Respondent Devisees) who are not members of the Songhees Indian Band (the Band).

[6] Subsection 50(1) of the Act prohibits a person who is not entitled to reside on reserve to acquire rights to possession or occupation of land in the reserve by devise or descent. Since the Respondent Devisees were not entitled to reside on the Songhees Reserve (the Reserve), they were not entitled to the CP Lots.

[7] As a result, pursuant to subsection 50(2), the Superintendent planned a sale of the CP Lots (the Section 50 Sale), the proceeds of which would go to the Respondent Devisees.

[8] Under subsection 50(4) of the Act, once completed, the Section 50 Sale would require the approval of the Minister.

[9] On July 10, 2003, in contemplation of the Section 50 Sale, Robert Janes, then counsel for the Council of the Songhees Indian Band (the Council), wrote to David Gill, counsel for the Department of Indian Affairs and Northern Development (DIAND). In his letter, he indicated that the Council would assist the appointed Superintendent with the sale but only if the material provided to interested individuals noted that the Chief and Council objected to the process by which

the Section 50 Sale was being conducted and were also expecting to object to the Minister's approval of the Section 50 Sale as well.

[10] On July 17, 2003, David Gill responded to Robert Janes advising that the Council's request could not be met.

[11] Sometime between February 24 and April 27, 2004, Rory Morahan replaced Robert Janes as counsel for the Council.

[12] On April 27, 2004, David Gill wrote to Rory Morahan providing him with an update on the ongoing sale of the CP Lots. Mr. Gill also wrote: "Any comments received from [the Council] on or before June 4, 2004 shall be considered by the Minister prior to the granting of any approval pursuant to section 50(4) of the *Indian Act*."

[13] On May 11, 2004, the applicant Chief Robert Sam wrote a letter addressed to David Gill and to the Minister setting out the Band's position in relation to the Section 50 Sale. On the last page of the letter, he wrote as follows:

> We wish to meet within the next two weeks with the Minister and his representatives in a without prejudice meeting to discuss the issues contained in this letter. We would appreciate a timely response, that being at least four (4) days prior to the meeting outlining DIAND's position on the above noted issues.

[14] On July 15, 2004, the Minister approved the transfer of possession of the land and the respective CP Lots were transferred to the possession of Alice Large and Sylvia Ann Joseph (the

Respondent Purchasers) upon the Minister approving of the transfers of possession, pursuant to subsection 50(4).

[15] On July 16, 2004, Thomas Howe, Director of Lands and Trust Services, DIAND, wrote to the Respondent Purchasers, to counsel for the Respondent Devisees, and to the Chief and Council, advising that the Minister had approved the transfer of possession of the CP Lots. Attached to the cover letter was the Minister's written decision setting out his reasons for approving the transfer of possession of the CP Lots.

ISSUES

[16] The case at bar involves the following four issues:

1. Does the Minister have a duty to verify the validity of the Certificates of Possession of the testator or testatrix prior to approving possession under subsection 50(4)?
2. Does the Minister have a duty to obtain a band council allotment prior to approving possession under subsection 50(4)?
3. Does the Minister owe a fiduciary duty to the band in conducting a section 50 sale?
4. Did the Minister breach the duty of procedural fairness in failing to provide the applicants with an opportunity to meet with the Minister, or at a minimum, to make further written submissions?

RELEVANT STATUTORY PROVISIONS

[17] Section 50 of the Act provides as follows:

Non-resident of reserve	Non-résident d’une réserve
50. (1) A person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve.	50. (1) Une personne non autorisée à résider dans une réserve n’acquiert pas, par legs ou transmission sous forme de succession, le droit de posséder ou d’occuper une terre dans cette réserve.
Sale by superintendent	Vente par le surintendant
(2) Where a right to possession or occupation of land in a reserve passes by devise or descent to a person who is not entitled to reside on a reserve, that right shall be offered for sale by the superintendent to the highest bidder among persons who are entitled to reside on the reserve and the proceeds of the sale shall be paid to the devisee or descendant, as the case may be.	(2) Lorsqu’un droit à la possession ou à l’occupation de terres dans une réserve est dévolu, par legs ou transmission sous forme de succession, à une personne non autorisée à y résider, ce droit doit être offert en vente par le surintendant au plus haut enchérisseur entre les personnes habiles à résider dans la réserve et le produit de la vente doit être versé au légataire ou au descendant, selon le cas.
Unsold lands revert to band	Les terres non vendues retournent à la bande
(3) Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation of land is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant,	(3) Si, dans les six mois ou tout délai supplémentaire que peut déterminer le ministre, à compter de la mise en vente du droit à la possession ou occupation d’une terre, en vertu du paragraphe (2), il n’est reçu aucune soumission, le droit retourne à la bande, libre de toute réclamation de la part du légataire ou

from the funds of the band, of such compensation for permanent improvements as the Minister may determine.	descendant, sous réserve du versement, à la discrétion du ministre, au légataire ou descendant, sur les fonds de la bande, de l'indemnité pour améliorations permanentes que le ministre peut déterminer.
Approval required	Approbation requise
(4) The purchaser of a right to possession or occupation of land under subsection (2) shall be deemed not to be in lawful possession or occupation of the land until the possession is approved by the Minister.	(4) L'acheteur d'un droit à la possession ou occupation d'une terre sous le régime du paragraphe (2) n'est pas censé avoir la possession ou l'occupation légitime de la terre tant que le ministre n'a pas approuvé la possession.

STANDARD OF REVIEW

[18] At the outset I would like to comment on the applicants' argument that it is a "jurisdictional fact" or a necessary precondition that before the Minister can exercise his discretion to approve the sale, the Minister must find that the deceased Indian person, at the time of his or her death, had a lawful right of possession in the land which is sold.

[19] In *Songhees Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, 2005 FC 1464, [2005] F.C.J. No. 1794 (F.C.), in the context of the aforementioned appeal of Prothonotary Tabib's decision, Justice Sean Harrington considered the "jurisdictional fact" argument. At paragraph 32, he stated as follows:

> 32 The question for decision is how the jurisdictional fact issue as set out in cases such as Bell, supra, would permit extrinsic evidence

> in judicial review. The Supreme Court has over time developed a new approach to judicial review, the pragmatic and functional approach. One need go no further than Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226 and Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247. In Dr Q, supra, the Chief Justice said at paragraph 24: "The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey."

[20] As the Supreme Court has repeatedly stated, “the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by [the] pragmatic and functional approach.” The focus of the inquiry is on the particular, individual provision being invoked and interpreted by the tribunal: *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, at para. 28. The labeling of a question as “jurisdictional” in order to arrive directly a correctness standard is no longer appropriate. “There is no shortcut past the components of the pragmatic and functional approach”: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 21.

[21] Both parties suggest that the proper standard of review is that of correctness. However, in making this assertion, neither side has conducted a pragmatic and functional analysis. Rather, they have simply stated that the Minister’s decision involves questions of law and therefore the standard is correctness. In light of the Supreme Court’s repeated pronouncements that **a** pragmatic and functional analysis must always be used, I will analyze the four factors in *Pushpanathan* in order to determine the appropriate standard. The four factors of that analysis are as follows: the presence or absence of a privative clause; the relative expertise of the decision-maker and the reviewing court; the purpose of the Act as a whole and the provision in particular; and the nature of the question in dispute.

[22] The case of *Tsartlip Indian Band v. Canada*, [2000] 2 F.C. 314 (F.C.A.) involved an application for judicial review of the Minister's decision to lease Indian reserve land under subsection 58(3) of the Act. On appeal, Justice Robert Décary conducted a comprehensive analysis of each of the factors in the context of a decision under subsection 58(3), at paragraphs 45-50, which I find it helpful to reproduce for the purposes of the present case:

> 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 [page335] 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.

[23] In the present case, the first factor, i.e. the absence of a privative clause, favours a lower standard of deference (*Tsartlip*, at para. 45).

[24] The second consideration is the relative expertise of the Minister to that of the Court, which, as noted by Justice Bastarache in *Pushpanathan*, at paragraph 33, is closely related to the fourth factor, the nature of the problem. Although the Minister has specialized knowledge in the approval of possession under subsection 50(4), which requires a determination of who is and who is not entitled to reside on a reserve, who is and who is not entitled by devise or descent to acquire a right of possession or occupation of reserve land and the bidding procedure under section 50, as I will explain further when discussing the fourth factor, the decision currently under review involves three questions of law. Questions of law generally involve determinations best fit for the judiciary and for which little to no deference will be shown. Thus, in my view, this second factor thus militates in favour of a low degree of deference.

[25] Turning to the third factor, as stated in *Tsartlip*, the purpose of the Act is generally more band-oriented and reserve-oriented when the use of reserve land is at issue. As for the purpose of the

particular provision, in *Okanagen Indian Band v. Bonneau*, 2002 BCSC 748, [2002] B.C.J. No. 1819 (S.C.) (QL), the British Columbia Supreme Court, in discussing the predecessor to the current section 50, stated that the purpose of such a regime was to permit the Band "to preserve land within the defined members of the Band and to redistribute land amongst its members for the preservation of the interests of Band members as a whole (at para. 85)." I agree. The purpose of section 50, in my view, is to ensure that reserve land remains in the hands of band members and at the same time, to give effect to the will of the testator or testatrix. Accordingly, the Minister must verify that the purchasers of the land in a section 50 sale are indeed band members. Subsection 50(4) involves the broad context of Aboriginal rights and the inquiry is more akin to a delicate balancing between different constituencies (*Pushpanathan*, at para. 36); this polycentric model favours a higher degree of deference.

[26] Finally, the fourth factor is the nature of the question, that is, whether the issue involves a pure question of law, of fact, or of mixed fact and law. The decision under review raises pure legal determinations, more particularly, whether under subsection 50(4) the Minister had: (i) a fiduciary duty towards the Band, (ii) a duty to investigate into the validity of the CPs, and (iii) a duty to obtain a prior Band allotment. These are pure questions of law with a high precedential value as their determination will serve to determine the Minister's duties under subsection 50(4) in future cases: *Ryan*, at para. 41. They are not confined to the particularities of the case at hand. To draw upon the word of Justice La Forest in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, these types of legal questions are "ultimately within the province of the judiciary" (at para. 28). Accordingly, balancing this factor with the others, these three legal questions will be reviewed on a correctness standard.

[27] As for the procedural fairness issue, in the recent case of *Campbell v. Canada (Attorney General)*, 2006 FC 510, [2006] F.C.J. No. 637 (F.C.) (QL), I discussed the Supreme Court of Canada's pronouncement on the inapplicability of the standard of review for procedural fairness issues at paragraphs 24 and 25:

> ¶ 24 In *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, the Minister made discretionary appointments under the *Ontario Labour Relations Act*, 1995, S.O. 1995, c. 1. The unions objected to the appointments themselves and further complained that the Minister's actions had breached procedural fairness and denied natural justice.
>
> ¶ 25 In dismissing the appeal, Justice Binnie, writing for a majority of the Supreme Court of Canada, drew a distinction between the substantive and procedural issues before the Court. He wrote that while the discretionary appointments themselves are subject to the pragmatic and functional analysis, any questions regarding acts or omissions relevant to procedural fairness and the principles of natural justice were for the Courts, not the Minister, to answer (at para. 100). "The content of procedural fairness goes to the manner in which the Minister went about making his decision, whereas the standard of review is applied to the end product of his deliberations" (para. 102).

[28] Justice Binnie also considered that on occasion, some confusion may arise in attempting to maintain a separation between the substantive and procedural lines of enquiry. Both the four-factor pragmatic and functional analysis for substantive questions and the five-factor "Baker" analysis for procedural questions involve examining a number of factors, some of which may overlap. As Justice Binnie cautioned, however, "while there are some common "factors", the object of the court's inquiry in each case is different (at para. 103)." The goal of the pragmatic and functional approach is to determine the level of deference owed by the court to the decision-maker. The goal of

the “Baker” analysis is to determine the content of the duty of procedural fairness, which was owed by the decision-maker to the person or persons subject to the decision.

ANALYSIS

Issue #1: Does the Minister have a duty to verify the validity of the Certificates of Possession of the testator or testatrix prior to approving possession under subsection 50(4)?

[29] The applicants submit that prior to approving a sale under subsection 50(4), the Minister must find that the testator or testatrix, at the time of his or her death, had a lawful right of possession in the land. According to the applicants, a reading of the Act as a whole shows that the Minister does indeed have the power to make such an inquiry. Subsection 20(1) gives the Minister a complete *carte blanche* to exercise the discretion to approve of the lawful occupation of land. Subsection 20(4) grants the Minister complete authority to issue a temporary possession, or, pursuant to subsection 20(5), a Certificate of Occupation. Section 23 grants the Minister the complete authority to determine compensation to be paid for improvements. Section 26 gives the Minister the complete authority to change a Certificate of Possession if there has been an error.

[30] All of these sections have to be read in conjunction with section 18 which states that: “Reserves are held by Her Majesty for the use and benefit of the respected Bands for which they are set apart.” Section 49 and subsection 50(4) have a parallel. Section 49 states that a person who claims to be entitled to possession or occupation of lands in a reserve by devise or descent shall be

deemed not to be in lawful possession or occupation of those lands until the position is approved by the Minister. Subsection 50(4) sets out the same elements.

[31] The applicants further submit that compliance with section 50 is clearly not the only element to consider as the Minister is also charged with determining whether there has been a valid possession of the land which forms the subject of the potential sale under section 50 and has the authority not to approve of a sale pursuant to subsection 50(4) if he believes there is an error in the title.

[32] Alternatively, the applicants submit that reliance on a CP (or confirmation from a Land Officer as to the existence of a CP) as proof of lawful occupation of land is insufficient to found a basis for jurisdiction. In this regard, the applicants draw the Court's attention to the affidavit evidence of Jacques Desrocher, an Acting Manager with Land and Trusts Services at DIAND that the CP system is not accurate as recording lawful possession of lands. As for any other potential indications of lawful possession, the applicants maintain that there was no search of title. Moreover, prior to 1951, there were no allotments or location tickets registered with the government and therefore, any interest in the land prior to 1951 would not have been registered in the CP process.

[33] On the other hand, the respondent submits that there was no duty incumbent upon the Minister to verify the validity of the CPs. The Reserve Land Register (the Register), created by section 21 of the Act, was legislated into existence through comprehensive amendments to the Act in 1951. No statutorily mandated registry for reserve lands existed prior to that date.

[34] When carrying out technical investigations in respect of a section 50 sale, DIAND lands officers consult the Register to determine if a CP was issued to the individual band member who devised the relevant CPs. In the affidavit of Jacques Desrochers, and during the cross-examination of Sherry Evans (both DIAND officers) each stated that DIAND does not have a policy or practice of having land officers search behind the last registered CP to investigate for errors in the chain of title leading to the last registered instrument.

[35] Rather, according to the respondent, in relation to the Minister's approval of a section 50 sale, DIAND implemented fairness procedures so that all parties with an interest in the sale would have the right to make submissions.

[36] Additionally, sections 26 and 27 of the Act provide the Minister with the discretion to correct or cancel a CP when the CP was issued through mistake, through fraud or in error:

Correction of Certificate or Location Tickets	Certificat corrigé; billet de location
26. Whenever a Certificate of Possession or Occupation or a Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter was, in the opinion of the Minister, issued to or in the name of the wrong person, through mistake, or contains any clerical error or misnomer or wrong description of any material fact therein, the Minister may cancel the Certificate or Location Ticket and issue a corrected Certificate in lieu thereof.	26. Lorsqu'un certificat de possession ou d'occupation ou un billet de location délivré sous le régime de l'Acte relatif aux Sauvages, 1880 ou de toute loi traitant du même sujet, a été, de l'avis du ministre, délivré par erreur à une personne à qui il n'était pas destiné ou au nom d'une telle personne, ou contient une erreur d'écriture ou une fausse appellation, ou une description erronée de quelque fait important, le ministre peut annuler le certificat ou billet de location et délivrer un certificat corrigé pour le remplacer.

Cancellation of Certificates or Location Tickets 27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.	Certificat annulé; billet de location 27. Le ministre peut, avec le consentement de celui qui en est titulaire, annuler tout certificat de possession ou occupation ou billet de location mentionné à l'article 26, et peut annuler tout certificat de possession ou d'occupation ou billet de location qui, selon lui, a été délivré par fraude ou erreur.

[37] The respondent maintains that the availability of recourse to sections 26 and 27, as well as the availability of judicial review of ministerial approvals of allotments and transfers of CP interests, creates an inference that there is a form of "tenure," or a certain level of security, to be associated with a CP that has not been challenged either by way of judicial review or under sections 26 or 27 of the Act. Accordingly, the Minister was entitled to rely on the validity of Irene Cooper's CPs in the case at bar and thus there was no duty on the Minister to enquire into the validity of her CPs, as alleged by the applicants.

[38] The respondent further submits that under subsection 50(4), the Minister's duty is to ensure that the purchaser in a section 50 sale is a band member. The Minister has no power or discretion under section 50 alone to address an issue as to the validity of the CPs sold. Accordingly, the Minister's decision cannot be set aside on the basis of an alleged failure to exercise a discretion he did not even have. Rather, the discretion to address any alleged invalidity of a CP exists under section 27. The Minister, in the course of exercising his discretion under subsection 50(4), may decide to exercise his discretion under sections 26 and 27 to correct or cancel a CP.

[39] The respondent also notes that in an unrelated lawsuit, where the Band succeeded in gaining an order that it was entitled to the rents flowing from Irene Cooper's CP Lots, the Band pleaded that Ms. Cooper was a member of the Band and that she possessed the CP Lots when she died: *Songhees First Nation v. Canada,* 2002 BCSC 255, aff'd 2003 BCCA 187.

[40] For the most part, I agree with the respondent. I cannot conclude that it is incumbent on the Minister to make inquiries into the validity of CPs when there is nothing before him to doubt their validity. In my view, such a duty will only arise when there is reason, based on the evidence before him or concerns raised by an interested party, to doubt the validity of the CPs. In such a case, the Minister would be obligated to determine whether he should exercise his discretion under sections 26 or 27 to correct or cancel the CP. This was not the case in the matter before me. There was not a scintilla of evidence before the Minister which would have given him reason to look beyond the CPs or which gave rise to a duty to do so.

[41] The applicants had the opportunity to make submissions, which they did. Not once did they raise the issue of CP validity despite extensive contact and communication between the parties during the sale process and throughout the previous litigation in the *Songhees First Nation* case.

[42] Moreover, a reading of the *Songhees First Nation* decision clearly indicates that the Band pleaded that Irene Cooper was in fact a Band member and possessed, until her death, eight lots on the reserve. While the applicants are certainly not issue estopped from raising the question of the Minister's duty to inquire into the validity of the CPs before me, the *Songhees First Nation* case is

evidence that during that period, the Band had no concern with respect to Irene Cooper's possession and in fact, relied on the validity of her possession to win their case. Taking this into consideration, if the Band maintained throughout that litigation that her possession was valid and subsequently never raised any issue with respect to the CPs, there was absolutely nothing which would have led the Minister to believe that he should make inquiries into the CPs' validity.

[43] Furthermore, any inquiries for errors in the chain of title would not have offered a guarantee of title. Under section 21 of the Act, the Reserve Land Register (the Register) records the particulars of CPs and other transactions respecting land in a reserve. As is explained in the affidavit of Mr. Desrochers, the Register, which was created in 1951 and is one part of Indian Land Registry (the ILR), is not the equivalent of a provincial title system. It is a deeds registry with a voluntary registration of interest. It is a "best efforts system." There may be interests that never make it onto the Registry. As such, unlike a provincial land registry system, there are no guarantees as to possession as there could be other legal interests which could have an affect on the possession but may not be registered. I do lend some credence to counsel for the applicants' argument that it is rather self-serving for the respondent to argue that since DIAND set up a deficient land registration system, they should not be forced to search within that deficient system. Ultimately, however, I agree with the respondent that given the "flaws" in the system, it would be neither prudent nor thorough enough to simply rely on such a search. Rather, it is crucial to have another safeguard in place, namely, giving interested parties the opportunity to make submissions in addition to checking the last entry in the Register.

[44] Any complaints from the applicants regarding the ILR seem to stem from their frustration with its alleged deficiencies. As I see it, given that all parties agree that the ILR is not entirely reliable, the only way for the Minister to be made aware of any potential issues with CPs is if they are brought to his attention. For example, in some cases, information surrounding the alleged invalidity of a CP may only be within the knowledge of the band, in which case the Minister would need to rely on band submissions to exercise his discretion to correct or cancel a CP under sections 26 or 27. This is why I must agree with the respondent that the duty of the Minister in the context of a section 50 sale is to check the last registration on the ILR with the additional administrative law safeguard that interested parties can make submissions if a mistake or fraud is suspected. The Minister would then have the duty to investigate and may use his discretion pursuant to sections 26 or 27 to correct or cancel the CP.

[45] The applicant also notes that the CPs themselves were not in the documentary materials before the Minister. While this is true, as is clear from the affidavit of Mr. Desrochers as well as the cross-examination of Ms. Evans, prior to conducting a Section 50 Sale, the Minister's staff do confirm the existence of a CP for the lands in question, which I find was also done in this case. This is common sense for, as Ms. Evans put it, "you can't have Fred Smith transferring land that belonged to Mary Joe."

[46] The applicants further maintain that the Minister should look beyond a CP because it does not provide conclusive evidence of possession in a section 50 sale. I agree with the applicants that a section 50 sale requires that the testator or testatrix have been in lawful possession. However, while it is true that a CP is only evidence of a right to possession (see subsection 20(2) of the Act), I

believe that the Minister is entitled to rely on CPs in granting his approval under subsection 50(4). In my view, a CP provides adequate evidence of lawful possession for the Minister to approve possession under subsection 50(4). Unless challenged, a CP is enough. I believe that the purpose of a CP is, in fact, to offer evidence of possession in situations such as a section 50 sale. Otherwise, as stated by counsel for the Estate of Irene Cooper, it would essentially render a CP worthless. Had there been no CPs for the lots in question, it would have been a different story altogether as the Minister would have had to confirm lawful possession through different means. Fortunately, there were existing CPs and, as I previously stated, the Minister was entitled to rely on them. At the end of the day, what the Minister had before him were CPs. What the Minister did not have before him were any allegations that the CPs were invalid. Again, without any suggestion of invalidity, there would be no reason for the Minister to go beyond the CPs.

[47] In summary, the Minister's decision to approve under subsection 50(4) cannot be set aside on the basis of his failure to ensure the validity of Irene Cooper's CPs, a duty which he does not have unless the issue is raised by one of the interested parties or on the evidence before him, at which point, the Minister has the discretion under sections 26 and 27 to correct or cancel the CP and to not approve the transfer of possession.

Issue #2: Does the Minister have a duty to obtain a band council allotment prior to approving possession under subsection 50(4)?

[48] Subsection 20(1) of the Act is entitled “Possession of lands in a reserve” and provides that no Indian is lawfully in possession of reserve land unless possession has been allotted to that individual by the band council.

[49] The applicants submit that subsection 20(1) is an overarching section in the Act and that the Minister is required to obtain a band allotment prior to approving possession under subsection 50(4). According to the applicants, the language of subsection 20(1) is prohibitory in that it does not allow possession until allotment has taken place. Section 50 does not exclude or prohibit the application of subsection 20(1) and thus it must apply; to do otherwise would go against the intent and purpose of the Act, which is to give band councils some measure of control over their land.

[50] The respondent submits that there is no band allotment required prior to a subsection 50(4) approval. According to the respondent, in developing the Act’s estate provisions, leading up to the introduction of section 50, Parliament’s intent was to increase testamentary freedoms and give effect to the will of a band member testator or testatrix in respect of his or her CP lands. Band councils were seen to interfere with testamentary dispositions of CP land by refusing to carry out the will of a testator and it was therefore considered necessary to eliminate band council approval for testamentary dispositions of CP lands.

[51] I agree with the respondent. A review of the historical development of the estate provisions found in the Act demonstrates a clear intent on the part of Parliament to eliminate the requirement for band council approval and to give greater effect to the wishes of the testator or testatrix.

[52] Under the 1876 Act, while there was no power for an individual band member to devise his real or personal property in a will, the Act did set out how CP land would devolve upon intestacy (where a band member dies without a will). In such a case, band council approval (in addition to that of the Superintendent-General) was necessary before a claimant (i.e. a beneficiary) could gain lawful possession of the CP land. Band council approval was also required in respect of *inter vivos* transfers of CP land: S.C. 1876, c. 18, sections 6, 8 and 9.

[53] Under the 1880 Act, the requirement for band council approval was eliminated in respect of *inter vivos* transfers. However, where CP land descended on an intestacy, there remained a requirement for band council approval (in addition to that of the Superintendent-General) before a beneficiary could be legally in possession of the land: S.C. 1880, c. 28, sections 9 and 20.

[54] In 1884, the Act was amended to permit individuals to devise CP land by will. Whether CP land devolved (by will) or descended (on an intestacy), the approval of the band council (in addition to that of the Superintendent-General) was still required before a beneficiary could be legally in possession of the land. There remained no requirement for band council consent in respect of *inter vivos* transfers: S.C. 1884, c. 27, section 20.

[55] By 1894, however, the requirement for band council approval was eliminated completely: S.C. 1894, c. 32, section 1. Thus by 1894, band councils no longer exercised any power of approval over testamentary transfers of individual interests in reserve land (or *inter vivos* transfers). Approval of wills, issuance of location tickets to beneficiaries, and approvals of *inter vivos* transfers fell entirely to the Superintendent-General.

[56] The 1918 amendment further enhanced testamentary freedoms. Prior to the 1918 amendment, an individual could not devise CP land to non-band members in his will (apart from a special class of exceptions). Accordingly, even close relatives could not benefit from a deceased's CP land interest if those relatives were non-band members. In 1918, Parliament enacted amendments to remedy this situation and to broaden testamentary freedom and give better effect to testamentary intent. The solution was the predecessor to section 50 of the present day Act.

[57] The 1918 amendment provided that reserve land could be devised to (or descend upon) non-band members but then had to be sold to a band member and the proceeds paid to the beneficiaries as in section 50 of the Act today: S.C. 1918, c. 26, section 1.

[58] The above analysis of the historical development of the provisions leading up to the introduction of section 50 in the Act today illustrates that band council approval for testamentary transfers was clearly eliminated. Parliament's intent was to broaden testamentary freedoms and to give better effect to the testamentary will of individual band members. Section 50 must be interpreted in a manner that is consistent with that intent. An interpretation that section 50 implicitly requires band approval by way of allotment before the band member purchaser can go into lawful possession of the land is inconsistent with Parliament's intent to broaden and enhance the testamentary freedoms of individual band members.

[59] The jurisprudence also clearly supports an interpretation that a section 50 sale does not require a band allotment.

[60] As previously described, under subsection 58(3) of the Act, a CP holder can ask that the Minister lease his land for his benefit. In *Boyer v. R.*, [1986] 2 F.C. 393 (F.C.A.), the band argued that the Minister was required to obtain the consent of the Band before executing a lease under subsection 58(3). The Court rejected this argument and considered the many formal limitations already imposed by the Act on band members, such as the prohibition from disposing of the right to possession or leasing the land to a non-member. The Court stated that such limitations "have the same goal: to prevent the purpose for which the lands have been set apart i.e., the use and benefit of the Band and its members, from being defeated (para. 15)." The Court was of the view that once an allotment is made, the right to use and benefit from the land shifts from the band as a collective to the individual band member who is given a certain amount of autonomy in the exercise of his entrepreneurship and development of the land. The band's interest disappears or is at least suspended (paras. 15 and 18). Ultimately, the Court held that it would defeat the scheme of the Act to read in the words "with the consent of the Band" into subsection 58(3). The duty of the Minister was toward the law, not the Band.

[61] The Court in *Simpson v. Canada (Department of Indian Affairs and Northern Development)*, [1996] F.C.J. No. 25 (T.D.) followed *Boyer*. In that case, the applicants sought an extension of time to file. In order to obtain such an extension, the applicants were required to justify the delay and establish that the application had a reasonable chance of success, which involved the applicants adducing some evidence upon which an arguable case could be based. The applicants argued that Band approval of an allotment under section 20 of the Act was required. The Court found that this argument had no merit. At paragraph 9, the Court wrote:

> […] The applicants at the time of transfer was the holder of a valid Certificate of Possession and was therefore vested with all the incidence of ownership with the exception of the legal title itself which remains with the Crown. Accordingly, he was entitled to transfer his interest in the property to himself and his daughter in joint tenancy pursuant to s.24 of the Indian Act. Under that section there is no explicit or implicit requirement for a Band Council resolution in respect of any such transfer. The Band's interest in land which has already been allotted to an individual band member has disappeared or is at least suspended (see Re Boyer and the Queen (1986), 26 D.L.R. (4th) 284 at 291-92.

[62] As I have previously stated, the purpose of section 50 is to ensure that reserve land remains in the hands of band members whilst giving effect to the will of the testator or testatrix. In order to fulfill this purpose, the Minister must verify that the purchasers of land in a section 50 sale are indeed band members. This does not require a band allotment. Parliament having clearly eliminated band council approval, an interpretation that section 50 implicitly requires the approval of the band by way of a requirement that the band must allot CP land purchased in a section 50 sale before the band member purchaser can go into lawful possession of the land would be nonsensical and inconsistent with the clear intent of Parliament.

[63] Thus, I conclude that, as explicitly expressed in subsection 50(4), only the approval of the Minister is required before a band member purchaser can go into lawful possession of reserve land purchased in a section 50 sale. Such an interpretation is consistent with a plain and ordinary reading of the provision within the context of the Act as a whole, and with the previous jurisprudence.

Issue #3: Does the Minister owe a fiduciary duty to the band in conducting a section 50 sale?

[64] The concept of fiduciary duty has had a long history in Canada. Today, the law supports the proposition that an examination of the particular relationship is critical in determining whether a fiduciary duty exists between two parties. In the recent case of *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, [2005] 1 S.C.R. 325, the Supreme Court discussed at length the fiduciary duty owed by the Crown to aboriginal people at paragraphs 23-27. Justice Major, writing for the Court, noted that "[a]lthough the Crown in many instances does owe a fiduciary duty to aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty. Not every situation involving aboriginal people and the Crown gives rise to a fiduciary relationship." Fiduciary principles will generally arise when one party is obliged to act for the benefit of another.

[65] The applicants submit that the Minister erred in finding that there was no fiduciary duty arising from section 50 of the Act. According to the applicants, section 50 requires the Minister to determine that there is a lawful possession of land that must transfer before he places lands for sale. The Band holds a reversionary interest in land subject to a section 50 sale, pursuant to subsection 50(3), which also permits the Minister to direct a time period before that reversionary interest crystallizes. The applicants rely on the three characteristics of a fiduciary relationship enunciated in paragraph 26 of *Gladstone*, and submit that, under section 50, the Minister has (1) the scope for the exercise of discretion; (2) which can be exercised unilaterally so that the Band's legal and practical interest in the land can be affected; and (3) that the relationship between the Band and the Minister is such that the Band is completely at the mercy of the Minister in granting or rejecting an approval pursuant to subsection 50(4). I disagree with the applicants. For the reasons that follow, I am of the view that the Section 50 Sale did not give rise to a fiduciary duty.

[66] In *Guerin v. Canada*, [1984] 2 S.C.R. 335, Justice Dickson, writing for the majority held that fiduciary relationships will typically arise only in the private law context. The discretionary exercise of a public law duty, such as that in the case at bar, will not typically give rise to a fiduciary relationship as "the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function" (at p. 385). The Supreme Court emphasized the same point in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at paragraph 96. In *Wewaykum*, Justice Binnie acknowledged that the existence of a public law duty does not exclude the possibility that the Crown undertook a fiduciary duty if the obligations towards the aboriginal peoples were in "the nature of a private law duty" (at paras. 74 and 85). This is not the case in the matter at hand. In exercising discretion under subsection 50(4), there is nothing that invokes responsibility "in the nature of a private law duty". Rather, this was a pure public law function requiring the exercise of discretion for which the Crown is not viewed as a fiduciary.

[67] In *Tsartlip*, the Minister had made a decision to lease reserve land under subsection 58(3) of the Act. The appellant Band submitted that the Minister had failed to take into consideration the Band's concerns and as a result his decision was unreasonable. Two issues were raised on appeal, first, whether the Crown owed a fiduciary obligation to the band, and second, whether the decision was reasonable. The Court allowed the Band's appeal on the second issue, namely that the decision was unreasonable because the Minister had discarded the band's concerns without proper consideration. As for the first issue (which is of relevance to the present case) the Court noted that it had previously ruled that the Crown, when acting under subsection 58(3) of the Act, has no fiduciary obligation to a band. The Court found no authority for the proposition that there exists a

fiduciary duty either to the band or to a member of the band in cases of management by the Minister of reserve land. With regard to the unsuitability of the concept of fiduciary duty, at paragraph 35, the Court said:

> (…)
>
> 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.

[68] Instead, the Court found that administrative law principles were more applicable to cases arising under subsection 58(3). At paragraph 38, the Court found that what was being proposed under the label of fiduciary duty was actually the approach under administrative law when a decision maker must weigh the competing interests of those persons affected by the decision.

[69] I echo the words of the Court of Appeal in *Tsartlip* that the concept of fiduciary duty is unsuited to the Minister's exercise of his discretionary powers under the Act with respect to the management of reserve land. Under subsection 50(4), the Minister's role is simply to approve or not. The Minister is an uninterested participant in the process. The Crown is not a party and has nothing to gain from section 50 sales as these sales are only open to those eligible individuals under the Act, those being band members.

[70] As in *Tsartlip*, in the case at bar, what the applicants are suggesting as falling under the concept of fiduciary duty are administrative law principles of fairness in conducting a section 50 sale, namely, whether the Minister weighed the respective views of the persons affected by the decision and did so on the basis of proper considerations. In a section 50 sale, the Minister must take into account: the collective interests of the band, the individual interests of the band member purchasers, the individual interests of the testator, and the individual interests of the non-band member beneficiaries.

[71] In the present case, there is no indication that the Minister failed to consider the views of these interested persons or that he based his decision on improper or irrelevant considerations. The reasons for decision are detailed, comprehensive and address each and every one of the concerns raised by the Chief and two councillors representing the Band in their May 11, 2004 letter.

Issue #4: Did the Minister breach the duty of procedural fairness in failing to provide the applicants with an opportunity to meet with the Minister, or at a minimum, to make further written submissions?

[72] The applicants submit that they did not have a sufficient opportunity to address all of the issues which may have been at stake. In this regard, the applicants submit that they should have had an opportunity to meet with the Minister or an opportunity to make further written submissions. The respondent agrees that the applicants were owed a duty of fairness but submits that the duty was met in this case.

[73] "The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations": *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 33. Fair participatory rights can thus be accomplished through various means depending on the context. In *Baker*, the Supreme Court of Canada set out a five factor methodology for determining the content of procedural fairness. Those factors are: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision-maker. This list is not exhaustive (*Baker*, at paras 23-28).

[74] Applying these factors to the case at bar, for the following reasons, I am of the view that only minimal procedural protections were required, which included neither the right to a meeting with the Minister nor the right to make further written submissions.

[75] Turning to the first factor, in *Baker*, Justice L'Heureux-Dubé reaffirmed the principle in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 that the closer the administrative process resembles the judicial process, the more likely that the duty of fairness will require procedural protections closer to that process (*Baker*, at para. 23). The section 50 sale process, as previously described, is purely administrative and does not resemble in any way the adversarial or court process.

[76] Under the second factor, Justice L'Heureux-Dubé provided two indications of where greater procedural protections will be required, first, where no appeal procedure is provided within the statute, and two, when the decision is determinative of the issue and further requests cannot be submitted (*Baker*, at para. 24). This is true of section 50 sales. There is no right of appeal, only judicial review before this Court, as is being sought at present. Moreover, the decision to approve a sale is determinative of the disposition of the lands.

[77] The third factor is the significance or importance of the decision to those affected. Justice L'Heureux-Dubé stated that the more important the decision is to the affected persons and the greater its impact on the affected persons, the more stringent the procedural protections that will be mandated (*Baker*, at para. 25). This factor raises an interesting question in the context of a section 50 sale in the sense that the band is not automatically affected by the sale. Rather, the band's interest is subject to a condition as it has a reversionary interest in the land under subsection 50(3), which provides that where no tender is received within six months or such further period set by the Minister, the unsold lands will revert to the band. The applicants submit that the decision of the Minister is one which substantially affects the rights and property interest of the Band and other Band members. In the Section 50 Sale at issue, the total sale proceeds equalled $1,278,500.00. While a section 50 sale does not affect the band with as much certainty as it does the heirs who will receive the proceeds and any bidders, I believe that the reversionary interest held by the band does militate in favour of some procedural protections in conducting the sale.

[78] The crux of the applicants' argument for a higher degree of procedural fairness rests on the fourth factor, that of legitimate expectations. The doctrine of legitimate expectations is an extension

of the rules of natural justice and procedural fairness. If the applicant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness (*Baker*, at para. 26). The applicants submit that, through a series of correspondence, they had a legitimate expectation of an oral hearing or a meeting with the Minister before the decision was rendered, or at the very least, an expectation that their request for a meeting would have been addressed directly. The respondent submits that nothing in the correspondence amounted to an offer of additional procedures or opportunities to make representations. At most, the DIAND representative indicated that the Minister would consider the request for a meeting.

[79] I agree with the respondent. A review of the relevant correspondence confirms that this is what happened. As previously set out in the facts above, the applicant Chief Robert Sam wrote a letter to the Minister expressing a number of concerns with the Section 50 Sale and requesting a meeting with the Minister to discuss these concerns. Counsel for the Minister replied that he expected the Minister would be replying directly to the First Nation regarding its request for a meeting. Subsequent correspondence from counsel for the Band asked about the status of a meeting with the Minister. Before any meeting could take place, the Minister made his decision approving the Section 50 Sale.

[80] There is a disagreement between the parties regarding a letter dated June 2, 2004 which was allegedly sent by DIAND to the Chief and Council, and provided that the Minister's schedule did not allow for him to attend a meeting, but that any correspondence and comments would be considered in the granting or refusing of approval of the Section 50 Sale. The Band maintains that it did not receive this letter. It is difficult to tell from the affidavit evidence and the evidence elicited

on cross-examination whether this letter was received. I find, however, that whether this letter was sent or not is not necessary for determination of the issue. In my view, it is clear from the correspondence that no promise of a meeting was ever made to the applicants. Similarly, I could not find anything which would suggest that the applicants had a legitimate expectation that they would be entitled to make further submissions.

[81] The applicants point to the case of *Mercier-Néron v. Canada (Minister of National Health and Welfare)*, [1995] F.C.J. No. 1024 (T.D.)(QL), in which the applicant sought judicial review of a decision that had denied her application for assistance under the Extraordinary Assistance Plan for Thalidomide Victims. After the applicant applied for the program, the respondent sent her documents clearly stating that her application could be adjudicated either on the basis of written material and information or in a hearing at which the applicant could appear or be represented. The applicant elected to have her application adjudicated at a hearing. No such hearing was held and, approximately a year later, her claim was denied because the respondent was not satisfied with the supporting documentation she had provided. In allowing the judicial review application, this Court found that when the respondent had advised the applicant that she was entitled to a hearing, it had created a legitimate expectation on the applicant's part that she could avail herself to such a hearing, at which time she could give a complete explanation of the circumstances related to her case. The respondent had therefore breached the duty of fairness when it did not hold the hearing.

[82] In the present case, there was nothing resembling an offer or an option to take part in additional procedures or an opportunity to make further representations at a meeting or an oral hearing. The Minister’s delegate simply stated that the applicants’ request for a meeting had been

forwarded to the Minister. There was no promise or assurance that one would be held. Therefore, I must find that the doctrine of legitimate expectation has no application to the case at bar.

[83] Additionally, I note that the first request for a meeting with the Minister came at the end of the Band's first five-page letter outlining its concerns, in which it was stated that the Council wished to discuss "the issues contained in this letter". Nowhere in the Band's subsequent correspondence requesting a meeting did it ever state that the meeting would involve any new concerns or suggest that there were other issues to be raised with the Minister (regarding, for example, the validity of the CPs). As far as the Band's concerns seemed to go, this letter was the end of the story.

[84] The fifth factor takes into account the Minister's choice of procedures. Justice L'Heureux-Dubé cited the case of *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 at 524 in which the Supreme Court stated that while it is not determinative, important weight must be given to the choice of procedure made by the decision-maker, particularly when the statute is silent which then leaves to the decision-maker the ability to choose its own procedure (*Baker*, at para. 27). The respondent submits that DIAND's conduct of a section 50 sale, including Ministerial approval, is a matter of policy. As such, DIAND implemented administrative law duty of fairness procedures so that all interested parties would have the right to make submissions.

[85] Taking these factors together, I conclude that, in the present case, the duty of fairness required a lesser degree of procedural safeguards and that the procedural fairness already afforded to the applicants was sufficient. They were given the opportunity to make written representations, which they did. I cannot see any reason why they should have been given a "second kick at the can"

to make further representations, especially in light of the fact that the applicants never indicated that they had any new concerns which had not already been addressed in their previous correspondence to the Minister. Additionally, I note that the Minister provided comprehensive reasons for the decision to approve under subsection 50(4), which clearly took into account the Band's concerns.

[86] Thus, I am satisfied that the Minister met the requisite duty of fairness.

CONCLUSION

[87] At the heart of this case lie the Minister's duties, obligations and responsibilities in approving possession under subsection 50(4). Accordingly, it is necessary to set out the general parameters of the Minister's discretion in making such a decision. The Court of Appeal in *Tsartlip* cited *Baker* and the "margin of manoeuvre" approach to reviewing a discretionary decision. In *Baker*, Justice L'Heureux-Dubé noted that "discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature…" (*Baker*, at para. 53). In *Tsartlip*, the Court of Appeal noted that the Minister's margin of manoeuvre was "not unlimited" in that, when considering whether or not to approve a lease under subsection 58(3), the Act contained enough provisions with regard to the use of land in a reserve by non-Indians, that the Minister's decision was more or less dictated.

[88] Counsel for the applicants described the respondent's interpretation of the Minister's discretion as a single-lane road whereas counsel for the applicants would have it be a "four-lane thoroughfare." I cannot agree. In my view, subsection 50(4) is even more limiting than subsection

58(3) and provides an even smaller margin of manoeuvre. Subsection 50(2) provides that the right to possess or occupy the land "shall be offered for sale…to the highest bidder among persons who are entitled to reside on a reserve". Thus, the choice of options available to the Minister is severely limited by the scheme contemplated by the Act. Indeed, subsection (4), read in light of subsection (2), suggests that once the Minister has made the correct relevant legal determinations, considered all the submissions of interested parties and is satisfied that the purchaser is a band member, only in compelling circumstances could he decide not to grant his approval of possession under subsection 50(4) when the sale is made mandatory pursuant to subsection 50(2). Applying these principles, while the Minister does possess the discretion to take into account many factors, in this case, the Minister found that the Band's statements regarding First Nations' need for land constituted insufficient compelling evidence. I see no reason to disturb the decision on this basis.

[89] In the result, this application for judicial review is dismissed with costs to the respondent Minister and to the respondent Estate of Irene Cooper.

JUDGMENT

The application for judicial review is dismissed with costs to the respondent Minister and to the respondent Estate of Irene Cooper.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1492-04
STYLE OF CAUSE:	Chief Robert Sam et al and The Minister of Indian and Northern Affairs et al
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	July 4, 2006
REASONS FOR :	TREMBLAY-LAMER J.
DATED:	August 22, 2006

APPEARANCES:

Mr. B. Rory B. Morahan	FOR THE APPLICANTS
Mr. Patrick Walker Ms. Isabel Jackson	FOR THE RESPONDENT – CROWN
Mr. Michael J. Lomax	FOR THE RESPONDENT – ESTATE OF IRENE COOPER

SOLICITORS OF RECORD:

Morahan & Company Victoria, B.C.	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada Department of Justice Vancouver, B.C.	FOR THE RESPONDENT – CROWN
Milton Johnson Victoria, B.C.	FOR THE RESPONDENT – ESTATE OF IRENE COOPER