Date: 20080218

Docket: T-1346-07

Citation: 2008 FC 207

Vancouver, British Columbia, February 18, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

TSAWOUT FIRST NATION
as represented by Councillors Frank Pelkey,
Antoine Underwood, Harvey Underwood,
Toby Joseph and Keith Pelkey Sr. and
EARL CLAXTON SR., EARL CLAXTON JR.,
JOANNA CLAXTON, MURIEL (ROSE) JIMMY,
WALTER (KENNY) JIMMY, IRVINE JIMMY,
LILLIAN JOE, MICHAEL HORNE, HELEN JACK,
ALLAN CLAXTON and ANNE JIMMY

Applicants

and

THE MINISTER OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT,
MARVIN UNDERWOOD as administrator
of the Estate of Ethel Underwood, and
DAVID UNDERWOOD, as a beneficiary
of the Estate of Ethel Underwood

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The matter originally scheduled for hearing before the Court is a judicial review application by the Applicants from a letter decision dated June 13, 2007, made pursuant to section 27 of the

Indian Act (the Act), by the Delegate of the Minister of Indian Affairs and Northern Development (the Minister's Delegate) who refused the Applicants' application dated January 7, 2003, to cancel, on the ground it was issued in error, Notice of Entitlement No. 1690 (the Notice of Entitlement), Lot 24, East Saanich Indian Reserve No. 2 (the Lot), issued to the late Ethel Underwood on June 19, 1962. Mrs. Underwood died in 1995. The Respondent Marvin Underwood is the administrator of her Estate; the Respondent David Underwood is the beneficiary of all of Mrs. Underwood's interest in the Lot.

[2] The Applicants, in their memorandum of fact and law, attacked the decision on traditional administrative law grounds: (1) breach of procedural fairness, (2) error of law (wrong legal test) and (3) material error of fact. The Minister of Indian Affairs and Northern Development (the Minister) in his reply memorandum countered the administrative law grounds advanced by counsel for the Applicants and raised one additional issue: "the Minister was without jurisdiction at the time the decision was made" [emphasis mine]. The basis for this argument is that section 27 of the Act no longer applied to the lands of the Tsawout First Nation (the First Nation) because the Minister and the First Nation had put into place, before the decision was made on June 13, 2007, the necessary instruments to achieve the transfer of the management of the reserve lands from the Minister to the First Nation. Specifically, that transfer became effective when the First Nation's Land Code (the Land Code) came into force on May 29, 2007, two weeks before the June 13, 2007 decision being challenged. Subsection 38(1) of the *First Nations Land Management Act* is clear on the point providing that "on the coming into force of the land code of a first nation the following cease to apply to the first nation, first nation members and first nation land: sections … 22 to 28 … of the

Indian Act." In the alternative, the Minister's counsel stated this Court could not grant one of the remedies sought by the Applicants – a reference back for redetermination – because the Minister was statutorily barred from so doing.

[3] Counsel for the administrator and beneficiary of the Estate of Ethel Underwood in his reply memorandum wrote that "it is not proper to characterize the June 13, 2007 letter as a "Decision" because, at the date of the letter, the Minister of Indian Affairs no longer had jurisdiction to make a decision pursuant to section 27 of the *Indian Act*" citing as the reason for loss of jurisdiction the coming into force of the Land Code which caused section 27 of the Act to cease to have effect on the First Nation's land with the result the Minister could not thereafter cancel the Notice of Entitlement that may have been issued in error.

[4] As an aside, I note the Land Code provides in section 27 that Council may "subject to any applicable ruling under Part 8 or by a court of competent jurisdiction, cancel or correct any interest or decision issued or allotted in error, by mistake or by fraud."

II. The Respondents Underwood's Motion to Dismiss and the Responses

[5] On February 8, 2008, counsel for the administrator and beneficiary of the Estate of Ethel Underwood made a motion, returnable before this Court on the date returnable for the hearing of the judicial review application (June 13, 2007), for an order for "the dismissal of the Applicants' notice of application dated July 10, 2007" on the grounds "the Applicants' application for judicial review … be dismissed on the basis of doctrines of mootness, lack of utility and lack of jurisdiction

pursuant to section 18.1(3) of the *Federal Courts Act*." The Court directed the hearing of this motion as the first item of business on February 13, 2008.

[6] On February 12, 2008, the Court was apprised the previous day that counsel for the Applicants had written to counsel for both Respondents in the following terms:

> Your clients have both taken the position that, "[a]s the Minister issued his decision on June 13, 2007, almost 2 weeks after the Tsawout First Nation gained the ability to manage its own reserve lands, the Minister was without jurisdiction at the time the decision was made." The Applicants agree".
>
> Accordingly, we propose circulating a consent order disposing with any need for hearing of the Applicants' application or the Respondent Marvin Underwood's motion in the following terms –
>
> THIS COURT ORDERS:
>
> 1. The June 13, 2007 decision of the Respondent Minister of Indian Affairs and Northern Development, or his delegate, regarding the Applicants' application to cancel Notice of Entitlement No. 1609 to lot 24 of East Saanich Indian Reserve No. 2 is set aside.
>
> Such an order is of practical effect, at the very least to address the legal presumption of propriety regarding the Minister's June 13, 2007 letter. It will be of practical importance to those handling the underlying dispute over Notice of Entitlement No. 1690 through the Tsawout First Nation Land Code dispute resolution process.
>
> The Applicants resile from seeking any order referring the matter back for determination.
>
> [My emphasis]

[7] Also attached to the February 12, 2008 letter to the Court from counsel for the Applicants was a copy of a letter, bearing the same date, addressed to the Lands Manager of the First Nation on

behalf of Allan Claxton in his personal capacity filing a written Notice of Dispute pursuant to the Land Code with respect to the Notice of Entitlement.

[8] Counsel for the Minister advised in writing she was not taking any position on the other Respondents' motion to dismiss, although at the hearing before the Court, she shifted position to endorse the arguments submitted by counsel for the Underwood Respondents on the issue whether the Minister's Delegate's letter was a decision.

III. Analysis and Conclusions

[9] All of the parties agree the Minister was without jurisdiction when the Minister's Delegate made the June 13 ruling, under the purported authority of section 27 of the Act, refusing the Applicants' application to cancel the Notice of Entitlement on the ground it was issued in error. On the return of the Underwood motion, I was advised by its counsel he wished to proceed with his dismissed application and so we did.

[10] I have two motions before me, one of which will be granted: either the Underwood motion for a dismissal of the Applicants' judicial review application on grounds of mootness, or the Applicants' motion that the June 13, 2007 decision be set aside because it was made without authority, a relief which counsel for Messrs. Underwood does not oppose if I do not grant their motion to dismiss the judicial review application. In the circumstances, it will not be necessary for the Court to deal with or comment on the merits of the Applicants' judicial review application.

[11] In support of his motion the Applicants' judicial review application be dismissed, counsel for Messrs. Underwood makes two arguments:

1) The June 13, 2007, communication from the Minister's Delegate is not a "decision" because it was made without authority. Counsel relies on the decision of my colleague Justice O'Reilly in *Nanavit Tunngavik v. Canada (Attorney General)*, 2004 FC 85.

2) The Applicants' judicial review application is moot, relying on the Supreme Court of Canada's decision in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. In particular, counsel argues the June 13, 2007 letter is just that – a courtesy letter having no practical effect because:

   (a) it does not affect or impact upon the parties; it does not resolve their dispute which will be handled by the First Nation in accordance with its Land Code;

   (b) it has been acknowledged by all of the parties the Minister's authority to make the decision under section 27 of the Act disappeared with the land management transfer of reserve lands to the First Nation.

[12] I am not persuaded by counsel for the Respondents Underwood's arguments.

[13] First, I am satisfied the Minister's Delegate's letter of June 13, 2007, is a decision amenable to the supervisory jurisdiction of this Court by way of certiorari to quash an action taken without jurisdiction. The decision was taken pursuant to section 27 of the Act which confers upon the Minister the statutory power "to cancel a Notice of Entitlement that, in his opinion, was issued through error."

[14] The Minister had before him an application by the Applicants who took the position the Notice of Entitlement had been issued in error. The Underwood Respondents submitted to the Minister that the Notice of Entitlement in question had not been issued in error. The Minister's Delegate decided in favour of the Underwood Respondents. This decision, admittedly taken without jurisdiction, had a legal effect: it decided against the application of the Applicants.

[15] In any event, the supervisory jurisdiction of this Court to quash a matter is not limited to a decision or order. Paragraph 18.1(3)(b) of the *Federal Courts Act* provides this Court may quash or set aside "a decision, order, act or proceeding of a federal board."

[16] On its face, the ability of this Court to quash an invalid or unlawful act is not limited to a decision. See the discussion on this point in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, and generally the Supreme Court of Canada's decision in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, where Justice Dickson stated the supervisory jurisdiction of this Court to quash is available "as a general remedy for the supervision of the machinery of government decision-making. The order may go to any public body with power to decide any matter affecting the rights, interests, property, privileges or liberty of any person."

[17] With respect, counsel for the Underwood Respondents' reliance on *Nanuvat*, above, is misplaced. In that case, the decision-maker was not relying on any statutory power having legal consequences. Here, the Minister's Delegate was relying, albeit without jurisdiction, upon section 27 of the Act as he himself recognized in the June 13, 2007 letter decision.

[18] Second, in my view this judicial review application is not moot. Justice Sopinka in *Borowski* above, elaborated on the concept of mootness at paragraphs 15, 16 and 17 in the following terms:

> **15** The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> **16** The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

> **17** The first stage in the analysis requires a consideration of whether there remains a live controversy. The controversy may disappear rendering an issue moot due to a variety of reasons, some of which are discussed below.

[19] Counsel for the Underwood Respondents candidly admits there is a live controversy remaining, i.e. whether the Notice of Entitlement should be cancelled. The process for that controversy has already been triggered and will be decided in accordance with the Land Code.

[20] Counsel for the Underwood Respondents argues the June 13, 2007 letter from the Minister's Delegate has no practical effect because everybody realizes it was made without jurisdiction. In the context of this case, I cannot accept this submission. Clearly, the Minister's Delegate intended his letter of June 13, 2007, to have legal effect – it was intended to signal the views of DINA. I need only refer to paragraph 24 of his affidavit.

[21] Moreover, counsel for the Underwood Respondents could not say whether the decision-makers under the Land Code would commit a reviewable error if they gave weight to the June 13, 2007 letter. In any event, the recent jurisprudence of this Court has expressed the view that unquashed decisions may have unintended consequences. They may not be collaterally attacked in other proceedings (see *Canada v. Grenier*, 2005 FCA 348).

[22] As noted, counsel for the Underwood Respondents advised the Court if it did not accept his motion to dismiss this judicial review application, the Underwood Respondents would not consent, but not oppose, an order of this Court setting aside the June 13, 2007 decision because it was made

without jurisdiction. On this basis, the order will go. As stated before, nothing in this decision touches upon the merits of the Applicants' judicial review application.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Underwood Respondents' motion to dismiss the Applicants' judicial review application is dismissed;

The Applicants' motion to set aside the June 13, 2007, decision of the Minister's Delegate is granted.

In light of the circumstances, no costs on these motions are awarded to any of the parties.

"François Lemieux"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1346-07
STYLE OF CAUSE:	TSAWOUT FIRST NATION et al. v. MIAND et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	February 13, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	LEMIEUX J.
DATED:	February 18, 2008

APPEARANCES:

Mr. David Robbins	FOR THE APPLICANTS
Mr. Murray Wolf	FOR THE RESPONDENT (Marvin Underwood)
Ms. Sandra Evans	FOR THE RESPONDENT (Minister of Indian & Northern Affairs)
Mr. David Underwood	FOR THE RESPONDENT (David Underwood, self-represented)

SOLICITORS OF RECORD:

Woodward & Company Victoria, BC	FOR THE APPLICANTS
McLarty Wolf Litigation Vancouver, BC	FOR THE RESPONDENT (Marvin Underwood)
John H. Sims, Q.C. Department of Justice	FOR THE RESPONDENT (Minister of Indian & Northern Affairs)
n/a	FOR THE RESPONDENT (David Underwood, self-represented)