Federal Court Cour fédérale

Date: 20101202

Docket: T-1861-09

Citation: 2010 FC 1218

Ottawa, Ontario, December 2, 2010

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

WALLACE PARKER

Applicant

and

OKANAGAN INDIAN BAND COUNCIL

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by the Respondent (the "Band Council"), wherein it refused to issue survey instructions for and/or to approve a survey of an allotment of land originally granted to the Applicant ("Mr. Parker") in 1966. The decision was made at a Band Council meeting on October 6, 2009.

[2] Mr. Parker would like this Court to set aside the decision and remit it back to the Band Council for redetermination, with instructions to issue survey instructions and to approve an

[3] allotment so that he can perfect his interest in the land and obtain lawful possession of reserve land under the *Indian Act*, R.S.C. 1985, c. I-5.

I. Facts

[4] The Applicant, Mr. Parker, is a member of the Okanagan Indian Band. The Respondent is the Okanagan Indian Band Council.

[5] On March 11, 1966, Mr. Parker was allotted some rights in a parcel of land on the Okanagan Indian Band reserve. The Applicant contends that this was a full "allotment of reserve land" that he apparently understood as a permanent granting of the land. In contrast, the Respondent holds that Mr. Parker was allotted the land on a merely temporary "two-year improvement basis." The minutes from the 1966 meeting confirm that the land was in fact originally applied for on this "two-year improvement basis," but do not explain what was meant by that phrase. This leaves uncertainty as to whether Mr. Parker's interest in the allotment was meant to continue after the two years, provided that it was improved, or whether it was intended to expire in 1968.

[6] With respect to the 1966 allotment, both parties agree that conditions of non-interference with a certain road and ditch were attached to the allotment. The Band Council believes that there were also logging and fencing conditions and according to an affidavit filed by the Band Council, there was some question as to whether these improvements were carried out. Mr. Parker alleges that no such logging and fencing conditions existed, but argues that if they did exist, he has fulfilled them.

[7] The Band Council maintains that "the two-year term of the improvement allocation on conditions expired on March 11, 1968." In contrast, Mr. Parker appears to believe that his interest in the 1966 Allotment continued on after 1968.

[8] In 1976 the Band Council invited Mr. Parker and everyone else who had been issued an allotment to re-apply, apparently because of a transfer of land application files from an Indian Agent office in Vernon to the Band offices. Mr. Parker re-applied for the allotment, but the Band Council did nothing with his application.

[9] Without a survey of the allotment approved by the Band council, no Certificate of Possession could be obtained, so the allotment would remain an unperfected interest. Therefore, on February 19, 1984, Mr. Parker wrote to the Council asking for permission to survey the 1966 allotment.

[10] On June 11, 1984, the Band Council authorized Mr. Parker to obtain a survey of the land, but imposed new restrictions on the 1966 allotment, reducing its size and excluding certain lands. Mr. Parker did not agree with the 1984 restrictions and communicated his disagreement to the Council, but no resolution was reached on this issue.

[11] On April 29, 1986, the Band Council adopted a new Allotment Policy (the Okanagan Indian Band Land Allotment Policy). The stated objectives of the Allotment Policy reflected a desire for consistency, fairness, and the protection of the Band's lands and natural resources.

[12] In 2007, the Band Council began the process of developing a framework plan to resolve land issues on the Reserve, which would take into account factors such as past and current policies, resources, land values, planning for future generations, consistency, fairness, traditional Sylix laws, balancing the competing priorities of conservation and development, etc.

[13] On June 9, 2008, a Band Council meeting was held to consider unperfected land allotments and applications. The Council addressed various land requests, including Mr. Parker's. The Council discussed past and present land policies and determined that a decision needed to be made as to whether the allotment would be surveyed according to the 1966 or the 1984 boundaries. The issue was tabled until the next "Lands" meeting.

[14] According to Mr. Parker, the June 9, 2008 meeting dealt with only two other applications that were similar to his, from a Mr. Robert Louis and a Mr. William Marchand. Band Council motions were passed allowing these men to proceed with the surveys of their respective allotments, and within the next year the resulting surveys were each approved by a Band Council Resolution.

[15] The Band Council maintains that three other land applications were also not granted at the June 9, 2008 meeting. The meetings minutes confirm that individuals named Francis Oppenheimer, Eva Lawrence and Angeline Jones made applications that were not granted, but it is not clear from the minutes whether their applications were analogous to Mr. Parker's, as Mr. Louis's and Mr. Marchand's ostensibly were, or whether they were rejected because they were made on behalf of deceased members, as contended by Mr. Parker.

[16] On November 5, 2008, the Band Council held another meeting to address Mr. Parker's application for a survey. The Band Council reviewed the history of the allotment and decided to do a site visit, which took place on November 6, 2008.

[17] On February 24, 2009, Mr. Randy Marchand, Band Land Supervisor, informed Mr. Parker by letter directing him to proceed with a survey of the land, subject to the 1984 Restrictions. Mr. Parker was instructed to have the survey completed and approved by the Chief and Council within six months. The letter stipulated that if he failed to meet the deadline of August 24, 2009, the Council would deny his application and the property would remain Band land. The letter offered the names of several potential surveyors, including Russell Shortt. The letter also stated that the surveyor chosen would request a Band Council Resolution allowing him to obtain survey instructions from Natural Resources Canada in Edmonton.

[18] On April 2, 2009, Council elections took place and there was significant turnover on the Council.

[19] On June 23, 2009, Mr. Parker, through counsel, requested a three-month extension of the six month period he had been given to complete the survey. Counsel's letter to the Band Council explained that before proceeding with the survey, Mr. Parker wanted some time to resolve the concerns he had with the Band Council's directions for the survey.

[20] On July 20, 2009, by letter to Mr. Parker, the Band Council refused to grant the extension request and confirmed that the deadline for the survey remained August 24, 2009. Mr. Parker was

reminded that in order to have the Band land surveyed, a Band Council Resolution was required for the surveyor to request survey instructions from Natural Resources Canada.

[21] On August 20, 2009, the surveyor Mr. Shortt submitted an initial survey to Mr. Randy Marchand, the Band Council Land Supervisor, via email and asked if Mr. Marchand had any questions.

[22] On August 21, 2009, Mr. Parker, through counsel, sent a letter to the Band Council in which he stated that he would proceed with the survey according to the Band Council's instructions. However, he also stated that his decision to do so was not to be taken as an acceptance by him of the Band's directions, with which he disagreed.

[23] On August 24, 2009, the day of the deadline to have the survey completed, Mr. Marchand responded to Mr. Shortt by email, indicating that amendments needed to be made to the survey's boundaries.

[24] The same day, Mr. Shortt responded, saying that he would submit the amended survey "today or tomorrow" and also asked to speak to Mr. Marchand because he needed a question answered regarding some abandoned ditches in order to complete the survey.

[25] From August 24 to September 8, 2009, Chief and Council were out of the office for the regular holiday period.

[26] On September 11, 2009, Mr. Shortt sent Mr. Marchand an email to two men named Mr. Reynolds Bonneau and Mr. Jimmy Bonneau attaching two survey options, asking them to advise Mr. Marchand as to which survey plan option they preferred so Mr. Marchand could present this information to Council. Apparently the Messrs. Bonneau did not provide this information.

[27] On September 15, a Band Council meeting was held during which Mr. Parker's request for a survey of his allotment was discussed; it was stated that no action was required.

[28] On October 6, 2009 Band Council held a meeting, at which it declined to pass a resolution to grant survey instructions in relation to Mr. Parker's application. This is the impugned decision. They also passed a motion to schedule a Special Lands Meeting regarding land allocation issues and to prepare a map of those lands held by the Band.

[29] On October 26, 2009, the Council claims that it "strengthened its policies and plans for land use issues" and prepared a map of lands held by the Band. Council maintains that this meeting was part of their strategic long-term land use planning policy which aims to ensure fairness, community input, and strategic long-term planning. No minutes of this meeting appear to have been submitted, but it appears that no further decisions have been made with respect to Mr. Parker's application.

II. The impugned decision

[30] According to the minutes of the Band Council meeting on October 6, 2009, the councillors discussed the facts relating to Mr. Parker's application. They stated that Mr. Parker required a Band Council Resolution to complete the survey of the Band land for allotment to him, and that at his

request the surveyor Mr. Shortt had requested a Band Council Resolution to obtain survey instructions for the project. They stated that on February 19, 2009 the Applicant had been notified that he had six months to complete the survey and have Council approve it. They stated that before the surveyor could complete the project, a Band Council Resolution requesting the survey would be required.

[31] The Councillors discussed the difficulties with being unaware of which areas remained in the Band lands and the need for a fair system. They said that it was a burden on the Council to make allotment decisions in a piecemeal fashion one at a time. They spoke of the need to get directions from the membership on how to resolve unperfected land allotments.

[32] The Council then voted on a motion to grant permission for a survey to be undertaken for the purpose of identifying and legally describing Mr. Parker's allotted lands. The motion was defeated on a vote.

[33] One councillor advised that there is a backlog of unperfected land allotments and that the numerous applications could take up the remaining band lands. He spoke of the need for proper planning and mapping to better understand what lands remain and the access available to homes and land. The Council carried a motion to hold a Special Lands Meeting; it stated that a comprehensive policy was to be developed instead of the current process of making individual decisions by motions, which would better suit the interests of the whole Band.

III. Issues

[34] This application for judicial review raises the following six issues:

A. What is the applicable standard of review?

B. Did the Band Council have the discretion to deny Mr. Parker the lands allotted to him by failing to issue the survey instructions required to perfect his interest?

C. If the Band Council had the discretion, did it act properly?

D. Was there a breach of procedural fairness, generally speaking or in regard to legitimate expectations?

E. Is the Band Council estopped from failing to issue survey instructions?

F. Are there alternative reasons for denying the survey that should be considered by the Court?

IV. Analysis

A. *The Statutory Regime*

[35] Pursuant to Section 20(1) of the *Indian Act* (R.S., 1985, c. I-5), lawful possession of reserve land by an Indian requires both an allotment of land by a valid resolution of the Band Council and the approval of the Minister of Indian Affairs and Northern Development (the "Minister"). According to the Land Allotment Policy of the Okanagan Band, the individual must first obtain a survey defining the borders of the parcel of land that corresponds to the allotment before the land can be allotted to him by the Council of the Band. It is this survey, which must be approved by a Band Council Resolution, that the Applicant is trying to obtain. He needs this survey so that he can continue with the rest of the process to obtain lawful possession.

[36] Under s. 20(2) of the *Indian Act*, once the Band Council has allotted the land and the Minister has given approval pursuant to s.20(1), the Minister may issue a Certificate of Possession to the Indian, which will serve as evidence of his right to possession of the land described therein. Under s. 21, the Certificate of Possession is registered with the Department of Indian Affairs and Northern Development. Such a certificate entitles the bearer to significant rights in the land.

[37] For ease of reference, sections 20 and 21 of the *Indian Act* are reproduced in the Annex to these reasons.

(1) What is the Applicable Standard of Review?

[38] Following the decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, deference usually applies where the question is one of fact, discretion or policy. This is precisely the case here. The decision about whether to grant an allotment involves a considerable appreciation of the circumstances by the Band Council, which must balance the interests of individuals against the interests of the entire community. As the British Columbia Supreme Court said in *Lower Nicola Band v. Trans-Canada Displays Ltd.*, 2000 BCSC 1209, [2000] B.C.J. No. 1672 [*Nicola Band*], at para. 155:

> …before making an allotment under s. 20(1), a council has a duty to consider the rights of other Band members. That duty would require a balancing of individual's request for the allotment, including the purpose for which the allotment would be used, with the best use the land could be put to for the Band community. In view of its fiduciary obligation to all of its Band members, this Band Council would have to carefully consider a request for an allotment of the 80 acres to an individual if the use for which the land was being sought was other than for residential or agricultural uses.

[39] The Okanagan Indian Band has developed its own land management regime for developing reserve land, which serves as a basis for making decisions regarding allotments of reserve lands to individual band members. Before a survey of the allotment can be submitted to the Department of Indian and Northern Affairs for the purpose of perfecting the allotment and obtaining a Certificate of possession, a Band Council Resolution must be passed to approve the survey. In deciding whether to approve the survey, the Okanagan Indian Band must consider the application in light of the factors set out in its policy. The Band Council clearly has a broad and specialized expertise in weighing these factors, and is obviously in a better position than this Court in determining whether to grant an allotment should be granted or not.

[40] In light of the above, I am of the view that reasonableness is the proper standard on which to review the Band Council's decision. Accordingly, the decision must be upheld if it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[41] The fourth issue, however, raises a question of procedural fairness. It is trite law that such issues attract a standard of correctness, since they are always reviewed as questions of law. As Justice Linden wrote in *Sketchley v. Canada (Attorney General),* 2005 FCA 404, at para. 53, "[t]he decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty".

(2) Did the Band Council have the Discretion to Deny Mr. Parker the Lands Allotted to him by Failing to Issue the Survey Instructions Required to Perfect his Interest?

[42] The Applicant argues that the Band Council, while having discretion to allot land, had already exercised that discretion prior to the decision of October 6th, 2009. He believes that the Council had previously exercised its discretion in affirming the allotment in 1966 and in 1984; by directing Mr. Parker to proceed with the survey on February 24, 2009; by setting out the parameters of the survey; and by using their Land Supervisor to direct the survey. Afterwards, it no longer had discretion to deny the allotment by failing to approve a survey. In the Applicant's view, the decision before the Council on October 6, 2009 was not whether land should be allotted to Mr. Parker, but rather whether the land surveyed accurately described the land that had been allotted.

[43] I am unable to agree with this argument, as it is not consistent with the legislative framework put in place by the *Indian Act*. Section 20 of that *Indian Act* grants the Band Council discretion to approve allotments. Nevertheless, it does not specify any particular process for Band Councils to use in granting or denying allotments. Rather, the legislation grants them discretion to do so as they see fit.

[44] This is precisely what the Okanagan Band Council has done in adopting its 1986 Land Allotment Policy. This Policy sets out an elaborate process to be followed for all land applications. Upon receiving a letter of application with a rough description of the parcel of land applied for and a description of proposed land use, the band manager prepares a brief report to assist the Council to decide whether or not to proceed further with the application. If the Council considers the application worthy of consideration, it is then referred to the Surveys Committee.

The applicant will then be instructed by the band manager to mark the parcel of land on a preliminary basis, following which the surveys committee will make a field trip to view it. After the field trip, the Surveys Committee may either make a recommendation to reject the application or, if the land applied for is suitable for its intended use, or negotiate an agreement with the applicant on the size of the parcel and any conditions of the allotment. Once an agreement has been reached, the applicant will then make a formal application to Council accompanied with the recommendation from the surveys committee. A field trip will then be made by the whole Council; the Policy states clearly that "no commitment to the applicant would be made at that stage". Once a field trip has been made by Council, the formal application and the committee's recommendation will be considered by the Council and a decision will be made. If the Council decides to allot the parcel of land on a conditional basis, notice of the Council's intent to make the allotment will be posted for a period of 30 days and distributed to each band member household. If no protest is made or if the Council decides that a protest made is not legitimate and dismisses that protest, the Council will authorize the preparation of a legal survey of the land at the Band's expense. Once the legal survey plan has been completed, accepted, and registered, then conditional allotment of the land will be made by Council and the issuing of a certificate of occupation pursuant to s. 20 of the *Indian Act* will be requested. It is only if the conditions of the allotment have been met, after a period of two years from the date of the conditional allotment, that the Council will request that a certificate of possession be issued pursuant to section 20 of the *Indian Act* and that the application process will have been completed.

[45] I cannot agree with the Applicant that the approval of a survey mandated by Band Council should have been perfunctory. At all times during the process of issuing the allotment and approving the survey, the Band Council has complete discretion. The request that the band member have a survey conducted, and the cooperation by the Lands Supervisory in completing the survey does not mean that the Band Council has waived its right to refuse to issue survey instructions, or to refuse to approve the survey. This is still part of the application process, and the Band discretion must extend to every step of that process.

[46] Indeed, for the grant of power presented by the *Indian Act* to be meaningful, the Band Council must retain discretion over the whole approval process, including survey authorization. This is especially true given that the pre-survey stage of the approval process can apparently take decades. In light of the sensitive issues surrounding aboriginal land use today, it is only logical that the *Indian Act*'s grant of discretion extends to allowing Band Councils to make final determinations on whether land will be granted today. This is especially true in situations, such as the case at bar, where there may be gaps of 40 years between the original allotment and the survey approval.

[47] Furthermore, finding in favour of the Applicant on this point could set a dangerous precedent, because it would leave us without a clear benchmark of Band approval of allotment. Section 20 of the *Indian Act* requires that an applicant seek Ministerial approval if "possession of the land has been allotted to him by the council of the band". Although the Applicant claims that the land was already allotted to him, he does appear to recognize and accept that he cannot proceed to the stage of ministerial approval until a survey is authorized. If Courts were to find

that the requirement of s. 20 is met at some point in the process before the survey is authorized, what point would that be? In the example of Mr. Parker, would we consider the land allotted in 1966? In 1984? On February 24, 2009? What would be the final criterion for Band approval if not a survey authorization by the Council? The Okanagan Indian Band has a number of other outstanding allotment applications that have presumably also received non-final versions of approval in the past from formal Band Councils. Without the survey authorization as a benchmark of Band approval, how would these claims be determined? Furthermore, the reason for requiring a survey authorization is to make sure that the land allotted is specified and agreed upon by the Council and the applicant; without an approved survey, there can be no assurance that such agreement has been reached.

[48] I am therefore of the view that the Band Council had the discretion to decline to issue survey instructions.

(3) If the Band Council had the Discretion, did it Act Properly?

[49] The Applicant submits that even if the Band Council did have discretion to reverse its decision to allot him the lands, it did not engage in a *bona fide* consideration of public policy issues and therefore could not validly reverse its prior exercise of discretion. He bases this position on the decision of the Supreme Court of Canada in *Mount Sinai Hospital Center* v. *Québec (Minister of Health and Social Services)*, 2001 SCC 41 [*Mount Sinai*], where the majority found that the Minister was required to act in accordance with his prior exercise of discretion and could not reverse his decision but that if, in the alternative, he did have a general discretionary power to reverse himself, he could only do so where the public policy concerns were legitimate and corresponded to the reality of the situation. In the eyes of the Applicant,

neither of the two reasons given by the Respondent for declining to grant the survey instructions was legitimate or corresponded to the reality of the situation.

[50] I believe the Applicant's case is distinguishable from *Mount Sinai*. For the reasons already stated in the previous section, I do not think it can be said the Band Council has engaged in a reversal of its discretionary decision. The process for issuing the allotment of land must be considered as a whole, and the authorization to conduct the survey is only one step in that process. While it is true that Mr. Parker had been granted a conditional allocation of land in the past and had been directed to proceed with a survey on February 24, 2009, it cannot be said that the Band Council had previously authorized the survey. Therefore, there has been no reversal of a prior exercise of a discretionary power.

[51] I also note that Mr. Parker was given a six month deadline to complete the survey of the land in question and to have this survey approved by Council. If this deadline was not met, it was made clear that Council would deny and revoke his application and that the property would remain Band land. He was reminded of that time limit when his request for an extension was denied. Yet, it was only three days before the six month deadline that his counsel announced that he would complete the survey in accordance with the directions set out in the February 24, 2009 letter directing him to proceed to a survey. Moreover, it was on the final day of the six month deadline that the surveyor retained by Mr. Parker requested a Band Council Resolution to obtain survey instructions. The least that can be said is that Mr. Parker was not diligent in complying with the request to perfect his application. This delay, in and of itself, would have been sufficient for the Band Council to reject his application.

[52] Furthermore, even if the Council's behaviour was to be considered as a reversal of the previous exercise of its discretion, I believe that it did so in accordance with the conditions set out by the Supreme Court in *Mount Sinai* because legitimate public policy goals appear to be the motivating factor behind the Council's denial of his application. The allotment of lands is an important public policy issue for any Band, and it is not sound to argue that any single allotment will have no public policy ramifications. It is clear that the individual allotment decisions, taken together, have significant public policy consequences. At some point, if the Band is truly going to reform its allotment policy, it must start doing so at the level of the individual decisions. It is legitimate of the Band to want to carefully consider the policy ramifications before proceeding with a land allotment process that was begun 40 years ago when the geo-political situation of reserve lands was dramatically different.

[53] As already mentioned, the Band Council developed a framework plan to resolve land issues on the Reserve in 2007. The purpose of developing and implementing such a plan, with the input of Band membership, was to serve the interests of all Band members by ensuring that Council's decisions regarding Band Reserve lands are fair, consistent, carefully balance competing interests and reflect the full spectrum of community concerns. Council's action was also consistent with the land use planning priorities that Council had apparently recognized in the preceding months. There is no evidence before the Court to suggest that Council's October 2009 decision to coordinate the Special Lands Meeting and to prepare a map did not reflect a desire by Council to ensure fairness, community input, and systemic long-term planning in all decisions related to Band lands.

[54] Counsel for the Applicant relied on the fact that the Band Council recently granted legal survey request and approvals (once in late 2008 and once in early 2009) for similar or larger allotments, as proof that it did not engage in a *bona fide* consideration of public policy issues in the case of Mr. Parker. But there is nothing in the record to support the argument that these allotments were as complex as that of Mr. Parker. I also note that these surveys were executed within or very close to the six-month timeline set out by the Band Council. As for the three applications that were rejected at the June 9, 2008 Band Council meeting, there is no explanation in the minutes of the meeting why they were not granted. However, even if they were rejected because they were made on behalf of deceased band members, as contended by Mr. Parker, it would still be consistent with the view that the Band Council retains discretion to further its policy objectives up to the last step of the allotment process.

[55] Accordingly, I come to the conclusion that the Band Council exercised its discretion properly when it failed to issue survey instructions to perfect Mr. Parker's allotment, pursuant to its revised land management system. Mr. Parker's allotment was not "reversed"; instead, the Band Council refused his survey request. A high level of deference must be given to Band Council's decision, given its overall objective to balance public policy issues. There is not a shred of evidence that the Band Council acted with malice or bad faith in denying Mr. Parker's request for a survey.

(4) Was there a Breach of Procedural Fairness, Generally Speaking or in Regard to Legitimate Expectations?

[56] The Applicant relies on the doctrine of legitimate expectations to argue that the Band Council led him to legitimately expect that the regular process for perfecting allotments would be continued to completion such that his interest would be perfected. He felt that the letter instructing him to do the survey implied that the survey would automatically be approved if it accurately reflected the land allotted. In addition, the fact that the other two applicants in his position received survey authorization led him to legitimately expect that his application would also be approved.

[57] It is not entirely clear yet whether the doctrine of legitimate expectations can give rise to substantive rights in Canada. In *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, Sopinka J. regarded the doctrine of legitimate expectations as "an extension of the rules of natural justice and procedural fairness" which may afford "a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity" (p. 557). The Court went on to say that purely ministerial decisions based on broad grounds of public policy do not typically afford procedural protection to the individuals affected: see also *Mount Sinai,* above, at paras. 22-38.

[58] Be that as it may, I agree with the Respondent that Mr. Parker should not have expected that his survey would be authorized simply because the allotment approval process had begun. The February 24, 2009 letter made it clear that "…in order for you to be allotted the property a survey of the land is required to be completed and the plan approved by Council". Moreover, as already indicated, the letter also stated that "[t]his survey must be completed and approved by Chief and Council within six (6) months or the Council will deny and revoke your application and the property

will remain Band land". I fail to see how this can be interpreted as an undertaking that the survey would necessarily be approved if it was executed and reflected the land allotted. The Band Council has a continuing discretion to perfect or to not perfect an allotment up until the moment it adopts a final resolution granting possession of that land, which is then forwarded to the Minister, who issues a Certificate of Possession under s. 20(1) of the *Indian Act*.

[59] In any event, Mr. Parker did not even fulfill the requirements set out in the February 24, 2009 letter. It was only three days before the six month deadline to have the survey completed and approved that counsel for Mr. Parker announced that Mr. Parker would complete the survey in accordance with the directions set out in that letter. Moreover, it was only on the final day of the six month deadline that the surveyor hired by Mr. Parker requested the Band Council Resolution to obtain survey instructions. The boundaries identified by the surveyor in his preliminary survey did not conform to the area for allotment specified in the February 24, 2009 letter. As a result, the survey was evidently not completed within the timeline stipulated in that same letter. In those circumstances, it is hard to understand how Mr. Parker can now complain that his legitimate expectations have not been met, considering that he has not complied with the requirements giving rise to his expectations.

[60] The Applicant also argued that his rights to procedural fairness were breached because he was given no notice that the Band Council was about to reverse its decision, no reasons for that reversal, and no opportunity to make representations protesting the reversal. This argument, of course, is premised on the notion that the Band Council did reverse its decision. I have already dealt

with this argument: the Band Council did not reverse its decision, as no decision is made until the survey is approved and the allotment is perfected by a Certificate of Possession.

[61] I would also add that the concept of procedural fairness is variable in its content and that its requirements will vary according to the specific context of each case. In the present case, a number of factors militate in favour of a relatively low level of procedural fairness. First of all, the nature of decision made by the Band Council has nothing to do with the judicial process and is more akin to a policy decision. Second, the *Indian Act* does not prescribe any particular procedure and leaves it to the Band Council to decide how the decision to allot a piece of land will be made. Third, there is no evidence that a particular procedure has been followed in the past beyond what is prescribed in the Land Allotment Policy, and in particular that applicants are generally invited to make representations to the Band Council.

[62] It is true that the decision is important to Mr. Parker. But as mentioned in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 33) an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved. Mr. Parker had numerous occasions to inform the Band Council about his version of the facts over the years. The minutes of the November 5, 2008 special Band Council meeting record that a memo examining Mr. Wallace's application was prepared and examined by Council; while Mr. Parker was not in attendance since the meeting was closed to prevent undue influence from Band members, it is clear that his views were well-known and considered. I am therefore of the view that there has been no breach of procedural fairness.

(5) Is the Band Council Estopped from Failing to Issue Survey Instructions?

[63] Counsel for the Applicant relies on the doctrine of public law promissory estoppel to attempt to prevent the Respondent from denying his application. Relying on the concurrent opinion of Justice Binnie in *Mount Sinai*, above, he contends that he meets all the requirements of that doctrine, that is 1) words or conduct making a promise or assurance, 2) which is intended to be acted on, 3) followed by reliance or a representation, and 4) resulting in a change in position to the party seeking to rely on estoppel.

[64] There are several problems with this argument, which is in many respects the same claim as the legitimate expectations claim in another disguise. First of all, the evidence does not support a finding that the Band Council ever promised to Mr. Parker that his survey would be approved and that he would be granted the land he applied for. Indeed, the facts of this case are quite different than those at the basis of the *Mount Sinai* decision, where the Minister had clearly promised on a number of occasions that he would issue the modified permit sought by the Mount Sinai Hospital Center, as a result of which the Hospital had agreed to move to Montréal. As already mentioned, the statute itself is inimical to the notion that the Band Council could tie its hands by making such a promise until the Certificate of Possession is actually delivered; the Land Allotment Policy adopted by the Band is further evidence that the allotment of Band land is a long process which culminates with the approval of a survey that is consistent with the survey instructions given by the Band Council.

[65] Secondly, the Applicant himself admits that in public law estoppel, special consideration has to be given to public policy goals. In *Mount Sinai*, Mr. Justice Binnie wrote (at para. 47):

> Public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount. Circumstances that might otherwise create an estoppel may have to yield to an overriding public interest expressed in the legislative text.

[66] Contrary to the Applicant's view, the allotment of a land does have considerable public policy ramifications. The Band Council is entrusted with the systemic long term responsibility of ensuring that the collective ownership of Band lands is not jeopardized by the allocation of pieces of land to individual members: see paragraph 155 of *Nicola Band*, already cited in these reasons.

[67] In the end, I believe the Band Council was properly fulfilling its public law duty in developing a fair lands management policy for the Band and assessing allotment applications, including request to issue survey instructions, in accordance with that policy. There is no evidence of bad faith or bias in the decision of the Band to decline to pass a resolution granting survey instructions in relation to Mr. Parker's land application. Instead, Council passed a motion to coordinate a Special Lands Meeting regarding land allocation issues and to develop a map of those lands that continue to be held by the Okanagan Indian Band. The minutes of the Council meeting reflect a collective desire by Council to ensure fairness, community input, and the collective long term interests of the Band.

[68] For all of the foregoing reasons, this application for judicial review is dismissed, with costs to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT IS that this application for judicial review is dismissed, with costs to the Respondent.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1861-09
STYLE OF CAUSE:	Wallace Parker v. Okanagan Indian Band Council
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	September 8, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	December 2, 2010

APPEARANCES:

Peter Feldberg	FOR THE APPLICANT
Gula Punia	
Robert James	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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ANNEX

Indian Act (R.S., 1985, c. I-5)

POSSESSION OF LANDS IN RESERVES

Possession of lands in a reserve

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

Certificate of Possession

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

Location tickets issued under previous legislation

(3) For the purposes of this Act, any person who, on September 4, 1951, held a valid and subsisting Location Ticket issued under The Indian Act, 1880, or any statute relating to the same subject-matter, shall be deemed to be lawfully in possession of the land to which the location ticket relates and to hold a Certificate of Possession with respect thereto.

Temporary possession

(4) Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian

POSSESSION DE TERRES DANS DES RÉSERVES

Possession de terres dans une réserve

20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

Certificat de possession

(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat, appelé certificat de possession, attestant son droit de posséder la terre y décrite.

Billets de location délivrés en vertu de lois antérieures

(3) Pour l'application de la présente loi, toute personne qui, le 4 septembre 1951, détenait un billet de location valide délivré sous le régime de l'Acte relatif aux Sauvages, 1880, ou de toute loi sur le même sujet, est réputée légalement en possession de la terre visée par le billet de location et est censée détenir un certificat de possession à cet égard.

Possession temporaire

(4) Lorsque le conseil de la bande a attribué à un Indien la possession d'une terre dans une réserve, le ministre peut, à sa discrétion, différer son approbation et autoriser l'Indien à occuper la terre

to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.

temporairement, de même que prescrire les conditions, concernant l'usage et l'établissement, que doit remplir l'Indien avant que le ministre approuve l'attribution.

Certificate of Occupation

(5) Where the Minister withholds approval pursuant to subsection (4), he shall issue a Certificate of Occupation to the Indian, and the Certificate entitles the Indian, or those claiming possession by devise or descent, to occupy the land in respect of which it is issued for a period of two years from the date thereof.

Certificat d'occupation

(5) Lorsque le ministre diffère son approbation conformément au paragraphe (4), il délivre un certificat d'occupation à l'Indien, et le certificat autorise l'Indien, ou ceux qui réclament possession par legs ou par transmission sous forme d'héritage, à occuper la terre concernant laquelle il est délivré, pendant une période de deux ans, à compter de sa date.

Extension and approval

(6) The Minister may extend the term of a Certificate of Occupation for a further period not exceeding two years, and may, at the expiration of any period during which a Certificate of Occupation is in force

(a) approve the allotment by the council of the band and issue a Certificate of Possession if in his opinion the conditions as to use and settlement have been fulfilled;

or

(b) refuse approval of the allotment by the council of the band and declare the land in respect of which the Certificate of Occupation was issued to be available for re-allotment by the council of the band.
R.S., c. I-6, s. 20.

Prorogation et approbation

(6) Le ministre peut proroger la durée d'un certificat d'occupation pour une nouvelle période n'excédant pas deux ans et peut, à l'expiration de toute période durant laquelle un certificat d'occupation est en vigueur :

a) soit approuver l'attribution faite par le conseil de la bande et délivrer un certificat de possession si, d'après lui, on a satisfait aux conditions concernant l'usage et l'établissement;

b) soit refuser d'approuver l'attribution faite par le conseil de la bande et déclarer que la terre, à l'égard de laquelle le certificat d'occupation a été délivré, peut être attribuée de nouveau par le conseil de la bande.
S.R., ch. I-6, art. 20.

Registre

Register

21. There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

21. Il doit être tenu au ministère un registre, connu sous le nom de Registre des terres de réserve, où sont inscrits les détails concernant les certificats de possession et certificats d’occupation et les autres opérations relatives aux terres situées dans une réserve.