Cour fédérale  Federal Court

Date: 20210421

Docket: T-2139-18

Citation: 2021 FC 325

Ottawa, Ontario, April 21, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

URSULA COPEAU

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

LE CONSEIL DES INNUS DE PESSAMIT

Respondent

JUDGMENT AND REASONS

[1] Ms. Copeau is a member of the Pessamit Innu First Nation. In 2007, the Conseil des Innus de Pessamit [the Council] allotted land in the community to her where she could build her residence. Today, she is seeking a certificate of possession pursuant to section 20 of the *Indian*

Act, RSC 1985, c I-5 [the Act], for this land. Both the Council and the Department of Indigenous Services refused to consider her request. She is now seeking judicial review of that refusal and is asking the Court to order that a certificate of possession be issued.

[2] I dismiss Mr. Copeau's request. She is confusing the concepts of possession of reserve land, which is the subject of the certificate under section 20 of the Act, and the various types of rights, often called rights of use or customary rights, that a First Nation may grant to its members, according to its own rules of law, policies or customs. The evidence before me shows that the Council never intended to consent to the issuance of a certificate of possession to Ms. Copeau, but instead to grant her a right of use. The case law clearly establishes that exercising a right of use does not result in entitlement to a certificate of possession.

I. Background

[3] Ms. Copeau is a member of the Pessamit Innu First Nation. Between 1997 and 2014, she lived with Paul-Émile Picard, also a member of the First Nation.

[4] In 2007, Ms. Copeau and Mr. Picard began plans to build a residence on the Pessamit territory. They made a request to the Council for the use of land and financial assistance. In April 2007, the Council granted the request. It allotted the use of Lot R-482 to either Ms. Copeau alone, or jointly to Ms. Copeau and Mr. Picard. The parties do not agree on this point because the Council's resolution to grant the land was apparently lost. Moreover, the Council awarded $27,100 in financial aid to Ms. Copeau only, as Mr. Picard had already received such assistance in the past.

[5] In January 2014, Ms. Copeau and Mr. Picard ceased living together. Ms. Copeau left the residence and moved to Sept-Îles.

[6] In September 2015, Mr. Picard died. He did not leave a will. This situation led to a disagreement between Ms. Copeau and Mr. Picard's heirs regarding use of the residence. Other that the fact one of Mr. Picard's daughters from a previous relationship was appointed administrator of the estate pursuant to the Act, I do not have much information about this estate dispute.

[7] In 2018, Ms. Copeau asked the Council to apply to the Department of Aboriginal Affairs (since replaced by the Department of Indigenous Services) for the issuance of a certificate of possession for Lot R-482 to her pursuant to section 20 of the Act. The Council declined to do so.

[8] Ms. Copeau then directly communicated with the Department of Aboriginal Affairs to request the issuance of a certificate of possession. On November 21, 2018, the Department dismissed this request, since it had not received an allotment request from the Council as required under the Act.

[9] Ms. Copeau is now seeking judicial review of that decision. Although she is seeking various remedies, her case is akin to an application for *mandamus*. In substance, she is asking the Court to order the Council to submit a request to the Department of Indigenous Services for a certificate of possession to be issued and to order the Department to issue the certificate.

II. Analysis

[10] In their written submissions and at the hearing, the parties put forward various arguments regarding the nature of the remedies Ms. Copeau is seeking, the relevant tests and the standard of review. The Council also submitted that Ms. Copeau's application was untimely.

[11] In my view, it is possible to decide the case on narrower grounds. All of Ms. Copeau's arguments are based on the premise that in 2007, the Council intended to issue a certificate of possession to her. However, the evidence clearly shows that the Council never had this intention. At most, the Council granted her a right of use, which does not give rise to the issuance of a certificate of possession. It follows that the Department of Indigenous Services was entirely correct in refusing to issue such a certificate and that the Council was not required to collaborate in such a procedure.

[12] To show why this is so, I will first describe the principles related to the individual possession of reserve land. I will then analyze the evidence filed by the parties to determine the type of right the Council wished to grant to Ms. Copeau.

A. *Possession of Reserve Land*

[13] This case requires us to review the principles governing the certificate of possession system set out in sections 20 to 27 of the Act. At the outset, I note that several terms used in the Act, such as "band" and "reserve," reflect the colonial origins of the Act. Today we use more appropriate terms such as "First Nation" and "community" or "territory". However, as Justice

LaForme of the Ontario Court of Appeal did in *Tyendinaga Mohawk Council v Brant*, 2014 ONCA 565 [*Tyendinaga*], I will nonetheless use the term “reserve” within the technical meaning attributed by the Act, to avoid confusion.

[14] According to section 2 of the Act, a reserve is “a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band”, namely a body of Indigenous individuals. In principle, rights in reserve land are collective. However, since the mid-19th century, legislation regarding Indigenous peoples has favoured the allotment of individual rights, under certain conditions. This was a component of the more general policy to assimilate Indigenous peoples.

[15] Beginning in 1869, the Act has empowered the Minister to grant a “location ticket” to a member of a First Nation, with the consent of that First Nation’s council. When the Act was overhauled in 1951, the certificate of possession system replaced the location ticket system. In the current Act, the main provision for this system is section 20. The first two subsections state the following:

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.	**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.
(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	(2) Le ministre peut délivrer à un Indien légalement en possession d’une terre dans une réserve un certificat, appelé certificat de

possession of the land described therein.	possession, attestant son droit de posséder la terre y décrite.

[16] In *Tyendinaga*, at paragraph 77, Justice LaForme summarizes the certificate of possession system as follows :

> Indian interest in lands in Canada is only the right to use and occupy them; it is not ownership in fee simple. The land rights are communal, but can be divided into individually held parcels of possession and evidenced by Certificates of Possession. The right of Indian possession of reserve land cannot be transferred, sold or surrendered to anyone other than to an Indian band or an Indian, provided always that it is with the consent of the government of Canada. As reserve land is Crown land, it is inalienable to third parties except with the consent of the Crown.

[17] It has been said that it is "extremely difficult" to accurately determine the legal nature of the right granted by a certificate of possession: *Pronovost v Minister of Indian Affairs*, [1985] 1 FC 517 (CA) at 523 [*Pronovost*]. Nonetheless, it is generally agreed that a certificate of possession grants rights that are very similar to private property, subject to the restrictions to alienation resulting from the Act and the fact that the underlying title belongs to the Crown: *Brick Cartage Ltd v The Queen*, [1965] Ex CR 102 at 106-107. It is beyond doubt that the issuance of a certificate of possession considerably restricts the management powers of the First Nation with respect to the parcel of land in question.

[18] The wording of section 20 could suggest that "possession" is the only type of individual right that can exist for reserve land. However, it is well known that many First Nations allot land to their members outside the process set out in section 20 of the Act: *Report on the Royal Commission on Aboriginal Peoples, Volume 3: Gathering Strength*, Ottawa, 1996, p 441. In

Many Guns v Siksika Nation Tribal Administration, 2003 ABPC 164, Judge Leonard S. Mandamin, then of the Provincial Court of Alberta, affirmed that the inherent capacity of a First Nation to make decisions regarding the use of its territory can manifest itself by the granting of so-called "customary" rights. He described this as follows, at paragraph 83:

> The most common example of the customary interest in Reserve land is the occupation of Reserve land by a First Nation member in accordance with the custom of the First Nation. In such instances there is no authorization by the Minister of Indian and Northern Affairs Canada through the issuance of a Certificate of Occupation or Possession pursuant to the provisions of the *Indian Act*. This occupation by custom usually means that an individual occupies certain Reserve land and exercises use of that land even to the exclusion of other members of the First Nation. The individual member's customary interest is recognized by the membership of the First Nation. This is the situation on the Siksika Reserve. Reserve land is variously occupied by members according to the custom of the First Nation rather than according to *Indian Act* Certificates of Possession or other *Indian Act* allocations.

[19] Similarly, in *Crowchild v Tsuu T'ina Nation*, 2017 FC 861, at paragraph 4 [*Crowchild*], my colleague, Justice William F. Pentney, noted the following:

> Tsuut'ina does not issue Certificates of Possession under s. 20 of the *Indian Act* nor has it adopted written by-laws, policies or procedures regarding the allocation of Reserve lands. Instead it follows its own customs and traditions in the allocation and re-allocation of Reserve lands.

[20] The case law occasionally provides illustrations of rights conferred outside the Act. In *MacMillan v Augustine*, 2004 NBQB 160 [*MacMillan*], the council of the First Nation allotted a house to one of its members without the Minister's permission. In *Gamblin v Norway House Cree Nation Band*, [2001] 2 CNLR 57 (FCTD), at paragraph 41, confirmed by 2002 FCA 385, and in *Cottrell v Chippewas of Rama Mnjikaning First Nation*, 2009 FC 261, at paragraphs 81-

82, our Court held that a First Nation could confer occupation rights on one of its members through a lease or private law contract; see also *Vollant v Innu Takuaikan Uashat mak Mani-Utenam*, JE 95-936 (Que SC). Justice Marceau of the Federal Court of Appeal seems to have contemplated this possibility in *Pronovost*, at 524.

[21] The potential recognition of such rights by the courts raises delicate issues. On the strength of decisions such as *Joe v Findlay* (1981), 122 DLR (3d) 377 (BCCA), *Cooper v Tsartlip Indian Band* (1996), 199 NR 126, [1997] 1 CNLR 45 (FCA) [*Cooper*], and *Penticton Indian Band v Jack*, 2015 BCCA 337, it is often said that such rights are unenforceable. In *Sayers v Batchewana First Nation*, 2013 FC 825, at paragraphs 25–26, Justice Donald Rennie, then a member of this Court, suggested that these were interests but not rights. The enactment of the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, may have altered the situation. The definition of "interest or right" in section 2 of this Act is not limited to certificates of possession. Likewise, subsection 16(4) of the *First Nations Land Management Act*, SC 1999, c 24, provides for a form of recognition of "[i]nterests or rights . . . pursuant to the custom of the First Nation". For example, in *Crowchild*, at paragraphs 32–34, Justice Pentney stated that a First Nation member could have a sufficient interest to trigger the rules of procedural fairness even without a certificate of possession. Given the lack of detailed evidence in this regard and given the way in which the matter has been argued before me, I need not comment on the nature of such rights or the manner in which they might be recognized.

[22] However, what is firmly established is that the use or mere occupation of reserve land is not a basis for claiming a certificate of possession. A "customary" right cannot be transmuted

into possession under section 20 of the Act. For example, in *Cooper*, at paragraph 11, the Federal Court of Appeal stated: “There is a possibility of acquisition by the Band member of the right of exclusive possession and use of individual parcels of reserve land, but that acquisition is strictly governed by the Indian Act”. See also *Lower Nicola Indian Band v Trans-Canada Displays Ltd*, 2000 BCSC 1209, at paragraphs 151–55 and 162; *MacMillan*, at paragraphs 35, 36 and 47; *Paul v Cooper*, 2009 BCSC 515, at paragraphs 41–44; *Bradfield v Canada (Indigenous and Northern Affairs)*, 2018 FC 682, at paragraphs 44–45; *Pelletier v Delorme*, 2019 FC 1487, at paragraph 119.

[23] In other words, there is a clear distinction between the certificate of possession system, as set out in sections 20 to 27 of the Act, and the regime of interests or rights conferred by a First Nation under its own law, sometimes referred to as “customary rights” or “rights of use”. Maintaining this distinction provides First Nations with increased autonomy in the management of their lands.

B. *Nature of Right Granted to Ms. Copeau*

[24] The evidence in the record does not show that the Council intended to recommend to the Minister that Ms. Copeau be granted a certificate of possession. On the contrary, there is every indication that the Council intended to grant a right of use not under the Act but rather under its own law or custom.

[25] Indeed, even though certificates of possession were granted in respect of some lands in the community of Pessamit, they are rare and were all issued decades ago. The witnesses agree

that, since at least the 1980s, the Council's policy has been not to consent to the issuance of such certificates, in order to promote collective land management. In particular, Jean-Marie Vollant, who was the Council's secretary-registrar in 2007 and who provided an affidavit in support of Ms. Copeau, testified that no certificate of possession was issued while he was the secretary-registrar, from 2003 to 2016. In cross-examination, René Simon, who was the chief at the time, testified that this policy was based on collectivist Indigenous thought.

[26] What is the nature of the right granted to members of the Pessamit Innu First Nation who wish to obtain a piece of land to build a house? In his affidavit, Jean-Claude Vollant, the Council's executive director, states that the allotment [TRANSLATION] "is simply a right to use the lot for residential purposes, with the Council still holding possession of the lot." In cross-examination, Jean-Marie Vollant confirmed that the allotment is a right of use:

> [TRANSLATION]
>
> Q: . . . Uh . . . so, a home can be built on that lot; is that correct?
>
> A: Yes, yes.
>
> Q: Is that it?
>
> A: It's a home.
>
> Q: However, the . . . the Council still owns the . . . the land?
>
> A: The land.
>
> Q: The land, OK, good. Basically, it's a right of use that is being granted . . .
>
> A: Yes, exactly.
>
> Q: OK, great.
>
> A: If there's oil, he doesn't have rights to it.
>
> Q: Or mineral deposits underneath, we don't know.

A: Yes, that's right.

[27] Let us now review the documents referred to by Ms. Copeau in support of her claims. Ms. Copeau did not produce the Council resolution granting her a right to the land in question. For some unexplained reason, the Council no longer has a copy of this resolution. However, Ms. Copeau produced a letter dated April 18, 2007, from Jean-Marie Vollant to her and Mr. Picard. Of interest is the following passage from the letter:

> [TRANSLATION]
>
> The Conseil des Innus de Pessamit allotted Lot R-482 to you at the meeting of April 16, 2007. . . .
>
> This allotment of land for you to build a house is subject to three conditions. The land is granted to you for residential construction only and not for any other purpose. You have 12 months to complete the construction or take the action necessary to complete the project. You will need to inform the housing authority and public utilities of the status of your project before the 12 months have elapsed. If the time limit is not met for either of these steps, the land will revert to the Council.

[28] Nothing in this letter suggests an intention to consent to the issuance of a certificate of possession to Ms. Copeau. If the Council had wanted to deviate from its established policy, the letter would have been much more explicit. In any event, the conditions attached to the allotment are inconsistent with the rights that a certificate of possession would confer. Possession, under section 20 of the Act, is not limited to a particular use and is not conditional on the completion of construction within a specified time.

[29] Ms. Copeau also refers to an excerpt from the minutes of a Council meeting held on May 31, 2007. At that meeting, the Council decided to award a subsidy to Ms. Copeau for the

construction of her home. The text of the resolution does not shed any additional light on the nature of the rights granted to her. The text of the preamble simply states that [TRANSLATION] "the Council has allotted Lot R-482 to Ursula Copeau."

[30] In this regard, the use of words such as "granted" or "allotted" does not mean that Ms. Copeau has a right of possession under section 20 of the Act. These terms are consistent with the granting of a right of use that is not governed by the Act.

[31] In short, the evidence shows that the Council never intended to grant Ms. Copeau anything other than a right of use, in accordance with its own policies or custom. The fact that this custom or these policies are unwritten is of no moment. Both the Council and the Department were therefore justified in denying Ms. Copeau's requests for a certificate of possession.

C. *Other Issues*

[32] Although Ms. Copeau did not emphasize this issue at the hearing, in her memorandum she seeks an order confirming that she was allotted Lot R-482 in 2007. As I understand it, this is a request for a declaratory judgment. There are two reasons not to decide this issue.

[33] First, a judgment declaring the state of affairs in 2007 is of little use today. The real issue is who now holds the rights to the land in question. These rights may have been the subject of an agreement between Mr. Picard and Ms. Copeau while they were living together or when they separated. Ms. Copeau alluded to this during her cross-examination.

[34] Second, such a judgment would necessarily affect the rights of Mr. Picard's estate, which is not a party to this proceeding. It would be unfair for me to decide the issue without the estate having had an opportunity to make submissions. Moreover, although this issue has not been argued, it is far from clear that a dispute between Ms. Copeau and Mr. Picard's estate falls within the jurisdiction of the Federal Court.

III. Conclusion

[35] Since Ms. Copeau has not shown that the Council granted her a certificate of possession, her application cannot succeed. Therefore, her application for judicial review will be dismissed.

[36] The general rule is that the losing party pays the costs of the successful party. I see no reason to depart from that rule in this case. In the circumstances, I find that $1,000, payable to each of the respondents, is an appropriate amount.

JUDGMENT in T-2139-18

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. The applicant is ordered to pay each respondent costs in the amount of $1,000, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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