

**Date: 20070308**

**Docket: 07-T-12**

**Citation: 2007 FC 269**

**Ottawa, Ontario, March 8, 2007**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**JAMES COTTRELL**

**Applicant**

**and**

**CHIPPEWAS OF RAMA MNJIKANING  
FIRST NATION BAND COUNCIL**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**I. INTRODUCTION**

[1] This was a vigorously contested motion for an extension of time to file a judicial review between a Band member and the Band. The effect of denial of this motion would have been to deny the Applicant an opportunity to be heard before this Court.

## II. BACKGROUND

[2] Mr. Cottrell is a status Indian who has resided in a rental property on the Band's reserve. His home is a single family house leased to him which he is entitled to own after 15 years of rental payments. He was in his 12<sup>th</sup> year of rental when, he alleges, the Band, without notice or warning, evicted him on November 1, 2006.

[3] The Notice of Motion is dated February 20, 2007, some 80 plus days after the expiry of the usual deadline for commencing judicial review of a "decision". Had the attack also been against the conduct of the Band, subject to jurisdictional issues, this deadline would not apply.

[4] Mr. Cottrell suffers from a severe and rare neurological condition (Chronic Inflammatory Demyelinating Polyneuropathy). He has had this condition since 2005, and while the condition presents itself as progressive weakness in his arms and legs, it does not affect cognitive functioning.

[5] Mr. Cottrell uses a wheelchair and has difficulty using his hands. He also has a history of problems with alcohol. The alcohol misuse appears to have had some effect on his relationship with the Band, which is obviously very strained.

[6] While Mr. Cottrell had significant accumulated arrears of rent on November 1, 2006, the grounds of eviction were not based on non-payment of rent and it is too late to advance that fact as a grounds for eviction. The Band invoked a provision in the lease dealing with physical and mental incapacity and which gave the Band the discretion to have the tenant placed in some other

appropriate accommodation. In that instance, the lease is terminated and the Band is free to re-lease the premises.

[7] On the eviction day, November 1, 2006, and before he had knowledge of the eviction, Mr. Cottrell's wheelchair lost power. He called the Band medical services for assistance to help him recharge his wheelchair. To make the telephone call, he had to crawl to the phone and had to await their arrival before he could get into his chair again.

[8] In response to his telephone call the Band paramedics, against Mr. Cottrell's wishes, transported him to a hospital where he has remained.

[9] During the course of being assisted by the paramedics, Mr. Cottrell learned from them that the Band Health Officer would be following the ambulance to the hospital. At the hospital the Band Health Officer served Mr. Cottrell with his Eviction Order and orally advised him that he had been evicted.

[10] While not relevant to this motion, the Band contends that there is a long history of difficulty with Mr. Cottrell which justifies the Band's decision to evict him because he was unable to live independently. This contention goes to the merits of its decision, not to whether Mr. Cottrell can challenge that decision.

[11] Germane to this motion is the fact that Mr. Cottrell advised the Band Health Officer, upon being served with the Eviction Order, that he intended to seek legal assistance to oppose the eviction.

[12] Mr. Cottrell's capacity (mental and physical) was directly in issue by virtue of the Eviction Order. After admission to the hospital, hospital staff requested a capacity assessment. The formal assessment, which ultimately found Mr. Cottrell to be capable of managing his property, was issued by a duly qualified physician on January 22, 2007.

[13] During the period from the Eviction Notice to the filing of this motion, Mr. Cottrell retained counsel at the Community Legal Clinic. What ensued was a series of communications between counsel, communications between his counsel and the clinical psychologist's office, the gathering of documentation but no legal action.

### III. ANALYSIS

[14] The criteria for granting an extension of time for the filing of a judicial review application is well established in such cases as *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846 (QL) and *Baksa v. Neis (c.o.b. Brookside Transport)*, [2002] F.C.J. No. 832 (QL). They are:

1. that the applicant had a continuing intention to pursue the application;
2. that there is an arguable case;
3. that there is an absence of prejudice to the respondent; and
4. that there is a reasonable explanation for the delay.

A. *Re: Continuing Intention*

[15] There is no requirement that an applicant have a continuing intention to pursue the specific remedy or claim in a particular court (see *APV Canada Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2001] F.C.J. No. 1099 (QL)). There must be an intent to pursue some form of legal relief.

[16] The evidence is clear that from the very beginning, Mr. Cottrell intended to contest the eviction. There is no evidence that he ever lost that intent or that he somehow acquiesced or consented to the eviction. He met with counsel and he resisted any efforts to categorize himself as “incapable” (the grounds relied on by the Band); his resistance extended to even having a capacity assessment performed. He never abandoned his intention to seek legal redress, if that was necessary.

[17] Mr. Cottrell’s efforts to find another solution such as long-term care cannot be taken as acquiescence or the abandonment of his intent to seek legal redress. Those efforts bear a striking resemblance to settlement-type negotiations, a matter to be encouraged before people embark on costly litigation.

B. *Arguable Case*

[18] The Respondent contends that the Applicant has no arguable case, that his case is “bereft of any chance of success” and that the law as to the rights of a tenant in administrative or public law

terms is settled. The Respondent puts great reliance on the Court of Appeal's decision initially rendered orally in *Gamblin v. Norway House Cree Nation (Band Council)*, [2002] F.C.J. No. 1411 (QL) and, in particular, paragraph 8 thereof:

As to the duty of fairness, we have not been referred to any authority which holds that there is an obligation on the Band Council to provide a hearing concerning the enforcement of the terms of tenancy agreements into which it enters.

[19] The Respondent's position, while not phrased as such, is a challenge to the Federal Court's jurisdiction in respect of what it describes as a private law matter. These are early days in this litigation and it is not at all clear what may be the source of the power to lease and whether the issues in this case are devoid of public law elements. The Applicant's case is not fully developed at this stage and it is premature to reach a definitive decision on the existence of private-public law rights or this Court's jurisdiction.

[20] In the *Gamblin* case, at the Trial Division, the Court was faced with a case involving eviction and banishment. The context of that case was a signed declaration between Mr. Gamblin and his native band stating that he would stop and desist from illegal activities related to drugs and alcohol. He was said to have breached this personal undertaking.

[21] While there were aspects of Mr. Gamblin's use of a trailer which resemble a lease, the learned trial judge, in characterizing the nature of the agreement between this band and Mr. Gamblin, described it as a private law contract. The learned judge drew this distinction:

It does not constitute a landlord-tenant situation because no rent is being paid, nor does it constitute a trust ...

[22] This would suggest that a landlord-tenant situation might attract different rights and remedies from that of a private law contract. Sexton J.A.'s comment must be read in this context, most particularly that he was not dealing with a landlord-tenant situation on reserve lands.

[23] Justice Sexton noted that no authority was cited to that Court to suggest a right to a hearing – which I take to mean procedural fairness, natural justice and other public law principles. In contrast, this Court was referred to the decision in *Obichon v. Heart Lake First Nation No. 176*, [1988] F.C.J. No. 307 (QL) which speaks to public law rights in respect of an eviction.

[24] Since all this Court must do is determine if there is an arguable case, and not resolve the different authorities, I conclude that there is an arguable issue as to the Applicant's public law rights which justifies, at the very least, an opportunity to put the issue to the Court in a judicial review. A more complete record is a better basis upon which to resolve these legal issues.

### C. *Prejudice*

[25] It is fair to say that the Band and at least some specific members do suffer some prejudice or at least inconvenience by virtue of this pending judicial review. The Band has not rented out Mr. Cottrell's house and there is a waiting list which is depriving one family (or person) of the use of the house because the Band has not leased the house even on a temporary basis.

[26] However, this prejudice is premised on the basis that the Band was entitled to evict Mr. Cottrell. If the Band was not so entitled, it cannot re-lease the premises. The Band chose to evict, it must live with the consequences until the legitimacy of the eviction is determined.

[27] Given this tenuous prejudice, it seems that any of these difficulties can be substantially minimized by expediting the judicial review. The Court offered the Band this opportunity but, no doubt for good reason, the Respondent's counsel was not able to commit to an expedited procedure or commit to an approximate hearing date.

[28] The Respondent has not been able to definitively establish prejudice because it presupposes the result of the judicial review. Moreover, in balancing prejudice, the loss of any opportunity to challenge the Band's eviction in this Court outweighs the temporary nature of the Band's prejudice (if any).

D. *Reasonable Explanation*

[29] The core of the Applicant's explanation is that he was undergoing a "capacity" assessment which would have made it imprudent for counsel to proceed until Mr. Cottrell's mental capacity issue was settled in a final manner.

[30] During this time the Applicant's counsel was making the usual "threatening noises" in litigation which the Respondent says is inconsistent with counsel being unable to obtain instructions



to proceed to court. The Respondent points out that the Applicant's counsel never asked for time to obtain instructions or even indicated a problem with obtaining instructions.

[31] It is not open to the Respondent to question the relevancy of issues surrounding mental (and physical) capacity. It was the Respondent who had put those issues in play even before Mr. Cottrell's eviction.

[32] In any event, it is a fact that Mr. Cottrell was undergoing a capacity assessment at the instigation of the hospital. It would have been unwise, at the very least, for counsel to accept, without qualification, any instructions issued. Mr. Cottrell's capacity assessment is more than a reasonable explanation for delay.

[33] Given the strong positions being taken, it is hardly surprising that Mr. Cottrell's counsel did not seek some accommodation from the Respondent. It is noteworthy that the Respondent has tenaciously opposed this extension of time; it speaks volumes as to the likelihood of other accommodation to counsel.

[34] Lastly, the Respondent says that the Applicant should pursue his rights under the *Canadian Human Rights Act* rather than embark on this litigation. It is not for the Respondent to dictate the remedies which the Applicant should employ to challenge the Eviction Order.

IV. CONCLUSION

[35] For all these reasons, this motion will be granted with costs in the cause. The Applicant is to file his Notice of Application for Judicial Review within 14 days of the issuance of this Order unless otherwise ordered by the Court.

**ORDER**

**IT IS ORDERED THAT** this motion is granted with costs in the cause. The Applicant is to file his Notice of Application for Judicial Review within 14 days of the issuance of this Order unless otherwise ordered by the Court.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** 07-T-12

**STYLE OF CAUSE:** JAMES COTTRELL

and

CHIPPEWAS OF RAMA MNJIKANING FIRST  
NATION BAND COUNCIL

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** March 5, 2007

**REASONS FOR ORDER  
AND ORDER:** Phelan J.

**DATED:** March 8, 2007

**APPEARANCES:**

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