Federal Court Cour fédérale

Date: 20140306

Docket: T-284-14

Citation: 2014 FC 222

Ottawa, Ontario, March 6, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOACHIM HENGERER, HENGERER FARMS LTD., CHARLENE FOX AND LOIS FRANK

Applicants

and

CHIEF AND COUNCIL OF THE BAND OF THE BLOOD INDIANS ON THE BLOOD INDIAN RESERVE #148, HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, JOHN CHIEF MOON SR., FLOYD MANY FINGERS, MILDRED MELTING TALLOW, JEFF MELTING TALLOW, OLIVER RUSSELL SR., CHRIS SHADE, MELVIN WADSWORTH SR., CELINA GOOD STRIKER, KEVIN SCOUT, AND IVAN MANY FINGERS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

APPLICATION

[1] This is an application for judicial review of a decision of the Chief and Council [Council or Band Council] of the Band of the Blood Indians dated December 17, 2013 [Decision] not to request the renewal of Permits that allow Hengerer Farms [Hengerer] to utilize Blood Reserve lands for agricultural production purposes.

[2] The Applicants seek an Order which:

(a) quashes the Decision; and

(b) directs Band Council to cause Agricultural and Grazing permits [Permits] to be issued to Hengerer in relation to certain Reserve lands that are referenced in the affidavit of Mr. Joachim Hengerer sworn February 5, 2014.

BACKROUND

[3] The Council of the Band of the Blood Indians on the Blood Indian Reserve #148 [Blood Tribe] are the elected representatives of the Blood Tribe. Band Council is elected pursuant to the *Kainaiwa/Blood Tribe Election Bylaw*, 1995, which is a custom election code.

[4] The Blood Tribe is a Band duly established pursuant to the *Indian Act*, R.S.C. 1985, c. I-6 and the amendments thereto [Indian Act], and occupies and administers the Blood Reserve No. 148 and 148A [Reserve], in the Province of Alberta, all on behalf of the members of the Blood Tribe.

[5] The Blood Tribe is located in southern Alberta on the Blood Reserve, the largest Indian reserve in Canada at 518.5 square miles, and has a population of approximately 11,500 members. The Blood Tribe's primary industry is agriculture. The Reserve is the largest agricultural Reserve in Canada. Other industry on the Reserve includes ammonite mining, house construction, oil and gas development, and small business and tourism.

[6] The Reserve has been set apart for the use and benefit and held in common for all Blood Tribe members.

[7] The Blood Tribe holds its lands under a land regime that is based on custom and traditional land use and occupation. A Lands Registry is maintained by the Blood Tribe Land Management Department as the authoritative document that identifies the existing use and occupation of individual Blood Tribe members [Occupants] on Reserve lands.

[8] The Blood Tribe members are not allocated lawful possession of land pursuant to section 20 of the Indian Act, and no Blood Tribe members have Certificates of Possession or Occupation. The Blood Tribe has historically rejected the idea of individual land allotments through Certificates of Possession but the Tribe does have a Land Use and Dispute Resolution policy that recognizes and sets out the current privileges enjoyed by Occupants.

[9] The Blood Tribe has not made application for, or been granted, powers pursuant to section 60 of the Indian Act which would grant the Blood Tribe the statutory power to exercise control and management over the Blood Reserve lands.

[10] As the demands for farm assistance for Occupants increased over time and individual Blood Tribe members were having a difficult time being successful in the farming business, Council decided to allow the land previously allocated to individuals to be farmed by non-Indian farmers under Permits on a 1/3 – 2/3 crop share basis. The Occupant who was originally allocated the land received the payments from the permittee. The 1/3 crop share was then taken by the Blood Tribe to retire the debts of the individual Occupant.

[11] To be a land Occupant became a means for some Band members to have an assured income. There were increasing demands on Council to allocate more land and to arbitrate disputes on land which had been allocated. Many of the disputes remained unresolved and continue through generations of families and through changes in terms of Council.

[12] To assist in resolving the disputes, Council established a *Land Use & Occupation Dispute Resolution Policy* on July 7, 2007 and further amended it on May 21, 2013. This Dispute Resolution Policy recognizes the land regime of customary and traditional land use and occupation and the fact that the Blood Reserves No. 148 and 148A have been set apart for the use and benefit and held in common for all Blood Tribe members.

[13] Hengerer is a 63-year-old farmer who has farmed his whole life. He operates Hengerer Farms which is located three miles north of the Reserve. Farming is Hengerer's sole occupation. From the period of 1966 through 1972, Hengerer farmed with his father. Since that time, he has farmed on his own. Hengerer has been farming on the Reserve since 1981.

[14] In 2013, Hengerer and Hengerer Farms farmed approximately 56,000 acres of land on the Reserve. Four thousand eight hundred acres of this land are irrigated. The crops farmed on these lands consist of barley, wheat and canola. There is also a cattle operation on these lands consisting of approximately 400 cow-calves.

[15] Charlene Fox and Lois Frank are members of the Blood Indian Band and are Registered Occupants of Reserve lands.

[16] On or about December 20 or 21, 2013, Hengerer received a letter which advised him that all Permits allowing him to farm on the Reserve would expire on or before March 31, 2014 and no future Permits would be issued.

REASONS FOR DECISION

[17] The alleged reasons for the Decision that Permits would expire and no future Permits would be issued to Hengerer are contained in a document entitled "Land Management Committee Recommendation (12172013-14) for Regular Chief and Council Meeting Holiday Inn, Lethbridge – December 17, 2013" [Recommendation].

[18] In brief, the allegations were that Hengerer had:

(a) disregarded directions from the Band's Land Management Department regarding the planting of winter wheat;

(b) disregarded survey markers;

(c) failed to report "Buck Shea" arrangements to Land Management;

(d) failed to submit a crop report to Land Management for 2013;

(e) failed to maintain fences in 2013;

(f) not remitted payment of crop rental fees for the invoice amounts in 2013;

(g) made racists remarks against Band members.

ISSUES RAISED

[19] The parties raise the following issues:

(a) Whether the Decision is subject to judicial review;

(b) If the Decision is reviewable, what is the standard of review;

(c) Was procedural fairness denied;

(d) If a reviewable error occurred, what relief should be granted?

ARGUMENT

The Applicants

[20] The Applicants say that the Decision is reviewable by the Court because Council acted as a federal board, commission or other tribunal as defined by the *Federal Courts Act* and the governing jurisprudence.

[21] Hengerer denies any of the alleged infractions and says that Council entered into agreements with registered Occupants (Agreements or MOUs) that provided that Council would cause Permits to be issued to Hengerer to allow Hengerer to farm approximately 56,000 acres of Reserve Lands from March 31, 2013 to March 31, 2016. Council's failure to renew Permits for Hengerer, or to

cause the Permits to be renewed, is a breach of legally binding contracts between the Band and Occupants.

[22] The Applicants say that the breach of contractual obligations by Council occurred in a manner that, given the whole context and representations made by Counsels, resulted in a breach of procedural fairness to the Applicants and which obviated their legitimate expectations.

[23] The Applicants say that the appropriate relief in this case is to quash the Decision and for the Court to direct that Band Council fulfill its obligations under the Agreements. Specifically, the Band Council should be directed to cause Permits to be issued to Hengerer and Hengerer Farms until March 31, 2016, with respect to the lands described in Exhibit "A" to the February 5, 2014 Hengerer Affidavit. Alternatively, they say the Court should direct the Decision to be reconsidered by an independent panel (an arbitration panel appointed pursuant to the Dispute Resolution Policy attached as Exhibit "A" to Elliot Fox's February 2014 Affidavit is one possible option) or the Chief and Council excluding the Land Management Committee members, who they say are biased.

The Respondents

[24] The Respondents say that the Decision is not subject to judicial review and, even if it is, Council had the discretion not to renew the Permits and acted properly in the circumstances and there was no breach of procedural fairness. In fact, the Respondents say that there was no action that required Council to observe the principles of natural justice and procedural fairness. The Decision was simply to not enter into further commercial activity with Hengerer.

[25] The Respondents point out that the Applicants Fox and Frank have no interest in the Reserve Lands in question and, even if they did, Council's Decision not to renew Permits for Hengerer has no effect upon such rights. This is because Occupants, including the Applicants, Fox and Frank, have little to no direct contact with permittees and it is the Land Management Department employees who work with the permittees and monitor their practices in accordance with the requirements of the Permits. If the permittees do not comply with the terms of the Permit it is Blood Tribe Land Management Department employees who contact the permittee; the Council would contact the Minister if there are any defaults under the Permits or initiate any legal action, including injunction applications, if there is interference with the Permits. The Blood Tribe Land Management Department has taken significant steps to ensure that the resources of the Blood Tribe are protected and that there will be no disruption to the farming and ranching practices on the Reserve. Occupants, including the Occupant Applicants, will be expecting land proceed payments on April 1, 2014, and all efforts are being made to ensure that this expectation is met.

[26] The Respondents also argue that even if the Applicants' rights were affected and Council owed a duty to consult with the Applicants, Fox and Frank, that duty has been fulfilled through the community meeting held on January 20, 2014, the communications through letter dated January 31, 2014 and the Public Notices to the community through social media which provided information with respect to the decision regarding Hengerer, the steps that Counsel was taking and which gave an opportunity to the Applicants, Fox and Frank, to have input into the future permittees on the lands they occupy.

[27] Finally, the Respondents say that the relief sought by the Applicants should not be granted for a variety of reasons,:

(a) A writ of certiorari setting aside the Decision

Even if the decision to not renew Hengerer's Permits is set aside, this does not mean that he would be granted new Permits.

The Council has yet to make a decision regarding consenting to Permits pursuant to section 28(2) of the Indian Act. There is no public law duty that has been breached.

(b) A declaration that Council is obliged to cause Grazing and Agricultural Permits to be issued to Hengerer or Hengerer Farms for the remaining term of each of the Agreements, including the Agreements with the Band members

The Applicants have based their arguments on a misunderstanding of what the MOUs are and it needs to be stated that the Band Council has not executed such agreements and even if they had, they would be void pursuant to subsection 28(1) of the Indian Act if they purported to permit a person other than a member of the Blood Band to occupy or use the Reserve or to reside or otherwise exercise any rights on the Reserve.

The MOUs do not purport to provide Hengerer with any rights to Permits but rather state that the Occupant has requested that Council cause Permits to be granted. The MOU itself does not make that request.

(c) A writ of mandamus directing that Band Council cause Grazing and Agricultural Permits to be issued to Hengerer or Hengerer Farms for the remaining term of each of the Agreements, including the Agreements with the Band members

Council cannot "cause" Permits to be issued to Hengerer. The Minister has the discretion to grant Permits and may not do so for more than a year unless Council consents to the Permits being issued.

There is no public law duty that requires Council to consent to Permits being issued to Hengerer.

[28] Although the Applicants refer to rights of all of the Occupants listed in Exhibit "A" of the Hengerer Affidavit sworn February 5, 2014, the Respondent points out that the only two Occupants are actually Applicants. The Applicants have not named as Respondents all of the potential Occupants who may be affected by any decision arising out of this Judicial Review application and in fact have only named a very small minority. None of these individuals filed a Notice of Appearance. Some of these named individuals have come forwards to express their preference with respect to a new farmer.

[29] As of the time of execution of Elliot Fox's Affidavit on February 20, 2014 the Blood Tribe Land Management Department had written indications from 101 Occupants with respect to their approval of the new farmer selected for them. A further 25 other individuals had verbally committed to coming in to the offices to provide written consent and there were a further 37 Occupant listings that are administered from the Blood Tribe Land Management office and therefore have been designated accordingly. The Respondents believe that there would be a larger number but for the misinformation that has been circulated in the community with respect to this matter.

[30] The Respondents say that the Applicants are challenging the decision of Council to not have commercial dealings with Hengerer in 2014 and this is causing a great deal of disruption in the Blood Tribe community. It is essentially a challenge to Council's inherent authority to make decisions with respect to lands on the Blood Reserve, the customary occupation system and the historical administrative practices of the Blood Tribe Land Management Department.

[31] The Respondents believe that the Applicant, Hengerer, has shown disrespect for the process and for the leadership of the Blood Tribe by failing to follow directions in accordance with the Permits and requests to meet the terms of the Permits. In addition, he continues to make arrangements with Occupants that are outside of the requirements of the Indian Act. There is potential that if arrangements for Permits are not made on a timely basis the lands would lie fallow for a year. This would be an extreme hardship to be Blood Tribe as a whole, and specifically to those Occupants who are not represented by the Applicants and have had no part in attempting to undermine the governing structure.

[32] The granting of any of the Orders sought by the Applicants in this application would jeopardize the 2014 farming season and the interests of all Blood Tribe members.

[33] Any Order directing the Council to "cause" permits to be issued to Hengerer would, in fact, be an Order affecting the Minister's authority pursuant to section 28(2) of the Indian Act. The Applicants have not sought any Order against Canada. Although the Minister has not taken a position on the substantial points in issue in this application the Respondents believe that he would be interested in ensuring that no Order issued would bind him to any particular course of action.

[34] The Respondents also believe that any Order referring this matter back for reconsideration would delay the requesting and granting of Permits for the 2014 season, and would negatively impact all Blood Tribe members and cause chaos in the administration of the largest agricultural Reserve in Canada.

RELEVANT LEGISLATION

[35] The following provisions of the *Federal Courts Act*, R.S.C., 1985, c. F-7 are relevant to this application

Definitions	**Définitions**
2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"federal board, commission or other tribunal"	**« office fédéral »**
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 ;	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.
[…]	[…]

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte

act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit

record;

manifeste ou non au vu du dossier;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

Vice de forme

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

[36] The following provisions of the Indian Act are relevant to this application

Grants, etc., of reserve lands void	**Nullité d'octrois, etc. de terre de réserve**
28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.	**28.** (1) Sous réserve du paragraphe (2), est nul un acte, bail, contrat, instrument, document ou accord de toute nature, écrit ou oral, par lequel une bande ou un membre d'une bande est censé permettre à une personne, autre qu'un membre de cette bande, d'occuper ou utiliser une réserve ou de résider ou autrement exercer des droits sur une réserve.
Minister may issue permits	**Le ministre peut émettre des permis**
(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.	(2) Le ministre peut, au moyen d'un permis par écrit, autoriser toute personne, pour une période maximale d'un an, ou, avec le consentement du conseil de la bande, pour toute période plus longue, à occuper ou utiliser une réserve, ou à résider ou autrement exercer des droits sur une réserve.

ANALYSIS

Introduction

[37] The farming season is fast approaching. Because both sides have urged me to provide a fairly immediate response to this application following the hearing on March 5, 2014 in Calgary, I will be as succinct as possible.

[38] There are a few collateral issues, but the essence of this application requires the Court to answer three basic questions:

a) Is the Decision subject to judicial review by this Court?

b) If the Decision is subject to judicial review, have the Applicants (or any one of them) suffered a breach of procedural fairness?

c) If a breach of procedural fairness has occurred, what is the appropriate remedy?

Jurisdiction

[39] The Band Council says it has severed a private business relationship with Hengerer in accordance with its inherent powers to contract and mange the use of lands on the Reserve. Hence, the Court has no jurisdiction to hear this matter.

[40] Section 18.1 of the *Federal Courts Act* allows for judicial review of a decision or order of a federal board or commission or other tribunal, and section 2 of that Act tells us that a federal board, commission or other tribunal "means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under and Act of Parliament…."

[41] We know that a band council can act as a federal board, commission or tribunal but that not all band council decisions are subject to judicial review. See *Provost v. Canada (Minister of Indian Affairs and Northern Development)*, [2009] F.C.J. No. 1505 at para 34.

[42] We also know that reviewable actions must not only find their source in federal law but must also be of a public nature and that all of the circumstances of the case must be considered when determining if a federal board, commission or other tribunal is acting in a manner which brings it within the purview of public law (see *Air Canada v. Toronto Port Authority*, [2011] F.C.J. No. 1725 at para 60. [*Toronto Port Authority*])

[43] In the present case, I am persuaded that, in making the Decision, Band Council exercised, or purported to exercise, jurisdiction and powers conferred by or under the Indian Act, and that it did so in such a way that brought Council within the purview of public law.

[44] The evidence before me shows that, in terminating the Band's relationship with Hengerer, Band Council regarded itself as acting under subsection 28(2) of the Indian Act and that, although the issuance of Permits is a power granted to the Minister and not Band Council, the *de facto* situation in this case is that Band Council controls who receives Permits by using its consent powers under subsection 28(2), and by refusing to request Permits or renewals if it decides to terminate a relationship with a farmer.

[45] In particular, the Band Council resolution of March 19, 2013 requesting Permits for named individuals, including Hengerer, refers to Council's powers under the Indian Act and specifically bases the request upon subsection 28(2) of the Indian Act. Likewise, the letter from Council to Hengerer of December 18, 2013 specifically says that the Permits were issued "pursuant to subsection 28(2) of the Indian Act."

[46] It is telling that the wording of the MOUs suggests that it is the Band who grants the Permits. In law, this is not the case, but the Band's own documentation assumes *de facto* control over the issuance of Permits under the Indian Act.

[47] As regards the public dimension of the Decision, and bearing in mind the factors and guidance referred to by the Federal Court of Appeal in para 60 of *Toronto Port Authority*, above, I am convinced that Band Council, in making this Decision, has brought itself within the purview of public law. In particular, I note that Council expressly engages subsection 28(2) of the Indian Act and exercises *de facto* control over the allocation of Permits. There is a large number of MOUs and the whole Permit system and the customary and traditional rights of band members are here brought into play in a way that affects the whole Blood Reserve community and, as the actions of Council in calling meetings has shown, has already affected the whole community. This is a situation that cannot be confined to the private and internal severing of a business relationship but needs to be dealt with by way of public law remedies.

[48] It is clear that the Applicants have been directly affected by the Decision. The evidence indicates that Hengerer will suffer severe financial prejudicial effects and Occupants have at least some rights – as evidences by the current Dispute Resolution Policy – that are prejudicially affected. The MOUs and the evidence of Charlene Fox indicate that, although Council may have the ultimate say over which farmer receives a Permit, it has been customary to allow Occupants to designate the farmer they want. In fact, the MOUs designating Hengerer for a three-year term from April 1, 2013 to March 31, 2016 are clearly intended to be contractual documents and not mere memoranda of understanding intended for purely internal purposes as alleged by Band Council. Band Council does

not sign the MOUs (they are witnessed by a Land Management employee) but their terms are clearly endorsed and accepted by Council by way of resolution, so that, in effect, Council has agreed with the Occupants who designated Hengerer to exercise its powers under the Indian Act to request and acquire Permits for a term that runs until March 31, 2016.

[49] If Council wishes to avoid the contractual consequences of its own documentation, then Council should change that documentation to reflect the relationship it wants. It is not sufficient to tell the Court that Council has decided to interpret clear contract documents as not giving rise to contractual consideration.

[50] All in all, then, I think the Applicants have established that they have suffered prejudice (Hengerer obviously in a way that is different from Occupant Applicants) as the result of a Decision made, or purportedly made, by Council in accordance with powers under the Indian Act, and which has the kind of public dimension that lends itself to public law remedies. In other words, it is my view that the Court does have the jurisdiction to deal with this application.

Procedural Fairness

[51] I agree with the Respondents that the procedural fairness issues are different for Hengerer and the Occupant Applicants. However, the Decision does affect the rights, interests and privileges of Hengerer and the Occupant Applicants as well as other Occupants who designated Hengerer.

[52] There is no statutory authority, under the Indian Act or otherwise, to suggest that procedural fairness should not apply to this Decision.

[53] It is well-established that the extent of procedural fairness owed is flexible, variable and dependant upon the context of each case. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and its numerous progeny [*Baker*].

[54] It is also well established that in reviewing this matter I should apply the standard of correctness and that no deference is owed to the decision-maker. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404 at para 53.

[55] When I apply the *Baker* factors to the present situation, it is clear to me that, as far as Hengerer is concerned, this Decision was of immense importance to his farming business and that he had legitimate expectations that Council would secure the Permits he needed to farm the Lands until March 31, 2016. The whole history if his long association with the Blood Tribe and the particular arrangements entered into to take the relationship to 2016 required Council to provide him with adequate notice of the case he had to answer before a decision was made not to seek renewal Permits for him, and to give him the opportunity to be heard by Council on the serious allegations that were made against him and which were set out in the Land Management Committee recommendation and accepted by Council and used as the reasons for terminating the relationship.

[56] This does not mean that Council's ultimate powers to determine who farms on Reserve Lands are curtailed in any way. Council might well wish to terminate even long-standing relationships from time to time for any number of legitimate reasons. But when, as in this case, Council decided to terminate the relationship with Hengerer for very specific reasons and to such

drastic effect for Hengerer, Council should have provided Hengerer the opportunity to know the case against him and be heard.

[57] This does not mean, as counsel for the Band argues, that the system will be thrown into chaos by disgruntled farmers. Procedural fairness is contextual and case specific. All I am saying is that, on the facts of this case, Hengerer was not dealt with in a procedurally fair way.

[58] As for the Occupants Applicants, the *Baker* factors I think require a different result. The impact of the Decision falls mainly on Hengerer. The Occupants were deprived of the opportunity to have their designated farmer as permittee. But they are not likely to suffer economic consequences and I think the system and the community at the Reserve recognize that, although in the usual case Council will endorse their chosen permittee, Council must have ultimate say in this matter because Council is fixed with the ultimate power and responsibility of ensuring that Reserve lands are managed for the economic and other benefits of the community as a collective. It seems to me that whatever procedural fairness is owed to Occupants cannot be separated from the fairness that might be owed to the designated farmer in each case. In the present case, I don't think the Applicant Occupants, or indeed other Occupants who designated Hengerer to farm the Reserve lands they occupied, could expect more than that Hengerer be afforded procedural fairness before a decision was made to terminate the relationship with him.

Other Matters

[59] The Respondents have raised a few peripheral matters but I don't think they need impact my findings and conclusions on the central issue. In particular, I don't think that the failure to

comply strictly with Rule 303(1)(a), should affect the outcome. The whole Blood Reserve is affected by the Orders sought and, in particular, the 500 or so Occupants who designated Hengerer. Given the exigencies on both sides, joining all of them would simply have been unmanageable and would have resulted in a severe detriment to both sides because of the inevitable delay. Likewise, joining the Band Council as an affected party, even though Council is also the tribunal who made the Decision, was the only manageable way of dealing with this matter in my view and I think that if the Respondents wished to raise this issue it should have been dealt with before the hearing. Band Council has appeared and conducted this application as though the Band Council is a proper party. Clearly, given the needs of the situation and the Minister's decision not to become involved, I can understand why both sides felt compelled to address the situation in this way and, although I can find no Federal Court jurisprudence on point, I note that in *Lam v University of British Columbia*, 2013 BCSC 2142, the B.C. Supreme Court used a rule identical to the Court's Rule 3 to remedy similar problems to the ones that arise in this case from a strict application of Rule 303.

Remedy

[60] The Court believes that Council has the ultimate power to decide who should farm on Reserve lands. Hengerer has demonstrated to me in this application that he has representations to make to Council concerning the reasons for the Decision that are highly material and that he should have been given the opportunity to present before the Decision was made. This does not mean that Council has to accept his position. In particular, although Hengerer denies making racist remarks, which particularly disturbed Council, this matter is still not clear on the evidence before me. Band Council should, however, bear in mind, that it agreed with Occupants that Hengerer would receive Permits through to March 31, 2016, so that there must be sufficient justification not to follow

through on these obligations and expectations that go with this commitment. But the decision is for Council to make after following due process and ensuring that procedural fairness is afforded to Hengerer.

[61] The Applicants argue that no useful purpose will be served if the matter is remitted to Band Council because Band Council has displayed bias towards Hengerer. While bias may have occurred, I do not think it has been sufficiently established in this case. Band Council simply followed the recommendations of the Land Management Committee, a committee composed of Council members. Hengerer can raise the issue of bias with Band Council, and I leave it to the good sense and fair play of Council to review this matter and decide who should participate in the final vote on a new decision, bearing in mind that bias could invalidate any such decision and exacerbate the problems of resolving this dispute and getting down to the real business of farming in the interest of the Blood Tribe. The Court is here to review decisions, not to make them for the tribunal, except in truly exceptional circumstances that have not been established in this case. I think that Band Council is now fully aware that if this dispute drags on it could have a severe impact upon the Band and its finances. The way to ensure that it does not continue is for Band Council to be meticulous about procedural fairness and I have no reason to think they will not be.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Decision is quashed and the matter is referred back to Band Council for reconsideration in accordance with the following directions:

    (a) If the Band still intends to sever its relationship with Hengerer before the March 31, 2016 commitment given in the applicable MOUs and accepted by Band Council, Band Council will promptly notify Hengerer in writing of its intention to do so and with adequate reasons for wishing to do so;

    (b) Before any decision is made by Band Council, Band Council will properly convene a meeting of all Band Members affected at which Hengerer will be given full opportunity to address Band Council concerns and reasons and Band Members will be allowed to speak on point;

    (c) Before any such meeting, Band Council will disclose to Hengerer in a timely way the evidentiary basis upon which it relies so that Hengerer has an opportunity to address that evidence and adduce his own evidence for Band Council's consideration;

    (d) Hengerer shall be allowed to have legal counsel present who can speak on his behalf;

(e) Band Council will inquire into, and Hengerer will be allowed to make submissions, adduce evidence and call witnesses on the issue of bias (actual or reasonably apprehended) and Council will exclude from voting any Council Member required to avoid a reasonable apprehension of bias and provide reasons for any decision it makes on the bias issues;

(f) Band Council will render its decision in a timely manner and provide adequate reasons.

2. In accordance with the Court's decision at the hearing (consented to by the Respondents) to allow the Applicant's Motion to Amend the application to request costs, the Parties shall have 45 days from the date of this judgment (or such further time as the Court may allow on the advice of counsel) to make written submissions on costs.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-284-14
STYLE OF CAUSE:	JOACHIM HENGERER, HENGERER FARMS LTD., CHARLENE FOX AND LOIS FRANK v CHIEF AND COUNCIL OF THE BAND OF THE BLOOD INDIANS ON THE BLOOD INDIAN RESERVE #148, HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, JOHN CHIEF MOON SR., FLOYD MANY FINGERS, MILDRED MELTING TALLOW, JEFF MELTING TALLOW, OLIVER RUSSELL SR., CHRIS SHADE, MELVIN WADSWORTH SR., CELINA GOOD STRIKER, KEVIN SCOUT, AND IVAN MANY FINGERS
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	MARCH 5, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	MARCH 6, 2014

APPEARANCES:

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Ms. Joanne Crook	FOR THE RESPONDENTS

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