Federal Court  Cour fédérale

Date: 20140812

Docket: T-376-12

Citation: 2014 FC 796

Ottawa, Ontario, August 12, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

KEVIN HILL

Applicant

and

ONEIDA NATION OF THE THAMES BAND COUNCIL AND CLINTON WAYNE HILL

Respondents

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Oneida Nation of the Thames Band Council (Band Council). The decision rendered a quit claim deed in favour of the Respondent, Clinton Wayne Hill, dated October 17, 1975 valid and nullified a subsequent land transfer agreement in favour of his brother, Kevin Hill, dated August 17, 2004. Both documents concern the same property located within the Oneida Indian Band Reserve No. 41. The application is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC, c F-7 (*FCA*).

Factual Background

[2] The background facts concerning this application for judicial review are, for the most part, not in dispute. The following summary is based on the evidence and submissions filed by the parties.

[3] This matter is, in essence, an unfortunate family dispute between two brothers concerning land that was in the possession of their mother. The status of the property in dispute was ultimately determined by the elected Band Council of the Oneida Nation of the Thames. Although Clinton Wayne Hill (Wayne Hill) was named as a Respondent in the application for judicial review, he did not file a Notice of Appearance or any submissions and did not attend at the hearing of this matter. Accordingly, all references to the Respondent in this decision refer to Band Council.

[4] The Applicant, Kevin Hill, and Wayne Hill are brothers and members of the Oneida Indian Band Reserve No. 41, also referred to as the Oneida Nation of the Thames (Oneida).

[5] The Oneida obtained reserve status on June 22, 1976 by Order-in-Council pursuant to the *Indian Act*, RSC 1985, c I-5 (*Indian Act*). Governance of the administration of possession of land by individuals within the Oneida community is performed by an elected Chief and Band Council.

[6] The dispute in this application concerns property located within the reserve described as Lot 24, Concession C of the Oneida Settlement, Township of Delaware, County of Middlesex, Province of Ontario, sometimes also described as 1286 Towline Road, Southwold, Ontario (property).

[7] On or about November 8, 1972, William George granted the property, comprised of six and one half acres, to his daughter, Marena Hill (Marena), by way of a quit claim deed. Marena was the mother of Wayne Hill, Cheryl Pearl Hill, Clifford James Hill and the Applicant, Kevin Hill.

[8] In October 1975, Marena wanted to apply for a $500 grant from the Canada Mortgage Housing Corporation (CMHC grant) to complete renovations to the house she was building on the property. She was ineligible for the CHMC grant because it was available only to first time home buyers of legal age and she had previously owned properties. At this time, her eldest child, Wayne Hill, was eighteen years old. Marena prepared a quit claim deed dated October 17, 1975 which granted the property to Wayne Hill. She signed the quit claim deed in the presence of the then acting Chief, Harry Doxtator. It was not signed by Wayne Hill nor was it approved by Band Council (1975 Quit Claim). The CMHC grant application was dated October 29, 1975 and was signed by Wayne Hill.

[9] Marena continued to live in the home and on June 15, 1976 she and Wayne Hill entered into a housing loan agreement with the Oneida Band in the amount of $12,500. On April 22, 1980, a housing loan and purchase agreement was entered into by only Marena and Band

Council which superseded all prior loan agreements. By letter dated January 6, 1982, Chief Doxtator, on behalf of Band Council, wrote to Marena indicating that she had paid the housing loan in full and that Band Council had no further lien on her property.

[10] On April 27, 1989, Marena executed a quit claim deed granting Wayne Hill one acre of the property and a right of way, which deed was approved by Band Council.

[11] On or about February 11, 1994, Marena spoke with Betty Green, who was a member of the Lands and Estates Administration (LEA) office (LEA Office) of the Oneida Band, and informed her that the 1975 Quit Claim was only written for the purpose of obtaining the CMHC grant. It was not valid and had never been submitted to Band Council for approval.

[12] Sometime in 2004, Marena decided to transfer the property to the Applicant. She met with Al Day, the LEA Administrator at the time, and on his advice prepared a Statement to Dissolve the Quit Claim Deed of 1975 (Dissolution of 1975 Quit Claim) and a Land Transfer Agreement (2004 LTA), by which she transferred the 5.5 acres of the remaining property to the Applicant, both dated August 17, 2004. The 2004 LTA was signed by Marena and the Applicant and was witnessed by Al Day. Marena also filed a letter dated September 14, 2004 with the LEA Office confirming that the 1975 Quit Claim had only been prepared to facilitate the obtaining of the CMHC grant, that it was never the intention that Wayne Hill would take ownership of the property and her home, and, that the property should be transferred to the Applicant. She confirmed that she had paid off the loan, maintained and insured the home for nearly 30 years

and that Wayne Hill had never taken ownership. Further, that she had transferred one acre of the property to him.

[13] On August 30, 2004, Wayne Hill wrote to the LEA Office claiming that he had been the owner of the property since 1975 and suggesting that Marena was not mentally competent to conduct transactions and that she was in the process of being medically assessed.

[14] On February 15, 2005, Al Day prepared a briefing memo for Band Council concerning Marena and the property transactions. Amongst other things, this outlined the background facts, Oneida customary law concerning quit claims and LTA's, the issues and considerations arising, and, a past precedent for voiding a quit claim. On February 22, 2005, Band Council met and discussed Marena's circumstances and the property transactions. They agreed that under Oneida customary practice, a quit claim and land transfer agreement becomes legal when Band Council approves the documents at a council meeting. On March 8, 2005, Band Council held a meeting at which it approved and accepted the Statement to Dissolve Quit Claim Deed of 1975 and approved the 2004 LTA. A similar briefing note was prepared by Al Day on March 21, 2005 and a second meeting was held on March 22, 2005 at which time it was decided that all decisions would be put on hold until two powers of attorney signed by Marena and the competency assessment were considered.

[15] On April 12, 2005 Band Council met to discuss the powers of attorney and Marena's competency. She had come to Council in March 2005, subsequent to her assessment. Band Council concluded that at the time she made the 2004 LTA she understood her actions. It

recommended that the 2004 LTA be acknowledged and that it would stand. The 2004 LTA was stamped approved by Band Council on March 8, 2005 and again on April 12, 2005 and the Statement to Dissolve Quit Claim Deed of 1975 was stamped approved on March 8, 2005 (collectively, the 2005 decisions). On April 28, 2005, Al Day, as the LEA Administrator, wrote to Marena advising that both documents had been approved by Band Council on March 8, 2005 and confirming that the Applicant was the recognized owner of 5.5 acres of the property including the house. A similar letter was sent to the Applicant on the same date which also noted the previous grant of one acre to Wayne Hill and the right of way.

[16] On August 31, 2005, Wayne Hill wrote to Band Council stating that the CHMC grant was provided under false pretences and that if the matter went to court it could be embarrassing for the Oneida and would affect Band Council's credibility. Further, that he had made improvements to the property, would suffer a loss of rental income and was seeking $500,000 in compensation. On September 15, 2005 Jeff Ross, Director of Operations for Band Council, responded by letter stating that Band Council would research and review the situation.

[17] Wayne Hill continued to object to the transfer alleging improprieties in the way the transfer was made and that his mother was not of sound mind at the time. He met on several occasions with the Chief and members of Band Council to make these complaints. On April 16, 2011 he put his complaints in a letter to Band Council stating that it had informed him that a final decision concerning the property would be made on that day. In that letter, he made allegations of fraud, duress and undue influence by the Applicant, specifically that he had

compelled their mother to transfer the land to him, and that the LEA administration was complicit.

[18] On March 22, 2011, Chris George, a former lands and estates portfolio officer, wrote to Band Council taking the position that due diligence had not been undertaken, the 1975 Quit Claim should not have been dissolved, the property should be returned to Wayne Hill, and, those involved be sanctioned.

[19] In early April 2011, Martin Powless, who was now the LEA Administrator, met separately with both the Applicant and Wayne Hill to discuss the property.

[20] On April 19, 2011, Band Council held a meeting to consider the claims to the property. It decided to reverse its 2005 decisions and to recognize the 1975 Quit Claim. It informed the Applicant of this meeting by letter dated April 22, 2011 and stated that Band Council made a motion that the 1975 Quit Claim would be approved and that all subsequent quit claims or land transfer agreements pertaining to the property were thereby null and void.

[21] Attached to the letter were minutes of the meeting containing the names of the councillors present and recording that six of them were in favour of the motion and that there were three abstentions. The motion was carried.

[22] The Applicant met with Band Council on June 7, 2011 to discuss the April 19, 2011 letter. At that time, he made representations regarding his rights to the property and was accompanied by his wife and daughter.

[23] The Applicant received an email from Chief Abram on January 18, 2012 stating that on December 15, 2011 Band Council had decided by consensus to reaffirm the most recent decision in favour of Wayne Hill, and that this would be the final decision.

[24] On January 23, 2012, Chris George wrote to the Band Council withdrawing his letter of March 22, 2012 stating that he had not been informed of all of the facts when he had written it.

Decision Under Review

[25] The Notice of Application states that the decision under review is the January 18, 2012 decision. In his memorandum of fact and law, the Applicant does not identify the decision under review, but states that he brings "this application for judicial review of the decision (the "Decision") of the Respondent, Oneida Nation of The Thames Band Council ("Band Council") rendering valid a quitclaim deed dated October 17, 1975, and nullifying all subsequent deeds and agreements concerning the real property…". The memorandum also submits, based on Chief Abram's evidence given when cross-examined on his affidavit, that the actual decision under review was made by Band Council on April 19, 2011 and communicated to the Applicant on January 18, 2012.

[26] In my view, the evidence in this matter supports a finding that the April 19, 2011 and December 15, 2011 decisions, and the April 22, 2011 and January 18, 2012 notifications of those decisions, can be considered to be a continuous course of conduct or so closely linked that they must be properly considered together (*Shotclose v Stoney First Nation*, 2011 FC 750 at paras 63-64 [*Shotclose*]). They will be collectively referred to as the 2011 decision.

[27] The April 22, 2011 letter states the following:

> This is to inform you of a Council Motion made on April 19, 2011, that the October 17, 1975, Quit Claim from Marena Hill to Clinton Wayne Hill for the house and approximately 6.5 acres +/- in Lot 24, Concession C, be approved and that all subsequent Quit Claims and/or Land Transfer Agreements pertaining to this particular parcel or land are hereby null and void.
>
> Please direct any questions and concerns to Harry Doxtator, Lands & Estates Portfolio at 519-652-3244.

[28] The January 18, 2012 email from Chief Joel Abram states:

> Shekoli Kevin,
>
> Please accept my apologies for the delay in informing you of council's decision regarding the property dispute between yourself and your brother Clinton Wayne Hill. On December 15, 2011 Council came to the following decision.
>
> "Council Consensus to reaffirm the decision regarding Wayne Hill and Kevil Hill with the most recent decision in favor for Wayne Hill, and this will be the final decision."
>
> The above decision was reached by consensus.
>
> I will write you a formal letter this week reaffirming the above.
>
> Chief Joel Abram

Issues

[29] The parties in their submissions have identified issues based on their respective views. I would reframe these as follows:

1. Is Band Council's decision subject to judicial review by this Court?
2. What is the standard of review?
3. What is the content of procedural fairness owed to the Applicant and did Band Council breach the duty of fairness?
4. Did Band Council exceed its jurisdiction by changing its decision?
5. Was there a reasonable apprehension of bias when Band Council made the decision?
6. Is the decision reasonable?

ISSUE 1: Is the Band Council's decision subject to judicial review by this Court?

Applicant's Submissions

[30] The Applicant submits that Band Council resolutions are decisions of a federal board, commission or other tribunal and are subject to judicial review pursuant to sections 18 and 18.1 of the *FCA*. This is the case both when a band council exercises powers explicitly granted to it by federal statute and when the contested decision is based on customary law (*FCA*, ss. 18, 18.1; *Shotclose*, above, at para 47; *Vollant v Sioui*, 2006 FC 487 at para 25 [*Vollant*]; *Frank v Bottle*, [1994] 2 CNLR 45 (FC)(TD) at 8 [*Frank*]; *Twigg v Blood Band of Indians*, [1988] AJ No 1104 (QB Ct)).

Respondent's Submissions

[31] The Respondent agrees that band council decisions are reviewable pursuant to the *FCA*. *Vollant*, above, held that all band council decisions are subject to review by the Federal Court because the *Indian Act* recognizes council's authority, whether by election or custom. Band councils are "federal boards, commissions or other tribunals" (*Frank*, above).

[32] There are two reasons to justify review of band council decisions under the *FCA*. First, council finds the authority for its existence in the *Indian Act*. Second, the subject matter over which authority is exercised is designated or delegated by federal statute. While some band council decisions made pursuant to private law contracts have been found not to be subject to review, decisions about councils' public approval of private land transactions are reviewable (*Cottrell v Chippewas of Rama Mjikening*, 2009 FC 261 [*Chippewas*]).

[33] The Respondent submits that because the courts have decided that decisions such as the one at issue would be subject to review, given Band Council's derived elected existence from the *Indian Act*, it is not necessary to determine how Oneida land law is related to federal law.

Analysis

[34] The Court may grant relief under subsection 18.1(3) of the *FCA* if it is satisfied that the subject federal board, commission or other tribunal acted, failed to act, erred or otherwise as set out in subsection 18.1(4)(a) to (f). The term federal board, commission or other tribunal is defined in section 2.

[35] The jurisprudence is clear that decisions of a band council are, for purposes of section 18 of the *FCA*, "a federal board, commission or other tribunal". As stated by Justice Mosley in *Shotclose*, above:

> [47] It is settled law that the Federal Court has jurisdiction to review the decisions and actions of the Chief and Council as they constitute a "federal board, commission or other tribunal" within the meaning of s. 2 of the *Federal Courts Act*. Such decisions are also subject to the jurisdiction of the Court set out in s.18.1 of the Act to hear applications for judicial review of the matter in respect of which relief is sought: *Sparvier v. Cowessess Indian Band No. 73*, 1993 CanLII 2958 (FC), [1993] 3 F.C. 142 (QL), 13 Admin. L.R. (2d) 266 at para. 13; *Angus v. Chipewyan Prairie First Nation Tribal Council*, 2008 FC 932 (CanLII), 2008 FC 932, 334 F.T.R. 187 at para. 29; *Vollant v. Sioui*, 2006 FC 487 (CanLII), 2006 FC 487, 295 F.T.R. 48 at para. 25; *Gabriel v. Canatonquin*, [1978] 1 F.C. 124 at para. 10; aff'd *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (F.C.A.).

[36] This is the case when a band council exercises the power it was explicitly granted by a federal statute and also when the contested decision is based on a custom. As stated by Justice de Montigny in *Vollant*, above:

> [25] It is now settled law that decisions taken by a band council, when it exercises, or is deemed to exercise, its power to govern the band may be judicially reviewed by the Federal Court. The case law is replete with decisions holding that a band council is, for purposes of section 18 of the Federal Courts Act, "a federal board, commission or other tribunal:" see, *inter alia*, *Rider v. Ear* 1979 CanLII 1177 (AB QB), (1979), 103 D.L.R.(3d) 168 (Alta. S.C.); *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (F.C.A.) (QL); *Coalition To Save Northern Flood v. Canada* reflex, (1995), 102 Man R. (2d) 223 (Man. C.A.). This is true not only when a council exercises the power it was explicitly granted by a federal statute, but also when the contested decision is based on a custom; this is so simply because it is the *Indian Act* itself, more specifically subsection 2(1) of the Act, that recognizes the legal character of the custom: see *Francis v. Mohawk Council of Kanesatake*, 2003 FCT 115 (CanLII), [2003] 4 F.C. 1133 (QL), at paragraphs 13-17 (F.C.); *Conatonquin v. Gabriel*, supra; *Frank v. Bottle*, [1993] F.C.J. No. 670 (QL); *Scrimbitt v. Sakimay Indian Band Council*

> (T.D.), 1999 CanLII 9381 (FC), [2000] 1 F.C. 513. Therefore, resolutions of a band council are considered decisions under the Federal Courts Act and may be subject to judicial review.

[37] Reviewable actions must not only find their source in federal law, but must also be of a public nature. Thus, 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 (*Hengerer v Blood Indians First Nation*, 2014 FC 222 at para 43; *Air Canada v Toronto Port Authority*, 2011 FCA 347 at para 60).

[38] The decision under review in this matter concerns a transfer of land between family members. However, the decision concerning that transfer was made by a public body (*Chippewas*, above, at para 81), the Oneida Band Council, which is elected pursuant to *the Indian Bands Council Elections Order*, SOR/97-138 made under subsection 74(1) of the *Indian Act*. Band Council administers estate matters and controls land transfers between individuals by requiring its approval of each transaction. Further, in this matter it not only approved transactions concerning the property, but also reconsidered and reversed its own decisions. Accordingly, in my view, Band Council's actions were of a public nature and it is a "federal board, commission or other tribunal" within the meaning of the *FCA* and, therefore, the 2011 decision at issue is reviewable by this Court.

ISSUE 2: What is the standard of review?

Applicant's Submissions

[39] The Applicant submits that the standard of review of the issue of whether Band Council acted without and/or beyond its jurisdiction, and whether there was a breach of procedural fairness and natural justice is correctness (*Prince v Sucker Creek First Nation No 150A*, 2008 FC 1268 at paras 21, 23 [*Sucker Creek*]). The issue of whether the decision was contrary to the *Indian Act* is also reviewable on a correctness standard, and, whether the decision was contrary to Oneida customary laws is reviewable on either a correctness or reasonableness standard (*Sucker Creek*, above, at para 22; *Shotclose*, above, at para 59; *Vollant*, above, at para 31).

Respondent's Submissions

[40] The Respondent submits that the standard of review of Band Council's decisions, given the deference owed by the Court if the decision is made in a system in which the Court is not familiar such as Oneida law, is reasonableness (*Shotclose*, above, at para 59).

Analysis

[41] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]) held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard

(*Dunsmuir*, above, at para 57; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18).

[42] As Justice Mosley stated in *Shotclose*, above:

> [58] This Court has recognized that the Chief and Council have expertise on matters such as knowledge of the band's customs and factual determinations: *Martselos v. Salt River Nation #195*, 2008 FCA 221, 411 N.R. 1 at para. 30, citing *Vollant*, above, at paragraph 31; *Giroux v. Salt River First Nation*, 2006 FC 285 at paragraph 54, varied on other grounds in 2007 FCA 108. As such, and as noted by Justice William McKeown at paragraph 20 of *News v. Wahta Mohawks* (2000), 189 F.T.R. 218, 97 A.C.W.S. (3d) 585, "[…] a considerable degree of deference should be shown to a decision of a Band Council". This is only true, however, provided that the principles of procedural fairness and natural justice have been observed: *Ermineskin v. Ermineskin Band Council* (1995), 96 F.T.R. 181, 55 A.C.W.S. (3d) 888 at para. 11.
>
> [59] It follows that band council decisions should be upheld unless they are unreasonable. With that said, custom is determined by the band, not by the Chief and Council: *Bone v. Sioux Valley Indian Band No. 290* (1996), 107 F.T.R. 133, [1996] 3 C.N.L.R. 54.
>
> [60] Where procedural fairness is in issue, the question is not whether the decisions made by the Chief and Council or the actions taken by them were "correct" but whether the procedure used was fair. See*: Ontario (Commissioner Provincial Police) v. MacDonald*, 2009 ONCA 805, 3 Admin L.R. (5th) 278 at para. 37 and *Bowater Mersey Paper Co. v. Communications, Energy and Paperworkers Union of Canada, Local 141*, 2010 NSCA 19, 3 Admin L.R. (5th) 261 at paras. 30-32.

[43] Similarly, in *Parker v Okanagan Indian Band Council*, 2010 FC 1218 at para 41 [*Parker*], which also involved a land dispute decided by a band council, Justice de Montigny found:

> [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 *LowerNicola 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".

[44] The Court acknowledges the Respondent's submission that procedural fairness is framed by Oneida law and custom in the present case. However, the jurisprudence has held that the issue of whether a band council breached a duty of procedural fairness is to be reviewed on a correctness standard (*Sucker Creek*, above, at para 23; *Parker*, above, at para 41; *Tsetta v Band Council of the Yellowknives Dene First Nation*, 2014 FC 396 at para 24 [*Yellowknives Dene*]).

[45] The issue of whether Band Council acted without or beyond its jurisdiction as well as whether it had a reasonable apprehension of bias are reviewed on a correctness standard (*Sucker Creek*, above, at para 21; *Hagos v Canada (Attorney General),* 2014 FC 231 at para 18; *Deschênes v Canadian Imperial Bank of Commerce*, 2011 FCA 216 at para 40).

[46] Regarding the final issue, this Court has recognized that chiefs and band councils have expertise on matters such as band custom and factual determinations and should be shown deference. Thus, band council decisions are to be reviewed on the standard of reasonableness and will be upheld if they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Shotclose*, above, at paras 58-59; *Parker*, above, at paras 38-40; *Dunsmuir*, above).

ISSUE 3: What is the content of procedural fairness owed to the Applicant in this case and did Band Council breach the duty of fairness?

Applicant's Submissions

[47] The Applicant submits that it is trite law that band councils owe a general duty of fairness to band members when making decisions which impact the members' rights or interests and that they must follow the principles of natural justice (*Campbell v Elliott*, [1988] 4 CNLR 45 (FCTD) [*Campbell*]; *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 8 [*Matsqui*]). The principles of natural justice, due process and procedural fairness at a minimum include: adequate notice of the hearing; to know the case made against the member including the allegations raised and the evidence submitted to the band council; a fair opportunity to respond; and, reasons for the decision (*Campbell*, above, at paras 23, 27; *Sucker Creek*, above, at paras 39-41).

[48] The Applicant submits that Band Council breached its duty of procedural fairness and natural justice because it failed to:

- provide adequate notice of the April 19, 2011 meeting, including that its purpose was to consider reversing the 2005 decisions;
- advise the Applicant of the case against him, including the allegations of fraud, undue influence and duress;
- provide the Applicant with the documents and evidence being considered by Band Council at the meeting including Wayne Hill's letters, the briefing memos by Martin Powless, Chris George's letter of March 22, 2011 and the two legal opinions submitted to Band Council on the issue;
- provide access to the content of Marena's LEA file which was provided to Wayne Hill in advance of the April 19, 2011 meeting;

- provide reasons for the decision;
- provide the minutes and/or a transcript of the April 19, 2011 meeting; and
- provide him with legal assistance after he was informed of the decision.

[49] The only notice of the meeting the Applicant received was when he was contacted by Martin Powless in early April 2011. Mr. Powless did not inform him of the date, time or place of the meeting, that Band Council would be reconsidering the 2005 decisions or provide him with any documents, complaints and allegations made by Wayne Hill. Chief Abram essentially admitted in his cross-examination that the Applicant was not treated fairly by the 2011 decision. The Applicant also submits that that Band Council met with him on June 7, 2011, after the decision was already made, but still did not correct the procedural fairness violations.

[50] The Applicant submits that Band Council also violated the duty of procedural fairness and natural justice when deciding to reaffirm the April 19, 2011 decision at an in-camera meeting held on December 15, 2011 by failing to:

- provide notice to the Applicant of the in-camera meeting or the opportunity to make submissions;
- provide minutes of that meeting; and
- provide reasons for the decision.

[51] The Applicant submits that the 2011 decisions had a significant and lasting impact on his interests as it stripped him of his possessory interest in the 5.5 acres of the property. He had a legitimate expectation that he would be treated fairly and equitably.

Respondent's Submissions

[52] The Respondent submits that the history of the Oneida settlement is significant to this matter as it is unique indigenous land in Canada. By way of an agreement made in 1838, the people represented by certain Oneida chiefs moved to upper Canada and bought land there with their own money. This agreement, confirmed in correspondence and by an 1840 Order in Council, included that the Oneida would continue to manage their own lands and estates matters. They have done so continuously since 1840.

[53] While the *Indian Act* provides that no Indian is in lawful possession of land in an Indian reserve unless that possession has been allocated to him or her with the approval of the Minister of Indian Affairs, very few certificates of possession have been issued for any land in the Oneida Settlement. Neither Kevin nor Wayne Hill has received the approval of the Minister pursuant to the *Indian Act* in respect of possession of the property. While Band Council is elected pursuant to the *Indian Act* and, amongst its other responsibilities, it oversees the administration of land and estates in the Oneida Settlement, it is Oneida land law, and not the *Indian Act*, which Band Council applied when making its decisions. Whatever possessory rights the Applicant and Wayne Hill have exist as the result of customary Oneida land law. This is unlike other indigenous communities which, if they administer land matters themselves, do so pursuant to a delegation of authority from the Minister of Indian Affairs under sections 53 and 60 of the *Indian Act*, or having opted into the *First Nation Land Management Act*, SC 1999, c 24 (FNLMA).

[54] The Respondent submits that the Applicant has raised two main issues. The first is whether Band Council has a legal duty of procedural fairness that is reviewable by this Court. The second is whether by reviewing and reversing its earlier decision, Band Council exceeded its jurisdiction under Oneida or Canadian law.

[55] However, the Court should consider and, if possible, decide the matter on the basis of the procedural fairness issue as this would avoid the second issue which would require the Court to make a decision about the content and nature of Oneida law. The Respondent submits that this Court has no expertise or training in that regard and owes considerable deference and respect to the Oneida government.

[56] The Respondent agrees that Aboriginal governments owe band members a duty of fairness (*Sparvier v Cowesses Indian Band No 73*, [1994] 1 CNLR 182 [*Sparvier*]; *Campbell*, above at para 23). The application of administrative law to aboriginal communities is contextual and each will be affected by the other (Lorne Sossin, *Indigenous Self-Government and the Future of Administrative Law*, UBC Law Review (2012) Vol 45:2, p 629). The manner in which a legal system fulfills the duty of procedural fairness may vary between people, cultures and laws (Sossin, above, at p 599).

[57] The content of the duty of procedural fairness depends on context, which requires considering relevant factors (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-28 [*Baker*]; *Maloney v Shubenacadie First Nation*, 2014 FC 129 at para 44). The Court owes deference to Band Council (*Shotclose*, above at paras 55-59) and must

avoid imposing its own cultural and legal preconceptions (*Delgamuukw v British Columbia*, [1997] 3 SCR 1010). According to Oneida law and custom, there was no breach of procedural fairness.

[58] The Respondent acknowledges that the Applicant was not provided with written notice of the April 19, 2011 Band Council meeting, but states that he was afforded a meeting with Martin Powless in early April 2011 which gave him notice of the intended meeting and the matter to be discussed. He was also given a meeting with the Chief informing him of the decision and the nature of the discussion and a personal meeting with Band Council on June 7, 2011 to discuss the matter. It is not the form of the notice that matters or its timeliness, but its content and the Oneida are more dependent on oral communication rather than written documents. The Applicant was provided with clear and timely oral notice of the meeting and the matters Band Council intended to discuss. The Applicant told Martin Powless that he considered the matter to have been resolved in 2005 and that he was not willing to attend a Band Council meeting about it. Therefore, he cannot rely on this to support a claim that he was denied procedural fairness (*Sucker Creek*, above at para 46). The Applicant also did not request copies of any documents.

[59] The Respondent submits that before a final decision was made Band Council felt it had heard fully from both brothers.

[60] Further, that the allegations of fraud and undue influence were the reason Band Council decided to review the matter, rather than forming the basis of the decision. Band Council, as a political body, took those allegations seriously in terms of their deleterious effect on the

community but did not find them to be supported by facts. Instead, its decision was based on the conflict between the 1975 and 2005 transactions, on the motivations for the 1975 transaction and on the sense that Band Council wanted to be fair but also removed from the family conflict.

[61] Band Council did not provide the Applicant with copies of the letters from Wayne Hill and Chris George alleging fraud, duress and undue influence. The Respondent submits that Band Council was concerned with the allegations, but that its intent appears to have been to inquire into them through staff and by asking questions at Band Council meetings rather than by increasing animosity between the brothers. Chris George's allegations had been withdrawn by the time of the meeting.

[62] The Respondent states that Martin Powless is a lands administration and a lawyer employed with Band Council. The legal opinions he prepared were subject to solicitor-client privilege and were not provided to either of the brothers. The Applicant was not denied an opportunity to retain and consult counsel. Band Council records minutes for its meetings, but does not provide reasons for its decisions. Further, Chief Abram did not make all the admissions as contended by the Applicant.

[63] The Respondent submits that it is a fundamental principle of Oneida society and law that "we are human, and we will do the best we can". That is what guided Band Council in its dealings with an uncomfortable conflict involving family members. If there was procedural unfairness, it lies at the mild end of the spectrum.

[64] However, if this Court finds that there was a breach of procedural fairness, it should refer the matter back to Band Council, to be determined by a fair appeal process or to be left unappealed. Such a finding does not require the Court to rule on the lawfulness of the decision, make findings of fact, bias, or about the right to possession of the property, all of which would require it to determine questions of Oneida law.

Analysis

[65] In the present case, there does not appear to be a statutory or other framework defining or guiding what procedural protections are to be afforded by Band Council to band members when decisions concerning land transfers are being made.

[66] Subsection 20 (1) of the *Indian Act* provides that "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". However, Chief Abram's affidavit states that land matters in the Oneida Settlement are managed by Oneida rather than by the federal government and that very few certificates of possession pursuant to the *Indian Act* have been issued. No certificates have been issued with respect to the property in dispute. Chief Abram further states that the decision regarding the allocation of land in the present case was made pursuant to Oneida law and custom and not pursuant to the *Indian Act*. In any event, the *Indian Act* does not prescribe any particular land allocation procedures.

[67] Pursuant to the FNLMA, a number of first nations groups are provided with the authority to adopt a land code under that legislation to take control of land management. This would

include such things as accountability to members of the First Nation for land management, community consultation and resolution of disputes. However, the Oneida Nation is not listed in the schedule to the FNLMA.

[68] Further, neither party has presented a Band Council by-law, if any exists, which might shed light on this issue. Attached as an exhibit to the Applicant's affidavit is an undated document entitled "Land Transfer Process on Oneida Nation of the Thames". This sets out the Oneida policy with respect to valid transfers of interests in Oneida lands including proof of valid ownership and Band Council approval requirements. It does not, however, otherwise prescribe procedural protections.

[69] That said, the absence of prescribed procedural fairness requirements does not suggest that such requirements do not exist. Indeed, the jurisprudence has held that is trite law that band councils must act according to the rule of law and that one of the cornerstones of procedural fairness is the right to be heard and to make representations before a decision affecting one's rights or interests is made (*Sucker Creek*, above, at para 39; *Shotclose*, above, at para 97; *Minde v Ermineskin Cree Nation*, 2006 FC 1311, at paras 44-46; *Laboucan v Little Red River Cree Nation #447*, 2010 FC 722, at paras 36-39; *Yellowknives Dene*, above).

[70] Thus, the question in the present case is what is the content of the duty of fairness owed by Band Council. In *Sparvier*, above, which concerned a band election, Justice Rothstein stated at paras 47-48 :

> While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of

> natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.
>
> In deciding what "principles" should apply to the matter at bar, I have had regard to the Supreme Court of Canada decision in Lakeside Colony of Hutterian Brethren v. Hofer, S.C.C. File # 22382, October 29, 1992, where at page 33 of the decision, Gonthier J., for the majority, states:
>
> > The content of the principles of natural justice is flexible and depends upon the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal.

[71] The Supreme Court of Canada in *Baker*, above, held that the duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. Several factors are relevant to determining the content of the duty of fairness: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and, (5) the procedural choices made by the agency itself. This list is not exhaustive.

[72] Applying the first of the *Baker* factors to this matter, the nature of the decision is the resolution of a property dispute and the administration of the possession of land. The process of the decision-making body, Band Council, does not closely resemble judicial decision-making.

Thus, fewer procedural protections are required. Further, as noted by Respondent, Band Council is not comprised of lawyers and deals with land and estates administration as one aspect of its duties as an elected council. Thus, the Band Council's composition also suggests a lower content of procedural fairness.

[73] As to the second factor, the statutory scheme applicable to the decision-maker, as noted above, the *Indian Act* does not prescribe any particular procedure. Thus, this factor too attracts a lower content of procedural fairness.

[74] However, with respect to the importance of the decision to the affected parties, the decision is very important to the Applicant as it resulted in the loss of his possession and of ownership interest in the property which he had held since 2005. Indeed, both parties appear to concede that the decision is an important one. I would add that, in my view, it is also important to the Respondent and to many Band members as it raises concerns about the finality of property decisions, whether they can be revisited after a passage of years and, if so, in what circumstances. This factor requires a higher content of procedural fairness.

[75] If a claimant has a legitimate expectation that a certain procedure will be followed or a certain outcome will be reached in his or her case, this may be required by the duty of fairness. That is, the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers and that it will generally be unfair of them to act in contravention of representations as to procedure, or to back track on substantive promises without according significant procedural rights. Here, the Applicant submits that he believed he

would be treated fairly and equitably and that he would receive notice of the meeting, its purpose and the case against him. Further, that Band Council would have provided him with the documents and evidence it considered, as well as minutes of the meeting and reasons for the decision. However, he provides little in the way of precedent or otherwise to support those expectations and the procedure that he felt should have been followed.

[76] That said, Band Council chose the procedure in this case. Therefore, this does afford greater weight in these circumstances and favours a higher degree of procedural fairness.

[77] Considering all of these factors together, in my view this case falls toward the lower end of the procedural fairness spectrum. However, even in cases where only minimal procedural fairness rights are required, those rights include notice, the opportunity to be heard and to have one's submissions considered, and, notice of the decision (*Public Service Alliance of Canada v Canada (Attorney General)*, 2013 FC 918 at para 53; *Canada (Attorney General) v Mavi*, 2011 SCC 30, 2011 SCC 30, [2011] 2 SCR 504, *Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764, 2011 FC 764, 406 FTR 49 at para 59).

[78] Accordingly, the content of procedural fairness in this case required Band Council to provide adequate notice of the meeting, including that it was considering reversing its approval of the 2005 decisions, an opportunity for the Applicant to make effective representations by fully informing him of the allegations made against him, and, to duly consider his representations.

[79] The parties have advanced opposing positions on whether or not the Applicant was provided with notice of the meeting leading to the 2011 decision and with an opportunity to make submissions.

[80] In his affidavit the Applicant acknowledges that in early April 2011 Martin Powless contacted him to "discuss issues pertaining to ownership of the Property". Mr. Powless advised him that he would inform the Chief and Band Council of the Applicant's position and that all pertinent information relating to the property's ownership would be contained in the file. However, that the Applicant was not prepared to meet with the Chief and Band Council without being provided with a rationale for revisiting the issue. Mr. Powless also advised the Applicant that he would be meeting with Wayne Hill.

[81] The Applicant deposes that the first time he heard of the Band Council meeting to deal with the property was by letter of April 22, 2011 when he was informed that a Band Council motion was brought on April 19, 2011 to approve the 1975 Quit Claim. The letter also advised that all subsequent quit claims or land transfer agreements were null and void. He also deposes that Wayne Hill was present at that meeting and was afforded an opportunity to make submissions with respect to the motion. Further, that Martin Powless advised him that Wayne Hill had made submissions to the Chief and Band Council on different occasions with respect to the property and the Applicant's relationship with Marena. The Applicant states that he was never provided with the opportunity to respond, nor was he provided with reasons for the April 22, 2011 decision or the information Band Council relied on in arriving at its decision.

[82] The Applicant also deposes that when he attended the meeting on June 7, 2011 to make submissions to Band Council as to his entitlement to the property, he was not advised of the nature of the allegations made by Wayne Hill and was not provided with a copy of Marena's LEA file. He deposes that it is his understanding that Wayne Hill was provided with access to that file prior to making his submissions.

[83] The affidavit evidence of Chief Abram acknowledges that after the 2004 LTA was issued, Wayne Hill continued to object to the land transfer, alleging that there had been improprieties in the way the transfer was made and that his mother was not of sound mind at the time. In that regard, Chief Abram notes that although Wayne Hill used the January 2005 mental health assessment of his mother to make this argument, in retrospect, it appears he quoted sections of it out of context. He also met on several occasions with the Chief and members of Band Council to make his complaints but there was no formal hearing and no plan to make a decision. The affidavit does not state when the decision was made to reconsider the 2005 decisions. It does note that Jeff Ross, Band Council's Director of Operations, wrote to Wayne Hill on September 15, 2005 indicating that Band Council would research and review the situation.

[84] Chief Abram deposes that Band Council asked Martin Powless to inquire into the facts concerning the alleged improprieties and Marena's competence and to report back. In that regard, Mr. Powless met with both Wayne Hill and the Applicant in early April 2011 and heard both sides of the matter. He told them that he would prepare a full file containing all relevant documents for Band Council to consider and would inform it of the positions of each brother.

Chief Abram deposes that the Applicant indicated to Martin Powless that he considered the matter to have been resolved and was not willing to meet with Band Council about it.

Chief Abram states that on April 16, 2011, Wayne Hill set out his complaints in writing since he had been informed that the Council would be "providing a final decision on the Land on that day".

[85] Chief Abram states the following in his affidavit:

> [50] The Council did not take lightly the allegations by Wayne Hill that there had been fraud committed by Oneida staff in connection with the Land, nor that there had been undue advantage taken of Marena Hill's age and mental condition. The Council, in addition to requesting an investigation and summary by Martin Powless, who is a lawyer, sought two separate legal opinions on the situation. The allegations of fraud and undue influence were serious and persistent and were the reason the Council decided to review the matter.
>
> [Emphasis added]

[86] On April 19, 2011, Band Council decided to reverse its 2005 decisions and recognize the 1975 Quit Claim.

[87] As to the June 7, 2011 meeting, Chief Abram deposes that the Applicant attended and made a detailed presentation as to his rights to the land and that he "was aware in general terms of the allegations that Wayne Hill had made, and he addressed these". He had not requested a copy of the material prepared by Martin Powless and, had he done so, they would have been provided.

[88] Chief Abram also states that the record available to Band Council indicated that Martin Powless was careful in assessing Marena's capacity to decide to issue a power of attorney in 2004 and that Al Day was careful to consult Martin Powless before putting through the transfer of the land in 2004. However, "Marena Hill's mental capability was an issue that may have clouded the Council's decisions".

[89] In his reply affidavit, the Applicant points out that Chief Abram's affidavit indicates that Band Council relied on Wayne Hill's allegations to strip him of his rights to the property and states that, had he been advised of the baseless and untrue allegations of fraud, he would have elected to appear to respond to them.

[90] The Applicant's reply affidavit also states that to the best of his information, knowledge and belief, Band Council did not conduct any investigation to verify those allegations prior to making its disputed decision and instead, it accepted them as being true and based its decision on them. Further, that he was advised by Martin Powless that the summary Mr. Powless prepared, as well as the two legal opinions, supported the Applicant's position.

[91] The Applicant's reply affidavit also states that Chief Abram was not privy to the conversation between Martin Powless and the Applicant and has not identified the source of the information on which he relies to make these statements. While it is correct that Martin Powless asked to meet with the Applicant to discuss the status of the property, Chief Abram's description of the discussion is not accurate. Significantly, the Applicant states that during that meeting Martin Powless did not inform him of Wayne Hill's complaints to Band Council nor that he

alleged that fraud had been committed by the Applicant and Oneida staff in connection with the property. Nor was he provided with a copy of Wayne Hill's April 16, 2011 letter to Band Council.

[92] He also attests that he was unaware that in September 2005 Band Council was researching and reviewing the property situation and was, therefore, surprised when he was advised that this was again being brought before Band Council. He saw no reason to make submissions as he considered the matter had to have been resolved in 2005.

[93] The Applicant also takes issue with Chief Abram's affidavit evidence that the Applicant was aware in general terms of Wayne Hill's allegations. He states that prior to the June 7, 2011 meeting, he had not been advised of the specific allegations regarding fraud but was asked at that meeting about his mother's mental health in 2004 and 2005 and provided documentation confirming that she had been competent when she made the 2004 LTA. He was also not aware that he would need to access his mother's LEA file prior to that meeting and, therefore, was unable to fully and properly respond to Wayne Hill's allegations upon which Band Council appears to have based its decision.

[94] In my view, upon reviewing the affidavit evidence, the Applicant was generally alerted to, or given notice of, the fact that the issue of the status of the property was of concern to Band Council by way of his meeting with Martin Powless. However, this notice was insufficient to alert him to the seriousness of the allegations made against him and to know the case to be met.

[95] While it is true that the evidence is that the Applicant declined to make submissions or to attend the Band Council meeting, his decision was informed by his belief that the status of the property was settled. That is, he had been informed in writing by Band Council on April 28, 2005 that it had approved the 2004 LTA and that he was the recognized owner of the 5.5 acres of the property and the home on it. He was not informed of the August 31, 2005 letter from Wayne Hill which, in effect, alleged that by nullifying the 1975 Quit Claim, Band Council sanctioned its own impropriety of having facilitated a fraudulent CHMC grant application. Further, he was not notified that Band Council had advised Wayne Hill in early September 2005 that it was reviewing the property transfer. Nor was he informed that Wayne Hill had subsequently met with the Chief and Band Council members a number of times to object to the transfer. And, most importantly, he was not advised of the serious allegations contained in the April 16, 2011 letter, including that his mother was forced to sign the Dissolution of 1975 Quit Claim and the 2004 LTA and that, based on the January 27, 2005 report from St. Joseph Health Care, his mother lacked mental capacity when she signed the 2004 LTA, nor that on March 22, 2011, Chris George had written to Band Council asserting that the property has been improperly transferred.

[96] Further, Band Council failed to provide the Applicant with an opportunity to know the case to be met. It did not advise him of the specifics of the fraud allegations nor did it provide him with the relevant documentation in advance of the April 19, 2011 meeting. And, although following the April 22, 2011 decision, and before it was reaffirmed on December 15, 2011, the Applicant was permitted to make submissions to Band Council, he was again only provided with a general explanation of Wayne Hill's allegations and was not advised of Chris George's

allegations or provided with copies of those allegations. Therefore, he was unable to properly address the issues.

[97] Chief Abram's affidavit evidence was that the allegations of fraud and undue influence were serious and persistent and were the reason Band Council decided to review the matter. It was therefore critical that the specifics of those allegations were made known to the Applicant in a timely manner.

[98] The Respondent submits that the Applicant was provided with the opportunity to make submissions at the June 7, 2011 meeting and, in essence, this cured any potential procedural unfairness. I cannot accept this submission. The Applicant met with Band Council after the April 19, 2011 decision was made. Further, based on the evidence, it appears that the April 19, 2011 decision was viewed by Band Council as final at the time of the June 7, 2011 meeting. Chief Abram's testimony when cross-examined on his affidavit was that at the April 19, 2011 Band Council meeting the final decision was made to transfer the property to Wayne Hill. When asked why the December 15, 2011 decision was stated to "reaffirm" the 2011 decision, Chief Abram stated that to the best of his recollection it had to do with Wayne Hill taking possession of the house on the property and that a document was needed by either the police or the occupants of the house, who were the Applicant's tenants, as confirmation from Band Council as to the ownership of the property. In my view, as a final decision had already been made, the subsequent opportunity afforded to the Applicant to set out his concerns was, in fact, meaningless.

[99] Further, at the June 7, 2011 meeting, the Applicant provided his mother's mental heath assessment to Band Council. Chief Abram's evidence was that Marena's mental capability was an issue that may have clouded Band Council's decision. Further, that although Wayne Hill had used his mother's January 2005 assessment to make his argument, in retrospect, it appeared that he quoted sections of it out of context. However, Band Council would, on June 7, 2011 have had the actual assessment before it and, therefore, would have seen that Wayne Hill's representation of it was inaccurate. Yet, the evidence does not suggest that this was considered when Band Council reaffirmed its decision on December 15, 2011. This again suggests that Band Council did not consider the information provided by the Applicant at the June 7, 2011 meeting.

[100] In sum, although the content of the duty of procedural fairness may have been on the lower end of the scale, given the factual findings above, it is my view that the duty was not met in the present case.

ISSUE 4: Did the Band Council exceed its jurisdiction by changing its decision?

Applicant's Submissions

[101] The Applicant submits that Band Council has the jurisdiction to allot and/or approve transfers of land on a reserve as granted to it by section 20(1) of the *Indian Act* and Oneida customary laws. Land on a reserve is not necessarily "owned" by individual band members, but they may possess land allotted by Band Council in accordance with band customary laws (*Indian Act*, section 20(1); *Many Guns v Siksika National Tribal Administration*, [2004] 1 CNLR 176 (Alb Prov Ct)).

[102] The Applicant submits that Band Council does not, however, have the jurisdiction to review and reverse its own decisions and, therefore, that it exceeded its jurisdiction when it issued the 2011 decision. If the *Indian Act* does not expressly grant Band Council the jurisdiction to do so, and, the Band's by-laws do not provide for a formal appeal process, then Band Council does not have jurisdiction to review its own decisions (*Matsqui*, above).

[103] Phrased otherwise, in the absence of a lawful and formal appeal process, which is sanctioned by the *Indian Act* and Oneida's customary law and/or by-laws, only the Federal Court or the Minister has the jurisdiction to reverse Band Council's decisions. The 2005 decisions were final, as acknowledged by Chief Abram there was no formal appeal process and, therefore, Band Council did not have the jurisdiction to reverse them. Further, Wayne Hill did not seek judicial review of the 2005 decisions. Accordingly, the 2011 decision should be set aside.

Respondent's Submissions

[104] As described above, the Respondent submits that land and estate administration in the Oneida Settlement is dealt with under Oneida law and process and not the *Indian Act*. Further, the right of appeal addressed in *Matsqui*, above, would arise only "under an Act of Parliament" and the Supreme Court of Canada in that case did not consider customary legal systems. The Respondent states that *Matsqui* addressed the extent of the jurisdiction of appeal tribunals pursuant to section 83 of the *Indian Act*. However, here, Oneida customary law is not connected to the *Indian Act*. In upholding the bands' tax appeal systems in *Matsqui*, the Supreme Court was in effect stating that Aboriginal people's legal systems ought to be respected and that Courts should be reluctant to facilitate recourse to external institutions.

[105] The Respondent submits that addressing the jurisdictional issue would require the Court to make a decision about the content and nature of Oneida law in which, it submits, the Court has no expertise or training and owes deference and respect to the Oneida government. Therefore, the Court should tread lightly and not embark on this inquiry if the matter can be addressed based on the procedural fairness finding.

Analysis

[106] The 2005 briefing memo prepared by Al Day states that under Oneida customary law, a quit claim or LTA does not become legal until approved by Band Council. Further, that no established policy exists which sets out steps for voiding a quit claim or LTA but that a previous Band Council did allow the revocation/cancellation of an LTA thereby establishing precedent. Counsel for the Respondent confirmed at the hearing before me that in 2011 there was no appeal process for such decisions.

[107] However, it is not necessary to resolve the jurisdictional issue as I have already determined that there has been a breach of procedural fairness and, as will be discussed below, that the 2011 decision was unreasonable. I would note, however, that I am influenced in this approach not only by the Respondent's submissions but also by the oral submissions on behalf of the Applicant indicating that he is sensitive to the Respondent's concerns as to the potential of unintended side effects of a jurisdictional finding on Oneida property law and, therefore, if Band Council's decision is found to be otherwise unsound, that this aspect of the argument need not be addressed.

ISSUE 5: Was Band Council biased?

Applicant's Submissions

[108] In the alternative, the Applicant submits that Band Council was biased when it made its 2011 decision as it was not independent when it reversed its own 2005 decisions or when it made the 2011 decision (*Matsqui*, above). According to Chief Abram's evidence on cross-examination, one of the reasons for the decision was that the 1975 Quit Claim was signed for the fraudulent purpose of applying for, and obtaining, a government loan. Band Council's then acting Chief, Harry Doxtator, was a witness to the 1975 Quit Claim. Band Council's concern was that if the 1975 Quit Claim was invalid, as its 2005 decisions permitted, then it would be viewed as having sanctioned a fraudulent loan. This indicates that Band Council did not decide the issue on the evidence or the facts before it, but to avoid being perceived as having sanctioned a fraudulently obtained loan. Therefore, Band Council and its Chief were not independent and did not appear to be when rendering the 2011 decision.

Respondent's Submissions

[109] The Respondent submits that the *Valente* principles in *Matsqui* do not apply to Band Council's decisions (*Valente v The Queen et al*, [1985] 2 SCR 673; *Matsqui*, above). It is not simply a tribunal but is an elected governmental body with some government, political and legal characteristics. Therefore, independence from the executive branch is not possible. The concept of bias may be ill-suited to Aboriginal communities (*Dean Sossin*, p 605, 607; *Sayers v Batchewana First Nation*, 2013 FC 825 at para 53).

[110] The Applicant is assuming that Band Council's determinations must be restricted to the evidence before it on a particular session or a hearing. The Applicant has not indicated which evidence was before Band Council when it made its decision. While a Canadian court is restricted to the evidence before it, this is not the practice of the Oneida. Band Council viewed the land issue as an ongoing matter according to its law and culture. The issue was not the potential embarrassment of the Chief's signature on the document, but was whether Marena should be held to the consequences of that transaction. Band Council has no interest in the dispute other than to seek to restore peace and to render a fair decision. There was no financial or other benefit to Band Council based on the outcome.

Analysis

[111] In my view, there is insufficient evidence to establish a reasonable apprehension of bias.

[112] The test is whether or not an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision-maker would unconsciously or consciously decide an issue unfairly (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369 at 394 [*Committee for Justice*]). The burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 100 at para 13). The threshold is a high one (*R v S(RD)*, [1997] 3 SCR 484 at paras 111-113) and the grounds for the apprehension as well as the evidence to support it must be substantial (*Committee for Justice*, above, at p 394).

[113] However, the Supreme Court of Canada has held that a less stringent standard in the test for bias will be applied where the administrative body in question is a board composed of popularly elected members (*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 638).

[114] The Applicant submits, in essence, that Band Council did not revisit the 2005 decisions based on the evidence before it, but rather because it sought to avoid being seen as sanctioning a fraudulently obtained loan.

[115] The only evidence as to Band Council's decision-making process comes from the cross-examination of Chief Abram on his affidavit. He was asked what new evidence was put before Band Council that caused it to reverse its 2005 decisions. Chief Abrams related that Harry Doxtator recalled that he had completed the 1975 Quit Claim and that the reason for it was to secure the CMHC grant. However, there was an election before it could go to Band Council for approval, Mr. Doxtator was elected and left the LEA position. The 1975 Quit Claim was never brought to Band Council for approval. Chief Abram also stated that some Councillors agreed with Wayne Hill that he and Marena should both have signed the Dissolution of 1975 Quit Claim. There was also discussion of why was it necessary to dissolve the1975 Quit Claim if it was not valid in the first place. There was also consideration of Marena's mental health but Chief Abram noted a lack of institutional memory in that regard given the passage of time and turnover of Councillors between 2005 and 2011. Another consideration was the subsequent transfer by Marena to Wayne Hill of one acre of the property, the purpose of this transfer and Wayne Hill's knowledge of it. Chief Abram concluded that:

> .. So I think those are the things that sort of swayed council at the time uh, they didn't want to be seen as being, I think, maybe a party to obtaining a loan under somewhat fraudulent circumstances possibly. So those are the things I – I remember being.

[116] Chief Abram agreed that part of Band Council's reasoning in 2011 was that it would need to approve the 1975 Quit Claim in order to make the transfer of the property to Wayne Hill valid and, therefore, avoid the loan being invalid or fraudulent.

[117] While this may have been part of Band Council's reasoning, the evidence is that it was not the only consideration. The evidence did not disclose what consideration or, considerations, was determinative. Given the high threshold that the Applicant must meet, the evidence is insufficient to establish that there was a reasonable apprehension of bias or that Band Council was biased when made its 2011 decision.

[118] As to the Respondent's submission that the issue was not the potential embarrassment of the Chief's signature on the document, but whether Marena should be "held to" the consequences of the 1975 transaction, there is no evidence supporting this submission. Further, the logic or reasonableness of this position is also questionable. Marena died prior to the 2011 decision being made, believing that her clearly demonstrated intention that the Applicant would be given the property had been effected. By holding a deceased person to "the consequences" of the 1975 Quit Claim the effect is that her wishes were not followed; that Wayne Hill, who was a party to the improper grant application and 1975 Quit Claim, benefited from his role in that transaction; and, the Applicant, the only party who had no part in the matter, which included a prior Band Council member, was deprived of his rights to the property. It could also be argued

that by way of the 2005 decisions, Band Council was, in effect, undoing or declining to approve or acknowledge the improper transfer effected by the 1975 Quit Claim. On that analysis, its 2011 decision endorsed the impugned action, at least as regards to the transfer.

[119] Accordingly, if potential embarrassment of Band Council for an act by a former Band Council member that occurred 30 years ago concerning a $500 grant was a factor that entered into the current Band Council's 2011 decision, which it should not have been, it is questionable if that embarrassment it would be relieved by the reversal.

ISSUE 6: Is the decision reasonable?

Applicant's Submissions

[120] In the further alternative, the Applicant submits that the 2011 decision should be set aside because it was contrary to Oneida's customary law and/or because Band Council exercised its discretion in an unreasonable manner. Further, it was contrary to section 20 of the *Indian Act* as there was no approval by the Minister of the land transfer.

[121] The 2011 decision was contrary to Oneida customary law as a transfer of land is only valid if approved by Band Council. The effect of the 2011 decision is that the 1975 Quit Claim is valid even though it was not approved by Band Council and, conversely, the 2004 LTA is declared invalid even though Band Council had approved it twice.

[122] Band Council's 2005 decisions were correct and/or reasonable because it found that the 1975 Quit Claim was invalid as it had not been approved by Band Council and because it was signed for the fraudulent purpose of obtaining a loan. Further, Band Council had the benefit of Marena's testimony respecting her intentions when executing those documents. This was consistent with the documentary evidence that she had continued to reside at the property for 30 years and to treat it as her own. Further, she had the legal and medical capacity to enter into the 2004 LTA.

[123] The Applicant submits that Chief Abram stated in his cross-examination that the 2011 decision reversed the 2005 decisions despite there being no new evidence that would give rise to a contradictory finding. Further, that Wayne Hill's allegations of fraud and undue influence provoked Band Council to review the 2005 decisions and Chief Abram admits that Wayne Hill's representations were inaccurate or incomplete. Further, Band Council did not investigate the allegations and, therefore, its decision was based solely on the unfounded and untrue representations by Wayne Hill.

Respondent's Submissions

[124] The Respondent submits that while the 2011 decision may be wrong in law and was difficult, it is not unreasonable. While most decisions are made by consensus, this was made by a vote and there were several abstentions. Chief Abram disagreed but a Chief does not usually vote in elected Band Council meetings. Further, there were factors in favour of each brother's position. And, while the 2005 decisions gave more weight to Marena's wishes, the 2011

decision gave more weight to the fact that the 1975 Quit Claim was used by the Hill family to secure funding in an admittedly dubious way and that its consequences could not be ignored.

[125] The decision was not contrary to the *Indian Act* as it does not apply to Oneida's administration of internal land matters.

Analysis

[126] As a preliminary point, I would comment on the evidence of Chief. In addition to providing the necessary factual information concerning the subject events, the affidavit evidence also provides information concerning Oneida history, traditions and customs. Chief Abram states that every Oneida government considers that it must act with great compassion towards all people and must consider the effects of each decision on peace, including peace within the community. Oneida culture also has a deep aversion to conflict within a family. Band Council considered the dispute between Wayne and Kevin Hill as a difficult family matter affecting peace within the community. There was never any advantage to Band Council in deciding in favour of one brother or the other. Band Council is comprised of ordinary citizens of the Oneida community who try their best to be fair in their decisions. There is no suggestion that Band Council's decisions in this matter were made in anything but good faith. I accept this to be the case and also note that Chief Abram's testimony on cross-examination was candid, straight-forward and obviously intended to be conciliatory in nature.

[127] However, good intentions and good faith may not always result in a reasonable decision. Reasonableness is concerned with the justification, transparency and intelligibility of the

decision-making process, and also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir*, above, at para 47). In *Komolafe v Canada (Minister Citizenship and Immigration)*, 2013 FC 431 at paras 10-11, Justice Rennie discussed *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, above stating that it:

> [10] …ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.
>
> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking.…

[128] In the present situation, it is my view that it is not possible for the Court to assess the basis for Band Council's 2011 decision as there are no reasons offered in support of it. The Court is also faced with a very limited record in this regard.

[129] A draft of the minutes of the December 15, 2011 Band Council meeting was submitted at the hearing of this matter. It states merely that: "Council consensus to reaffirm the decision regarding Wayne Hill and Kevin Hill with most recent decision in favour for Wayne Hill and this will be the final decision. Approved.". Chief Abram confirmed on cross-examination that at the April 19, 2011 Band Council meeting the final decision was made to transfer the property from the Applicant to Wayne Hill. Further, that to the best of his recollection, Band Council reaffirmed the decision in December because Wayne Hill was taking possession of the house and

required a document to show the police or the tenants of the house who were leasing from the Applicant.

[130] The minutes of the April 19, 2011 Band Council meeting have not been produced. As discussed above, Chief Abram's cross-examination evidence was that Band Council considered a number of factors when reaching its 2011 decision. However, his evidence does not indicate on what basis Band Council ultimately decided to reverse its 2005 decisions. Accordingly, the Court would be speculating as to the basis for Band Council's 2011 decision.

[131] That said, I would note that Marena's mental capacity at the time she entered into the 2004 LTA and Dissolution of 1975 Quit Claim is addressed in the record. The minutes of the April 12, 2005 Band Council meeting indicate that Martin Powless prepared two powers of attorney when he met with Marena alone. In his opinion, she had the mental capacity to understand her actions. And as far as the assessment, there was also a consultation with a nurse who concurred with the assessment of Marena's mental health. The minutes conclude that at the time she signed the 2004 LTA, Marena understood her actions and that the two powers of attorney were valid and binding. Further, that when Marena came to Band Council in March 2005 it was following her assessment. During the cross-examination of Chief Abram he was asked what new evidence Band Council considered in 2011 that was not available to it in 2005. His response was that the only new evidence was the assessment. Further, that while Wayne Hill had disclosed parts of the assessment at the April 19, 2011 meeting, the actual document was provided by the Applicant at the June 7, 2011 meeting.

[132] The assessment confirmed Marena's mental capacity and thereby confirmed Band Council's 2005 conclusions as to her mental capacity to enter into the 2004 LTA. Thus, to the extent that mental capacity may have been a basis for reversing the 2005 decisions, it was not supported by the record, was not reasonable and would have rendered the outcome unreasonable.

[133] As a public body making a decision which impacts its members, Band Council has an obligation to provide intelligibility and transparency in its decision-making process. I do not suggest that, in the normal course, Band Council resolutions pertaining to administrative decisions concerning approval of land transfers between individuals require detailed written reasons. Indeed I am of the view that this would place too onerous a burden on this and other band councils. However, in extraordinary circumstances such as these, where Band Council was reversing its own decision made six years earlier and which would and did have a significant impact on the Applicant, and leaving aside the question of its jurisdiction to do so, more intelligibility in the decision-making process is required.

[134] Given the evidence and in the absence of reasons, the 2011 decision-making process was not intelligible or transparent and must be set aside. In any event, in my view, Band Council's breach of procedural fairness in making its 2011 decision also rendered the decision unreasonable in its outcome.

Relief Sought

[135] In his Amended Notice of Application, the Applicant sought the following relief:

1. an order in the nature of mandamus compelling the Respondent to provide written reasons for the decision;
2. a declaration that the decision was invalid and unlawful;
3. a declaration that the Respondent acted without jurisdiction in making the decision;
4. a declaration that the Respondent acted with actual bias in making the decision;
5. a declaration that the Respondent, in making the decision, failed to observe principles of natural justice, procedural fairness and/or procedures that it was required by law and/or by band custom to observe;
6. a declaration that the Respondent based the decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it;
7. a declaration that the Applicant is the sole and rightful owner of the property;
8. an order in the nature of *certiorari* quashing or setting aside the decision; and
9. costs on a substantial indemnity basis.

[136] The Respondent submits that it will serve the parties' interests if the Court restricts itself to setting aside the 2011 decision, should it conclude that this is warranted. The matter would then return to Band Council which could either let the matter rest, or, refer it to an independent appeal tribunal to decide the matter fairly within Oneida law.

[137] The Applicant, while seeking finality, is satisfied with setting aside the decision as in his view this would have the impact of reinstating the 2005 decisions. He is also sensitive to the Respondent's position that a declaration as to ownership may potentially have an unintended impact on Oneida property law.

[138] Having considered these views, I have determined that the 2011 decision shall be set aside and that no declarations shall be issued. I have some concerns that this approach may not

result in the final resolution of the matter and, in that event, as to whether any appeal process effected subsequent to the 2011 decision being rendered has application to the 2005 decisions of Band Council. However, the Respondent is directed to take into consideration the Court's findings and comments above. And, given the respect and sensitivity displayed by both the Applicant and the Respondent to the issues of jurisdiction and Oneida law, it is to be hoped that this matter will not be the subject of further, unnecessary decision-making.

[139] Accordingly, the only remedy will be the setting aside of the 2011 decision. In effect, this will mean that the 2005 decisions, previously approved by Band Council, are restored.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The April 19, 2011 Band Council decision, as reaffirmed by its December 15, 2011 decision, approving a 1975 Quit Claim made by Marena Hill in favour of Clinton Wayne Hill and rendering all subsequent quit claims or land transfer agreements pertaining to the subject property null and void, is hereby set aside;
2. The Applicant shall have its costs; and
3. In the event the parties cannot agree as to the quantum of the costs to be paid to the Applicant, they may file written submissions to the Court within 10 days of the issuance of this judgment.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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