Federal Court | Cour fédérale

Date: 20130618

Docket: T-951-10

Citation: 2013 FC 669

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

THE MOHAWKS OF THE BAY OF QUINTE

Applicant

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Mohawks of the Bay of Quinte (the applicant) occupy the Tyendinaga Mohawk Territory (Indian Reserve No. 38) in southeastern Ontario. This territory is part of the original Mohawk Tract granted to the Six Nations by Treaty 3½, the Simcoe Deed of 1793.

[2] The Culbertson Tract is a 923 acre parcel of land within the Mohawk Tract. The applicant alleges it was wrongfully alienated by the Crown in 1837. The Minister accepted this claim for negotiation in accordance with criteria of the Specific Claims Policy (the Policy) in 2003. A decade later, the claim remains unresolved.

[3] The applicant submits that the Minister is in breach of his fiduciary duty to negotiate in good faith. The applicant seeks a declaration that, as an aspect of his duty to negotiate in good faith, the Minister must consider all possible options including the acquisition of third party interests in the Culbertson Tract and returning the land to the applicant. The applicant seeks an order directing that the Minister negotiate on this basis.

[4] The Minister does not dispute the obligation to negotiate in good faith, which is derived from the honour of the Crown; rather the Minister characterizes this application as an attempt to force a particular negotiation position on the Crown and a breach of the confidentiality provisions of the protocol governing negotiations.

[5] While this case engages questions of Aboriginal law, it fits equally into orthodox principles of administrative law. The Minister has publicly committed to a policy and has a broad discretion under that policy as to how he will negotiate. In the exercise of that discretion, the Minister must have regard to the Policy's parameters and terms. This requirement is not new law, nor is it unique to Aboriginal law; rather it is simply the application of settled principles of administrative law.

[6] The Minister has publicly stated that the Policy does not permit a land-based settlement, only financial compensation. This is incorrect. The Policy explicitly contemplates the acquisition and return of land. The Minister's statements suggest that he either misunderstood or refused to acknowledge the scope of the settlement options open to him.

[7] While it is for the Minister to decide what negotiation position he will take, the duty to negotiate in good faith precludes him from publicly mischaracterizing the Policy. The distinction in the end, is narrow, but real. It is the difference between saying I cannot do something as opposed to saying I can do something but choose not to do so.

[8] The Court cannot interfere with the negotiations or mandate that the Minister take a specific negotiation position. Under the Policy the Minister may negotiate on the basis of land, monetary compensation or a mix of each, in any proportion he considers appropriate. However, in light of the Minister's public statements, declaratory relief is appropriate. I accept the applicant's argument that the Minister's mischaracterization of the Policy affects the perception of other residents in the broader community, who may in turn see the applicant as intransigent and demanding. Misstating the tools available to the Minister may in fact impede settlement and reconciliation. Therefore, a declaration to clarify the governing Policy has some utility.

Background

The Specific Claims Process

[9] The Specific Claims Policy (the Policy) was established in 1973 to create a framework for the negotiation of claims involving the administration of land, other First Nation assets and the

fulfillment of treaty obligations. A First Nation may submit a claim and, if it is accepted for negotiation, formal negotiations proceed under a protocol. If the parties do not reach a settlement, the issue can be litigated through the courts or the Specific Claims Tribunal.

[10] There have been two iterations of the Policy, in 1982 and 2009. Compensation guideline 3(i) is nearly identical in both versions; in the 2009 version it provides:

> Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of the lands or by the current unimproved value of the lands.

[11] The Policy also provides that "As a general rule, the government will not accept any settlement which will lead to third parties being dispossessed."

The Contested Land

[12] On April 1, 1793, the Crown granted the Mohawk Tract to the Six Nations, the applicant's predecessor, by Treaty 3½, also known as the Simcoe Deed. The treaty recognized the fidelity of the Six Nations to the Crown during the American war of independence and provided the land in compensation for losses the Six Nations had sustained.

[13] Treaty 3 ½ guaranteed the land to the Six Nations "for the sole use and behoof of them and their Heirs for ever." It provided that the Six Nations could surrender the land but that it had to be purchased by the Crown. Treaty 3 ½ also provided that the Crown could dispossess any person occupying the Mohawk Tract without lawful authority and any alienation of the land outside of the

people of the Six Nation "shall be null and void and of no effect whatever." In light of subsection 35(1) of the *Constitution Act, 1982*, this treaty now has constitutional significance.

[14] The applicant alleges that the Crown illegally patented approximately 923 acres of this land, known as the Culbertson Tract in 1837, despite the land having never been surrendered. Over time, various third parties acquired interests in the Culbertson Tract. Approximately 500 acres are now part of the Township of Tyendinaga. The remaining 423 acres comprise approximately 60% of the Town of Deseronto.

[15] Terry Kimmett, a local resident, owns approximately 300 acres of the Culbertson Tract. In 1999, the applicant's learned of an aggregate quarry on the land and requested that the then Minister of Indian Affairs and Northern Development and the provincial Attorney General and Minister Responsible for Native Affairs enjoin the extraction of further aggregate, in light of the pending claim. In March of 2007, certain members of the applicant began "occupying" the land. While the continuous physical occupation has ended, the situation remains of concern to all parties.

The Turton Penn Reacquisition

[16] In 1991, the parties settled a land dispute involving 200 acres of the original Mohawk Tract in Shannonville, Ontario. This land had been leased to a businessperson named Turton Penn in 1835 for 999 years. This land was then subleased and occupied by many third parties. In the 1970s the applicant questioned the legality of the leasehold interests of the third party occupants.

[17] A settlement was reached in 1991 whereby the Crown acquired the Turton Penn lands as they became available for sale by willing sellers at fair market value and then returned the land to the applicant. The land was reacquired over approximately fifteen years. In his affidavit evidence the applicant's Chief states that he believes that the Turton Penn reacquisition model "points the way forward for a successful resolution of the Culbertson Tract claim."

The Negotiations

[18] The applicant submitted its claim to the Minister regarding the Culbertson Tract in 1995. The claim was accepted for negotiation in 2003.

[19] On June 30, 2004, the Band Council passed a resolution agreeing to negotiate and on December 6, 2004, the parties signed the negotiation protocol. Section 2 of the protocol provides that all negotiations would be on a confidential and without prejudice basis:

> 2.01 The Parties agree that all negotiations shall be conducted on a "without prejudice" basis and with a view to achieving the settlement of this claim without the necessity of litigation.
>
> 2.02 All admissions, information and/or communications arising from, leading to, and/or obtained in the course of negotiations shall be considered privileged and confidential.
>
> 2.03 No such admission, information or communication may be tendered as evidence in any court or quasi-judicial proceeding.

[20] The parties met regularly between 2004 and 2008. Since then, progress has stalled.

[21] The applicant, through the affidavit of its Chief, states that there is no mandate to surrender the land. Upon taking office, the Chief and Council swore an oath to protect the land from seizure. Therefore, the Chief and Council will not accept a monetary settlement requiring that the land be surrendered. The evidence, as reinforced by its oral and written submissions, strongly suggests that the applicant is well-entrenched in this position.

[22] While the negotiations have been confidential, elected officials and government representatives have made certain public statements with respect to their parameters to newspapers and at town hall meetings.

[23] In an interview with *The Belleville Intelligencer* dated June 20, 2008, Member of Parliament Daryl Kramp (Prince Edward - Hastings, Ontario) was quoted as saying that the government "can't go around buying property, regardless of how valid claims are." The article explains that Canada had been negotiating how land could be returned, after accepting the claim as valid, but that negotiations had stalled after Canada announced that it may not be able to return all of the land.

[24] A community liaison officer engaged by the respondent held community meetings regarding the negotiation. In May of 2007, articles in *The Napanee Beaver* and *The Belleville Intelligencer* quoted the liaison officer as saying that Canada will not expropriate any land or force people to sell. He also explained that any settlement would likely involve cash or the transfer of non-occupied Crown land to the Band: "If the Mohawks of the Bay of Quinte wish to take that settlement money and make offers to people for that land, they have every right to do that. They may also come back to the government later and ask for reserve status."

[25] The then Minister, Chuck Strahl, made various statements to the media regarding the government's position. In a radio interview on June 24, 2008 with the Quinte Broadcasting Company, he explained that the government would not expropriate any land:

> Willing buyers, willing sellers, you know people that say well I am willing to sell to the First Nation and I'd be delighted to sell it, looking to get out of it and I'll sell it at market price. The money that the First Nation gets from the Federal government is that they use part of that money to purchase the land and they want to add it to their reserve and make it reserve status, then we do that [sic].

[26] In a separate broadcast on the same day, the Minster explained that the applicant could bring the claim to the Specific Claims Tribunal:

> They'll do the investigation, the First Nation can make their case and the tribunal will issue a settlement. But again, it is strictly cash. And so there is no land transfers in a specific claims process, it is strictly cash [sic].

[27] In a letter to the editor of *The Belleville Intelligencer* two weeks later, Minister Strahl wrote:

> … negotiations work towards financial settlements… Canada does not expropriate or buy land to settle specific claims. When negotiations with the [applicant] began in 2004, the First Nation agreed to negotiate under the specific claims policy – a policy that explicitly speaks of financial compensation.

[28] I note, parenthetically, that the Minister is correct in describing the limitation on the Specific Claims Tribunal. The Tribunal may award monetary compensation only, not the return of land.

Issues

[29] The reason for the impasse is readily apparent. The applicant will not surrender its interest in the Culbertson Tract. This means that one of the settlement vehicles available under the Policy

has been removed from the table *ab initio*. The Minister, in what appears to be a different position than that adopted in the *Turton Penn* negotiation, says he will not acquire the lands and houses of the homeowners on the Culbertson Tract. In sum, the Council will not take a financial settlement requiring surrender, and the Minister will not purchase the lands. It is clear why negotiations have not progressed over the past decade.

[30] To conclude this review of the context, it should be noted that while the Chief and Council emphasize that a surrender of the lands is not acceptable to them, the decision to accept or reject a surrender is not their decision, rather it is a decision of the Band membership. It may be that, if presented with a proposal comprising lands of greater long term strategic interest or value, the Band may accept the offer. This necessarily forms part of the legal landscape against which the *bona fides* of the Minister's negotiating position is assessed.

[31] The applicant raises two issues, which I would restate as whether the matter is justiciable, and whether the requirements of good faith have been satisfied.

Analysis

Preliminary Issue

[32] The Minister seeks an order striking out certain portions of the Confidential Affidavit of Chief Maracle on the basis that it contains evidence which is subject to settlement privilege and contrary to the terms of the negotiation protocol. These portions of the affidavit disclose the content of the negotiations and related correspondence between the parties.

[33] Settlement privilege exists to support the public interest in encouraging parties to resolve disputes without recourse to litigation. It protects information, particularly admissions, shared between parties in the course of negotiations. There are limited exceptions to settlement privilege, including where disclosure is necessary to serve another, overriding public interest.

[34] The necessary conditions for settlement privilege are set out in Sopinka et al, *The Law of Evidence in Canada*, 3rd ed., (Markham, ON: LexisNexis Canada Inc., 2009):

> (1) A litigious dispute must be in existence or within contemplation.
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed.
>
> (3) The purpose of the communication must be to attempt to effect a settlement.

[35] All three conditions are present. While the purpose of negotiation was to avoid litigation, the prospect of litigation was always on the horizon. The communications at issue were made with the intention that they be confidential and in an effort to reach a settlement, as evidenced by the terms of the settlement protocol.

[36] In addition to settlement privilege, the Minister relies on the express terms of the settlement protocol, reproduced above. The protocol provides that information and communications arising from the negotiation are confidential and cannot be tendered as evidence in a court proceeding.

[37] The confidential affidavit of Chief Maracle, including the attached "without prejudice" communications and statements regarding what took place during confidential negotiations are inadmissible. This evidence is covered by both the negotiation protocol, freely consented to by the

parties, and the evidentiary principles in respect of settlement privilege. Accordingly, the negotiation itself cannot be reviewed on administrative law grounds or otherwise.

[38] That said, all that is required for the applicant to advance its case can be derived from information readily available to the public. The Minister and his representatives have made public statements about the negotiations and the Policy, including its position regarding what would be an appropriate settlement of the claim. Such public statements by definition are not confidential and are properly before the Court. Importantly, the parties were able to fully argue their respective cases before this Court without resort to the privileged discussions.

[39] This is not to say that the Crown can shelter behind settlement negotiations to shield itself from an allegation that it has breached its duty to negotiate in good faith. If there were evidence that supported such an allegation, the important interest at stake may require examination of the settlement record to determine whether the duty to negotiate in good faith had been met. This, however, is not the case here. The evidentiary foundation for this application is available on the public record. Accordingly, it is unnecessary to consider whether ensuring that the Crown negotiates in good faith outweighs the interest in protecting privileged communications.

Whether the Matter is Justiciable

[40] The applicant submits that this Court may supervise the ongoing negotiation under the Policy, in order to ensure that the Crown acts honourably. The Minister emphasizes that the specific claims process is a voluntary alternative to litigation and submits that the applicant should withdraw from the process and commence an action if it is dissatisfied.

[41] It is well settled that the honour of the Crown is always engaged in its dealings with Aboriginal peoples. As a matter of honour, the Crown must negotiate in good faith: *Chemainus First Nation v British Columbia Assets and Lands Corporation*, [1999] 3 CNLR 8 (BCSC) at para 26; *Gitanyow First Nation v Canada*, [1999] 3 CNLR 89 (BCSC) at para 7.

[42] In *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at paragraphs 17 and 19, the Supreme Court of Canada explained the Crown's duty to act honourably:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.
>
> […]
>
> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41).

[43] *Haida Nation* established the Crown's duty to consult and accommodate when managing the forests of Haida Gwaii, in the context of the Haida Nation's unproven but credible assertion of Aboriginal title over the land and the right to harvest old-growth red cedar. While the present circumstances do not involve the duty to consult and accommodate, the general principles from *Haida Nation* provide guidance. Indeed, the Supreme Court of Canada was clear to say that the honour of the Crown binds the Crown "[i]n all of its dealings with Aboriginal peoples".

[44] The applicant also relies on *Gitanyow First Nation* (1999), a decision of the British Columbia Supreme Court regarding treaty negotiation. Justice Williamson granted a declaration that the Crown must negotiate in good faith. He noted that while the courts should avoid interfering in the negotiation process itself, they may assist in determining the duties of the parties. Justice Williamson also identified certain principles of good faith negotiation, including the absence of sharp dealing or oblique motive and the disclosure of relevant information. In an earlier decision involving the same parties, the applicant's claim was struck as it was characterized as a challenge to the Crown's negotiation position: *Gitanyow First Nation v Canada*, [1998] 4 CNLR 47 (BCSC).

[45] Additionally, in *Chemainus First Nation v British Columbia Assets and Lands Corporation*, [1999] 3 CNLR 8, Justice Melvin of the BC Supreme Court found that though the Crown is under no legal duty to negotiate or reach an agreement, once it commences negotiations it must do so in good faith.

[46] The duty to negotiate in good faith is not unique to the Crown. While different and potentially wider remedies may be available where the Crown does not negotiate in good faith with Aboriginal peoples, good faith in negotiations has been expected from parties, private and public, particularly where relief or assistance is sought from the Court. Although speaking in the context of the constitutional duty to consult First Nations, the Supreme Court of Canada recently referred to that dialogue as one of "mutual good faith": *Behn v Moulton Contracting Ltd*, 2013 SCC 26, para 42.

[47] The parties have identified only one previous decision of this Court regarding the Policy, *Alexis Nakota Sioux Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2006 FC 721. In that decision, Justice Harrington found the Minister's decision not to accept the Alexis Nakota Sioux Nation's claim for negotiation under the Policy to be reasonable.

[48] I accept the Minister's assertion that a court may not review or dictate its negotiation position. This would constitute interference with the negotiation process. However, as Justice Williamson held in *Gitanyow*, a declaration can issue where it may assist in clarifying the legal duties of the parties. In this case, there is the additional factor of the Policy which creates a legitimate expectation as to how the negotiation will unfold. The honour of the Crown is a justiciable issue and this Court can assist in clarifying the content of that duty in the present circumstance.

The Requirements of Good Faith

[49] The applicant argues that the Minister has fettered his discretion by stating that a land-based settlement cannot be considered. The applicant further submits that the Minister has failed the duty of good faith by engaging in what it describes as "surface bargaining", that is, pretending to want to reach an agreement but in reality having no intention to do so.

[50] The Policy states that if reserve land was not lawfully surrendered, the return of the land is one possible settlement option. As set out previously, Guideline 3(i) provides that:

> Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority, the band shall be compensated either by the return of the lands or by the current unimproved value of the lands.

[51] This is qualified by the statement that, as a "general rule" third parties will not be "dispossessed."

[52] The Policy, as updated in 2009, requires "certainty and finality" for the settlement of any claim but it does not go as far as to require the surrender of the disputed land in all circumstances:

> First Nations must, therefore, provide the federal government with a release and an indemnity with respect to the claim, and may be required to provide a surrender, end litigation or take other steps so that the claim cannot be re-opened at some time in the future. (emphasis added)

[53] It is open to the Minister to take a negotiation position that, in any specific dispute, the land must be surrendered. However, good faith negotiation would require an acknowledgement that the Policy contains no blanket prohibition on a settlement which involves returning the land without surrender. Additionally, the Policy leaves it open that, in appropriate circumstances, expropriation may be necessary for a just settlement of the claim. Nor is there a blanket prohibition on dispossessing third parties, only a statement that third parties generally will not be dispossessed.

[54] The applicant is not seeking expropriation. Rather, the applicant points to the Turton Penn model and requests that the Minister purchase the land from willing sellers over time and gradually incorporate that land into the reserve. It is not for this Court to say whether this option should be acceptable to the Minister.

[55] I also note that, following the Ontario Court of Appeal's decision in *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No 4804, should settlement negotiations fail a court

may, as an element of the range of remedies available, order the return of disputed land, depending on the particular factual context at issue.

[56] It may be open to the Minister to amend the Policy and remove the option of a land-based settlement. However, this is not accomplished merely by making public statements which contradict the Policy as published in 2009. There must be a "tangible and intelligible articulation" of any change in a public policy relied on by the parties: *Smith v Canada (Attorney General)*, 2009 FC 228, para 37. This principle applies with great resonance in the context of the Policy, as it constitutes the framework within which negotiations unfold.

[57] The Minister has chosen to make public statements regarding the negotiation, both personally and through representatives. The consequence of these public statements cannot be avoided. The negotiation protocol does not shield from scrutiny statements made to the public, outside of the confidential negotiations. While the Minister submits that these statements are not a complete summary of his position, he does waive privilege over the confidential negotiations so that the Court may place the public statements in context. Accordingly, the Minister must live with the consequences of making these statements.

[58] The Minister's statements indicate a fettering of his discretion. In particular, his letter states that, "Canada does not expropriate or buy land to settle specific claims." This statement is from 2008, one year prior to the re-issuance of the Policy which reaffirmed the possibility of a land-based settlement.

[59] The Policy explicitly provides for returning the land, or financial compensation, or both. To the extent that the Minister misreads or misunderstands the Policy to preclude that option, he has fettered his discretion. To be clear, this does not mean he must pursue a settlement with that component; he may choose not to. Apart from the fact that the content of the settlement negotiations is privileged, judicial review of how that discretion is exercised crosses the line into the review of the substance of the Minister's negotiation position. The Minister must, however, acknowledge the scope of the discretion and mandate he has under the Policy.

The Appropriate Remedy

[60] I do not accept the suggestion by the applicant that I remain seized of the negotiations and supervise their progress. Nor will I issue a declaration regarding what negotiation position the Minister must take or consider. This would be contrary to the negotiation protocol, which calls for confidentiality and would be an inappropriate intrusion into the voluntary negotiation process.

[61] Declaratory relief may be appropriate when there is a real dispute between the parties and when a declaration may have some practical effect in resolving the issues. Here, a declaratory order would have some practical effect in clarifying the scope of the Policy. It is in the interest of both the parties that there be clarity regarding the possible components of any potential settlement so that the parties may consider the full range of the options available.

[62] As the Supreme Court of Canada set out in *Solosky v The Queen*, [1980] 1 SCR 821, "[d]eclaratory relief is a remedy neither constrained by form nor bounded by substantive content,

which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.":

[63] Many of the factors to be considered by a court in deciding whether to grant a declaration weigh in the applicant's favour. First, the question is real, not theoretical. The negotiations remain extant. Second, the applicant has an identifiable interest in the relief, and the Minister a real interest in opposing.

[64] This then leads to the third consideration, whether the remedy will have any utility. On this point the parties have opposing views. The Minister sees no utility in a bare declaration as the negotiating position is within the Minister's discretion. This argument conflates two discrete issues: i) the substance of the Minister's negotiation position; and ii) the legal framework that governs that negotiation. The former is not in issue; the latter, however, is. It is hard to quantify the practical effect but in these circumstances the requirement for utility is satisfied by the desirability of bringing clarity to the law and a governing policy instrument.

[65] Clarity around the scope of the Policy is useful, even as the Minister retains discretion as to which path he wishes to follow. In the context of negotiations that appear to have been stalled for five years, there is a public interest in removing any uncertainty from the negotiation landscape.

[66] There is insufficient evidentiary foundation on which to conclude that the Minister has breached a duty of good faith. The applicant may wish to return to this Court and advance the argument that the settlement negotiations should be examined and they would, in turn establish the

breach of that duty. There are mechanisms under the Court rules that would allow this to be done, *in camera*. It is possible that that review would establish the breach of duty to negotiate in good faith. However, the case was not put on that basis.

[67] To conclude, it is an open question as to whether the parties will continue down the path of the Policy when neither of the settlement vehicles available under the Policy are palatable to the opposite party. Declaratory relief in this Court would perhaps move the parties closer to a resolution which would be in their joint and public interest.

JUDGMENT

THIS COURT'S JUDGMENT is that declaratory relief is granted in the following terms:

(1) A declaration that the Specific Claims Policy permits a settlement involving the return of land, including the Crown purchasing land from willing sellers on a voluntary basis and returning the land to the applicant.

(2) A declaration that the duty of good faith requires the Crown, in its dealings with the applicant, to acknowledge the distinction between the scope of administrative action available to it under the Policy, as opposed to the action it chooses to take.

(3) The remainder of the application is dismissed.

(4) Submissions on costs are due within twenty days of this decision.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-951-10
STYLE OF CAUSE:	**THE MOHAWKS OF THE BAY OF QUINTE v THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT**
PLACE OF HEARING:	Ottawa, ON
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APPEARANCES:

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