Alexis Nakota Sioux Nation v. Canada (Minister of Indian Affairs and Northern Development), 2006 FC 721 (CanLII)

Date: 2006-06-08
Docket: T-1333-05
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Date: 20060608

Docket: T-1333-05

Citation: 2006 FC 721

Ottawa, Ontario, June 8, 2006

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ALEXIS NAKOTA SIOUX NATION

Applicant

and

ANDY SCOTT, MINISTER OF INDIAN AFFAIRS AND

NORTHERN DEVELOPMENT AND FEDERAL INTERLOCUTOR

FOR METIS AND NON-STATUS INDIANS

Respondents

REASONS FOR ORDER AND ORDER

[1] In 1969, the Federal Government (Canada) granted Calgary Power Co. Ltd. an easement in the form of a right of way to build high voltage transmission towers across the Alexis Nakota Sioux Nation's Reserve 133, on the north shore of Lac Ste-Anne, approximately 60 kilometres northwest of Edmonton. The Band received a one-time lump sum payment in compensation, provision was made that Band members be hired to clear the right of way, and the land could be used for grazing without charge.

[2] The Band has taken the position that Canada breached its fiduciary obligations to it in failing to achieve fair and reasonable compensation. It failed to exact annual payments, failed to advise the Band that it could levy taxes on Calgary Power, and failed to assist it in realizing that tax revenue. The Band submitted a claim to the Department of Indian Affairs and Northern Development, a claim which was ultimately rejected.

[3] The matter was also considered by the Indian Claims Commission, an independent board of inquiry. It

recommended that Canada accept the claim for negotiation under what is known as the Specific Claims Policy on the grounds that a number of fiduciary duties owed to the Band were breached. The then Minister, the Honourable Andy Scott, decided not to follow that recommendation. He was of the view that the claim did not disclose an outstanding "lawful obligation" on Canada's part. This is a judicial review of that decision.

ISSUES

[4] Care must be taken to identify with precision the decision under review. The decision of the Commission to recommend that the claim be negotiated is not under review. Nor is the Court to decide if Canada is liable to the Band. What is under review is the Minister's refusal to negotiate, for to do so would be to admit liability. Did that decision meet the appropriate standard? Should the decision be set aside if it is not correct, or if it is not reasonable, or only if it is patently unreasonable?

THE FACTS

[5] The outstanding business between Canada and the Band relates to a 1959 electrical distribution line, a 1967 electrical distribution line and the 1969 electrical transmission line. Issues surrounding the 1959 line and the1967 line are not subject to this judicial review, and nothing more should be said as there is ongoing litigation in this Court relating thereto. The 1969 transmission line was not intended to distribute electricity to Band members. Rather, its purpose was to transmit electricity across the reserve from Calgary Power's plant south of it at Wabamun, Albertato Slave Lake in the north. The land to be traversed was undeveloped and covered by bush. The Band, by way of resolution, agreed to an easement for the construction of about 13 towers for a lump sum price of $100 per acre for a 100-foot right of way, which took up approximately 41 acres. However, a width of 150 feet would be cleared by Band members for $300 per acre. This covered another 20 acres. The land under easement could be used for pasture or agriculture as long as same did not interfere with the lines. Calgary Power was to be responsible for any crop, livestock or fire damage resulting from the operation of the line.

[6] The right of way came to pass as resolved. The Governor in Council approved the taking of the easement pursuant to what is now Section 35 of the Indian Act. The reserve in question falls within Treaty No. 6, which was concluded in 1876. In consideration of the surrender of land for the purposes of immigration and settlement, Her Majesty undertook to lay aside reserves provided that such sections thereof as may be at any time required for public works or buildings could be appropriated, against "due compensation". This obligation is currently reflected in Section 35 of the *Act*, which by no means records the full extent of Canada's duty and honour.

[7] As a matter of policy, Canada divides First Nation claims into two categories, specific and comprehensive. The claim advanced in this case is specific in nature. The policy goes back prior to 1982 when Canada published a Specific Claims policy entitled "Outstanding Business - A Native Claims Policy" which provides that Canada "will recognize claims by Indian Bands which disclose an outstanding "lawful" obligation, i.e. an obligation derived from the law, on the part of the federal government." This policy established a review process by what is now the Specific Claims Branch of the Department of Indian Affairs and Northern Development and in theory reduces the need for litigation.

[8] To further ameliorate the process, the Indian Claims Commission was established in 1991. If a Band's specific claim is rejected, or if the claim is accepted but no agreement can be reached on compensation, the Band may apply to have the Commission inquire into the matter. It is an independent commission of inquiry, with the powers set out in the *Inquiries Act*. It is neither a judicial nor a quasi-judicial board, and its report and recommendations are not legally binding.

[9] The Band submitted a claim to the Specific Claims Branch in 1995 alleging that Canada had breached its fiduciary duties in negotiating three electrical rights of way, including the 1969 right of way that is subject to this review.

[10] In 1998, the Band filed a covering action in the Federal Court, which action was later placed in abeyance while the Band pursued its specific claim. It is still on the books.

[11] As Canada had neither accepted nor rejected the claim, the Band asked the Commission to proceed with an inquiry on the basis that Canada be deemed to have rejected the claim. In April 2000, the Commission decided to proceed. In any event, by January 2001 Canada did formally reject the claim. The Commission released its report in March 2003 and recommended that the claim be accepted for negotiation.

[12] Finally, Minister Scott advised last year that he had decided not to accept the claim for negotiation. According to an accompanying letter from the Assistant-Deputy Minister, Canada disagreed with the Commission's finding that it had an "outstanding lawful obligation" to the Band. Ten years had passed with nothing to show.

ANALYSIS

[13] The parties were unable to point out any case in which the decision of the Minister to decline to follow the recommendations of the Commission was subjected to the functional and pragmatic approach to judicial review summarized in such cases as *Dr. Q. v. Royal Collegeof Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226 and *Law Society of N.B. v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247.

[14] Before the pragmatic and functional approach was developed, the Courts showed a very high degree of deference to discretionary decisions. In *Maple Lodge Farms v. Canada*, 1982 CanLII 24 (S.C.C.), [1982] 2 S.C.R. 2, the Court said:

It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[15] In *Baker v. Canada(Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817, it was held that discretionary decisions were subject to judicial review on a pragmatic and functional basis. As noted therein at paragraphs 51 and following: "The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries." Nevertheless, the discretion is not unlimited. It must be exercised in a manner consistent with the legislation (*Roncarelli v. Duplessis*, 1959 CanLII 1 (S.C.C.), [1959] S.C.R. 121).

[16] I do not think it necessary to carry out a probing analysis of which of the three standards of review applies: correctness, reasonableness simpliciter, or patent unreasonableness. Discretion carries with it a choice. The issue is not whether Canada is liable to the Band. The issue is whether the Minister should admit liability. Absent an admission, liability will ultimately be established by the Courts. Thus, when Minister Scott made his decision, there was no correct answer. The standard of review cannot be correctness.

[17] It is not necessary to chose between reasonableness simpliciter and patent unreasonableness. The initial presumption is that discretionary decisions are not to be set aside unless patently unreasonable (*Mount Sinai HospitalCentre v. Quebec(Minister of Health and Social Services)*, 2001 SCC 41 (CanLII), [2001] 2 S.C.R. 281. However, the decision of the Minister of Citizenship and Immigration to waive certain requirements of the *Immigration Act* on humanitarian and compassionate grounds is subject to review on the basis of reasonableness simpliciter, *Baker*, *supra*. I find that the Minister's decision was reasonable, and so it is not necessary to chose between the two standards.

Expropriation

[18] Section 35(1) of the *Indian Act* provides:

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or	35. (1) Lorsque, par une loi fédérale ou provinciale, Sa Majesté du chef d'une province, une autorité municipale ou locale,

local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.	ou une personne morale, a le pouvoir de prendre ou d'utiliser des terres ou tout droit sur celles-ci sans le consentement du propriétaire, ce pouvoir peut, avec le consentement du gouverneur en conseil et aux conditions qu'il peut prescrire, être exercé relativement aux terres dans une réserve ou à tout droit sur celles-ci.

[19] As held in *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85 (CanLII), [2001] 3 S.C.R. 746 at paragraphs 51 and following, once it has been determined that it is in the public interest to expropriate Indian land, a fiduciary duty arises on the part of Canada to expropriate or grant only the minimum interest required in order to fulfil the public purpose. This is part of Canada's *sui generis* fiduciary obligation. An easement does not constitute an outright alienation of land. Consequently, the land was not removed from the reserve and could be taxed pursuant to Band by-law as per Section 83 of the Act. However, prior to 1988 a Band had limited power to tax, which was contingent upon a declaration from the Governor in Council that it had "reached an advanced stage of development". After 1988, Bands were given a broad jurisdiction to tax, subject to the approval of the Minister. The Commission had been given to believe that there had been no declaration prior to 1988 that the Band had reached an advanced stage of development. This appears to be an error as an Order in Council to that effect was made in February 1974 (PC 1974-224).

[20] It is not necessary to plumb the extent of the Canada's fiduciary duty to the Band, and its honour because I am satisfied that there is a fairly arguable case that no matter the extent of the obligation, there has been no breach thereof. As stated by McLachlin J. as she then was, in *Blueberry River Indian Band v. Canada*, 1995 CanLII 50 (S.C.C.), [1995] 4 S.C.R. 344 (often cited by the name of the Band Chief, Joseph Apsassin):

¶ 37 If the Indian Act did not impose a duty on the Crown to block the surrender of the reserve, the further question arises of whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the Indian Act.

¶ 38 Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see Frame v. Smith, 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99; Norberg v. Wynrib, 1992 CanLII 65 (S.C.C.), [1992] 2 S.C.R. 226; and Hodgkinson v. Simms, 1994 CanLII 70 (S.C.C.), [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[21] I would consider the Minister's decision patently unreasonable if Canada's liability was "plain and obvious" (*Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (S.C.C.), [1990] 2 S.C.R. 959). I would consider his decision to be reasonable if there is a fairly arguable case that Canada is not liable (*Bains v. Canada(Minister of Employment and Immigration*, (1990), 109 N.R. 239 (FCA), [1990] F.C.J. No. 457 (QL). A reasonably arguable case does not reach the standard of the balance of probabilities. Indeed, a fairly arguable case anticipates that there may well be a fairly arguable defence. The Minister has an obligation not to pay out money gratuitously. There must be a legal basis. This Court will eventually decide in the action instituted in 1998 whether Canada is liable or not. In the circumstances, it would be highly speculative and irresponsible to admit that there was breach of a fiduciary duty.

[22] As regards the 1969 transaction, there was minimum impairment in that the Order in Council was for a right of way not for a fee simple. Furthermore, the one hundred foot strip and the additional fifty feet which were cleared were undeveloped bush. The Band was given liberty to use the 100 feet for agricultural or livestock purposes, and the additional 50 feet was improved out of the pocket of Calgary Power. The price Canada negotiated for the right of way was at least 5% higher than the going rate for the sale of land.

[23] The contention of the Commission is that the right of way should have been limited in time, with periodic renewals which would have generated more money, over time, for the Band. Indeed Canada was in the process of adopting that very policy. If that had been the case, the upfront money would have been less. Cash in hand is also a good thing. It is most speculative to say that less will eventually mean more and that therefore the Band's trust in Canada was misplaced. Canada has a fairly arguable case that it breached no fiduciary duty in its dealings with Calgary Power. As to assisting the Band in reaching an advanced stage of development so that it could have taxed the right of way prior to 1988, and its alleged duty to advise the Band on how to conduct its business, no case law has been submitted which supports the proposition that Canada had a fiduciary duty to put the Board in position to tax or to tell it how to exercise that taxing power. As Oliver Wendell Holmes Jr. said, "the prophecies of what the Courts will decide in fact and nothing more pretentious are what I mean by the practice of the law". The Minister certainly has a fairly arguable case that there is no legal liability in that regard, which, I must emphasize, is not to say that the Band, which relied heavily upon Canada, cannot make out a fairly arguable case that it was entitled to expect that the provision of legal advice arose naturally out of that relationship.

[24] As a general proposition, both parties are presumed to know the law and there is no duty on the part of one to bring aspects of a statute to the notice of the other (*Anticosti Shipping Co. v. Saint-Amand*, 1959 CanLII 61 (S.C.C.), [1959] S.C.R. 372.

[25] The Commission's premise is that the 1969 deal was inadequate. It conceded there was a lack of legal precedent to support the argument that a positive duty arose to assist the Band in the years following to draft and implement a taxing by-law. It relied on *Apsassin, supra*, to say that a fiduciary duty is a continuing one. However, in *Apsassin* the fiduciary duty was to revoke an erroneous grant of land. In this case, it was reasonable for the Minister to take the position that there was no error; that the lump sum payment in 1969 did not result in a loss to the Band and did not constitute the breach of a fiduciary duty. Even the Commission did not suggest that there was a duty at large to act as legal counsel to the Band.

[26] Consequently, the application for judicial review shall be dismissed.

ORDER

THIS COURT ORDERS that the application for judicial review of the decision of the Honourable Andy Scott, Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, dated 4 July 2005, refusing to implement the recommendations of the Indian Specific Claims Commission, is dismissed with costs.

"Sean Harrington"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1333-05

STYLE OF CAUSE: ALEXIS NAKOTA SIOUX NATION v.

ANDY SCOTT, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT AND FEDERAL INTERLOCUTOR FOR METIS AND NON-STATUS INDIANS

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: May 24, 2006

REASONS FOR ORDER

AND ORDER: HARRINGTON J.

DATED: June 8, 2006

APPEARANCES:

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