Date: 20080627

Docket: T-1985-07

Citation: 2008 FC 812

Ottawa, Ontario, June 27, 2008

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

DEVIL'S GAP COTTAGERS (1982) LTD.

Applicant

and

**THE CHIEF AND COUNCIL OF THE RAT PORTAGE BAND NO. 38B,
Also known as the WAUZHUSHK ONIGUM NATION and the said
RAT PORTAGE BAND NO. 38B and
THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Summary of Conclusions

[1] Blackstone observed, "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."[1] This case illustrates, however, that not every legal remedy is available for each perceived wrong.

[2] In this case, the applicant, Devil's Gap Cottagers (1982) Ltd. (Cottagers), is a corporation whose 33 shareholders each own a cottage located on a parcel of land that forms part of the reserve lands of the Rat Portage Band No. 38B, also known as the Wauzhushk Onigum Nation (First Nation). The parcel of land was leased to the Cottagers on January 4, 1988 by Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development (Minister). The lease was entered into with the consent of the First Nation.

[3] The Cottagers assert that an agreement was reached in 1997 with the Chief and Council of the First Nation to extend the term of the lease to December 31, 2020. The Cottagers further assert that, notwithstanding this agreement, the First Nation's counsel advised in 2007 that the First Nation did not want to extend or enter into a new lease with the Cottagers. As a result, this application for judicial review was commenced by the Cottagers, which seeks, among other things, the following relief:

a) a declaration that the refusal of the Chief and Council of the First Nation to extend the lease (impugned decision) is a breach of a pre-existing contractual obligation owed to the Cottagers to extend the term of the lease to December 31, 2020;

b) a declaration that the impugned decision is contrary to the law;

c) an order of *certiorari* quashing the impugned decision; and

d) an order of *mandamus* requiring the First Nation to honour the pre-existing contractual obligation and to request the Minister to extend the term of the lease to December 31, 2020.

[4] The application for judicial review is dismissed because I find that the Council of the First Nation was not acting as a "federal board, commission or other tribunal" when it made the

impugned decision. Accordingly, the Court does not have jurisdiction to deal with this application for judicial review. I also express doubt concerning the availability of the prerogative relief sought by the Cottagers because of the absence of a public law duty to support a claim to either *mandamus* or *certiorari*. These findings and observations do not prejudice the availability of private law remedies that may be sought by way of action.

[5] These reasons also deal with a motion by the Cottagers that the Court receive supplementary evidence and costs. That motion is dismissed because the evidence would not assist the Court on the issues that it finds to be determinative.

[6] No costs are awarded because the First Nation did not put in issue the equities of the Cottagers' claim and because the determinative issue was raised by the Court — not the respondent First Nation.

Facts

[7] The land in question is a contiguous block of 10.34 acres located on the shore of Lake of the Woods, south of Kenora, Ontario. The land was originally leased to the Canadian Pacific Railway and then to the Devil's Gap Lodge Limited. The Cottagers incorporated for the purpose of assuming the lease from the Devil's Gap Lodge Limited.

[8] On January 4, 1988, the Minister entered into a lease agreement with the Cottagers in respect of the land. On January 14, 1988, the First Nation passed band council resolution number 24, which consented to the lease. The lease was for a term of twenty years, commencing on January 1, 1985 and ending on December 31, 2004. The lease also provided the Cottagers with a

right to renew the lease for an additional three year period from January 1, 2005 to December 31, 2007.

[9] On August 23, 1997, the then chief of the First Nation and the Cottagers agreed in writing to extend "the existing lease expiry date to the year 2020." The Cottagers agreed to pay $5,000.00 to the First Nation as a "signing bonus." On December 10, 1997, the First Nation passed band council resolution number 6038, which approved the extension:

> BE IT FURTHER RESOLVED: that the Wauzhushk Onigum Band Council has extended the terms of the Devil's Gap Cottagers (1982) Ltd. Lease to the Year Two Thousand and Twenty (2020) with the same terms and conditions as the Original Lease.

[10] On June 24, 1999, the First Nation passed band council resolution number 7120, which again approved the extension of the lease.

[11] On July 15, 1999, the Cottagers delivered a cheque for $5,000.00 to the First Nation.

[12] According to the Cottagers, a third band council resolution confirming the extension of the lease was passed by the First Nation and reviewed with its representatives at a meeting on March 9, 2001.

[13] On January 14, 2004, the First Nation elected a new Chief and Band Council.

[14] On February 5, 2004, the newly-elected Chief and Band Council advised the Department of Indian and Northern Affairs Canada (Department) that it would be reviewing the Cottagers' lease

agreement and that it was the consensus of the Chief and Council not to sign any agreement until further notice.

[15] On March 12, 2004, the Cottagers acknowledged, in a status report to the Department, that a new lease agreement was “contingent” upon:

- approval to renew the lease from the First Nation in the form of a band council resolution; and

- the drafting of a new lease agreement and approval from both the Cottagers and the First Nation.

[16] On December 14, 2004, the Cottagers exercised their right to extend the lease to December 31, 2007.

[17] By letter dated August 31, 2006, the Department advised the Cottagers that band council resolutions stated that the former Band Council of the First Nation was willing to extend the lease and that “proper and timely process was followed by department staff in researching and preparing a draft copy of a new lease.” However, by the time the draft lease was completed, the new Band Council had been elected and had not indicated to the Department that it was willing to enter into a new lease.

[18] On December 27, 2006, the Chief of the First Nation informed the Cottagers that a new lease agreement would not be entered into beyond December 31, 2007:

> While the matter must be brought to the Nation members for a final ratification, it is the Chief and Council's position that no new lease will be entered into with the [Cottagers] beyond December 31, 2007.

[19] There is no evidence that the matter was ever brought before the members of the First Nation.

[20] On February 23, 2007, the Department informed the Cottagers that the lease could not be renewed without the consent of the First Nation. The Department also informed the Cottagers that the First Nation had said that it did not want to renew the lease.

[21] On March 4, 2007, the Cottagers wrote to the Chief of the First Nation asking that the First Nation "review/reconsider" its position on the extension of the lease.

[22] On October 18, 2007, the First Nation's legal counsel informed the Cottagers' legal counsel that the First Nation did not wish to extend the lease, or enter into a new lease, with the Cottagers.

[23] On December 31, 2007, the lease expired. To date, a new lease agreement between the Cottagers and the Minister has not been signed. The First Nation states that it regards the expired lease to be a "commercially unsuccessful venture" and that it now "has the opportunity to consider what is the highest and best use of the land for them."

Position of the Minister

[24] The Minister takes no position on the substantial points in issue in this application. His interest is simply to ensure that no order issues that would bind him to any particular course of action.

[25] The Minister does observe that there has been no delegation of authority to the First Nation under section 60 of the *Indian Act*, R.S.C. 1985, c. I-5 (Act), which would grant to the First Nation the right to exercise control and management over the reserve lands. Sections 53 and 60 of the Act are set out in the appendix to these reasons.

Procedural History

[26] No party to this proceeding raised the issue of the Court's jurisdiction. However, given that jurisdiction cannot be conferred by consent, the Court directed that the parties should be prepared at the hearing of the application to deal with two prior decisions of the Court which dealt with the issue of jurisdiction: *J.G. Morgan Development Corp. v. Canada (Minister of Public Works)*, [1992] 3 F.C. 783 (T.D.), and *Peace Hills Trust Co. v. Saulteaux First Nation* (2005), 281 F.T.R. 201 (F.C.).

[27] At the hearing, counsel for the Cottagers addressed these and other relevant authorities. Counsel for the First Nation advised that he had not received the Court's direction. Accordingly, a schedule was agreed to whereby counsel for the First Nation submitted written submissions on the issue of jurisdiction (which raised additional jurisprudence, including *Aeric Inc. v. Canada Post Corporation,* [1985] 1 F.C. 127 (C.A.)) and counsel for the Cottagers filed written reply submissions. The Minister did not make submissions on the issue.

The Jurisdictional Issue

[28] Subsection 18(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which is set out in the appendix to these reasons, vests exclusive original jurisdiction in the Federal Court to issue certain relief, including *certiorari*, *mandamus* and declarations, against certain federal boards, commissions and other tribunals. The phrase "federal boards, commissions or other tribunals" is defined in subsection 2(1) of the *Federal Courts Act* to mean:

> […] any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; [emphasis added]

[29] Relevant to this definition, and its requirement that the entity have, exercise, or purport to exercise jurisdiction or powers conferred by or under an Act of Parliament, is the following observation from *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 2007) (Brown & Evans), at §1:2257:

> Not all decisions of statutory or public bodies are subject to judicial review by way of the prerogative remedies or under the *Judicial Review Procedure Acts.* Indeed, notwithstanding the statutory origin of all powers exercisable by public bodies, courts usually have declined to review decisions which can be characterized as "commercial" as opposed to "public," on the ground that when exercising powers flowing from their contractual capacity, public bodies are not acting in a governmental capacity. [footnotes omitted]

[30] Consistent with this observation is the recent reminder from the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 28, that the function of judicial review is

"to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes." In this context, administrative process refers to "the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures." See: *Dunsmuir* at paragraph 27.

[31] The jurisprudence of this Court with respect to whether an entity is acting as a federal board, commission, or other tribunal was extensively reviewed by my colleague Justice Mactavish in *DRL Vacations Ltd. v. Halifax Port Authority*, [2006] 3 F.C.R. 516 (F.C.). I endorse and adopt both her review of the authorities and the conclusions drawn from that review. To Justice Mactavish's review of the authorities, I would only add the following case.

[32] In *J.G. Morgan Development*, the Court found that it did not have jurisdiction to review a decision by Public Works Canada to contract for leased office space. The Court found that the negotiations that led to the contract were conducted pursuant to the Crown's inherent right to contract and were not conducted pursuant to the *Government Contracts Regulations*, SOR/87-402. Thus, the final decision was not made pursuant to powers conferred by an Act of Parliament. It followed that Public Works Canada was not acting within the scope of the definition of a "federal board, commission or other tribunal."

[33] Following her review of the jurisprudence, Justice Mactavish distilled, at paragraph 48 of her reasons, a number of principles. The following are of particular relevance to the present case:

1. The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" in subsection 2(1) of the *Federal*

Courts Act is "particularly broad" and should be given a liberal interpretation: *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.).

2. The powers referred to in subsection 2(1) of the *Federal Courts Act* do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: *Wilcox v. Canadian Broadcasting Corporation*, [1980] 1 F.C. 326 (T.D.).

3. Although the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision-maker is a “federal board, commission or other tribunal” for the purposes of section 18.1 of the *Federal Courts Act*: *Aeric.*

4. While an organization may be a "federal board, commission or other tribunal" for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a "federal board, commission or other tribunal" in a given situation, it is necessary to have regard to the nature of the powers being exercised: *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.), aff’d (2000), 261 N.R. 100 (C.A.).

[34] Consistent with this jurisprudence are a number of decisions that have considered whether a band council is a “federal board, commission or other tribunal.”

[35] In *Sparvier v. Cowessess Indian Band*, [1993] 3 F.C. 142 (T.D.), Justice Rothstein wrote at page 150:

> It is well settled that for purposes of judicial review, an Indian band council and persons purporting to exercise authority over members of Indian bands who act pursuant to provisions of the Indian Act constitute a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Courts Act*. [references omitted and emphasis added]

[36] In *Ermineskin v. Ermineskin Band Council* (1995), 96 F.T.R. 181 (T.D.), then Associate Chief Justice Jerome found the Court to have jurisdiction to review a decision of the band council to delete the applicant's name from the band membership list. One of the factors he relied upon was that the rules applied by the band council, when exercising authority over band membership, "are a 'manifestation' of the powers conferred by the Government of Canada under the aegis of section 10 of the Indian Act." See: *Ermineskin* at paragraph 14.

[37] In *Wood Mountain First Nation v. Canada (Attorney General)* (2006), 55 Admin. L.R. (4th) 293 (F.C.), Justice Strayer found that the action taken by Indian and Northern Affairs Canada to acknowledge receipt of the results of a custom band election was not reviewable as an action of a "federal board, commission or other tribunal" because it did not have, exercise, or purport to exercise jurisdiction or powers conferred by or under an Act of Parliament. Justice Strayer wrote at paragraph 8:

> This Court has held that the reference to band custom elections in the definition of "council of the band" in section 2 of the Act does not create the authority for custom elections but simply defines them for its own purposes: see *Bone v. Sioux Valley Indian Band No. 290 Council*, 107 F.T.R. 133, at paras. 31-32. Thus such elections are not held under the authority of an Act of Parliament.

> Counsel for the Applicants did not draw to my attention any provision in the Act which gives to [Indian and Northern Affairs Canada] the authority to decide who has won such an election. It was held by Justice Paul Rouleau in *Lac des Mille Lacs First Nation et al. v. Canada (Minister of Indian Affairs and Northern Development),* [1998] F.C.J. No. 94 (QL), at para. 4 that the Minister has no authority over such elections. Nor does INAC have any role in determining what is band custom for the purpose of governance of an election: see *Chingee v. Chingee,* (1999), 153 F.T.R. 257, at para. 13. [emphasis added]

[38] Finally, in *Peace Hills Trust,* Justice Heneghan found the Court had no jurisdiction to review a band council resolution that directed Indian and Northern Affairs Canada and/or a third-party manager to withhold payments in respect of the debt owed to the applicant trust company. Justice Heneghan found that "administrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law… ." The band council resolution was not amenable to judicial review because it was "unrelated to the exercise of statutory authority pursuant to the Indian Act." See: *Peace Hills Trust* at paragraphs 61 and 62.

[39] Acknowledging that a band council may be a “federal board, commission or other tribunal” for some purposes, I turn to consider the nature of the power exercised by the Chief and Council in this case when, contrary to the earlier representations, they decided to refuse to consent to an extension of the Cottagers' lease.

[40] I begin by noting that in *Native Law,* looseleaf (Toronto: Thomson Carswell, 1994) (Woodward), it is stated at page 259 that:

> Bands exercise aspects of the control and management of reserve lands under various sections of the *Indian Act*. Under s. 18(2) the band council may authorize the Minister to “take” any lands in a reserve for the general welfare of the band. The band council may

> enact by-laws which deal with zoning, public works, building standards, etc. pursuant to s. 81 of the Act. The band council may authorize the Minister to operate farms under s. 58(1), and to dispose of non-metallic minerals, sand, gravel and clay, under s. 58(4). But the most extensive powers which may be exercised by a band council derive from a s. 60 declaration. [footnote omitted and emphasis added]

[41] As noted above, no grant has been made to the First Nation under section 60 of the Act. It follows from a review of the above referenced sections of the Act that a decision not to extend a lease does not fall within any aspect of the control or management of reserve lands dealt with in the Act. It is also worth noting that the Cottagers have pointed to no statutory power exercised by the Chief and Council in making the impugned decision. Indeed, as quoted above at paragraph 3, the Cottagers frame the dispute to be "a breach of a pre-existing contractual obligation" owed to them.

[42] In 1873, Treaty No. 3 was signed. The First Nation is a signatory to Treaty No. 3. Of relevance in this case is the following provision of that treaty:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; […] provided also that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained. [emphasis added]

[43] Thus, pursuant to Treaty No. 3, the First Nation retained the inherent right to consent to any lease of reserve lands.

[44] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, the Supreme Court of Canada considered the nature of a first nation's interest in reserve lands. Justice Dickson, as he then was, writing for the majority, noted at page 379 that "[t]heir interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision." [emphasis added]

[45] Given that nature of the First Nation's interest in the reserve lands, and the reservation of rights in Treaty No. 3, I am unable to conclude that the decision to refuse to proceed with a lease extension agreement is an exercise of any power conferred under the Act or any other Act of Parliament. As such, I find that the Chief and Council were not acting as a "federal board, commission or other tribunal" when they refused to consent to an extension of the Cottagers' lease. It follows that the Court does not have jurisdiction to deal with this application for judicial review.

[46] This result is also consistent with the Court's decision in *Peace Hills Trust*, where it found that a decision embodied in a band council resolution relating to a commercial loan agreement was a matter of private law, independent of the public interest. Band councils have been recognized as possessing an implied power to contract, without specific authority under the Act. See, for example: *Gitga'at Development Corp. v. Hill* (2007), 66 B.C.L.R. (4th) 349 (C.A.) at paragraph 27.

[47] In reaching this conclusion, I have considered the opposing arguments presented by the Cottagers. They may be summarized as follows.

[48] The Cottagers argue that there is a lack of clarity in the jurisprudence that has considered whether the Court has jurisdiction when a public authority is making “private” decisions. Particular reference was made to Brown & Evans at §7:2320. Three approaches are said to have evolved in the jurisprudence of this Court. The Cottagers argue that, under each approach, the Court has jurisdiction on the facts of this case.

[49] The three lines of jurisprudence are said to be exemplified by the following decisions:

i) *McCabe v. Canada (Attorney Geneal)*, [2001] 3 F.C. 430 (T.D.).

ii) *687764 Alberta Ltd. v. Canada (Minister of Health)* (1999), 166 F.T.R. 87 (T.D.).

iii) *J.G. Morgan Development*.

[50] The decision in *McCabe* is said to stand for the proposition that the purpose of the definition of "federal board, commission or other tribunal" in subsection 2(1) of the *Federal Courts Act* is to distinguish between types of entities — not types of actions. It is submitted that the *Federal Courts Act* applies to entities that derive their powers from Acts of Parliament. Once an entity is found to have powers conferred by an Act of Parliament, all actions of that entity are subject to judicial review by the Court.

[51] *McCabe* was decided without reference to the prior decisions referred to in *DRL Vacations*, and particularly without reference to the prior decisions of the Federal Court of Appeal in *Aeric* and

Jackson. In *Aeric*, at pages 135-138, the Federal Court of Appeal found that, while Canada Post was of a significantly public character, the determinative factor as to the existence of the Court's jurisdiction was whether the power being exercised by Canada Post was public in nature or, rather, a general power of management conferred upon it incidentally to allow it to carry out its commercial activities. Thus, *Aeric* held that what is dispositive is not the nature of the entity, but the nature of the power being exercised.

[52] The decision in *McCabe* cannot be relied upon to the extent that it is contrary to prior appellate jurisprudence.

[53] Turning to *687764 Alberta Ltd.*, this decision is said to represent the preferred approach that "[e]ach case involving a convergence of contractual and statutory rights must be considered on its own merits to determine whether judicial review is appropriate." See: *687764 Alberta Ltd.* at paragraph 21.

[54] What was before the Court in that case was a motion to extend time for the commencement of an application for judicial review. The Court's comments are *obiter* (see particularly paragraph 28) because the decision turned upon whether the application carried any reasonable prospect of success. The subsequent endorsement by the Court of Appeal also reflects the narrow issue before the Court. Also, again, the Court was apparently not referred to the prior appellate jurisprudence. For these reasons, the case is of limited assistance and does not vary the principles established by the Federal Court of Appeal as set out above.

[55] The decision in *J.G. Morgan Development* is said to stand for the principle that, if the decision at issue is of a private nature, it is not reviewable. In my view, this decision is consistent with the jurisprudence of the Federal Court of Appeal. More precisely stated, it stands for the principle that it is the source or character of the power being exercised that determines whether an entity is acting as a “federal board, commission or other tribunal” and therefore subject to review.

[56] The Cottagers make two arguments as to why the Chief and Council were "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" so as to make the impugned decision reviewable. The Cottagers base their arguments upon the following passage from *Goodtrack v. Lethbridge* (2003), 242 Sask. R. 45 (Q.B.), at paragraphs 6 and 7:

> It is well-established that an Indian band council is a "federal board" within the meaning of that term in the *Federal Court Act*. In *Canatonquin v. Gabriel*, [1980] 2 F.C. 792, the Federal Court of Appeal held that as a consequence of an Indian band council being a "federal board", s. 18 of the *Federal Court Act* gave the Federal Court, Trial Division, jurisdiction in the matter. It is interesting to note that the court also held that the Federal Court had jurisdiction even though the validity of the impugned council election was governed by customary Indian law and not by a federal statute.
>
> In discussing the powers of an Indian band council, Cameron J.A. in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Saskatchewan Labour Relations Board* (1982), 15 Sask.R. 37 at 44 (C.A.), stated:
>
> > ... [A]n Indian band council is an elected public authority, dependent on parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power-delegated to it by parliament-in relation to the Indian reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the minister and the representative of the band with respect to the

> administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the minister of certain of his statutory authority relative to the reserve.
>
> Therefore, it is clear that the powers of an Indian band council are delegated by Federal Parliament. Its powers are conferred under the *Indian Act*, R.S.C. 1985, c. I-5.

[57] Two things are said to flow from this passage. First, a band council is said to obtain its existence, powers, and responsibilities from Parliament. It follows that the decision to refuse to extend the lease flows from powers conferred by Parliament. Second, the refusal by the Chief and Council to extend the lease is said to have played a decisive role in respect of the exercise of the Minister's statutory authority.

[58] Dealing first with the argument that a band council obtains its existence, powers, and responsibilities from Parliament, as stated by Woodward, the *Whitebear Band Council* decision, which was relied upon in *Goodtrack*, exemplifies the narrow conception of a band council and its powers. Woodward observes that the powers of band councils, in carrying out their functions under the Act, are increasingly founded in their status as governments and not merely as agents of the federal government. See: Woodward at 7§690. The broader view recognizes that band councils possess at least all of the powers necessary to effectively carry out their responsibilities, even if not specifically provided under the Act:

> It may be said that band councils possess at least all the powers necessary to effectively carry out their responsibilities under the *Indian Act*, even when not specifically provided for. There is an implied power to contract, without the need for authority under the *Indian Act*. [footnotes omitted]

See: Woodward at 7§700.

[59] In addition, the notion that a band council is dependent upon Parliament for its existence and powers is inconsistent with jurisprudence of this Court, such as *Wood Mountain*. In the above-quoted passage from that decision, Justice Strayer notes that, while band councils elected by custom are recognized under the Act, custom elections themselves are not held under the authority of the Act or any Act of Parliament. This is contrary to any notion that band councils are dependent upon Parliament for their existence and powers, and reflects the broader view that the powers of band councils are not conferred exclusively by the Act.

[60] It follows that the Cottagers have not satisfied me that Parliament is the sole source of a band council's powers so that the Council was exercising a statutory authority when it refused to extend the lease.

[61] Turning to the Cottagers' argument that the Council's decision to refuse to extend the lease played a "decisive role" in the Minister's decision not to extend the lease, I accept that the Department advised the Cottagers by letter dated February 23, 2007 that the "lease cannot be renewed without the consent of the First Nation." As a matter of fact, the decision of the First Nation was decisive in that the Department would not extend or renew the lease without its approval.

[62] In the context of that decisive role, the Court is asked to consider the following:

- The First Nation agreed to surrender the land for leasing.

- The land is leased by the Minister pursuant to its statutory powers under the Act.
- The policy of the Minister regarding the leasing of surrendered land is to obtain the consent of Chief and Council to any lease, extension, or addendum.
- While the ultimate authority regarding the leasing of surrendered land rests with the Minister, that authority will not be exercised without Chief and Council agreeing on the "key elements" of every lease. Those key elements are the name of the lessee, the rent, the term of the lease and the proposed use of the land. The facts of this case show that this agreement is a necessary pre-condition to the Minister exercising his/her statutory authority.
- By agreeing to the lease in 1988, the Chief and Council satisfied the necessary pre-condition for the Minister to exercise his/her statutory authority over the subject land.
- By agreeing to extend the lease to 2020, the Chief and Council satisfied the necessary pre-condition for the Minister to exercise his/her statutory authority over the subject land.
- By deciding to breach its contractual commitment, the Chief and Council removed the necessary pre-condition for the Minister to exercise his/her statutory authority over the subject land.

[63] Those facts are not seriously challenged by the First Nation.

[64] Those facts do not, in my view, change the nature or source of the power exercised by the Chief and Council. The power to refuse to extend the lease, and perhaps to thereby breach an existing contract, did not flow from any grant of statutory authority or from any power that is public

in nature. Rather, the power to refuse is the result of the First Nation's inherent interest in its lands and the reservation of its rights to consent in Treaty No. 3.

[65] For completeness, I note that the Cottagers also rely upon the Court's conclusion in *Williston v. Canada (Minister of Indian Affairs and Northern Development)* (2005), 274 F.T.R. 260 (F.C.), that, by operation of subsection 18(3) of the *Federal Courts Act*, the decision of the first nation in that case not to renew a lease on reserve lands could only be challenged by way of judicial review. Subsection 18(3) of the *Federal Courts Act* is set out in the appendix to these reasons.

[66] I have considered this case carefully and note the following. First, it does not appear that any issue was raised in *Williston* with respect to whether the decision at issue was made by a "federal board, commission or other tribunal." Second, that may reflect the fact that the first nation in *Williston* had been delegated land management authority pursuant to sections 53 and 60 of the Act. The agreed statement of facts in *Williston* recorded that the Minister had "appointed the Chief and Councillors of the First Nation as elected from time to time to manage in accordance with the Indian Act and the terms of the Surrender" the relevant land. [emphasis added] Such delegation of authority under the Act may well have been sufficient to have conferred a statutory or public power upon the first nation.

[67] For these reasons, the application for judicial review will be dismissed because the Court does not have jurisdiction to hear the matter.

[68] Three other matters require comment.

The Relief Sought

[69] As noted above, the relief sought by the Cottagers includes *mandamus* and *certiorari*. In view of my conclusion as to jurisdiction, it is not necessary, and may well not be appropriate, for me to consider any further issue in any detail.

[70] However, in the event that I am wrong in my conclusion about jurisdiction, I express doubt as to whether either prerogative remedy would be available to the Cottagers. In this regard, it is worth noting that the defining characteristic of the prerogative remedies is that they are available only in respect of a breach of a duty imposed by public law. See: Brown & Evans at §1:1200.

[71] Where the impugned decision-maker has the characteristics of both public and private law paradigms, it is necessary to consider a number of factors, including:

- the nature of the decision-maker, which considers the extent to which it is subject to governmental control;
- the source and nature of the decision-maker's power, which considers whether it is statutory or derives from another source such as contract; and
- the function of the decision-maker, which considers whether it advances the interests of members (that is, the function enables the body to conduct business) or serves the broader public interest (that is, the function is one that would otherwise be undertaken by government).

See: Brown & Evans at §1:2252.

[72] One of the requirements for the issuance of *mandamus* is the existence of a public legal duty to act. See: *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (C.A.) at page 766.

[73] With respect to this requirement, Brown & Evans state at §1:3220:

> [T]he duty must be "public" and not "private" in order to be subject to mandamus. Therefore, and although such a duty can be implied, there must be a statutory provision imposing and defining the duty which is sought to be enforced. [footnotes omitted and emphasis added]

[74] To similar effect, Wade and Forsyth, in *Administrative Law*, 9th ed. (Oxford: Oxford University Press, 2004), write at page 621:

> A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. [footnotes omitted and emphasis added]

[75] For the reasons set out above, including particularly the absence of any statutory provision "imposing and defining the duty" sought to be enforced, I doubt whether there is any "public" law duty to support a claim to *mandamus* or *certiorari*.

The Existence of Alternate Relief

[76] By virtue of its expeditious process, I can well understand the attractiveness of judicial review as a remedy to the Cottagers. While I have found that the remedy of judicial review is not available to them on the facts of this case, nothing in that conclusion precludes recourse to private law remedies, including damages and specific performance, that may be available by way of action.

The Motion for New Evidence

[77] After the hearing of the judicial review, a teleconference was scheduled for the purpose of ascertaining whether the Minister wished to make submissions on the jurisdictional issue. Before that teleconference was to be heard, the Cottagers filed a motion seeking leave to file supplemental affidavits. Those affidavits were said to respond to an argument made by counsel for the First Nation and to questions raised by the Court. The motion was opposed by the First Nation. It was agreed that the motion would be dealt with on the basis of the written submissions of the parties.

[78] The specific evidence the Cottagers wish to adduce:

- responds to the assertion that their conduct after 2002 indicated that they were not relying upon the agreement made with the Chief and Council in August, 1997; and

- responds to a comment by the Court to the effect that there was no evidence with respect to the sale price of cottage properties.

[79] The Cottagers argue that the evidence should be received if it meets the test set out in *Mazhero v. Canada (Industrial Relations Board)* (2002), 292 N.R. 187 (C.A.). In that case, the test was expressed to be whether the additional material will serve the interests of justice, assist the Court, and not seriously prejudice the other side. It was further stated that any supplementary affidavit should not deal with material that could have been made available at an earlier date, nor should it unduly delay the proceeding.

[80] In my view, the proposed supplementary evidence will not assist the Court because it is not relevant to the issue that the Court has found to be determinative. Accordingly, the motion is dismissed.

Conclusion and Costs

[81] Both the Cottagers and the First Nation seek costs. The Minister, who requested that he be added as a party to the application, very properly did not seek costs.

[82] I am mindful that, while costs generally follow the event, costs are always in the full discretion of the Court. Relevant factors include those set out in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106.

[83] Two factors are significant to the exercise of my discretion in this case.

[84] First, Chief Skead of the First Nation, in his affidavit, is careful not to deal with matters that occurred prior to 2004 (except for a passing reference to one earlier dispute over the fair market value of the rent payments). The First Nation does not put in issue the equities of the Cottagers' claim.

[85] Second, it was the Court, and not the First Nation, that raised the issue of jurisdiction.

[86] In my view, these factors make this an appropriate case for each party to bear their own costs.

[87] The application for judicial review is therefore dismissed, without costs.

1. William Blackstone, *Commentaries on the Laws of England*, vol. 3 at 23.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed, without costs to any party.

"Eleanor R. Dawson"
Judge

APPENDIX

Sections 53 and 60 of the *Indian Act* read as follows:

53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be, (a) manage or sell absolutely surrendered lands; or (b) manage, lease or carry out any other transaction affecting designated lands.	53(1) Le ministre ou son délégué peut, conformément à la présente loi et aux conditions de la cession à titre absolu ou de la désignation: a) administrer ou vendre les terres cédées à titre absolu; b) effectuer toute opération à l'égard des terres désignées et notamment les administrer et les donner à bail.
(2) Where the original purchaser of surrendered lands is dead and the heir, assignee or devisee of the original purchaser applies for a grant of the lands, the Minister may, on receipt of proof in such manner as he directs and requires in support of any claim for the grant and on being satisfied that the claim has been equitably and justly established, allow the claim and authorize a grant to issue accordingly.	(2) Lorsque l'acquéreur initial de terres cédées est mort et que l'héritier, cessionnaire ou légataire de l'acquéreur initial demande une concession des terres, le ministre peut, sur réception d'une preuve d'après la manière qu'il ordonne et exige à l'appui de toute demande visant cette concession et lorsqu'il est convaincu que la demande a été établie de façon juste et équitable, agréer la demande et autoriser la délivrance d'une

concession en conséquence.

(3) No person who is appointed pursuant to subsection (1) or who is an officer or a servant of Her Majesty employed in the Department may, except with the approval of the Governor in Council, acquire directly or indirectly any interest in absolutely surrendered or designated lands.

(3) La personne qui est nommée à titre de délégué conformément au paragraphe (1), ou qui est un fonctionnaire ou préposé de Sa Majesté à l'emploi du ministère, ne peut, sauf approbation du gouverneur en conseil, acquérir directement ou indirectement d'intérêts dans des terres cédées à titre absolu ou désignées.

[…]

[…]

60(1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

60(1) À la demande d'une bande, le gouverneur en conseil peut lui accorder le droit d'exercer, sur des terres situées dans une réserve qu'elle occupe, le contrôle et l'administration qu'il estime désirables.

(2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

(2) Le gouverneur en conseil peut retirer à une bande un droit qui lui a été conféré sous le régime du paragraphe (1).

Subsections 18(1) and 18(3) of the *Federal Courts Act* read as follows:

18(1) Subject to section 28, the Federal Court has exclusive original jurisdiction
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a),

18(1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;
b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre

including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
[…]	[…]
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1985-07
STYLE OF CAUSE:	DEVIL'S GAP COTTAGERS (1982) LTD., Applicant and THE CHIEF AND COUNCIL OF THE RAT PORTAGE BAND NO. 38B ET AL., Respondents
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	MAY 7, 2008
SUPPLEMENTARY WRITTEN SUBMISSIONS:	May 12, 2008 and May 14, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	DAWSON, J.
DATED:	JUNE 27, 2008

APPEARANCES:

WILLIAM G. HAIGHT	FOR THE APPLICANT
WILLIAM J. MAJOR	FOR THE RESPONDENTS Chief and Council of the Rat Portage Band No. 38B et al.
PAUL ANDERSON	FOR THE RESPONDENT Minister of Indian Affairs and Northern Development

SOLICITORS OF RECORD:

DUBOFF EDWARDS HAIGHT & SCHACHTER BARRISTERS AND SOLICITORS WINNIPEG, MANITOBA	FOR THE APPLICANT
KESHEN & MAJOR BARRISTERS AND SOLICITORS KENORA, ONTARIO	FOR THE RESPONDENTS
JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT