**Date: 20090316**

**Docket: T-1682-07**

**Citation: 2009 FC 261**

**Ottawa, Ontario, March 16, 2009**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**JAMES EDWIN COTTRELL**

**Applicant**

**and**

**CHIPPEWAS OF RAMA MNJIKANING FIRST NATION BAND COUNCIL**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This application is a judicial review under section 18.1(4) of the *Federal Courts Act*, R.S., 1985, c. F-7, of the Chippewas Rama Mnjikaning First Nation Band Council (Band Council) decision, dated November 1, 2006, (Decision) in which the Band Council ordered that the Applicant, James Cottrell, be evicted from his rental accommodations on the Rama First Nation Reserve, located at Rama, Ontario.

## BACKGROUND

### Bases for Termination of the Applicant's Tenancy

[2] The Applicant is a status Indian and a member of the Chippewas of Rama Mnjikaning First Nation Band. In 1993, he applied to the Band Council for housing on the reserve. On November 17, 1993, he purchased a lot on the reserve from his aunt, Gail Anderson, for $2000. He became the registered owner of Lot 52-3 based on Plan No. 60012, located on the Mnjikaning Indian Reserve, No. 32, Ramara Township.

[3] The Band provides social housing for the benefit of low-income members of its community. The Band entered a Rental Purchase Agreement (Lease Agreement) with the Applicant on March 9, 1994, which became effective April 1, 1994. As part of the Lease Agreement, the Applicant transferred his property interest in Lot 52-3 to the Band. He resided in a house that he helped to build.

[4] Under the Lease Agreement, the Applicant paid rent that was based on his income. The Agreement further provided that, after 15 years, the Applicant had the option of buying the house and the land from the Band for the sum of $1. That right was to vest on April 1, 2009.

[5] The Respondent submits that as early as the summer of 2005, the First Nation made accommodation for the Applicant by furnishing him with a walker and a wheelchair at its expense.

By the fall of 2005, the First Nation offered to accommodate the Applicant in its ECU (ECU) so that he could be assessed by a doctor, which the Applicant declined. The Respondent alleges that the Applicant was admitted to the ECU as early as November 2005 but was ordered to leave by November 23, 2005 due to his inappropriate behaviour, including allegations of sexually inappropriate conduct towards female staff, and loud outbursts which caused alarm to the other, mostly elderly, residents. Following promises to improve his behaviour the Applicant was permitted to stay until January 31, 2006, when he returned to his home in accordance with his wishes. Upon his return home from the ECU, the Band cleared the Applicant's driveway, cleaned his home, delivered and set up a hospital bed and installed grab bars and other equipment in the Applicant's home to assist him to live independently. The Applicant denies that he ever stayed in an ECU.

[6] The Respondent states that the Applicant was provided from time to time with home care services by the First Nation and by the Community Care Access Centre (CCAC), but CCAC and the Band have been unable to continue these services because of concerns about the Applicant's conduct during their provision. The Respondent submits that from the time the Applicant was discharged from the ECU, the Applicant treated "911" emergency services as home care services, making inappropriate requests such as a food delivery.

[7] The Respondent states that in the two weeks prior to the Decision to remove the Applicant to hospital on November 1, 2006, emergency services had attended on several occasions. They observed that the Applicant was living in lamentable and unhealthy conditions. He was generally unclothed below the waist and was soiled with human waste and unable to control his bodily

functions or clean himself. The residence was soiled with human waste and the environment was noxious. The Applicant had at times expressed a desire to harm himself and had used belligerent language towards emergency personnel. The Applicant's mother, who had undertaken to look after him after his discharge from the ECU, was unable to do so because of her fear of the Applicant's behaviour when he drinks alcohol.

**Applicant's History of Arrears**

[8] Pursuant to Article 6(a) of the Lease Agreement, the Band was entitled to evict the Applicant for the late payment of rent. The Applicant had built up rental arrears of about $5000 since March 1997. Between February 6, 2001 and March 6, 2006, the Band sent at least five letters to the Applicant regarding the arrears. In the letters there was no indication that the Band was contemplating eviction of the Applicant based on the arrears.

[9] In late 2005, the Applicant's mother, Christina Lawson, spoke to Randy McKinnon, the Band's Property Manager about paying off her son's arrears. It is alleged that her offer to pay down the debt was refused. The Respondent contends that the Property Manager for the First Nation, Mr. McKinnon, did not tell the Applicant's mother that she could not "pay off" the Applicant's rental arrears, but advised her that the she would have to visit the Finance Department, as payments were not made directly to him. The Respondent states that the Applicant's mother did not try to pay Mr. McKinnon; nor did he refuse to accept payment. Mr. McKinnon advised the Applicant's mother that she could not pay a lump sum to cover the remaining balance such that the Certificate of

Possession would be transferred to the Applicant. He explained that this was a result of the contractual arrangement between the First Nation and the Canada Mortgage Housing Corporation.

**Applicant's Health**

[10] The Applicant, since 2005, has suffered from a severe and rare neurological illness, which is characterized by progressive weakness in his legs and arms but which does not affect cognitive functioning. The Applicant requires the use of an electric wheelchair and has difficulty using his hands. The Applicant cannot work and his only source of income is the Ontario Disability Support Program and a Band annuity.

[11] The Applicant also needs support and accommodation to live independently. His wheelchair was provided to him by the Band and he receives some equipment and a few hours of support services per week from the CCAC which is located off-reserve, as well as support from his elderly mother. The Applicant has no wheelchair ramp to enter his house and no emergency contact services for assistance. The Applicant sometimes uses alcohol excessively.

[12] The Respondent notes that the Applicant acknowledges that he required support in his home and that he has difficulty preparing food, cleaning his home, going to the bathroom and bathing. He also acknowledged that he was using emergency services because they are the only other source of support he could access.

**Meeting Between Family Members and the Band**

[13] The Applicant's mother wrote to the Band's Chief on September 21, 2006 seeking assistance on her son's behalf. On October 23 or 24, 2006**,** the Applicant's mother and his brother, Rick, met with Chief Sharon Stinson Henry, Band Councillors and other officials, including Ms. Sawyer, the Band's Director of Health and Social Services. The officers advised the Applicant's mother that they were "considering" evicting the Applicant because of his inability to live independently and, possibly, because of his arrears. The Applicant's mother reiterated her requests for support for her son. The Applicant's mother alleges that nothing was solved during this meeting and that she "did not believe anything would happen."

[14] The Respondent submits that the Band consulted with the Applicant's mother and brother over a period of time and that Ms. Sawyer was frequently in contact with the Applicant and his mother. This contact culminated in the October 23 or 24, 2006 meeting between the Band Council, Ms. Sawyer and the Applicant's mother and brother.

[15] At that meeting, the Respondent contends that the Band Council sought the input of the Applicant's family members and they both agreed that something had to be done about the Applicant's future care. The Applicant's family agreed that they would ask the Applicant to give his mother a power of attorney for property and personal care. The Respondent states that, at the meeting, Ms. Elaine Conroy, a member of Community Care Access Centre in Orilla had with her the necessary intake forms for a long-term care facility in Toronto which only required the

Applicant's signature. The Applicant's admission to a long-term care facility was discussed with his brother and mother. Following this meeting, the Applicant would not agree to move to a long-term care facility or give power of attorney to his brother or mother. The Respondent states that, after this consultation, the Applicant's mother was advised of the intended use of Article 12 of the Lease.

[16] After the meeting, the Applicant's mother relayed the content of the meeting to the Applicant who was then in an intoxicated state. Neither the Applicant's mother nor the Applicant believed that the Band could or would evict him.

[17] A meeting of Band officials was held on October 31, 2006 to discuss the Applicant's living situation, but neither the Applicant nor his family members were invited. After the meeting, the Applicant's mother and Ms. Sawyer spoke on the phone. The content of this conversation is disputed but the Applicant's mother alleges that the Band was only "considering" evicting the Applicant.

[18] The Applicant says that neither the Band Council nor any Band officers informed him of the nature of the complaints against him or of their intention to evict him. As well, the Band Council did not grant the Applicant the opportunity to make representations to them regarding their concerns.

**Termination of the Applicant's Tenancy**

[19] On November 1, 2006, the Applicant's wheelchair lost power. He had to leave his wheelchair and crawl along the floor to reach a phone. He called the Band's Emergency Medical Services for assistance in moving his wheelchair to a location where it could be recharged. Two Band paramedics arrived and returned the Applicant to his wheelchair and moved it to a location for recharging. Against his will and his protests, the paramedics loaded the Applicant into a waiting ambulance and transported him to the hospital. The Respondent contends that the Applicant was taken to Soldiers' Memorial Hospital for a determination to be made under the *Mental Health Act.*

[20] Upon his arrival at the hospital, Ms. Sawyer approached the Applicant with a hand-delivered Eviction Order in the form of a letter signed by one of the Band's Housing Officers, Andrea Edgar, and dated November 1, 2006. Ms. Sawyer then verbally advised Mr. Cottrell that he was being evicted. The Eviction Order states as follows:

> This letter will serve as your immediate notice of eviction at 5759 Willison Side Road, in accordance with Rama Mnjikaning Chief and Council Motion.
>
> I refer to the Rental Purchase Agreement made on the 8th day of March 1994 between The Chippewas of Rama First Nation (First Nation) and yourself, James Edmin Cottrell (Tenant).
>
> Section 12-Band's Right of Termination
>
> > Should at any time during the lease the Tenant become incapable of living under his own power, mind and Termination Independence, the First Nation may at its discretion make arrangements to have the Tenant placed in appropriate accommodation after consultation with the Tenant's relative, or friend if any is named by the Tenant on his application. In such event, this lease is automatically terminated and the First Nation may move the personal belongings and store same at the Tenant's expense. The First Nation is free to re-lease the Lease Premises.

> Subject to the above, YOU ARE HEREBY GIVEN NOTICE to immediately vacate lot 5203 also known as 5759 Willison Side Road. [emphasis in original]

[21] The Applicant says he was unaware of the Band's intention to evict and he had no clothing or items gathered to take with him. Since November 1, 2006, the Applicant's house has been locked and vacant. His possessions are inside. The Band has not removed the Applicant's possessions to storage or re-let the premises and is awaiting the outcome of this application. The premises are needed for other band members.

**Post-Eviction**

[22] The eviction rendered the Applicant homeless. He has not obtained a permanent residence, and since then he has been transient and residing at the Hospital and elsewhere.

[23] On March 8, 2007, Justice Phelan granted the Applicant's motion for an extension of time to file this application. On September 17, 2007, the Federal Court of Appeal dismissed the Band Council's appeal and affirmed Justice Phelan's order.

**ISSUES**

[24] The Applicant submits the following issues:

1) Whether the Band Council owed a duty of fairness to him;

2) If so, what the content of that duty was; and

3) Whether the Band Council satisfied the duty in the circumstances.

**STANDARD OF REVIEW**

[25] The Applicant submits that the Band Council, as a public body endowed with statutory powers to administer Band affairs, and one that was in a fiduciary relationship with the Applicant, owed him a duty of fairness when terminating the Lease Agreement.

[26] The Applicant states that there is a duty of fairness upon every public authority making an administrative decision which affects an individual's rights, privileges or interests: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 at paragraph 14 (*Cardinal*).

[27] The Applicant also states that the existence of procedural obligations and their extent depends on: 1) the nature of the decision; 2) the relationship between the decision-maker and the person asserting the claim to procedural fairness; and 3) the effect of the decision on the person's rights: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at paragraph 24 (*Knight*).

[28] As discussed in *Angus v. Chipewyan Prairie First Nation Tribal Council*, [2008] F.C.J. No. 1161, jurisdictional issues, specifically whether a Band Council acts beyond its jurisdiction in passing resolutions, are reviewable on a standard of correctness: *Dunsmuir v. New Brunswick* 2008 SCC 9. If a Band Council is found to have acted within its jurisdiction, then the applicable standard of review involves issues of fairness and natural justice and should be reviewed under a standard of

correctness: *Pete v. Canada (Attorney General)* 2005 FC 993 at paragraph 75. *Vollant v. Sioui*, [2006] F.C.J. No. 611 also holds that band council decisions are reviewable under the standard of correctness.

**ARGUMENTS**

**The Applicant**

**Administrative Decision**

[29] The Applicant submits that administrative decisions that have an affect on a specific individual are subject to the duty of fairness. In addition, decisions that are final in nature are more likely to attract the duty of fairness than preliminary or interim decisions.

[30] The Applicant points out that an Indian band council is created by the *Indian Act* and, derives its power exclusively from Parliament. It is an elected public authority whose main function is to administer band affairs. When exercising its authority over band members, an Indian band council constitutes a public body subject to judicial review. This means that band members are entitled to due process and procedural fairness in the procedures that affect them: *Indian Act, 1985*, R.S.C. 1-5 at subsection 2(3) (Act); *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan*, [1982] 3 W.W.R. 554 (Sask. C.A.) at paragraphs 13-19; *Paul Band v. R.*, [1984] 2 W.W.R. 540 (Alta. C.A.) at paragraph 21 and *Sparvier v. Cowessess Indian Band (T.D.)*, [1993] 3 F.C. 142 (F.C.T.D.) at paragraph 47.

[31] The Applicant submits that this Court has previously held that this particular Band Council is instituted pursuant to the Act and that it is a public body amendable to judicial review and subject to the obligation to act fairly: *CHC Casinos Canada Ltd. v. Chippewas of Mnjikaning First Nation Band Council*, [2005] F.C.J. No. 414 at paragraphs 5 and 52.

[32] The Applicant also says that the Act grants power to Indian bands to allow lands for residence and leasing to its members. In the preamble to the Applicant's Lease Agreement, the First Nation specifically identified its authority to administer its own Housing Program: Act at subsections 2(3), 20(1), 20(4), 25, 58(3) and 60.

[33] Pursuant to section 81 of the Act, an Indian band is entitled to create by-laws to govern the "allotment of reserve lands among the members of the Band" and the "residence of Band members." The Applicant submits that there is no evidence of any by-law created by the Band Council in this case which governs its housing program or the termination of tenancies. Hence, by evicting the Applicant, the Applicant says that the Band Council was not acting in a legislative capacity: Act at paragraph 81(i)(p.1) and section 82.

[34] The Applicant cites *Campbell v. Elliot, Alphonse, Charlie and Cowichan Indian Band Council*, [1988] 4 C.N.L.R. 45 (F.C.T.D.) at paragraphs 23 and 27 where an Indian band council exercised its powers under section 20 of the Act to allot land to certain members. The Court held that the band council was subject to the duty of fairness and that the duty of fairness would still apply should the band council retract the land.

[35] The Applicant concludes that the Decision to evict him was administrative in nature and ancillary to the management of the Band's Housing Program. The Decision applied solely and specifically to the Applicant and it was final because it terminated his tenancy immediately and permanently. The applicant argues that these factors indicate that the Decision was an administrative one to which the duty of fairness applies.

**Eviction Order had Profound Impact**

[36] The Applicant submits that it is a well-recognized fact that an administrative decision that affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 20 (*Baker*).

[37] The Applicant contends that the Eviction Order took the Applicant by surprise and he was given no time to prepare for it or pack any clothes or other items that he needed. He was also not given the opportunity to store his furniture or personal items. Without notice, he was homeless and dependent on hospital accommodation.

[38] The Applicant submits that, prior to his eviction and despite having had ample time to do so, no one from the Band Council ever approached him to discuss the Band's issues with his tenancy or to advise him that the Band Council was contemplating his eviction. Nor had anyone spoken to the

Applicant about arranging for alternative accommodation. The Applicant also lost his opportunity to purchase the home outright when the option vested in 2009.

**Relationship between Applicant and Band Attracts Procedural Fairness**

[39] The Applicant submits that there are three reasons why the nature of his relationship with the Band attracts procedural fairness. Firstly, the relationship has a contractual element that is insufficient to preclude the application of administrative duties. Secondly, the particular qualities of the Lease Agreement require procedural safeguards and, thirdly, band councils have a fiduciary duty to their members. This fiduciary duty requires band councils to deal with their members in a manner that embodies principles of utmost fairness.

[40] The Applicant says that, before Justice Phelan, the Band Council claimed that its relationship with the Applicant was a contractual one and its conduct was governed solely by the provision of the contract, without regard to the duty of fairness. The Applicant, however, contends that a contractual relationship does not preclude the application of the duty of fairness. The Applicant cites *Knight* at paragraph 22 for the proposition that the modern application of procedural fairness to a public body involves the contractual relationship between a public body and the individual affected.

[41] The Applicant also submits that, since the early days of the recognition of the duty of fairness, courts have evolved from granting immunity to the contractual dealings of government

actors to permitting judicial review of contractual conduct. Chief Justice McLachlin, in the dissent of *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 at paragraphs 8-12, held that the duty of fairness applies because statutorily created bodies contract with public funds and in the public interest.

[42] The Applicant goes on to contend that this Court has held that only where public bodies contract in a purely private commercial context, independent of the public interest and without specific statutory authority, will the Court refrain from applying administrative law duties: *Peace Hills Trust Co. v. Saulteaux First Nation*, [2005] F.C.J. No. 1646 at paragraphs 61-62.

[43] The Applicant says that where a public body contracts in the public interest to provide affordable housing to low-income persons within social housing schemes, the duty of fairness applies, notwithstanding lease provisions that purport to derogate from those duties. The Applicant cites and relies upon *Re Webb and Ontario Housing Corporation* (1978), 93 D.L.R. (3d) 187 at paragraphs 21-23 (Ont. C.A.), which involved the Ontario Housing Corporation (OHC), a public body empowered by the *Ontario Housing Corporation Act*, R.S.O. 1990, c. O.21, that was held to be under a duty of fairness to tenants when seeking to evict them under their rental agreements. The Court held that a relevant consideration in imposing the duty of fairness on the OHC was that it fulfilled the public interest of providing affordable housing to low-income persons and, in terminating a lease, was thus depriving the tenant of an important benefit.

[44] The Applicant points out that the Band's property manager, Randy McKinnon, has said that "the social housing program is intended to be a benefit to the community, not just to individual members." The Lease Agreement between the Applicant and the Band was clearly made in the public interest and was funded by public monies through the Band and the Minister of Indian and Northern Affairs. This relationship was not a purely commercial contract that should be immunized from judicial review.

**Landlord-Tenant Relationship**

[45] The Applicant further submits that he and the Band have a landlord-tenant relationship. Tenants residing off-reserve enjoy statutory protection under the *Residential Tenancies Act, 2006,* S.O. 2006, c. 17 (RTA) at section 1. Therefore, there is a clear rationale for providing off-reserve tenants with statutory protection mechanisms and a need to ensure that on-reserve social housing schemes provide tenants with similar procedural safeguards: *Price v. Turnbull's Grove Inc.* (2007), 85 O.R. (3d) 641 (Ont. C.A.) at paragraph 26.

[46] The Applicant says that the RTA, at section 37 contains "Security of Tenure" provisions which prohibit terms in a lease that provide for the termination of tenancy upon a set condition. The Ontario Court of Appeal in *Clandfield v. Queen's University (Apartment and Housing Services)* (2001), 54 O.R. (3d) 475 at paragraph 12 has said that these provisions are in place because tenants are often not in an equal bargaining position with landlords when leases are being negotiated.

[47] The Applicant states that, under the RTA, there are no circumstances where a landlord can unilaterally evict a tenant, and even the most egregious breaches of a lease do not give rise to that entitlement. The landlord must serve the tenant with a notice and an application to evict setting out the landlord's intentions and reasons. Once the tenant is served with the landlord's application to evict, a hearing before the Landlord and Tenant Board is automatically scheduled. This gives the tenant an opportunity to be heard regarding the grounds of their eviction: RTA at sections 37, 43, 69, 80 and subsection 194(5).

[48] The Applicant concludes on this point by stating that the nature of the landlord-tenant relationship, and the procedural protections ordinarily afforded to off-reserve tenants, provide a strong rationale for the application of the duty of fairness to the Band Council in this case.

**Fiduciary Relationship between Band member and the Band**

[49] The Applicant submits that the Chief and members of the Band Council are fiduciaries as far as all members of the Band are concerned. The members of the Band are vulnerable to abuse by the Chief and Council, who have a corresponding duty to treat members equitably and fairly: *Buffalo v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] 1 C.N. L.R. 1 (F.C.T.D.) at paragraph 11 and *Gilbert v. Abbey*, [1992] 4 C.N.L.R. 21 (B.C.S.C.) at paragraph 14.

[50] In the Applicant's view, the Band Council had a fiduciary duty to exercise the utmost fairness in its dealings with him, particularly since his disability rendered him more vulnerable than his fellow Band members.

**The Content of the Duty of Fairness**

[51] The Applicant submits that this Court has previously articulated the content of the duty of fairness in situations very closely analogous to the case at bar. The Court has consistently held that the duty of fairness applies in the enforcement of residential tenancy or tenancy-like agreements between First Nations band councils and band members, and that the duty requires band councils to:

(a) Provide band members with notice that their removal is being contemplated;

(b) Advise band members of the allegations against them that give rise to the question of whether they should be removed; and

(c) Provide band members with the opportunity to respond to the allegations against them.

The Applicant submits that a duty of fairness is owed to him by the Band Council in this case.

[52] The Applicant relies particularly upon the cases of *Obichon v. Heart Lake First Nation No. 176*, [1989] 1 C.N.L.R. 100 and *Sheard v. Chippewas of Rama First Nation Band Council*, [1996] F.C.J. No. 659, as well as *Gamblin v. Norway House Cree Nation (Band Council)*, [2000] F.C.J. No. 2132 (F.C.T.D.) (*Gamblin No. 1*) and *Gamblin v. Norway House Cree Nation (Band Council)*, [2002] F.C.J. No. 1411 (F.C.A.) (*Gamblin No. 2*).

[53] The Applicant argues that the following conclusions can be drawn from the *Gamblin* case:

(a) The agreement between Gamblin and the band council was expressly found not to be a lease agreement because no rent was being paid;

(b) The agreement between Gamblin and the band council was one in which the band council agreed to permit Gamblin and his family to continue to live in band housing in consideration of his promise not to permit any illegal activity to occur in the residence;

(c) The agreement was a private law agreement, the breach of which did not attract a duty of fairness; and

(d) In any event, even if a duty of fairness was applicable, it was met in the circumstances.

[54] In the matter at hand, the Applicant submits that there is a contract between the Applicant and the Band Council because it was a lease agreement under which rent was paid. Therefore, he says that the present situation is distinguishable from the private law agreement which occasioned the decision to evict Gamblin.

[55] The Applicant submits that the essential finding by the Court of Appeal in *Gamblin No. 2* is that in the case of enforcement of the particular private law agreement between Gamblin and the band council, there was no duty of fairness owed. Any comments by the Federal Court of Appeal regarding the characterization of the agreement as a tenancy agreement were purely *obiter dicta* and

were not determinative of the applicability of a duty of fairness in the enforcement of tenancy agreements on reserves.

**Notice/Opportunity to Make Representations**

[56] The Applicant submits that the content of the duty of fairness is not fixed and depends on the particular circumstances of any given case: *Baker* at paragraph 21. He argues that the Decision in this matter had a critical effect on him, rendering him homeless and depriving him of the opportunity to purchase his home eventually in accordance with the Lease Agreement. The Band Council followed no particular procedure in making the Decision but simply relied on its general powers under the Act. The Decision was final and there was no appeal mechanism under the Lease Agreement to permit the Applicant to seek reconsideration of the Decision.

[57] The Applicant's evidence was that he did not believe that the Band Council would order his eviction because he knew that he owned the land and because he had a mortgage over the house. Therefore it can be inferred that, in light of this knowledge, the Applicant did not legitimately expect that the Band Council could simply evict him summarily and without any prior warning.

**Band Council Failed to Afford Applicant Procedural Fairness**

[58] The Applicant submits that the uncontested evidence before the Court is that the Band Council failed to do any of the things required of it under the laws of procedural fairness. The Band

Council attempts to rely on a meeting it held with the Applicant's mother and brother several days before making the Eviction Order. However, the Band Council has not provided any justification for why its officials did not attempt to speak directly with the Applicant, given that it was him and not his immediate family who would be critically impacted by the Eviction Order.

[59] The Applicant submits that the members of the Band Council relied on the Applicant's mother who, though well-meaning, lacked the necessary sophistication to fully understand and relay the message. The Applicant argues that it can be inferred from the Applicant's mother's evidence that she did not fully appreciate what the Band Council was contemplating and she did not believe that the Band Council was serious about evicting her son. This did not constitute adequate notice.

[60] In addition, the Applicant states that Ms. Sawyer provides no explanation for why no effort was made to speak with him. She can only offer the observation that "James was an active participant in all of the instances where various staff members of the First Nation developed the view that he was simply not capable of living independently." The Applicant states that the Applicant's signature on the Lease Agreement, which he signed over a decade earlier, is not sufficient to obviate the Band Council's duty to comply with the duty of fairness. This is particularly so since the Applicant was disabled and especially vulnerable. The Band Council owed him a fiduciary duty and the provision that the Band Council relied upon to evict him was unusual and extraordinary and poorly drafted, as it gave the Band Council inordinate power. Also, no explanation was offered for the Band Council's failure to arrange a meeting with the Applicant directly.

[61] The Applicant concludes on this issue by stating that the Band Council owed him a duty of fairness and failed to satisfy that duty. Regardless of whether the Band Council's Decision to issue the Eviction Order had any merit, its failure to comply with the duty of fairness rendered the Eviction Order void and it should be quashed.

**Band Council Cannot Rely on the Applicant's Arrears as an Alternative Basis for the Eviction Order**

[62] The Applicant submits that he does not dispute the arrears, or that Article 6 of the Lease Agreement, give the Band Council the right to evict tenants who are in arrears for more than 45 days. However, in the Applicant's view, the Band Council cannot rely on this provision as a ground for eviction in these circumstances.

[63] The arrears are not referred to anywhere in either the Eviction Order or the Band Council motion authorizing that Order. It is the Band's evidence that it first sought to rely on the arrears as a ground of eviction nearly a month after it evicted the Applicant. As well, the Band Council never once in the Applicant's history of arrears threatened to evict him on that basis. In a series of letters from the Band Council, it never referred either expressly or by implication to Article 6 and the right to evict for arrears. The letters made broad suggestions that "[n]ow would be the ideal time to consider repayment of this outstanding debt," request a "proposed/re-payment schedule," or invite the Applicant to meetings "to discuss this further…" In the Applicant's view, the Band Council cannot suddenly appeal to the arrears as a basis for buttressing the Eviction Order.

**The Respondent**

[64] The Respondent submits that the privilege of residing on-reserve under a rental purchase agreement is not available to all Band members and there is a substantial waiting list. Housing on the reserve is a scare resource and the social housing program is intended to benefit the community, not only individual members. Therefore, when a unit remains unoccupied, it is a wasted resource that could benefit other members of the community.

[65] The Respondent points out that the health, social services and policing services available on the reserve are also limited and the burden of ensuring constant home care for individual residents is a serious one. The Lease Agreement entered into with the Applicant provides at Article 12 that the First Nation retains the right to terminate in cases where tenants become incapable of living independently. The Respondent states that the purpose of Article 12 is to facilitate the care and well-being of individuals who cannot live independently, and to preserve the First Nation's ability to assist those members of the community who can make effective use of a housing unit.

**Nature of the Decision**

[66] The Respondent submits that it made the Decision to terminate the Lease Agreement in its private law capacity as a landlord and it is governed by the law of contract and is not subject to a public law duty of fairness. The Respondent states that the Lease Agreement as signed by the Applicant is a private contract and includes a clause permitting the landlord to terminate the lease if

the tenant becomes “incapable of living under his own power, mind and Termination independence.” Despite the typographical error, this provision is capable of interpretation and of being given effect as a contractual term. Its intent and effect are readily apparent.

[67] The Respondent says that this provision is not concerned with the question of the tenant’s medico-legal capacity to make decisions about his property or treatment. The term is about the tenant’s ability to continue to live in the leased premises on his own, having regard to his “power” physically to provide for himself, and his “independence” from the care and support of others, in addition to any question of the medico-legal capacity of his “mind”.

**No Duty of Fairness**

[68] The Respondent cites *Gamblin No. 1* at paragraph 43, where the judge distinguished between banishment and eviction. Justice Muldoon held that banishment attracted a duty of fairness but that the termination of a tenancy relationship did not, as it was a private law matter. The Federal Court of Appeal agreed with the applications judge and held at paragraph 8 of its decision in *Gamblin No. 2* as follows:

> As to the duty of fairness, we have not been referred to any authority which holds that there is an obligation on the Band Council to provide a hearing concerning the enforcement of the terms of the tenancy agreements into which it enters.

[69] The Respondent states that the applicant in *Gamblin No. 1* relied at the trial division level on the same *Obichon* case that the Applicant relies on in the present application for the proposition that

the Federal Court has been "…consistent in holding that a duty of fairness applied in the enforcement of residential tenancy or tenancy-like agreements between First Nations Band Councils and Band Members…" The Respondent points out that the Federal Court of Appeal has already established the opposite, and any suggestion that *Obichon* stands for the proposition that the duty of fairness should apply to an eviction decision has been overruled.

[70] The Respondent states that the brief comments in *Obichon* concerning the duty of fairness were *obiter* and no reasons were provided by the Court in that case as to why a duty of fairness should attach to an eviction decision. The result in that case was governed by the Court's determination that the band council's decision to move a resident from one home to another smaller home was tainted by a reasonable apprehension of bias. The bias consisted of the fact that a band council member, who proposed to move the resident to a smaller home, secured the larger home for himself.

[71] The Respondent says the *Sheard* case relied on by the Applicant was about banishment of a non-Indian person from the reserve and had nothing to do with eviction. The non-Indian applicant in *Sheard* was ordered to be removed from the reserve and not to return and he was not a tenant or a party to any lease agreement. He lived with his Indian spouse in a rental property similar in character to the property formerly occupied by the Applicant. The Court in *Sheard* determined that the non-Indian person was entitled to a hearing prior to the banishment decision. No order was made against the Indian spouse; nor was any order made that affected any of her rights under the lease agreement.

[72] The Respondent says that the *Knight* case was overturned by *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 114:

> [T]o the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not public law.

[73] The Respondent takes the position that although the Supreme Court of Canada in *Dunsmuir* considered whether a duty of fairness was owed by a public authority in the context of an employee's dismissal from statutory employment which was governed by a private contract, its application is not limited to statutory employment. The Respondent submits that it stands for the broader principle that where a public authority properly enters into a private contract with another party and the public authority enforces a term of a contract, the public law duty of fairness does not apply. The relationship is governed by the private law of contract. The other party is protected from wrongful action by the public authority under private law, for breach of contract, and public law remedies do not apply.

[74] The Respondent submits that, in the present case, Article 12 of the Lease Agreement protected the Applicant's interest in private law by providing that a decision to place the tenant in alternative accommodation upon the tenant becoming incapable of living independently could be made only after consultation with the tenant's relative or friend. The Band Council fulfilled its contractual obligation under the Lease and the Respondent contends that Ms. Sawyer and the other staff of the First Nation consulted with the Applicant's mother and brother over a period of time. As well, Ms. Sawyer was frequently in contact with the Applicant and his mother. The October 24,

2006 meeting involved the Applicant's mother being advised that the Council intended to enforce Article 12 of the Lease Agreement and, on November 1, 2006, the Band Council exercised its contractual rights to terminate the Applicant's lease in accordance with Article 12.

[75] The Respondent states that the Band Council does not dispute that it is under a fiduciary duty to exercise its discretion in the best interests of all band members. A fiduciary duty is a duty in equity, arising from the nature of the relationship between the parties. A fiduciary must act towards the beneficiary with the utmost good faith and fidelity, but the Applicant conflates the nature of the fiduciary duty with the public law duty of fairness. The concept of fiduciary duty in equity is conceptually distinct from that of procedural fairness in public law. The existence of a fiduciary duty does not, in itself, create a public law right of procedural fairness. The Band Council acted in the utmost good faith and fidelity towards all Band members when it terminated the Lease Agreement under Article 12.

[76] The Respondent concludes by stating that the law is clear that no duty of fairness lies upon the Band Council when exercising its right to evict a tenant under a lease agreement. The Federal Court has no jurisdiction to entertain a purely private law case in the absence of the express grant of jurisdiction.

**Alternative Legal Remedy Available**

[77] The Respondent states that the supervisory jurisdiction of the courts over subordinate administrative tribunals, including those available under the *Federal Court Act*, is based upon the codification of prerogative remedies at common law. It is a settled rule of the court that the exercise of such jurisdiction is extraordinary, discretionary and will only be available when the decision in issue is final and where all alternative remedies have been exhausted.

[78] The Respondent states that, in this case, the Applicant and his counsel have expressly contemplated and threatened in their November 28, 2006 letter an available alternative remedy by way of complaint and investigation under the *Canadian Human Rights Code*. The Respondent submits that the availability of such a process is an alternative to judicial review which has not been exhausted and constitutes a complete bar to the availability of the relief sought in this application.

**ANALYSIS**

[79] This application raises the narrow, but extremely important, issue of whether a band council owes a public law duty of procedural fairness where the decision complained of was made in accordance with a private law tenancy agreement between the parties that specifically provides for the band to make the decision in question.

[80] I am not here dealing with the respective contractual rights and obligations of the parties. The record shows that Mr. Cottrell is a very vulnerable man, but it also shows that he is a very difficult man. I see nothing in the record to suggest that the Band Council has not acted in good faith in this matter, or that its decision to evict Mr. Cottrell from his house on the reserve was not made with his well-being, and the interests of other band members, in mind. Mr. Cottrell needs care and assistance. He also wants to stay in his own house. The Band Council cannot provide the care and assistance he needs if he stays in his own home. The Band Council believes he belongs in a care facility where he can be looked after. This is why he has been evicted.

[81] It seems clear that a band council is a public body and that its decision can be subject to judicial review by this Court: see *Vollant v. Sioui*, [2006] F.C.J. No. 611 at paragraph 25. But in this case the parties entered into a private law contract dealing with Mr. Cottrell's right to occupy the house in question, and that contract specifically addressed what would happen if the time came when the Band Council came to the conclusion that Mr. Cottrell could no longer look after himself in the house. Mr. Cottrell may be vulnerable now, but there is nothing to suggest that he was vulnerable when he entered into the agreement or that he did not understand what could happen if he became incapable of "living under his own power, mind and … independence … ."

[82] Mr. Cottrell, of course, has the full range of contractual remedies available to him if he feels that the Band Council has not honoured the contract. But he also wishes to avail himself of public law remedies by imposing a duty of procedural fairness on the Band Council. He says that, before

moving to evict him under the contract, the Band Council should have notified him of its concerns and allowed him to address them.

[83] From the record, it seems clear that the way the Band Council handled the eviction was very much connected to the problems Mr. Cottrell has caused in the past and his refusal to move out of his house and into a care facility.

[84] The principal case relied upon by the Applicant for this kind of situation is *Obichon v. Heart Lake First Nation Band Council*, [1989] 1 C.N.L.R. 100. But the *Obichon* case is not on all fours with the present application because the duty of fairness was not fully addressed and the case appears to have been based upon a reasonable apprehension of bias. There is no bias in the present case and, in any event, whatever *Obichon* decided, it has been rejected by both the Federal Court and the Federal Court of Appeal as an authority for the kind of situation that arises in the present application.

[85] In *Gamblin No. 1*, Justice Muldoon found at paragraphs 41-43 that the relationship between the band council and Mr. Gamblin "regarding the allocation of housing" to be a "private law contract," and that "a duty of fairness is not owed in a private law contract and, therefore, is not a consideration." Justice Muldoon also held, in what appears to have been an alternative ground that "[h]owever, upon examination of the foregoing argument, one can state that if a duty of fairness were owed to the applicants, it was met."

[86] The Federal Court of Appeal also considered the Gamblin situation on appeal in *Gamblin No. 2*.

[87] The Federal Court of Appeal delivered its judgment orally and upheld Justice Muldoon's decision. One of the issues that Mr. Gamblin argued on appeal was that the "Trial Judge erred in concluding there was no duty of fairness owed by the Band Council to the Appellants in the sense of providing them with a hearing before being evicted."

[88] The Federal Court of Appeal obviously rejected this ground of appeal because it upheld Justice Muldoon's decision in *Gamblin No. 1*.

[89] However, the Federal Court of Appeal in *Gamblin No. 2* also offered the following rationale:

> 6. There was evidence upon which the Trial Judge could conclude there was a tenancy agreement between the Band Council and Gamblin and that a term of this agreement was that Gamblin would not use or traffic in illegal drugs on the premises.
>
> 7. There was also evidence which would allow him to conclude that Gamblin had breached this condition.
>
> 8. As to the duty of fairness, we have not been referred to any authority which holds that there is an obligation on the Band Council to provide a hearing concerning the enforcement of the terms of tenancy agreements into which it enters.

[90] The situation is a little unclear because Justice Muldoon, at paragraph 41 of his decision in *Gamblin No. 1* said that the agreement between Mr. Gamblin and the Band Council did not

"constitute a landlord-tenant situation because no rent is being paid" and he referred to the agreement as "a private law contract."

[91] Reviewing the two *Gamblin* decisions together, I do not believe that there is a disagreement on this point. Justice Muldoon obviously meant that the agreement in question may not have been a formal or typical landlord-tenant agreement because no rent was paid, but it was still a "private law contract" that did not attract a public duty of fairness.

[92] In referring to the same agreement as a "tenancy agreement," I do not believe that the Federal Court of Appeal mistook the basis of Justice Muldoon's decision. There was obviously a tenancy agreement of some kind between Mr. Gamblin and the band council, even if it could not be called a formal landlord-tenant agreement under which rent was paid. It is also significant that, in *Gamblin No. 1*, *Obichon* was cited to Justice Muldoon for the very principle that the Applicant, in the present application, says it embodies i.e. that the band council owed Mr. Obichon a public law duty on the facts before him. *Obichon* was obviously one of the authorities that the Federal Court of Appeal rejected in its decision in *Gamblin No. 2*, because the case is cited in Justice Muldoon's reasons.

[93] In the present case, rent is payable under the Lease Agreement that the Applicant entered into, but I do not see how that fact can take it out of the "private law contract" category that underlies the *Gamblin* decisions.

[94] This would seem to leave me in the same position as the Federal Court of Appeal in *Gamblin No. 2* in that I have not "been referred to any authority which holds that there is an obligation on the Band Council to provide a hearing concerning the enforcement of the terms of tenancy agreements into which it enters."

[95] In fact, the two *Gamblin* decisions suggest that, in a situation such as the present, no duty of fairness arises over and above the contractual relationship.

[96] Judicial comity and Federal Court of Appeal authority by which I am bound would suggest that there is little point in examining this matter further and that the application should be dismissed.

[97] The Respondent has not asked for costs.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application is dismissed.

"James Russell"
Judge

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-1682-07 |
| **STYLE OF CAUSE:** | JAMES EDWIN COTTRELL<br><br>v.<br><br>CHIPPEWAS OF RAMA MNJIKANING FIRST NATION BAND COUNCIL |
| **PLACE OF HEARING:** | TORONTO |
| **DATE OF HEARING:** | JANUARY 20, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | RUSSELL J. |
| **DATED:** | MARCH 16, 2009 |

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| | |
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| Mr. Brendan Van Niejenhuis<br>Mr. Owen Rees | FOR THE RESPONDENT |

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