

Federal Court



Cour fédérale

**Date: 20120523**

**Docket: T-708-06**

**Citation: 2012 FC 624**

**Ottawa, Ontario, May 23, 2012**

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

**BETWEEN:**

**THERESA SQUARE, EUGENE DAVID  
and MADELINE DAVID**

**Applicants**

**and**

**EVELYN MARY DAVID, DELIA COOK,  
NELSON JACOBS, RAYMOND COOKE,  
PAULA COOKE, and SHEILA ESCOBAR**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicants seek judicial review of a decision of the Minister of Indian Affairs and Northern Development (INAC - as it then was) (Minister), through his delegate, dated March 23, 2006, refusing to cancel five Certificates of Possession (CPs) issued in relation to Lot 139, in Cornwall Island, Ontario, pursuant to section 27 of *Indian Act*, RSC, 1985, c I-5 (*Indian Act*).

[2] None of the respondents have opposed the application, nor has the Minister intervened. The applicants are therefore the only participants in the proceeding. For the reasons that follow, the application is granted.

***Facts***

[3] The applicants are Theresa Square, Eugene David, and the estate of Madeline David. Theresa and Eugene live on Lot 139. Madeline David is Eugene's mother, and also lived on Lot 139 until her death.

[4] Lot 139 is located on Cornwall Island, Ontario, on Mohawks of Akwesasne Reserve No. 59. Lot 139 was initially possessed solely by Paul David, who died intestate in 1976. The evidence indicates that Paul David lived in accordance with the traditions of the Longhouse Council of Chiefs for the People of the Mohawk Nation of the Five Nations Iroquois Confederacy and thus, after his death, a traditional "Tenth Day Feast" was held. At the feast all of his real and personal property was distributed in accordance with tradition and customary law.

[5] As part of the feast the whole of Lot 139 was conveyed to Paul David's son, Ross David. The applicants state that no family members contested this conveyance during the feast or at any other time until almost 20 years later. Ross David and his wife, Madeline David (one of the applicants), built a home in Lot 139. Their son, Eugene David, and his wife Theresa Square (the other applicants), built another home on Lot 139 in 1989.

[6] Shortly after Ross David died in 1995, his brother George David applied to become Administrator of the estate of their father, Paul David. George was appointed as Administrator in April 1996. The applicants state that George David did not produce an inventory of the estate nor did he notify creditors, heirs and other claimants about their right to make claims.

[7] Shortly after being appointed as Administrator, George David submitted Transfers of Land by a Personal Representative dividing Lot 139 into five sub-lots and allocating them to Paul's five children: himself; Betty David; Delia Cook; Cecilia Jacobs; and Madeline David (widow of Ross David). The applicants state that they were given no notice of this transfer.

[8] In January 1997, Ms. L. Delormier, Manager of the Office of Vital Statistics for the Mohawk Council of Akwesasne, learned of the dispute over Lot 139 and advised INAC that it should delay in issuing CPs for Lot 139 due to the dispute and the problems with George's administration of the estate. Despite this request, INAC issued the CPs on April 30, 1997, as follows:

- Lot 139-1 to Betty David;
- Lot 139-2 to Evelyn Mary David (widow of George David);
- Lot 139-3 to Delia Cook;
- Lot 139-4 to Cecilia Jacobs;
- Lot 139-5 to Madeline David (widow of Ross David).

[9] The allocation of the CPs was inconsistent with historical usage of the lands and, on its face, gave rise to questions of fairness and common sense:

- Madeline David received a CP for Lot 139-5, despite the fact that she had lived in a home on Lot 139-1 for over 20 years;
- Eugene David and Theresa Square did not receive a CP, despite living in a home on Lot 139 since 1989;
- Evelyn Mary David was issued a CP, despite the fact that she is not Paul David's issue, and George David had no established right to possession of Lot 139 before his death.

[10] Several parties subsequently contacted INAC to express their concern that the CPs were not properly issued and that they were contrary to the Mohawk nation's traditional practices. INAC received submissions on this issue from: the Mohawk Nation Council of Chiefs, Mr. V. Kovich, a lawyer with the Akwesasne Justice Department, the Mohawk Council of Akwesasne, and the applicants.

[11] In 2003, the applicants requested that INAC cancel the CPs pursuant to sections 26 and 27 of the *Indian Act*. They made submissions to INAC on this issue dated February 26, 2003; May 9, 2003; and June 26, 2003. The crux of their submissions was that those who received CPs were not lawfully in possession of Lot 139, with the exception of Madeline David. They argued that the manner in which George David administered Paul David's estate was irregular and the resulting distribution of Lot 139 was invalid.

[12] After repeated requests to resolve this issue, Stephen Gagnon, Director of the Land Operations Registration Directorate at INAC, some three years later, issued a decision letter on behalf of the Minister, dated March 23, 2006, refusing the request to cancel the CPs. The letter characterized the applicants' concern to be that Paul David's estate had been distributed in an unequal manner. The letter noted that an administrator's decision regarding distribution of assets

did not fall within section 27 of the *Indian Act*, and therefore the Minister could not cancel the CPs on this basis. The letter stated:

The Certificates of Possession in question were issued to the heirs of Paul David, all members of the Mohawks of Akwesasne entitled to reside on reserve land, in accordance with the terms of the transfer documents duly executed by the administrator of his estate, and subsequently registered in the Indian Land Registry. These Certificates of Possession were therefore not issued in error, and accordingly Ms. David's request for their cancellation is declined.

[13] The applicants seek judicial review of this decision. This matter was held in abeyance for several years while the Mohawk Council of Akwesasne tried to resolve the matter, an effort which yielded partial success. The applicants have settled the matter in relation to Evelyn Mary David, whose CP has now been transferred to the applicants.

### ***Standard of Review and Issue***

[14] The applicants raise the following issues in their application:

- a. Did the Minister commit a reviewable error by failing to recognize evidence that the applicants had lawful possession of Lot 139 and that none of the other CP holders held lawful possession of Lot 139?
- b. Did the Minister breach his duty to investigate and cancel the CPs when provided with substantial evidence showing the invalidity of the CPs and did he commit an error by failing to exercise his discretion to cancel the CPs?
- c. Did the Minister breach the rules of procedural fairness and natural justice by ignoring relevant submissions provided by the Mohawk Nation Council of Chiefs, the Mohawk Council of Akwesasne, and the applicants relating to errors regarding the CPs?
- d. Did the Minister commit a reviewable error by ignoring relevant evidence regarding Mohawk tradition and custom relating to the disposition of Lot 139?

[15] I would reframe the issues and distill them as to whether the Minister's decision refusing to cancel the CPs reasonable, and were the principles of procedural fairness respected in the reaching of that decision?

[16] As the applicants submit, the Minister's decision not to cancel the CPs is to be reviewed on a reasonableness standard, since it is a question of mixed fact and law and involves an element of discretion: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. The question of whether the Minister breached the principles of procedural fairness, however, is to be reviewed on a standard of correctness: *Parker v Okanagan Indian Band Council*, 2010 FC 1218 at para 41.

### ***Analysis***

#### ***Was the Minister's decision refusing to cancel the CPs reasonable?***

[17] There is no jurisprudence of this Court reviewing decisions by the Minister pursuant to section 27 of the *Indian Act*. This type of decision is mentioned in *Songhees Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, 2006 FC 1009, [2007] 3 FCR 464, but the actual decision under review in that case was the Minister's approval of a sale of reserve land under section 50(4) of the *Indian Act*. However, Justice Tremblay-Lamer's comments at paragraph 40 of that decision set the stage for the matter before this Court:

I cannot conclude that it is incumbent on the Minister to make inquiries into the validity of CPs when there is nothing before him to doubt their validity. In my view, such a duty will only arise when there is reason, based on the evidence before him or concerns raised by an interested party, to doubt the validity of the CPs. In such a case, the Minister would be obligated to determine whether he should exercise his discretion under sections 26 or 27 to correct or cancel the CP.

[Emphasis in original]

[18] This is the kind of case described by Justice Tremblay-Lamer, the applicants and the Mohawk Council of Akwesasne raised doubts about the validity of the CPs. Thus, the question before the Minister was whether the five CPs should be cancelled because they were issued through fraud or in error, pursuant to section 27 of the *Indian Act*:

Cancellation of Certificates or Location Tickets

27. The Minister may, with the consent of the holder thereof, cancel any Certificate of Possession or Occupation or Location Ticket referred to in section 26, and may cancel any Certificate of Possession or Occupation or Location Ticket that in his opinion was issued through fraud or in error.

Certificat annulé; billet de location

27. Le ministre peut, avec le consentement de celui qui en est titulaire, annuler tout certificat de possession ou occupation ou billet de location mentionné à l'article 26, et peut annuler tout certificat de possession ou d'occupation ou billet de location qui, selon lui, a été délivré par fraude ou erreur.

[19] As the applicants submit, a CP does not actually grant the individual an interest in land; rather, it is merely evidence that the individual is lawfully in possession of that land. As section 20 of the *Indian Act* states:

Possession of lands in a reserve

20. (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Certificate of Possession

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be

Possession de terres dans une réserve

20. (1) Un Indien n'est légalement en possession d'une terre dans une réserve que si, avec l'approbation du ministre, possession de la terre lui a été accordée par le conseil de la bande.

Certificat de possession

(2) Le ministre peut délivrer à un Indien légalement en possession d'une terre dans une réserve un certificat,

called a Certificate of Possession, as evidence of his right to possession of the land described therein.

[...]

appelé certificat de possession, attestant son droit de posséder la terre y décrite.

[...]

[20] Therefore, it is a condition precedent to obtaining a CP that the individual be lawfully in possession of the land, which in turn requires that the land have been allotted to the individual by the band council. Thus, when the Minister was asked to consider whether the CPs were issued in error, the essence of his determination was whether the individuals named in the CPs were lawfully in possession of the land.

[21] It is readily apparent based on the record before the Court that the Minister's delegate, Mr. Gagnon, failed to properly consider this question and reached an unreasonable conclusion. The applicants made several detailed submissions, supported by relevant documentation, to establish that the five CPs were issued in error. To illustrate the extent of the problems with the CPs, the following is a non-exhaustive summary of the applicants' submitted concerns:

- The band council never allotted the land comprising Lot 139 to any of the individuals that received the CPs, with the exception of Madeline David;
- Rather, the five recipients of the CPs derived their purported possession of the land from the division of Lot 139 into five sub-lots by George David, as Administrator of the estate of Paul David;
- George David's administration of Paul David's estate was riddled with irregularities, including:
  - George David never completed an inventory of the estate;
  - George David never notified creditors, heirs and other claimants to the estate to submit their claims;
  - Lot 139 was subdivided and transferred 29 days after George David was appointed as Administrator and the subdivision and transfer were not accepted by all the heirs or by the Mohawk Council of Akwesasne;
  - Section 8(1) of the *Indian Estates Regulations* (CRC, c 954) requires that eight weeks transpire between appointment and distribution;



- Even if George David was authorized to divide Lot 139 into five sub-lots for distribution among Paul David's issue, one of the CPs was granted to Evelyn Mary David, who was not Paul David's issue, but rather was George David's widow, and thus Evelyn Mary David clearly had no right to the CP;
- The Mohawk Council of Akwesasne made a decision regarding the possession of Lot 139 in November 2002 that conflicted with the CPs;
- The Band made very clear, in several submissions that it objected to the CPs. The CPs divided the single piece of land into five separate pieces or lots. This resulted in the creation of five new properties. The decision conflicts, therefore, with section 20 of the *Indian Act*.

[22] Mr. Gagnon appears to have misapprehended the applicants' submissions: his letter implies that the sole basis for the applicants' request was that the estate of Paul David was unequally distributed by George David. This does not even closely resemble the applicants' submissions. The applicants requested cancellation of the CPs because the purported allocation of Lot 139 to Paul David's issue was invalid for numerous reasons relating to the lawfulness of the procedure by which the CPs were allocated by the estate. Furthermore, because the band council did not allot or recognize the allotment of the land according to the CPs, the recipients of the CPs were not lawfully in possession of the land. The mistakes made in the administration of the estate and in the allocation of the CPs fall easily within the ambit of the "error" contemplated by section 27. Since Mr. Gagnon gave no consideration to those submissions, or the evidence provided in support of them, I have no trouble concluding that his decision was unreasonable and should be set aside.

[23] In addition, the substance of the applicant's concerns were set forth, in detail, in a February 26, 2003 letter from their counsel. Neither this letter, nor the substance of the arguments contained in the letter, are considered in the Minister's decision. The decision fails to consider the relevant factual and legal submissions in issue, and thus violates the principle that the reasons must address

the key factual legal issues: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425.

[24] I would further note that, according to *Directive 3-6: Correcting and Cancelling Certificates of Possession, Certificates of Occupation or Location Tickets*, a document that Mr. Gagnon claimed to have considered in reaching his decision, this decision was intended to take place in consultation with “the First Nation council.” In this case, the Mohawk Nation Council of Chiefs, the Mohawk Council of Akwesasne, and a lawyer from the Akwesasne Justice Department all made submissions to INAC since this dispute began; first asking INAC not to issue the CPs until this matter could be investigated and resolved, and then disputing the validity of the CPs as issued. Mr. Gagnon’s decision makes no mention of the input from any of these parties. In making this observation, I do not accept the proposition that the consent of the band council was required. The discretion under section 20(2) of the *Indian Act* to issue a CP is that of the Minister.

[25] There is therefore no reason to consider the other possible errors alleged by the applicants in the Minister’s decision. The application must be granted and the matter remitted back to the Minister for re-determination. The applicants have requested an order “referring the matter back to the Minister with directions to cancel the Certificates of Possession so that the matter may be dealt with by the Mohawk Council of Akwesasne.” However, the Court is not permitted to compel the Minister to exercise his discretion under section 27 of the *Indian Act* in a particular way. Thus, it appears that the appropriate relief is to refer the matter back for reconsideration in light of these reasons.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is granted. The decision of the Minister is set aside and the matter remitted back to the Minister for re-determination in light of these reasons.

"Donald J. Rennie"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-708-06

**STYLE OF CAUSE:** THERESA SQUARE, EUGENE DAVID and  
MADELINE DAVID v EVELYN MARY DAVID,  
DELIA COOK, NELSON JACOBS, RAYMOND  
COOKE, PAULA COOKE, and SHEILA ESCOBAR

**PLACE OF HEARING:** Toronto

**DATE OF HEARING:** May 9, 2012

**REASONS FOR JUDGMENT  
and JUDGMENT:** RENNIE J.

**DATED:** May 23, 2012

**APPEARANCES:**

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