

CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT) v. OROMOCTO INDIAN BAND AND POLCHIES ET AL.

New Brunswick Court of Queen's Bench, Trial Division, Creaghan J. January 30, 1987

John D. Townsend, for the plaintiff
Leslye L. Fraser, for the defendant, Polchies

The chief and two councillors of the Oromocto Indian Band negotiated a land claims settlement with the federal government and certain moneys were credited to the band's capital and revenue accounts. Pursuant to a band council resolution the chief and the two councillors were paid large sums as compensation for their efforts in concluding the land claims settlement. However, the Department did not approve the payments to the chief and councillors, nor was the money transferred to the band's capital account for that purpose. The Minister sued for recovery of the fees.

Held: Judgment for plaintiff.

1. Expenditures of capital under the authority of s.64(1)(k) of the Indian Act, R.S.C. 1970, c.I-6 require the approval of the Minister and such authority cannot be delegated. In this case the payments to the chief and councillors had not been given ministerial approval and thus were not authorized as capital expenditures by the Minister pursuant to s.64(1)(k).
2. The final land claims settlement made no provision for fees of any type.
3. The plaintiff had a duty to recover funds, which legally belonged to the band members.

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CREAGHAN J.: On September 30, 1983 the plaintiff commenced this action against all of the above named defendants claiming \$230,000.00, which sum represented \$150,000.00 paid to Emmanuel Polchies on July 25, 1983, then Chief of the Oromocto Indian Band and \$40,000.00 paid to each of the Band Councillors, Mark Sabattis and John Sacobie.

The amount of \$230,000.00 was part of the payment received by the Band under a land settlement agreement executed at Ottawa July 12, 1983 by the Minister of Indian Affairs and Northern Development, and at Oromocto on July 13 by the Chief and Councillors. By this agreement the Band surrendered 72.5 acres of land for \$2,550,000.00 less \$43,000.00 owed by the Band, that is, the amount of a loan from the Minister which assisted the Band Council or Chief in the expense of negotiating and researching the claim.

The agreement provided that one million dollars of the settlement would be deposited in the consolidated revenue fund to the credit of the Capital account of the Band and the balance to the Revenue account.

On July 13, 1983 the Chief and Councillors by band council resolution 433, hereinafter called a B.C.R., requested that \$500,000.00 from the Capital account and 1.5 million dollars from the Revenue account be transferred by the Department of Indian Affairs to a new bank account. This account was opened July 14, 1983 at the Oromocto branch of the defendant, the Toronto-Dominion Bank, current account number 0153 0735201 entitled Oromocto Indian Nation Land Claim.

This B.C.R. stated that the two million dollars was:

for the purpose of a per capita distribution to the Band members whose eligibility was determined by the official Band Membership list updated as of May 25, 1983 and for payment of all expenses related to the establishment and negotiation of the claim; authority of such distribution being established at a Band Meeting of April 5, 1983 and confirmed by this resolution.

The Chief and Councillors were elected to office in the summer of 1981 for a two year term. The Chief soon decided that an earlier surrender of the same lands in 1954 was not a final and conclusive settlement and that the Band was entitled to further compensation. He made several trips to Ottawa and after meeting persons in authority including Maria Bryant, legal adviser in the Office of Native Claims (O.N.C.), he was successful. It was on her advice that the Minister agreed that the claim of the Band was a valid one and O.N.C. was then authorized to negotiate a

settlement.

Audrey Stewart of O.N.C. was assigned the task of negotiating for the department assisted by Maria Bryant. The Chief was advised to retain legal counsel. He preferred to have an Indian as counsel and Mrs. Bryant mentioned the name of Harry LaForme, barrister and solicitor of Toronto. Mr. LaForme was contacted by the Chief and retained by him on behalf of the Band.

The negotiation of the claim was concluded at a hotel in Fredericton in March 1983 after earlier meetings and phone calls. The hotel negotiations lasted three days. The original offer was \$150,000.00, however the Chief and his team were persistent and succeeded in obtaining a settlement of 2.5 million dollars. At the conclusion of the negotiations, it was agreed that Mr. LaForme would return to Toronto and prepare a draft of the agreement and submit it to Mrs. Bryant.

In his first draft Mr. LaForme provided that \$250,000.00 would be paid to him by the Government of Canada in Trust for fees and disbursements. A day or so later the draft of this clause of the agreement was amended to provide for a payment of \$150,000.00 to counsel for his fee.

The Chief was kept advised of the draft agreements but I am satisfied that he had no intention of approving payment of such a large fee to his counsel.

On April 5, 1983 after notice he called a Band meeting. The Oromocto Band consists of only 169 persons including children. The minutes of this meeting, Exhibit 15, indicate that 35 adult band members were present as well as a few Non-Status women and two band members from the Kingsclear Reserve.

This meeting lasted two to three hours. It was understood that two million dollars was to be distributed on a per capita basis. I am satisfied that many of those present were of the opinion that the Chief and two Councillors should receive a bonus or some compensation for their services in negotiating the settlement. I am certain that the solicitor's fee was debated and considered exorbitant.

Charles Stark recalled much of the discussion. He said that it was agreed the solicitor would be paid \$25,000.00. Also that the Chief "wanted \$150,000.0," that it was mentioned by some of the members that he had already been paid for his services. That late in the meeting some of those still present suggested that the Chief be paid \$50,000.00 and the two Councillors, \$25,000.00 each.

Ronald Witt, at the time Regional Director General of the Atlantic Region of the department, requested a copy of the minutes of the April 5 meeting of the Band to support the B.C.R. 433 application. The minutes, Exhibit 15, are brief and as follows:

All the 35 Oromocto Band Members in the hall, they all voted that the non-status and Kingsclear shouldn't have involvement [sic] in our land claim.

The 35 Band Members all agreed that the lawyer for the Oromocto Indian Band, Harry S. LaForme [sic] should only receive \$25,000.00 for 6 days work with the Oromocto Indian Band pertaining [sic] to the Land Claim Settlement.

The conclusion of the meeting was that all the 35 Band Members in attendance [sic] were all in favour of distributing [sic] the money among each Band Member of the Oromocto Indian Band.

These minutes make no reference to compensation other than to counsel.

It should be mentioned that on June 2, 1983 certain members of the Kingslear Reserve commenced an action in this court against the Oromocto Indian Band, see cause F/C/358/83 (1985), 59 N.B.R. (2d) 190, 154 A.P.R. 190 [[1986] 1 C.N.L.R. 145].

The plaintiffs claimed that as former members of the Oromocto Band they had a legal right to share in the per capita distribution of the settlement. Kelly J., dismissed their action finding that this court had no jurisdiction, that the action should be tried in the Federal Court. The Court of Appeal [[1987] 3 C.N.L.R. 99] on November 7, 1986 ruled otherwise and remitted the case to the Court of Queen's Bench for trial on the merits.

On July 14, 1983 B.C.R. 433 was approved at the Regional office by an officer of the department.

At that time Mr. Witt was on vacation. However, on the same day at Fredericton a judge of this court granted an order to the effect that fifteen percent of the settlement would be withheld until the claim in cause F/C/358/83 was determined. As a result, and after obtaining legal advice, Ronald Hodgkinson of Ottawa, Director of Trust and a person responsible for "Indian moneys", held back \$382,500.00, that is, fifteen percent of the total settlement.

The Chief then went to Ottawa on July 18, 1983, however, he was unsuccessful in his mission to obtain payment of the holdback. As a result, on July 22 the Band received a government cheque for \$1,699,500.00 instead of two million dollars.

In an effort to obtain some of the holdback, the Chief and Councillors on July 20, 1983 passed B.C.R. 434. This resolution requested a further expenditure of \$300,800.00. On the same day, after consultation with his superiors, Mr. Witt authorized payment of \$70,800.00.

This amount was paid by cheque dated August 2, 1983, represented:

1. \$5,000.00 for Norville Getty, consultant
2. \$5,800.00 for D. Watters, legal fees
3. \$20,000.00 for S. Paul, legal fees
4. \$25,000.00 for H. LaForme, legal fees
5. \$15,000.00 for G. Burns, property improvement

\$70,800.00

Mr. Witt denied authorization of the balance of B.C.R. 434 which provided for payment of \$150,000.00 to the Chief and \$40,000.00 to each Councillor.

In any event, the Chief and Councillors were paid. On July 25, 1983 two cheques each for \$75,000.00 were delivered payable to the Chief and cheques for \$40,000.00 to each Councillor. The cheques were signed by the Chief and Councillor Sabattis.

These cheques were debited to the Land Claim account of the bank as well as about one hundred cheques representing per capita distribution of \$10,056.21. Some of those cheques represented as many as five shares. It is understood that \$50,281.05 was payable to the Chief's wife as there are three children in his family. Per capita cheques were delivered to all members then living on the Reserve. Delivery of cheques payable to non-residents was delayed, however, by late August 1983 some cheques to non-residents were dishonoured by the bank. In all, about twenty-five members of the Band did not receive payment for their per capita share.

It is important to state that by s.64(1)(a) of the Indian Act, R.S.C. 1970, c.I-6 that the Minister may authorize a per capita distribution of fifty percent of the capital money of the band derived from the sale of surrendered lands. That was the intent of B.C.R. 433, as the settlement agreement provided that one million would be deposited to the capital account and the balance of the settlement deposited in the revenue account. So B.C.R. 433 effectively requested distribution of all that could be withdrawn from the capital account.

It should also be mentioned that the Oromocto Band as provided by s.69 of the Act has the right to control, manage and expend its revenue moneys, subject to audit. Its capital account is controlled by the department under the provisions of s.64.

According to Mr. Hodgkinson, although all of the settlement could have been considered as "capital" he agreed that only one million would be credited to the capital account and 1,550 million to revenue. This would permit a larger per capita payment as s.64(1)(a) only permitted fifty percent of capital moneys derived from the sale of surrendered lands to be distributed. I accept his opinion that any expenditures of capital under the authority of s.64(1)(k) required the personal approval of the Minister, that such authority could not be delegated thus the payment to the Chief and Councillors requested by B.C.R. 434 was not authorized. In fact, the Minister concurred in the opinion of his deputy, M.A.J. Lafontaine, dated October 29, 1983 and endorsed the same as follows (see Exhibit 26):

In my opinion the expenditures described above to Chief Polchies and Councillors Sabattis and Sacobie are not for the benefit of the Band and therefore I cannot approve them

pursuant to subsection 64(k) of the Indian Act.

(Signed) John C. Munro.

The Chief then made application for a writ of mandamus against the Minister in the Federal Court of Canada. This application was dismissed by McNair J., on December 19, 1983. He held that:

The Minister carried out the discretionary determination which Parliament entrusted to him.

Norwell Getty, a member of the New Brunswick bar since August 1986 testified for the defence. He stated that the decision of McNair J., was "now on appeal," as the Chief's notice of appeal was not withdrawn. On cross-examination he suggested that this delay was because the Band "stopped funding" the cost of the appeal. In my opinion, after a period of three years and the election of two or more Chiefs, it is fair to state that this appeal has been abandoned.

By the end of August 1983 the bank had dishonoured several per capita cheques. The R.C.M.P. carried out an investigation and the Chief was charged with an offence contrary to s.294(a) of the Code. On May 22, 1984 see [1985] 2 C.N.L.R. 141 (N.B.Q.B.)] he was convicted and on June 6, sentenced to imprisonment and ordered to make restitution to the Band in the sum of \$95,000.00. On March 12, 1985 [see [1986] 3 C.N.L.R. 136] the Court of Appeal dismissed his appeal, the rule stating (see Exhibit 28):

1. the appeal against conviction is dismissed;
2. the appeal against sentence is allowed and the term of imprisonment is reduced from 9 months to a term of 3 months; and
3. the probation order and the order of restitution are confirmed.

Mr. Corby, Crown Prosecutor, testified that the Chief was granted leave to appeal to the Supreme Court of Canada, but as the appeal never "proceeded" he was informed it has been abandoned.

Most of the per capita cheques were cashed on August 2, 1983 and a few days later the Chief was re-elected for a two year term. Due to his conviction for an indictable offence, he was obliged to resign. He was succeeded as Chief by Mark Sabattis.

B.C.R. 455 and 471 were forwarded to the department. On January 16, 1985, the then Minister, David Crombie, pursuant to ss.64(a) and (k) and s.66 of the Act authorized further revenue and capital payments of \$411, - 409.12. This amount provided for per capita distributions of \$10,056.21 to twenty-five members of the Band not previously paid.

It should be mentioned by this date that solicitor Harry S. LaForme had obtained a judgment in the Supreme Court of Ontario against the Band and the Minister for \$255,000.00. However, Charles Kingston, a local solicitor then representing the Band, negotiated a settlement for \$50,000.00. It should also be mentioned that Chief Mark Sabattis had repaid with interest the \$40,000.00 he received and the present action against him was discontinued.

At the date of trial, Mr. Hodgkinson testified that the current balance of the capital account was sixty-two cents with \$68,000.00 credit in the revenue account. These were "net" figures taking into consideration the fifteen percent holdback from each account for the Kingsclear action.

The plaintiff has obtained judgment by default against former Councillor, John Sacobie, and over half of the claim against him has been satisfied. His account at the Toronto-Dominion was seized as well as funds in the bank account of the defendant, Emmanuel Polchies.

The plaintiff in its post trial brief admits that by consent it recovered \$69,026.44 from the defendant, Polchies, in July 1985 and \$12,661.98 representing interest paid by the bank in April 1986. As a result, the plaintiff discontinued its claim against the bank and the claim against the remaining defendant is reduced to \$68,311.58.

As mentioned, the defendant was persistent in obtaining a favourable settlement. He was also active in attempting to have this action discontinued. On October 13, 1983, that is, two weeks after the action was commenced, he obtained thirty-five band member signatures on a petition. This document, Exhibit 29, authorized our Chief" and Councillors to be paid the amounts already received.

James Sark, brother-in-law of the defendant, succeeded Mark Sabattis as Chief. On October 17, 1985 B.C.R. 495 was passed, (Exhibit 31). It reads as follows:

We the Chief & Council of the Oromocto Indian Band hereby inform the Minister of Indian & Northern Affairs the Honorable David Crombie that we have discontinued our civil action against Emmanuel Polchies and that we are desirous that the Minister also does the same.

We, therefore request that the Minister also discontinue any and all legal action against Emmanuel Polchies of the Oromocto Indian Band.

On October 21, 1985 counsel of record wrote to the enclosing this resolution. The Minister replied to Mrs. Fraser on April 11, 1986, Exhibit 33, in part as follows

I am reluctant, however, to comply with the request as it is based on a band council resolution only. It certainly expresses the wishes of the council of the day but it leaves unsaid the wishes of the band members and this is an important element which is missing.

He continued:

I am, therefore, suggesting that the Chief and Council seek the views of the band members. This can be done at either a regularly scheduled meeting or a meeting called specifically for the purpose of soliciting the views of the band members. Needless to say, proper notice of the meeting is to be given, minutes kept and recorded along with the result of the vote of the membership in regard to the question of my dropping the action. A band council resolution can then be resubmitted to me.

The band meeting took place on September 30, 1986. Chief James Sark presided. The minutes show that thirty-seven band members voted, that the defendant was permitted to address the meeting, that his solicitor was present but denied the right to speak. Mr. Tony Gabriel, an employee of the department, was also present at the request of his superintendent. He testified that many present were primarily concerned about payment of the restitution order. He advised that \$70,000.00 had been paid. The vote was twenty-seven to ten to continue this action.

It should be repeated, as stated earlier, that in April 1986 the bank paid interest and at the date of meeting, that is, September 30, 1986, the sum of \$81,688.42 had been credited to the restitution order. In fact, the bank also paid costs before the present action was discontinued.

The defendant claims that the plaintiff has no legal right to claim \$150,000.00 and that all sums already paid by him be returned. In my opinion, this court has no jurisdiction to entertain a request for the return of any amount recovered and credited to the restitution order, a term of probation confirmed by the Court of Appeal.

The defendant maintains that in July 1983 as Chief he was the active head of a duly elected Council and relying on a B.C.R. he was entitled to be compensated for his valuable services. He said that during the negotiations at the hotel "we settled for two million" and in "another twenty minutes I got another one-half million". He insisted that Mr. LaForme then wanted a post-dated cheque for \$250,000.00, with the promise "he would later send me \$100,000.00". Although this was a verbal promise, he said that Mrs. Bryant overheard the same.

Mrs. Bryant, who was called by the defence, stated that after settlement for 2.5 million that "Harry (LaForme) wanted costs of \$250,000.00 to be part of the formal agreement". She stated that "we" were prepared to put that in the agreement if "the band voted on it". She added, as "there was a falling out between Harry and the Chief" that "my party officials did not want this in the agreement.

Mrs. Bryant admitted that the Chief said "Harry had suggested \$250,000.00, 100,000 of same for me".

This witness frankly stated that this problem was not my affair. She added that there is a policy for legal fees, negotiating fees and any other costs.

In any event, I am satisfied that the final settlement made no provisions for fees of any type.

I am also satisfied that certain members of the band from time to time felt that the defendant should receive some compensation for his successful negotiation on their behalf. It also appears likely that if a majority of the band members present at the meeting of September 30, 1986 had voted that this action be discontinued that the Minister would have accepted such a decision. This,

however, is not the case.

In my opinion the plaintiff had the duty to proceed to trial in an effort to recover funds which I find in law belong to the members of the Band. This includes the defendant and his family.

There will be judgment for the plaintiff against the defendant for \$68,311.58 without interest. This takes into consideration the sum already credited on the restitution order which likewise did not bear interest.

COSTS

This has been a long trial with many witnesses and exhibits. Since the cause of action arose, there have been at least three Chiefs, three Ministers, three or more solicitors engaged by each party, a criminal trial and appeal, an application in the Federal Court and other proceedings. Although costs have been requested by both parties, it is my opinion, in the exercise of my discretion, that costs should not follow the event. There will be no order for costs.