SUPREME COURT OF NOVA SCOTIA

Citation: *Annapolis Valley First Nation v. MacEachern*, 2024 NSSC 372

Date: 20240729
Docket: No. 531200
Registry: Kentville

Between:

Annapolis Valley First Nation

Applicant

v.

Shanika MacEachern, Chadwick Thorpe, Donovan Morgan, David Smith-Deveau, Emily Ann Potter, Cody Osborne-Copage, Amanda MacDonald

Respondents

Judge:	The Honourable Justice Gail L. Gatchalian
Heard:	April 24 and June 6, 2024, in Kentville, Nova Scotia
Oral Decision:	July 29, 2024
Counsel:	Ashley Hamp-Gonsalves, for the Applicant Shanika MacEachern, Chadwick Thorpe, Donovan Morgan, David Smith-Deveau, Emily Ann Potter, Cody Osborne-Copage, Self-Represented, with Delroy Riley and Tom Keefer making oral submissions on their behalf Amanda MacDonald, not participating

By the Court:

Introduction

[1] If I am required to place these reasons in writing, I reserve the right to edit them for spelling and grammar, to make them more readable, for example, by adding headings, and to add complete citations and quotations. However, I will not change the substance of my reasons.

[2] The Respondents have taken over four homes ("the Properties") owned by the Annapolis Valley First Nation ("the Band"). The Properties are located on the Cambridge Indian Reserve No.32 (the "Reserve") in Cambridge, Nova Scotia. The Respondents entered the Properties without the consent of the Band on or about February 4, 2024. The Respondents have continued to occupy the Properties since then without the consent of the Band. The Respondents took over the Properties as a form of self-help because they felt that the Band had failed to address their concerns about adequate housing.

[3] The Band filed this Application in Chambers against the Respondents. The Band wants a declaration that the Respondents are trespassing on the Properties

and an order that the Respondents deliver vacant possession of the Properties to the Band.

[4] The central issues to resolve are:

1. Whether the Respondents are in violation of the Band's housing by-law and are trespassing on the Properties; and
2. If so, whether the Band is entitled to an order evicting the Respondents from the Properties

[5] In order to determine whether the Band is entitled to the relief claimed, I will discuss the following:

1. the parties
2. the Housing By-law
3. the Properties
4. the Notice to Vacate
5. the procedural history of the Application
6. my reasons for dismissing the Respondents' motions
7. the Respondents' Grounds of Contest
8. the Band's statutory power to seek eviction of the Respondents from the Properties

9. the Respondents' constitutional challenge

The Parties

[6] The Annapolis Valley First Nation, is a "band" within the meaning of s.2(1) and 2(2) of the *Indian Act*, R.S.C. 1985, c.I-5.

[7] The Chief and Council of the Band (the "Band Council") is the elected governing body of the Band pursuant to s.2(2) and s.74 of the *Act*.

[8] The Respondents are:

1. Shanika MacEachern, Band member
2. Donovan Morgan, non-Band member
3. David Smith-Deveau, Band member
4. Chadwick Thorpe, Band member
5. Emily Ann Potter, non-Band member
6. Cody Osborne-Copage, Band member
7. Amanda MacDonald, non-Band member

The Housing By-law

[9] The Band says that it is entitled to an order that the Respondents vacate the Properties because the Respondents' occupation of the Properties is in violation of the Band's Housing Program Policy ("the Housing By-Law").

[10] The Housing By-Law is a by-law passed by the Band Council pursuant to s.81(1) of the *Indian Act*.

[11] The Housing Bylaw creates an application process for Band-owned housing and a housing list for completed and approved applications. Under the Housing bylaw, a successful applicant must sign an occupancy agreement before being allocated a home.

[12] There is a great need for housing on the Reserve, with many individuals and families on the housing list awaiting allocation of a home.

[13] The Respondents were not allocated any of the Properties pursuant to the process laid out in the Housing By-Law.

[14] The Band asks the Court to restrain the Respondents' breach of the Housing By-Law under s.81(3) of the *Indian Act*, which states that a contravention of a band by-law may be restrained by court action at the instance of the band council.

The Properties

[15] The Reserve is a "reserve" within the meaning of s.2(1) of the *Indian Act*, which defines "reserve" as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by her Majesty for the use and benefit of a band."

[16] Pursuant to ss.2(1) and 18(1) of the *Act*, reserve lands are vested in the Crown, but held for the use and benefit of the respective bands for which they were set apart.

[17] On or about February 4 and 5, 2024, the following Respondents entered into and began to occupy the following Properties on the Reserve land without the knowledge of or consent of the Band:

1. Shanika MacEachern and Donovan Morgan: 72 Smith Avenue
2. David Smith-Deveau: 84 Smith Avenue
3. Chadwick Thorpe and Emily Ann Potter: 90 Smith Avenue
4. Cody Osborne-Copage and Amanda MacDonald: 133 Kakwa Street

[18] The Band's plan was to allocate the Properties to those persons on the Housing list pursuant to the Housing By-law when the Properties were ready to be occupied.

Notice to Vacate

[19] On or about February 26, 2024, the Band Council passed a Band Council Resolution declaring the Respondents trespassers on the Properties and providing them 48 hours notice to vacate the Properties. The Notice to Vacate was delivered

to the Properties starting on February 28, 2024. The Respondents have refused to leave.

Procedural History

Affidavits, Brief and Book of Authorities of the Applicant

[20] In support of its Application, the Band relied on the Affidavit of Gerald Toney, Chief of the Annapolis Valley First Nation, as well as the solicitor's affidavit of Sarah MacCallum. The Band filed a brief and book of authorities.

Notice of Contest

[21] One Notice of Contest was filed, signed by all seven Respondents. The Notice of Contest does not contain any material facts in support of the grounds, as required by Civil Procedure Rule 5.04(2)(b).

Affidavit and Brief of Ms. MacEachern

[22] Only Ms. MacEachern filed an affidavit and a brief.

The Hearing

[23] The hearing took place over the course of two half-days on April 24, 2024 and June 6, 2024.

Intervention Request

[24] On April 24, 2024, I denied the request of the Micmac Rights Association to intervene.

Respondents' Request that Non-Lawyers Assist Them

[25] The Band was represented by counsel. All of the Respondents except Amanda MacDonald attended the hearing dates. The Respondents in attendance were not represented by counsel.

[26] On April 24, 2024, I granted the request of the Respondents that former Chief Delroy Riley and his assistant Tom Keefer, non-lawyers, make oral submissions on their behalf.

Adjournment For Respondents to Serve and File a Notice of Constitutional Question

[27] During their oral argument, the Respondents requested an adjournment to serve and file a Notice of Constitutional Question. I granted their request.

Respondents' Request to File Late Affidavits

[28] At the end of the hearing on April 24, 2024, the Respondents requested permission to file late affidavits. I gave the Respondents one week to file a written

submission explaining what additional affidavit evidence they wished to file, the relevance of the evidence, and why I should allow the Respondents to file late affidavits. I gave the Band one week to respond. My directions were then included in an Order dated April 29, 2024.

[29] The Respondents did not file written submissions as required, but rather filed four affidavits on May 1, 2024, without permission from the court. In an email from Mr. Keefer on May 1, 2024, he stated that two further affidavits would be filed the next day or at the earliest possible time. In a letter dated May 2, 2024, the Band objected to the late filed Affidavits.

[30] In a letter decision dated May 2, 2024, I refused the request of the Respondents to file late Affidavits, and directed that the Affidavits be returned to the Respondents.

Last Minute Motions on June 6, 2024

[31] On June 6, 2024, the Respondents made several last-minute motions, which I dismissed, with reasons to follow.

Completion of Respondents' Legal Argument

[32] Chief Riley and Mr. Keefer then completed their argument.

[33] I reserved my decision.

Reasons for Dismissing Respondents' Motions

[34] Mr. Keefer made the following last-minute motions on June 6, 2024:

1. A second motion for permission to file late affidavits.
2. A motion for an order for "advance costs" to provide funds to the Respondents to allow them to hire legal counsel and expert witnesses.
3. A motion for an order for a "change of venue," ordering that this matter be moved to Halifax to be the subject of a meeting between the members of the Band and the federal Crown on October 1st.
4. A motion to convert the Application to an Action.

[35] These are my reasons for dismissing the motions made by the Respondents on the second day of the hearing.

Second Motion for Permission to File Late Affidavits

[36] The starting point for considering the Respondents' second motion for permission to file late affidavits is Civil Procedure Rule 5.15(1), which states that a party to an application may only file an affidavit within the deadlines under Rule 5

or set by a judge giving directions, unless a judge hearing the application permits an affidavit to be filed later. Under Rule 5.06(2), the deadline for the Respondents to file their affidavits was five days after the date they were notified of the Application. The Respondents therefore require permission from the Court to file any further affidavits.

[37] In response to the first motion for permission to file late affidavits, I set a deadline for the Respondents' submissions in support of that motion, which the Respondents did not meet. The Respondents asserted that they did not understand that they were required to make written submissions supporting their request for permission to file affidavit evidence by May 1, 2024, but rather that I had granted their request to file late affidavits. I do not accept this explanation. My directions were clear.

[38] Civil Procedure Rule 5.15 states that, on a motion to allow a late affidavit, the judge must consider all of the following:

- the prejudice that would be caused to the party who offers the affidavit, if the application proceeds without that affidavit,

- the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice of an adjournment if that would be a result, and
- if any adjournment would result, the public interest in making the best use of court facilities, judges' time and the time of court staff.

[39] I was not satisfied that the Respondents would suffer prejudice if the application proceeded without the affidavits. On April 24th, Mr. Keefer stated that the late affidavits would address the following allegations: the failure of the Band Council to allocate vacate Band houses, the resignation of the Housing Manager and the lead building contractor, unsafe housing, the failure of the Band Council to meet with its Band members despite repeated requests, the failure of the Band Council to meet with community members over the last decade, and "this kind of material."

[40] When I asked Mr. Keefer how such evidence was relevant to the issues in the Application, he stated that it was relevant to the alleged breach of fiduciary duty on the part of the Band Council, which he asserted is not an institution of the Mi'kmaq nation, but rather an institution of the Canadian Parliament. None of the proposed evidence is relevant to the issues in this proceeding.

[41] On the other hand, the Band would have suffered prejudice if I allowed the late affidavits to be filed because: (1) the time and resources expended by the Band preparing for and participating in the hearing on April 24 and June 6 would have been wasted, as the Band would have had the right to file rebuttal affidavits and to cross-examine the Respondents' affiants on their affidavits, and legal arguments would have to be made again; and (2) the Properties would have remained unavailable to Band members on the housing list who would otherwise be entitled to occupy those Properties pursuant to the Band's Housing By-Law.

[42] The first category of prejudice could be compensated by an award of costs. The second category of prejudice could not.

[43] If I allowed the Respondents' request to file late affidavits, it would have required an adjournment. This would have been the second adjournment, made at the request of the Respondents. The court facilities, judge's time and the time of court staff expended to date would have been lost. A further adjournment would not have served the public's interest in making the best use of court facilities, judges' time and the time of court staff.

[44] Taking all of the relevant factors into account, it was not in the interests of justice to allow the request of the Respondents to file late affidavits.

Motion for "Advance Costs" to Hire Legal Counsel and Experts

[45] I assume that the Respondents' motion for "advance costs" is a motion for an "Okanagan order" pursuant to the decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71.

[46] Such a motion must be made properly, with supporting evidence: *Okanagan* at para.40. No evidence was filed in support of the motion.

"Change of Venue" Motion

[47] I dismissed the Respondent's motion for a "change of venue" and an order that this matter be moved to Halifax to be the subject of a meeting between the members of the Band and the federal Crown on October 1st because:

1. The Crown is not a party to this proceeding, and
2. The Respondents did not satisfy me that there was a legal basis for this request.

Motion to Convert the Application to an Action

[48] There was no proper motion before me to convert the Application to an Action. Civil Procedure Rule 6.02 sets out a number of factors for the Court to consider in determining a motion to convert. Civil Procedure Rule 6.04(1) requires

a party who makes a motion to convert an application to an action to file an affidavit. The Respondents did not address the relevant factors, nor file an affidavit in support of the motion.

The Respondents' Grounds of Contest

[49] In the Notice of Contest, the Respondents contest the Application on the following "grounds":

1. Breach of fiduciary duties by the Chief and Council
2. Breach of *An Act Respecting First Nations, Inuit and Metis Children, Youth and Families*
3. Breach of the *Human Rights Act*
4. Fraudulent federal election activity
5. Breach of "Privacy Act" causing safety risk
6. Defamation of character
7. Negligence of duties and responsibilities
8. Perjury
9. Breach of Aboriginal and Treaty Rights under s.35 of the *Constitution Act, 1982* and s.25 of the *Canadian Charter of Rights and Freedoms*

[50] None of Grounds 1 to 8 are relevant to the issues raised by the Application, which are: (1) whether the Respondents' occupation of the Properties is in violation of the Housing By-Law and constitutes trespass and (2) if so, whether the Band is entitled to an order for vacant possession to restrain the contravention.

[51] None of the above Grounds 1 to 8 justify the Respondents' unauthorized and unlawful occupation of the Properties.

[52] For these reasons, I will not discuss Grounds 1 to 8 any further.

[53] I will discuss the Respondents' Constitutional argument in more detail later in these reasons. First, I will discuss the Band's statutory power to enact by-laws and its statutory power to seek enforcement of any contravention of a Band by-law under the *Indian Act*. Then I will discuss the Respondents' Constitutional argument to determine whether it has any bearing on the Band's powers.

The Band's Statutory Power to Seek Eviction from the Properties

[54] Section 2(2) of the *Indian Act* defines "band," with reference to a reserve, as the band for whose use and benefit the reserve was set apart.

[55] Section 18(1) of the *Indian Act* states that "[s]ubject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they

were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band."

[56] Individual band members do not have a right of individual possession to Reserve land except by application of s.20(1) of the *Act*. Section 20(1) says that "[n]o 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." Thus, s.20(1) creates two requirements for lawful possession of reserve land: (1) allotment from the band council and (2) Ministerial approval of the allotment: see *MacMillan v. Augstine*, 2024 NBQB 160 at para.40.

[57] Absent an individual right of possession under s.20(1) of the *Indian Act*, an individual band member may occupy a property on reserve land by agreement with their respective Band, for example, pursuant to an occupancy agreement: see *Copeau v. Canada (Attorney General)*, 2021 FC 325 at para.20.

[58] Subsections 81(1)(h) and (p.1) of the *Indian Act* grant the Band Council the authority to make by-laws to regulate the use of buildings on the Reserve and the residence of Band members and others on the Reserve.

[59] The Housing By-law is a by-law passed by the Band Council pursuant to s.81(1) of the *Indian Act*.

[60] Under s.81(3) of the *Indian Act*, the Band may request that the court restrain the Respondents' contravention of the Housing By-Law.

The Respondents' Constitutional Argument

Section 35 of the Constitution and s.25 of the Charter

[61] The final ground of contest is the Respondents' constitutional challenge.

[62] Section 35(1) of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights.

[63] Section 25 of the *Canadian Charter of Rights and Freedoms* guarantees that no other provision of the *Charter* can have the effect of taking away or suspending Aboriginal and Treaty rights that are recognized in section 35(1) of the *Constitution*, the *Royal Proclamation of October 7, 1763*, or in land claims agreements.

The Notice of Contest

[64] The Notice of Contest does not identify the Aboriginal or Treaty right asserted by the Respondents, or contain any material facts in support of this ground.

Ms. MacEachern's Affidavit

[65] Ms. MacEachern's affidavit does not set out an evidentiary basis for an Aboriginal or Treaty right claim.

[66] Her affidavit contained a great deal of argument, which is inappropriate for an affidavit. I will not be relying on any of the inadmissible content of her affidavit.

Ms. MacEachern's Brief

[67] It is very difficult to understand the argument being made by Ms. MacEachern in her brief. It is possible that she is asserting an Aboriginal title claim to the Reserve land, although she does not say so. For example, she writes at para.6 of her brief that the Reserve land has never been surrendered to the Crown and therefore that Mi'kmaq people cannot be trespassers on the land.

[68] However, Ms. MacEachern's brief is internally inconsistent. For example, at para.3 of her brief, she relies on a case that confirms that s.18(1) of the *Indian Act*

provides that reserve land is held by the Crown for the use and benefit of the respective bands.

[69] In addition, while Ms. MacEachern criticizes the *Indian Act* as being contrary to s. 25 of the *Charter* and s.35 of the *Constitution Act* (para.8), she appears elsewhere to rely on the *Act*, stating that "[h]owever flawed, the *Indian Act* and the Band Council system remains a means by which the Government of Canada discharges its fiduciary responsibilities to Indians" (para.13).

[70] Ms. MacEachern's argument, whatever it is, is based on a flawed premise, which is that "Chief and Council and the Band Administration [are] Federal Government employees…" (para.13) and that they "are part of the Canadian government" (paras.22 and 24). This premise is wrong in law.

[71] At the end of her brief, the only relief requested by Ms. MacEachern is that the Court "call upon the Minister of Indigenous Services Canada to convene a community meeting for all members of the AVFN to gather together and to resolve matters through peaceful dialogue and discussion" (para.25). She does not adequately explain the legal basis for the Court ordering such relief in this Application.

[72] Ms. MacEachern's brief does not set out a viable argument in support of an Aboriginal or Treaty right, let alone an Aboriginal or Treaty right that justifies the Respondents' unauthorized occupation of the Properties.

The Notice of Constitutional Question

[73] The Respondents filed and served a Notice of Constitutional Question on the Attorney General of Canada. The Attorney General chose not to participate in the hearing.

[74] The Notice of Constitutional Question is signed by five of the seven Respondents:

1. Ms. MacEachern, Band member
2. David Smith-Deveau, Band member
3. Chadwick Thorpe, Band member
4. Emily Ann Potter, non-Band member
5. Cody Osborne-Copage, Band member

[75] The Notice of Constitutional Question is also very difficult to understand.

[76] In the Notice, the Respondents seek a declaration that the following legislation is unconstitutional under s.25 of the *Charter* and s.35 of the *Constitution Act, 1982*:

> (a) ss.18(1) and 20(1) of the *Indian Act* and
>
> (b) the Annapolis Valley First Nation Disorderly Conduct and Nuisance By-Law and the associated Band Council Resolution.

[77] As the Disorderly Conduct and Nuisance By-Law has no relevance to this Application, I will not discuss it or the constitutional challenge to it further.

[78] My best guess is that, by challenging the constitutionality of ss.18(1) and 20(1) of the *Indian Act*, the Respondents who signed the Notice of Constitutional Question might be asserting Aboriginal title to the Reserve as against the Band (see paras.2 and 8 of the Notice), which they equate with the Crown (see paras.1-4 and 6 of the Notice), and that they might be relying on Aboriginal title to the Reserve to argue that, as Mi'kmaq people, they cannot legally be trespassers on their own land and that the Band Council (which the Respondents assert is an institution of the Crown) has no authority to expel them from the Reserve (see paras.2 and 8 of the Notice).

[79] The Aboriginal title claim of the Respondents, if that is what they are asserting, fails for a number of reasons, namely:

1. There is an insufficient evidentiary foundation for the claim: see *Mitchell v. M.N.R.*, 2001 SCC 33 (CanLII) at para.39.
2. Aboriginal title is a collective right and the Respondents have not adequately explained how they, as individuals, are entitled to claim Aboriginal title to the Reserve on behalf of the community, nor have they provided a sufficient evidentiary basis for doing so: see *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC) at para.115 and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para.86.
3. The premise of the Respondents' Aboriginal title claim, which is that the Band Council is the Crown, is wrong in law.
4. Neither the federal Crown nor the provincial Crown is a party to this Application.
5. The Respondents bear the onus of establishing Aboriginal title, yet they have not stated that they are making an Aboriginal title claim, and they have not referred to the test for Aboriginal title, explained how they meet the test, or referred to any of the leading cases in

this important area of the law: see Delgamuukw at para.143, and Tsilhqot'in Nation at para.26.

[80] If the Respondents are making an Aboriginal or Treaty right claim that is different from an Aboriginal title claim, such a claim or claims fail for the following reasons:

1. The Respondents have failed to properly characterize the claim: see *R. v. Pamajewon*, [1996] 2 SCR 821 at para.27.
2. There is an insufficient evidentiary basis for any such claim: *Mitchell* at para.39.
3. The Respondents have not referred to the test for establishing s.35 claim, demonstrated how they meet that test, or otherwise referred to any of the leading cases on Aboriginal and Treaty rights: see *R. v. Desautel*, 2021 SCC 17 at para.51, citing *R. v. van der Peet*, [1996] 2 S.C.R. 507.

[81] The burden of proof is on the Respondents to prove, on a balance of probabilities, the existence of a s.35 right and that the impugned legislation causes a *prima facie* infringement of the right: see *Van der Peet* at para.134 and *Mitchell* at para.39. The Respondents have failed to discharge that burden.

[82] For all of the above reasons, the constitutional challenge of the Respondents is dismissed.

Conclusion

[83] For the following reasons, the Band is entitled to the relief claimed in this Application.

[84] The Band has a collective right of possession to the Reserve land, pursuant to ss.2(2) and 18(1) of the *Indian Act*,

[85] The Respondents do not have an individual right of possession to the properties under s.20(1) of the *Act*.

[86] The Respondents do not have the agreement of the Band to occupy the properties, nor do they possess occupancy agreements authorizing them to occupy the properties.

[87] The Respondents entered and are occupying the Properties without authorization from the Band, in violation of the Housing By-Law.

[88] The Respondents did not challenge the by-law making power of the Band under s.81(1) of the *Indian Act*.

[89] The Respondents did not challenge the validity of the Housing By-Law.

[90] The Respondents' occupation of the Properties also constitutes trespass, because they have intentionally and physically entered and remain on the Properties without lawful justification: see Lewis Klar et al., *Remedies in Tort* (Thomson Reuters ProView, 2023) at §26:5 and *Joe v. Findlay*, 1981 CarswellBC 35 at para.13.

[91] Under s.81(3) of the *Act*, the Band has the statutory authority to seek a court order to restrain the Respondents' contravention of the Housing By-Law. The Respondents did not challenge the validity of s.81(3) of the *Act*.

[92] The Band is therefore entitled to a court order restraining the Respondents' contravention of the Housing By-Law and their trespass on the Properties. The Respondents are not entitled to take matters into their own hands, and unlawfully enter and occupy Band-owned housing.

[93] I therefore order as follows:

1. The Respondents occupying the following Band-owned properties ("the Properties") on Reserve land are unlawfully trespassing on those properties:

a. 72 Smith Avenue, Cambridge

b. 84 Smith Avenue, Cambridge

c. 90 Smith Avenue, Cambridge

d. 133 Kakwa Street, Cambridge

2. The Respondents who are unlawfully occupying the Properties and any other individuals residing with the Respondents are required to deliver vacant possession of the Properties to the Band no later than 5:00 p.m. on August 12, 2024.
3. The Royal Canadian Mounted Police are authorized to enforce the Order should the Respondents or anyone residing with them refuse to vacate the Properties in accordance with the Order.
4. A permanent injunction shall issue, enjoining the Respondents from unlawfully occupying the Properties, or occupying any other property on Reserve land, without authorization from the Annapolis Valley First Nation Band Council.

[94] Annapolis Valley First Nation did not seek costs. The parties will bear their own costs.

[95] Order accordingly.