

THE QUEEN'S BENCH
WINNIPEG CENTRE

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BETWEEN:)	
)	Mr. R. Zaparniuk and
BUNIBONIBEE CREE NATION,)	Mr. M. Jerch,
)	for the Plaintiff
)	
Plaintiff	)	Mr. G. Hannon and
	)	Mr. I. Wiebe,
- and -	)	for the Govt. of Manitoba
)	
	)	Mr. J. Harvie,
THE GOVERNMENT OF MANITOBA,	)	for Cambrian Credit Union
CAMBRIAN CREDIT UNION)	
LIMITED, RESORT MANAGEMENT &	)	Mr. R. Hoeschen,
CONSULTANTS LTD. and PAYBACK	)	for Payback Limited
LIMITED PARTNERSHIP,	)	Partnership and Purchaser
)	
Defendants	)	Mr. T. Saunders
	)	(Watching Brief) for
	)	Attorney-General of Canada
)	
	)	Judgment delivered
	)	February 14, 2006

28

29 SIMONSEN, J. (Orally)

30 The plaintiff, Bunibonibee Cree Nation (formerly

31 known as Oxford House Indian Band and Oxford House First

32 Nation and hereinafter referred to as "the Band"), seeks an

33 interlocutory injunction preventing the defendant Cambrian

34 Credit Union (the "Credit Union") from assigning a certain

1 Crown land lease ("the Lease") as part of an agreement for
2 the sale of a fishing lodge ("the lodge"). The Lease
3 relates to lands that are near, but not currently included
4 within the Band's reserve.

5 Background. The Band is a signatory to Treaty 5.
6 Treaty 5 provided for the setting aside of land for the use
7 and benefit of the First Nations who entered into the
8 treaty. It is common ground between the parties that the
9 Band did not receive all of the land to which it was
10 entitled under the Treaty.

11 In 1929, the Federal and Provincial Governments
12 agreed, in the Natural Resources Transfer Agreement
13 (confirmed in the Constitution Act of 1930), that Manitoba
14 would assume an obligation to set aside a sufficient amount
15 of unoccupied lands owned by it to enable Canada to fulfill
16 its obligations to the First Nations under the treaties.

17 In 1997, the Federal and Provincial Governments
18 and representatives of the Band (and other bands in a
19 similar position) negotiated an agreement with a view to
20 resolving the outstanding treaty land entitlement. On
21 May 29, 1997, a Framework Agreement Treaty Land Entitlement
22 was signed by Her Majesty the Queen in Right of Manitoba
23 ("Manitoba"), Her Majesty the Queen in Right of Canada
24 ("Canada"), and Treaty Land Entitlement Committee of
25 Manitoba Inc., on behalf of the First Nations of Manitoba
26 with outstanding treaty land entitlements. The Framework
27 Agreement provided a mechanism by which the individual
28 entitlement bands could resolve their outstanding treaty
29 entitlements with the two levels of government. The
30 Framework Agreement anticipated that there would be a
31 Treaty Land Entitlement Agreement entered into by each
32 entitlement band.

33 On February 17, 1999, the Band, Manitoba, Canada,
34 and Treaty Land Entitlement Committee Inc. executed the

1 Oxford House First Nation Treaty Land Entitlement Agreement
2 (hereinafter referred to as "the TLE Agreement"). The TLE
3 Agreement provided that it would be implemented in
4 accordance with the provisions of the Framework Agreement.

5 Pursuant to the Framework Agreement, the Band was
6 entitled to select Crown lands within Manitoba, with a view
7 to having said lands transferred from Manitoba to Canada
8 for the purpose of becoming Indian Reserve Lands pursuant
9 to the provisions of the *Indian Act*, R.S.C., Cap. I-6.
10 Once the lands that had been selected were approved by
11 Manitoba, then Manitoba would transfer its right, title and
12 interest to Canada, for Canada to set aside the land as
13 reserve land.

14 Article 3 of the Framework Agreement sets out a
15 process to be followed to determine whether or not the
16 selected lands would be transferred.

17 Article 6.02(6) of the Framework Agreement
18 prohibits Manitoba from effecting any disposition of or
19 authorizing or allowing any disposition of selected lands
20 other than in keeping with the Framework Agreement.

21 The Framework Agreement and the TLE Agreement
22 acknowledge that third party interests might exist on Crown
23 lands selected pursuant to the TLE Agreement. Third party
24 interests are defined as an interest in Crown land held by
25 any party other than Canada, Manitoba, or any Entitlement
26 First Nation.

27 Article 10 of the Framework Agreement and Article
28 10 of the TLE Agreement provide a process by which third
29 party interests are to be acknowledged and dealt with.
30 Essentially, third party interests are to be respected and
31 unaffected by the Framework and TLE Agreements unless the
32 third party interests are bought by the Band or otherwise
33 disposed of in accordance with the third party's agreement
34 or consent. In addition, Manitoba is entitled to deal with

1 any lands selected pursuant to the TLE Agreements without
2 regard to the third party interests if the third party is
3 in breach of its obligations under the requisite lease or
4 permit.

5 The facts. On March 2, 1993, Manitoba, as
6 lessor, leased the lands described as: Parcels A and B as
7 shown hatched on a plan of part of unsurveyed Township
8 68-18 EPM at Knee Lake filed in the office of the Director
9 of Surveys in Winnipeg as Plan 19523 (hereinafter referred
10 to as "the leased lands"), to Knee Lake Resort Inc. ("Knee
11 Lake"), as lessee. The land was leased to Knee Lake for a
12 term of 21 years ending on December 31, 2013, with
13 provision for one 21-year renewal on like terms and
14 conditions except as to rent.

15 Knee Lake has operated the lodge on the leased
16 lands.

17 On or about July 4, 2000, pursuant to the
18 provisions of the TLE Agreement, the Band passed a Band
19 Council Resolution selecting the lands covered by the
20 Lease. The land selection was forwarded to Manitoba by
21 letter dated July 5, 2000. On July 18, 2000, Canada
22 acknowledged the Band's selection of the lands contained in
23 the Lease.

24 Manitoba also acknowledged receipt of the Band's
25 land selection and, in a letter to the Band dated
26 August 31, 2000, identified the Lease as a third party
27 interest. Specifically, the letter stated that third party
28 interests "will have to be resolved to the satisfaction of
29 Canada, Manitoba, the Entitlement First Nation and the
30 holder of the third party interest in accordance with
31 Article 10 of the Framework Agreement prior to the transfer
32 of administration and control of the land by Manitoba to
33 Canada."

34 The total lands selected by the Band are

1 approximately 1,511.09 acres, with approximately 102.6
2 acres being the leased lands. Manitoba considers the
3 balance of the selected land to be unencumbered and
4 therefore eligible to be set apart as reserve.

5 In May 2004, Knee Lake assigned to the Credit
6 Union all of its right, title and interest in the Lease as
7 security for a loan. The assignment was consented to by
8 Manitoba.

9 At the time of the assignment to the Credit
10 Union, the Band had a 60% ownership interest in Knee Lake,
11 through a related company, Bunibonibee Corporation. The
12 Band's Chief was on Knee Lake's Board of Directors. A
13 resolution of the Board of Directors of Knee Lake,
14 approving the financing arrangement with the Credit Union,
15 was signed by the Chief of the Band and other directors of
16 the company.

17 In April 2005, Knee Lake made a further
18 assignment of all of its right, title and interest in the
19 lease to the defendant Resort Management & Consultants Ltd.
20 ("Resort"), and the defendant Payback Limited Partnership
21 ("Payback"), subject to the interests of the Credit Union.
22 This assignment was also provided as security for a loan
23 and was consented to by Manitoba.

24 In November 2005, Knee Lake defaulted in its
25 financial obligations to the Credit Union. The Credit
26 Union took action to enforce its security. In a letter
27 dated November 29, 2005, the Credit Union advised counsel
28 for the Band that it was proceeding to enforce its rights.
29 As part of its enforcement, the Credit Union is seeking to
30 sell all of its rights available pursuant to the assignment
31 of Lease from Knee Lake.

32 Lazer Grant Inc., the Credit Union's
33 receiver/manager of Knee Lake, has distributed information
34 packages to parties who might be interested in purchasing

1 the assets of Knee Lake, including the Lease. Bids have
2 been sought. The Credit Union is now in a position to
3 finalize a transaction with respect to the assets of Knee
4 Lake, including the Lease, by February 15, 2006.

5 Analysis and decision. The Supreme Court of
6 Canada, in RJR MacDonald v. Attorney-General of Canada,
7 [1994] S.C.J. No. 17, set out the following three criteria
8 to be met in order to obtain an interim or interlocutory
9 injunction: whether there is a serious issue to be tried;
10 whether the applicant would suffer irreparable harm if the
11 application were refused; and which of the parties would
12 suffer greater harm from the granting or refusal of the
13 injunction pending a decision on the merits. This third
14 criterion is often referred to as the balance of
15 convenience test.

16 In order to determine whether there is a serious
17 issue to be tried, I must make a preliminary assessment of
18 the merits of the case. There are no specific requirements
19 which must be met in order to meet this part of the test.
20 The threshold is a low one.

21 With respect to the merits of the claim, the
22 Band's position is that Manitoba's consents to the
23 assignments made to the Credit Union and Payback, and its
24 intended consent to assignment to the purchaser of the
25 lodge are invalid because of the land selection previously
26 made by the Band. Specifically, it says that, once a
27 selection was made by the Band, Manitoba was precluded by
28 the terms of the Framework Agreement from disposing of the
29 land, which includes the providing of its consent to these
30 assignments of the Lease.

31 Manitoba and the Credit Union submit that neither
32 the Framework Agreement nor the TLE Agreement prevents
33 Manitoba or the Credit Union from dealing with third party
34 interests which pre-dated the agreements.

1 The relevant provisions of the Framework
2 Agreement are as follows:

3
4 6.02(6) Forthwith upon receipt by Manitoba of the
5 items referred to in subsection (4), Manitoba will
6 enter the Selection or Acquisition on the Crown Land
7 Register maintained by Manitoba, where applicable, and
8 upon that entry, Manitoba will not make any further
9 dispositions or Mineral dispositions or issue any
10 further quarry leases or quarry permits under the
11 Mines and Minerals Act in respect of the Selection or
12 Acquisition unless it is determined that the Selection
13 or Acquisition is not eligible to be set apart as
14 Reserve in accordance with the Principles.

15
16 "Disposition" is defined in Article 1.01(27) as follows:

17
18 "Disposition" means an act by Manitoba whereby Crown
19 Land or a right, interest or estate in Crown Land is
20 granted or disposed of, or by which Manitoba creates a
21 right, interest or estate in, divests itself of or
22 permits the use of Crown Land, but does not include:

23
24 (a) a renewal of or consent to the assignment of
25 a right, interest or estate in or permit to use
26 Crown Land which is subject to renewal as a
27 matter of law, established practice or the policy
28 of Manitoba as at the Date of Execution;

29
30 (b) A Mineral Disposition;

31
32 (c) A quarry permit issued under The Mines and
33 Minerals Act to authorize the use of a specific
34 volume of quarry minerals for a specific period

1 of time from a specific quarry site for a specific
2 project or activity for public purposes;

3

4 The Band makes a number of submissions in support
5 of its assertion that there is a serious issue as to
6 whether the consents to assignment are valid:

7

8 (a) The Band says that the consents to assignment are
9 prohibited under the Framework Agreement because
10 they are dispositions, and they are not exempted
11 under subsection 1.01(27)(a), because that
12 exemption only pertains to consents to
13 assignments of a right or interest that is
14 "subject to renewal". As the assignments made in
15 this case were for collateral purposes, they do
16 not involve a right, interest, or estate "which
17 is subject to renewal".

18

19 (b) The Band also says that any such right of renewal
20 must be "as a matter of law, established practice
21 or policy of Manitoba" and there is no such
22 evidence in this case;

23

24 (c) Further, and in the alternative, the Band says
25 that the exemption in subsection 1.01(27)(a) is
26 void for uncertainty as it is in contradiction
27 with the express prohibition contained in Article
28 6.02(6) of the Framework Agreement.

29

30 (d) Finally, the Band submits that Knee Lake breached
31 clause 10(4)(b) of the Lease by virtue of its
32 insolvency and, as such, the Lease is now
33 terminated and not capable of assignment.

34

1 First, as to whether the consents to assignment
2 are dispositions, I am, based on the evidence before me at
3 this time, satisfied that Manitoba's consent to the
4 assignment of Lease is not an act whereby it granted or
5 disposed of a right, interest or estate in Crown land. The
6 Crown interest was granted or disposed of when the Lease
7 was entered into in 1993.

8 If the assignments are dispositions, I must then
9 consider whether there is a serious issue as to whether
10 they are nonetheless exempt under subsection 1.01(27)(a) of
11 the Framework Agreement. This involves an interpretation
12 of the subsection. As stated by the Supreme Court of
13 Canada in the case of BG Checo International Ltd. v.
14 British Columbia Hydro and Power Authority, [1993] 1 S.C.R.
15 12, at para. 9, it is a cardinal rule of the construction
16 of contracts that the various parts of the contract are to
17 be interpreted in the context of the intentions of the
18 parties as evident from the contract as a whole.

19 Therefore, the issue in this case is whether it
20 was the intention of the parties signing the Framework
21 Agreement that Manitoba could only consent to assignments
22 when those assignments relate to interests that are ripe
23 for renewal. I am not persuaded that the Band has
24 established that there is a serious issue as to whether
25 this was the intention of the parties. Rather, the
26 agreement as a whole reflects an intention to allow third
27 parties to assign their interests at any time. Consistent
28 with this intention, subsection 1.01(27)(a) must mean that
29 Manitoba can consent to an assignment of a third party
30 interest where the interest is intended to be a continuing
31 interest, by virtue of a right of renewal as defined.

32 As to the general principles of the Framework
33 Agreement which support my interpretation of subsection
34 1.01(27)(a), the Agreement provides that a third party

1 interest which pre-dates the selection will not be affected
2 by the selection unless the third party consents to the
3 method of resolving the interest. The Framework Agreement
4 prescribes a comprehensive mechanism for resolving issues
5 related to third party interests. There is no prohibition
6 in the Framework Agreement against a third party dealing
7 with its interest as it sees fit.

8 Further, the Band's interpretation of subsection
9 1.01(27)(a) would preclude third parties from dealing with
10 their interests, including the assigning of same for
11 security. To impose this type of restriction, purportedly
12 arising from an agreement to which the third parties were
13 not even parties, is simply not appropriate.

14 I also find that there is no serious issue as to
15 whether the right of renewal of the third party interest in
16 this case was "as a matter of law, established practice or
17 the policy of Manitoba". Clearly, the right of renewal was
18 specifically provided for in the Lease.

19 Further, based on the evidence before me, the
20 consent to assignment to the Credit Union and the proposed
21 consent to assignment to the purchaser also appear to have
22 been provided in accordance with established practice or
23 policy of Manitoba.

24 Mr. Jonasson, Director of Lands Branch with the
25 Department of Conservation of the Government of Manitoba,
26 swears in his affidavit that assignments of Crown leases
27 for collateral are established practices or policies of
28 Manitoba in effect as at the date the Framework Agreement
29 was signed. The assignment of such leases is necessary for
30 collateral purposes to allow businesses that operate on
31 crown land to secure financing. Lands under Crown land
32 leases are not subject to mortgages or caveats that may be
33 filed in the Land Titles Office. Instead, registrations of
34 assignments are registered in the Crown Lands Register. It

1 necessarily follows that it would be the usual practice of
2 Manitoba to execute a consent to assignment necessary to
3 allow the holders of the assignment to be able to realize
4 on their security.

5 Counsel for the Band also submits that the
6 exclusions contained in the definition of "disposition" are
7 in conflict with the intent and meaning of Article 6.02(6)
8 and are therefore null and void. I disagree that a serious
9 issue is raised by this argument. There is no conflict,
10 uncertainty, or ambiguity in these provisions. Article
11 6.02(6) only prohibits further dispositions in respect of
12 selected lands. The exclusion to the definition of
13 "disposition" is clear and consistent with the rest of the
14 Framework Agreement with respect to third party interests.

15 In any event, even if there were ambiguity or
16 uncertainty, the primary rule of contractual construction,
17 as stated in Armitage v. Armitage, [2004] M.J. No. 138
18 (Q.B.) is that "a deed shall never be void where the words
19 may be applied to any extent to make it good". In other
20 words, a clause should not be rejected unless it is
21 manifestly inconsistent with or repugnant to the rest of
22 the agreement. In this case, I am, for the reasons stated
23 above, able to give subsection 1.01(27)(a) meaning
24 consistent with the real intentions of the parties.

25 Finally, the Band submits that Knee Lake has breached
26 clause 10(4) of the lease and has thereby terminated the
27 lease. As such, the lease is not capable of assignment.
28 Clause 10(4)(b) of the Lease provides:

29

30 In addition to its rights under paragraph (3), and
31 without restricting any other remedies available, the
32 Crown may, at its sole option, immediately terminate
33 this Agreement in writing if:

34 ...

1 (b) the Lessee becomes bankrupt or insolvent.

2

3 I note that there is no evidence that the Crown exercised
4 its option to terminate the Lease under this section. In
5 any event, the Lease has been assigned to the Credit Union.
6 Therefore, I do not accept that the Band's position raises
7 a serious issue.

8 Based on the above, I conclude that the Band has
9 not established that there is a serious issue to be tried.

10 Counsel for the Credit Union submits that in the
11 case of RJR, *supra*, the court contemplated (at para. 56)
12 that, in certain circumstances a different standard should
13 be used for the first part of the test for an interlocutory
14 injunction. Specifically, he says that, in circumstances
15 like the case before me where there are no facts in
16 dispute, the applicants must prove a strong *prima facie*
17 case rather than merely a serious issue to be tried.
18 Having found that the Band has not even established a
19 serious issue to be tried, I need not determine whether a
20 more stringent test is applicable.

21 With respect to the second part of the test in
22 RJR, *supra*, namely irreparable harm, the Federal Court of
23 Appeal in Imperial Chemical Industries PLC v. Apotex,
24 [1989] F.C.J. No. 846, held at page 5, that "Evidence as to
25 irreparable harm must be clear and not speculative". Is
26 the evidence clear and not speculative in this case?

27 According to the affidavit of Band Councillor Tim
28 Muskego, the leased land was "used historically by members
29 of the Band to sustain their livelihood and as such this
30 land forms part of their culture and heritage". However,
31 no further particulars have been provided as to why the
32 leased land is particularly significant and why other land
33 would not suffice, other than that the leased land is
34 relatively close, approximately 30 kilometres from the

1 reserve.

2 The Band also submits that, at the time of
3 execution of the Framework Agreement, it knew the third
4 party with which it was required to negotiate and, now that
5 a new third party is being introduced, it will either
6 prevent the Band, or make it extremely difficult for the
7 Band to acquire this land. Hence, it will suffer
8 irreparable harm if the injunction is not granted.

9 In my view, the Framework Agreement did not
10 provide that the third parties involved at the time of
11 execution of the Agreement were the only third parties to
12 be dealt with. The Agreement did not freeze matters in
13 time in this way.

14 Apart from the fact that a new third party is
15 involved, the Band is in no different position than it
16 would have been had the assignments not been granted. It
17 would, in either case, have to deal with a third party in
18 order to secure the selected land. It is noteworthy that
19 the Framework Agreement includes an allocation of almost \$9
20 million to a Third Party Interest Account as a contribution
21 toward the costs anticipated to be incurred by Entitlement
22 First Nations in discharging, replacing or accommodating
23 third party interests.

24 Finally, even if the Band suffers provable loss
25 as a result of the involvement of a new third party and is
26 able to establish that Manitoba has breached the Framework
27 Agreement by consenting to the assignments, the Band may
28 have a claim against Manitoba for damages in a quantifiable
29 amount.

30 Therefore, in my view, the Band has not been able
31 to prove that it would suffer irreparable harm if the
32 injunction is not granted.

33 As to the balance of convenience, Mr. Lazer has
34 sworn an affidavit stating that the sale must close no

1 later than February 15, 2006, to allow for the construction
2 and use of a winter road to bring supplies to the lodge for
3 the 2006 season. He says that the cost of delivering the
4 supplies by air would be completely uneconomical and
5 impractical and that, if this were required, the lodge
6 could not operate this season. Further, he says that if
7 the lodge does not operate this season, the cost of
8 securing it for further operation would be prohibitive. It
9 is submitted that this would result in permanent loss of
10 business and irreparable harm.

11 Effectively, if the injunction were granted, the
12 Credit Union would be prevented from realizing upon the
13 security it took in consideration of the loan it advanced
14 to Knee Lake. The Band says that this is not a concern
15 because the Credit Union could seek damages from Manitoba
16 for having wrongfully consented to an assignment. In my
17 view, it is not a meaningful response to suggest that the
18 Credit Union should accept an unsecured claim for damages
19 in lieu of its security interest.

20 On the other hand, as noted above, if the
21 injunction is not granted, the Band will be in essentially
22 the same position it was prior to the assignments being
23 granted.

24 As well, when weighing the balance of
25 convenience, I note that, while the Band may not have
26 formally approved the assignment to the Credit Union, its
27 Chief certainly knew of the financing, and presumably, was
28 prepared, as a director of Knee Lake, to see the company
29 take advantage of the financing. The Band, as a part owner
30 of Knee Lake, would also have had the benefit of this
31 financing. I have difficulty with the Band now saying that
32 the Credit Union cannot realize on its security. The
33 balance of convenience does not weigh in favour of granting
34 an injunction in these circumstances.

1 Therefore, the application for an injunction is
2 denied.

3 If the parties cannot agree on costs, they may
4 speak to the issue at a later date to be arranged through
5 the trial co-ordinator.
6

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CERTIFIED COURT TRANSCRIPT
FROM THE OFFICE OF
TRANSCRIPTION SERVICES UNIT
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