Federal Court  Cour fédérale

Date: 20110323

Docket: T-2128-09

Citation: 2011 FC 361

Ottawa, Ontario, March 23, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

WHITE BEAR FIRST NATIONS CHIEF AND COUNCIL, on their own behalf and on behalf of all the members of the WHITE BEAR FIRST NATIONS

Applicant

and

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, on behalf of Her Majesty the Queen in Right of Canada

Respondent

and

OCEAN MAN BAND CHIEF AND COUNCILLORS, on their own behalf and on behalf of the members of the OCEAN MAN BAND OF INDIANS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The matter under judicial review is the Minister of Indian and Northern Affairs Canada's (Minister) decision to withhold two-thirds of monies under dispute in protracted litigation before this Court involving some of the parties to this judicial review. The monies were transferred to a suspense account pending the outcome of that litigation (the *McArthur* litigation).

II. BACKGROUND

[2] The *McArthur* litigation in the Federal Court involves the White Bear First Nation (White Bear), the Ocean Man Band of Indians (Ocean Band), the Pheasant's Rump Nakota Band of Indians (Pheasant Rump) and the Minister. The claim relates to the allegedly wrongful amalgamation of these three Bands, the beneficial ownership of oil-rich lands and an accounting for and payment of past and future profits and royalties from these lands.

[3] The *McArthur* litigation involves, amongst other matters, entitlement to some $8 million of royalties held in White Bear's account maintained by and with the Minister.

[4] The Minister decided to preserve two-thirds of that amount ($5,333,334) (the Funds) in a suspense account. The remaining one-third was available to White Bear. White Bear wants all of the $8 million for itself in the *McArthur* litigation.

[5] The problem raised in that action stems from a 1901 amalgamation of the three Bands, the sale of the Ocean Man and Pheasant Rump's reserve lands, the purchase of the "Northern Boundary Lands" with the proceeds of the sale of reserves, and the 1941 surrender of petroleum and natural

gas rights. The amalgamation of the three Bands was unwound in 1986. The division of assets between the newly unamalgamated Bands is part of the *McArthur* litigation.

[6] In the context of the *McArthur* litigation, Ocean Man requested the Crown to preserve the past and future royalty proceeds from the Northern Boundary Lands pending determination of entitlements in that litigation.

[7] White Bear was advised by the Minister on July 31, 2009 that he intended to place an appropriate amount into an interest earning suspense account until the issue of entitlement was determined. The Minister expressed concern for potential liability on the part of the Crown and the Band for any payment of proceeds arising from resource leased for the disputed Northern Boundary Lands. The amount to be put into the account was two-thirds of $8 million which represented interest and principal accrued in respect of royalties.

[8] White Bear was invited by the Minister to discuss the matter further. However, in the absence of any response, the Funds were transferred from the White Bear capital account to the suspense account.

[9] Thereafter, White Bear formally objected to the preservation of funds. White Bear was also informed on November 19, 2009 that because of this transfer, there were no funds available for a per capita distribution.

[10] By a letter, possibly signed November 9, 2009, the Minister invited the Chiefs of the three Bands to discuss the matter further. White Bear's response was to commence this judicial review.

III. LEGAL ANALYSIS

[11] What is at issue is the Minister's decision, in the face of competing contentions from the three Bands as to the right to the amount of $8 million, to place two-thirds in a suspense account. This gave White Bear access to one-third of that amount but no access to the Funds by either of the other two Bands.

A. *Standard of Review*

[12] The first issue is whether the Minister had the authority to make the decision under review. This is a true jurisdictional challenge and attracts the correctness standard of review.

[13] The second issue is the merits of the Minister's decision. This is subject to the reasonableness standard of review (*Ermineskin Tribe v Canada (Indian Affairs and Northern Affairs)*, 2008 FC 741).

[14] The Applicants have tried to assert breach of a duty to consult. If there were merit to this submission, the existence and content of the duty is a question of law as is the question of whether the consultation was reasonable. These issues are dealt with under a correctness standard of review (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73).

B. *Duty to Consult*

[15] Dealing with this last issue first, the decision at issue is simply to deposit funds in trust pending litigation. There is no suggestion or identification of an aboriginal or treaty right which is said to be infringed.

[16] Even if there was such a duty arising in the context of a step in litigation similar to a payment into Court, the duty was met in the Minister's efforts to consult all three Bands who had an interest. As held in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the duty to consult imposes a reciprocal onus on the First Nation to also consult in good faith. White Bear failed to identify the necessary aboriginal interest or to exhibit any reciprocal consultation stance.

[17] Any such interest or claim to such duty is at the lower end of the spectrum of interests deserving of consultation. The Minister owed any such duty to all three Bands and his decision to transfer Funds to a suspense account is temporary in nature and analogous to the preservation of trust referenced in *Haida*, paragraphs 44 and 77. There was no duty to consult and if there was, it was met.

C. *Ministerial Authority*

[18] The starting point for consideration of the Minister's authority is that the Funds at issue are in dispute in the *McArthur* litigation. The Minister has control over these Funds and took a step similar to payment into Court to preserve the Funds. As a litigant, a party would usually have the capacity to take such a step unilaterally.

[19] The Minister has a further concurrent fiduciary duty to all three Bands arising from the fiduciary relationship with the Crown. The Minister also has responsibilities under the *Financial Administration Act* and the *Indian Act* in dealing with public and Indian monies.

[20] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, establishes that Indian-owned funds must be dealt with in accordance with the *Financial Administration Act* and the *Indian Act*. These statutes give the Minister power to deal with those monies. However, it does not resolve the question of how such funds, in dispute as between competing claimants, are to be handled.

[21] Nevertheless, the Minister as trustee has the power to act as necessary to carry out his fiduciary obligations. This is a critical source of his authority to handle the Funds, supported by his responsibilities under the *Financial Administration Act* and his authority under the *Indian Act*.

[22] Therefore, the Minister had the power to make the transfer to the suspense account. The next issue is whether he should have done so.

D. *Reasonableness of Decision*

[23] The Applicant's basic position is that the decision is unreasonable because it owns the Funds and that the Minister had the duty to handle the money for the Band's "use and benefit".

[24] Given the position in which the Minister found himself wherein each Band was claiming some or all of the $8 million, it is difficult to see what other reasonable course of action could be

taken. If there is any criticism of the Minister, it is that the whole amount should have been put in the suspense account. However, to reach that conclusion, the Court would be substituting its view of the appropriate course of action for that of the Minister's. There was no explanation for the Minister not seeking an order permitting him to pay the funds into Court although the security for the Bands is the same as the funds in either case are part of Consolidated Revenue Fund.

[25] The exercise of discretion to preserve two-thirds of the $8 million was based on a balancing of the interests of the three Bands. It balanced the interest of the Applicant, by ensuring that it received some of the disputed monies, with those of the other Bands, by ensuring that the remaining two-thirds were preserved for future resolution.

[26] There are several potential outcomes of the *McArthur* litigation ranging from White Bear receiving 100% to receiving nothing. A one-third split is at least as reasonable as most other formulas other than the two extremes of all or nothing.

[27] The Minister's decision was a reasonable effort to ensure even handed treatment of the relevant parties. The outcome and the manner by which it occurred were clear, and within a range of acceptable outcomes.

[28] Therefore, the Minister's decision is reasonable and ought not to be disturbed.

IV. CONCLUSION

[29] For all these reasons, this judicial review is denied with costs in favour of both Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is denied with costs in favour of both Respondents.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2128-09
STYLE OF CAUSE:	WHITE BEAR FIRST NATIONS CHIEF AND COUNCIL, on their own behalf and on behalf of all the members of the WHITE BEAR FIRST NATIONS and THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, on behalf of Her Majesty the Queen in Right of Canada and OCEAN MAN BAND CHIEF AND COUNCILLORS, on their own behalf and on behalf of the members of the OCEAN MAN BAND OF INDIANS
PLACE OF HEARING:	Saskatoon, Saskatchewan
DATE OF HEARING:	November 24, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	March 23, 2011

APPEARANCES:

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