Federal Court  Cour fédérale

Date: 20110324

Docket: T-677-10

Citation: 2011 FC 364

Ottawa, Ontario, March 24, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KEHEWIN CREE NATION AND THE CHIEF AND TRIBAL COUNCIL OF KEHEWIN CREE NATION

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF THE DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicants seek judicial review of the Minister of Indian and Northern Affairs' (Minister) decision to appoint a third party manager due to the default by Kehewin Cree Nation (Band) under its Comprehensive Funding Arrangement (CFA).

The Application for Judicial Review was approximately six days late. There was no serious opposition to an extension of time, nor should there have been. An order was issued from the bench extending the time to bring this judicial review.

II. BACKGROUND

[2] Parliament annually appropriates public funds for the purposes of the provision of a variety of programs and services to First Nations including education services, supplies, operations and maintenance of community infrastructures (such as water and sewage), administration of welfare benefits and administration of band offices.

[3] These funds from the Consolidated Review Fund are provided to the Minister as a matter of policy pursuant to various policies and directions. These funds may be provided to Indian bands by the Minister for the delivery of services and programs in accordance with separate comprehensive funding arrangements entered into between the respective band and the Minister.

[4] The Band had a CFA with the Minister under which the Minister provided over $7 million on condition that the Band provided certain services, completed capital projects, complied with delivery reporting and met accountability requirements.

[5] The CFA provided that failure to meet the CFA terms and conditions, the existence of an adverse audit opinion, the occurrence of operating deficits of over 8% and the compromising of the health, safety or welfare of Band members/recipients were all events of default.

[6] In the event of default, the Minister was required to meet or communicate with the Band to review the situation.

[7] Notwithstanding these requirements on the Minister, the Minister could, amongst other remedies, appoint, upon providing notice to the Band Council, a Third Party Manager.

[8] The Minister alleges that during the currency of the CFA, the Applicants had breached the CFA by:

- failing to provide required reports and financial statements;
- failing to provide a deficit recovery plan;
- failing to use monies for the intended purpose (for example, the failure to repair a water treatment plant);
- undertaking renovation projects which caused Central Mortgage and Housing Corporation to invoke a guarantee of payment made by the Minister;
- accumulating a cumulative operating deficit of 29.25%;
- failing to pay key suppliers and meet material obligations (for example, gas and power suppliers, employee pension funds, fire and protection costs, employee and teachers' salaries);
- being unable to contract for sewage removal services.

[9] Throughout the term of the CFA meetings were held and correspondence exchanged between the Minister and the Applicants about the Applicants' defaults and impending Ministerial intervention due to the continuing default.

[10] The Minister's officials decided on March 3, 2010 not to enter into a CFA for the 2010-2011 fiscal year because of continuing unremedied defaults. The next day the Applicants were so informed and advised that an alternate service provider would provide the necessary programs and services. The Applicants were also informed that the Minister was "exploring options".

[11] By March 9, 2010, the Minister had appointed the AAC Aboriginal Corporation (AAC) as the Third Party Manager but did not inform the Applicants of the appointment of the Third Party Manager until a meeting with the Applicants on March 19, 2010; the appointment was further confirmed in a letter to the Applicants on March 24, 2010.

[12] The parties debated whether the time to judicially review the decision, to appoint a third party manager for the 2010-2011 fiscal year, commenced March 19, 2010 when the appointment was announced or April 1, 2010 when the appointment became effective.

[13] The real issue in this litigation is a) whether the Minister had an obligation to give advance notice/consult, and if so, was the obligation met and b) was the decision reasonable.

[14] Applicants' counsel quite candidly and appropriately said that it was his burden to convince the Court that the Court's decision in *Tobique Indian Band v Canada*, 2010 FC 67, was either in error or distinguishable or ought not to be followed.

For the brief reasons to follow, the Applicants were unable to overcome Justice Beaudry's decision in *Tobique*, above.

III. LEGAL ANALYSIS

A. *Standard of Review*

[15] The issue of notice/duty to consult is a legal one to which the correctness standard applies. In *Tobique*, above, Justice Beaudry, in dealing with whether the procedural protection of adequate notice had been breached, concluded that correctness is the standard of review (I concur):

> **66** Although, neither party has made submissions on the standard of review on this issue, I wish to note that this aspect of the decision must be held to a standard of correctness. The Applicant alleges that the Respondent breached procedural fairness by failing to give advance notice of the decision. This Court has repeatedly found that the standard or review for breaches of procedural fairness is correctness and that will be the standard applicable to this issue (*Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 16, [2009] 1 C.N.L.R. 256 at paragraph 61).

[16] On the issue of the decision to appoint a third party manager, Justice Beaudry adopted the reasonableness standard following Dawson J's (as she then was) rationale in *Ermineskin Tribe v Canada (Indian Affairs and Northern Affairs)*, 2008 FC 741. Justice Dawson's decision also recognized that deference is to be accorded the Minister's decision.

> **56** Both parties submit that the decision to implement third party management is held to a standard of reasonableness. I agree with

> those submissions. In *Pikangikum First Nation*, it was held that the appropriate standard of review was patent unreasonableness. In *Dunsmuir*, the Supreme Court stated that existing jurisprudence can offer guidance in establishing the standard of review (at paragraphs 57 and 62). Also, in *Ermineskin Tribe*, Justice Dawson considered the factors set out in *Dunsmuir* and arrived at the conclusion that reasonableness is the appropriate standard (at paragraphs 42 and 43). The impugned decision in *Ermineskin Tribe* was that a Band had defaulted under the funding agreement and I find that those same factors would also apply here and point to reasonableness. Accordingly, the Court will consider if the impugned decision here "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).
>
> *Tobique*, above

[17] Justice Beaudry summed up the situation in *Tobique*, above, which is equally applicable to this current case:

> **67** The Applicant has submitted that there is a duty of advance notice in this case where the DIAND decided to appoint a third party manager to the Tobique First Nation. In making that claim, the Applicant relied entirely on the decision of this Court in *Pikangikum First Nation*. However, I note that the decision in that case was factually different - it was actually a decision by DIAND requiring the First Nation to enter into a co-management agreement failing which funding would be withheld and programs would be delivered through an agent.

[18] Therefore, the standard of review on the Minister's decision is reasonableness with deference owed to the Minister.

B. *Notice/Duty to Consult*

[19] The Applicants have argued that they were entitled to advance notice before a third party manager was appointed. Whether the Court approaches the issue as one of public law, applying the

factors in *Baker v Canada*, [1999] 2 SCR 817, or as one of contract, the result is the same – no advance notice is required.

[20] As a matter of public law, the policy under which funds were authorized did not contemplate advance notice. Indeed the current policy, unlike that in the *Tobique* case, does not set out procedural steps but merely requires "notification that the decision has been made". No issue of legitimate expectation of notice arises from the policy or from the particular facts of this case.

[21] The general purpose of advance notice is to buttress the "right to be heard". There is no such right under Treasury Board policies. This is not a case where a party has a right to make representations to influence a decision. The purpose of notice in the present case is to convey information that a manager has assumed certain responsibilities.

[22] From a contractual perspective, the notice provision of the CFA obligates the Minister to inform a band of the decision to appoint a third party manager, not to obtain the band's position on such an appointment.

[23] Closely related to the issue of advance notice is the Applicants' submission that there was a duty to consult in advance. It was their position that there is a free standing, overarching, duty to consult any time a band's interests are affected.

[24] Reliance on the Supreme Court decision in *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, is misplaced as it is based on treaty rights; no such rights are involved in the present litigation.

[25] Regard must be had to the rights being affected before one concludes that there is a duty to consult. As held in *Elders Council of Mitchikanibikok Inik v Canada (Minister of Indian Affairs and Northern Development)*, 2009 FC 374, there is no link between the appointment of a third party manager and native self-government. Justice Harrington summarized the situation, which is equally applicable here.

> **40** … The consequence of appointing the Third Party Manager was to temporarily remove administrative responsibilities from the Band Council with respect to the delivery of programs and services to the community. The aim of the appointment was to protect public funds and to ensure that essential programs and services were not disrupted, as disrupted they were in years past. Assets and responsibilities falling outside the funding arrangements are not affected by the nomination of a Third Party Manager and remain under the control of the Band.

[26] Even if there was a duty to consult, it would be at the very low end of the consultation spectrum because the strength of the claim to Aboriginal rights asserted is weak and the potential adverse effect is temporary (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 39).

[27] Given the nature of any such duty, it was met by the Minister. There is no issue that the Band was not in default of the CFA and that programs and services were not being provided, yet the Minister's staff did meet with the Band officials, and warned of the problems forthcoming. Other

than giving the Applicants more time, it is difficult to find what further utility would be served by consultation.

C. *Reasonableness of Decision*

[28] As indicated above, there was no issue that the Board was in default of the CFA. The nature of those defaults are described in paragraph 8. The Minister had to remedy the default to CMHC and programs needed to be implemented and payments had to be made. While the problems may not be attributed to the current Chief and he may well be working hard to remedy the situation, it was reasonable for the Minister to act in the way he did.

[29] The Minister owes duties under the CFA and to natives generally but he also owes a duty to the public and in respect of public funds. The Minister's decision is a reasonable balancing of the various duties to which he is subject.

[30] There was nothing unreasonable in the Minister's actions. What was done was reasonably open to the Minister. It is not for the Court to "second guess" the Minister's reasonable conduct.

IV. CONCLUSION

[31] Therefore, this judicial review will be dismissed. Given the position of the Band, an award of costs in favour of the Minister would be a fruitless gesture. No costs will be awarded.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-677-10
STYLE OF CAUSE:	KEHEWIN CREE NATION AND THE CHIEF AND TRIBAL COUNCIL OF KEHEWIN CREE NATION and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE ATTORNEY GENERAL OF CANDAA, THE MINISTER OF THE DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS CANADA
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