Federal Court  Cour fédérale

Date: 20120203

Docket: T-2037-11

Citation: 2012 FC 146

BETWEEN:

ATTAWAPISKAT FIRST NATION AS REPRESENTED BY CHIEF AND COUNCIL

Applicant (Moving Party)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Respondent (Respondent)

REASONS FOR ORDER

PHELAN J.

I. PRELIMINARY

[1] This is a motion by the Applicant, Attawapiskat First Nation (AFN), for several forms of interlocutory relief:

(a) a declaration that the Chief and Council continue to have the authority conferred on them through election and by statute, including the authority to manage and direct

the emergency measures necessary to ensure the health, safety and well-being of the members of AFN.

(b) an order enjoining the Minister from imposing third party management on the AFN pending hearing of AFN's judicial review application.

(c) alternatively, an order generally confining the third party manager's (TPM) authority over funds provided under the Comprehensive Funding Agreement (CFA), requiring Canada to fulfil its obligations under the CFA and to prevent the TPM from directing funds available under the CFA to pay the TPM.

[2] The AFN has filed a judicial review application to quash the appointment of the TPM. That application will be heard on April 24, 2012.

[3] The facts and circumstances of this case appear to be developing as time moves along which has made it difficult for both parties to identify the critical facts governing this dispute. The day-to-day situation apparently continues to evolve.

[4] As this is an interlocutory motion with a final hearing on the full merits to be heard by the same judge, the Court will restrict its comments and findings to those that are absolutely necessary to deal with this motion and the immediate exigencies of the situation at Attawapiskat.

[5] From the argument before the Court, the Applicant is not pushing for an interlocutory declaration. That is just as well as there is ample precedent that interlocutory declarations either cannot or ought not to be given.

[6] The real relief sought is an injunction against the Minister from imposing third party management or to otherwise restrict the TPM in certain ways.

[7] The Court is indebted to all counsel for trying to bring some clarity to a murky situation. As indicated at the hearing, there is an urgent need to move 22 housing trailers over the winter road that is created when the water and land freezes sufficiently to allow for the movement of heavy loads. That could be any time now with the window of opportunity open until melting begins in, at best, six weeks. This issue will be addressed more fully in the reasons and order.

II. FACTUAL BACKGROUND

[8] Many of the core facts are not disputed. However, the meaning, interpretation, motives, responsibilities and the like related to these undisputed facts are very much in issue.

[9] There is a serious and unprecedented housing crisis on the Attawapiskat Reserve. Many members of the AFN are now living in overcrowded, unsafe conditions, in uninsulated and unserviced dwellings or in tents where sanitation is a bucket which is emptied into a ditch. Many existing houses were mold infested; other dwellings were trailers in which excessive numbers of people are cramped together.

[10] The Applicant filed numerous letters from medical professionals which address the types of diseases and other conditions rampant in the Reserve due to the inadequacy of housing.

[11] How conditions such as these could occur in a country as rich, as strong and as generous as Canada has yet to be determined. That issue is for another day.

[12] The plight of the community has garnered significant political and media attention. The record before the Court makes some reference to the media attention and very specific reference to questions and answers in the House of Commons.

[13] The AFN entered into the CFA with the Minister effective April 1, 2011 until March 31, 2013. The CFA provides for the payment of amounts to the AFN to carry out various programs and services. The characterization of the CFA, as a commercial type contract, is in dispute. The Applicant considers it to be a contract of adhesion imposed on it by the federal government and subject to departmental policies and the executive discretion of the Minister.

[14] CFA Section 9.0 defines the circumstances under which the AFN will be considered in default. Subparagraph (d) is the operative provision in this instance.

> **9.0 DEFAULT**
>
> 9.1 The Council will be in default of this Agreement in the event:
>
> (a) the Council defaults on any of its obligations set out in this Agreement or any other agreement through which a Federal Department provides funding to the Council;
>
> (b) the auditor of the Council gives a denial of opinion or adverse opinion on the Consolidated Audited Financial Statements of the Council in the course of conducting an audit under section 4.4 (Reporting) or section 10.3 (Where Financial Statements Not Provided) of this Agreement or the corresponding clauses in its predecessor;

> (c) in the opinion of the Minister of Indian Affairs and Northern Development or any other Minister that represents Her Majesty the Queen in Right of Canada in this Agreement, having regard to Council's financial statements and any other financial information relating to the Council reviewed by the Minister, the financial position of the Council is such that the delivery of any program, service or activity for which funding is provided under this Agreement is at risk;
>
> (d) in the opinion of the Minister of Indian Affairs and Northern Development or any other Minister that represents Her Majesty the Queen in Right of Canada in this Agreement, the health, safety or welfare of Members or Recipients is at risk of being compromised.
>
> (Court's underlining)

[15] In the event of default the Minister has a number of remedies from which to choose as set forth in Section 10.0:

> **10.0 REMEDIES ON DEFAULT**
>
> **10.1 Parties Will Meet**
>
> 10.1.1 Without limiting any remedy or other action Canada may take under this Agreement, in the event the Council is in default, the parties will communicate or meet to review the situation.
>
> **10.2 Actions Canada May Take**
>
> 10.2.1 In the event the Council is in default under this Agreement, Canada may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:
>
> (a) require the Council to develop and implement a Management Action Plan within sixty (60) calendar days, or at such other time as the parties may agree upon and set out in writing;
>
> (b) require the Council to seek advisory support acceptable to Canada;
>
> (c) appoint, upon providing notice to the Council, a Third Party Funding Agreement Manager;

> (d) withhold any funds otherwise payable under this Agreement;
>
> (e) require the Council to take any other reasonable action necessary to remedy the default;
>
> (f) take such other reasonable action as Canada deems necessary, including any remedies which may be set out in any Schedule;
>
> (g) terminate the Agreement.

[16] A Third Party Funding Agreement Manager (generally referred to as a Third Party Manager or TPM) is defined in the CFA as follows: a third party, appointed by Canada, that administers funding otherwise payable to the Council (a reference to the Band Council) and the Council's obligations under this Agreement, in whole or in part, and that may assist the Council to remedy default under this Agreement. The definition is somewhat awkwardly phrased.

[17] In August, the AFN's Housing Manager expressed concern that there were insufficient funds to deal with repairs to the homes (including shacks and tents). The AFN receives approximately $580,000 per year to deal with housing issues (debt serving, repairs and new construction) for the population of approximately 1,900 inhabitants.

[18] On October 28, 2011, the Grand Chief of the Mushkegowuk Council (the regional council which embraces Attawapiskat) declared a state of emergency due to the developing housing crisis.

[19] Initially the crisis related to five families who lived in tents.

[20] The Minister's department agreed, on November 8, 2011, to advance $500,000 in response to a plan developed by the AFN to safely house these families for the 2011-12 winter.

[21] On November 12, 2011, the Chief issued a declaration of emergency with respect to the housing crisis.

[22] The AFN's plans and identified needs continued to change over the period to the end of 2011 as new requirements arose or various assumptions proved incomplete or in error. By November 21, 2011, the Chief advised departmental officials that there was an additional 17 families living in sheds whose needs had become urgent and requested a further $1.5 million.

[23] On November 25, 2011, the Chief informed departmental officials that the Chief and Council lacked the resources and capacity to address the situation.

[24] After the announced emergency and advance of extra funds, departmental officials visited Attawapiskat on November 28, 2011 to assess the community's housing needs. They concluded that immediate action was required.

[25] The Applicant places considerable reliance on the fact that, over a two-week period in November, there was considerable political attention on the plight of the community culminating in statements made by the Prime Minister in the House of Commons on November 30, 2011.

[26] That same day the Chief was notified that the AFN was in default under s. 9.1(d) of the CFA and that a TPM had been appointed.

[27] The AFN immediately objected to the appointment of a TPM. That opposition appeared to strengthen when the AFN was informed that the TPM was the same firm that the AFN had terminated as their co-manager two years earlier.

[28] It is not necessary at this stage of the judicial review application to deal in depth with the various back and forth exchanges and positions adopted. It is sufficient to say that there is a significant amount of frustration, anger and distrust.

[29] The record on this motion included evidence and references to residential schools and other mistreatment of First Nations people including those in the AFN. While this evidence may help explain certain reactions and supports the *bona fides* and sincerity of the AFN's opposition to the TPM, the issue before the Court on an injunction application is narrower than the issues raised by that evidence. It may be relevant to the judicial review.

[30] Lastly, on facts relevant to this injunction proceeding, by December 2, 2011 the AFN had obtained a quote for the construction of 22 modular homes (commonly called trailers) at a cost of $2.4 million.

[31] The AFN and TPM signed a contract for the construction of these homes and some money has been advanced so that construction of the trailers and the shipment of them as they are completed could be undertaken by the supplier.

[32] The AFN has a plan for the servicing of the necessary lots, the shipment and the installation of the trailers. De Beers Canada Inc. (De Beers), the mining company that has a mine on the reserve, has agreed to act as project manager. The plan and De Beers' role has been accepted by the Minister.

[33] There are trailers at Moosonee (and more to come) and the winter road is hardening. Despite all this, the parties seem locked in an inability to act in concert to move the trailers on site. Time is critical; a loss of the ability to ship over the ice road means that the urgent project would be deferred until next year.

[34] At the hearing and with counsel doing their best to explain the almost unexplainable gap in perceptions between the two sides, the Respondent explained that if the AFN presents the invoices and De Beers confirms that these invoices are in accord with the approved plan, the TPM will issue payment and the project can move ahead with the necessary urgency. In so doing, the AFN is not now being asked to "accept" the legitimacy of the TPM. Any such actions in submitting invoices and dealing with the TPM by the AFN will be without prejudice their opposition to the appointment of the TPM.

[35] With that somewhat abbreviated outline of the facts, the Court will turn to the analysis of the legal basis for the issue of an injunction.

III. LEGAL ANALYSIS

[36] The tripartite test for an injunction is clearly established in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. The applicant for the injunction must establish that (a) there is a serious issue to be decided, (b) irreparable harm would be caused to the applicant absent an injunction, and (c) the balance of convenience favours the granting of injunctive relief.

[37] However, before turning to the tripartite test, the Respondent raises a preliminary issue: they argue that injunctive relief is not available against the Crown by virtue of s. 22 of the *Crown Liability and Proceedings Act*.

22. (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.	**22.** (1) Le tribunal ne peut, lorsqu'il connaît d'une demande visant l'État, assujettir celui-ci à une injonction ou à une ordonnance d'exécution en nature mais, dans les cas où ces recours pourraient être exercés entre personnes, il peut, pour en tenir lieu, déclarer les droits des parties.
(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.	(2) Le tribunal ne peut, dans aucune poursuite, rendre contre un préposé de l'État de décision qu'il n'a pas compétence pour rendre contre l'État.

[38] As was clear from *Zenon Environmental Inc v Canada*, 2005 FC 210, where Justice Strayer described the immunity of the Crown from general law to be an anomaly, the provision operates where there is an action against the Crown, but not where there is an attack on the authority exercised by a public official on the grounds that the official was acting outside of his statutory or constitutional powers. Section 22 of the *Crown Liability and Proceedings Act* merely codified the common law. Most particularly, s. 22 does not apply where the proceeding is a proper *Federal Courts Act* s. 18.1 application for judicial review.

[39] This Court has in several cases, including *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 579, ordered injunctive relief in the context of s. 18.1 *Federal Courts Act* judicial review proceedings. The prohibition of injunctions against the Crown is a long held common law principle which predates the more specific language of the *Federal Courts Act*.

[40] The Respondent's position is tantamount to asking this Court to dismiss, at this early stage, the application for judicial review without prejudice to the Applicant's right to bring an action against the Crown.

[41] There is ample authority that judicial reviews should not be struck down at a preliminary stage except in the most exceptional circumstances where the application for judicial review is bereft of any possibility of success (see *David Bull Laboratories (Canada) Inc v Pharmacia Inc (CA)*, [1995] 1 FC 588; *Chiasson v Canada (Attorney General)*, 2006 FC 1208).

[42] The Respondent's position is based on the argument that the relationship between the Band and the federal government under the CFA is contractual in nature – a contract for the delivery of programs and services. The Respondent relies on *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116. That decision was based on an analysis of the nature of the relationship between the parties – a process which the current court record does not allow. It is premature to reach a final conclusion on this legal argument.

[43] Even in a contractual type situation, public law remedies may be available where the grounds of attack are constitutional in nature or are based on a party lacking the required jurisdiction or exceeding their authority. The Applicant's grounds of attack include allegations of improper use of authority, taking into account irrelevant factors and acting for an improper purpose – all grounds amenable to judicial review.

[44] Therefore, the Court does have the jurisdiction under s. 18.1 and s. 18.2 of the *Federal Courts Act* to issue injunctive relief against the Respondent in the appropriate circumstances. This conclusion does not foreclose any of the Respondent's arguments regarding the appropriateness of a s. 18.1 proceeding being advanced at the judicial review hearing.

[45] The Respondent's argument as to the nature of the relationship between the parties and the characterization of the relationship under the CFA may well raise a serious issue to be determined – the first prong in the tripartite test which the Court will now address.

A. *Serious Issue*

[46] As *RJR-MacDonald*, above, established, the threshold of "a serious issue" is not high; an applicant for injunctive relief need only show that there is an issue for adjudication and that it is not "frivolous and vexatious".

[47] In such cases as *Kehewin Cree Nation v Canada*, 2011 FC 364, and *Tobique Indian Band v Canada*, 2010 FC 67, this Court has confirmed that the Minister's decision to appoint a Third Party Manager is reviewable on a "reasonableness" standard of review.

[48] The AFN has alleged that the Minister exercised the power to appoint the TPM for an improper purpose, not for the purpose for which the power was established, and in doing so took into account extraneous or irrelevant considerations.

[49] The Applicant places considerable reliance on circumstantial evidence including the timing of political statements and that of the appointment of the TPM. It also relies on the failure of the department to follow its own policies in making the decision to appoint the TPM.

[50] The Applicant further argues that there must be a connection between poor management/mismanagement of funds on the part of the AFN and the health, safety and welfare crisis which the parties agree exists. The Applicant says no such connection exists.

[51] Whether the Applicant can establish the elements of improper purpose on the part of the Minister remains to be seen. There is obvious need for cross-examinations and further evidence.

[52] However, the Applicant has gone far enough to establish that there is a serious issue to be determined and that the matter is not frivolous and vexatious. There is a genuine dispute as to the interpretation of the CFA, the characterization of the relationship between the parties and the legal principles applicable to this dispute.

B. *Irreparable Harm*

[53] The Applicant must also establish that it will suffer irreparable harm if the injunction is not granted pending the determination of the judicial review. Irreparable harm refers to the nature of the harm and not to its magnitude.

[54] As noted by the Court of Appeal in *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25, an applicant must establish that irreparable harm would occur; the harm cannot be speculative or hypothetical.

[55] The Applicant claims that the appointment of the TPM causes irreparable harm by its very nature because it deprives the Applicant of dignity, self-determination and the ability to remediate serious and urgent risks to the members of its community for whom and to whom the Chief and Council are responsible.

[56] The Respondent undermines those concerns by pointing out that the powers and responsibilities of the Chief and Council remain in place, that the TPM only affects the CFA and no other funding or powers.

[57] One should not be dismissive of the impact that the TPM may have on the concerns raised by the Applicant. However, the potential for the appointment of a TPM was contemplated by the CFA and the nature of the harm accepted (albeit reluctantly perhaps) by the Applicant particularly where there was a proper appointment. It is not the appointment itself which causes irreparable harm - that harm to dignity, self-government and ability to remediate risk only arises if the appointment is improper. The establishment of improper appointment has not been made out yet and is the matter for the judicial review.

[58] The other types of harm alleged, such as harm to the fiduciary relationship to the Crown, the harm to the trust between the parties and other forms of intangible (but potentially no less real) harm have not been established at this stage of the proceedings absent an improper appointment of the TPM.

[59] The only area of real and present harm which the Applicant has established is the delay in the servicing of the lots and the delivery of the trailers referred to earlier. The question of who is responsible for this harm is a somewhat open matter.

[60] On this matter, the interests of the people in the community are directly affected and must take precedence over the arguments between the Chief/Council and the Minister. There is real harm to the affected people and to the community at large if the “window of opportunity” is missed due to legal wrangling.

[61] The Applicant's argument that the use of funds to pay the TPM cause irreparable harm has not been sufficiently established as an issue of irreparable harm distinct from one for which damages may suffice.

C. *Balance of Convenience*

[62] The third part of the tripartite test requires the Court to consider the balance of convenience which has been described as a

> … determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.
>
> (See *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 at 129)

[63] In the situation of injunctive relief against a public authority, this consideration of who is most harmed is layered with a consideration of the public interest.

[64] The Respondent relies on the following quote from *RJR-MacDonald*, above, to establish that given the duties of the Minister, any restraint would cause the Minister, not the Chief and Council, irreparable harm.

> 71 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the

> court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[65] The difficulty in the present circumstances is that both parties are public authorities charged with various and sometimes complimentary elements of public interest.

[66] The balance of convenience is generally fairly evenly balanced in this situation. The Minister is responsible to the Canadian public for the proper expenditure of funds. The Minister and the Chief/Council have a responsibility to the community at Attawapiskat. This is particularly so where the risk is to people's health, safety and welfare.

[67] It is only in respect of the issue of the installation of the trailers where the balance clearly favours the Applicant. There is no other evidence of problems with the TPM impacting the people of Attawapiskat so directly.

IV. CONCLUSION

[68] In the exercise of the Court's discretion with respect to the equitable relief of injunction, having considered the tripartite test as required by law, the Court will not issue an injunction at this time subject to compliance by the Minister and his TPM with the terms of the Order regarding payments for matters in respect of the 22 trailers to be installed at the Attawapiskat Reserve.

[69] The Court would expect the Chief and Council to take the steps necessary to permit the TPM to comply with the terms imposed on the Order dismissing this injunction application.

[70] It will be a term of the Order that upon the TPM being presented with invoices related to the installation of the trailers (including servicing of lots, transportation or anything reasonably related thereto) and upon confirmation by the Project Manager, De Beers, that the goods or services in the invoices are consistent with the remedial plan previously approved by the parties, the TPM will forthwith pay those invoices.

[71] The Applicant shall not be required to accept, acquiesce or acknowledge the legality of the appointment of the TPM in order to secure payment of the invoices.

[72] In the time prior to the hearing of this injunction application, the parties had the benefit of the mediation efforts of Justice Mandamin. Should there be any difficulties in effecting the terms of the Court's Order, the parties may call upon Justice Mandamin to assist if possible. Otherwise any adjudication of the matters arising from the Order shall be referred to the Court.

[73] The application will be dismissed without costs.

"Michael L. Phelan"

Judge

Ottawa, Ontario
February 3, 2012

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2037-11
STYLE OF CAUSE:	ATTAWAPISKAT FIRST NATION AS REPRESENTED BY CHIEF AND COUNCIL and HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA
PLACE OF HEARING:	Toronto, Ontario
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