

Date: 20080923

Docket: T-1763-07

Citation: 2008 FC 1065

Ottawa, Ontario, September 23, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ERMINESKIN INDIAN BAND AND NATION

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review concerns the power of the Minister of Indian Affairs and Northern Development (Minister) to withhold payment of funds payable under the Pigeon Lake Split (Split) on the basis that the Minister required further substantiation of the purposes for which the funds would be used.

[2] This proceeding has been complicated by continuing changes in circumstances where events have overtaken some of the factual background since the judicial review was first filed. What ultimately remained at issue was approximately \$2.1 million withheld pending receipt of further information from the Ermineskin Band and Nation (Ermineskin Band).

[3] The Ermineskin Band has sought *mandamus* to compel the Minister to pay out, forthwith, the remaining amount of \$2.1 million.

II. FACTS

[4] The Ermineskin Band is a nation of aboriginal peoples who reside in central Alberta and are parties to Treaty No. 6.

[5] In 1896 the Pigeon Lake Reserve (located south-west of Edmonton) was established, pursuant to Treaty No. 6, for four Indian Bands - the Sampson, Ermineskin, Bull and Montana Bands (Bands).

[6] Oil and gas reserves were discovered under the surface of the Pigeon Lake Reserve and, pursuant to the scheme under the *Indian Act*, the Ermineskin Band and the three other named bands surrendered their interests in the mineral and mining rights to the Crown so that these lands could be leased for the respective Bands' benefit. The surrenders were executed in 1946 and, within a few years, commercial quantities of oil and gas were explored.

[7] Beginning in 1952, the Crown prepared and executed leases with oil and gas companies that would yield royalties for the four Bands. At all relevant times, the oil and gas resources were and are beneficially owned by the Bands. The royalty moneys were and are paid to and managed by the Crown on each Band's behalf.

[8] In accordance with s. 62 of the *Indian Act*, all Indian moneys are either categorized as "capital moneys" (derived from the sale of surrendered lands or the sale of capital assets of a first nation) or "revenue moneys" (all Indian moneys which are not capital moneys derived from a variety of sources including interest earned on capital and revenue moneys). The two categories are managed differently and must be accounted for separately. The Crown maintains separate capital accounts and revenue accounts for Indian moneys held in the Consolidated Revenue Fund (CRF).

[9] There are separate capital accounts and revenue accounts for each of the four Bands as well as for the Pigeon Lake Reserve as a whole. These latter accounts are held for, and periodically allocated among, the Bands according to their respective populations – this is known as the Pigeon Lake Split.

[10] The management of capital moneys which include the royalties derived from the Pigeon Lake Reserve are governed by s. 64 of the *Indian Act*. These moneys are credited to the Pigeon Lake Capital Account and are then allocated periodically to the capital accounts of the four Bands according to the Split. Currently, the Ermineskin Band's share of the Split, based upon population, is 27%.

[11] Moneys held in the capital accounts can be expended pursuant to s. 64 of the *Indian Act*. Section 64 (see attached Annex A) outlines a number of specific types of expenditures which, with the consent of the Indian band, the Minister may authorize to be paid. The provision has a further catch-all provision in s. 64(1)(k):

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

...

(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

...

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

[12] While the governance of the Ermineskin Band's revenue funds were in issue, the principal issue in this proceeding concerns the capital moneys of the Split. In 1964 the Canadian government passed Orders-in-Council under s. 69(1) of the *Indian Act* authorizing the Ermineskin Band to manage its own revenue moneys. It has done so since then to the present time. There is a procedure in place by which the revenue moneys are turned over to the Band Council upon conditions. The legality of those conditions were in issue in this proceeding; however, all of the revenue moneys in issue have been paid out. As such, the principal issue in this proceeding relates to the capital moneys of the Split.

[13] There are two critical steps with respect to the use of the moneys related to the Split. As Justice MacKay outlined in *Louis Bull Band v. Her Majesty the Queen* (3 September 1999), Ottawa T-2953-93 (F.C.T.D.), firstly the Crown must calculate the amount of the Split and the respective shares and secondly pay those amounts into the capital accounts of the respective Bands.

[14] The other procedure which is of importance is that in the normal course in respect of expenditures under s. 64(1)(k) of the *Indian Act*, any proposal for expenditure of capital moneys is usually initiated by a Band Council, submitted as a Band Council Resolution (BCR) to the Minister containing the particulars of the proposal. That request is considered by the Minister and if approved, the moneys are released to the Ermineskin Band or as the Ermineskin Band directs.

[15] In 2007 the Ermineskin Band Council enacted two BCRs to request the transfer of moneys in the amounts of \$23,262,232.76 and \$7,700,000.00 respectively to fund the Ermineskin Band's 2007/2008 operating budget. Of these amounts, approximately \$13,287,000.00 was withheld because of delays in submitting an auditor's report. Of that amount withheld, approximately \$5,313,000 was in respect of the capital account.

[16] This judicial review was commenced in September 2007 and sought "an order in the nature of *mandamus* directing the Minister of Indian Affairs and Northern Development to pay out the Revenue Fund including the Pigeon Lake Split on a per capita basis pursuant to the *Federal Courts Act*, sections 18.1 and 44, and the *Federal Courts Rules*, Rules 358-367, *Indian Act*, section 69 and the *Indian Band Revenue Moneys Order*, S.O.R./90-297 ...".

[17] The use of the term “Revenue Fund” was the source of no end of confusion.

[18] In the grounds for relief, the Plaintiff submitted, *inter alia*:

- that the Pigeon Lake Indian Reserve No. 138A was set aside on July 8, 1896 for the Indians of the Hobbema Agency;
- that Ermineskin are part of the Indians of the Hobbema Agency;
- that the Crown has distributed revenues from the Pigeon Lake Indian Reserve No. 138A on a per capita basis to, *inter alia*, the Ermineskin Cree Nation every year since 1954 generally in July or August of each year;
- that these oil and gas Revenues from the Pigeon Lake Indian Reserve No. 138A and the interest earned on the capital funds held by the Crown in trust for Ermineskin are held in the Revenue Fund which is held by Ermineskin pursuant to section 69 of the *Indian Act*, S.O.R./90-297;
- that Ermineskin uses the Revenue Fund to finance its governance of the Ermineskin Band;
- that Ermineskin has demanded on numerous occasions including September 24, 2007, that the Minister of Indian Affairs and Northern Development pay the Pigeon Lake Split and the Revenue Funds to Ermineskin and the Minister has not done so and has refused to do so.

[19] As referred to in paragraph 15 of these Reasons, a significant amount of money was withheld from transfer to the Ermineskin Band because the Ermineskin Band had not met a condition imposed by the Minister that a proper auditor's report be submitted to the department. Over the course of the litigation, the Ermineskin Band ultimately submitted the audit report which resulted in the release of the bulk of the moneys which had initiated these proceedings.

[20] Of the \$5,313,000 withheld in respect of capital moneys, approximately \$4.7 million was attributed to the Split. The Minister, on March 26, 2008, released \$2.6 million approximately 200 days later than what the Ermineskin Band claim is the normal course of distribution in July or August of each year. In addition to late payment, \$2.1 million remains outstanding pending satisfaction of the Minister's information requirements.

[21] In the Minister's letter of March 26, 2008, releasing the \$2.6 million, the Department noted as follows:

The Department still awaits information to support the following expenditures relating to the Property Management program:

Renovations	\$869,100
Fire Damaged Homes	\$560,000
New Homes – 0405 Shortfall	\$371,000
New Homes – 4	<u>\$258,308</u>
Total	<u>\$2,058,408</u>

There is a further \$100,000 in dispute in respect of a camp which was under provincial jurisdiction. These amounts constitute the approximate \$2,100,000 held by the Minister and currently in dispute under this litigation.

[22] At the hearing of this matter, the Ermineskin Band placed considerable emphasis on the fact that the Split had traditionally been paid in the summer of each year; that the Ermineskin Band was in control of its monetary affairs; that the Minister has a public duty to pay these moneys, at the very least as a trustee of these moneys. In addition to the fact that the obligations in respect of the Split are pursuant to treaty obligations, the Ermineskin Band further claims that the Minister is estopped from altering the timing of payment of these moneys.

[23] The Minister had a number of preliminary objections to the nature of this litigation, in part because of the confusing circumstances with respect to what was at issue. As stated earlier, some of that confusion related to the term “revenue fund” used in the Notice of Motion. The Minister understood “revenue fund” to equate to “revenue account”. It was the Minister’s position that all amounts under the “revenue account” had been paid out. Therefore, it was the Minister’s position that this litigation was largely moot, both because the amounts had been paid out of the revenue account and because the impediment to previous payments, e.g. the audit, had been satisfied.

[24] The Court has some sympathy with the Minister’s position – the facts and positions at issue were often opaque. However, there was a genuine dispute regarding the \$2.1 million withheld. The circumstances of the withholding were entirely within the knowledge and control of the Minister. I therefore reject the submission that it would be unfair to the Minister to consider the merits of the withholding of the remaining amounts.

[25] The parties have had this case under case management. They have also been afforded the opportunity to clarify positions, and to amend and update materials and submissions.

[26] The Court is not prepared to address the issues of the demand for an audit, that matter has been complied with and therefore is not a live issue. The only remaining issue for the Court to address is whether the Minister is empowered to withhold the capital moneys on the grounds of the failure to comply with the department's information requests.

[27] The Court notes that the requirement for an audit is contained in s. 8 of the *Indian Bands Revenue Moneys Regulations*, C.R.C., c. 953, enacted pursuant to s. 69(2) of the *Indian Act*. It would not be helpful to conclude on the consequences of failure to provide an audit report or providing an audit report at a later date than required as such a consideration may turn largely on the facts of a particular circumstance. It is an issue best left for another day.

III. ANALYSIS

[28] The issue before this Court is whether the Minister has the discretion to withhold release of portions of the Split, and if so, has that discretion been exercised properly.

[29] As the issue before the Court engages the Minister's actions, it is necessary to consider the standard of review. I adopt Justice Dawson's rationale in *Ermineskin Tribe v. Canada (Indian Affairs and Northern Affairs)*, 2008 FC 741. While Justice Dawson's decision related to Ministerial discretion to administer a publicly-funded program, and in this present proceeding the Minister's

discretion relates to the use of funds for homes (s. 64(1)(j)) and for other purposes (s. 64(1)(k)), I see no material difference in respect of either the power or the scope of the discretion to be exercised. For the same reasons as in the earlier decision, the Minister's actions are subject to a standard of reasonableness.

[30] The starting point of this case is that the Ermineskin Band is seeking *mandamus*. The standard of review only becomes relevant to the discretionary aspect of the principles governing *mandamus*.

[31] On the issue of *mandamus*, the Court of Appeal in *Apotex v. Canada (A.G.)*, [1994] 1 F.C. 742 (F.C.A.), held that the principles applicable to *mandamus* are:

1. There must be a public duty to act.
2. The duty must be owed to the applicant.
3. There is a clear right to performance of the duty, in particular:
 - (a) the applicant has satisfied all conditions precedent giving rise to the duty;
 - (b) there is (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can either be expressed or implied, e.g. unreasonable delay;
4. Where the duty sought to be enforced is discretionary, the following rules apply:
 - (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as “unfair”, “oppressive” or demonstrate “flagrant impropriety” or “bad faith”;

- (b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
- (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
- (d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
- (e) mandamus is only available when the decision-maker's discretion is "spent";
i.e. the applicant has a vested right to the performance of the duty.

(emphasis added by Court)

[32] The Federal Court of Appeal in *Ermineskin Indian Band and Nation v. Canada*, [2007] 3 F.C.R. 245 (F.C.A.), has set out the statutory scheme for the management of royalties received by the Crown commencing at paragraph 63 of the judgment. The Court notes the Minister's obligation is to ensure that moneys released (in this instance from the capital account) are expended on behalf of the Ermineskin Band and in accordance with the *Indian Act*.

[33] The Ermineskin Band claims that moneys from the Split are treated differently than capital and revenue account moneys. On the evidence in this case, I am not satisfied that the Ermineskin Band has made that case. Of equal importance is the fact that the *Indian Act* does not make such a distinction – moneys are accounted for either to the revenue or capital accounts. The evidence is that the Ermineskin Band's Split moneys are credited to the capital account.

[34] For the Ermineskin Band to establish a basis for *mandamus*, it must meet the conditions in respect of the exercise of discretion. Given the obligations of the Minister to ensure that moneys are properly expended on behalf of the Ermineskin Band and in accordance with the *Indian Act*, there is nothing unfair, oppressive or in bad faith in requiring support for the proposed expenditures. The Ermineskin Band has not shown that anything demanded is unreasonable nor has the Ermineskin Band shown that it has a vested right in performance such that the Minister's discretion is "spent".

[35] The Ermineskin Band has argued that the pattern of paying out the Split to the Ermineskin Band in the summer of each year created estoppel against the Minister delaying payment. In this, the Ermineskin Band relies particularly on *Ryan v. Moore*, [2005] 2 S.C.R. 53, in establishing the three conditions of estoppel by convention.

[36] However, that decision applies in the context of relations between private parties not to situations governed by statute. Estoppel cannot operate to vitiate a statutory obligation on the Minister.

[37] The Ermineskin Band has not made out a case for an order of *mandamus*. Section 64(1) makes it clear that moneys from the Ermineskin Band's account can only be disbursed with the consent of both the Ermineskin Band and the Minister. As long as the Minister exercises his discretion reasonably – and there is nothing to suggest unreasonableness in demanding substantiation for planned expenses – the Minister is authorized to withhold approval of disbursement. The Minister's refusal to disburse is not amendable to *mandamus*. The moneys at

issue are not unpaid Split moneys – those amounts have been paid to the capital account. The moneys that the Ermineskin Band seeks to obtain are already in this account. The Ermineskin Band really seeks to compel the Minister to authorize disbursement from the capital account.

[38] I need not find, as the Defendant has asked, that this *mandamus* application is an abuse of process because it is contrary to the position taken by the Ermineskin Band before the Supreme Court of Canada in *Ermineskin Indian Band and Nations v. Canada*, [2007] S.C.C.A. No. 86. Firstly, it is not clear that the positions are inconsistent. Secondly, it is not bad faith to take different or alternate positions, particularly in the face of uncertainty as to the law.

[39] For these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

“Michael L. Phelan”

Judge

ANNEX A

Financial Administration Act, R.S., 1985, c. F-11

42. (4) The following definitions apply in this section.

...

"recipient" means an individual, body corporate, partnership or unincorporated organization that has, in any five consecutive fiscal years, received a total of one million dollars or more under one or more funding agreements, but does not include

...

(c.1) a band, as defined in subsection 2(1) of the *Indian Act*, any member of the council or any agency of the band or an aboriginal body that is party to a self-government agreement given effect by an Act of Parliament or any of their agencies;

42. (4) Les définitions qui suivent s'appliquent au présent article.

...

«bénéficiaire» Personne physique ou morale, société de personnes ou organisme non doté de la personnalité morale qui a reçu, au total, au moins un million de dollars au cours de cinq exercices consécutifs au titre d'un ou de plusieurs accords de financement. Sont exclus de la présente définition :

...

c.1) les bandes, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, tout membre du conseil ou tout organisme de la bande, et les organismes autochtones qui sont parties à un accord d'autonomie gouvernementale mis en vigueur par une loi fédérale, ainsi que leurs organismes;

Indian Act, R.S., 1985, c. I-5

61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, 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 Indian moneys are used or are to be used is for the use and benefit of the band.

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(a) to distribute *per capita* to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

61. (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

(b) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

(c) to construct and maintain outer boundary fences on reserves;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

(d) to purchase land for use by the band as a reserve or as an addition to a reserve;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

(e) to purchase for the band the interest of a member of the band in lands on a reserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the band;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

(h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments

suiuants :

(i) the chattels owned
by the borrower, and

(i) les biens meubles
appartenant à
l'emprunteur,

(ii) the land with
respect to which he
holds or is eligible to
receive a Certificate of
Possession,

(ii) la terre concernant
laquelle il détient ou a
le droit de recevoir un
certificat de possession,
et percevoir des intérêts et
recevoir des gages à cet
égard;

and may charge interest
and take security therefor;

(i) to meet expenses
necessarily incidental to the
management of lands on a
reserve, surrendered lands
and any band property;

i) pour subvenir aux frais
nécessairement accessoires
à la gestion de terres
situées sur une réserve, de
terres cédées et de tout bien
appartenant à la bande;

(j) to construct houses for
members of the band, to
make loans to members of
the band for building
purposes with or without
security and to provide for
the guarantee of loans
made to members of the
band for building purposes;
and

j) pour construire des
maisons destinées aux
membres de la bande, pour
consentir des prêts aux
membres de la bande aux
fins de construction, avec
ou sans garantie, et pour
prévoir la garantie des prêts
consentis aux membres de
la bande en vue de la
construction;

(k) for any other purpose
that in the opinion of the
Minister is for the benefit
of the band.

k) pour toute autre fin qui,
d'après le ministre, est à
l'avantage de la bande.

(2) The Minister may make
expenditures out of the capital
moneys of a band in
accordance with by-laws made
pursuant to paragraph

(2) Le ministre peut
effectuer des dépenses sur les
sommés d'argent au compte de
capital d'une bande
conformément aux règlements

81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

administratifs pris en vertu de l'alinéa 81(1)p.3) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

69. (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1763-07

STYLE OF CAUSE: ERMINESKIN INDIAN BAND AND NATION
and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: June 24, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: September 23, 2008

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