Federal Court of Appeal  Cour d'appel fédérale

Date: 20120827

Docket: A-171-11

Citation: 2012 FCA 224

CORAM: **PELLETIER J.A.**
DAWSON J.A.
STRATAS J.A.

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

Appellant

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

Heard at Saskatoon, Saskatchewan, on March 12, 2012.

Judgment delivered at Ottawa, Ontario, on August 27, 2012.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DAWSON J.A.
CONCURRING REASONS BY: STRATAS J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

INTRODUCTION

[1] White Bear First Nations Chief and Council ("White Bear") appeal from the decision of Phelan J. of the Federal Court (the Judge), reported at 2011 FC 361, [2011] F.C.J. No. 466 (Reasons) dismissing White Bear's application for judicial review of the Minister of Indian Affairs and Northern Development's (the Minister) decision to transfer $5,333,334 previously held in accounts in White Bear's name to a suspense account. The issues are whether the Minister has the right to do so, and if he does, whether his decision is reasonable.

[2] For the reasons which follow, I am of the view that the appeal should be allowed. In my view, the Minister breached his obligations, as trustee of the funds, and as fiduciary, in acting as he did.

FACTS

[3] The Minister's decision and White Bear's application for judicial review are part of a larger dispute which is currently pending in the Federal Court between White Bear and two other bands, the Ocean Man Band (Ocean Man) and the Pheasant's Rump Nakota Band of Indians (Pheasant's Rump), and the Federal Crown. That litigation arises out of the amalgamation of the Ocean Man and Pheasant's Rump bands into the White Bear band in 1901 and the subsequent unwinding of that amalgamation in 1986. After the amalgamation, Ocean Man and Pheasant Rump's reserve lands were sold and all or some of the proceeds were used to purchase land ("the Northern Boundary Lands") in the name of amalgamated Band. In 1941, the oil and gas rights in the White Bear Reserve lands including the Northern Boundary Lands were surrendered to the Crown which then managed the exploitation of those resources on behalf of the amalgamated band. When the

amalgamation was unwound, one of the contentious issues was the extent to which the reconstituted bands, Ocean Man and Pheasant's Rump, were entitled to a share in the oil and gas revenue generated by the Northern Boundary Lands whose purchase was funded to some extent by the sale of their reserve lands.

[4] Those issues are now before the Federal Court in action no T-1672-99 (the McArthur Action), litigation which is now in its 13th year with no obvious end in sight.

[5] For the sake of simplicity and to avoid repetition, I shall refer to all monies received from oil and gas leases on the Northern Boundary Lands together will interest paid or owing on those amounts as the Fund. Prior to the events giving rise to this litigation, the Fund was held in trust in the consolidated revenue fund in White Bear's name.

[6] In July 2009, the Minister (through his officials) wrote to White Bear to advise it that some of the money in the Fund would be placed in a suspense account pending the determination of the McArthur Action. The material portion of the Minister's letter is reproduced below:

> […] In [McArthur], the Ocean Man and Pheasant's Rump Bands claim ownership of the Northern Boundary Lands and demand an accounting and payment of past proceeds from those lands from the Crown and White Bear jointly.
>
> Since May 1989, the proceeds of the leases of the Northern Boundary Lands have been deposited to the White Bear Band accounts. We understand the White Bear may seek payment of the Band accounts to it in accordance with FNOGMMA [*First Nations Oil and Gas Moneys Management Act*]. If these moneys which are being claimed by the other Bands, are paid out to White Bear in the face of the claim referred to above, there could potentially be liability on Canada's part and there would certainly be a claim against White Bear. Given Canada's responsibility to each of the Bands it would not be appropriate to pay out disputed sums to White Bear, possibly putting them beyond the reach of Ocean Man and Pheasant's Rump.
> …

> It is Canada's intention to place an appropriate amount in a suspense account until the issue of entitlement to the lands and proceeds has been determined by the Court…Given that it is likely that each Band will have some entitlement, although this is not certain, and given the interest factor, Canada will retain in the suspense account two-thirds of the $8,000,000 [the total amount in White Bear's accounts] representing possible interest and principal which equals $5,333,334 and will retain two thirds of future proceeds as well.

[7] The letter concluded with an invitation for further discussion, but on terms which were unacceptable to White Bear. The Minister placed $5,333,334 in a suspense account as he had indicated he would. White Bear's application for judicial review followed shortly thereafter.

THE DECISION UNDER APPEAL

[8] After reviewing the facts, the Judge identified the standard of review. He concluded that the question of whether the Minister had the authority to make the decision under review was a true jurisdictional question, and thus reviewable on a standard of correctness. He also concluded that the standard of review of the merits of the Crown's decision was reasonableness. With respect to White Bear's argument that the Crown was under a duty to consult, the Judge found that the existence and content of such a duty was a question of law, reviewable on a standard of correctness.

[9] With respect to the duty to consult, the Judge found that the decision to place the funds in a suspense account pending the outcome of the litigation raised no issue of an aboriginal or treaty right. As a result, he found that there was no duty to consult. Further, in light of White Band's failure to engage in discussions with the Crown, the Judge found that even if there were a duty to consult, it was met.

[10] As for the question of the Crown's authority to do what it did, the Judge began by noting that ownership of the Fund was in dispute in the McArthur Action. In the Judge's view, the placing of funds in a suspense account was the equivalent of paying funds into Court, which any litigant would be entitled to do.

[11] The Judge was of the view that the Crown owed concurrent fiduciary obligations to all three bands. Furthermore, the Crown was also bound by the terms of the *Financial Administration Act,* R.S.C. 1985 c. F-11 and the *Indian Act,* R.S.C. 1985 c. I-5 in relation to its dealing with Indian monies. The Judge found that the Crown had the powers necessary to discharge its fiduciary obligations. In his view, this included the power to place the funds in a suspense account.

[12] The Judge then considered the reasonableness of the Minister's decision. He expressed the view that, given the claims to the funds being made by the other bands, it was difficult to see what else the Minister could have done. The setting aside of two thirds of the amount in White Bear's accounts was "based on a balancing of the interests of the three Bands": see Reasons, at paragraph 25. In the Judge's view, the Minister's decision was "a reasonable effort to ensure even-handed treatment of the relevant parties": see Reasons, at paragraph 27.

[13] In the result, the Judge dismissed the application for judicial review.

Standard of Review

[14] This is an appeal of a judicial review, in which the role of this Court is to determine whether the reviewing court identified the proper standard of review and then applied it correctly. In

practice, this means that the appellate court applies the normal rules of appellate review as articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paragraph 43.

[15] The normal rules of appellate review are review of questions of law on a standard of correctness, and review of questions of fact or mixed fact and law on a standard of reasonableness. The only qualification to the latter proposition is where one can extricate a clear question of law from a question of mixed fact and law, in which case, that question of law is reviewed on a standard of correctness.

[16] In this case, the extent of the Minister's powers as a trustee and fiduciary is a question of law reviewable on a standard of correctness. I would only describe that question as one of jurisdiction to the extent that it is one that must be answered correctly: see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46, at paragraph 28.

ANALYSIS

[17] As a preliminary matter, it is useful to properly characterize the Minister's decision. The Notice of Application describes the decision under review as the Minister's decision to remove approximately two-thirds of the Fund from White Bear's account. In its Memorandum of Fact and Law, White Bear says that it brought its application for judicial review "once it became aware its money had been moved from its capital trust account and once it became clear that the Respondent

Minister was not going to return the money": see White Bear's Memorandum of Fact and Law at paragraph 15.

[18] It appears to me that the transfer of money from one account to another in the consolidated revenue fund, without more, is simply a matter of record keeping which would not normally be the subject of judicial review. But, where the transfer is a step in a process by which the Minister denies an Indian Band access to moneys which he holds in trust for that Band, the decision subject to review is the decision to deny the Band access to its funds. In this case, that decision crystallized on November 20, 2009 when the Minister refused to advance funds to White Bear for a per capita distribution on the basis that the amount in its account was insufficient: see Appeal Book, at p. 128. It was only insufficient because of the transfer of two-thirds of the money to another account. It was at this point that White Bear knew that the effect of the transfer was to deny it access to its funds.

[19] In my view, the subject matter of this application for judicial review is the Minister's decision to deny White Bear access to the $5,333,334, a decision which was implemented, in accounting terms, by the transfer of the funds from the Band's trust account to the suspense account.

[20] Before addressing the lawfulness of the Minister's decision, I wish to touch briefly on White Bear's allegation that the Minister breached the duty to consult. If we assume for a moment that White Bear is correct, and we were to set aside the Minister' decision and refer the matter back to him with a direction that he consult with White Bear, the Minister could nonetheless decide, in good faith, to withhold White Bear's funds. The duty to consult is not a duty to agree: *Haida*

Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511, at paragraph 42. While it is possible that the consultation process could persuade the Minister to change course, the conflicting demands on the Minister lead me to believe that this is unlikely. In such a case, it is inconceivable, on this record, that White Bear would agree that the Minister's decision was legitimate because it had been preceded by a consultation process. White Bear would return to the Court seeking to compel the Minister to give it access to the funds which the Minister is withholding. It seems to me preferable to dispose of that question on its merits now, rather than later.

[21] As for the merits of the appeal, it appears to me that the facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada' benefit and that of the two other Bands.

[22] If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others.

[23] The general principle is set out as follows in Donovan W.M. Waters, ed., *Waters Law of Trusts in Canada*, 3rd Ed. (Toronto: Thomson Canada Limited, 2005) ("Waters") at p. 966:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not share. In this way the trustees act impartially; they hold an even hand.

[24] This principle has been applied to the relationship between the Federal Crown and Indian bands. In *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*], the Supreme Court was dealing with a dispute between two bands, each of whom claimed to be entitled to the other's reserve land. The Court observed, at paragraph 97 of its reasons:

> As the dispute evolved into conflicting demands between the appellant bands themselves, the Crown continued to exercise public law duties in its attempt to ascertain "the places they wish to have" (as stated at para. 24), and, as a fiduciary, it was the Crown's duty to be even-handed towards and among the various beneficiaries.

[25] Similarly, in *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [2009] 1 S.C.R. 222 [*Ermineskin*], in the context of a claim by two Indian Bands with respect to the management of oil and gas revenues held in trust by the Crown, the Supreme Court stated, at paragraph 39 of its decision:

> The standard of care and diligence required of the Crown was that of a man of ordinary prudence in managing his own affairs. This required the Crown, among other things, to assess the circumstances of the fund and the beneficiaries to ascertain appropriate investments, build a diversified portfolio where appropriate, monitor the investments, seek expert advice and maintain an even hand between successive beneficiaries.

[26] It is true that the content of the Crown's duty as a fiduciary will vary with the circumstances. As the Supreme Court said in *Wewaykum*, at paragraph 96:

> The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting [citation omitted]

[27] In this case, the issue is the contending Bands' interest in the Fund, which consists of money earned from land purchased with the commingled assets of the three Bands. Because of this commingling, it is arguable that if the Minister owed a fiduciary duty to one Band, he owed the same duty to the others. Within that fiduciary duty, the Minister, as trustee, was bound to act even-handedly between the three bands.

[28] Assuming the existence of a fiduciary duty to all three Bands with respect to the Fund, did the Minister breach his duty to act even-handedly? In my view he did because he gave White Bear access to one third of the Fund while denying access to the other two Bands. In choosing to treat the beneficiaries of the Fund differently, the Minister breached his duty of even-handedness.

[29] If the Minister did not owe a fiduciary duty to Ocean Man and Pheasant's Rump with respect to the Fund, then he had a duty to avoid conflicts of interest and to act without regard to his own interest. This is a basic principle of trust law:

> […] it is a fundamental principle of every developed legal system that one who undertakes a task on behalf of another must act exclusively for the benefit of the other, putting his own interests completely aside.
>
> Waters, cited above, at p. 877

[30] This principle has also been applied to the dealings between the Crown and aboriginal peoples. In *Ermineskin*, cited above, the Supreme Court said, at paragraph 125:

> A fundamental principle underlying the fiduciary relationship is the requirement that a fiduciary acts "exclusively for the benefit of the other, putting his own interests completely aside" (Waters, Gillen and Smith, at p. 877). This is the duty of loyalty and it requires the trustee to avoid conflicts of interest. A fiduciary is required to avoid situations where its duty to act for the sole benefit of the trust and its beneficiaries conflicts with its own self-interest or its duties to another (see Waters,

> Gillen and Smith, at p. 877, and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47).

[31] In this case, the Minister's letter makes it clear that one of his reasons for denying White Bear access to the full amount of the Fund was the threat of claims against the Crown if the Minister allowed White Bear to deplete the account:

> […] If these moneys which are being claimed by the other Bands, are paid out to White Bear in the face of the claim referred to above, there could potentially be liability on Canada's part and there would certainly be a claim against White Bear. Given Canada's responsibility to each of the Bands it would not be appropriate to pay out disputed sums to White Bear, possibly putting them beyond the reach of Ocean Man and Pheasant's Rump.

[32] By withholding a portion of the Fund from White Bear, the Minister was essentially using trust funds to protect itself from potential claims from others. Furthermore, since it is assumed for these purposes that the Minister does not have a fiduciary obligation to Ocean Man and Pheasant's Rump, the Minister cannot set aside funds held for the benefit of White Bear for the benefit of the other two Bands. In doing so, the Minister breached his obligation to act solely in the interests of White Bear with respect to the Fund.

[33] That said, the Minister was acting in good faith in the face of conflicting claims to the same pool of money. Equity does not require the Crown, in the name of avoiding conflicts of interest, to incur liability to others with respect to the Fund claimed by White Bear. The weakness in the Minister's position is not that he preserved property pending litigation but that he did so unilaterally and without right. The Minister should have applied to the Federal Court, where the McArthur Action is pending, for directions. Rule 108 of the *Federal Courts Rules* SOR/98-106 provides for precisely such an eventuality:

108. (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person	108. (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête ex parte, demander des directives sur la façon de trancher ces réclamations, si :
(a) claims no interest in the property, and	*a*) d'une part, elle ne revendique aucun droit sur ces biens;
(*b*) is willing to deposit the property with the Court or dispose of it as the Court directs,	*b*) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.
that person may bring an ex parte motion for directions as to how the claims are to be decided.	
(2) On a motion under subsection (1), the Court shall give directions regarding	(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :
(*a*) notice to be given to possible claimants and advertising for claimants;	*a*) l'avis à donner aux réclamants éventuels et la publicité pertinente;
(*b*) the time within which claimants shall be required to file their claims; and	*b*) le délai de dépôt des réclamations;
(*c*) the procedure to be followed in determining the rights of the claimants.	*c*) la procédure à suivre pour décider des droits des réclamants.

[34] This appears to be a case where payment into Court is not required since the Crown holds the funds. I presume that the Crown is willing to "dispose of it [the Fund] as the Court directs." In

the interests of a full hearing of the issue, it appears to me that such an application should be made upon notice to the other parties, and not ex parte, as permitted by the Rule.

CONCLUSION

[35] As a result, I would allow the appeal, set aside the judgment of the Federal Court and quash the order of the Minister transferring $5,333,000 of the Fund into a suspense account. I would however maintain the status quo by staying the execution of this order for a period of 60 days to allow the Minister to make an application to the Federal Court under Rule 108. I would grant White Bear its costs in this Court and in the Federal Court against the Minister. Ocean Man and Pheasant's Rump should bear their own costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Eleanor R. Dawson J.A."

STRATAS J.A. (Concurring reasons)

[36] I agree with my colleague's proposed disposition for somewhat different reasons.

[37] My colleague characterizes the decision as one to deny White Bear access to the $5.3 million. I characterize the decision as one about how to proceed in the face of conflicting claims. As will be seen, this difference in characterization changes the analysis of the standard of review and creates different implications for future cases.

[38] I agree with my colleague's summary of facts and I adopt it. In these reasons, I also adopt the definitions he uses.

A. The effects of the decision vs. the decision itself

[39] In an application for judicial review of an administrative decision, the first step must be to identify, with particularity, the decision itself, not the effects of the decision.

[40] This is not to say that the effects of the decision do not enter the analysis. They can: they may be relevant to the assessment of the correctness or reasonableness of the decision. But it is the decision itself that is being reviewed.

[41] As my colleague notes, one effect of the Minister's decision was to deny White Bear access to two-thirds of the Fund, or $5.3 million, but allow it to access one-third, or $2.7 million. I would add that the Minister's decision had effects on all potential claimants to the Fund, not just White Bear. But these are the effects of the decision, not the decision the Minister made.

[42] After characterizing the decision as one to deny White Bear access to $5.3 million in the Fund, my colleague concludes (at paragraph 28, above) that the Minister breached his duty to act even-handedly by giving White Bear access to one-third of the Fund while denying the other two Bands any access to the Fund.

[43] I agree that Canada, as trustee, is subject to a duty of even-handedness. But, in these circumstances, that obligation requires only that the terms of the trust be obeyed: see the passage from *Waters Law of Trusts in Canada*, *supra*, set out in paragraph 23, above. Here, the terms of the trust – who is entitled to what parts of the Fund – are disputed. At this time, we cannot say whether the effects of the Minister's decision are consistent with the legalities. Maybe White Bear is entitled to access one-third of the Fund. Then again, maybe not. The McArthur Action will clear up the uncertainty.

B. The Minister's decision

[44] So what is the decision the Minister made? To identify this, we need to recall the circumstances facing the Minister that prompted the decision. The Minister realized that White Bear

might seek payment of certain amounts to it from the Fund. He realized that if he paid those amounts to White Bear, Canada might be liable to the two other bands. In the face of these conflicting claims, the Minister had to decide what to do.

[45] Specifically, the Minister had three available options:

- interplead all or part of the monies in the Fund, for example by using Rule 108 of the *Federal Courts Rules*;
- leave the monies in the Fund; or
- unilaterally move all or part of the monies in the Fund into a suspense account.

[46] The Minister chose the last-mentioned option, moving two-thirds of the Fund, $5.3 million, into a suspense account. The Minister's decision, then, was his choice of one option over other available options.

C. The nature of the Minister's decision and the standard of review

[47] The Minister's decision, as I have characterized it, did not involve significant legal determinations. In fact, appreciating the existence of conflicting claims and uncertain legalities, the Minister expressly avoided making any legal determinations. The decision to be made here – choosing among three options – involved weighing the benefits and detriments of each option and

making an overall assessment. While some elementary understanding of law and the issues in the McArthur Action may be necessary to appreciate the consequences associated with each option, the decision also has some factual and discretionary aspects that might touch on policy considerations. Accordingly, it is arguable that the Minister's decision should be reviewed under the deferential standard of reasonableness, rather than correctness.

[48] However, I need not determine whether the standard of review is correctness or reasonableness, as the Minister's decision cannot withstand scrutiny under either standard.

D. Reviewing the Minister's decision

[49] If the standard of review is reasonableness, then, for the reasons set out below, the Minister failed to take the only defensible and acceptable option on the facts and the law in these circumstances: to interplead monies under Rule 108. If the standard of review is correctness, the Minister was wrong in not interpleading monies.

[50] In these circumstances, the advantages of interpleader are overwhelming. Under interpleader:

- the Minister does not take a position and thereby expose himself and the public purse to liability and the cost of litigation on the contentious issues of who is entitled to the monies, the needs of White Bear pending determination of the dispute, and what should happen to the monies pending determination of the dispute;

- the Minister does not take a position that puts himself in a conflict of duty to the Bands, whether that duty is characterized as a common law trust duty, a fiduciary duty, a duty to aboriginal peoples, or any or all of these things;

- the Minister does not put himself in a position where, as was apparent in the argument before us, his statutory or common law authority to act is disputed; on the other hand, the Minister's authority under Rule 108 to interplead in this case is undoubted;

- all affected persons have the opportunity to file evidence, cross-examine on it, and make submissions – this is procedurally fair and maximizes the chances that a fully-informed, appropriate decision will be made;

- the judge hearing the interpleader – perhaps a judge who has been involved in the McArthur Action and is familiar with it – can set speedy and efficient procedures, tailoring them to the particular circumstances of the case (see Rule 108(2)); those procedures can include, among other things, case management, settlement discussions concerning what should happen pending the McArthur Action, and mediation (see Rules 385-387).

[51] In choosing the option of moving some of the monies in the Fund into a suspense account, the Minister unnecessarily exposed himself and the public purse to potential liability. Further, other

than the bald assertions in the Minister's letter, the evidentiary record contains no support for two-thirds of the Fund being the proper or appropriate amount to be placed in a suspense account. Finally, the record contains nothing suggesting that the option chosen by the Minister had any advantages over the option of interpleader.

[52] In another case, there might be exigent circumstances or other considerations of law, fact or both that would make the option of interpleader inapt and other options preferable. In another case, there might be considerations of policy or other matters rooted in the Minister's expertise and experience that might reasonably lead to the selection of a different option. But, here, the record discloses no such considerations. On this record, the only acceptable and defensible option available to the Minister was to interplead the monies that were subject to conflicting claims.

E. An additional issue

[53] Before concluding, I wish to flag an important issue for full argument and consideration should a case like this recur.

[54] In this case, all parties argued their cases on the assumption that judicial review lies in these circumstances. But does it? More specifically is this a public law matter for which judicial review is available? Or is it a private law matter in which judicial review is not available. Several factors are relevant: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at paragraph 60. I shall mention just a few.

[55] Some factors suggest this matter is private. The trust resembles a private trust to be administered on the basis of private law principles. It does not appear that any law required the trust to be set up or the Minister to act as trustee. The issue facing the Minister in this case is indistinguishable from one that private trustees encounter and, on my colleague's view of the matter, the Minister acted contrary to private law rights.

[56] Other factors suggest this matter is public. As I have mentioned, the Minister's decision has potentially significant consequences for the public purse. Further, the remedy sought by way of judicial review – the public law remedy of *certiorari* – seems well-suited to addressing the problem before us.

[57] Given the uncertainty arising from this mix of factors, the possibility that there are other relevant factors, and the absence of argument before us on this point, I am prepared to accept for the purposes of this case that the matter is public and judicial review is available. However, in a future case, based on full argument and a different factual record, I might reach a different conclusion on this point.

F. Proposed disposition

[58] Therefore, for the foregoing reasons, I conclude that the Minister's decision should be quashed. It follows that I agree with my colleague's proposed disposition of the matter. In the circumstances, I also agree with his suggestions in paragraph 34, above regarding the manner in

which the Minister should proceed with the interpleader. I would add that the Minister should carefully consider what monies to interplead. Failure to interplead monies over which there may be conflicting claims may result in civil liability to one or more Bands.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-171-11
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
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CONCURRING REASONS BY:	STRATAS J.A.
DATED:	August 27, 2012

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