Federal Court of Appeal  Cour d'appel fédérale

**Date: 20121128**

**Docket: A-110-12**

**Citation: 2012 FCA 312**

**CORAM:** **NOËL J.A.**
**MAINVILLE J.A.**
**WEBB J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**CHIEF JESSE JOHN SIMON and COUNCILLORS FOSTER NOWLEN AUGUSTINE, STEPHEN PETER AUGUSTINE, ROBERT LEO FRANCIS, MARY LAURA LEVI, ROBERT LLOYD LEVY, JOSEPH DWAYNE MILLIEA, JOSEPH JAMES LUCKIE TYRONE MILLIER, MARY-JANE MILLIER, JOSEPH DARRELL SIMON, ARREN JAMES SOCK, JONATHAN CRAIG SOCK AND MARVIN JOSEPH SOCK on behalf of themselves and the members of the ELSIPOGTOG FIRST NATION, and on behalf of the MI'GMAG FIRST NATIONS OF NEW BRUNSWICK, and on behalf of the MEMBERS OF THE MI'GMAG FIRST NATIONS OF NEW BRUNSWICK**

**Respondents**

Heard at Halifax, Nova Scotia, on November 20, 2012.

Judgment delivered at Ottawa, Ontario, on November 28, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: NOËL J.A.
WEBB J.A.

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**Respondents**

## REASONS FOR JUDGMENT

**MAINVILLE J.A.**

[1] The Attorney General of Canada is appealing an order of Justice Simpson of the Federal Court (the "judge"), dated March 30, 2012 and issued for the reasons cited as 2012 FC 387, allowing a motion for an interlocutory injunction which prohibits the implementation of a rule of strict compliance with provincial rates and standards for income assistance on First Nations reserves

in Nova Scotia, New Brunswick and Prince Edward Island until a decision has been issued in an underlying application for judicial review before the Federal Court in docket T-1649-11.

[2] The Attorney General of Canada (the "appellant") raises numerous grounds of appeal, and is essentially seeking that this Court review and decide *de novo* the motion which was before the judge. However, this Court does not decide *de novo* in an appeal from an interlocutory order providing injunctive relief. Rather, deference is owed to the judge in granting or refusing such relief. This Court will not interfere unless it can be shown that the judge proceeded on a wrong principle of law, gave insufficient weight to relevant factors, has seriously misapprehended the facts, or if an obvious injustice would otherwise result.

[3] For the reasons set out below, I can find no such error in the judge's decision, nor do I find that an obvious injustice results from the order. I would consequently dismiss this appeal.

**BACKGROUND AND CONTEXT**

[4] Canada has been providing for some time essential services and programs to "Indians" residing on "reserves" under the meaning of these terms in the *Indian Act*, R.S.C 1985, c. I-5. There is no specific federal legislation regulating such essential services and programs. Instead, the services and programs have been provided under various directives from the Treasury Board and through various policies of the Department of Indian Affairs and Northern Development, now recently renamed Aboriginal Affairs and Northern Development Canada ("Aboriginal Affairs").

[5] Though these services and programs were originally provided directly by the federal government, in recent years - with a view of encouraging greater self-administration by aboriginals - the delivery of many essential services and programs destined for "Indians" residing on reserves has been devolved to the *Indian Act* "band" administrations.

[6] Since the *Indian Act* does not provide for a proper framework regulating the devolution of program administration to *Indian Act* bands, Aboriginal Affairs has for some time been using funding arrangements for this purpose. For the purposes of this appeal, two types of funding agreements are at issue: (a) Comprehensive Funding Agreements ("CFA"); and (b) Canada/First Nations Funding Agreements ("Block Funding Agreements"). The choice of the type of funding arrangement is usually guided by the capacity of the concerned band administrations. Both types of funding agreements are similar in that they provide for the terms and conditions for services and programs delivery and for financial management and reporting.

[7] For social services and programs provided and delivered under these funding agreements, First Nations must follow certain Aboriginal Affairs policies and guidelines, including its national and regional manuals setting out the overall objectives and requirements for the five principal social programs delivered on reserve: (1) the Income Assistance Program; (2) the Assisted Living Program; (3) the National Child Benefit Reinvestment Program; (4) The Family Violence Prevention Program; and (5) the First Nation Child and Family Service Program.

[8] For many years, Aboriginal Affairs had maintained in its program manuals dealing with income assistance an approach of "reasonable comparability" with provincial social assistance programs. In essence, Aboriginal Affairs accepted a certain degree of limited flexibility for First Nations in determining eligibility and levels of support for income assistance. Thus, the eligibility criteria and support levels under the Income Assistance Program had to be "reasonably comparable" to those offered under the social assistance programs delivered to non-aboriginals by the provincial authorities of the province in which the concerned reserve was located.

[9] Aboriginal Affairs has recently decided to change its program manuals in order to do away with the "reasonably comparable" approach for the Income Assistance Program. This has now been replaced by a requirement of strict compliance with the provincial eligibility criteria and assistance rates. Aboriginal Affairs submits that its prior long-standing "reasonably comparable" approach set out in its manuals must be abandoned since it is not compliant with a Treasury Board Directive dating from 1964 (the "1964 Directive"). That directive authorized Aboriginal Affairs to adopt provincial or local municipal standards and procedures for the administration of relief assistance for Indians.

[10] The respondents have taken exception to this change. They submit that it is unconstitutional and that, in any event, it was carried out improperly in Atlantic Canada. They have consequently applied to the Federal Court for relief submitting, *inter alia*, that the change:

> (a) is an unconstitutional abandonment or sub-delegation to the provinces of the federal government's powers under subsection 91(24) of the *Constitution Act, 1867*;

> (b) was made without an opportunity for meaningful consultation, thus failing to meet the obligations of the Crown which flow from its *sui generis* relationship with the Aboriginal peoples of Canada, from the honour of the Crown, and from international instruments;
>
> (c) failed to meet the requirements of procedural fairness in accordance with the doctrine of legitimate expectations arising from the past history of dealings between the Crown and the respondents.
>
> (Amended Notice of Application for Judicial Review at pp. 39 to 41 of Appeal Book)

[11] Within the framework of these judicial review proceedings, the respondents also applied to the Federal Court for interim relief in the form of an order restraining the appellant from changing the "reasonably comparable" approach until the final disposition of their application.

**THE JUDGE'S DECISION**

[12] After reviewing the evidence before her, the judge found that the First Nations had been consulted by Aboriginal Affairs about the implementation of the change to the "reasonably comparable" approach, but chose to abandon the process. However, she also found that there was never meaningful consultation about the merits of the change before it was developed, nor was there any suggestion on the part of Aboriginal Affairs that the consultations would delay or prevent the implementation of the change.

[13] The Attorney General submitted that the motion was moot since the First Nations, and particularly the respondent Elsipogtog First Nation, had acquiesced in their funding agreements to the change from "reasonable comparability" to "strict compliance" with provincial eligibility criteria and rates. The judge found that none of the funding agreements placed before her directly

referred to the new Aboriginal Affairs manual requiring strict compliance, and that consequently, she could not conclude that some form of acquiescence to this change had occurred.

[14] The judge then applied the three-part test for injunctive relief set out in *RJR-MacDonald Inc, v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR-MacDonald*").

[15] Dealing first with irreparable harm, she found that any harm to the First Nations resulting from an eventual "administrative dismantling" of the current social programs funding arrangements could be compensated in damages.

[16] She nevertheless concluded that the individual recipients of the income assistance and their families would suffer irreparable harm if the change was implemented. She based this finding on the evidence submitted to her that many of the current recipients would experience reduced assistance under the planned change, and that there was likelihood that some recipients would become ineligible to receive income assistance. She further determined that the change would cause emotional and psychological stress to these individuals, who are especially vulnerable even to small changes in the resources available to meet their basic needs.

[17] The judge also found that the balance of convenience favoured granting the order, since (a) as noted above, the individual recipients of income assistance would be adversely affected pending the outcome of the judicial review application, and (b) the issue of compliance with provincial

eligibility criteria and rates was not an urgent matter given that Aboriginal Affairs and the First Nations have been applying the "reasonably comparable" approach for many years.

[18] Finally, on the serious issue aspect of the test, she found that it was sufficient to conclude that the duty of fairness set out under *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*") may require Aboriginal Affairs to consult First Nations about how to comply with the 1964 Directive.

**THE ISSUES**

[19] The issues which are to be addressed in this appeal may be set out as follows:

a. What is the standard of review in an appeal from an order granting interim relief in the form of an interlocutory injunction?

b. Did the judge proceed on a wrong principle of law, give insufficient weight to relevant factors, or seriously misapprehend the facts in determining that (a) a serious issue was raised by the proceedings (b) that irreparable harm would occur and (c) that the balance of convenience favoured issuing the order?

**THE STANDARD OF REVIEW**

[20] Pursuant to section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, on an application for judicial review, the Federal Court may make any interim order that it considers appropriate pending the final disposition of the application. This includes interim and interlocutory injunctions, which are specifically dealt with in Rules 373 and 374 of the *Federal Courts Rules*, SOR/98-106. Though the power of the Federal Court to grant interlocutory injunctions rests on a statutory footing, it is nevertheless a discretionary power of the sort exercised by common law jurisdictions in equity: see

*A.I.E.S.T., Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, [2004] S.C.R. 43 at para. 13; *Trudel v. Clairol Inc. of Canada*, [1975] 2 S.C.R. 236 at p. 246; *Chinese Business Chamber of Canada v. Canada*, 2006 FCA 178 at para. 4.

[21] As already noted, the appellant is essentially seeking a *de novo* determination of the motion. As stated at paragraph 22 of its memorandum, the appellant asks this Court to "substitute its discretion for that of the Motions Judge and allow the appeal." This is not the mandate of this Court in this appeal.

[22] This Court must show deference and exercise care when reviewing the discretionary decision of a Federal Court judge to grant or to refuse an interlocutory injunction. This Court will not interfere with the decision unless it is established that the Federal Court judge has proceeded on a wrong principle of law, has given insufficient weight to a relevant factor, has seriously misapprehended the facts, or where an obvious injustice would otherwise result: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at pp. 154-156.

**DID THE JUDGE PROCEED ON A WRONG PRINCIPLE OF LAW, GIVE INSUFFICIENT WEIGHT TO RELEVANT FACTORS OR SERIOUSLY MISAPREHEND THE FACTS**

[23] The judge correctly identified the applicable test as the one set out by the Supreme Court of Canada in *RJR-MacDonald*. It is the application of that test to the circumstances of these proceedings which the appellant challenges.

***Serious Issue***

[24] The appellant correctly notes that the duty of fairness and the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain (*Baker* at paras. 26). The appellant consequently submits that the judge erred in finding, based on *Baker*, that meaningful consultation about the merits of the change from "reasonable comparability" to "strict compliance" was a serious issue.

[25] In this case, the judge's findings on the serious issue cannot be separated from the proceedings considered as a whole and from the other issues raised by the respondents. The respondents are challenging the impugned change to the Aboriginal Affairs manuals on many grounds, including on the ground that there is a duty to consult with them on the substantive merits of the change. They submit that this duty flows from the *sui generis* relationship between Canada and Aboriginal peoples, the honour of the Crown, and international instruments. The respondents also rely on the doctrine of legitimate expectations arising from the past history of dealings between the Crown and the respondents.

[26] Though they can point to no specific jurisprudence supporting their asserted right to substantive consultations regarding government programs delivered on reserves, the respondents nevertheless submit that under a purposive reading of *Baker* and *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, Canada may well have a duty to consult Aboriginal peoples with respect to subjects other than Aboriginal and treaty rights. This is an innovative submission which will require an evidentiary basis and full argument in the underlying

judicial review application in order to be properly determined. The fact that the submission is innovative does not necessarily mean that it is not serious.

[27] Under the *RJR-MacDonald* test, the threshold for a serious issue is a low one. In the context of this case, the scope of the duty to consult is itself a serious issue. Here, the band administrations have been entrusted by Aboriginal Affairs with the implementation of social programs such as income assistance, and they have been adapting these programs to the particular needs of their reserves for many years under the "reasonably comparable" approach. In the context of the evolving law relating to aboriginal consultations, it is not unreasonable to suggest, as the judge did, that there may be a duty to hold meaningful consultation about the merits of changing this approach prior to its implementation. Consequently the judge did not err in finding that the respondents had met the low threshold of establishing a serious issue.

[28] The appellant adds that the judge also erred in not recognizing that the dispute involved the terms of a contract, *i.e.* the funding agreements. As there is no statute against which the decision to change the "reasonable comparability" policy can be reviewed, the appellant submits that there is no basis for judicial review, and as a result, no basis upon which the judge could have granted an injunction. The appellant refers to the decision of this Court in *Irving Shipbuilding v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 ("*Irving Shipbuilding*"), and that of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*") to support the proposition that public law duties and remedies do not extend to contractual relationships with the Crown.

[29] The starting point in an analysis of the availability of public law remedies is to determine the true nature of the relationship at issue. The First Nations' CFA and Block Funding Agreements in this case are not commercial agreements as considered in *Irving Shipbuilding*, nor are they contracts of employment as dealt with in *Dunsmuir*.

[30] These funding agreements are rather akin to government to government agreements for the delivery of various essential services. Since the *Indian Act* does not provide a proper statutory framework for this purpose, *sui generis* agreements have been developed so as to empower band authorities to deliver essential services to the residents of their reserves. These agreements are therefore to be understood within the overall context of aboriginal governance and of the special relationship between Canada and the First Nations. In light of the special nature of the funding agreements, both public law and private law remedies may be available depending on the circumstances and the issues.

[31] In this case, the respondents are challenging a change to the Aboriginal Affairs' manuals which are referred to in their funding agreements. That challenge is made on constitutional grounds and on the ground of a breach to an alleged duty of substantive consultation flowing from the honour of the Crown and from the special Crown-aboriginal relationship. Public law remedies, such as judicial review and injunction, may well be available to the respondents in such circumstances.

[32] The appellant also submits that the judge erred by extending the effect of her order to all First Nations in New Brunswick, Nova Scotia and Prince Edward Island when the respondents were

only the Mi'gmag First Nations of New Brunswick. It is not necessary for this Court to decide this issue as it became moot when First Nations of New Brunswick, Nova Scotia and Prince Edward Island joined the underlying judicial review proceedings in the Federal Court.

[33] The appellant finally submits that the judge committed an error in not finding that the respondents had acquiesced to the provincial rates for income assistance in the funding agreements they signed. These agreements make no specific reference to the eligibility criteria and rates for income assistance, but rather generically refer to the manuals and program documentation of Aboriginal Affairs. The heart of the dispute between the parties concerns the legality of the changes made to those manuals. The fact that First Nations generically agreed to apply Aboriginal Affairs manuals does not necessarily affect the issue of whether Aboriginal Affairs could change those manuals as it did without first consulting with First Nations.

[34] As a final comment, it is important to note that neither these reasons nor the reasons of the judge should be seen as expressing a favourable or unfavourable opinion on any of the issues raised by the parties in the underlying judicial review application. The judge only found that the respondents had raised at least one issue in those proceedings that satisfied the serious issue test for the purposes of an interlocutory injunction. The merits of all these issues still remain to be determined.

***Irreparable Harm***

[35] The appellant further challenges the judge's order on the ground that irreparable harm was not established on a balance of probabilities. In the appellant's view, only speculative evidence of irreparable harm was submitted.

[36] Yet the record abundantly shows that Aboriginal Affairs itself was of the view that the change from "reasonably comparable" to "strict compliance" with provincial eligibility criteria and rates for income assistance would have serious negative financial impacts on many individual recipients of the assistance: see notably paras. 73 to 76 of the judge's reasons.

[37] Moreover, it was reasonable for the judge to draw the inference that reductions in income assistance would cause harm to individual recipients which could not be compensated through a subsequent monetary award. This is an inference which courts have not hesitated to draw in cases involving disability benefits: *El-Timani v. Canada Life Assurance Co.*, 2001 CarswellOnt 2336 (Ont. SCJ); 28 CCLI (3d) 195 at paras. 8-9; *Ausman v. Equitable Life Insurance Co. of Canada*, 2002 CarswellOnt 3922 (Ont. SCJ); 46 CCLI (3d) 14 at paras. 45 to 54.

[38] As aptly noted by the judge in her reasons, even small changes in the resources available to the poorest and most vulnerable of Canadians to meet their basic essential needs can result in serious harm. Adding to the impoverishment of those who are already vulnerable is not something which should be taken lightly.

[39] In my view, the judge committed no error in finding irreparable harm.

***Balance of convenience***

[40] The appellant finally submits that the judge erred in finding that the balance of convenience favoured the respondents. Even though the appellant acknowledges that there will not be new costs for Canada should the "reasonably comparable" approach be maintained, it nevertheless submits that the public interest favours immediately implementing the 1964 Directive.

[41] The appellant does not have a monopoly on the public interest: *RJR-MacDonald* at para. 70. All parties to an interlocutory injunction proceeding may rely on considerations of the public interest and may tip the scales of convenience by demonstrating a compelling public interest in granting or refusing the relief. Moreover, the notion of "public interest" includes both the concerns of society generally and the particular interests of identifiable groups: *RJR-MacDonald* at para. 71.

[42] The appellant's public interest argument essentially boils down to the assertion that it has exclusive and unfettered authority to effect the change from "reasonably comparable" to "strict compliance", which is the very issue which is to be decided in the underlying judicial review application. Its submission addresses the merits of that application rather than the balance of convenience. Other than this, the appellant has presented no substantiation of any harm which would befall it as a result of extending for a limited time the long-standing Aboriginal Affairs approach of "reasonably comparable".

[43] The 1964 Directive was adopted close to half a century ago, yet the "strict compliance" interpretation of this Directive has not been followed for many years by Aboriginal Affairs. In these circumstances, the appellant's submission that the public interest requires its immediate implementation rings hollow.

[44] The effect of the judge's order is to maintain the long-standing *status quo* and to thus allow the income support program to continue with "reasonable comparability" and attending administrative and reporting requirements in exactly the same way as in past years. The judge committed no error in finding that the harm resulting from the reduction in benefits to vulnerable individual recipients far outweighed any minor inconvenience which the appellant may suffer from a short delay in implementing the change to "strict compliance".

**CONCLUSION**

[45] I would therefore dismiss this appeal with costs.

"Robert M. Mainville"
J.A.

"I agree
Marc Noël J.A."

"I agree
Wymann W. Webb J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-110-12 |
| **APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE SIMPSON DATED MARCH 30, 2012, NO. T-1649-11** | |
| **STYLE OF CAUSE:** | Canada (Attorney General) v. Chief Simon *et al* |
| **PLACE OF HEARING:** | Halifax, Nova Scotia |
| **DATE OF HEARING:** | November 20, 2012 |
| **REASONS FOR JUDGMENT BY:** | MAINVILLE J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>WEBB J.A. |
| **DATED:** | November 28, 2012 |

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