Federal Court Cour fédérale

Date: 20150218

Docket: T-791-14

Citation: 2015 FC 200

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

**THUNDERCHILD FIRST NATION
as represented by its duly elected
CHIEF AND COUNCIL**

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA (also known as THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHER DEVELOPMENT CANADA)

Respondents

JUDGMENT AND REASONS

I. Nature of the mater

[1] This is an application for judicial review to set aside the decision of the Minister of Indian Affairs and Northern Development Canada (the Minister), as carried out by the

Saskatchewan Regional Director General of Indian Affairs and Northern Development also known as Aboriginal Affairs and Northern Development Canada (AANDC), to place Thunderchild First Nation (TFN) under third party management following its refusal to sign an Aboriginal Recipient Funding Agreement (ARFA) for the 2014-2015 fiscal year.

II. Context

[2] Parliament annually releases funds to First Nations to provide funding for several social programs, including: (i) Post-Secondary Education Assistance, (ii) Social Services Programs, including income support for basic needs; (iii) Assisted-Living Programs; (iv) Support for First Nations Governance at the community level; and (v) Elementary and Secondary Education for Indian children. The transfer and the administration of these funds are normally governed by an ARFA between the relevant First Nation and Her Majesty the Queen in Right of Canada, as represented by the Minister.

[3] If a First Nation fails to comply with its ARFA, AANDC may intervene to appoint a Third Party Funding Agreement Manager (TPFAM) who (in place of the First Nation) will then receive the funds contemplated in the ARFA and then administer the funds and deliver the services to the members of the First Nation. An AANDC internal policy entitled *Directive 210 – Third Party Funding Agreement Management* (*Directive 210*) provides as follows at section 3.1:

> 3.1 Objective
>
> To provide for the timely and effective remedy of high risk Defaults, where the Recipient is assessed by the Department as being unwilling and/or unable to rectify its default situation and only when deemed by the Department to be necessary, by engaging a Third Party Funding Agreement Manager to administer the terms and conditions of the funding agreement signed by the Department – for a period of time during which the Recipient

> works to remedy the underlying causes of the Defaults and reassume administration of funding.

[4] *Directive 210* also includes the following passage at section 4.0 (entitled: "Context (Why this directive matters?)"):

> The Directive sets out Third Party Funding Agreement Management as an administrative response appropriate in the event of high risk Defaults involving a First Nation, Tribal Council and Other Aboriginal Recipient providing essential services; or the funding agreement that would normally exist with these Recipients is not in place.
>
> [Emphasis added]

[5] Accordingly, AANDC's internal policy contemplates a TPFAM when no funding agreement is in place, even in the absence of default.

[6] *Directive 210* further provides as follows at section 8.1:

> 8.1 Requirement for Third Party Funding Agreement Management
>
> The requirement for Third Party Funding Agreement Management is determined through the Default Assessment processes as set out in the *Directive on Default Prevention and Management*. Third Party Funding Agreement Management may be determined to be the most appropriate Default Management Strategy in the following circumstances:
>
> •high risk default: a Default Assessment determines a Recipient's Overall Default Management Risk Rating is high;
>
> •the Recipient is unwilling and/or unable to rectify its default situation;
>
> •the implementation of the Management Action Plan, within the required timeframe, proves unsuccessful;
>
> •extraordinary circumstances dictate the need for a Third Party Funding Agreement Management.

III. Facts

[7] In 2011, the Minister and TFN entered into an ARFA that was to remain in force until March 31, 2014.

[8] On March 13, 2013, TFN signed an Amending Agreement that amended the ARFA for the 2013-2014 fiscal year. The Applicant asserts that it had concerns with the suggested amendments. Those concerns included: (i) the absence of consultation; (ii) the fact that the agreement was affording wider discretion to the Minister; (iii) insufficient funding; and (iv) the requirement that the Council prepare a consolidated audit. The Applicant also argues that the Amending Agreement was signed "under protest and with a view to providing interim funding while [AANDC] and Thunderchild worked through the impasse."

[9] In autumn 2013, AANDC announced certain changes to the ARFA model agreements and on November 6, 2013, a letter was sent by AANDC to invite the TFN leadership to a regional workshop/discussion regarding the proposed changes. A number of other First Nations would also be invited to this workshop.

[10] On November 15, 2013, Delbert P. Wapass, Chief of TFN, informed the Minister that no representatives of TFN would be at the workshop. In his letter, Chief Wapass stated:

> Needless to say, I was very discouraged when I was advised that information sessions were being organized by your Ministry's Saskatchewan regional office for even more amendments to the CFA [aka ARFA]. These sessions are scheduled to proceed despite the fact that we have not discussed the amendments to the current CFA which we had signed under duress. Such discussions can only be facilitated through the implementation of a Treaty Nations and state of Canada bilateral process table.

> Be advised, that the Thunderchild First Nation will not be present at any of these information sessions until such time that the current CFA amendments have been dealt with.

[11] On November 19, 2013, during the workshop, AANDC staff provided background papers, sample agreements, working tools and other resource materials to the participants. AANDC heard and took note of concerns expressed about the changes to the ARFA model, and later prepared a document that was sent to AANDC headquarters. This document notes the following concerns, among others:

1. First Nations must often supplement AANDC programs with their own revenues in order to meet the needs of their community;
2. AANDC's proposed adjudication and approval process is cumbersome and results in later approval of projects;
3. Preparing consolidated audits is a significant burden, and no additional funding is provided therefor, and;
4. First Nations want the consolidated audits to be useful and have purpose, and would like to have an opportunity to provide input in determining the areas on which they focus.

[12] AANDC made three changes to the ARFA model following the recommendations made by the First Nation leaders. These changes were:

1. In the "whereas clauses" the reference to treaties was amended to highlight the historical fact that treaties had been signed with Her Majesty the Queen in Right of Canada;

2. In the "whereas clauses" dealing with the fiduciary relationship, the term "First Nations people" was used since this type of agreement is to be used for First Nations (who prefer that term over "Indian Bands" or "Recipients"); and
3. Sections 3.1 and 6.1 of the model agreement were revised so as to clarify that they could not be used to add new reporting requirements or to change the frequency of reporting requirements.

[13] Ms. Anna Fontaine, the Regional Director General of AANDC Saskatchewan, alleges in her affidavit that several other proposals made by Saskatchewan First Nations "remain under active consideration by AANDC." The Applicant too acknowledges in its Memorandum of Fact and Law that "consultation and negotiation regarding funding agreements was, and continues to be, ongoing with other Nations at this time."

[14] On December 15, 2013, AANDC posted on its website the 2014-2015 standard ARFA agreement. On February 21, 2014, TFN was directly provided with a 2014-2015 standard ARFA agreement and was asked by AANDC to sign it.

[15] On March 6, 2014, after meeting with the Elders and Community Members at large, TFN Leadership passed a motion not to sign the 2014-2015 Funding Agreement. On March 7, 2014, TFN informed AANDC of its decision.

[16] On March 11, 2014, the representatives of TFN met with the representatives of AANDC to address the impasse. Ms. Fontaine informed TFN that AANDC would not be transferring funds to TFN without a signed ARFA. Ms. Fontaine also mentioned that the funding of programs would have to continue somehow, and that a TPFAM might have to be put in place if no agreement was signed. Ms. Fontaine also mentioned that an expert resource could be appointed.

She alleges in her affidavit that by using the term "expert resource" she was referring to a TPFAM. For its part, TFN representative recall the "expert resource" suggestion as being distinct from a TPFAM. TFN alleges that an expert resource was raised as a possibility when TFN argued that a TPFAM would be inappropriate since TFN was not in default of its funding agreement. The parties disagree as to whether TFN was informed in advance that a TPFAM would be appointed should its representatives refuse to sign the ARFA.

[17] Ms Fontaine alleges that during this meeting, the representatives of both parties explored the possibility of naming a regional tribal council to serve as the vehicle for the delivery of the funds or asking the Treaty 6 Education Council to step in to deliver some of the programs to TFN's people. However, these options were rejected by TFN.

[18] Another option, this one proposed by TFN, was to have its Chief Financial Officer, Sheila Sutherland, named as a co-manager or an expert resource. That option was rejected by AANDC because it would not overcome the need for a signed funding agreement.

[19] On March 17, 2014, Chief Wapass was informed that a TPFAM, selected through a tender process, would be appointed to deliver programs and services to the people of TFN.

[20] On March 25, 2014, Mr. Robert Harvey, the Associate Regional Director General of AANDC Saskatchewan, informed TFN that Evan Schemenauer, CA Professional Corporation (ESPC) had been appointed as a TPFAM for TFN.

[21] On March 27, 2014, Chief Wapass sent a letter on behalf of TFN expressing his disagreement with the appointment of a TPFAM.

[22] TFN alleges that on April 1, 2014, ESPC was not yet properly set up to deliver the programs and services as planned. Therefore, TFN delivered cheques as well as the programs and services for a time. I understand that ESPC later reimbursed TFN for these expenditures.

IV. Decision

[23] In the letter dated March 26, 2014 formally informing TFN of the appointment of a TPFAM, AANDC mentioned that this decision had been taken to ensure that AANDC programs and services continued to be delivered to the people of TFN.

[24] AANDC alleges that it considered the risk that programs and services would not be delivered on April 1, 2014. Ms. Fontaine alleges in her affidavit:

> I made the decision to appoint ESPC as TPFAM because the Band Council for the TFN had absolutely and unequivocally refused to sign any of the standard available ARFAs for the time frame running from April 1, 2014 onwards. This left no mechanism by which the AANDC-funds programs and services could be administered and delivered to the people of the TFN, except through government action. Before making my decision, I considered whether the TFN had the financial where-with-all to deliver the programs and services without benefit of AANDC funding. Based on a review of the TFN consolidated audited financial statement for 2012-2013, I determined that it was not an option. TFN did not have enough "own-source" revenue to deliver the programs and services. I therefore reached the conclusion that, unless a TPFAM was appointed, the health, safety or welfare of the people of the TFN would be placed at risk of being compromised from April 1, 2014 onwards.

V. Issues

[25] This matter raises the following issues:

1. Did the Minister err in appointing a TPFAM?

2. Did the Minister fail to observe the principles of natural justice or procedural fairness?

VI. Analysis

A. *Standard of review*

[26] I agree with the Respondent that the decision to appoint a TPFAM because the Applicant refused to sign the ARFA is to be reviewed on a standard of reasonableness (*Kehewin Cree Nation v Canada*, 2011 FC 364, paras 16-18 (*Kehewin*); *Tobique Indian Band v Canada*, 2010 FC 67, at para 56 (*Tobique*)). Therefore, this Court will determine whether the decision to appoint a TPFAM falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[27] With respect to the issue of natural justice or procedural fairness, the correctness standard applies (*Kehewin*, at para 15; *Tobique*, at para 66).

B. *Did the Minister err in appointing a TPFAM?*

[28] TFN argues that it was unreasonable to appoint a TPFAM as it was not in default of the ARFA. It argues that "there was no legal or policy basis upon which to make the determination that Thunderchild was in default." In fact, the parties, are agreed that TFN is not, and was not, in default. But default is not the real issue since the impugned decision was not based on any finding of default.

[29] I am mindful that the decision to appoint a TPFAM is of great importance as it removes TFN's right to govern its own financial affairs (*Tobique*, at para 71). Also, as explained by

Justice Phelan in *Attawapiskat First Nation v Canada*, 2012 FC 948, at para 59, an ARFA is "essentially an adhesion contract imposed […] as a condition of receiving funding." However, decisions made by AANDC with respect to "funding and the administration of that funding are highly discretionary" (*Tobique*, at para 69).

[30] Pursuant to paragraph 4.0 of *Directive 210*, a TPFAM can be appointed when "the funding agreement that would normally exist […] is not in place." Moreover, in *Kehewin*, the Minister decided not to enter into an ARFA with the applicant "because of continuing unremedied defaults" under the proceeding agreement. In *Kehewin*, after an analysis of the specific facts in that case, Justice Phelan ruled that Minister's decision to appoint a TPFAM was reasonable (*Kehewin*, at para 30). Therefore, a TPFAM can be appointed in situations where no funding agreement has been signed. Though I recognize that *Directive 210* is an internal policy and not binding law, I am nevertheless of the view that AANDC may appoint a TPFAM even in the absence of any default, where such an appointment is necessary to ensure that programs and services provided to members of a First Nation are not interrupted.

[31] In making its decision in this case, AANDC was obliged to weigh not only the interest of the people of TFN but also the importance of public funds and the urgency of the situation (*Tobique*, at para 61). The purpose of the appointment of a TPFAM is to ensure that essential programs and services are not disrupted and to protect public funds (*Wawatie v Canada (Indian Affairs and Northern Development)*, 2009 FC 374, at para 40 (*Wawatie*)). In the present case, AANDC reasonably considered that it would have been inappropriate to transfer public funds to TFN in the absence of a funding agreement. It was also reasonable for AANDC to conclude both that the ARFA would not be signed before the beginning of the 2014-2015 fiscal year, and that, in the absence of a signed ARFA, an alternative had to be found to deliver essential programs

and services to the people of TFN. TFN took a strong position that they would not sign the ARFA as proposed. Moreover, AANDC reviewed TFN's consolidated audited financial statement for 2012-2013 and concluded therefrom that TFN did not have the financial wherewithal to deliver the programs and services without the benefit of AANDC funding.

[32] TFN argued that it was able to fund the programs and services in question and that it actually did so during a brief period after the termination of the 2013-2014 ARFA but before the TPFAM was in place. However, it seems clear that TFN's ability to fund the programs and services independent of AANDC funding was short term only. TFN does not dispute that it would have required outside funding in order to maintain the programs and services over the longer term.

[33] AANDC considered other alternatives before appointing a TPFAM to ensure that social services and programs would be delivered to the people of TFN without interruption. As mentioned above, the proposed alternatives included: (i) naming a regional tribal council to step in and serve as the vehicle for the distribution of the funds; (ii) asking the Treaty 6 Education Council to step in to deliver some of the programs to TFN's people; and (iii) appointing TFN's CFO as a co-manager or expert resource. None of these options was workable.

[34] After having considered all the materials submitted by the parties, it is my view that AANDC made significant efforts to find an alternative solution and to come to an agreement with TFN for funding its programs and services.

[35] TFN argues that it does not lack the ability to manage its own finances. I agree. However, the absence of an ARFA is determinative here.

[36] In my opinion, given the circumstances, the decision to appoint a TPFAM to ensure the delivery of essential social programs was reasonable and falls within the range of possible, acceptable outcomes.

C. *Did the Minister fail to observe the principles of natural justice or procedural fairness?*

[37] I agree with the Applicant that in making its decision, the Minister had an administrative duty to act fairly. As mentioned in *Simon v Canada (Attorney General)*, 2013 FC 1117, at para 144:

> This Court agrees that the Applicants were entitled to procedural fairness; however, in determining the extent of this obligation, the five [*Baker v Canada (Minister of Citizenship and Immigration)*,[1999] 2 SCR 817 [*Baker*]] factors must be weighed. It is appropriate to recall these factors:
>
> (1) the nature of the decision being made and the process followed in making it;
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> (2) the nature of the relevant statutory scheme;
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> (3) the importance of the decision to the individuals affected;
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> (4) the legitimate expectations of the individual challenging the decision;
>
> (5) the decision maker's own choice of procedure.

[38] Having the *Baker* factors in mind, I note the Applicant's submission that the Minister failed to observe the principles of natural justice as it was "entirely reasonable for TFN to expect that, prior to signing an 'agreement' on behalf of their community regarding issues fundamental to the community's well-being, meaningful consultation and negotiation would occur." Citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74,

[2004] 3 SCR 550, the Applicant argues that the Minister failed in his duty to negotiate the ARFA in good faith.

[39] There are at least two issues to keep in mind with regard to this argument by the Applicant. First, the present application is a judicial review of the Minister's decision to appoint a TPFAM. It is not a review of the process by which AANDC addressed the concerns of the First Nations of Saskatchewan with respect to the ARFA for the 2014-2015 fiscal year. Second, even if this were a review of the process by which AANDC addressed Saskatchewan First Nations' concerns, it remains that TFN opted not to participate in that process.

[40] I agree with the Respondent that TFN cannot refuse to participate in the consultation process and then rely on that fact to argue that it was not consulted in a meaningful and serious manner (*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at para 65). It would impose an impossible burden on AANDC if such argument could be made on that basis. Though AANDC implemented only three recommendations made by the First Nation leaders during the November 2013 workshops/discussions, and though the modifications made were arguably minor ones compared to the concerns expressed by the First Nations, these facts are insufficient to establish that AANDC failed to engage in meaningful consultations with the First Nations of Saskatchewan.

[41] Further, AANDC continued discussions with TFN about the ARFA after the November 2013 consultations. It posted the modified standard ARFA on its website in December 2013, and then sent it directly to TFN in February 2014. There were also several meetings and other discussions in March 2014 regarding (i) the need to have a funding arrangement in place before the end of the existing ARFA, and (ii) attempting to find an alternative arrangement that the

parties could agree on. I am satisfied that, during these discussions, TFN was reasonably aware that management of programs and services delivered to TFN members would be taken out of TFN's hands if an agreement was not reached. I am also satisfied that AANDC made reasonable efforts to get TFN's agreement on an ARFA, and that it did not fail to observe any principles of natural justice or procedural fairness in so doing.

[42] TFN argues that the ARFA should have been sent to it earlier in order to allow a reasonable time for negotiation. Given the parties' respective positions at the time, as well as the passage of time since then, I am satisfied that neither additional time for negotiation, nor longer advance notice of the imposition of a TPFAM, would have resulted in the parties reaching an agreement.

[43] TFN also argues that the sort of collective consultation that AANDC conducted in November 2013 with many First Nations together was inadequate as meaningful consultation and that, to be meaningful, consultation had to be one-on-one. In my view, AANDC was not obliged to conduct separate consultations with each First Nation. In any case, my understanding is that TFN's main objection to AANDC's November 2013 consultations was not that they were collective, but rather that they introduced new modifications to the ARFA for 2014-2015 when TFN's concerns about 2013-2014 ARFA still had not been satisfied.

[44] TFN argues that "[t]he Minister has failed to observe the principles of procedural fairness by failing to follow the guidelines and procedures it is required to follow." To support this argument, TFN cites AANDC's *Default Prevention and Management Policy 2013*, and specifically relies on sections 4.2, 5.1 and 5.2.2 thereof. For the most part, these sections are not applicable to the present case as TFN was not in default. To the extent that this policy document

applies to the present case, it is my view that, once efforts to reach a negotiated agreement failed, and the March 31, 2014 termination of the prior ARFA was approaching, the appointment of a TPFAM was a reasonable last resort (per section 5.2.2). I am also satisfied that no less intrusive solution (per section 4.2) was available.

[45] TFN argues that the Minister failed to perform his duty to consult and accommodate. To the extent that such a duty existed in the present case, its scope was limited (*Wawatie*, at para 40; *Kehewin*, at para 26). In the present case, I am of the opinion that the Respondent did not fail to consult TFN. As mentioned by Justice Phelan in *Kehewin*, at paras 19-20 and 25-26:

> 19. The Applicants have argued that they were entitled to advance notice before a third party manager was appointed. Whether the Court approaches the issue as one of public law, applying the factors in *Baker v Canada*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, or as one of contract, the result is the same – no advance notice is required.
>
> 20. As a matter of public law, the policy under which funds were authorized did not contemplate advance notice. Indeed the current policy, unlike that in the *Tobique* case, does not set out procedural steps but merely requires "notification that the decision has been made". No issue of legitimate expectation of notice arises from the policy or from the particular facts of this case.
>
> […]
>
> 25. Regard must be had to the rights being affected before one concludes that there is a duty to consult. As held in *Elders Council of Mitchikanibikok Inik v Canada (Minister of Indian Affairs and Northern Development)*, 2009 FC 374, there is no link between the appointment of a third party manager and native self-government. Justice Harrington summarized the situation, which is equally applicable here.
>
> > 40. … The consequence of appointing the Third Party Manager was to temporarily remove administrative responsibilities from the Band Council with respect to the delivery of programs and services to the community. The aim of the appointment was to protect public funds and to

> ensure that essential programs and services were not disrupted, as disrupted they were in years past. Assets and responsibilities falling outside the funding arrangements are not affected by the nomination of a Third Party Manager and remain under the control of the Band.
>
> 26. Even if there was a duty to consult, it would be at the very low end of the consultation spectrum because the strength of the claim to Aboriginal rights asserted is weak and the potential adverse effect is temporary (*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 39).
>
> [Emphasis added]

[46] Therefore, in my opinion, the Minister neither failed to observe the principles of natural justice nor his duty to consult and accommodate.

VII. Conclusion

[47] I am of the opinion that the application for judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application is dismissed with costs.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-791-14
STYLE OF CAUSE:	THUNDERCHILD FIRST NATION AS REPRESENTED BY ITS DULY ELECTED CHIEF AND COUNCIL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA, (ALSO KNOWN AS THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHER DEVELOPMENT CANADA)
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