Federal Court  Cour fédérale

Date: 20100121

Docket: T-1497-07

Citation: 2010 FC 67

Ottawa, Ontario, January 21, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

TOBIQUE INDIAN BAND

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of C. Dougal MacDonald, A/Regional Director General, Department of Indian and Northern Development (DIAND) to implement third party management of the Tobique Indian Band (the Applicant). This decision was communicated to the Applicant on August 9, 2007.

Factual Background

[2] The Applicant is a First Nation community in New Brunswick which has received approximately 14 million dollars annually in funding pursuant to an agreement with DIAND. In

2007, at the time of the impugned decision, the Applicant and DIAND were parties to a First Nations Funding Agreement for the term of April 1, 2005 to March 31, 2008 (the Agreement). It is pursuant to that Agreement that DIAND took the decision to appoint a third party manager.

[3] The financial history leading up to the appointment of the third party management is long and I will summarize only the relevant facts. Essentially, the Applicant has been in remedial intervention, a lower level of intervention, for over 18 years due to defaults in the funding agreements. This remedial intervention was self-administered and required the Band to develop, implement and comply with a remedial management plan. During these years, the Applicant's cumulative deficit ratio increased. Finally, in December 2005, DIAND required the Applicant to enter into co-management and the firm of Teed Saunders Doyle & Co. was hired accordingly.

[4] Although a remedial management plan was put in place in January 2006, DIAND requested a revised plan to address certain concerns about the Applicant's deficits for over a year but one was never received. The Applicant did not provide DIAND with a revised budget or fulfill its reporting requirements for those same periods.

[5] Eventually, in June 2007, the firm of Arbuthnot, MacNeil, Douglas, Dorey and Associates Ltd. (AMDD) replaced Teed Saunders Doyle & Co. as co-managers with the Applicant. A new remedial management plan was to be completed by the co-managers by August 31, 2007.

[6] During this time, the Applicant was trying to garner support for a financial restructuring proposal and obtained a proposal from Merchant Capital LLC to consolidate its debts and obtain additional financial resources for certain anticipated projects. It seems that at a meeting held on July 12, 2007, Mr. Ian Gray (then Acting Associate Regional Director of DIAND) expressed his qualified support for the Merchant Capital proposal.

[7] A report entitled “Tobique Co-Management Assessment”, dated July 13, 2007, was communicated to the parties shortly after that date. This report indicates that the Applicant’s deficit ratio was 67.2%. It also notes that the current multi-year funding agreement is set to expire and the Applicant does not meet the criteria for a further agreement. The report mentions Tobique Economic Development Corp. Operations (TEDCO) and its 2.1 million dollar liability to the Canada Revenue Agency along with other debts and losses. It also notes that the accounting for this corporation is incomplete. Additionally, there are TEDCO liabilities which have been linked into Band operations and impact on the Band finances with no notice of these until after the fact. The report also contains a summary of the Applicant’s cash flow which shows a shortfall of more than six million dollars and notes that it does not include its obligations to the Canada Revenue Agency and other obligations such as insurance and health and safety. It indicates that certain progress has been made by reducing staff and implementing financial controls and the history of not meeting reporting requirements needs to be addressed. It also details several observations by community members and that success is not possible without a collective effort.

[8] A representative of DIAND provided affidavit evidence saying that DIAND began to consider the appointment of a third party manager on or about August 3, 2007 after a series of meetings with AMDD during which it was advised that the Applicant's financial situation was more severe than originally thought and there was a serious likelihood that many lenders would call in their loans. Furthermore, the Applicant would likely have a serious cash flow problem which would shortly affect its ability to provide services such as education. The Merchant Capital proposal was also an area of concern. The Applicant was made aware of these concerns by AMDD.

[9] On August 7, 2007, at a meeting where AMDD was also in attendance, DIAND advised the Applicant that it intended to implement third party management. It was following that meeting that DIAND sent the letter of August 9, 2007, via fax, confirming the decision and setting out the reasons for it.

[10] This application for judicial review was filed on August 14, 2007 and concerns the third party management decision.

Impugned Decision

[11] The letter of August 9, 2007 indicates that it is a follow-up to the council meeting of August 7, 2007, where DIAND advised that it had decided to implement third party management in order to maintain the provision of essential services. This was further to the determination that the Applicant was in default of section 8 of the Agreement. The letter also shows that concern regarding the financial situation had been communicated for some time as outlined in the attached

correspondence and that the Applicant had been advised numerous times to take remedial steps. It also mentions that the co-managers have recently confirmed that any funding is now subject to garnishment from various creditors. Due to these reasons and the Applicant's inability to remedy the defaults, the highest level of intervention is required in order to secure funding and maintain the provision of programs and services.

[12] Consequently, a third party manager is being appointed to administer funding otherwise payable to the Applicant. The letter also details the process that will be required in developing a new comprehensive funding arrangement and confirms that the reporting requirements are continuing.

Questions at issue

[13] The parties have raised six questions, two of which are preliminary matters:

a. Should certain paragraphs of Chief Bear's affidavit be struck as they contain irrelevant, new evidence not before the decision maker?

b. Should the letter written by AMDD's counsel to correct a statement made during the cross-examination on affidavits be considered as part of the judicial record?

c. Was the decision to implement third party management reasonable?

d. Was DIAND in breach of procedural fairness by failing to give adequate notice to the Applicant regarding the third party management decision?

e. Did DIAND have a fiduciary duty towards the Applicant which was breached when it implemented third party management?

f. Are the remedies sought by the Applicant practical and/or available in law?

[14] The application for judicial review shall be dismissed for the following reasons.

Relevant Provisions of the Agreement

[15] *DIAND/Tobique Funding Agreement for 2005/2006-2007/2008* (March 16, 2005).

8.0 DEFAULT

8.1 The Council will be in default of this Agreement in the event:

(a) the Council defaults in any of its obligations set out in this Agreement;

[…]

(c) the Audit indicates that the Council has incurred a cumulative deficit equivalent to eight (8) % or more of the Council's total annual revenues; or

(d) the Minister has a reasonable belief, based on material evidence, that the health, safety or welfare of the Members or Recipients is being compromised.

9.0 REMEDIES ON DEFAULT

9.1 In the event the Council is in default, the parties will meet to review the situation.

9.2 Notwithstanding section 9.1, in the event the Council is in default under this Agreement, the Minister may take one or more of the following actions as may reasonably be necessary, having regard to the nature and extent of the default:

(a) require the Council to develop and implement a Remedial Management Plan within thirty (30) days, or at such other time as the parties may agree upon and set out in writing, but not to exceed sixty (60) days;

(b) require the Council to enter into a Co-Management Agreement;

(c) appoint, upon providing notice to the Council, a Third Party Manager;

(d) withhold any funds otherwise payable under this Agreement;

(e) required the Council to take any reasonable action necessary to remedy the default;

(f) take such other reasonable action as the Minister deems necessary to remedy the default; or

(g) terminate this Agreement.

Applicant's position

Reasonableness of the decision

[16] The Applicant submits that the Minister's decision to implement third party management must be held to a standard of reasonableness. It relies on the Court's decision in *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)*, 2002 FCT 1246, 224 F.T.R. 215, where it was held that the decision to make funding contingent on the Band entering co-management would be reviewed on a standard of patent unreasonableness. It adds that since then, the Supreme Court has recast the standard as that of reasonableness in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[17] The Applicant alleges that the decision was unreasonable for a number of reasons. Firstly, it argues that it was unreasonable to reject the Merchant Capital proposal on the basis of unsubstantiated information provided by the co-manager AMDD. It further contends that the Respondent knew that such information was being provided without the authority of the Applicant's Chief and Council and did not take into account the fact that there was a resolution by the Applicant

allowing for further steps in pursuing the Merchant Capital proposal (pages 67 and 68, Applicant's record). It also claims that information about community concerns on the Merchant Capital proposal was received from a dissident Band councillor and DIAND acted unreasonably by relying on the AMDD report which was based on this information.

[18] Secondly, the Applicant contends that is was unreasonable for DIAND to rely on the ground that the Applicant's funds were subject to seizure and garnishment as this ignores the protection against such actions where the funds are held on a reserve. The Applicant submits that the funds at issue were located in a financial institution on the reserve and were exempted from garnishment and seizure by virtue of section 89 of the *Indian Act*, R.S.C. 1985, c. I-5 as they would meet the physical situate test as applied in *MacDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846.

[19] Thirdly, the Applicant alleges that it was unreasonable to rely on the AMDD's information because it did not reflect any knowledge or consideration of the good relationship enjoyed by the Applicant and its financial institution (Peace Hills Trust).

[20] Fourthly, it was unreasonable to rely on the AMDD report because the report expressly included debts of corporate owned entities with the Band's direct debts. It was also unreasonable to rely on the AMDD report because it gave no consideration to the defences that the Applicant had against various creditors or to the Applicant's outstanding claim against the province of New Brunswick.

[21] Finally, the Applicant asserts that it was unreasonable for the Respondent to refuse to accept decisions made by the Applicant; the Respondent could have challenged those decisions under section 18 of the *Indian Act*. It points particularly to the decision to continue the co-management agreement with Teed Saunders.

Procedural fairness

[22] The Applicant asserts that there is a duty of fairness owed here and that there was a breach of that duty when, on August 7, 2007, DIAND communicated the decision to implement third party management shortly after the meeting of July 12, 2007, where the possibility was mentioned but no notice of intent to do so was given.

[23] The Applicant relies on the findings of this Court in *Pikangikum First Nation* at paragraphs 93, 101 and 102, where it was held that a duty of fairness was owed and did require a notice of the alleged defaults before co-management was imposed. Furthermore, it was held that announcements and statements of generalities are not sufficient.

Breach of fiduciary duty

[24] The Applicant submits that there is a fiduciary duty to help preserve and promote the self-government of Indian Bands. Although it acknowledges that there is a lack of judicial precedent for such a finding, the Applicant claims that it was owed a fiduciary duty of care in the making of the decision to implement third party management.

Respondent's Position

Affidavit evidence of Chief Bear

[25] The Respondent urges that paragraphs 7, 8, 9, 10, 11 & 11 of the affidavit of Chief Bear, dated January 21, 2008, should be struck as they contain new evidence not before the decision-maker. These paragraphs relate to the termination of the co-management agreement with AMDD and allegations are made of underfunding to the Applicant. It submits that this information does not fit the permitted exceptions and is irrelevant to the decision at bar.

Letter from counsel for AMDD

[26] On March 5, 2008, counsel for AMDD wrote to correct evidence pertaining to the statements given by Mr. Arbuthnot (from AMDD) on cross examination. It appears that there were two versions of the co-management assessment prepared by AMDD and that Mr. Arbuthnot confused the two versions (D-1, pages 54 to 57 and D-2, pages 58 to 62, Applicant's record). The letter indicates that he later realized his mistake and that the version included in Chief Bear's affidavit as Exhibit D-1 was the one submitted to DIAND and not Exhibit D-2 he had identified. The Respondent points out that this is confirmed by Exhibit C to the affidavit of Dougal MacDonald which contains the report received by DIAND. The Respondent argues that this would be appropriate and must be accepted in order for the Court to have the most relevant and accurate information (*Pharmacia Inc. v. Canada (Minister of National Health and Welfare*) (1996), 111 F.T.R. 140 at paragraphs 5-8 (F.C.T.D.) (QL)).

Reasonableness of the decision

[27] The Respondent advances that the applicable standard of review on this question is reasonableness and notes that the Applicant seems to agree. The Respondent points to the Court's decision in *Pikangikum First Nation* and to the more recent decision *Ermineskin Tribe v. Canada (Minister of Indian Affairs and Northern Development)*, 2008 FC 741, 334 F.T.R. 126 where it was found that DIAND's decision to apply default provisions under a funding agreement was reviewable according to the standard of reasonableness.

[28] As to the decision itself, the Respondent contends that the decision to invoke third party management is a discretionary decision of DIAND under section 9 of the Agreement. Furthermore, it urges that the facts demonstrate the reasonableness of the decision. Particularly, the fact that the Applicant had been in default for numerous years for having an unacceptable cumulative deficit and that even Chief Bear agreed on cross-examination that there were further defaults to the current Agreement. Also, the Applicant was already in co-management since 2005 and the co-managers advised that funds were at risk of seizure. Furthermore, in July 2007, DIAND was informed that the Applicant's financial situation was at its worst and DIAND had no way of fully knowing the financial situation as the Applicant continually failed to provide necessary information. Finally, despite advances of funds, essential services were deemed to be at risk.

[29] The Respondent also submits that DIAND was entitled to consider and rely on AMDD's representations respecting the financial situation as it is the co-manager's role to work in conjunction with a Band to fulfill its obligations. The Respondent points out that the co-managers

did not take direction from DIAND, nor was DIAND a party to the co-management agreement between the Applicant and AMDD.

[30] As for the possible seizure of funds by creditors, the Respondent acknowledges that this was a specifically articulated concern in the decision letter. It also acknowledges that generally speaking section 89 of the *Indian Act* will exempt such funds from seizure. However, the Respondent argues that case law has held that Bands can waive this condition (see *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, 2009 MBCA 72, 240 Man.R. (2d) 122) and that DIAND was informed that funds may be seized pursuant to terms and condition of a security agreement. Whereas, funds in the hand of a third party manager are not subject to seizure and thus was a relevant factor within the discretion of the decision maker in concluding that intervention should be escalated.

[31] According to the Respondent, DIAND knew of the Merchant Capital proposal and the expressed provisional support by Mr. Gray. Citing affidavit evidence of Dougal MacDonald, the Respondent claims that discussions were ongoing and the same decision would have been made regardless of the comments that community members were fearful of any deals. Furthermore, MacDonald came to his own conclusion and, notwithstanding the Merchant Capital proposal, it was determined that the best course of action was the implementation of third party management because of the high risk to the funding.

[32] As for the Applicant's claims that it was unreasonable to rely on the AMDD report, the Respondent counters that it was reasonable to rely on the co-managers' opinion and its other

experiences in dealing with similar situations. Also, it could not take into account any legal defences towards various creditors and the outstanding claim against the province until the issues were settled, the latter could not be considered as receivable and the claims from different creditors had to be considered as debts. Finally, the Respondent reiterates that the Applicant failed to provide financial information and it was not unreasonable for DIAND to proceed without that information despite the Applicant's current allegations.

[33] With regard to the argument that DIAND acted unreasonably by refusing to accept decisions without challenging them under the *Indian Act*, the Respondent submits that the relevance of this ground has not been established by any evidence.

Procedural fairness

[34] The Respondent holds that the duty of fairness is eminently variable and that its content is to be decided in the specific context of each case (*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at paragraph 46). Furthermore, having considered the five factors set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 23 to 27, the Respondent proposes that there is a minimal procedural fairness requirement in this context and that any such duty does not require advance notice to the Applicant.

[35] The Respondent argues that when it comes to the nature of the decision, the decision at bar is more akin to a purely ministerial decision and as such, should be afforded minimal protection. It is also a policy driven decision involving considerable discretion and consideration of multiple

factors and the duty of fairness should be relaxed accordingly. Finally, it proposes that to burden DIAND with an onerous duty of procedural fairness in this context would limit the Minister's capacity to ensure that funds are spent for their intended purpose.

[36] As for the nature of the statutory scheme, the Respondent emphasizes that there are no statutory provisions that dictate how decisions are to be made regarding funding First Nations. This discretion would suggest minimal procedural fairness.

[37] On the issue of the importance of the decision to the individuals affected, the Respondent submits that one must consider the interests of all Band members who benefits from the funds being used for services and programs that will serve them. DIAND must be able to hold the Band accountable with respect to the use of public funds for these purposes, again suggesting a low level of procedural fairness.

[38] The Respondent contends that no evidence has been adduced of any contravention as to procedures or substantive promises that would accord significant procedural rights as per *Baker*. Accordingly, the factor of legitimate expectations would suggest minimal notice is required.

[39] With regard to the choices of procedure made by the decision maker, the Respondent proposes that the terms of the Agreement are relevant to determine the Applicant's entitlement to procedural protections. The Respondent claims that the Agreement does not require advance notice

of a decision to implement third party management, nor does it provide the Applicant with a right to respond to the reasons or to remedy its defaults.

[40] No notice is required under section 9.2(c) (volume 1, page 65, Respondent's record) to appoint a third party manager. The Respondent argues that this is in order to allow for an orderly transfer of funds.

[41] The Respondent adds that these factors are not exhaustive and that in this case, the pressing time constraints should be considered as the situation was significant and the fear of seizure was urgent. This factor, in conjunction with the others in *Baker*, creates a situation where a low level of procedural fairness is owed.

[42] Even if it is found that advance notice is required, the Respondent submits that it was provided here. Drawing upon the law surrounding employment contracts, the Respondent holds that any advance notice required by procedural fairness would be satisfied if it can be demonstrated that the Applicant knew of the risks and grounds (*Knight v. Indian Head School Division No. 19*; *Pelletier v. Canada (Attorney General)*, 2007 FCA, [2007] 4 F.C.R. 81).

[43] The Respondent emphasizes that the Applicant continually failed to comply with its obligations and was aware that intervention measures could escalate pursuant to the Agreement. Furthermore, the tribunal record shows that numerous meetings were held with the Applicant where

it could have made its position known and it was advised that third party management was a possibility.

[44] The Applicant was under co-management and third party management was the next level of possible intervention. The Applicant was also aware of the concerns expressed in the AMDD report and that DIAND had been advised accordingly. Finally, the Respondent adds that there was an opportunity leading up to the August 7, 2007 meeting to address the contents of the report and the issues raised. Consequently, DIAND's actions were proper and the Applicant was aware of the risks and grounds upon which the decision is based thus satisfying any requirement of advance notice.

[45] The Respondent distinguishes the case at bar from that in *Pinkangikum First Nation* on the ground that the policy in that case required that it be determined whether the recipient is willing, but lacks the capacity to address its defaults. Here the policy requires a consideration of the recipient's willingness to address the defaults and the evidence shows that the Applicant was given many opportunities to remedy its defaults and failed to do so. This was considered in the decision to implement third party management. Also, in the cited decision, the parties were not subject to an agreement. Consequently, Justice O'Keefe's conclusion that the recipient must first know what the difficulty or default is thus requiring an advance notice does not apply in this case.

[46] Based on all of the above, the Respondent submits that there is a low degree of procedural fairness owed and that it did not require advance notice. Alternatively, any such duty was not breached.

Fiduciary duty

[47] The Respondent states that courts have traditionally recognized fiduciary duties where there is management of Aboriginal lands, where the fiduciary duty requires the Crown to justify the infringement of a section 35 rights and more recently where there is a specific Indian interest over which the Crown takes discretionary control (*Guerin v. Canada*, [1984] 2 S.C.R. 335; *R v. Sparrow*, [1990] 1 S.C.R. 1075; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245). It submits that none of these situations apply and the Applicant has not asserted a cognizable Indian interest over which DIAND assumed discretionary control.

[48] The Respondent argues that the Court has already held that there is no link between the appointment of a third party manager and self-government (*Elders Council of Mitchikanibikok Inik v. Canada (Minister of Indian Affairs and Northern Development)*, 2009 FC 374, 343 F.T.R. 298 at paragraph 40). Thus the Applicant's argument that makes reference to self-government cannot succeed.

[49] The Respondent further alleges that the arguments made by the Applicant on this issue are the same as those made under other grounds and would be more appropriately addressed as administrative law issues. Thus, the Court should follow the more traditional route of applying administrative law in this context (*Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 F.C. 314 (C.A.)).

Remedies

[50] The Respondent submits that the Court should decline to exercise its discretion with respect to many of the remedies sought by the Applicant in the notice of application. The Respondents contends that quashing the decision would have unknown ramifications as it has been over two years since the decision was made and the evidence shows that, even today, the Applicant is in financial disarray. As for the declaration sought by the Applicant, it would similarly serve little purpose as it would leave the parties unclear as to what conduct they should adopt in light of the unknown changed circumstances.

[51] The Respondent further submits that by asking the Court to order co-management, the Applicant is essentially asking for *mandamus* but has failed to meet several parts of the test. Nor would a directed verdict be appropriate because the current situation is unknown.

[52] Moreover, any breach of procedural fairness by failing to give notice was an inconsequential breach of natural justice and thus, setting aside of the decision is not required.

[53] Finally regarding the claim for damages, the Respondent submits that it is trite law that such cannot be obtained on judicial review (*Al-Mhamad v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 2003 FCA 45, [2003] F.C.J. No. 145 at paragraph 3 (QL)).

Analysis

Should certain paragraphs of Chief Bear's affidavit be struck as they contain irrelevant, new evidence not before the decision maker?

[54] It is well established that judicial review of a decision should be conducted using only the material that that was before the decision maker during the decision making process unless there is a question of jurisdiction or a breach of procedural fairness. There is an allegation of a breach of procedural fairness in the case at bar but paragraphs 7, 8, 9, 10, 11 and 11 do not deal with that issue. Furthermore, they are irrelevant to the application as a whole and deal with events that arose after the impugned decision was made and will therefore be struck out.

Should the letter written by AMDD's counsel to correct a statement made during the cross-examination on affidavits be considered as part of the judicial record?

[55] The Respondent has asked the Court to add a letter from AMDD's counsel in order to correct a statement made during cross-examination as to which version of a report was submitted to DIAND. This will not be granted as it will not add to the record or complete it. The tribunal record provided by DIAND contains a copy of the report and thus it can easily be ascertained which copy was received and there is no need to add to the record. This case is not like that of *Pharmacia Inc.* on which the Respondent relies. In that case, it was a question of expert evidence based on speculation and the corrected evidence provided more certain and specific information. There is no dispute expressed by the parties as to which version DIAND relied on and I am satisfied that the record is adequate and complete.

Was the decision to implement third party management reasonable?

[56] Both parties submit that the decision to implement third party management is held to a standard of reasonableness. I agree with those submissions. In *Pikangikum First Nation*, it was held that the appropriate standard of review was patent unreasonableness. In *Dunsmuir*, the Supreme Court stated that existing jurisprudence can offer guidance in establishing the standard of review (at paragraphs 57 and 62). Also, in *Ermineskin Tribe*, Justice Dawson considered the factors set out in *Dunsmuir* and arrived at the conclusion that reasonableness is the appropriate standard (at paragraphs 42 and 43). The impugned decision in *Ermineskin Tribe* was that a Band had defaulted under the funding agreement and I find that those same factors would also apply here and point to reasonableness. Accordingly, the Court will consider if the impugned decision here "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47).

[57] The Applicant argues that the decision made by DIAND was unreasonable for a number of reasons including that it was unreasonable to rely on the information provided by the co-managers. However, I disagree with this and find that it was reasonable and necessary to rely on the report by AMDD. First of all, it is undisputed that the Applicant had been in default of the Agreement for numerous years for having an unacceptable cumulative deficit and had not fulfilled many of its reporting requirements.

[58] Furthermore, DIAND had no way of fully knowing the financial situation as the Applicant continually failed to provide necessary information. DIAND had no way to verify the financial

information provided by AMDD. It seems incongruous that the Applicant would not provide the require financial information to DIAND but now faults DIAND for relying on the financial picture put together by AMDD. It was also reasonable not to have considered any defences to various claims or amounts owing to the Applicant as these were not certainties. Moreover, the co-managers' role was to work in conjunction with the Band to fulfill its obligations - it did not have any interest in the information provided, nor was it taking orders from DIAND.

[59] Turning now to the issues relating to the good relationship between the Applicant and the Peace Hills Trust and the possibility of seizure of funds. On the first, I note that the tribunal record actually shows that Peace Hills Trust had refused to advance further funds to the Applicant at one point and had demanded payment of debts owed. The Applicant has not adduced evidence on this relationship or shown how it would render the decision unreasonable.

[60] As to the possible seizure of funds, I do accept that generally, funds held on a reserve are exempt from seizure pursuant to the *Indian Act* and there is no evidence of the loans agreements on the record that would allow me to ascertain whether or not that right had been waived. However, the record does contain an e-mail from AMDD to DIAND indicating that the Applicant's funds were subject to garnishment or seizure as well as an e-mail indicating that Peace Hills Trust had demanded payment of certain debts owed by the Applicant and intended to debit accounts accordingly.

[61] In making this decision, DIAND had to consider not only the interest of the members of the Applicant but also the importance of public funds in light of the sudden revelation of the state of the Applicant's finances and the urgency of the situation. Based on this and the overall state of the Applicant's finances, I find that it was realistic to fear that some type of seizure or garnishment proceedings could start at anytime and that the consideration of protection of public funds and trying to insure the future availability of services was a reasonable ground in reaching the decision to implement third party management in order to protect the funds.

[62] With regard to the argument that DIAND acted unreasonably by refusing to accept decisions without challenging them under the *Indian Act*, this ground has not been established by any evidence.

[63] As for the effect on the Merchant Capital proposal, this was not a concrete possibility and required further investigation and action by the Applicant. It could have been a long term solution but that alone does not make it a determinant factor for DIAND in arriving at its decision. The Court notes that there was no firm commitment by Merchant Capital (Volume 2, Tab "TT", page 468).

[64] Overall, DIAND had to consider a variety of factors in reaching its decision – those include the interests of the Band members who were on the verge of no longer having essential services due to the depletion of funds. Furthermore, the co-managers were hired in order to help the Applicant meet its requirements under the Agreement and this includes providing adequate financial information and other reporting so that DIAND could verify if the Applicant was in default of the

Agreement. Accordingly, it was completely reasonable to rely on the information provided by the co-manager who had a specialized knowledge of such matters and was fulfilling its duty.

[65] Finally, the Applicant was unquestionably in default of the Agreement and had been for a number of years and had done very little to remedy its difficulties. On the face of these facts and the evidence on the record, I find that DIAND's decision to implement third party management was reasonable and falls within the acceptable range of outcomes in view of the facts and the law in this case.

Was DIAND in breach of procedural fairness by failing to give adequate notice to the Applicant regarding the third party management decision?

[66] Although, neither party has made submissions on the standard of review on this issue, I wish to note that this aspect of the decision must be held to a standard of correctness. The Applicant alleges that the Respondent breached procedural fairness by failing to give advance notice of the decision. This Court has repeatedly found that the standard or review for breaches of procedural fairness is correctness and that will be the standard applicable to this issue (*Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)*, 2009 FC 16, [2009] 1 C.N.L.R. 256 at paragraph 61).

[67] The Applicant has submitted that there is a duty of advance notice in this case where the DIAND decided to appoint a third party manager to the Tobique First Nation. In making that claim, the Applicant relied entirely on the decision of this Court in *Pikangikum First Nation*. However, I

note that the decision in that case was factually different – it was actually a decision by DIAND requiring the First Nation to enter into a co-management agreement failing which funding would be withheld and programs would be delivered through an agent.

[68] Also, the parties had previously been governed by an agreement but were not at the time of the decision. Furthermore, the policy in that case was not the same as the one before me and a reading of Justice O'Keefe's reasons shows that the policy played an important role in his determination. Therefore, I cannot accept the submission that the duty owed has already been determined in *Pikangikum First Nation* and will consider the relevant factors identified in *Baker* in order to determine what type of procedural fairness the Applicant is entitled to in the present case.

Nature of the decision being made

[69] Decisions made by DIAND regarding funding and the administration of that funding are highly discretionary. DIAND is at liberty to choose how it will dispense the funding that flows to a First Nation and can enter into agreements setting out the parties' obligations. The decision to intervene pursuant to an agreement is also highly discretionary. DIAND will not necessary take action the minute a party is in default of the agreement but will weigh multiple factors in coming to a decision. This particular case is a good example of that discretion – the Applicant had numerous defaults under the Agreement, stretching over a long period of time, but still DIAND met with the Applicant in order to find ways to provide services and meet the needs of the community members. This discretion is indicative of minimal procedural fairness.

Nature of the statutory scheme

[70] There is no legislated duty of procedural fairness in this case.

The importance of the decision to the individuals affected

[71] The decision is clearly of great importance as it essentially removes the Applicant's rights to govern its own financial affairs. The decision will also affect the interests of the community members who risk not having access to programs and services if funds are not administered properly. Furthermore, there is a public interest in maintaining accountability with respect to the use of public funds.

Legitimate expectations

[72] The Applicant has not brought any evidence of its past dealings with DIAND when such decisions were made and the procedures that were used, nor is there any evidence of a promise being made. Thus, this factor is neutral.

Choice of procedure by DIAND

[73] There are two documents that govern DIAND's decision in this case – the Agreement and the Policy. Starting first with the Agreement, it does not require advance notice of a decision to implement third party management, nor does it provide the Applicant with a right to respond to the reasons or to remedy its defaults. There is no notice for the appointment of the third manager (s.9.2(c)).

[74] Turning now to the Policy, the Respondent has argued that because there was an agreement in place and the policy was implemented after its signing, its requirements cannot supersede the terms of the Agreement. However, I must disagree with this proposition as the Policy itself specifies the scope as follows:

> 2.1 This policy applies to Canada/First Nation Funding Agreements (CFNFA), Comprehensive Funding Arrangements (CFA) and all other Funding Arrangements signed by Indian and Northern Affairs Canada (INAC). It may also be applicable in a situation where no Funding Arrangement has been executed by Council.

Also, the Policy was in place at the time the decision was made. The Policy states that it is designed to support timely intervention and consistency in regional operations (at s. 1.3). Accordingly, there was clearly an intention that the Policy be followed in all cases in order to ensure consistent interventions.

[75] The Policy provides for certain steps in the intervention process. If a recipient is in default of their funding arrangement, DIAND is required to meet with the recipient to review the situation and assess the reasons for the difficulties that give rise to the default (s. 8.1.1). The Policy also sets out the steps for deciding what level of intervention will be required. DIAND must provide written notification of the relevant default clauses on which the intervention is based; the kind of intervention and the reasons for that intervention; the immediate steps to be taken to address the default giving rise to the default and the relevant information or policies that would assist the First Nation in meeting the requirements (ss. 8.1.6 to 8.1.6.4).

[76] The Policy also contains specific information that must be given in the written notification depending on the level of intervention which includes stating that the Minister will appoint a third party manager and offering to meet with the community to explain the decision. Section 8.4 specifies that in instances where the level of intervention is being escalated, the Minister shall provide notice indicating the default in the performance of obligations under s. 17.0.

[77] In my view, the Policy does not contemplate a requirement to give advance notice of the decision but rather notification that the decision has been made. I arrive at this conclusion based on the elements that are to be contained in the written notification which are essentially the factors motivating the decision and the immediate steps that will follow. The written notification leaves no room for response from the recipient.

[78] The Respondent submits there is an additional factor in play in such matters – that of urgency. I do note that the decision to implement third party management is meant to be a short term one in order to ensure the provision of services and the protection of funds. It must be acted upon quickly to ensure that this goal is met. The urgent circumstances giving rise to the decision to implement third party management also indicate a low threshold of procedural fairness.

[79] Having considered all of these factors, I am of the view that no advanced notice of the decision to implement third party management was required in this case.

[80] DIAND had met its requirement under section 8.1.1 of the Policy and met with the Applicant and its co-managers many times in order to discuss various defaults under the Agreement and the steps that were required to remedy them. The tribunal record contains ample correspondence between the parties on the defaults and necessary steps to remedy them. Also, the trip reports in the tribunal record and the minutes from some of these meeting show that there was mention, on more than one occasion, that DIAND was contemplating increasing the level of intervention and implementing third party management. This was mentioned at the July 12, 2007 meeting (volume 2, Tab “TT”, page 468, Respondent's record) shortly before the decision was made and communicated to the Applicant. Thus, even if I am wrong on the issue of a requirement for an advance notice, I am satisfied that it has been met in this case. All the parties involved were fully aware of the precarious situation and the urgency for the highest level of intervention by DIAND.

[81] Therefore, the Court is of the opinion that there was no breach of procedural fairness on this ground.

Did DIAND have a fiduciary duty towards the Applicant which was breached when it implemented third party management?

[82] The Applicant acknowledges that there is no authority to support the proposition that a fiduciary duty exists in a case such as this one where a decision has been made to implement third party management. Therefore this argument cannot succeed.

Are the remedies sought by the Applicant practical and/or available in law?

[83] In light of my analysis above, it is not necessary to answer that question.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. The Applicant shall pay costs to the Respondent by way of a lump sum in the amount of $2,500 plus GST.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1497-07
STYLE OF CAUSE:	**TOBIQUE INDIAN BAND and HER MAJESTY THE QUEEN**
PLACE OF HEARING:	Fredericton, New Brunswick
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REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	January 21, 2010

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