DESJARLAIS ET AL. V. MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

[Indexed as: **Desjarlais et al. v. Canada (Minister of Indian Affairs and Northern Development)**]

Federal Court, Trial Division, Strayer J., February 2, 1988

Vic Savino, for the plaintiffs
Craig Henderson, for the defendant

In this interlocutory proceeding the plaintiffs, the Chief and Councillors of the Sandy Bay Indian Band, applied for an order requiring payment into court of a sum of money pending final determination in an action in which they seek damages to build or upgrade 24 housing units on the reserve.

In October 1986 the former Council of the band applied for 1986/87 funding for the purpose of providing 24 housing units for new band members pursuant to the Bill C-31 housing program. In November 1986 a draft amendment to the band's capital agreement was signed by the band council then in office. As of January 1987, DIAND had not received the agreement and reminded the band that unless the signed agreement was returned in time to be processed by March 31, 1987 the Bill C-31 housing funding would lapse. Whether, and if so when, the signed agreement was returned was not clear. DIAND minutes of a February meeting with the plaintiffs indicated that DIAND agreed to comply with the band's request to lapse the funds to 1987/88. The band's minutes of the meeting recorded that the band could carry the funds forward to 1987/88. In June 1987 the band requested that the funds be made available, but were advised that all available funds had already been allocated to other bands for the fiscal year.

The plaintiffs asserted that the defendant owed a fiduciary obligation to the plaintiffs in the administration of' such housing funds. In seeking the order for payment into court the plaintiffs contended that they could not rely on the assurances by the defendant that such monies, which in their view the government agreed to provide to them in 1986/87, would be forthcoming in 1988/89 and that the funds allocated to Bill C-31 housing would be exhausted within two more years. The position of the defendant was that no such housing funds were even available, as the funds voted by Parliament for 1987/88 had already been allocated.

Held: Application discussed.

1. There is a serious question to be determined as to the existence of the fiduciary obligation alleged. It is certainly arguable that the defendant has the kind of discretionary power in the allocation of funds for the purposes of Bill C-31 housing which gives rise to a fiduciary duty. It is further arguable that s.61(1) of the Indian Act, R.S.C. 1970, c.I-6 creates or reinforces the obligation to act for the benefit of the plaintiffs.

2. The facts might well support a claim for breach by the defendant of any fiduciary obligation. There was substantial evidence that at least at the time of the February meeting the band could have reasonably understood the defendant to be undertaking to make funds available in 1987/88 in lieu of 1986/87. The band may have agreed on that basis to allow the 1986/87 grant, of which it was virtually certain, to lapse. A serious factual question was raised by the plaintiffs and therefore they met the threshold test for an interlocutory injunction.

3. The plaintiffs, however, did not demonstrate that a failure to grant the order requested, which was in the nature of a mandatory injunction for the payment into court of moneys they sought in the action, would cause irreparable harm which could not be compensated in damages even if the action succeeded. If the plaintiffs were to ultimately succeed in getting an award of damages which they claim, then such judgment could be enforced by virtue of s.57(3) of the Federal Court Act, R.S.C. 970, (2nd Supp.), c.10 which provides that any money or costs awarded to any person against the Crown in any court proceedings shall be paid out of the Consolidated Revenue fund.

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STRAYER J.: This is an application under Rule 470 for an order requiring payment into Court of

a sum of money pending final determination in an action in which the plaintiffs are seeking damages in the amount of $1,250,000 or such amount as will be sufficient to build or upgrade twenty-four housing units on the Sandy Bay Reserve.

Rule. 470 generally provides for interlocutory orders for the detention, custody or preservation of property that is the subject-matter of an action. In particular the plaintiffs rely on sub-rule 470(7) which provides as follows:

> 470.(7) Where the right of any party to a specific fund is in dispute in an action, the Court may, on the application of a party, order the fund to be paid into court or otherwise secured.

Because this is an interlocutory proceeding both the evidence and legal argument presented to me were limited. Both sides have filed affidavits but there has been no cross-examination on those affidavits and there are important conflicts between them. I cannot, nor need I, make any final determination as to either the facts or the law. It appears to me that the same principles should apply to the remedies of Rule 470 as apply to interlocutory injunctions. (Society pour l'administration du Droit de Reproduction Mecanique des auteurs, compositeurs et editeurs (S.D.R.M.) v. Trans World Record Corp.,[1977] 2 F.C. 602 (F.C.A.).) Further, it appears to me that the criteria for exercise of judicial discretion as laid down by the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 which have been generally adopted by this Court, should apply.

Those facts which appear to be undisputed are as follows. The plaintiffs include the Chief and Councillors of the Sandy Bay Band of Indians in Manitoba. When the Parliament of Canada amended the Indian Act, R.S.C. 1970, I-6, by S.C. 1985, c.27 so as to restore Indian status to those who had lost it through, inter alia, the marriage of Indian women to non-Indian men, the intention of the government was stated to be to provide the means for Indian bands to make available the additional services and facilities for those persons who were thereby gaining Indian status and returning to live on reserves. It appears that sums have been voted by Parliament for this purpose, including the provision of funds for bands to create housing.

The former council of the Sandy Bay Indian Band on October 8, 1986 submitted to the Department of Indian Affairs and Northern Development an application for funding for the purpose of providing twenty-four housing units for new band members. The application was for the amount of $689,160. According to the plaintiffs, although the evidence is not clear on this, any such funding would automatically carry with it a further grant of $5,000 per unit of housing for the purposes of "infrastructure". On November 5, 1986 a letter was sent by the Department to the band enclosing a draft amendment to the band's capital agreement

> in the amount of $689,200 to provide an increase to your Capital Budget for twenty-four (24) on-reserve housing subsidy units through the provision of Bill C-31.

(Bill C-31 was the bill which became S.C. 1985 c.27.) The evidence indicates that this draft amendment was signed by representatives of the band council then in office, on November 5th. What happened thereafter is not clear. There was a band election and a new Council was chosen. As of January 19, 1987 the Department of Indian and Northern Affairs had not yet received the agreement with band signatures and wrote to remind the band that unless the duly signed amendment to the agreement was returned in time to be processed by March 31, 1987, "those Bill C-31 housing funds will lapse." Whether, and if so when, the signed copy of the amendment to the agreement was returned to the Department is not clear. What is clear is that there was a meeting on February 11, 1987 including the plaintiffs representing the Sandy Bay Band and eight officials from the Department of Indian Affairs and Northern Development. A number of things were discussed at that meeting. According to the minutes kept by D.I.A.N.D. officials the following discussion took place concerning the "C-31 housing program."

> The Band indicated that they have C-31 Housing funds and that tenders for housing materials have been received from two suppliers. Both tenders are in excess of a million dollars with only $900,000 being available.
>
> Band requested that the Department lapse the funds to the next fiscal year since it would take the Band at least another couple weeks to re-submit the tenders and by that time it would be almost March 31, 1987.
>
> The Department complied with Band's request in view of the fact that tender call for suppliers and contractors would take time.

Minutes of this meeting made on behalf of the Indian band, and signed by the Chief and the four Councillors present, record with respect to this item:

> Gordon states after consultation with Doug Wanamaker, the band can carry forward to them Bill C-31, Housing Program to 1987/88. They will not lose the allocations.

As far as I can ascertain, the band did not communicate further with the Department on this matter until June 8, 1987 when it requested that the funds for twenty-four units and infrastructure be made available. A department official, Douglas Wanamaker, advised the band on June 22nd that all available funds had already been allocated. He asked the band to submit a new application and this was done on June 26th. At a meeting between the band council and representatives of the Department of Indian Affairs on July 13, 1987 officials advised the council that all capital funds available in the current fiscal year for such purposes had been allocated to other bands.

The plaintiffs have submitted evidence by affidavit, and it is in no way contradicted by the defendant, that there is a serious shortage of suitable housing on the Sandy Bay Reserve. There are some 375 houses for 500 families. Thirty percent of the houses have 10 people or more, and most such houses have no running water or indoor toilets. Some of the persons reinstated to Indian status and wishing to return to the reserve have sworn affidavits describing the living accommodations they have been obliged to occupy; in one case, an abandoned and uninsulated home on the reserve without running water; in other cases, houses off the reserve without proper insulation or heating, with frost on the inside walls; and a trailer without an indoor toilet. These are deplorable conditions which should in my view be an embarrassment to the Department concerned and to Canadian society generally.

On November 12, 1987 the plaintiffs brought action asserting that the defendant owes a fiduciary obligation to the plaintiffs in the administration of such housing funds. They seek damages in the amount of $1,250,000 "or in an amount which will be sufficient to obtain the twenty-four housing units promised" together with exemplary damages and various declarations. They filed a notice of motion in this present application on December 10, 1987 on the basis that, if the defendant were not ordered to pay the money into Court now, they might never get it. They say they can no longer rely on assurances given by the representatives of the defendant that such monies will be forthcoming in the fiscal year 1988/89, and that the funds to be allocated for "Bill C-31 Housing" will be exhausted within two years. The plaintiffs thus fear they will never receive the money which, in their view, the Government agreed to provide to them in the fiscal year 1986/87.

Using the criteria appropriate to the grant of interlocutory injunctions, as laid down in the American Cyanamid case, I am satisfied that there is at least a "serious question" to be determined as to the existence of the fiduciary obligation alleged. It is true that the Guerin case [Guerin et al. v. Her Majesty the Queen et al., [1984] 2 S.C.R. 335, [1985] 1 C.N.L.R. 120], which recognized a fiduciary duty owed by the Crown with respect to Indians, was concerned with Indian lands and the terms upon which they had been surrendered to the Crown. Nevertheless Dickson J. writing for the majority stated at p.384 [p.137 C.N.L.R.] that:

> …where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.

It is certainly arguable that the defendant has the kind of discretionary power here, in the allocation of funds voted for the purpose of "Bill C-31 housing" by Parliament, which gives rise to a fiduciary duty. It is further arguable that the obligation to act for the benefit of the plaintiffs is created or reinforced by s-s.61(1) of the Indian Act which requires that

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

on a basis similar to that on which the Supreme Court in the Guerin case held s-s.18(1) of the same Act to reinforce a fiduciary relationship with respect to dealing with reserve lands. It is a fairly debatable question: it is not clear what is meant by "Indian moneys" as referred to in s-s.61(1), and it is also arguable that such funds have their origin in public law which does not give rise to a fiduciary relationship [at 385 S.C.R., 138 C.N.L.R.]. These are very complex questions which cannot be dealt with adequately on an interlocutory motion. But it appears there is a serious legal question as to whether a fiduciary relationship might be made out.

Further, the facts as outlined above might well support a claim for breach by the defendant of any such fiduciary obligation. As the Supreme Court said in the Guerin case [at 388 S.C.R., 140 C.N.L.R.], where it was referring to the fact that the Indian band there had surrendered certain land on the understanding that the Crown would lease it on certain terms which had been stated orally on behalf of the band as being required in any such lease:

> … The oral representations form the backdrop against which the Crown' s conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.

There is substantial evidence in the present case that, at least at the time of the February 11th meeting, the band could have reasonably understood the representatives of the defendant to be undertaking to make the funds available in the fiscal year 1987/88 in lieu of 1986/87. The band may have agreed on that basis to allow the 1986/87 grant, of which it was virtually certain, to lapse. Even the minutes kept by the defendant's own official said that the

> Band requested that the Department lapse the funds to the next fiscal year... The Department complied with Band's request in view of the fact that tender call for suppliers and contractors would take time....

The minutes kept by the band reflect such an understanding even more strongly. The band should perhaps have assumed that some further formalities would be required, particularly the joint signature of an agreement to amend their capital agreement along the lines of the one sent to them on November 5, 1986 (which was never jointly signed). But on the evidence so far available, it appears to me that the plaintiffs may very well be able to demonstrate that they reasonably could have expected that the amount which they had requested in 1986/87, and for which the defendant was apparently prepared to sign an agreement, would be tentatively held for them out of the budget for 1987/88, and that it would not be allocated to some other band before the Sandy Bay Band had had the opportunity to complete the formalities. Thus it can be said that a serious factual question has been raised by plaintiffs as well and therefore they have met the threshold test for an interlocutory injunction.

I do not believe, however, that they can succeed in meeting the other criteria for an interlocutory injunction and therefore for an order under sub-rule 470(7). They must show that a failure to grant the order requested, which is in the nature of a mandatory injunction for the payment into Court of the moneys they seek in the action, would cause them irreparable harm which could not be compensated in damages even if their action succeeds. I do not believe this has been demonstrated. If the plaintiffs should succeed in their action, the very remedy they ask for and could legally claim (apart from declarations) is the remedy of damages. The dollars which the defendant might be obliged to pay pursuant to such a judgment would be just as good for the purposes of the plaintiff as the dollars I might now order the defendant to pay into Court if I were to give the order requested under sub-rule 470(7). The Supreme Court of Canada was faced with a somewhat similar issue in Amax Potash Limited et al. v. The Government of Saskatchewan, [1977] 2 S.C.R. 576. There the plaintiff sought orders under rather similar rules of the Saskatchewan Court of Queen's Bench for the preservation of funds paid by it to the defendant government pursuant to taxation legislation whose validity it was attacking in the action. In refusing an order for preservation the Court said at 598:

> … “Money” is in no way unique so as to require preservation. The dollars which the appellants pay to the respondent will not be the same dollars which the appellants will get back if they are successful. In the meantime, the respondent will have the use of the dollars. All of this is inapposite to the preservation of property with which Rules 387 and 390 are concerned.

The case of Douglas, Rogers, Ltd. v. Henderson, [1972] 28 D.L.R. (3d) 106 (N.S.S.C.,T.D.) cited by the plaintiffs, is distinguishable because there a specific fund could be identified for preservation and its continuing availability appeared in doubt. (See also Rotin et al. v. Lechcier-Kimel et al., [1985] 3 C.P.C. (2d) 15 (Ont. H.C.).)

In the present case the plaintiffs say that if an order is not made now for payment into Court of funds from the housing program, no such funds may be available by the time this action is determined even if they win. But it is the position of the defendant that no such housing funds

are even available now, as the funds voted by Parliament for this program for 1987/88 have already been allocated. If, however, the plaintiffs do ultimately succeed in getting an award of the damages which they claim, then it appears to me that such judgment can be enforced by virtue of s-s.57(3) of the Federal Court Act which provides as follows:

> 57.(3) There shall be paid out of the Consolidated Revenue Fund any money or costs awarded to any person against the Crown in any proceedings in the Court.

Therefore on the material before me I can find no basis for concluding that the plaintiffs will suffer irreparable harm if an interlocutory order for payment into court is not made at this time. The application is therefore dismissed. Costs shall be in the cause.