

Stoney Tribal Council v. PanCanadian Petroleum

IN THE COURT OF APPEAL OF ALBERTA BETWEEN: STONEY TRIBAL COUNCIL, REPRESENTING THE CHIEFS, COUNCILS AND MEMBERS OF THE BEARSPAW, CHINIKI AND WESLEY BANDS Respondents - and - PANCANADIAN PETROLEUM LIMITED Appellant APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE P. J. McINTYRE

Dated April 9th, A.D. 1998

MEMORANDUM OF JUDGMENT OF THE HONOURABLE MADAM JUSTICE HUNT (IN CHAMBERS)

COUNSEL:

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| G. H. Poelman | C. J. Elofson | For the Appellant |
| K. E. Staroszik | L. D. Rae | For the Respondents |

MEMORANDUM OF JUDGMENT (IN CHAMBERS) THE COURT:

[1] The Respondents/Plaintiffs ("the Stoney Tribal Council") sued the Appellant/ Defendant ("PanCanadian") in the Court of Queen's Bench, alleging that PanCanadian had made inappropriate deductions in calculating the amount of royalties payable to the Council in regard to oil and production on their land. The trial judge found in favour of the Stoney Tribal Council and ordered PanCanadian to pay a sum which, with interest, is in the order of \$6,000,000. PanCanadian seeks a stay of execution of that order, pending its appeal. The parties agree that the issues raised by the case are novel and may eventually be decided by the Supreme Court of Canada.

[2] To succeed on its motion, PanCanadian must establish that:

1. There is a prima facie or serious triable issue.
2. It will suffer irreparable harm if the stay is not granted.
3. The balance of convenience favours a stay.

Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers Local 832 and Labour Board (Man.), [1987] 1 S.C.R. 110; 73 N.R. 341; 46 Man.R. (2d) 241; 18 C.P.C. (2d) 273; 38 D.L.R. (4th) 321.

The issue in this application is whether PanCanadian has satisfied the second and, if necessary, third conditions.

[3] In its affidavit evidence, PanCanadian asserts that the Stoney Tribal Council may be unable to repay all or part of the judgment, should PanCanadian succeed on its appeal. It relies upon newspaper articles that report that the Council has a deficit of over \$5,000,000 and that a further deficit of \$4,000,000 is projected if spending is not brought under control. It argues, based upon other newspaper articles as well as a judgment of His Honour Judge J. D. Reilly, that there are serious problems of government and financial mismanagement on the Stoney Reserve. It also relies upon newspaper articles that report that a third party manager has been appointed to take charge of the Stoney Tribal Council's financial affairs until better management practices are put into place. On the other hand, it points to its own strong financial circumstances to suggest that, if its appeal fails, it is clearly in a position to pay the judgment.

[4] Affidavit evidence relied upon by the Stoney Tribal Council refers to its various assets and revenues. Of particular note are the following:

1. In excess of \$22,000,000 held in trust for the Stoney Tribal Council by the federal Department of Indian Affairs in capital accounts, being funds from natural gas royalties.
2. In excess of \$15,000,000 deposited in a trust account in a bank off the reserve, being the proceeds of a land claims settlement with the federal government.
3. 4200 acres of "clear title fee simple land" off the reserve (including several ranches), acquired from 1950 to 1986 at a cost of about \$3,500,000.
4. Annual natural gas royalties of about \$12,000,000 per year, of which some 13% is attributable to PanCanadian. According to PanCanadian's counsel, the latter amount is approximately \$1,500,000 annually.

[5] The Stoney Tribal Council therefore argues that it has sufficient resources to repay the judgment, should that be necessary. Briefly, PanCanadian replies that the first two and the last items listed above are likely not exigible because of the protection afforded to Indian lands and property situated on a reserve by the *Indian Act* and because the royalties may be interests in reserve lands. As to the off-reserve land, PanCanadian says that there is insufficient detail in the evidence to demonstrate the value of the land and its marketability.

[6] In response to a concession made by the Stoney Tribal Council's counsel that, at the least, PanCanadian would be entitled to set off, as against natural gas royalties it will owe in the future to the Stoney Tribal Council, any money that may be payable to it as a result of a successful appeal, PanCanadian says it has assigned the lease that was the subject of this litigation to a third party and therefore it no longer has royalties payable that can be utilized for set-off purposes. There is no evidence before the Court about this assignment, but counsel for the Stoney Tribal Council was prepared to accept that such an assignment had been made. He says, however, that to be effective, the assignment has to receive certain approvals under the *Indian Oil and Gas Regulations*, which approvals may not be forthcoming. He also says that PanCanadian assigned its interest during the course of the trial and should not be permitted to better its own position on this application under such circumstances.

[7] I am not satisfied that PanCanadian has discharged its onus of showing irreparable harm. I accept that there are concerns about the financial management of the reserve, although it seems to me that those concerns are allayed by the fact that a third party manager is presently in place. I also accept that there are provisions in the *Indian Act* that may protect many of the assets of the Stoney Tribal Council from attachment, should the appeal succeed and the judgment have to be repaid.

[8] On the other hand, there is evidence of off-reserve land holdings of significant value. While PanCanadian asserts that the evidence is vague and that such lands may not be easily marketable, I am not convinced by those arguments alone that PanCanadian has shown irreparable harm. I accept from the evidence that the land holdings are valuable and that there are no unusual problems of execution in regard to those lands.

[9] In addition, as I have said, the Stoney Tribal Council's counsel conceded that PanCanadian would have a right of set-off against royalties payable to the Council in the future. Although PanCanadian has assigned its lease on the reserve to a third party, there are some outstanding questions about the effectiveness of that assignment. Additionally, since the assignment was made in the course of litigation about the royalties payable under the subject lease, I am of the view that PanCanadian should not be able to shore up the discharge of its burden of proof in this application by relying upon a business decision it made to sell an asset against which it could have claimed a set-off. Its business decision must be set alongside the fact that the Stoney Tribal Council is entitled to enjoy the fruits of the litigation pending the appeal (absent a demonstration of irreparable harm).

[10] For these reasons the application for a stay is dismissed.

APPEAL HEARD on July 29th, A.D. 1998

JUDGMENT DATED at CALGARY, Alberta, this 5th day of August, A.D. 1998

HUNT J.A.