

White Bear First Nations Chief and Council, on their own behalf and on behalf of all the members of the White Bear First Nations (appellant) v. The Minister of Indian Affairs and Northern Development, on behalf of Her Majesty the Queen in Right of Canada (respondent) and Ocean Man Band Chief and Councillors, on their own behalf and on behalf of the members of the Ocean Man Band of Indians (respondent)
(A-171-11; 2012 FCA 224)

Indexed As: White Bear First Nations v. Canada (Minister of Indian Affairs and Northern Development) et al.

Federal Court of Appeal
Pelletier, Dawson and Stratas, J.J.A.
August 27, 2012.

Summary:

Litigation in the Federal Court involved the White Bear First Nations, the Ocean Man Band of Indians, the Pheasant's Rump Nakota Band of Indians, and the Minister of Indian Affairs and Northern Development. The claim related to the allegedly wrongful amalgamation of those three Bands, the beneficial ownership of oil-rich lands and an accounting for and payment of past and future profits and royalties from those lands. The litigation involved, inter alia, entitlement to some \$8 million held in White Bear's account maintained by and with the Minister. The Minister decided to preserve two-thirds of that amount (\$5.3 million) in a suspense account. The remaining one-third was available to White Bear. White Bear applied for judicial review.

The Federal Court, in a decision reported at [2011] F.T.R. Uned. 214, dismissed the application. White Bear appealed.

The Federal Court of Appeal allowed the appeal. The Minister breached his obligations, as trustee of the funds, and as fiduciary. The court quashed the Minister's decision. However, the court stayed the execution of its order for 60 days to allow the Minister to apply for directions (Federal Courts Rules, rule 108). Stratas, J.A., agreed with the disposition for somewhat different reasons.

Administrative Law - Topic 3203

Judicial review - General - Matters not subject to review - [See second and fourth **Indians, Inuit and Métis - Topic 3.1**].

Crown - Topic 5182

Officials and employees - Duties - Duty of fidelity - [See second **Indians, Inuit and Métis - Topic 3**].

Equity - Topic 3611

Fiduciary or confidential relationships - General principles - Crown - [See second **Indians, Inuit and Métis - Topic 3**].

Equity - Topic 3649

Fiduciary or confidential relationships - Breach of fiduciary relationship - Conflict of interest - [See second **Indians, Inuit and Métis - Topic 3**].

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - In the face of competing contentions, the Minister of Indian Affairs and Northern Development transferred two-thirds of the disputed funds from the White Bear First Nations' trust account to a suspense account - The reviewing judge dismissed White Bear's application for judicial review - The Federal Court of Appeal addressed White Bear's allegation that the Minister breached the duty to consult - "If we assume for a moment that White Bear is correct, and we were to set aside the Minister's decision and refer the matter back to him with a direction that he consult with White Bear, the Minister could nonetheless decide, in good faith, to withhold White Bear's funds. The duty to consult is not a duty to agree ... While it is possible that the consultation process could persuade the Minister to change course, the conflicting demands on the Minister lead me to believe that this is unlikely. In such a case, ... White Bear would return to the Court seeking to compel the Minister to give it access to the funds which the Minister is withholding. It seems to me preferable to dispose of that question on its merits now, rather than later." - See paragraph 20.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada's benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Indians, Inuit and Métis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - In the face of conflicting claims to the same pool of money held by the federal Crown (the McArthur Action), the Minister of Indian Affairs and Northern Development transferred two-thirds of the money from the White Bear First Nations' trust account to a suspense account - The reviewing judge dismissed White Bear's

application for judicial review - The Federal Court of Appeal, in allowing the appeal, stated that "[T]he weakness in the Minister's position was not that he preserved property pending litigation but that he did so unilaterally and without right. The Minister should have applied to the Federal Court, where the McArthur Action is pending, for directions" (Federal Courts Rules, rule 108) - See paragraph 33 - The Minister was wrong in not interpleading monies under rule 108 - On the record, the only acceptable and defensible option available to the Minister was to interplead the monies that were subject to conflicting claims - See paragraphs 49 to 52.

Indians, Inuit and Metis - Topic 3.1

General - Judicial review of exercise of Crown's duty to Indians - This was an appeal of a judicial review of a decision of the Minister of Indian Affairs and Northern Development - The Federal Court of Appeal stated that "the role of this Court is to determine whether the reviewing court identified the proper standard of review and then applied it correctly. In practice, this means that the appellate court applies the normal rules of appellate review ... The normal rules of appellate review are review of questions of law on a standard of correctness, and review of questions of fact or mixed fact and law on a standard of reasonableness. The only qualification to the latter proposition is where one can extricate a clear question of law from a question of mixed fact and law, in which case, that question of law is reviewed on a standard of correctness. In this case, the extent of the Minister's powers as a trustee and fiduciary is a question of law reviewable on a standard of correctness. I would only describe that question as one of jurisdiction to the extent that it is one that must be answered correctly" - See paragraphs 14 to 16.

Indians, Inuit and Metis - Topic 3.1

General - Judicial review of exercise of Crown's duty to Indians - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5,333,334 previously held in accounts in White Bear's name to a suspense account - The Federal Court of Appeal (Pelletier and Dawson, J.J.A.), as a preliminary matter, characterized the Minister's decision - "[T]he transfer of money from one account to another in the consolidated revenue fund, without more, is simply a matter of record keeping which would not normally be the subject of judicial review. But, where the transfer is a step in a process by which the Minister denies an Indian Band access to moneys which he holds in trust for that Band, the decision subject to review is the decision to deny the Band access to its funds. ... In my view, the subject matter of this application for judicial review is the Minister's decision to deny White Bear access to the \$5,333,334, a decision which was implemented, in accounting terms, by the transfer of the funds from the Band's trust account to the suspense account." - See paragraphs 17 to 19.

Indians, Inuit and Metis - Topic 3.1

General - Judicial review of exercise of Crown's duty to Indians - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5.3 million previously held in accounts in White Bear's name to a suspense

account - The Federal Court of Appeal (Pelletier and Dawson, J.J.A.) characterized the Minister's decision as one to deny White Bear access to the \$5.3 million - Stratas, J.A., characterized the decision as one about how to proceed in the face of conflicting claims, and stated that "this difference in characterization changes the analysis of the standard of review and creates different implications for future cases" - The Minister's decision, as Stratas, J.A., characterized it, was his choice of one option over other available options, and did not involve significant legal determinations - The decision had some factual and discretionary aspects that might touch on policy considerations - Accordingly, it was arguable that the Minister's decision should be reviewed under the deferential standard of reasonableness, rather than correctness - See paragraphs 37 to 48.

Indians, Inuit and Metis - Topic 3.1

General - Judicial review of exercise of Crown's duty to Indians - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5.3 million previously held in accounts in White Bear's name to a suspense account - The Federal Court of Appeal allowed the appeal - Stratas, J.A., wished "to flag an important issue for full argument and consideration should a case like this recur. ... More specifically, is this a public law matter for which judicial review is available? Or is it a private law matter in which judicial review is not available." - Some factors suggested the matter was private (the trust resembled a private trust) - Other factors suggested the matter was public (the Minister's decision had potentially significant consequences for the public purse; the public law remedy of certiorari was well-suited to address the problem) - See paragraphs 53 to 57.

Indians, Inuit and Métis - Topic 8903

Practice - Appeals v. judicial review - [See first **Indians, Inuit and Metis - Topic 3.1**].

Practice - Topic 3375

Interim proceedings - Preservation of property - Fiduciary or trust funds - [See second **Indians, Inuit and Métis - Topic 3**].

Practice - Topic 3412

Interim proceedings - Interpleader - When available - [See second **Indians, Inuit and Métis - Topic 3**].

Practice - Topic 8825.8

Appeals - General principles - Duty of appeal court regarding the standard of judicial review applied at first instance - [See first and third **Indians, Inuit and Metis - Topic 3.1**].

Cases Noticed:

Housen v. Nikolaisen et al., [2002] 2 S.C.R. 235; 286 N.R. 1; 219 Sask.R. 1; 272 W.A.C. 1; 2002 SCC 33, reld to. [para. 14].

Dr. Q., Re, [2003] 1 S.C.R. 226; 302 N.R. 34; 179 B.C.A.C. 170; 295 W.A.C. 170; 2003 SCC 19, reld to. [para. 14].

Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, addendum [1998] 1 S.C.R. 1222; 226 N.R. 201, refd to. [para. 16].
Haida Nation v. British Columbia (Minister of Forests) et al., [2004] 3 S.C.R. 511; 327 N.R. 53; 206 B.C.A.C. 52; 338 W.A.C. 52; 2004 SCC 73, refd to. [para. 20].
Wewayakum Indian Band v. Canada and Wewayakai Indian Band, [2002] 4 S.C.R. 245; 297 N.R. 1; 2002 SCC 79, refd to. [para. 24].
Ermineskin Indian Band and Samson Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al., [2009] 1 S.C.R. 222; 384 N.R. 203; 2009 SCC 9, refd to. [para. 25].
Air Canada v. Toronto Port Authority et al. (2011), 426 N.R. 131; 2011 FCA 347, refd to. [para. 54].

Statutes Noticed:

Federal Courts Rules, SOR/98-106, rule 108 [para. 33].

Authors and Works Noticed:

Waters, Donovan W.M., *The Law of Trusts in Canada* (3rd Ed. 2005), p. 966 [para. 23].

Counsel:

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Karen M. Jones and Gwen MacIsaac, for the respondent, The Minister of Indian Affairs and Northern Development on behalf of Her Majesty the Queen in Right of Canada;
Brian A. Barrington-Foote, for the respondent, Ocean Man Band Chief and Councillors, on their own behalf and on behalf of the members of the Ocean Man Band of Indians.

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Myles J. Kirvan, Deputy Attorney General of Canada, Ottawa, Ontario, for the respondent, The Minister of Indian Affairs and Northern Development on behalf of Her Majesty the Queen in Right of Canada;
MacPherson Leslie & Tyerman, Regina, Saskatchewan, for the respondent, Ocean Man Band Chief and Councillors, on their own behalf and on behalf of the members of the Ocean Man Band of Indians.

This appeal was heard at Saskatoon, Saskatchewan, on March 12, 2012, before Pelletier, Dawson and Stratas, J.J.A., of the Federal Court of Appeal. The Court delivered the following judgment at Ottawa, Ontario, on August 27, 2012, with the following reasons:

Pelletier, J.A. (Dawson, J.A., concurring) - see paragraphs 1 to 35;
Stratas, J.A. (concurring reasons) - see paragraphs 36 to 58.

Appeal allowed.

Editor: E. Joanne Oley

Administrative Law - Topic 3203

Judicial review - General - Matters not subject to review - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5,333,334 previously held in accounts in White Bear's name to a suspense account - The Federal Court of Appeal (Pelletier and Dawson, J.J.A.), as a preliminary matter, characterized the Minister's decision - "[T]he transfer of money from one account to another in the consolidated revenue fund, without more, is simply a matter of record keeping which would not normally be the subject of judicial review. But, where the transfer is a step in a process by which the Minister denies an Indian Band access to moneys which he holds in trust for that Band, the decision subject to review is the decision to deny the Band access to its funds. ... In my view, the subject matter of this application for judicial review is the Minister's decision to deny White Bear access to the \$5,333,334, a decision which was implemented, in accounting terms, by the transfer of the funds from the Band's trust account to the suspense account." - See paragraphs 17 to 19.

Administrative Law - Topic 3203

Judicial review - General - Matters not subject to review - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5.3 million previously held in accounts in White Bear's name to a suspense account - The Federal Court of Appeal allowed the appeal - Stratas, J.A., wished "to flag an important issue for full argument and consideration should a case like this recur. ... More specifically, is this a public law matter for which judicial review is available? Or is it a private law matter in which judicial review is not available." - Some factors suggested the matter was private (the trust resembled a private trust) - Other factors suggested the matter was public (the Minister's decision had potentially significant consequences for the public purse; the public law remedy of certiorari was well-suited to address the problem) - See paragraphs 53 to 57.

Crown - Topic 5182

Officials and employees - Duties - Duty of fidelity - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests

of the beneficiary, White Bear, by holding back a portion of the Fund for Canada' benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Equity - Topic 3611

Fiduciary or confidential relationships - General principles - Crown - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada' benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Equity - Topic 3649

Fiduciary or confidential relationships - Breach of fiduciary relationship - Conflict of interest - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada' benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Indians, Inuit and Métis - Topic 8903

Practice - Appeals v. judicial review - This was an appeal of a judicial review of a decision of the Minister of Indian Affairs and Northern Development - The Federal Court of Appeal stated that "the role of this Court is to determine whether the reviewing court identified the proper standard of review and then applied it correctly. In practice, this means that the appellate court applies the normal rules of appellate review ... The normal rules of appellate review are review of questions of law on a standard of correctness, and review of questions of fact or mixed fact and law on a standard of reasonableness. The only qualification to the latter proposition is where one can extricate a clear question of law from a question of mixed fact and law, in which case, that question of law is reviewed on a standard of correctness. In this case, the extent of the Minister's powers as a trustee and fiduciary is a question of law reviewable on a standard of correctness. I would only describe that question as one of jurisdiction to the extent that it is one that must be answered correctly" - See paragraphs 14 to 16.

Practice - Topic 3375

Interim proceedings - Preservation of property - Fiduciary or trust funds - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada's benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Practice - Topic 3412

Interim proceedings - Interpleader - When available - White Bear First Nations appealed from the dismissal of its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer two-thirds of \$8 million (the Fund) previously held in accounts in White Bear's name, to a suspense account - The Fund consisted of money earned from land purchased with the commingled assets of White Bear and two other Bands ("Ocean Man" and "Pheasant's Rump") - The Federal Court of Appeal allowed the appeal - "[T]he facts lend themselves to an either/or dichotomy. Either the Minister was a trustee, in a fiduciary relationship, with all three bands with respect to the Fund or he was not. In either case, the Minister could not do what he did. If he owed all three bands a fiduciary duty in relation to the Fund, then he breached his duty

of even-handedness between beneficiaries. If the Minister did not owe Ocean Man and Pheasant's Rump a fiduciary duty, then he breached his duty to act solely in the interests of the beneficiary, White Bear, by holding back a portion of the Fund for Canada' benefit and that of the two other Bands. If the Minister was in a fiduciary relationship with all three bands with respect to the Fund, then the common law duty of even-handedness between beneficiaries applied and the Minister was precluded from favouring the interests of some beneficiaries over those of others." - See paragraphs 21 and 22.

Practice - Topic 8825.8

Appeals - General principles - Duty of appeal court regarding the standard of judicial review applied at first instance - This was an appeal of a judicial review of a decision of the Minister of Indian Affairs and Northern Development - The Federal Court of Appeal stated that "the role of this Court is to determine whether the reviewing court identified the proper standard of review and then applied it correctly. In practice, this means that the appellate court applies the normal rules of appellate review ... The normal rules of appellate review are review of questions of law on a standard of correctness, and review of questions of fact or mixed fact and law on a standard of reasonableness. The only qualification to the latter proposition is where one can extricate a clear question of law from a question of mixed fact and law, in which case, that question of law is reviewed on a standard of correctness. In this case, the extent of the Minister's powers as a trustee and fiduciary is a question of law reviewable on a standard of correctness. I would only describe that question as one of jurisdiction to the extent that it is one that must be answered correctly" - See paragraphs 14 to 16.

Practice - Topic 8825.8

Appeals - General principles - Duty of appeal court regarding the standard of judicial review applied at first instance - White Bear First Nations Chief and Council appealed from the decision dismissing its application for judicial review of the Minister of Indian Affairs and Northern Development's decision to transfer \$5.3 million previously held in accounts in White Bear's name to a suspense account - The Federal Court of Appeal (Pelletier and Dawson, J.J.A.) characterized the Minister's decision as one to deny White Bear access to the \$5.3 million - Stratas, J.A., characterized the decision as one about how to proceed in the face of conflicting claims, and stated that "this difference in characterization changes the analysis of the standard of review and creates different implications for future cases" - The Minister's decision, as Stratas, J.A., characterized it, was his choice of one option over other available options, and did not involve significant legal determinations - The decision had some factual and discretionary aspects that might touch on policy considerations - Accordingly, it was arguable that the Minister's decision should be reviewed under the deferential standard of reasonableness, rather than correctness - See paragraphs 37 to 48.