No Fiduciary Obligation for Crown in Ermineskin Nation Case

On February 13, 2009, the Supreme Court of Canada (S.C.C.) re-examined the Crown's fiduciary obligations toward the Ermineskin Nation and Samson Nation ("the bands"). The central question addressed in the case was whether or not the Government of Canada had a duty to invest royalties arising from the development of oil and gas reserves found beneath the surface of the Samson Reserve and the Pigeon Lake Reserve in Alberta.

Two decades ago, the bands filed statements of claim alleging that the Crown's duties required investment of the royalties in a diversified portfolio.[1] The bands argued that the Crown's failure to fulfill this duty has deprived them of hundreds of millions of dollars since the early 1970s.[2] Their claims were dismissed at the Federal Court level and the Federal Court of Appeal upheld that decision.[3]

The S.C.C. found that the *Indian Act*,[4] read in combination with the *Indian Oil and Gas Act* ("*IOGA*")[5] and the *Federal Administration Act* ("*FAA*")[6] neither requires nor authorizes the Crown to invest the bands' royalties.[7]

Issue 1

The main issue at the S.C.C. was whether the Crown was obligated as a fiduciary to invest the oil and gas royalties that it was holding on behalf of the bands. If no such obligation existed, the bands alleged that the Crown breached its fiduciary obligations in the way in which it calculated and paid interest on the royalties.[8]

Analysis

The bands say that Treaty No. 6, which established the bands' reserves, imposed on the Crown the duties of a common law trustee, which, they believe, would oblige the Crown to invest their royalties.[9] However, the Court found that the language and circumstances of the treaty did not point to a common law trust because all rights were relinquished to the Crown and, in return, the Crown simply agreed to set aside certain lands for use by the Indian signatories. This could only be characterized as a conditional transfer of land, and not a common law trust.[10]

Even if it were found that a common law trust existed, the Court held that this would not guarantee the outcome sought by the bands.[11] The bands argued that an oral representation made by the Crown to "put away to increase" implied that investments would be made.[12] However, the Court pointed out that investments do not guarantee increases: "there is no duty of a trustee at common law to

guarantee against risk of loss to the trust corpus or that the corpus would increase."[13] Therefore, the actions taken by the government, including the deposit of moneys in the Consolidated Revenue Fund (CRF) and the payment of interest to the bands, were consistent with its oral representation.[14]

If there had been a fiduciary obligation to invest arising out of Treaty No. 6 the rights of the bands may have been considered treaty rights protected under section 35(1) of the *Canadian Charter of Rights and Freedoms*("*Charter*").[15]existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Any legislation, such as the *Indian Act* restricting those duties, would be inconsistent and unconstitutional.[16] However, the Crown's obligation under the treaty was not to invest the royalties. Instead, it had the obligation to guarantee that the funds would be preserved and would increase. The Crown could accomplish this by holding the royalties and paying a rate of interest to the bands so that the funds would indeed grow.[17] Since no treaty right to investment was found, section 35(1) did not come into play.[18]

The Court stated that the instruments of surrender, signed in 1946, created a fiduciary relationship that was trust-like in nature.[19] In accordance with these instruments, the Crown is only able to impart rights over the land in a manner that is beneficial to the bands. Although the fiduciary relationship does not arise out of a trust but is trust-like in nature, the Crown may still be assigned the duty to invest, unless there is legislation limiting this possibility.[20] In the case at hand, the *Indian Act,* the *FAA*, and the *IOGA* preclude the possibility of investment.

The *Indian Act* indicates that after 1951 the Crown was deprived of the power to invest moneys held in the government's CRF for the bands.[21] The legislative changes were in accordance with government practice from 1859 to 1951, during which time the Crown had never invested these types of proceeds but rather had paid interest at rates of between three and six percent.[22] The reason that investment powers were no longer ascribed after 1951 was that it was recognized that failure to pay annual sums (due to potential investment losses) would be seen by the aboriginal people as a breach of faith.[23]

The bands also claimed that a different interest rate formula ought to have been chosen. In hindsight, investment in a laddered bond portfolio would have created better returns than the long-term floating rate approach, which the government chose at the time.[24] However, the government's actions can only be considered prospectively. From the standpoint of the Crown, at the time it was reasonable to contend that the formula struck a balance between interest rates and inflation risk and, therefore, there was no breach of the fiduciary duty owed by the

Crown.[25]

Issue 2

The bands argued that the Crown was in a conflict of interest when it "borrowed" the royalties without permission, again causing a breach of fiduciary obligations. In addition, the bands argued that the Crown was unjustly enriched by this borrowing.[26]

Analysis

The Court stated that the conflict of interest named by the bands is inherent within the statutory scheme.[27]A fiduciary that acts within the bounds of the applicable legislation cannot be in breach of its duties.[28] The Court also found that the Crown was not unjustly enriched.[29]

Issue 3

The appellants have also argued that if the *Indian Act* does preclude the Crown from investing the royalties, those provisions infringe their right to equality under section 15 of the *Charter*.[30] Section 15 reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Analysis

The Crown found that the provisions relating to money management in the *Indian Act* do draw a distinction between Indians and non-Indians.[31] However, that distinction is not a discriminatory one because it does not perpetuate stereotyping, prejudice, or disadvantage.[32] The bands or their trustees can make investments after the funds have been released from the CRF to the bands and the Crown no longer holds responsibility for the royalties.[33] This allows for more control by the bands.[34]

Alex Bailey (February 19, 2009)

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[1] *Ermineskin Indian Band and Nation v. Canada, 2009 SCC 9* at paras. 17 and 2.
[2] *Ibid*. at para. 2.
[3] *Ibid*. at para. 3.
[4] R.S.C. 1985, c. I-5.
[5] R.S.C. 1985, c. I-7.
[6] R.S.C. 1985, c. F-11.

[7] *Supra* note 1 at para. 80.
[8] *Ibid.* at para. 20.
[9] *Ibid.* at para. 49.
[10] *Ibid*. at para. 50.
[11] *Ibid*. at para. 51.
[12] *Ibid*. at para. 53.
[13] *Ibid*. at para. 57.
[14] *Ibid*. at para. 67.
[15] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11, s. 35(1).
[16] *Supra* note 1 at para. 46.
[17] *Ibid*. at para. 67.
[18] *Ibid*.
[19] *Ibid*. at para. 74.
[20] *Ibid*. at paras. 73 and 74.
[21] *Ibid*. at para. 66.
[22] *Ibid*. at para. 61.
[23] *Ibid*. at para. 60.
[24] *Ibid*. at para. 148.
[25] *Ibid*.
[26] *Ibid*. at para. 21.
[27] *Ibid*. at para. 127.
[28] *Ibid*. at para. 128.
[29] *Ibid*. at para. 184.
[30] *Supra* note 15; *Supra* not 1 at para. 22.
[31] *Ibid*. at para. 189.
[32] *Ibid*. at para. 190.
[33] *Ibid*. at para. 201.
[34] *Ibid*.