Federal Court  Cour fédérale

Date: 20151023

Docket: T-2492-14

Citation: 2015 FC 1197

Ottawa, Ontario, October 23, 2015

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

ATTORNEY GENERAL OF CANADA (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT)

Applicant

and

COLD LAKE FIRST NATIONS, SAWRIDGE FIRST NATION, ATHABASCA CHIPEWYAN FIRST NATION, ONION LAKE CREE NATION, THUNDERCHILD FIRST NATION, THE OCHAPOWACE INDIAN BAND

Respondents

ORDER AND REASONS

[1] The Court is faced with two motions brought respectively by Sawridge First Nation [Sawridge] and Onion Lake Cree Nation [Onion Lake] seeking to either enjoin the Attorney General of Canada [Attorney General] from further prosecuting this application or staying the

application pending the resolution of related actions in this Court and in the Alberta Court of Queen's Bench. Onion Lake seeks, in addition, mandatory injunctive relief against the Minister of Aboriginal Affairs and Northern Development Canada [Minister] in respect of the withholding of funding for so-called non-essential programs.

[2] All of the outstanding litigation among the parties concerns the enforceability of the *First Nations Financial Transparency Act*, SC 2013, c 7 [the Act]. The underlying application was brought by the Attorney General under section 11 of the Act, seeking to enforce against the Respondent Bands the financial reporting functions described in sections 7, 8 and 9. All of the Respondents have refused to comply with these provisions and they seek to challenge the constitutionality of the legislation on the basis of their asserted treaty and Aboriginal rights. They also maintain that the Act violates sections 15, 25 and 35 of the *Canadian Charter of Rights and Freedoms*, 1982, CQLR c C-12 [Charter], or breaches the Crown's fiduciary duties.

I. The Evidence (Sawridge)

[3] The record discloses a long history of largely amicable interaction between Sawridge and the Department of Aboriginal Affairs and Northern Development Canada [the Department] concerning Sawridge's financial disclosure. Correspondence in 2003 and later indicates that Sawridge regularly disclosed its financial statements to the Department but always on the understanding that the information would be held in the strictest of confidence. This situation changed beginning in 2012 when Sawridge and a number of other First Nations bands expressed their opposition to the passage of the Act.

[4] On February 12, 2013, Chief Roland Twinn testified before the Standing Senate Committee on Aboriginal Peoples and expressed his opposition to the Act. In that testimony, Chief Twinn expressed his willingness to follow Sawridge's earlier disclosure practices with the Department and also to publically account for its public funding. He objected to the disclosure of the financial affairs pertaining to the Band's private commercial operations. He also contested the constitutional validity of the Act and advised the Committee that its passage into law would trigger a legal action.

[5] When Sawridge elected not to comply with the reporting requirements of the Act, the Department warned that the default would be publically disclosed and an enforcement proceeding could be launched. On November 27, 2014, the Department advised Sawridge that its default would be publically declared. On December 8, 2014, the Minister issued a press release announcing his intention to bring applications against the Respondents in the Federal Court to compel compliance with the Act. That press release also stated that the Department would withhold funding for "non-essential" programs from all non-compliant First Nations.

[6] On December 8, 2014 the Attorney General filed an originating application launching this proceeding seeking an Order compelling the Respondents to comply with the stipulated disclosure requirements. This was, in turn, followed by an action brought by Sawridge against the Attorney General in the Court of Queen's Bench of Alberta (File Number 1503-04882) challenging the constitutional validity of the Act based on Sawridge's asserted Aboriginal and treaty rights, a breach of fiduciary and trust obligations, a breach of its right to self-government,

a breach of the duty to consult, and a violation of the equality provisions guaranteed by section 15 of the Charter.

II. The Evidence (Onion Lake)

[7] The historical record filed on behalf of Onion Lake is less voluminous than that of Sawridge. It discloses a letter dated October 27, 2014 from the Department to the Chief and Council for Onion Lake indicating that their non-compliance with the Act would lead to the withholding of funding for non-essential programs and possibly withholding of funding for essential services. In a letter dated November 27, 2014, the Department confirmed that it had held back funding in the amount of $159,605 and would continue to withhold monies if Onion Lake failed to meet the disclosure requirements of the Act.

[8] The affidavit of Chief Fox states that as of May 14, 2015, the Department had withheld funding to Onion Lake in the amount of $1,034,017.52. Those funds were payable in connection with band employee benefits for approximately 800 employees (including on-reserve teachers), band registry administration, and band support administration. Although not entirely clear from Chief Fox's affidavit, the impasse with the Department appears to have disrupted funding necessary for the occupation of 15 housing units on the reserve.

[9] As a result of these actions by the Department, on November 26, 2014 Onion Lake initiated a legal action in this Court against the Government of Canada. That action claims damages and declaratory and injunctive relief against the Crown based on allegations of Charter-

based discrimination, a failure to consult, a breach of fiduciary duties, and a breach of promises made by the Crown in Treaty 6.

III. Analysis

[10] Sawridge and Onion Lake assert that they have each made out a claim to injunctive relief to be realized in the form of an exemption from the statutory disclosure provisions in the Act pending the resolution of the legal issues they have raised. In the alternative, they ask that the Court stay the Minister's section 11 application pending the outcome of their respective legal challenges to the Act in this Court and in the Court of Queen's Bench of Alberta. That relief is sought under subsection 50(1) of the *Federal Courts Act*, RSC, 1985, c F-7 which allows the Court to stay one proceeding in favour of another where the issues raised are substantially the same. The remaining Respondent First Nations have not brought their own motions for relief but effectively seek to shelter under the motions brought by Sawridge and Onion Lake.

[11] For the reasons that follow, I decline to entertain the First Nations' motions for injunctive relief in connection with the prosecution of the Attorney General's enforcement application. That is not to say that those motions lack merit, but only that relief under section 50 is more appropriate and less disruptive than an interim order exempting a party from the obligation to comply with facially-valid legislation. In practical terms, the result is the same.

[12] Subsection 50(1) provides for the following:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay	50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de

proceedings in any cause or matter	suspendre les procédures dans toute affaire
(a) on the ground that the claim is being proceeded with in another court or jurisdiction; or	a) au motif que la demande est en instance devant un autre tribunal;
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[13] The burden, of course, rests with the moving parties to satisfy the Court that relief in the form of a stay is warranted.

[14] A leading authority applying subsection 50(1) is *White v EBF Manufacturing Ltd*, 2001 FCT 713, [2001] FCJ No 1073. In that case the plaintiff had commenced proceedings in both the Nova Scotia Supreme Court and in the Federal Court seeking substantially the same relief. The defendants sought a stay of the Federal Court action in the face of the further-advanced proceeding in the Nova Scotia Supreme Court. After reviewing the relevant authorities, Justice Jean-Eudes Dubé of this Court set out the applicable principles to be applied:

> 1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
>
> 2. Would the stay work an injustice to the plaintiff?
>
> 3. The onus is on the party which seeks a stay to establish that these two conditions are met;
>
> 4. The grant or refusal of the stay is within the discretionary power of the judge;
>
> 5. The power to grant a stay may only be exercised sparingly and in the clearest of cases;

> 6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
>
> 7. What are the possibilities of inconsistent findings in both Courts?
>
> 8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction;
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> 9. Priority ought not necessarily be given to the first proceeding over the second one or, *vice versa*.

[15] More recently, Justice Anne Mactavish considered subsection 50(1) in the context of parallel trade-mark proceedings: see *Tractor Supply Co. of Texas, LP v TSC Stores L.P.*, 2010 FC 883, [2010] FCJ No 1102. One of the parties argued that the applicable legal test was that recognized for interlocutory injunctive relief in *RJR-MacDonald Inc v Canada*, [1994] 1SCR 311, 1994 CarswellQue 120F, requiring proof of a serious issue and irreparable harm and where the balance of convenience favours the grant of relief. Justice Mactavish dealt with this argument in the following way:

> [19] There is no question that the *RJR-MacDonald* test is often applied in stay applications. It is undoubtedly applicable where what is sought to be stayed is the enforcement of regulations, pending a judicial determination of their constitutionality. Indeed, that was the issue before the Supreme Court of Canada in the *RJR-MacDonald* case.
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> [20] The *RJR-MacDonald* test also clearly applies where what is sought to be stayed is the decision of an inferior court or tribunal, pending an appeal or application for judicial review of that decision. This was the situation facing the Federal Court of Appeal in *Canada (Attorney General) v. Canada (Canadian International Trade Tribunal)* and *Canada (Attorney General) v. United States Steel Corp.*, both cited above.
>
> [21] However, stays are also sought in circumstances where the *RJR-MacDonald* test has no application. For example, a

proceeding in one jurisdiction may be stayed in favour of a proceeding brought in a different jurisdiction on the basis of the principle of *forum non conveniens* or because the other forum is "more appropriate": see, for example, the decisions of the Federal Court of Appeal in *Apotex Inc. v. AstraZeneca Canada Inc.*, 2003 FCA 235, [2003] F.C.J. No. 838, application for leave to appeal dismissed [2003] 2 S.C.R., p. v, and *Discreet Logic Inc. v. Canada (Registrar of Copyrights)*, [1994] F.C.J. No. 582, 55 C.P.R. (3d) 167 (F.C.A).

[22] A stay of proceedings can also be granted on the basis that the conduct of state actors is such that the proceeding in question constitutes an abuse of process: see, for example, *Mugesera*, cited above, *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *Canada (Attorney General) v. Sheriff*, 2007 FCA 90, [2007] F.C.J. No. 380. Once again, the *RJR-MacDonald* test has no application in such circumstances.

[23] There is a substantial body of jurisprudence dealing with situations where a stay is being sought with respect to one of two related proceedings being pursued in different fora: see, for example, *Safilo Canada Inc. v. Contour Optik Inc.*, cited above; *Plibrico (Canada) Limited v. Combustion Engineering Canada Inc.*, [1990] F.C.J. No. 36, 30 C.P.R. (3d) 312 (F.C.T.D.); *Ass'n of Parents Support Groups v. York*, [1987] F.C.J. No. 141, 14 C.P.R. (3d) 263 (F.C.T.D.); *Compulife Software Inc. v. Compuoffice Software Inc.* (cited above); *94272 Canada Ltd. v. Moffatt*, [1990] F.C.J. No. 422 31 C.P.R. (3d) 95 (F.C.T.D.); *General Foods v. Struthers*, [1974] S.C.R. 98.

…

[29] There is obviously some overlap between the *White v. E.B.F. Manufacturing Ltd.* factors and the *RJR-MacDonald* test, particularly as the latter relates to the issues of irreparable harm and balance of convenience. Given that what is really in issue in this case is whether having the two proceedings continue in tandem amounts to an abuse of process, I am of the view that considerations such as those identified in *White v. E.B.F. Manufacturing Ltd.* are more relevant and appropriate in considering a motion such as this than are the three elements of the *RJR-MacDonald* test.

I agree with the above view. I am satisfied that a motion for a stay under subsection 50(1), at least in the context of multiple, related proceedings, is to be resolved in accordance with the principles listed in *White*, above, supplemented with some consideration of the balance of convenience.

[16] Where the parallel proceedings involve a contest between an action and an application, a further important consideration is whether the issues raised are more appropriately resolved by way of full discovery and trial or summarily by way of an application. The juridical advantages and disadvantages of an application were described by the Supreme Court of Canada in *Canada v Telezone Inc*., 2010 SCC 62 at para 26, [2010] 3 SCR 585. There the Court observed that, while the application process is speedy and cost-effective, it denies the litigants access to full pre-hearing discovery and the benefits of *viva voce* evidence: also see *Lundbeck Canada Inc. v Genpharm ULC*, 2009 FC 146 at para 11, [2009] FCJ No 249.

[17] On this point the law seems to be fairly well settled: at least in the context of cases like this involving Aboriginal and treaty rights. In *Soowahlie Indian Band v Canada*, 200 FTR 21, [2001] FCJ No 105, Justice Paul Rouleau summarized the law in the following way:

> 6 The jurisprudence has clearly established that cases which require proof of aboriginal rights or title require determination by way of an action. In MacMillan Bloedel Ltd. v. Mullin et al. (1985), 61 B.C.L.R. 145, one of the first cases to reach the courts dealing with claims of this nature, the British Columbia Court of Appeal rejected the assertion that aboriginal rights or title could be determined on the basis of affidavit evidence. The Court stated at p. 151:
>
> > I am firmly of the view that the claim to Indian title cannot be rejected at this stage of the litigation. The questions raised by the claim are not the type of questions that should be decided on an interlocutory

> application. A great amount of factual evidence will have to be heard and considered, opinion evidence of those knowledgeable in these matters will have to be assembled and related to the factual evidence, and there will have to be a meticulous study of the law. That must take place at a trial; it cannot be done on an interlocutory application.

7 This same reasoning has been applied in a number of subsequent cases including Barlow v. Canada, [2000] F.C.J. No. 282 (T.D.); Taku River Tlingit First Nation v. Tulsequah Chief Mine Project, [1999] B.C.J. No. 984, (April 30, 1999) Vancouver Registry No. A990300 (B.C.S.C.); Athabasca Tribal Council v. Alberta (Minister of Environmental Protection) (1985), 15 Admin. L.R. (3d) 110 (Alta. Q.B.); Calliou and Kelly Lake Cree Nation v. Canada (Ministry of Energy and Mines), [1998] B.C.J. No. 3207, (September 21, 1998, Vancouver Registry No. C984320 (B.C.S.C.); British Columbia (Minister of Forests) v. Westbank First Nation [2000] B.C.J. No. 1613 (B.C.S.C.).

8 The most recent decision on this question is Haida Nation v. British Columbia (Minister of Forests), [2000] B.C.J. No. 2427 (B.C.S.C.), a case which deals with issues which are very similar, if not identical, to those raised in the case at bar. The Haida Nation judgment concerns a legal challenge by the Haida to certain statutory decisions made by the British Columbia Minister of Forests relating to timber harvesting on the Queen Charlotte Islands. The grounds raised at the hearing and addressed by the Court were that the assertion of aboriginal title gives rise to a fiduciary duty on the part of the Provincial Crown and triggers the protection of section 35 of the Constitution Act, 1982.

9 In dismissing the Haida's petition, the British Columbia Supreme Court held that the assertion of aboriginal title cannot be determined without a trial. The Court stated at p. 8 as follows:

> I see fundamental weaknesses in the petitioners' argument. First, it purports to cast an onus on the Crown to disprove the asserted Aboriginal title of the Haida to all of the lands of Block 6. If the Crown has not done this, so the argument goes, the existence of Haida title to Block 6 must be presumed. But more than that, the argument requires that Haida title be presumed to exist, to the extent claimed by the Haida. Only if that presumption is made, can the argument proceed to the next step, namely, the contention that Haida title

> must be given "priority". This would permit the petitioners to argue that the Crown had the duty to "accommodate" Haida title. But I have concluded that there is no such presumption, in law.
>
> The petitioners are saying, in effect, that the Crown has the burden of proving "justification" for infringing rights that have not yet been proved, in kind or in extent. In my opinion, the issue of whether there has been infringement of Aboriginal right cannot be decided until both the kind of right, and its extent, have been established. I think the fatal flaw is that the petitioners want results that could be achieved at a trial, and only after the Haida proved their Aboriginal title, and its infringement.
>
> My opinion is that the scope of the Crown's fiduciary duty to the Haida cannot be determined without a trial. Whether the duty requires that priority be given to Aboriginal title, and if so, whether the measures taken by the Crown are consistent with the principle of priority, are issues that depend on the nature and extent of the Aboriginal right or title at issue. In my view, the judgement of Lamer, C.J.C. in Delgamuukw, [1997] 3 S.C.R. 1010, at paragraphs 162 to 167 indicates that these questions are matters for trial.
>
> 10 That reasoning is equally applicable to the case now before me. The applicants' judicial review application as currently pleaded raises the issues of proof of aboriginal rights and title. These are questions which can only be determined by way of a trial and accordingly the applicants' judicial review application should be converted into an action. [Emphasis added]

[18] Only a few weeks ago Justice Michael Manson dealt with this issue in *Prophet River First Nation v Canada,* 2015 FC 1030, 2015 CatswellNat 4485. There the First Nation was arguing for judicial review and the Minister maintained that a trial was necessary. Justice Manson held that an application would not do justice to the issues for the following reasons:

> [52] In my view, the evidentiary record developed for an action is the appropriate basis for a Court to make a determination on the issue of infringement of the Applicants' treaty rights. While in *Beckman v Little Salmon/Carmacks First Nations*, above, at para 47, the Supreme Court made it clear that the judicial review process is a flexible one, capable of dealing with an array of issues presented in that context, it cannot reasonably be construed as saying that it is flexible enough to deal with all issues, in all contexts and, as here, not for a determination of infringement of Treaty No.8 rights.
>
> [53] Where consultation is required at the deep end of the spectrum and a specific determination on infringement on established treaty rights is at issue, the Court is ill-equipped to make a determination with an incomplete record or an informal evidentiary process before it on judicial review. The infringement of those important and fundamental treaty rights require a complete evidentiary record, that has reached the standard of admissibility at trial, to be reasonably and fairly determined. Nevertheless, it is without question that consideration of the issue of infringement of those treaty rights, short of making an ultimate decision or determination, needs to be part of the consultation process, as discussed below.

[19] In this situation, there is considerable overlap in the legal issues that will be material to the outcome of the two actions and this application. The Respondent First Nations intend to challenge the validity of the Act on the ground, *inter alia*, that it violates their constitutionally protected Aboriginal and treaty rights under Treaty 6 and Treaty 8 respectively. That position will be advanced within the confines of this application and also in the two pending actions. It will also, of necessity, involve the development of a considerable evidentiary record. This factor strongly favours an action over an application.

[20] There is also potential for inconsistent outcomes having particular concern for the evidentiary limitations inherent in an application.

[21] I note, as well, that all of the proceedings are in their very early stages and a stay will not result in any material thrown-away costs to any party.

[22] As between the two proceedings in this Court, a choice must be made. It is not as clear whether, and to what extent, actions ought to be prosecuted in two different courts. It is worth noting, however, that those proceedings involve different treaties requiring the development of different evidentiary records. Judicial economies may still be achievable as between the two outstanding actions in the context of cooperative case management.

[23] To the extent that a balancing of interests ought to be considered, it does not, in these circumstances, favour the Minister. The Minister was forewarned that the constitutional validity of the Act would be challenged if it was passed into law. Onion Lake initiated its action against the Minister in this Court on November 26, 2014. The next day the Minister withheld funding for certain Onion Lake programs he deemed to be non-essential, apparently with no advance consultation. The Minister then brought this application on December 8, 2014.

[24] The Attorney General acknowledges that the issues raised by the Respondents are serious and, therefore, worthy of judicial determination. Those issues were placed squarely before this Court by Onion Lake and later by Sawridge in its Alberta action. The Supreme Court of Canada has repeatedly held that disagreements of the sort raised in these legal proceedings should be the subject of consultation and, where possible, accommodation.

[25] Needless to say, highly adversarial conduct by either the Crown or a First Nation is generally to be avoided in favour of mediation and, when necessary, by the courts. It does not serve the public interest for either party to aggravate a legitimate disagreement that has properly been placed before a court for resolution.

[26] Subject to the duty to consult, the Minister's enforcement action against the Respondents was discretionary but, nevertheless, authorized under the Act, as was the action he took in the form of withholding funding from the Respondents and their members. It is also within the Minister's discretion under the Act to impose ongoing administrative penalties against the Respondents and other non-compliant First Nations notwithstanding the fact that his legal right to do so has yet to be judicially determined. That is not to say, however, that this history is irrelevant in the determination of which of the proceedings ought to be allowed to move forward. Against this background the greater public interest favours the Respondent First Nations and their right to move forward with their litigation in the absence of the encumbrance of the Attorney General's competing application.

[27] For the foregoing reasons, the Attorney General's application will be stayed pending further order of the Court.

IV. Onion Lake's Claim to Injunctive Relief

[28] Onion Lake seeks a mandatory injunction requiring the Minister to reinstate the benefits previously withheld from it under the authority of section 13 of the Act and to enjoin the Minister from taking similar action going forward.

[29] I accept Onion Lake's point that injunctive relief against the Crown is available in cases like this where important Constitutional issues are raised. At the same time the authorities indicate that considerable caution is required where the requested interim relief interferes with validly enacted legislation. In *Bellegarde v Canada*, 2002 FCT 1131, 2002 CarswellNat 3081, this point was made by Justice Michel Beaudry at para 66:

> 66. Although this is not a *Charter* case, the *Constitution Act*, 1982, of which the *Charter* is a part, is at play here. The Applicants are asserting rights that, in their view, are supported by the Constitution of Canada, as well as the treaties into which they entered. With this consideration in mind, it is useful to refer to the remarks of Sopinka and Cory JJ. in their judgment of the interlocutory injunction sought in *RJR-Macdonald*. In that case, the tobacco company sought the suspension of application of laws with respect to the packaging and advertising of tobacco pending the final disposition of their challenge of the law. At pages 333 and 334 of the reasons, Sopinka and Cory JJ. laid out the competing forces requiring careful consideration:
>
> The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken. On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect. On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute. [Emphasis in original]

Also see *RJR MacDonald Inc*, above, at pp 346-347.

[30] I also accept that the Attorney General does not hold a monopoly over the public interest solely on the strength of the enforcement of legislative compliance. This point was recognized in RJR *MacDonald*, above, at pp 343-344:

> Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
>
> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

[31] The test for interim injunctive relief requires the proponent to establish (a) a serious issue; (b) irreparable harm; and (c) that the balance of convenience favours the grant of relief.

[32] As noted above, the Attorney General concedes that a serious issue has been raised. What remains in contention is whether irreparable harm has been made out. On the evidentiary record before me, I am unable to find that Onion Lake has met its burden on this issue.

[33] Considerable attention was paid by the parties to the potential for harm to Sawridge's and Onion Lake's financial interests by the public disclosure of their financial statements. According to the Bands irreparable harm will result if, in order to reinstate program funding, they are compelled to disclose commercially sensitive information to their competitors.

[34] The Attorney General maintains that the Act requires the disclosure of only highly consolidated financial data and thereby effectively shields information that could be advantageous to the Bands' commercial competitors. Although their previous reporting practices were apparently more explicit, the Act does not compel that level of reporting.

[35] The expert evidence advanced on behalf of the Respondents to establish actual economic prejudice is, in my view, insufficient. Presumably because Mr. Glen Hamilton did not review Sawridge's actual financial statements, he was unable to say whether the disclosure of its financial data in a consolidated form would be likely to compromise its commercial interests. His opinions concerning Sawridge are, therefore, theoretical. In any event, his evidence does not touch on the financial affairs of Onion Lake and provides no support to its claim to injunctive relief. In the absence of specific examples of financial information that could harm Onion Lake's commercial interests and that are required to be publically disclosed under the Act, this argument lacks evidentiary support.

[36] The only evidence of irreparable harm to Onion Lake comes from the affidavit of Chief Fox. Although it is clear enough that Onion Lake has been deprived of a significant level of program funding, the practical consequences of the Minister's administrative actions are not

sufficiently explained to establish irreparable harm. I am effectively left to speculate whether the funding shortfall for employee benefits to some 800 Band employees (including teachers) can be made up from other sources or has otherwise resulted in personal hardships to the employees and their families. If the Minister's action is interfering with employee recruitment or tenure, some supporting evidence is required.

[37] The withholding of a Ministerial Loan Guarantee is said by Onion Lake to have affected 15 needy families, but no particulars of their personal circumstances have been offered. It is not even clear if the homes in question have been built and, if so, why they cannot be occupied.

[38] I accept that, in some circumstances, the failure by the Crown to consult before it acts may be sufficient to constitute irreparable harm: see *Haida Nation v Canada*, 2015 FC 290 at para 54, [2015] FCJ No 281 and *Wahgoshig v Ontario*, [2012] OJ No 22, 108 OR (3d) 647 at para 53. However, in both the *Haida Nation* and *Wahgoshig* cases, there was evidence of material harm to the resource in question. The former involved potential damage to a small herring fishery said to be "a significant risk of harm not compensable in damages". In the latter case, the breach arose from "a concerted, willful effort not to consult" in connection with mining explorations on asserted traditional territories.

[39] In this case, the Minister acted unilaterally – albeit on notice – under a specific authority granted to him in the Act. His actions involve the withholding of money: something inherently compensable in damages. In the absence of clear and convincing evidence that the withholding of funding for the programs in question is causing other types of non-compensable harm to

Onion Lake's membership or its employees, I am not satisfied that the apparent failure to consult is sufficient, on its own, to establish irreparable harm.

[40] The denial of interim relief on this aspect of Onion Lake's motion is based solely on the paucity of evidence of irreparable harm caused by the Minister's administrative action. Nothing in these reasons should be interpreted by any party as being finally determinative or preclusive of the right of any of the Respondents to seek interim relief on a stronger evidentiary record. Neither should the Attorney General interpret this outcome as an endorsement of the actions taken to date by the Department. The Crown has an ongoing legal obligation to consult and the Minister is required to carefully consider the prejudicial effects of further administrative action on the members of these Bands. That is particularly obvious where the legality of the Act is before this Court. It is worth remembering that the underlying decisions that have given rise to this litigation were made by Band leaders and by the Department. However, those most affected are the members of the Bands and their interests are worthy of careful consideration. The Crown's failure to consult before withholding further funding from the Respondents is, therefore, likely to be a consideration in the face of evidence showing non-compensable injury to band members going forward.

V. Relief

[41] On the basis of the foregoing, this application is stayed until further order of the Court. The motion by Onion Lake seeking injunctive relief in connection with the Minister's withholding of program funding is dismissed but without prejudice to the right of any of the Respondents to bring a future motion for injunctive relief on a different evidentiary record.

[42] Inasmuch as Sawridge has been substantially successful on its motion, I award it costs of $4,500.00 and its reasonable disbursements including the costs of travel for up to two counsel.

[43] Because of Onion Lake's partial success, I award it costs of $2,500.00 plus its reasonable disbursements including the costs of travel for up to two counsel.

ORDER

THIS COURT ORDERS that these motions are allowed in part and this application is stayed until further order of the Court.

THIS COURT FURTHER ORDERS that Sawridge will have its costs in the amount of $4,500.00 and its reasonable disbursements including the costs of travel for up to two counsel.

THIS COURT FURTHER ORDERS that Onion Lake will have its costs in the amount of $2,500.00 and its reasonable disbursements including the costs of travel for up to two counsel.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2492-14
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA, (MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT) v COLD LAKE FIRST NATIONS, SAWRIDGE FIRST NATION, ATHABASCA CHIPEWYAN FIRST NATION, ONION LAKE CREE NATION, THUNDERCHILD FIRST NATION, THE OCHAPOWACE INDIAN BAND
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ORDER AND REASONS:	BARNES J.
DATED:	OCTOBER 23, 2015

APPEARANCES:

Michael Roberts and Daniel Kuhlen	FOR THE APPLICANT
Edward Molstad and Gabriel Joshee-Arnal	FOR THE RESPONDENT Sawridge First Nation
Cathy Guirguis	FOR THE RESPONDENT Athabasca Chipewyan First Nation
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