

CANADA / JUDGMENT

First Nations Health Authority v. Inter Tribal Services Association

2020 BCSC 476

COURT

Supreme Court of British Columbia

DECIDED

28 February 2020

Source: bccourts.ca - Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 476 First Nations Health Authority v. Inter Tribal Services Association

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

First Nations Health Authority v. Inter Tribal Services Association,

2020 BCSC 476

Date: 20200228

Docket: S200942

Registry: Vancouver

Between:

First Nations Health Authority

Plaintiff

Andp

Inter Tribal Services Association and

New Horizons Indigenous Association

Defendants

Corrected Judgment: The front page of the judgment

was corrected on March 30, 2020

Before: The Honourable Madam Justice W.A. Baker

Oral Reasons for Judgment

Counsel for Plaintiff:

M. Faille

A. Christoff

Counsel for Defendants:

J.W. Gailus

Place and Date of Hearing:

Vancouver, B.C.

February 24, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2020

- [1] THE COURT: This is an application brought by First Nations Health Authority ("FNHA") to preserve certain funds which it says are held by the defendants, Inter Tribal Services Association and New Horizons Indigenous Association, which were formerly known as the Inter Tribal Health Authority. For simplicity, I will refer to the defendants as "ITHA".
- [2] ITHA was incorporated in 1998 to administer health care funding for First Nations on Vancouver Island. It received its initial funding through a health funding contribution agreement with Canada.
- [3] On August 14, 2013, the obligations of the Crown under the contribution agreement were transferred to FNHA, a society created for the purpose of delivering health care services for First Nations in the province. This transfer was effected by way of a novation agreement.
- [4] Just prior to the novation agreement, on March 31, 2013, the ITHA financial statements show an accumulated surplus of \$2,184,293.
- [5] In 2015, FHNA and ITHA entered into a second funding agreement.
- [6] Under the agreements, funding is provided to ITHA two ways, through Block Funding and Set Funding. Block Funding allowed ITHA to provide enhanced services as Nations could direct the funds where needed for health-related services. If ITHA did not use all of the block funding for mandatory programs in a fiscal year, those funds could be reinvested into health-related services as ITHA deemed appropriate.
- [7] It is common ground that substantially all of ITHA's funds came through the funding agreements with Canada and FNHA. ITHA has obtained some limited additional funding over the years, but during the currency of the funding agreements outside funding represented less than 1% of ITHA's total funding.

- [8] On December 21, 2018, ITHA received a notice of termination from FNHA advising that the health services agreements would be terminated effective March 31, 2019. On January 24, 2019, ITHA filed a notice of civil claim against FNHA and Canada claiming breach of contract, breach of fiduciary duty, and interference with contractual relations. In February 2019, ITHA sought an injunction prohibiting the imposition of a third party manager and a notice of termination.
- [9] On February 28, 2019, Madam Justice Power issued Reasons prohibiting the third party manager, but allowing the notices of termination. In her reasons, she set out the background facts related to the agreements between the parties. I refer to paras. 6 through 10 of her Reasons:
- [6] FNHA is a province-wide health authority whose members are the First Nations Health Council, the members of which are in turn elected regionally by First Nations people.
- [7] ITHA is a British Columbia society which has been, for over 21 years, responsible for providing specific health services to First Nations people in 29 communities on Vancouver Island and the mainland. ITHA has also passed on flow-through funding so that some of these communities can deliver the services themselves.

Agreements

- [8] On May 25 and 26, 2011, the Gathering Wisdom for a Shared Journey IV meeting was held and attended by many First Nations leaders, health service providers, and members to establish principles for the transition of health care provision. This was to allow for First Nations self-determination in health care following seven directives included in a consensus paper ratified at the meeting. Another result of Gathering Wisdom IV was a vote on a funding agreement material to this application and the underlying action.
- [9] For these purposes, FNHA funds ITHA under two agreements: the Health Funding Consolidated Contribution Agreement PA1200036-BFT (I will follow the parties in referring to this as the "first agreement", which ITHA entered into with Canada after the Gathering Wisdom IV conference on May 27, 2011) and the Contribution Agreement #PAI 600049-BL (which I will refer to as the "second agreement", which ITHA entered into with FNHA on April 1, 2015).
- [10] In between these two agreements came the Novation Agreement of August 2013, which ITHA entered into and through which FNHA stepped into the role earlier filled by Canada under the first agreement.
- [10] On March 31, 2019, the health services agreements were terminated.

- [11] FHNA takes the position that pursuant to the funding agreements, on termination, ITHA was required to return to it all unexpended funds which had been provided pursuant to the funding agreements. In particular, FNHA says that the accumulated surplus, which at the time of termination was in the range \$2.7 million, should have been returned to FNHA.
- [12] On January 4, 2019, FNHA advised ITHA that pursuant to the notice of termination, FNHA expected ITHA to "safeguard and repay where required all surplus funds accumulated by ITHA under the current funding arrangements".
- [13] On January 27, 2020, FNHA filed a claim against the defendants and filed this application to preserve the unexpended funds which it says should have been returned to it on termination of the funding agreements.
- [14] At the time of this application ITHA had \$615,719 on deposit. Of that, \$500,000 is in a restricted fund set aside for the benefit of the Gwawaenuk, a First Nation located on Vancouver Island. Both parties agree that the \$500,000 is held in trust for the Gwawaenuk and cannot be used for ITHA operational funds. As such, the real amount at issue on this application is the \$115,719 which ITHA holds in its accounts net of the Gwawaenuk funds.
- [15] Rule 10-1 of the Supreme Court Rules provides authority for making an order preserving property which is the subject matter of a proceeding. The test for granting such an order is similar to the test on an injunction application. The following four questions must be answered:
- a) Does the plaintiff have a claim on the evidence to a proprietary interest in property?
 - b) Is there some evidence which reasonably supports the plaintiff's belief that the property is threatened with disposition?
 - c) Is there a substantial question to be tried as to the applicant's entitlement to the property?
 - d) Does the balance of convenience favour granting the order?

Kepis & Pobe Financial Group Inc. v. Timis Corporation, 2018 BCCA 420 [Kepis & Pobe v. Timis] at para. 21.

A. Does the plaintiff have a claim on the evidence to a proprietary interest in property?

- [16] FNHA says that its proprietary interest in the unexpended funds is established by virtue of the termination provisions of the first funding agreement in effect from April 1, 2011. Specifically, FNHA refers to para. 48 of the agreement, which sets out the obligations of the parties in the event of termination. I note that references to the Minister now refer to FNHA by virtue of the novation agreement. The following obligations are relevant on this application:

- s. 48(1) The recipient, which is ITHA, shall make no further commitments in relation to the use of the minister's funding under this agreement and shall cancel or otherwise reduce to the greatest extent possible the amount of any outstanding commitments in relation thereto.
 - s. 48(2) Any monies owed to the recipient up to the date of termination date of this agreement will be paid to the recipient by the minister unless the recipient and the minister otherwise agree in writing.
 - s. 48(4) The recipient will provide the minister with an audit within 120 calendar days of the date of termination unless the minister waives this requirement in writing.
 - s. 48(5) Any funding paid to the recipient which is unexpended at the termination date of this agreement will be paid to the minister by the recipient unless the recipient and the minister agree otherwise in writing.
- [17] FNHA submits that the plain language of s. 48(5) requires ITHA to return to FNHA all funds which had been paid to it by FNHA or by Canada prior to the novation in 2013, including any surplus funds which had been retained by ITHA over the years.
- [18] ITHA argues that surplus monies do not have to be returned pursuant to s. 48(5). It says that surpluses are dealt with in s. 7 of the agreement and, pursuant to s. 7(2), any entitlement of the recipient to retain unspent funds after the recipient has fulfilled its obligation to provide health programs and services shall be set out in schedule 7. Schedule 7 clearly states that, if the recipient has not expended all Block Funding after delivering all mandatory programs, the recipient may retain the surplus for reinvestment and health-related activities. ITHA says that, effectively, any excess block funding at the end of the fiscal year transfers wholly to ITHA and FNHA has no residual interest in those funds.
- [19] At this stage of the analysis, I must decide if there is an evidentiary basis for the proprietary interest asserted by the applicant. I am satisfied that the funding agreements provide an evidentiary basis for the proprietary interest asserted by FNHA in the funds held ITHA.

B. Is there some evidence to reasonably support the plaintiff's belief that the property is threatened with disposition?

- [20] ITHA provided an affidavit from Marjorie Reid, the Director of Operations, who has been employed with ITHA in the area of financial operations. Ms. Reid states that the organization requires \$75,959 per month to carry on with their operations. The \$115,000 at issue on this application will carry the organization for less than two months given its financial requirements. ITHA candidly conceded that if the preservation order is not made, the funds at issue will be spent prior to any final determination of this action. As such, I find that there is evidence before me which reasonably supports the applicant's belief that the property will be dissipated if the preservation order is not granted.

C. Is there a substantial question to be tried as to the applicant's entitlement to the property?

- [21] The Court of Appeal in *Kepis & Pobe v. Timis* sets out how this element is to be assessed. At para. 24 the court says:
- [24] The requirement that the applicant must demonstrate a substantial question to be tried appears to be a less onerous standard than the strong prima facie or good arguable case for a Mareva injunction and more akin to the "serious question to be tried" for a conventional interlocutory injunction.
- [22] ITHA refers to *RJR-MacDonald* and says that while generally a judge should not engage in an extensive review of the merits of the applicant's case, the likelihood of the applicant's success at trial is a factor the court should consider when the result of the interlocutory application will in effect amount to a final determination of the action, such as when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial: *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 338.
- [23] ITHA says the relief sought by FNHA is akin to a mandatory injunction, and, as such, the court must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in its claim: *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 [CBC] at paras. 13 through 17. In CBC, the Supreme Court of Canada stated that in determining whether an interlocutory application is mandatory or prohibitive, the application judge must examine the substance of what is being sought and the practical consequences of the injunction. The court must determine whether the overall effect of the injunction is to require the defendant to do something or to refrain from doing something. If the former, the more onerous test is to be applied.
- [24] In the case before me, FNHA seeks an order that the funds at issue be preserved pending final decision. In the circumstances of this case, and in light of the consequences of the injunction if granted, I find that the order sought is in the nature of a mandatory injunction and the more stringent standard applies.
- [25] FNHA relies on the plain language of the agreement. It says that s. 48(5) refers to "any funding paid to the recipient which is unexpended at the termination date of the agreement." The agreement defines Block Funding and Set Funding and could have used those terms in s. 48, but did not. FNHA argues that there is no limiting language in s. 48(5) which would exclude surplus funds. It says that while the agreement is in effect, ITHA was entitled to roll surplus funds over and use them for specified purposes. FNHA does not seek a return of any surplus funds which were spent in accordance with the agreement; however, once the agreement is terminated, FNHA says that all funds, surplus or otherwise, must be returned.
- [26] ITHA says schedule 7 of the agreement can only mean that any surplus funds remaining at the end of the fiscal year are transferred to ITHA's ownership to be spent in accordance with the terms set out in schedule 7 and that FNHA effectively releases its rights to those surplus

funds each year. ITHA says it had a significant amount of surplus funds prior to the current agreement being signed, and prior to the novation agreement which assigned the minister's contract to FNHA, and it would be absurd if FNHA would now be entitled to those funds upon termination.

- [27] ITHA also points to the fact that at no time during the agreement did FNHA ever require ITHA to return surplus funds to it or require ITHA to spend surplus funds in the next year to pay ongoing health care delivery costs. ITHA says FNHA waived its rights to the funds by allowing ITHA to keep the funds year over year.
- [28] ITHA submits that FNHA has also breached the agreement by failing to provide escalator funds, i.e. increased funds allocated to programs for the 2017/2018 fiscal year end, and reimbursement of certain non-insured benefits paid out by ITHA on behalf of FNHA. These amounts total approximately \$1,000,000.
- [29] While I am not required to make the final determination of this issue, I am required to assess the strength of the positions advanced. I find that FNHA has a substantial likelihood of success on its claim to ownership of the unexpended surplus funds for the following reasons:
- a) The agreements are flow-through funding agreements. Funds flow from Canada through FNHA to ITHA and from ITHA to the people and communities entitled to receive health care funding from Canada. In essence, the funds provided under the agreement are earmarked for the provision of Canada's health care funding obligations. The funds are not provided for operations outside these federal obligations. Following termination of the agreements, ITHA no longer delivers federal health care programs.
 - b) The agreement provides Block Funding and Set Funding as "funding provided under this agreement for health programs and services". The specific uses of these different funds are set out in schedule 2 of the agreement. Surplus Set Funding is required to be returned to the Minister (FNHA) at the end of the fiscal year, but surplus Block Funding may be retained by ITHA for reinvestment into health-related activities.
 - c) Section 48(5) refers to "any funding paid to the recipient". Both Block Funding and Set Funding are funding paid to the recipient. In my view, there is a substantial likelihood that FNHA will be successful in its submission that the fact that Block Funding is permitted to be retained beyond a fiscal year does not change the character of the funds from "funding paid to the recipient".
 - d) The use of the surplus funds is restricted by the agreement. This restriction is not consistent with ITHA's absolute ownership of the surplus funds. If ITHA was correct and owned absolutely the surplus funds, upon termination of the agreement ITHA would be able to use those funds in any manner it deemed appropriate. I find this to be inconsistent with the terms upon which the flow-through funds were paid to ITHA under the agreement.

- e) The novation agreement does not change this fundamental point. While the novation agreement releases ITHA from any obligations it owed the Minister at the novation date, the agreement also requires the recipient to retain any surplus funds subject to and in accordance with the terms of the novated agreement. Therefore, the restrictions on the use of surplus funds as set out in the first agreement continues notwithstanding the novation.
- f) I also find that FNHA has a substantial likelihood of success in its submission that s. 53 of the agreement is a complete answer to ITHA's claim that FNHA waived its rights to seek a return of the surplus funds by not requesting a return of such funds at any time during the currency of the agreement. While the agreement was in force, ITHA was permitted to retain surplus Block Funding and FNHA was likely not able to request a return of such funds. However, even if the failure of FNHA to request a return of surplus funds would constitute a waiver of its right, s. 53 provides that a waiver of default under the agreement is only effective if made in writing and signed by the other party. This did not happen in relation to the surplus funds.
- g) With respect to the funds which ITHA alleges were withheld by FNHA, at best these funds would allow for a setoff of approximately \$1,000,000. At the time of the termination of the agreements, ITHA held approximately \$2,200,000 net of the Gwawaenuk trust funds. All of the potential setoff funds plus virtually all of the remaining funds, have been spent by ITHA. I find there is little likelihood that ITHA will succeed in an argument that FNHA's alleged failure to make proper payments to ITHA justifies its non-compliance with the termination provisions of the agreement.

D. Does the balance of convenience favour granting the order?

- [30] One party will be harmed, no matter what decision is made. If the preservation order is made, ITHA will likely not have sufficient funds to continue its current operations. If the preservation order is not made, FNHA is unlikely to be able to recover any of the funds which had been paid to ITHA under the agreement.
- [31] In her decision of February 28, 2019, Madam Justice Power had to assess the likelihood of harm to the parties if FNHA was permitted to terminate the funding agreement. At that time she concluded the following:
- [80] I conclude the termination would obviously render ITHA financially unviable, in that it would not have capacity for employees, for example, as that would clearly require stable income. I agree with FNHA that the harm would technically be compensable by damages, although this would not be the same as reassembling ITHA. I also see a difference between ITHA being not viable financially and ITHA ceasing to exist as a society. The applicants have not taken to evidence that the entity itself would have to collapse irreparably instead of surviving in a significantly modified form.
- [81] Overall, I find that ITHA would be irreparably harmed with respect to its financial viability as a health authority with respect to employees and services.

- [32] The situation before me on this application is no different.
- [33] On January 4, 2019, FNHA advised ITHA that, pursuant to the notice of termination, FNHA expected ITHA to "safeguard and repay where required all surplus funds accumulated by ITHA under the current funding arrangements", and "not incur any additional commitments with funding provided by FNHA funding, except to cancel or reduce the amount of outstanding commitments". As such, ITHA had noticed more than one year ago that FNHA was seeking a return of the surplus funds. ITHA continued to use those funds for its operations at its own risk, knowing the claim asserted by FNHA.
- [34] ITHA no longer receives funding from FNHA. Any funds that it obtains are from other granting bodies such as First Peoples' Cultural Council, BC Community Action Initiative or the Ministry of Children and Family Development. Since the funding agreement with FNHA was terminated in March 2019, ITHA has generated funding in the amount of \$358,962 from such funding sources; however, ITHA could not tell me how those funds had been spent or whether the new funds were fully spent on projects for which the grants were made. Further, ITHA could not tell me whether the \$115,000 it presently holds comes from the surplus FNHA funding or the new funding it generated over the last year. All of the funds have been comingled.
- [35] ITHA produced no evidence on this application to indicate that funding for the organization was imminent or expected in the next two to three months. The only evidence of funding which may be available to the organization in the 2019/2020 fiscal year is from the First Peoples' Cultural Council, which has provided a three-year funding agreement for a language project. ITHA is currently in year two of that project. The affidavit of Ms. Reid indicated that they had \$104,292 pursuant to that funding agreement; however, it was not clear if that represented a yearly amount or the total for the three years.
- [36] ITHA has indicated that it requires the last \$115,000 that it has in its accounts to continue funding its operations for the next approximately six weeks.
- [37] Ms. Reid states that ITHA requires close to \$76,000 per month to run its operations and that if that money is not available to it, the organization will have to lay off staff, close its doors, and pay penalties on their lease and equipment. Ms. Reid states that if ITHA's funds are tied up, it will not be able to pay its staff severance or pay its suppliers and the organization will go bankrupt. The difficulty I have with the submissions of ITHA is that, on the evidence before me, the dire outcome described by Ms. Reid will occur in any event when the \$115,000 has been spent, likely before two months are up.
- [38] ITHA did not provide a breakdown of where the \$76,000 per month is spent. Therefore, I cannot assess whether a certain amount should be retained by the organization to allow it to meet its ordinary obligations while preserving the remainder pending the outcome of the litigation.

- [39] I am not satisfied on the evidence before me that if I was to allow ITHA to use the funds presently on deposit in its account, ITHA will be in a position to continue to fund its operation once that money runs out.
- [40] The harm to FNHA if the preservation order is not made is significant. If the preservation order is not made, ITHA will have spent all of the money at issue long before the issues in the litigation are finally determined. Based on the evidence before me, it is likely that ITHA will be bankrupt before a trial date is set. There will be no ability of FNHA to recover any funds.
- [41] I find the balance of convenience favours FNHA. The preservation order sought will preserve the funds at issue pending final determination of this action. I realize that this outcome will have severe ramifications for ITHA. However, not granting the preservation order will only serve to forestall those ramifications a few short months. ITHA has had more than a year of notice that FNHA claimed the remaining surplus funds. It should have reduced its operation to a sustainable level based on the funding it could generate for itself outside of FNHA funding.
- [42] I recognize that my order will have a significant immediate impact on ITHA and ITHA is likely to have some immediate payment obligations which it must meet. As such, I order that \$100,000 of the existing funds on deposit with ITHA will be preserved pending final determination of this action or further court order. ITHA is permitted to use any amounts in excess of this \$100,000 subject to my further orders herein.
- [43] With respect to the \$500,000 which is earmarked for Gwawaenuk, both counsel agreed that those funds would be held in trust pending further agreement as to who will be responsible for the funds until such time as they are required to be spent. ITHA is not permitted to use these funds for any purpose other than the trust purposes upon which it holds the funds. There are more parties with an interest in those funds than are before me on this application. As such, I am reluctant to make an order regarding those funds at this time. The parties have stated to me that they are prepared to deal with these funds on the basis of solicitor's undertakings. However, they do have liberty to appear back before me to speak to terms of an order if they so desire.
- [44] On this application, FNHA also sought an order requiring ITHA to account for the unexpended funds. While I am not prepared to grant such an order at this time; I do not dismiss the application for this order. I expect FNHA will seek such an order at trial, and nothing I have said here should prejudice its ability to seek this relief. FNHA has leave to reapply on an interlocutory basis to seek that relief if it chooses.
- [45] FNHA seeks an order dispensing with the need to provide an undertaking as to damages. I do not agree that this is an appropriate case to dispense with such an undertaking. Given the ramifications to ITHA of the preservation order, I find that an undertaking as to damages is required by FNHA.

[46] I order costs in the cause to FNHA.

[47] Is there anything arising?

[48] MR. GAILUS: John Gailus here, My Lady. I take it that you will leave it up to counsel to deal with the logistics of implementing your order?

[49] THE COURT: Yes. If you need to come back to me and speak to terms, you can do so, but I am confident you can work out those terms.

[50] MR. GAILUS: Thank you.

[51] MR. FAILLE: Nothing on our end, My Lady. Thank you.

[52] THE COURT: All right. Then we can adjourn.

"Baker J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/04/2020BCSC0476cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/first-nations-health-authority-v-inter-tribal-services-association-2020>

Prepared on 26 October 2026 · Esheria