Federal Court Cour fédérale

Date: 20151221

Docket: T-1183-14

Citation: 2015 FC 1403

Ottawa, Ontario, December 21, 2015

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE SCHOODIC BAND OF THE PASSAMAQUODDY NATION BY ITS COUNCIL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] On its face, this is an application for judicial review of a decision made on behalf of the Minister of what was then Aboriginal Affairs and Northern Development Canada refusing the Schoodic Band of the Passamaquoddy Nation's request that $5,000 be paid to it from trust monies held by the Government of Canada. The funds were sought to assist in paying for research to be used in negotiations between the applicant and the Department of Fisheries and Oceans.

[2] The reality is, however, that the applicant hopes to achieve much more through this application than the simple review of an administrative decision. The applicant argues that the Minister's decision was unreasonable, as the refusal was based on the fact that the Schoodic Band was not a "recognized Band pursuant to the *Indian Act*". The applicant says that it is a "Band", as defined in section 2 of the *Indian Act*, as it is "a body of Indians … for whose use and benefit in common, moneys are held by Her Majesty". Consequently, the applicant seeks a declaration that the Minister of Indian Affairs and Northern Development is holding certain funds for its benefit.

[3] To make the declaration that the applicant is seeking, the Court would have to first find that the Schoodic Band is entitled to claim the monies sought on the basis that lands in New Brunswick that were set aside as reserve lands in 1881 were in fact set aside for the benefit of the Passamaquoddy people. The Court would then have to find that the members of the Schoodic Band are the successors to the Passamaquoddy people for whom the reserve was created. This would have enormous significance for the applicant, as the effect of such findings would be that the Schoodic Band would then come within the definition of a "Band" as set out in section 2 of the *Indian Act*, entitling it to access the social programs and other benefits that come with being a "Band".

[4] I understand that the applicant has limited resources available to it, and also understand the depth of its desire to achieve formal acceptance of its status as a "Band" through this application for judicial review. Unfortunately, the record that is properly before me is far too sparse to make the findings that the applicant seeks. I have also not been persuaded that the Minister's delegate's decision was either incorrect or unreasonable, based upon the limited

record that appears to have been before him at the time that the decision was made. Nor have I been persuaded that the Minister's delegate applied the wrong standard of proof in rejecting the applicant's request for funds. Consequently, the application for judicial review will be dismissed.

I. **Background**

[5] The applicant says that, as with many claims advanced by indigenous people, the "backstory" to this case is a community's loss of its land.

[6] The following historical background is provided in order to situate the applicant's request for funds in context and to understand the ramifications of its application for declaratory relief.

[7] It should be noted however, that this information comes from the affidavits of Chief Hugh Akagi and Mark Davis, a former official with Aboriginal Affairs and Northern Development Canada (AANDC), which were filed in connection with this application, and from the cross-examination of the two deponents on their affidavits. As will be discussed further on in these reasons, there is a real question as to the nature and extent of the information that was before the Minister's delegate when he made the decision under review. The following historical review must thus be read with this in mind.

[8] The applicant identifies itself as "The Schoodic Band of the Passamaquoddy Nation, by its Council". The applicant says that the Passamaquoddy Nation is an Aboriginal Nation whose territory is the watershed of Passamaquoddy Bay and the St. Croix River, in what is now Charlotte County in the Province of New Brunswick and the State of Maine. According to the applicant, Passamaquoddies have lived in this territory since time immemorial.

[9] The Passamaquoddy did not historically live continuously in one place, but constantly traversed their territory, hunting and fishing in various locations according to the season. There are currently two Passamaquoddy communities in Maine, and one, the Schoodic Band, near Qonaskamkuk (or St. Andrews), New Brunswick.

[10] Many of the Passamaquoddies living in New Brunswick are not "Indians" within the meaning of the *Indian Act*, R.S.C., 1985, c. I-5, and the Schoodic Band is not currently acknowledged by the Government of Canada as a "Band" under the provisions of the Act.

[11] As the Supreme Court of Canada noted in *R. v. Marshall*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513, the Crown has long had a treaty relationship with the Passamaquoddy Nation. The Crown entered into several treaties with the Passamaquoddy Nation, including 1725 and 1752 "peace and friendship" treaties, entered into to ensure that settlers in North America would not interfere with their traditional way of life. Additional treaties were signed between the Crown and the Passamaquoddy in 1760-61 and again in 1779, re-affirming their earlier treaties.

[12] In the 1763 *Royal Proclamation* (reproduced in R.S.C. 1985, App. II, No. 1), the British Crown "pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples": *Long Plain First Nation v. Canada (Attorney General)*, 2015 FCA 177 at para. 105, 388 D.L.R. (4th) 209. The *Royal Proclamation* has been described as the "Magna Carta of Indian rights in North America and the Indian 'Bill of Rights'": *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 at para 86, [2005] 2 S.C.R. 220, citing *R. v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (C.A.), at p. 912, [1982] 2 All E.R. 118.

[13] The *Royal Proclamation* confirmed that the interest of Canada's indigenous people in land "is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown": *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 69, [2014] 2 S.C.R. 257.

[14] In 1841, a petition was made to the Lieutenant Governor of New Brunswick on behalf of the Passamaquoddy people asking that they be provided with a tract of land near St. Croix on which to camp, harvest timber, and make improvements. In that same year, the Government of New Brunswick allocated fifty pounds to purchase land for the Passamaquoddy people. It is, however, unclear whether any such a purchase was ever made.

[15] With the influx of United Empire Loyalists into New Brunswick after the Treaty of Paris, lands that were traditionally used by the Passamaquoddies were being settled by people of European origin. The applicant says that in order to avoid conflict between the indigenous people and the settlers, colonial officials promised that lands in St. Andrews, on Grand Manan Island, at Salmon Falls and elsewhere in New Brunswick were to be set aside for the Passamaquoddy people, but it is unclear if this ever happened.

[16] In 1881, the Lieutenant Governor of New Brunswick directed that 200 acres of land in York County be set aside as an "Indian Reserve", which became known as the St. Croix Indian Reserve No. 22 (Saint Croix Reserve). Although there were indigenous people from the Maliseet, Mi'kmaq and Passamaquoddy Nations living in New Brunswick at the time, the Order in Council did not specify that the Saint Croix Reserve lands were being set aside for any specific band or group of "Indians".

[17] Chief Akagi says that Passamaquoddy oral tradition maintains that the lands were provided for their benefit. The applicant also says that the Reserve lands fall within the Passamaquodies' traditional territory, and that the small size of the Reserve further supports its claim that the lands were set aside for the benefit of the Passamaquoddies, as they would have only have used the lands from time to time, on a seasonal basis. The applicant argues that, taken together, this evidence suggests that the Saint Croix Reserve was created for the benefit of the Passamaquoddy people.

[18] In contrast, AANDC records suggest that the lands may have been set aside for the use of the "Amalecites" or Maliseet.

[19] The Saint Croix Reserve appears to have been administered largely from Fredericton, which led to problems, as timber on Reserve lands was being cut by individuals with no legal entitlement to the wood. Consequently, the Department of Indian Affairs issued permits to cut timber on the Reserve land, and the proceeds derived from the sale of timber in 1899 and 1927 were placed by the respondent into Trust Account No. 0032 (the Trust Account). Unlike most trust accounts held by the Department, the funds were held in a "special account", as the funds did not pertain to any specific First Nation.

[20] Historical documents note a concern on the part of the Department that the Saint Croix Reserve lands were not being occupied by indigenous people and were not being used for the purpose for which they had been set aside, something with which the applicant takes issue. In any event, in 1944, the Saint Croix Reserve lands were transferred to the Province of New Brunswick by Order in Council "free from Indian trust".

[21] The applicant maintains that it was both illegal and inconsistent with the fiduciary relationship between the Crown and Canada's indigenous people for the Crown to transfer the St. Croix Indian Reserve lands to the Province of New Brunswick without a surrender and without compensation. While the applicant has instituted a Special Claim with the Minister concerning what it describes as "the unlawful transfer of the St. Croix Reserve to the Province of New Brunswick", the legality of the transfer is not at issue in this proceeding.

[22] As a result of amendments to the *Indian Act* in 1951, the Department of Indian Affairs was required to compile "band lists" of Band members and "general lists" of "Indians" who did not belong to a specific Band. There is no indication that any attempt was made by the Department to compile a list of the Passamaquoddy people.

[23] Over time, departmental officials at Indian Affairs became concerned that it was continuing to hold monies in trust, given that the funds were not being held for any particular Band, raising a question as to whether the funds were "Indian Monies" as defined by the *Indian Act*. As a result, in 1987, the trust funds were transferred into the Consolidated Revenue Fund, with the proviso that "the funds, with interest from the date of the transfer, may be paid over at any time thereafter to those who establish a legal entitlement thereto".

II. <u>The Applicant's Attempts to Achieve Recognition as a Band</u>

[24] The Schoodic Band maintains that they are the only group of Passamaquoddy people living in Canada. Since the 1980's, the Passamaquoddy people in New Brunswick have sought formal recognition as a "Band" within the meaning of the *Indian Act*.

[25] In 1998, Mark Davis (who was then an official at the Atlantic Regional Office of Indian and Northern Affairs Canada, as AANDC was then known), advised Passamaquoddy leaders that the Passamaquoddies would have more success in their dealings with the Government of Canada if they had an elected Chief and Council.

[26] Consequently, a gathering of the Passamaquoddy people was held in the autumn of 1998, at which Hugh Akagi was elected Chief of what became known as the Schoodic Band of the Passamaquoddy Nation. Chief Akagi was also made a member of the Band's council, along with four others. At present, the Schoodic Band is accepted by the Mi'kmaq and Maliseet Nations as the Passamaquoddy community in Canada, and Chief Akagi is recognized as its Chief. The Mi'kmaq and Maliseet have, moreover, included Chief Akagi in the Atlantic Policy Congress of First Nations Chiefs Secretariat. The two Passamaquoddy communities in Maine also recognize the Schoodic Band as a Passamaquoddy community.

[27] In addition to holding his elected position, Chief Akagi also holds the position of Chief on a hereditary or traditional basis, as he is the great-grandson of Chief John Nicholas, the Chief of the Passamaquoddy people at Qonaskamkuk and elsewhere. Chief Akagi's mother was herself informally recognized as a Chief by the Passamaquoddy people, although she was not considered to be either an "Indian" or a Chief by the Government of Canada.

[28] In 2005, Chief Akagi met with the Honourable Andy Scott, the then-Minister of Indian Affairs and Northern Development. According to Chief Akagi, during this meeting, the Minister pledged his support and the assistance of his Department in securing recognition of the Passamaquoddies as a "Band" of "Indians" pursuant to the *Indian Act*. Since 2005, AANDC has provided funds to the Schoodic Band for research into the community and its membership, so as

to aid the Band and AANDC in determining whether the Band should participate in an ongoing New Brunswick land claims process.

[29] According to Chief Akagi, the Government of Canada's Treaties and Aboriginal Government branch has, since 2007, been dealing with the Council of the Schoodic Band in a process that is intended to lead to the negotiation of a comprehensive Passamaquoddy claim in relation to traditional Passamaquoddy lands in New Brunswick. Chief Akagi says that the Government has required that the Passamaquoddy people prove that they have continued to be an organized society in New Brunswick during the last century, and that research into this question be done by a professional, independent research group. To this end, the Government provided funding for a study to be carried out by Joan Holmes and Associates Inc. In January of 2014, a report entitled "Passamaquoddy in Canada: 1920 to Present" was presented by Joan Holmes at a meeting of the Passamaquoddy Council, the Government of Canada and the Government of New Brunswick.

III. Chief Akagi's Inquiry into the Trust Account

[30] In February of 2012, Chief Akagi wrote to the Minister of Aboriginal Affairs and Northern Development seeking confirmation that AANDC continued to hold monies in the St. Croix Reserve Trust Account for the Schoodic Band of the Passamaquoddy Nation. Chief Akagi also asked the Minister to provide him with the Trust Account's current capital and revenue balances.

[31] AANDC responded to Chief Akagi in March of 2012, stating that AANDC could not provide him with the requested information, as AANDC believed that the information was

protected as "personal information" under the *Privacy Act*, R.S.C. 1985, c. P-21, and could not therefore be released to members of the general public.

[32] AANDC states that its policy is that information concerning the trust accounts that it holds is only released to the Band Councils of beneficiary Indian Bands, or to a party expressly authorized by Band Councils to receive such information. As the St. Croix Reserve Trust Account was not held for the benefit of any particular Band, and the Schoodic Band was not, in any event, a recognized band under the *Indian Act*, AANDC denied Chief Akagi's request for information.

[33] In April of 2012, Chief Akagi contacted the Office of the Privacy Commissioner of Canada seeking information regarding the administration of the Trust Account, together with an accounting of it. The Office of the Privacy Commissioner responded the following month, advising that the information being sought was not considered to be "personal information" as defined by the *Privacy Act*, with the result that the Office of the Privacy Commissioner could not assist Chief Akagi in obtaining the information that he was seeking.

[34] In May of 2012, counsel for the Schoodic Band wrote to AANDC, again requesting that it be provided with information regarding the administration and current accounts of the Trust Account. AANDC responded on June 15, 2012, stating that it could not provide the requested information without being "*absolutely certain* that there is a direct and uninterrupted link between the person or persons seeking the confidential information and the trust account in question" [my emphasis]. AANDC recommended that the Band pursue its request for information through the *Access to Information Act* process.

[35] On September 28, 2012, Chief Akagi made a formal Access to Information request, asking for all records and correspondence concerning the Trust Account. He received a substantial number of documents in January of 2013, the overwhelming majority of which were heavily redacted pursuant to section 20(1)(b) of the *Access to Information Act*, R.S.C. 1985, c. A-1.

IV. The Funding Request

[36] On August 6, 2013, the Council of the Schoodic Band passed the following resolution:

> Whereas the St. Croix Reserve was set apart by Order in Council for the Passamaquoddy people of Charlotte County, New Brunswick;
>
> And whereas this Council is the Council of the collectivity of the Passamaquoddy people in Charlotte County, New Brunswick, now knows as the Schoodic Band of the Passamaquoddy Nation;
>
> And whereas there is no other Passamaquoddy entity in Canada;
>
> Now therefore this Council requests of the Minister of Indian Affairs and Northern Development that five thousand dollars ($5,000.00) of the interest money in the St. Croix Reserve trust account be provided to this Council for the purpose of paying for research into the location and operation of the Passamaquoddy fisheries and shellfish gathering in Passamaquoddy Bay and the Bay of Fundy, to assist in preparation for our negotiations with the Department of Fisheries and Oceans.

[37] The resolution was sent to the Minister of Aboriginal Affairs and Northern Development Canada that same day.

V. The Minister's Delegate's Decision

[38] On August 28, 2013, the applicant's request for funding was refused by the Acting Regional Director General for the Atlantic Region of AANDC, acting on behalf of the Minister.

[39] The decision is three paragraphs long, with the operative paragraph stating:

> Please note that AANDC administers trust accounts on behalf of First Nation Bands in Canada. As the Passamaquoddy Nation is not at this time a recognized Band pursuant to the *Indian Act*, we are unable to action your request.

[40] It is this decision that underlies this application for judicial review.

VI. The Relief Sought

[41] The applicant stated in its Notice of Application that it was seeking:

(a) An order of *mandamus* requiring the Minister of Indian Affairs and Northern Development to provide Chief Akagi and the Council of the Schoodic Band with an accounting for the Crown's administration of the St. Croix Indian Reserve Trust Fund;

(b) An order of mandamus requiring the Minister of Indian Affairs and Northern Development to provide Chief Akagi and the Council of the Schoodic Band with a copy of the files relating to the St. Croix Indian Reserve Trust Fund, as requested pursuant to the *Access to Information Act*;

(c) An order of mandamus requiring the Minister of Indian Affairs and Northern Development to provide the Council of the Schoodic Band with $5000.00 from the revenue account of the St. Croix Indian Reserve Trust Fund, as requested by the Council, for the purpose of mapping research; and

(d) A declaration that the Minister of Indian Affairs and Northern Development is holding the funds in the St. Croix Indian Reserve Trust Account for the benefit of the Schoodic Band.

[42] By the conclusion of the hearing, counsel for the applicant had acknowledged that its claims for access to files relating to the St. Croix Indian Reserve Trust Account had to be pursued through the process established under the *Access to Information Act*. As a consequence the applicant is no longer seeking the relief sought under heading (b).

[43] The applicant further recognized that it was not open to me, sitting in judicial review of the Minister's delegate's decision, to order that the $5,000 be paid to the applicant. As a result, the applicant is no longer seeking the relief referred to at paragraph (c). The applicant is, however, still seeking the orders described in (a) and (d).

VII. Issues

[44] At the hearing of the application, the applicant identified what it says are two reviewable errors in the Minister's delegate's decision. According to the applicant, the Minister's delegate erred:

1. In applying the wrong standard of proof when making his decision by requiring that the Schoodic Band establish with absolute certainty that there is a link between the present-day Schoodic Band Council and the Trust Account held in connection with the St. Croix Indian Reserve; and

2. In requiring that the Schoodic Band be a "recognized Band" pursuant to the *Indian Act*, when the Act does not make any reference to the requirement of "recognition" by the Government of Canada.

[45] However, in its further memorandum of fact and law, the applicant identifies the issues in this application as being:

a. Is recognition by the Department of Indian Affairs necessary for a group of First Nations people to be considered a Band under the *Indian Act* if that group otherwise meets the statutory definition?

b. Is the Schoodic Band of the Passamaquoddy Nation the successor entity to the group for whom the St. Croix Indian Reserve was set apart, and thus also the rightful beneficiary of the St. Croix Indian Reserve Trust Account?

c. Was it unlawful for the Minister to refuse to grant the Schoodic Band's request for funds on the basis that they are not a recognized Band under the *Indian Act*?

[46] I understand the applicant's first and third issues to relate to its argument that the Minister's delegate erred in requiring that the Schoodic Band be a "recognized Band" pursuant to the *Indian Act*. The applicant's second issue relates directly to its request for a declaration that the Minister of Indian Affairs and Northern Development held the funds in the St. Croix Indian Reserve Trust Account for the benefit of the Schoodic Band.

[47] Elsewhere in its memorandum, however, the applicant raises the argument that the Minister's delegate applied the wrong standard of proof in considering the applicant's request for funding, by requiring that the Schoodic Band establish the basis for its request with absolute certainty.

[48] Before addressing the issues raised by the applicant, however, there are two preliminary matters that must be addressed: the fact that the application was brought outside of the statutory time limit for the commencement of an application for judicial review, and the state of the record in this case.

VIII. Extension of Time

[49] Subsection 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, requires that applications for judicial review of administrative decisions be commenced within 30 days of the date on which the decision was communicated to the applicant, or such further time as may be fixed by the Court. The Minister's delegate's decision was made on August 28, 2013. There is no suggestion that the decision was not communicated to the applicant at or around the time that it was made. The applicant's application for judicial review was not, however, commenced until May 14, 2014. As a result, the applicant required an extension of time in which to bring the application.

[50] No extension of time was, however, sought by the applicant until an oral motion was brought in the middle of the hearing.

[51] There are four criteria that must be satisfied on a motion to extend the time for the commencement of an application such as this. The applicant must establish first, that it had a

continuing intention to pursue the application; second, that there is some merit to the application; third, that no prejudice to the respondent arises as a result of the delay; and fourth, that there is a reasonable explanation for the delay: *Canada (Attorney General) v. Hennelly* (1999), 167 F.T.R. 158 (C.A.), 244 N.R. 399. The underlying consideration is that justice be done between the parties: *Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, (C.A.), 63 N.R. 106.

[52] The respondent accepted that the applicant had a continuing intention to pursue this matter, and that there is some merit to the application. The respondent further conceded that it had not suffered any prejudice as a result of the delay. The respondent noted, though, that no explanation had been provided for the delay by the applicant. However, once the applicant's counsel explained the reasons for the delay in commencing the application, the respondent accepted counsel's explanation, and I was satisfied that it was in the interests of justice that the extension of time be granted. Consequently, an oral order was made to that effect in the course of the hearing.

IX. The State of the Record that was Before the Minister's Delegate

[53] Consideration of this application for judicial review has been complicated by the fact that it is not clear precisely what was in the record that was before the Minister's delegate when he made the decision under review.

[54] Given that the task for the Court is to consider the reasonableness or correctness of an administrative decision *in light of the record that was before the decision-maker*, the failure to provide the Court with evidence of the material relied upon by the decision-maker can interfere with the ability of the reviewing Court to do its job, and can even go so far as to "immunize the

administrative decision-maker from review on certain grounds": *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at para. 14, [2015] F.C.J. No. 1397, citing *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at para. 276 (dissenting reasons, but not on this point).

[55] The applicant included a request under Rule 317 of the *Federal Courts Rules*, S.O.R./98-106, in its Notice of Application, asking that the respondent provide it with "the tribunal record which consists of the entire file of the respondent and the Department of Indian Affairs and Northern Development in relation to the St. Croix Indian Reserve Trust Fund".

[56] The respondent objected to this request under Rule 318(2), submitting that the applicant's request was "too broad and far exceeds 'material relevant' to [the applicant's] application". The respondent further contended that the request "…contains information which is confidential to third parties, which is not relevant to the application". The respondent also noted that the decision under review was not clearly identified in the Notice of Application.

[57] The respondent advised the applicant, however, that "[i]f you are prepared to identify the salient decision, a more narrow request can be entertained". There is no indication in the record before me that the applicant ever responded to the respondent's objection.

[58] Where an objection is brought to a production request, the requesting party can either accept the objection, or bring a motion to challenge the objection: Brian J. Saunders, the Hon. Donald J. Rennie & Graham Garton, *Federal Courts Practice*, 2016 ed. (Toronto: Carswell, 2015) at 754. Although the *Federal Courts Rules* provides a mechanism for the resolution of

production disputes, the applicant did not pursue the matter by availing itself of the Rule 318 process, and no tribunal record was ever produced in this case.

[59] The respondent did produce an affidavit from Mark Davis, the departmental official who was involved in discussions with Chief Akagi over the years regarding the status of the Passamaquoddy in New Brunswick. While Mr. Davis provided a number of documents as exhibits to his affidavit, he did not identify which of these documents were before the Minister's delegate at the time that the decision under review was made. Nor did Mr. Davis indicate which of the documents appended to Chief Akagi's affidavit were before the Minister's delegate when the request for funds was considered.

[60] Where there is uncertainty as to whether documents appended to an affidavit filed in relation to an application for judicial review were before an administrative decision-maker at the time that the decision was made, the issue can be clarified through cross-examination on the affidavit: *Access Copyright*, above at para. 23. Although Mr. Davis was cross-examined on his affidavit, he was not asked to identify the documents forming the record in this case during his cross-examination.

[61] The one thing that is clear, however, is that the Report of Joan Holmes and Associates Inc. (on which the applicant relies to support its claim that it is the beneficiary of the St. Croix Indian Reserve Trust Fund) was not before the Minister's delegate when he made the decision at issue in this proceeding as the Report post-dates the decision. While the applicant says that the respondent had an earlier draft of the Report in its possession at the time that the Minister's delegate's decision was made, there is no evidence in the record before me to support this claim, nor is there any evidence establishing what this earlier version of the Report might have said.

[62] Judicial review is ordinarily to be conducted on the basis of the record that was before the original decision-maker. Additional evidence may be admitted on judicial review in limited circumstances where, for example, there is an issue of procedural fairness or jurisdiction: see *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218 at para. 30, [2003] 1 F.C. 331. The applicant makes no such assertion in this case.

[63] The Holmes Report also does not merely provide uncontroversial background facts for the assistance of the Court: *Ochapowace Indian Band v. Canada (Attorney General)*, 2007 FC 920 at para. 9, 316 F.T.R. 19*; Chopra v. Canada (Treasury Board)*, (1999), 168 F.T.R. 273 at para. 9, [1999] F.C.J. No. 835. Indeed, the respondent takes issue with a number of the findings made in the Report.

[64] While the fact that the Holmes Report was not before the Minister's delegate when he made the decision under review is determinative of the question of the document's admissibility, I would also note that there are a number of other problems with accepting the Report as evidence on this application. It is clearly intended to be an expert's report, yet the applicant did not comply with the expert evidence requirements of the *Federal Courts Rules*. In particular, we have not been provided with curricula vitae for the individual or individuals involved in the preparation of the Report, with the result that we know nothing about their areas of expertise. The Report is, moreover, attached as an exhibit to the affidavit of Chief Akagi, meaning that it was not open to the respondent to cross-examine its author or authors on it.

[65] In his oral submissions, counsel for the respondent attempted to identify which of the documents produced by the parties were before the Minister's delegate at the time that the decision under review was made. I do not understand the applicant to dispute the respondent's

claim, although it suggests that the honour of the Crown imposed a duty on the Minister's delegate to seek out additional information before dealing with the request.

[66] In the interest of providing the applicant with the greatest possible latitude in establishing its case, I am prepared to assume for the purposes of determining whether the applicant has demonstrated the existence of a reviewable error in the Minister's delegate's decision that all of the documents produced by each side were available to the Minister's delegate when he made the decision under review. The one exception to this is the Holmes Report, which, as noted earlier, was clearly not before the Minister's delegate, nor available to him, at the time that the decision in issue was made.

X. Analysis

[67] Subsection 61(1) of the *Indian Act* provides, in part, that "Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held". "Indian moneys" are defined in subsection 2(1) of the Act as being "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands".

[68] The request for funds at issue in this proceeding was made under subsection 66(1) of the Act, which provides that with the consent of a band council, "the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band".

[69] In considering the request for funds, the applicant accepts that it was legitimate for the Minister's delegate to first ask whether the request came from the Council of the Band for whom

the monies were held in trust before considering whether the monies would "promote the general progress and welfare of the band or any member of the band".

[70] I also understand it to be common ground that the Minister's delegate never considered whether the $5,000 sought by the applicant would "promote the general progress and welfare of the band or any member of the band", as he was not satisfied that the applicant was in fact "the council of a band". As was noted earlier, the applicant says that in making this finding, the Minister's delegate erred by requiring that the applicant prove that it was a "Band" with absolute certainty. This argument will be considered next.

A. *The Standard of Proof Applied by the Minister's Delegate*

[71] It will be recalled that the operative portion of the decision states that "[a]s the Passamaquoddy Nation is not at this time a recognized Band pursuant to the *Indian Act*, we are unable to action your request". The letter does not, however, refer to the standard of proof that would have to be met in order for the applicant to be recognized as a "Band" for the purposes of the Act.

[72] The applicant nevertheless submits that in order for it to be recognized by the Minister's Delegate as a "Band", the Minister's delegate required that the applicant establish with "absolute certainty" that the St. Croix Indian Reserve lands were originally set aside for the benefit of the Passamaquoddy peoples, and that the members of the Schoodic Band are the successors to the Passamaquoddy people for whom the reserve was originally created. In so doing, the applicant says, the Minister required it to satisfy an evidentiary burden that was even stricter than the one that would be imposed on the Crown in a criminal prosecution.

[73] I do not need to decide whether the standard of review to be applied with respect to this aspect of the Minister's delegate's decision is that of correctness or reasonableness because the respondent agrees that the balance of probabilities standard is the one that should be applied to a funding request such as this, and that the use of a standard of absolute certainty would be both incorrect and unreasonable. I agree. The balance of probabilities standard is the one that would be applied by a Court in assessing claims by indigenous people, and there is no reason to think that the Minister should apply a more rigorous standard in dealing with a request from a group of indigenous people.

[74] Where the respondent does disagree with the applicant, however, is with respect to whether the Minister's delegate did in fact apply a standard of absolute certainty in concluding that the applicant is not a "recognized Band pursuant to the *Indian Act*".

[75] In support of its contention that the Minister's delegate applied the standard of absolute certainty in rejecting its request for funding, the applicant points to the June 15, 2012, letter from the Regional Director General of the Atlantic Region of AANDC to counsel for the applicant. This letter was written in response to Chief Akagi's May, 2012, request for information regarding the administration and current accounts of the Trust Account.

[76] In his response, the Regional Director General stated that Canada could not provide the requested information without being "*absolutely certain* that there is a direct and uninterrupted link between the person or persons seeking the confidential information and the trust account in question" [my emphasis]. The Regional Director General went on to recommend that the Band pursue its request for information through the *Access to Information Act* process.

[77] The applicant's request for funding was sent to the Minister on or around August 6, 2013 – nearly 14 months after the Regional Director General's response to Chief Akagi's request for information. AANDC's response came from a different Departmental official - the Acting Regional Director General for the Atlantic Region of AANDC - and is dated August 28, 2013. It does not expressly identify the standard that would have to be met in order for AANDC to be satisfied that the applicant was in fact "a recognized Band pursuant to the *Indian Act*". I am not, however, prepared to infer that the standard referred to by one Departmental official in one context, namely a request for information, was then subsequently applied by a different Departmental official considering a different issue more than 14 months later.

[78] In coming to this conclusion, it must be kept in mind that AANDC's prior decisions relate to requests for information, which raised different questions arising in a different statutory context, which therefore required different considerations on the part of the decision-maker. Put simply, while the factual background to the Schoodic Band's inquiries may have been the same throughout, the legal context in which the decisions were made was not.

[79] The decision under review is admittedly very brief. The applicant has not, however argued that the decision should be set aside based on an insufficiency of reasons, nor has it demonstrated that an incorrect or unreasonable standard of proof was in fact applied by the Minister's delegate in rejecting its request.

[80] Before leaving this issue, I would further note that even if the Minister's delegate erred as alleged, the outcome of the applicant's request would likely not have been any different given the sparsity of the record that was before him. Without the Holmes Report, there was little evidence to support the Schoodic Band's claim that the St. Croix Indian Reserve lands were

originally set aside specifically for the benefit of the Passamaquoddy peoples, or that the members of the Schoodic Band are indeed the successors to the Passamaquoddy people for whom the reserve was originally created.

[81] The answers to these questions are also not as clear as the applicant suggests. The St. Croix Indian Reserve was established in York County, whereas I understand that the traditional territory of the Passamaquoddies was in what is now Charlotte County. There were other First Nations people living near the St. Croix Indian Reserve at the time that the Reserve was created, and, as Chief Akagi himself acknowledged in his cross-examination, there are other aboriginal groups asserting claims to the St. Croix Indian Reserve lands.

[82] Although Chief Akagi contends that these claims do not actually compete with that of the Passamaquoddy people, the fact is that a claim to the Reserve lands has been asserted by the Union of New Brunswick Indians on behalf of all of the Indians of New Brunswick. Claims have also been asserted by the Congress of Aboriginal People, on behalf of the Maliseet people, and by the Kingsclear and St. Mary’s First Nations, both of whom are also Maliseet.

[83] It remains open to the applicant to file a fresh request for funding, this one supported by the Holmes Report. The Minister or her delegate would then have to consider whether it had now been established on a balance of probabilities that the St. Croix Indian Reserve lands were set aside for the benefit of the Passamaquoddy peoples, and whether the members of the Schoodic Band are indeed their successors.

[84] If these things are established on a balance of probabilities, the Minister or her delegate would then have to go on to consider whether the expenditure of the funds requested would be

for a purpose that would promote the general progress and welfare of the Schoodic Band (or any member of the Band), keeping in mind the principles that govern the relationship between Canada and its indigenous people, including Canada's fiduciary obligations, the honour of the Crown, and the over-riding goal of reconciliation between the Crown and indigenous peoples.

[85] This takes me to the applicant's second argument, which is that the Minister's delegate erred in refusing the applicant's funding request on the basis that the Schoodic Band was not a "recognized Band pursuant to the *Indian Act*".

B. *The Schoodic Band as a "Recognized Band"*

[86] As previously noted, the operative portion of the decision states that "[a]s the Passamaquoddy Nation is not at this time a *recognized Band* pursuant to the *Indian Act*, we are unable to action your request" [my emphasis].

[87] The applicant notes that the term "recognized Band" does not appear anywhere in the *Indian Act*, submitting that being a "Band" is a question of fact: the Schoodic Band either is a "Band" or it is not. Because the Crown is holding funds for the benefit of the group of "Indians" that make up the Schoodic Band, the applicant says that it is a "Band" according to the definition of the term contained in the *Indian Act*, regardless of whether AANDC recognizes it as such.

[88] In refusing its request for funding, the applicant says that the Minister's delegate invented an additional criterion as part of the definition of a "Band" for the purposes of the *Indian Act* - namely recognition by the Crown - when the Act imposes no such requirement. In so doing, the applicant says that the Minister's delegate erred in law and that this makes the Minister's delegate's decision both unreasonable and incorrect.

[89] The applicant also says that by requiring formal "recognition" of its status as a "Band", the Minister is penalizing the Schoodic Band, as the failure of the Minister to accept that the Schoodic Band is in fact a "Band", as contemplated by the *Indian Act*, means that its members will not have access to the essential services and other benefits that are extended to Band members in Canada.

[90] Citing my decision in *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204 at para. 73, 405 F.T.R. 182, the applicant submits that the standard of review to be applied in reviewing this aspect of the Minister's delegate is that of correctness.

[91] However, *Sambaa K'e* was a "duty to consult" case and the issues in that case were thus very different from the issues in the present case. Moreover, relying on the Supreme Court's decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 61, [2004] 3 S.C.R. 511, I went on in *Sambaa K'e* to find that to the extent that the duty to consult or accommodate required an assessment of the facts, a degree of deference to the findings of fact of the original decision-maker may be appropriate.

[92] I agree with the applicant that to some extent, whether "a body of Indians" constitutes a "Band" is a question of fact, although the facts have to be assessed against the statutory definition of the term, making the question ultimately one of mixed fact and law. As such, the Minister's delegate's finding on this point is entitled to deference.

[93] I am also not persuaded that the Minister's delegate did in fact require the applicant to meet a non-existent legal criterion as alleged. When read in context, the Minister's delegate's use of the term "recognized Band" does not indicate that he was requiring the applicant to satisfy a

definition of "Band" that is not found in the *Indian Act*. Rather, it appears that the term is being used as a descriptor, simply noting that the applicant had not, as yet, established that it met the statutory definition of "Band".

[94] It is noteworthy that the applicant itself discusses the "recognition" of the Schoodic Band, using the term as a descriptor rather than a legal criterion. For example, the applicant states that "[s]ince the early 1990's, there have been talks between the Passamaquoddies and the Government of Canada about *formal recognition* of the Passamaquoddies by the Government of Canada": applicant's Amended Memorandum of Fact and Law at para. 5, my emphasis.

[95] Chief Akagi also asserts in his affidavit that during his 2005 meeting with Andy Scott, the Minister "pledged the support and the assistance of his Department in *securing recognition of the Passamaquoddies as a 'band'* of 'Indians' pursuant to the *Indian Act*": at para. 21, my emphasis.

[96] The *Indian Act* provides three different definitions of what will constitute a "Band" for the purposes of the Act, none of which involve recognition by the Government of Canada.

[97] Subsection 2(1) of the *Indian Act* defines a "Band" as being "a body of Indians … for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951". Alternatively, a "Band" is "a body of Indians … for whose use and benefit in common, moneys are held by Her Majesty". Finally, a "Band" can also be "a body of Indians" that have been "declared by the Governor in Council to be a band for the purposes of this Act".

[98] The applicant submits that it is a "Band" as defined in paragraph 2(1)(b) of the *Indian Act*, as it is "a body of Indians … for whose use and benefit in common, moneys are held by Her Majesty". The applicant is, moreover, seeking a declaration that the Minister of Indian Affairs and Northern Development is holding the funds that were previously in the Trust Account for the benefit of the Schoodic Band. The effect of such a declaration would be that the Schoodic Band would then come within the definition of a "Band" as set out in section 2 of the *Indian Act*, giving it the recognition that it has long sought.

[99] The respondents concedes that there is no need for there to be formal recognition of its status by the Government of Canada for a finding to be made that the Schoodic Band is indeed a "Band" for the purposes of the *Indian Act*. Indeed, as the Supreme Court of Canada held in *Isaac v. Davey*, [1977] 2 S.C.R. 897, 77 D.L.R. (3d) 481, a finding that a "group of Indians" constitutes a "Band" can be made if there is *clear evidence* that moneys were being held by the Crown for the use and benefit of the "group of Indians" in question: at page 902, [my emphasis], see also *Papaschase Indian Band No. 136 v. Canada (Attorney General)*¸ 2004 ABQB 655 at para. 168, 365 A.R. 1.

[100] The problem here is that, as was noted earlier in these reasons, it does not appear that there was clear evidence before the Minister's delegate at the time that he made the decision under review that the monies that were previously in the Trust Account were in fact being held by the Crown for the use and benefit of the Passamaquoddies generally or the Schoodic Band in particular.

[101] Under the provisions of subsection 66(1) of the *Indian Act*, the Minister may only provide funds to "Bands", as defined by the Act. As a consequence, for the applicant to be

provided with the funds that it has requested, it first must establish that it is a “Band” as defined by the Act. There is no record of the applicant ever having been considered to be a “Band” by the Crown. Indeed, the applicant was well aware of this fact, which is why it has been advocating for its recognition as a “Band” for many years.

[102] As was noted earlier, to find that the trust monies that are being held by the Crown are in fact being held for the use and benefit of the Schoodic Band requires the connecting of a number of dots. It would first have to be shown that the St. Croix Indian Reserve lands were originally set aside for the benefit of the Passamaquoddy people. If that was established, it would then have to be shown that the members of the Schoodic Band are the successors to the Passamaquoddy people for whom the Reserve was originally created. A question may also arise as to whether the members of the Schoodic Band are indeed “a body of Indians” within the meaning of the *Indian Act*, given that at least some of its members are not currently registered as “Indians”.

[103] Prior to the Holmes Report, there was little evidence connecting these dots, particularly on the question of successorship. Given that, the finding of the Minister’s delegate that the applicant had not yet established that it was a “recognized Band” was one that was reasonably open to him on the record that was before him.

[104] This does not mean that the Schoodic Band will not be able to meet the statutory definition of a “Band” in the future, perhaps with the benefit of the Holmes Report or any other additional evidence it may wish to present to the Minister. It just means that it has not done so yet.

XI. Conclusion

[105] I understand the applicant's frustration and the deep desire of its members to formalize their collective status as a "Band" under the *Indian Act*. Unfortunately, given the record that appears to have been before the Minister's delegate at the time that the decision under review was made, this application for judicial review is not the vehicle by which they can achieve this goal. Consequently, the application for judicial review is dismissed. In the exercise of my discretion, I make no order as to costs.

[106] Before concluding, I would note that this decision does not foreclose a finding by the respondent in the future that the Schoodic Band is a "Band" for the purposes of the *Indian Act*. As previously mentioned, it is open to the applicant to reapply for the funds it seeks, supporting its new request with the Holmes Report and whatever submissions it may wish to make as to why this newly available evidence demonstrates that it now meets the statutory definition of a "Band".

[107] Such a request would then have to be considered by the respondent in good faith, in a manner consistent with the constitutional obligations of the Crown in dealing with Canada's indigenous people. The question of whether the request came from the Council of the Band for whom the monies were held in trust would have to be decided by the Minister or her delegate on a balance of probabilities.

[108] The respondent suggests that an alternative and more straight-forward approach would be for the applicant to ask the Government of Canada to pass an Order in Council declaring the Schoodic Band to be a "Band" for the purposes of the *Indian Act*. The respondent says that this would avoid the Schoodic Band first having to establish that its members were indeed "Indians"

in that they were registered as “Indians” or were entitled to be registered as “Indians” under the *Indian Act*: *Davis v. Canada (Attorney General)*, 2007 NLTD 25 at paras. 126-127, [2007] N.J. No. 42, aff’d 2008 NLCA 49, [2008] N.J. No. 280, and see paragraph 6(1)(b) of the *Indian Act*.

[109] I accept that this may be another way for the applicant to achieve its goal, and would encourage the parties to work together, in the spirit of reconciliation, in an effort to resolve the questions that divide them in the most expeditious manner possible.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, without costs.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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