Federal Court  Cour fédérale

**Date: 20150924**

**Docket: T-722-12**

**Citation: 2015 FC 1113**

**Ottawa, Ontario, September 24, 2015**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**SAGKEENG FIRST NATION**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA AND THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA**

**Respondents**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision issued by Ms. Nadine Stiller, Director, Funding Services Operations, Manitoba Region, Aboriginal Affairs and Northern Development Canada ("AANDC"), dated March 7, 2012. The decision was to only partially fund the Sagkeeng First Nation's ("Sagkeeng" or "Band") employer contributions to its defined benefits pension plan for its teachers, The Retirement Plan for the Employees of the Sagkeeng

First Nation ("Pension Plan"). The application is brought pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 ("*Federal Courts Act*").

**Background**

[2] Sagkeeng is legally known as the Fort Alexander Indian Band and is located in the province of Manitoba. The Government of Canada, by way of the Department of Indian and Aboriginal Affairs, now the Department of Aboriginal Affairs and Northern Development Canada and known as AANDC, administered education for Sagkeeng until 1974. At that time, AANDC delegated its responsibility in this regard to Sagkeeng. As a result, Sagkeeng became the employer of the teachers, who had previously been federal public servants, and transitioned those personnel to its Pension Plan. As the employer of the teachers, Sagkeeng was responsible for making the employer contributions to the Pension Plan.

[3] The Pension Plan is a defined benefits plan ("DB Plan"). This means that its contributions are calculated with reference to maintaining a fixed benefit amount and, therefore, employer contributions may fluctuate with the market and investment choices of the plan administrator. This is unlike a defined contribution pension plan ("DC Plan"), where employer contributions are fixed.

[4] Pursuant to the *Pension Benefits Standards Act*, 1985, RSC 1985, c 32 (2d Supp) and the *Pension Benefits Standards Regulations*, 1985, SOR/87-19, all pension plan deficiencies are to be remedied by additional employer contributions, referred to as special payments, to maintain the defined level of benefits.

[5] AANDC provides funding to Sagkeeng for payment of its employees' benefits through the Band Employees Benefits Program ("BEB Program"), the particulars of which are set out in the Band Employee Benefits Program Policy ("BEB Policy"). AANDC and Sagkeeng enter into an annual funding arrangement ("FA"), which serves as the vehicle by which funding is actually received by Sagkeeng. The BEB Policy sets express limits on the amount that AANDC will fund employer contributions to DC Plans. It also contains an exemption for three DB Plans, including the Pension Plan. The exception does not provide an upper limit but instead provides that funding will be based on Actuarial Valuation Reports ("AVR"s).

[6] An AVR for the fiscal period ending August 31, 2008 identified, for the first time since its inception, that the Pension Plan was in a deficit position. The Pension Plan remained in a deficit position in the fiscal years 2009–2012, and Sagkeeng, as the employer, was required to make special payments to keep the Pension Plan solvent. Sagkeeng requested additional funding from AANDC to cover the cost of the special payments. In August 2010 AANDC advised Sagkeeng that special payments were not eligible for funding.

[7] Sagkeeng requested adjudication pursuant to the BEB Policy's dispute resolution mechanism. The parties agreed to waive the requirement under that mechanism to proceed in the first instance with the adjudication before the Regional Director General of AANDC ("RDG"). Instead, a dispute resolution with the Director General, Governance ("DG"), was scheduled for January 5, 2011, this was later adjourned to February 8, 2011. On February 3, 2011, Sagkeeng cancelled the proceeding and advised by letter of March 9, 2011 that it could not proceed until it had received all relevant documents.

[8] On March 7, 2012, Ms. Stiller sent a letter to Sagkeeng confirming a meeting scheduled for March 9, 2012 and advising that AANDC had reconsidered its position concerning funding to be provided for the Pension Plan. This resulted in the payment of additional, but not full funding. That decision is the subject of this application for judicial review.

**Decision Under Review**

[9] Given its brevity, the whole March 7, 2012 decision is set out below.

> Dear Chief and Council:
>
> Re: Meeting Scheduled March 9, 2012 – Band Employees Benefits Funding
>
> This letter is to confirm the meeting scheduled for 1:00 pm Friday March 9, 2012 at the AANDC offices at 365 Hargrave Street, Winnipeg, MB. The purpose of the meeting is to discuss the BEB funding issues that have been disputed by your First Nation.
>
> In advance of the meeting please note AANDC has reconsidered its position regarding funding to be provided for the Sagkeeng Defined Benefit Pension Plan, which results in additional BEB funding of $890,504.00.
>
> If you have any questions on this matter, you can reach me at […]
>
> Yours truly,
>
> Nadine Stiller
>
> Director, Funding Services Operations
>
> Manitoba Region

**Issues**

[10] The issues can be formulated as follows:

i. Does this Court have jurisdiction to hear this application for judicial review?

ii. Is the application for judicial review premature?

iii. Did AANDC commit a reviewable error?

**Standard of Review**

[11] The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved, in a satisfactory manner, the degree of deference owed to a particular category of question. If it has not, the Court must engage the second step, which is to determine the appropriate standard having regard to the nature of the question, the expertise of the tribunal, the presence or absence of a privative clause, and the purpose of the tribunal (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51-64 [*Dunsmuir*]; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48).

[12] In this matter the parties agree that the standard is reasonableness but provide no authorities previously establishing this in similar circumstances. I agree, however, that applying the *Dunsmuir* criteria in these circumstances leads to that standard. The decision under review was made in the context of the BEB Program and pursuant to the BEB Policy. Thus, while there is no enabling legislation that creates a tribunal or informs the decision-maker, this is an administrative decision concerning pension policy and funding. The Federal Court of Appeal in

*Elsipogtog First Nation v Canada (Attorney General)*, 2015 FCA 18 [*Elsipogtog FCA*] has recently dealt with the standard of review in analogous circumstances. In *Elsipogtog FCA*, the Court found that the reasonableness standard applied to the Minister's interpretation of a Memorandum of Understanding that circumscribed his powers in the administration of an income assistance program. The Minister's special familiarity with the terms of the Memorandum of Understanding justified a deferential standard of review. In my view, the interpretation of the BEB Program and BEB Policy in this case is a similar circumstance. Further, questions of fact, discretion and policy, as well as questions where the legal issues cannot be easily separated from the factual issues, generally attract a standard of reasonableness (*Dunsmuir* at paras 51, 53).

[13] Reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paras 45, 47-48; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 62).

**Preliminary Issue – admission of new evidence**

[14] Pursuant to a case management Order dated January 19, 2015, the Respondents filed a supplementary memorandum of fact and law seeking to have admitted into evidence, at the judicial review hearing, a statement of claim attached as Exhibit "A" to an affidavit of Ms. Lisa Cholosky, counsel with the Department of Justice ("DOJ" ), affirmed on February 5, 2015. Ms. Cholosky states in her affidavit that she was assigned as counsel on September 3, 2014, that on

November 25, 2014 she accepted service of the statement of claim and that she had no prior knowledge of the filing of it nor did a review of DOJ's file reflect prior knowledge of the claim.

[15] The statement of claim is as between Acting Chief Derrick Henderson and Band Councillors: Kirby Swampy, Lyle Morrisseau and Joseph Daniels on their own behalf and on behalf of Sagkeeng First Nation also known as Fort Alexander Indian Band No. 262 and its members and on behalf of the Members of the Retirement Plan for employees of the Fort Alexander Indian Band, Plaintiffs, and Her Majesty the Queen in Right of Canada as represented by the Minister of Aboriginal Affairs and Northern Development Canada and the said Minister of Aboriginal Affairs and Northern Development Canada and the Attorney General of Canada, Defendants, filed in the Queen's Bench of Manitoba, Winnipeg, as Court File No. Cl 14-01-91171 ("MBQB Statement of Claim").

[16] The MBQB Statement of Claim, seeks, amongst other things, a declaration that the defendants therein are obliged, pursuant to an agreement or otherwise, to pay for the full costs, including special payments, of the contributions of Sagkeeng to the Pension Plan; special damages for all pecuniary losses including penalties, interest and fees resulting from the failure of the defendants to make the required contributions; general damages; aggravated, punitive and exemplary damages; and, interest and costs. The MBQB Statement of Claim sets out five causes of action: breach of contract, misrepresentation, interference with contractual relations by unlawful means, unjust enrichment, and, breach of fiduciary duty.

[17] As to breach of contract, Sagkeeng asserts that prior to the establishment of the Pension Plan an express or implied agreement existed between it and the defendants which included a material term or condition that the defendants would pay Sagkeeng the full costs, including special payments, of its contributions to the Pension Plan. As to misrepresentation, Sagkeeng asserts that the defendants represented to it, prior to the establishment of the Pension Plan and on an ongoing basis throughout its administration, that the defendants would pay Sagkeeng the full costs, including special payments, of the required Pension Plan contributions. The defendants owed a private law duty of care in making the representation to take reasonable care to ensure its accuracy.

[18] Sagkeeng also asserts that the defendants unlawfully interfered with their ability to fulfil their obligations under the Pension Plan as a result of the defendants' refusal to provide the funding as required by agreement, the BEB Policy or otherwise and that the defendants were unjustly enriched. Further, that the relationship between Sagkeeng and the defendants is a fiduciary relationship giving rise to a fiduciary duty of care which was breached by the failure to provide full funding of the Pension Plan contributions.

[19] Sagkeeng claims that, as a result of these breaches, it has and will continue to suffer loss and damage with respect to the unpaid normal contributions, unpaid special contributions, interest and of penalties with respect to the unpaid contributions, loss and damage resulting from the use of other resources by Sagkeeng to pay the amounts that should have been paid by the defendants including reduction in programmes and support such as housing and housing

maintenance, infrastructure as well as loss and damage to the members of the Pension Plan as a freeze on or reduction of benefits.

*Respondents' Position*

[20] The Respondents assert that the MBQB Statement of Claim meets the new evidence requirements of Rule 312 of the *Federal Courts Rules*, SOR 98/106 ("*Federal Courts Rules*") and the test set out in *Atlantic Engraving Ltd v Lapointe Rosenstein*, 2002 FCA 503 at paras 8-9.

[21] Further, that it will assist the Court because it demonstrates that, at their core, Sagkeeng's issues are less about a particular delegated authority involved in the process of making a specific decision, and more about damages and a determination of any ongoing obligations arising from an alleged contractual relationship between Sagkeeng and Canada (*Manuge v Canada*, 2010 SCC 67 at paras 17-22 [*Manuge*]).

[22] Further, *Nation Huronne-Wendat v Canada*, 2014 FC 91 at para 29 [*Huronne-Wendat FC*], aff'd 2014 FCA 264 which considered a very similar claim, addressed the question of whether the claim ought to have been proceeded by a judicial review. The Respondents submit that the Court in that case referred to *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 76 [*TeleZone*] which stated "If the Plaintiff has a valid cause of action in damages he or she is normally entitled to pursue it" and reasoned that the primary distinction between a judicial review and a claim of damages is the nature of the remedies sought. That reasoning favours an action for damages in this matter. The Respondents also submit that the Crown ought not to be put to answering multiple proceedings when one will serve.

*Sagkeeng's Position*

[23] Sagkeeng submits that the test for leave in filing an additional affidavit pursuant to Rule 312 is not in dispute and was recently restated in *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2014 FCA 88 [*Forest Ethics*]. There are two preliminary requirements that must be met: is the evidence admissible on the application for judicial review and is it relevant to an issue properly before the Court? Only if it meets these requirements should the Court go on to consider whether to exercise its discretion and, in that regard, referring to the guiding principles of whether the evidence could have been available with the exercise of due diligence, whether it assists the Court, and, whether it causes substantive or serious prejudice to the other party.

[24] The general rule in applications for judicial review is that, subject to certain exceptions, the evidentiary record before the Court is restricted to the evidentiary record that was before the administrative decision-maker whose decision is the subject of the review (*Assn of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19-20 [*Assn of Universities*].

[25] Sagkeeng submits that the evidence contained in the Cholosky Affidavit was not before the decision-maker in this case and does not fall within an exception to the general rule.

[26] Further, that the Respondents do not take issue with the Court's jurisdiction to review the impugned decision. Nor was the argument that the dispute between the parties should be

resolved by way of an action for damages made by the Respondents in the first instance and it is not an argument that requires evidence to advance. In effect, the Respondents seek a stay of proceedings without advancing an application seeking that remedy as required by s 50 of the *Federal Courts Act*. Sagkeeng submits that the Court should not exercise its discretion to admit the Cholosky Affidavit in these circumstances.

[27] However, even if the affidavit is admitted, *Manuge*, *Huronne-Wendat FC* and *TeleZone* are distinguishable as they all address situations where the issue to be decided was whether an action should be stayed on the basis that the relief sought should have been obtained by means of an application for judicial review. Here Sagkeeng seeks a determination of its judicial review application in advance of its action for damages.

[28] And, although Sagkeeng's Notice of Application does request relief in the nature of damages, its application record limits the relief sought to remedies specifically dealing with the impugned decision and not monetary compensation.

[29] Further, while the Respondents have not yet filed a defence to the MBQB Statement of Claim, their defence could allege that the action amounts to a collateral attack on the impugned decision. That is, because it was open to Sagkeeng to challenge the validity of the decision and, as it was not overturned, it is now bound by it. Accordingly, by filing the action Sagkeeng seeks to avoid a potential procedural pitfall.

[30] Sagkeeng also submits that this proceeding involves arguments that cannot be dealt with by the MBQB Statement of Claim such as whether the Respondents abused their discretion, made erroneous or unreasonable considerations in order to make the decision and whether it is discriminatory. Conversely, the action seeks damages under a number of causes of action unrelated to the impugned decision, although the ultimate goal to obtain additional funding with respect to the Pension Plan, is the same.

[31] Moreover, the Respondents are asking this Court to limit the avenues for relief available to Sagkeeng on the basis that doing so would be more convenient for the Respondents. However, where a valid application for judicial review has been advanced, the Court should not decline jurisdiction on the basis that it looks like a case that should be pursued by way of an action for damages (*TeleZone* at para 76) and in this case jurisdiction is not in dispute.

*Analysis*

[32] Rule 312 permits a party, with leave of the Court, to file affidavits additional to those provided for in Rules 306 and 307.

[33] As stated by Justice Stratas in *Forest Ethics*:

> [4] At the outset, in order to obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:
>
> > (1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.);

> *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.
>
> (2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654.

[5] Assuming the applicants establish these two preliminary requirements, they must convince the Court that it should exercise its discretion in favour of granting the order under Rule 312. The Court exercises its discretion on the basis of the evidence before it and proper principles.

[6] In *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101 at paragraph 2, this Court set out the principles that guide its discretion under Rule 312. It set out certain questions relevant to whether the granting of an order under Rule 312 is in the interests of justice:

> (a) Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> (b) Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> (c) Will the evidence cause substantial or serious prejudice to the other party?

[34] In my view the Cholosky Affidavit, and more particularly the MBQB Statement of Claim, is not admissible. First, as pointed out by Sagkeeng, it was not before the decision-maker when the decision to refuse to fully fund the Pension Plan contributions was made, on that basis alone it should not be admitted (*Assn of Universities* at para 19). The Respondents do not submit

that the Cholosky Affidavit falls within any exception to the general rule that the record before the reviewing court consists of the material that was before the administrative decision-maker. Further, in my view, not only does the affidavit not fall within any of the exceptions, it also does not serve to provide general background as the information it contains does not assist in understanding the issues relevant to this judicial review (*Assn of Universities* at para 20). Further, it is not relevant to the issue of whether AANDC committed a reviewable error in making the decision to deny full payment of all Pension Plan contributions.

[35] The Cholosky Affidavit does not assist the Court both because it is not relevant and because it is not sufficiently probative to affect the result. The existence of the MBQB Statement of Claim and its content will have no impact on the relief sought as described in the Sagkeeng's written representations, being a declaration that the decision is invalid, quashed and/or of no force and effect, or, an order quashing the decision and referring it back to AANDC for redetermination on such terms as this Court deems just. Or, as I have framed this issue, a determination of whether the decision is reasonable.

[36] The Respondents submit that the Cholosky Affidavit will assist the Court as it demonstrates that Sagkeeng's issues are not about delegated authority involved in the process of making a specific decision but are about damages. However, as noted above, the relief sought by way of Sagkeeng's written representation concern the decision, not damages. Further, even if that were not so, it is unclear to me what impact the admission of the impugned affidavit could have on the outcome of the judicial review. As pointed out by Sagkeeng, the Respondents assert that the "preferred procedure" for addressing the issues is an action. Yet the Respondents do not

bring a motion seeking to stay the application for judicial review as would be required by s 50 of the *Federal Courts Act* or even explicitly submit that the Court should exercise its discretion in that regard. Nor do the Respondents suggest that the application for judicial review should be converted to an action pursuant to Rule 18.4(2).

[37] I am also not convinced that the application for judicial review is a disguised claim for damages. As Sagkeeng admits, the ultimate goal of both the application and the action is the same, being full payment of the Pension Plan contributions by the Respondents, however, the essential character of the application pertains to the impugned decision in refusing to do so while the action pertains to the payment of damages. Subsection 18.1(3) of the *Federal Courts Act* does not permit damages to be awarded on an application for judicial review. In order to seek damages, the application must be converted to an action, either by seeking a direction from the Court under s 18.4(2) of the *Federal Courts Act* or by discontinuing the application and issuing a statement of claim (*TeleZone*).

[38] In *TeleZone* the Supreme Court of Canada stated that:

> [18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.
>
> [19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be

> permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[39] In my view, this confirms that the choice of how to proceed lies with the applicant when there is more than one procedural avenue open to it. Here Sagkeeng seeks to set aside the administrative decision to only partially fund the Pension Plan. If it succeeds, then it is possible that it may not be necessary for it to pursue its action for damages.

[40] And, while the Respondents rely on paragraph 76 of *TeleZone* which states:

> Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

I agree with Sagkeeng that this is of little assistance to the Respondents in these circumstances as the jurisdiction of this Court to hear the application for judicial review is not in issue.

[41] Nor does *Manuge* assist the Respondents. There the Supreme Court found that the pleadings in issue, at their core, represented a claim for alleged breaches of s 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982 c 11and, therefore, that the action need not be stayed in favour of an application for judicial review. It also stated:

> [17] Following *TeleZone*, there is no question that the Federal Court has jurisdiction to entertain Mr. Manuge's claim as an action for damages: *Federal Courts Act* , s. 17(1) ; *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 , s. 21 ; *TeleZone*, at paras. 19-23 and 43-46; *Canada (Attorney General) v. McArthur*, 2010

> SCC 63, [2010] 3 S.C.R. 626, at para. 17; *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, [2010] 3 S.C.R. 648, at para. 16. Mr. Manuge's pleadings disclose claims against the Crown seeking remedies that the Federal Court has authority to grant in an action.
>
> [18] But under *TeleZone*, there is a residual discretion to stay an action if it is premised on public law considerations to such a degree that, in Binnie J.'s words, "in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong" (*TeleZone*, at para. 78). The Crown's argument, in essence, is that Mr. Manuge's action should be stayed on that basis.
>
> [19] The exercise of the discretion to stay an action in this context is dependent on an identification of the essential character of the claim as an assertion of either private law or public law rights. I agree with the Crown that some of Mr. Manuge's claims raise issues that are amenable to judicial review. However, the question is not just whether some aspects of Mr. Manuge's pleadings could be addressed under ss. 18 and 18.1 of the *Federal Courts Act* , but what, in their essential character, his claims are for.

[42] The Supreme Court concluded that the discretion to grant a stay of the action should not be exercised in that case. Nor is this is not the circumstance that is now before me.

[43] Interestingly, in *Huronne-Wendat FC*, which also concerned a decision by AANDC to cap its contribution to the funding of another of the exempted defined DB Plans and a claim for damages in that regard brought by the First Nation, AANDC argued before this Court that because the First Nation was asking for an order depriving the decision of its effects for the years 2008-2012 it should first have applied for judicial review. Here, of course, it argues the opposite, suggesting that the action and not the judicial review should have been pursued.

[44] In *Huronne-Wendat FC*, Justice Gagné did not accept the AANDC's position. She noted that the primary distinction between an application for judicial review and a claim for damages is the nature of the remedy sought and that is it always open to an applicant "to seek the performance of an obligation by equivalence rather than by specific performance" (para 28):

> [29] It is possible to invoke the unlawfulness of an administrative decision as a source of the State's contractual or extracontractual liability. "If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it" (Telezone, above, at para 76). In Quebec civil law, the plaintiff who invokes a fault (contractual or extracontractual), damage and a causal link between the two should also be entitled to bring an action in damages against the State. The Council's action in damages, the ultimate private remedy, in based primarily on a breach of contract. It therefore appears to me that the Department is proposing a rather artificial distinction.

[45] Again, I do not see how this assists the Respondents as the decision in *Huronne-Wendat FC* simply confirms the right to proceed by way of an action, it does not compel that outcome.

[46] For all of these reasons, leave to admit the Cholosky Affidavit is denied.

**Issue 1: Does this Court have jurisdiction to hear this application for judicial review?**

[47] Sagkeeng submits that this Court has jurisdiction to review the March 7, 2012 decision pursuant to s 18(1)(b) of the *Federal Courts Act*:

| **Definitions** | **Définitions** |
|---|---|
| 2. (1) In this Act, | 2. (1) Les définitions qui suivent s'appliquent à la présente loi. |
| […] | […] |

| | |
|---|---|
| "federal board, commission or other tribunal" | « office fédéral » |
| "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; | « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. |
| […] | […] |
| **Extraordinary remedies, federal tribunals** | **Recours extraordinaires : offices fédéraux** |
| 18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction | 18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : |
| (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and | a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral; |
| (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding | b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du |

| | |
|---|---|
| brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. | Canada afin d'obtenir réparation de la part d'un office fédéral. |

[48] Sagkeeng's view is that the decision is one of a federal board, commission or other tribunal as Ms. Stiller articulated it on behalf of AANDC. The decision states that AANDC had reconsidered its position and Ms. Stiller's evidence was that senior officials had obtained concurrence for partial payment towards the Pension Plan shortfall at AANDC headquarters (Affidavit of Nadine Stiller, affirmed August 17, 2012, para 55, Tab 4, Volume 1, Applicant's Record (Stiller Affidavit)). Further, that the Deputy Minister's office was notified of the intention to make a partial payment and made no objection (Answers to Written Examination Affidavit of Nadine Stiller, affirmed January 31, 2014, Tab 3, Vol 4, Tab 3 of the Applicant's Record, p 1227 (Answers to Written Examination)). Sagkeeng submits that the decision articulated by Ms. Stiller is, *ipso facto*, the decision of the Deputy Minister of AANDC who was acting as a federal board, commission or other tribunal when he exercised or purported to exercise powers conferred by or under an act of Parliament. The Deputy Minister decided to provide Sagkeeng with the additional funding through the BEB Program and applied the BEB Policy, which program the Deputy Minister is authorized to operate pursuant to the *Department of Indian Affairs and Northern Development Act*, RSC 1985, c I-6, s 4 ("*DIAND Act*"). Accordingly, this Court has jurisdiction.

[49] The Respondents do not take issue with the Court's jurisdiction to review the decision.

[50] The Federal Court of Appeal in *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 at para 29 stated that a two-step enquiry must be made in order to determine whether a body or person is a federal board, commission or other tribunal. First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.

[51] And, as stated by the Supreme Court of Canada in *TeleZone*:

> [3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between…

[52] The *DIAND Act* establishes the Department of Indian and Northern Affairs, over which the Minister presides and a Deputy Minister is appointed. The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not otherwise assigned, relating to Indian Affairs (*DIAND Act*, ss 2-4). The Department's applied title is AANDC (Treasury Board of Canada, Federal Identity Program Policy). Pursuant to s 3 of the *Indian Act*, RSC, 1985 c I-5 ("*Indian Act*"), the Minister of Indian Affairs and Northern Development may authorize the Deputy Minister or the Chief Officer in charge of the branch of the Department relating to Indian Affairs to perform and exercise any of the duties, powers and

functions of the Minister under the *Indian Act* or any other act of Parliament relating to Indian Affairs.

[53] As discussed further below, while the evidence of Ms. Stiller is certainly not as clear as it could and should have been as to the manner in which she was authorized to make the decision and AANDC's organizational structure in that regard, I am satisfied that the decision to partially fund the Pension Plan shortfall was made by Ms. Stiller as part of her responsibilities as Director, Funding Services Operations of the Manitoba Region of AANDC, which position included the administration of funding to Sagkeeng. I am also satisfied that her decision purports to interpret and apply the BEB Policy, which policy was, presumably, established by AANDC. Further, that her decision was authorized by the Assistant Deputy Minister ("ADM") with the knowledge of the Deputy Minister ("DM"), and was exercised or purported to exercise a delegation of power ultimately derived from s 4 of the *DIAND Act* read together with s 3 of the *Indian Act*. Therefore, it is a decision that falls within the definition of a federal board, commission or other tribunal, and this Court has jurisdiction to review it pursuant to s 18(1)(b) of the *Federal Courts Act*. The Respondents do not suggest otherwise.

**Issue 2: Is the application for judicial review premature?**

[54] The BEB Policy contains the following dispute resolution mechanism:

> Disputes regarding the accuracy of stated populations and programs administered will be adjudicated by the Regional Director General.
>
> Disputes regarding the application of policy or formulae will be adjudicated by, in the first instance, the Regional Director General. If a satisfactory resolution is not achieved, the matter must be referred to the Director General, Governance, at headquarters.

*Respondents' Position*

[55] The Respondents take the position that document disclosure was provided to Sagkeeng both before and after the decision; discussions between the parties took place at various times allowing for a further exchange of information; documentation was received pursuant to Access to Information Requests of the Treasury Board; document disclosure under the *Federal Courts Rules* was made; and, Sagkeeng also pursued a motion regarding document disclosure. Although the issue of document disclosure was resolved, Sagkeeng did not subsequently request dispute resolution.

[56] Accordingly, the application for judicial review is premature because the dispute resolution mechanism contained in the BEB Policy was not being utilized. A party must exhaust a statutory administrative review process before applying to the Court for relief (*Canada (Border Services Agency) v CB Powell Ltd*, 2010 FCA 61 at paras 30-33 [*CB Powell*]). There are no exceptional or extraordinary circumstances in this case that would allow this judicial review to occur before Sagkeeng exhausts its rights and remedies under the administrative process (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 105 [*Matsqui*]).

*Sagkeeng's Position*

[57] Sagkeeng submits that after the decision was issued neither it nor AANDC requested an adjudication. AANDC was asked whether it would participate in a dispute resolution proceeding under the BEB Policy but no response was provided. Further, that in paragraph 51 of her affidavit Ms. Stiller characterizes the decision as final, yet in paragraph 57 she indicates that the

decision would be discussed on March 9, 2012. Accordingly, the March 9, 2012 meeting was not to adjudicate the issue but to notify Sagkeeng of the final decision.

[58] Sagkeeng submits that judicial review is a discretionary remedy and, absent exceptional circumstances, it should not occur until after the administrative process is complete (*CB Powell* at paras 30-33). However, in this case it is clear that the administrative process has been exhausted. Sagkeeng has expressed its dissatisfaction with the lack of documentary disclosure that it received in advance of a scheduled adjudication and this issue was not resolved. In advance of further meetings scheduled to discuss funding under the BEB Program, AANDC released a decision that it later called a final decision and Ms. Stiller's evidence was that senior officials at AANDC Headquarters had concurred with partial payment towards the shortfall in the Pension Plan.

[59] Further, issues cannot be raised and an effective remedy cannot be granted by adjudicating them before the DG of AANDC. The final decision has been made and authorized by the person whose task it would be to resolve an adjudication of the issue under the BEB Policy. This lack of institutional independence gives rise to a reasonable apprehension of bias. As a result, further adjudication under the BEB Policy would not be an adequate alternative to this application (*Matsqui* at para 105).

*Analysis*

[60] At the hearing of this matter I advised the parties that I would hear them first on the prematurity issue and then, reserving my decision on that matter but subject to it, I would hear

them on the remaining issues. For the following reasons I have now concluded that the application for judicial review is premature.

[61] The relevant factual background to this issue is as follows. By letter of December 15, 2010, Sagkeeng advised the RDG that it was invoking the dispute resolution procedure under Annex 4 of the BEB Policy and requested a complete copy of AANDC's file on the pension as well as other listed documents (Affidavit of Rochelle Andal, sworn October 23, 2013 ("Andal Affidavit"), Exhibit 6, Vol 2, Applicant's Record, Tab 6(1), p 368).

[62] Further to the December 15, 2010 letter, on January 4, 2011 counsel for Sagkeeng wrote to the RDG enclosing written submissions, a book of exhibits and other materials for the RDG's consideration in advance of the adjudication meeting scheduled for January 5, 2012 (Stiller Affidavit, para 33, Exhibit "L", Applicant's Record, Vol 1, Tab L, p 124).

[63] In her Answers to Written Examination, Ms. Stiller states that a dispute resolution date was set up with the DG, with all parties agreeing that Sagkeeng waived its right to be heard initially before the RDG due to a conflict between the RDG and Sagkeeng (Applicant's Record, Vol 4, Tab 3, p 1226).

[64] A letter of January 19, 2011 from Sagkeeng's counsel to DOJ states that on December 15, 2010 Sagkeeng requested adjudication pursuant to the BEB Policy. Further, that on January 4, 2011, Sagkeeng followed up with written submissions in support of its application and on January 5, 2011 it attended at the RDG's offices for the adjudication but was advised that the

hearing could not proceed (Stiller Affidavit, Exhibit N, Vol 1, Applicant's Record, p 139). The letter also stated that Sagkeeng was ready and willing to proceed immediately with adjudication.

[65] By letter to Sagkeeng dated January 27, 2011, AANDC stated, amongst other things, that it had tentatively set aside February 8, 2012 to hold the dispute resolution meeting with the DG and that it would follow up to confirm those arrangements (Stiller Affidavit, Exhibit O, Vol 1, Applicant's Record, p 150).

[66] The evidence of Ms. Stiller is that on February 3, 2011 Sagkeeng unilaterally cancelled the dispute resolution scheduled with the DG. She refers to a letter to DOJ from Sagkeeng's counsel, of the same date, advising that "SFN will not participate in a hearing before the Director General, Governance on Tuesday, February 8, 2011 owing to the ongoing failure of INAC to provide the requested disclosure", a copy of that letter is not found in the record (Stiller Answers to Written Examination, Vol 4, Applicant's Record, Tab 3, p 1229).

[67] She also states that further document disclosure was provided to Sagkeeng and that discussions between Sagkeeng and the Respondents and their representatives occurred. Her affidavit states that on March 9, 2011 a letter was sent by Sagkeeng's counsel to "Canada" which letter stated that document disclosure provided by AANDC was incomplete and that "SFN cannot proceed with an adjudication of this dispute until it has received all relevant documents", a copy of that letter is not found in the record (Stiller Answers to Written Examination, Vol 4, Applicant's Record, Tab 3, p 1229).

[68] Further, that on March 7, 2012 she advised Sagkeeng that AANDC had reconsidered its position regarding partial funding to be provided for the Pension Plan. However, that Sagkeeng did not contact her, or to her knowledge, anyone else within AANDC or DOJ subsequent to March 9, 2011 regarding the matter of dispute resolution.

[69] In support of their respective positions the parties both refer to *CB Powell*, in which the Federal Court of Appeal held that the legislation of concern in that matter, the *Customs Act*, (RSC, 1985, c 1 (2nd Supp) ("Customs Act") contained an administrative process of adjudications and appeals that was to be followed to completion absent exceptional circumstances. There the Court noted that, by way of the Customs Act, Parliament had established an administrative process of adjudications and appeals. The courts were not part of this administrative process and allowing them to become involved before the administrative process was completed would inject "an alien element" into Parliament's design. Further, Parliament had also precluded judicial interference at every stage of that administrative process (*CB Powell* at paras 28-29).

[70] The Court also set out the following applicable general principles:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34*; Danyluk v. Ainsworth Technologies Inc.*, [2001] 2

S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. **All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.**

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 38; *Greater Moncton International Airport Authority v. Public Service Alliance of Canada*, 2008 FCA 68 at paragraph 1; *Ontario College of Art v. Ontario (Human Rights Commission)* (1992), 99 D.L.R. (4th) 738 (Ont. Div. Ct.). Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience: see, *e.g.*, *Consolidated Maybrun*, *supra* at paragraph 43; *Delmas v. Vancouver Stock Exchange* (1994), 119 D.L.R. (4th) 136 (B.C.S.C.), aff'd (1995), 130 D.L.R. (4th) 461 (B.C.C.A.); *Jafine v. College of Veterinarians (Ontario)* (1991), 5 O.R. (3d) 439 (Gen. Div.). Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to

> discharge: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 48.
>
> [33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings**. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted**: see *Harelkin*, *supra*; *Okwuobi*, *supra* at paragraphs 38-55; *University of Toronto v. C.U.E.W, Local 2* (1988), 55 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.
>
> (Emphasis added)

[71] *CB Powell* and the cases cited therein involve administrative processes, established by statute, requiring that all effective remedies available within that process must be exhausted before the parties may approach the courts with their dispute. Further, the courts have often justified the doctrine of exhaustion in part by reference to legislative intent (*R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706 at para 38) as it avoids "frustrat[ing] specialized schemes set up by Parliament" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 85) and "compromis[ing] carefully crafted, comprehensive legislative

regimes" (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 36).

[72] In this case, however, there is no statutorily mandated administrative process. Rather, the subject dispute resolution mechanism provision arises only within the BEB Policy. Therefore, the question is whether the doctrine of exhaustion extends to administrative frameworks not established by statute. In that regard, it is of note that in this case the parties agree that the administrative process must be adhered to, disagreeing only as to whether it is exhausted or is an ineffective remedy in the circumstances of this case.

[73] In *Transport and Allied Workers, International Brotherhood of Teamsters, Local 855 v Labourers' International Union, Local 1208*, 2014 NLCA 45 (leave to the SCC denied 36280) [*Transport and Allied Workers*] the Newfoundland and Labrador Court of Appeal addressed alternate remedies noting that:

> [38] Stratas J.A. of the Federal Court of Appeal set out detailed reasons for the adequate alternative remedy requirement in judicial review proceedings in *C.B. Powell* and *JP Morgan*. It is intended to:
>
> - Prevent the fragmentation of administrative processes and the creation of piecemeal court proceedings (see *C.B. Powell* at paragraph 32);
> - Eliminate "the large costs and delays associated with premature forays to court" (see *C.B. Powell* at paragraph 32; see also *Harelkin*);
> - Avoid frustrating "specialized schemes set up by Parliament" (see *JP Morgan* at paragraph 85);
> - Avert waste where the applicant for judicial review has a possibility of succeeding under the

administrative scheme (see *C.B. Powell* at paragraph 32);

- Ensure the court has access to all of the administrative expertise; this can best be achieved after the final administrative decision has been made (see *C.B. Powell* at paragraph 32);
- Support the concept of judicial respect for administrative decision-makers (see *C.B. Powell* at paragraph 32); and
- Reinforce the notion that judicial review remedies are to be of last resort (see *JP Morgan* at paragraph 85).

[74] In *Transport and Allied Workers* the Newfoundland and Labrador Court of Appeal was concerned with the decision of a jurisdiction umpire appointed under a project-specific collective agreement, not a statutory administrative regime. Regardless, that Court found that the doctrine of exhaustion was applicable.

[75] Therefore, and given that Sagkeeng does not oppose its application, it would appear to be appropriate to apply the doctrine of adequate alternative remedies in this circumstance. In this regard, Sagkeeng asserts both that the adjudication process was exhausted and, even if it were not, that a lack of institutional independence raises a reasonable apprehension of bias with the result that the process does not provide an adequate alternate remedy.

[76] It is therefore first necessary to address the issue of document disclosure as that is the basis of Sagkeeng's position that the adjudicative process had been exhausted. As noted above, the first level of the dispute resolution process was waived by agreement. The second level

before the DG was scheduled and then cancelled by Sagkeeng, apparently on the basis of a lack of document disclosure. In my view, Sagkeeng has failed to establish that a lack of disclosure continued to preclude the utilization of that process.

[77] In support of its application for judicial review, Sagkeeng submitted only the affidavit of Ms. Rochelle Andal, legal assistant with Sagkeeng's counsel, sworn on October 23, 2013 ("Andal Affidavit"). In essence, the Andal Affidavit serves only to place documentation on the record. Specifically, the decision (Exhibit "1"); an April 26, 2013 letter from Mr. Paul Anderson, counsel for the Respondents, to Mr. John Harvie, counsel for Sagkeeng (Exhibit "2"); a list of revised documents enclosed with that letter (Exhibit "3"); Stiller Affidavit of August 17, 2012 (Exhibit "4"); Stiller Affidavit of June 7, 2013 (Exhibit "5"); the Written Submissions of Sagkeeng provided to the RDG (Exhibit "6"); and, the documents contained in the revised list of documents (Exhibit "7"). Sagkeeng provides no other affidavit evidence.

[78] As to the status of disclosure, the Andal Affidavit states that by way of the letter of April 26, 2013, counsel for Sagkeeng received a revised list of documents from counsel for the Respondents which Ms. Andal states that she understands to set out those documents relevant to the decision. The April 26, 2013 letter states that, in compliance with Rules 317 and 318 of the *Federal Courts Rules*, a certificate from the Privy Council Office had been obtained and was enclosed, and that the referenced schedule is a secret document which was not released (a copy of the schedule is not attached in Exhibit "2"). She also describes Exhibit "3" of her affidavit as a copy of the revised list of the Respondents' documents.

[79] At paragraph 4 of her affidavit Ms. Andal states that:

> Ms. Nadine [Stiller] swears two (2) Affidavits in these proceedings identifying presumably those additional relevant documents in her possession and upon which she bases her Decision. Attached to my Affidavit and marked as Exhibit "4" is a copy of the Affidavit of Nadine Stiller, Affirmed August 17, 2012 and marked as Exhibit "5" is a copy of the Affidavit of Nadine Stiller, Affirmed June 7, 2013.

[80] In the result, Sagkeeng provides no affidavit evidence to support its position that documentary disclosure in the dispute resolution process remains in dispute or serves to preclude the continuation of that process. It also acknowledges that the dispute resolution meeting was not rescheduled after the cancellation.

[81] Sagkeeng also submits that after the decision was issued, neither it nor AANDC requested an adjudication before the DG. Further, that AANDC was asked whether it would participate in a dispute resolution proceeding under the BEB Policy but that no response was received. Sagkeeng references paragraphs 33, 51 and 57 of the Stiller Affidavit of August 17, 2012 and paragraphs 4(j) and 4(l) of the Stiller Answers to Written Examination in this regard. However, review of those references does not indicate a second, post-decision request for adjudication or that AANDC was asked if it would participate in dispute resolution after the decision was issued. Rather, at paragraph 4(l) of the Stiller Answers to Written Examination Ms. Stiller states that Sagkeeng had not contacted her, or to her knowledge anyone else within AANDC or DOJ, since March 9, 2011 regarding the matter of dispute resolution while she was at AANDC (she departed in April 2012).

[82] Based on the foregoing, in my view the BEB Policy dispute resolution process commenced on December 15, 2010 was not exhausted. Nor was a request for dispute resolution made by Sagkeeng after the March 7, 2012 decision concerning provision of partial funding was issued. The Stiller Affidavit states that the March 9, 2012 meeting referenced in the decision letter proceeded at which BEB funding issues and funding provided to the Pension Plan were discussed, calculations were provided to support the reconsidered additional funding of $890,504.00 and that there was a discussion about the capped amount going forward. Accordingly, in my view that meeting would not appear to have been intended to be, nor was it, the second level of the initiated dispute resolution process.

[83] The second aspect of the pre-maturity issue is Sagkeeng's submission that because a "final" decision has been made and authorized by the person whose task it would be to resolve the adjudication of the issue, there is no effective remedy available to it by adjudication before the DG. This lack of institutional independence gives rise to a reasonable apprehension of bias and, as a result, further adjudication under the BEB Policy would not be an adequate alternative to the application for judicial review.

[84] As noted above, the evidence of Ms. Stiller on the question of the making and authorization of the decision of March 7, 2012 is vague. However, in her August 17, 2012 affidavit she states that one of her primary responsibilities as Director, Funding Services Operations, was to oversee the provision of funding to core programs related to the operations of First Nations in Manitoba and that she was responsible for the administration of funding to Sagkeeng and supervised others in that regard.

[85] In paragraph 51 of that affidavit Ms. Stiller states that "[i]n reconsidering the final decision to make a partial payment to" Sagkeeng she took into account the items that she then listed. It is unclear from this what or whose final decision she was reconsidering and, having taken these matters into account, whether she made a recommendation based on her reconsideration. However, in the written examination she was asked if the decision she referred to at paragraph 51 was the one contained in her letter of March 7, 2012 and in her Answers to Written Examinations she confirmed that it was.

[86] Paragraph 55 of her affidavit is equally vague. There she states that on February 13, 2012 she was informed by AANDC Headquarters "that concurrence for provision of a partial payment towards the shortfall in the Plan was obtained by senior officials at AANDC Headquarters". She does not state what those officials may have been referencing so as to concur with the partial payment. However, as noted above, in that same paragraph she refers to the attached Exhibit "W", which is an email stating that confirmation had been received that "our ADM's approval of your approach is sufficient authorization to proceed. The Deputy's office was notified and made no objection. I will forward under separate cover, for your records, the version of the recommendation that Mr. Hallman approved".

[87] Counsel for Sagkeeng made valiant efforts to determine the decision-making process by way of the Written Examination of Ms. Stiller. When asked whether she had consulted with or had authorization from the RDG or DG before she made her decision, she responded by referring to paragraph 55 of her affidavit. When asked whether the Minister expressly or impliedly authorised her to make the decision, she responded that the Deputy Minister's office was notified

of the intention to make a partial payment to Sagkeeng and made no objection, she also referenced paragraph 55 of her affidavit and Exhibit "W". When asked whether at any point before she made the decision she had consulted with the Minister, she gave the same response.

[88] It is unclear why the Respondents are so reluctant to clearly identify the decision-making structure, the decision-maker and the decision-making process in this matter. However, based on what evidence there is, it would appear that the ADM approved and thereby authorized Ms. Stiller's recommendation to maintain the initial refusal to fully fund the Pension Plan contribution shortfall, but to make a partial payment, and that the Deputy Minister was aware of this decision.

[89] Given this, it is not entirely without merit to assert, as Sagkeeng has, that because the ADM approved the decision to only partially fund the Pension Plan shortfall and the DM was aware of this, any adjudication of the reconsideration decision by the DG pursuant to the BEB Policy would not provide an adequate alternative resolution because of a lack of institutional independence giving rise to a reasonable apprehension of bias. The DG being, presumably, subordinate to the ADM and DM.

[90] This is further complicated, in my view, by the fact that the dispute resolution provision set out in the BEB Policy is an informal one and contains no actual structure for the stipulated dispute resolution process.

[91] In *Harelkin v University of Regina*, [1979] 2 SCR 561 [*Harelkin*], the Supreme Court of Canada addressed the considerations that should be taken into account when deciding whether an applicant must exhaust the prescribed administrative appeal remedy before seeking judicial review. In that regard, the Supreme Court stated (p 588):

> In order to evaluate whether appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration, among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

[92] The Supreme Court of Canada noted that at the relevant time in that matter there were no by-laws in force in relation to the procedure before the Senate appeal committee. However, by-laws subsequently approved were admitted into evidence and considered by the Court. The Court also stated (p 589):

> In my view, appellant was not entitled to assume that, because of the lack of such by-laws at the relevant time, the senate committee would have denied him a hearing within the meaning of s. 33(1)(e) of the Act, nor should he have assumed that, since one of the governing bodies of the university had erroneously failed to comply with the principles of natural justice, another governing body of superior jurisdiction would do the same. He should on the contrary have assumed that the body of superior jurisdiction would give him justice, as was held by the Judicial Committee in *White v. Kuzych* at p. 601:
>
> > Their Lordships are therefore constrained to hold that the conclusion reached by the general committee was subject to appeal. And they must respectfully repudiate both the correctness and the relevance of the view that it would have been useless for the respondent to appeal because the federation would be sure to decide against him.

> They see no reason why the federation, if called on to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision.
>
> Section 33(1)(e) of the Act does not spell out the detailed powers of the senate appeals committee but there is no reason to doubt that such powers comprise the ordinary powers of an appellate jurisdiction including, if the appeal be allowed, the power to set aside the decision of the council committee and render on the merits the decision that the council committee should have rendered or send it back before the council committee for a proper hearing. There is thus no jurisdictional lacuna in the senate committee which could have prevented it from giving full justice to appellant.

[93] The Supreme Court concluded that the appellant's right of appeal to the Senate committee provided him with an adequate alternative remedy.

[94] *Harelkin* can, of course, be distinguished from the matter before me both because the appeal process was statute-based and because it was an appeal. And, unlike the senate appeal in *Harelkin*, the BEB Policy provides only for an informal dispute resolution without stipulating a formal adjudication or appeal process. It is relevant, however, to the extent that it suggests that, in these circumstances, it should not be assumed that the DG, if called upon to do so, would be incapable of rendering a fair and unbiased decision.

[95] The Supreme Court of Canada again addressed the question of whether an appellant should be permitted to seek judicial review rather than proceeding through a statutory appeal procedure in *Matsqui*. There, pursuant to the *Indian Act*, First Nation bands were able to pass their own by-laws for the levying of taxes against real property on reserve lands. The Matsqui

assessment by-law provided for the appointment of courts of revision to hear appeals from assessments, the appointment of an assessment review committee to hear appeals from the decisions of the courts of revision and, finally, an appeal on questions of law to this Court from the decisions of the assessment review committee. There, the respondents commenced an application for judicial review seeking to have the assessments set aside and the appellants sought to strike out the application on the basis that the decision was not subject to judicial review because of the eventual right of appeal to this Court or, alternatively, because the assessment by-laws provided an adequate alternate remedy.

[96] The issue before the Supreme Court was whether the motions judge properly exercised his discretion to strike the application for judicial review, thereby requiring the respondents to pursue their jurisdictional challenge through the appeal procedure established by band.

[97] The Supreme Court noted that judges of this Court have discretion in determining whether judicial review should be undertaken. In determining whether to undertake judicial review rather than requiring an applicant to proceed through a statutory appeal procedure the Court referenced its prior decision in *Harelkin* as well as *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 and concluded:

> [37] On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

[98] There, when applying the adequate alternate remedy principle, the Court considered the adequacy of the statutory appeal procedures created by the band and not just the adequacy of the appeal tribunals and concluded that it was open to the motions judge to find that allowing the respondents to circumvent the appeal procedures created by the bands would be detrimental to the overall scheme in light of its policy objectives. These included the promotion of Aboriginal self-government and respect for the appeal procedures developed by the bands given that the purpose of s 83(3) of the *Indian Act* was to allow bands to develop their own internal appeal procedures.

[99] The Supreme Court then addressed the respondents' submission that the statutory appeal procedures were not an adequate alternative to judicial review because the appeals tribunal gave rise to a reasonable apprehension of bias. One basis for this allegation was that band members may be appointed to the appeal tribunals raising the issue of the impartiality of those members. The Court agreed with the applicants that the allegations of a reasonable apprehension of bias were speculative. This was because the allegations were made before the respondents had applied to the appeal tribunal and before any members had been appointed to them, yet the respondents were asking the Court to find that they could not obtain an impartial hearing. There was an important interest in having band members sit on appeal tribunals and the concern that these members might be inclined to increase taxes in order to maximise the income flowing to the band was simply too remote to constitute a reasonable apprehension of bias at a structural level.

[100] As to the second basis of the allegation of reasonable apprehension of bias, this arose from the fact that the tribunal members may not be paid, lacked security of tenure and were appointed by Band Chief and Councils, that is that the tribunals lacked sufficient institutional independence.

[101] The Court noted that the principles of security of tenure, security of remuneration and administrative control also apply in the case of an administrative tribunal where it is functioning as an adjudicative body settling disputes and determining the rights of the parties, although their strict application is not always warranted in that circumstance. Further that:

> [81] The classic test for a reasonable apprehension of bias is that stated by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> > . . .the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly".
>
> De Grandpré J. further held that the grounds for the apprehension must be "substantial".

[102] The Supreme Court of Canada in *Matsqui* noted that in the case of administrative tribunals, the requisite level of institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. The requisite levels security of tenure, financial security and administrative control will depend on the nature of the tribunal, the interest at stake and other indices of independence such as oaths of office. It then assessed the

provisions of the assessment of the by-laws dealing with the power of the appeal tribunals and the appointment and recommendation of its members. It concluded that a combination of three factors i) the complete absence of financial security for tribunal members ii) inadequate security of tenure, and iii) tribunal members were required to determine the interest of the very people, the bands, to whom they owed their appointments, led to a reasonable apprehension that the members of the appeal tribunals were not sufficiently independent. Ultimately, the majority found that "[t]he function of institutional independence is to ensure that a tribunal is legally structured such that its members are reasonably independent of those who appoint them" (para 104).

[103] As stated in *Matsqui*, the test for institutional independence must be applied in light of the functions being performed by the particular tribunal at issue. In this matter the function is purely an internal and informal administrative adjudication process to interpret and apply a policy. It is not an appeal tribunal, and there is no set procedure. Unlike *Matsqui*, the DG's role is not the performance of adjudication functions similar to those of the courts. The adjudication is a role imposed on the DG by virtue of his or her position. However, there is no evidence as to how the position of DG is filled, whether by hiring by the Public Service Commission or appointment by the Governor in Council; and whether the DG's position is subject to the ADM or DM's ongoing approval. Thus, it is unknown if security of tenure or financial security are even relevant factors.

[104] Further, although the recommended approach to only partially fund the Pension Plan shortfall was approved by the ADM, in my view it has not been established that because of this

the DG is, on an anticipatory basis, more likely than not to fail to decide the issue fairly. It could equally be the case that if the DG disagreed with the recommendation, or made a different one, that the ADM would also approve and authorize that approach or decision. The burden of proof is on the party alleging a reasonable apprehension of bias (*Abi-Mansour v Canada Revenue Agency*, 2015 FC 883 at para 51; *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098 at para 41; *Panov v Canada (Minister of Citizenship and Immigration)*, 2015 FC 716 at para 19). And, as noted above, the differences between judicial and administrative decision-making require flexibility in the assessment of an administrative decision-maker's independence (*2747-3174 Québec Inc c Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 62 [*2747-3174 Québec*]).

[105] Absent evidence to the contrary, a decision-maker is presumed to be impartial (*Telus Communications Inc v TWU*, 2005 FCA 262 at para 36; *Hughes v Canada (Attorney General)*, 2009 FC 574 at para 43 [*Hughes*]; *Munoz v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1273 at para 59; *Finch v Assn of Professional Engineers and Geoscientists (British Columbia)*,(1996) 18 BCLR (3d) 361 (BCCA) at para 26). Similarly, public servants are presumed to be impartial and independent (*Muhammad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 448 at para 144; *Dunova v Canada (Minister of Citizenship and Immigration)*, 2010 FC 438 at para 69; *Mohammad v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 363 (Fed CA)). Further, allegations of a lack of independence or a reasonable apprehension of bias are serious and cannot be based on speculation or limited evidence (*Roberts v R*, 2003 SCC 45 at para 2, 59; *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at p 394; *IBEW, Local 894 v Ellis-Don Ltd*, 2001 SCC 4 at

para 56). A mere suspicion of bias is not enough (*Hughes* at para 43). Here the allegation is anticipatory and there is no evidence as to potential bias. Accordingly, in my view, Sagkeeng has not met its onus in this regard and the presumptions of independence and impartiality are not rebutted. A reasonable apprehension of bias on an institutional level requires the identification of a substantial number of similar cases (*2747-3174 Québec* at para 44). Sagkeeng has failed to provide sufficient evidence to establish a reasonable apprehension of bias on either an institutional or a case by case basis and I am not convinced that the DG would not adjudicate the issue fairly.

[106] In reaching this decision I also note the Respondents' position, as to the nature of the decision, that the Crown's funding decisions are a matter of policy and are not subject to judicial review on administrative law grounds. Further, that Sagkeeng is asking the Court to scrutinize a decision that, at its essence, relates to how the government disburses public monies. The Respondents submit that absent statutory language or other legal requirements, that it is not the Court's role to make such determinations (*Hamilton-Wentworth (Regional Municipality) v Ontario*, 2 OR (3d) 716, leave to appeal dismissed [1991] OJ No 3201(OCA); *Children's Aid Society of Huron-Perth v Ontario*, 2012 ONSC 5388 at paras 2 and 52). Conversely, Sagkeeng submits that the decision is purely administrative. There is no specific federal legislation regulating the funding of benefits payable to Aboriginal band employees and the BEB Policy fills this void, sets out the objective of the BEB Program and describes disbursement of funds. Because the application seeks judicial review of the decision on the basis that it does not comply with the BEB Policy this Court can review decisions of a Minister interpreting policy criteria and determine whether that interpretation will result in the objective set by the policy. Sagkeeng

submits that this is to be distinguished from a review of a Minister's spending authority (*Simon v Canada (Attorney General)*, 2013 FC 1117 at paras 27, 34-39).

[107] Because I am of the view that the application is premature, I need not address the nature of the decision. I note the above, however, because if the application were not premature and if the Respondents' position as to the justiciability of the decision were correct, and I make no finding in that regard, Sagkeeng would be left with no avenue for review of the decision. Further, the parties' submissions on the nature of the decision simply reinforce my view that, at first instance, the nature of this issue is such that it should first be adjudicated by the DG as contemplated by the BEB Policy.

[108] As I have found that this application for judicial review is premature, I need not decide this issue on the merits. The matter is referred back and shall be adjudicated by the DG pursuant to the administrative dispute resolution provision of the BEB Policy. As that process is not defined, I would point out that the DG is required to be impartial, unbiased and to fully and fairly consider all of the submissions before him or her. In my view, the adjudication should, in effect, be a *de novo* review and the DG should provide reasons for his or her ultimate decision.

[109] In that regard, I note that the March 7, 2012 decision contains no reasons. Subsequent to the decision being made Ms. Stiller filed her affidavit in support of the Respondents' position in this application or judicial review. As noted by Sagkeeng, in her affidavit Ms. Stiller sets out, in considerable detail, the reasons for her decision. For purposes of judicial review, it is unacceptable for a decision-maker to "bootstrap" their decision in this manner (*Stemijon*

*Investments Ltd v Canada* (Attorney General), 2011 FCA 299 at para 41; *Phan v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1203 at para 24) and it is trite law that the record before this Court on judicial review is generally restricted to that which was before the decision-maker (*Assn of Universities* at para 19). As I am not addressing the decision on the merits I need not address the weight or admissibility of Ms. Stiller's affidavit in this context. However, in my view, when adjudicating the dispute, that affidavit should not be placed before the DG. The Respondents, as well as Sagkeeng, no doubt will make submissions in support of their positions, but the Stiller Affidavit providing after the fact reasons for the disputed decision should not be one of them.

[110] In the event that, when the DG's decision has been rendered, Sagkeeng is of the view that it contains a reviewable error, at that time it may seek judicial review of that decision.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. This application for judicial review is premature. The matter is remitted back to the AANDC for adjudication pursuant to the BEB Policy.
2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-722-12 |
| **STYLE OF CAUSE:** | SAGKEENG FIRST NATION v ATTORNEY GENERAL OF CANADA AND THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA |
| **PLACE OF HEARING:** | WINNIPEG, MANITOBA |
| **DATE OF HEARING:** | APRIL 20, 2015 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | STRICKLAND J. |
| **DATED:** | SEPTEMBER 24, 2015 |

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| | |
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