

MAINE STATE LEGISLATURE

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August 5, 1964

The Honorable John H. Reed
Governor of Maine
and
Members of the Executive Council
State House
Augusta, Maine

Gentlemen:

There has been considerable controversy recently concerning the hiring of an attorney by the Passamaquoddy Indians. The attorney has made two appearances before the Governor and Council to present his arguments supporting this request.

First, it seems advisable to go into the history of the Passamaquoddy Indian Trust Fund. In 1821 the Legislature authorized agents to sell timber and grass on the land of the Tribe, the money to be distributed among the Indians of the Tribe "according to their usages, rights and interests." In various sessions of the legislature similar acts were passed.

Finally in 1853 Resolves, C. 51 provided for sale of timber, grass and use of water, the proceeds to

". . . be deposited in the State treasury and constitute an Indian fund, the interest of which at 6 per cent per annum shall be forever appropriated to the benefit of the Passamaquoddy Indians, . . ."

Public Laws 1887, C. 84 authorized the Governor and Council to sell or lease the whole or part of the Indian township and all sums received from such leases or sales were to be credited to the "funds of said Indians."

Thus it appears that the Passamaquoddy Trust Fund was created by the legislature from the sale or lease of timber, grass, water and lands of the tribe.

Next in line is an examination of the legislative history of methods of expending these funds. Apparently expenditures from these funds were by the legislature in the form of resolves until 1927. Public Laws 1927, C. 147 provided for expenditure by the Governor and Council. At that time the control of all Indian affairs was in the Governor and Council. Public Laws 1933, C. 1, § 299 changed the 1927 act to its present form. It was in 1933 that control of the Indians was given to the Department of Health and Welfare.

It seems quite obvious from the foregoing legislative history that the legislature has set up a Trust in which it has authorized the Governor and Council to act as a Trustee in determining the advisability of expenditure from the funds with the concurrence of the Indians. Hence we must turn to the law of trusts for answers to any questions concerning requested expenditures.

Generally it is said that:

"Under the usual type of spendthrift trust, the matter of payments from the corpus of the trust to a beneficiary or beneficiaries is discretionary with the trustees. Trustees 'authorized' to make payments from principal have been held to be given power to make or withhold them in their discretion."
90 C.J.S., § 349 c.

The "matter of payments from the corpus of the trust" being "discretionary with the trustees" it next must be determined what standard of care is required of a trustee. Our court has said:

"Trustees are bound in the execution of their fiduciary duties, to exercise the same care over the property of the

cestuis que trust, that prudent and discreet men exercise over their own property." *Starrett v. James*, 29 Maine 504.

See "The Law of Trusts and Trustees" Bogert 2nd Ed., § 541.

The statute under which the Governor and Council operates is C. 25, § 334:

"Expenditure of Funds of Indian Tribes.
The department, subject to the approval of the governor and council, may expend for the benefit of either Indian tribe, any portion of the funds of that tribe; provided, however, that the expenditure will not decrease the principal of the fund to such an extent as to prevent compliance with any existing provisions of statute, and provided further, that the tribe whose funds are used shall consent to the expenditure at a meeting duly called for that purpose."

The attorney holding a Retainer Agreement signed by the Governor of the Passamaquoddy Indians and approved by their Council and membership has requested \$3,000 from the tribal trust fund. This amount is for expenses to be incurred by him in determining and protecting the Passamaquoddy Indians' "rights." He does not state what these "rights" are. He does state that one of the most pressing problems is the matter of real estate. He then intimates that there are other "rights" that must be resolved. In addition, he has indicated that the expense money requested is for only one year. He states there will be a similar request from the next council. He further states that when all of these "rights" have been fully adjudicated, he will then present a bill for his legal fees.

In summary, the attorney is asking the trustee of the trust fund to advance a certain down payment on indeterminate expenses to pursue and have declared indefinite "rights" of his client.

It is my belief that the Governor and Council should first be reasonably assured that the Passamaquoddy Indians have a need for an attorney. They should secondly be reasonably assured that there are "rights" which need adjudication either in court or before some administrative or legislative body. And lastly, that the amount requested is a reasonable amount for expenses when correlated with the two items above. In short, the Governor and Council should feel, at least, reasonably assured that the expenditure of this money will result in a "benefit" to the Passamaquoddy Indians.

The question, then, to be answered by the Governor and Council could be phrased as follows:

Under the state of facts, as they now exist, is it possible to exercise the judgment that a careful, prudent and discreet man would exercise over his own property?

Very truly yours,

George C. West
Deputy Attorney General

GCN/dn