



Court File No. A-500-15

FEDERAL COURT OF APPEAL

BETWEEN:

LAKE BABINE NATION

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDECTIONS
PARTICULIÈRES

November 18, 2015

RECEIVED / REÇU
OTTAWA, ON

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Indian Affairs and Northern Development Canada

Respondent

APPLICATION UNDER: Section 28(1)(r) of the *Federal Courts Act*, RSC 1985, c F-7

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN
IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

NOV 18 2015

Date Issued by:

ORIGINAL SIGNED BY
MODELISA HENNESSY
A SIGNÉ L'ORIGINAL

Registry Officer

Courts Administration Service
P.O. Box 10065, 3rd Floor
701 West Georgia Street
Vancouver, B.C. V7Y 1B6
Address of local
office:

Federal Court of Canada
3rd Floor
701 West Georgia Street
Vancouver, British Columbia
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TO: Her Majesty the Queen in Right of Canada
as represented by Tanya Jorgenson / Michael Mladen
Department of Justice
900 - 840 Howe Street
Vancouver, BC V6Z 2S9

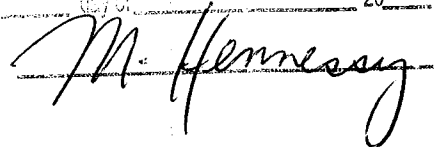
Tel: 604.666.9219
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AND TO: The Specific Claims Tribunal
427 Laurier Avenue West, 4th floor
PO Box 31
Ottawa, ON K1R 7Y2
Tel: 613.943.1515
Fax: 613.943.0586

I HEREBY CERTIFY that the enclosed is a true copy of
the original of _____

day of NOV 18 2015 A.D. 20

Dated this NOV 18 2015 day of 20



MODELISA HENNESSY
REGISTRY OFFICER
AGENT DU GREFFE

APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal ("Tribunal") dated October 19, 2015 in the matter of *Lake Babine Nation v Her Majesty the Queen in Right of Canada (as represented by the Minister of Indian Affairs and Northern Development Canada)*, 2015 SCTC 5 ("Decision"). The Decision was first communicated to the applicant on October 19, 2015.

The applicant makes application for:

1. An order quashing or setting aside the Decision;
2. An order substituting the decision of the Tribunal with an order that Her Majesty the Queen in Right of Canada breached a legal obligation to the Lake Babine Nation ("LBN"), and that LBN established a valid claim under the provisions of the *Specific Claims Tribunal Act*, SC 2008, c 22;
3. Costs; and
4. Such other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

Background

1. The Decision concerns Canada's failure to complete the reserve establishment process with respect to 128 acres of land located south of the Fulton River at Babine Lake ("Claim Lands") as a reserve for LBN.
2. LBN people habitually, historically and traditionally used and occupied land on both sides of the Fulton River at Babine Lake.
3. In 1912, Canada and British Columbia entered into an agreement to establish the Royal Commission on Indian Affairs for the Province of British Columbia ("Royal Commission") to, *inter alia*, "settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia."

4. In July 1915, the Royal Commission visited Hazelton, British Columbia. Charlie Pice, an LBN member, testified before the Royal Commission that he and his family lived north of the Fulton River and that they used lands south of the Fulton River for harvesting timber which they used for firewood and to build houses and canoes. Charlie Pice testified with the aid of a provincial 1913 Pre-emptor's Map of the region, which showed "Ind Res" south of the Fulton River. When asked by the Royal Commission why there was an Indian Reserve marked south of the River he said, "because we asked for timber land there." Asked why he had not sought timber land north of the Fulton River he answered, "I thought this land was mine." The Royal Commission thereafter referred to this request for land at the Fulton River as Application No. 84.
5. In November 1915, the Secretary of the Royal Commission wrote to the Province regarding Application No. 84, asking it to protect certain lands pending the Royal Commission's final decision regarding the lands that were to be reserved for LBN. In particular, the Royal Commission asked that three parcels of land applied for by LBN "be withheld from alienation."
6. One of these parcels was a portion of a lot located north of the Fulton River which the Royal Commission asked be "subtracted" from a settler's Application to Purchase. That Application to Purchase purported to include lands where some LBN houses were located and thus comprised an Indian settlement that could not lawfully be alienated. The other two parcels of land were located south of the Fulton River and included the Claim Lands.
7. The Province advised the Royal Commission that the lot north of the Fulton River was covered by a settler's Application to Purchase, but that the other lots south of the Fulton River were vacant and that no disposition would be made of the vacant lands until the Royal Commission arrived at a final decision.
8. The Province advised its local agent that in the event the Application to Purchase was abandoned neither the lot that was covered by the Application to Purchase, nor the lots south of the Fulton River, which were expressly identified by the

Royal Commission for protection, ought to be available for alienation until the Royal Commission had reached a final decision.

9. On May 30, 1916, the Royal Commission issued a Minute of Decision recommending that Lot 1353 south of the Fulton River, consisting of 128 acres (more or less) be reserved for LBN.
10. In 1923 and 1924, through B.C. Order-in-Council No. 911 of July 26, 1923 and Dominion Order-in-Council No. 1265 of July 19, 1924, the Province and Canada confirmed the Royal Commission's allotment of a reserve consisting of 128 acres south of the Fulton River.
11. At the time of these Orders-in-Council, the lot north of the Fulton River, containing LBN houses, continued to be subject to the settler's unlawful Application to Purchase.
12. In January 1927, the lot north of the Fulton River reverted to the Province due to the settler's failure to pay taxes.
13. In April 1927, consistent with the Minute of Decision and corresponding Orders-in-Council, the federal Department of Indian Affairs ("DIA") instructed a surveyor to survey a reserve for LBN south of the Fulton River.
14. Notwithstanding DIA's April 1927 instructions, in May 1927, the Provincial Surveyor General told the surveyor to survey the reserve north of the Fulton River, and to survey the lands south of the River comprising the Claim Lands as provincial Crown lands. The surveyor did so.
15. When the survey documents were provided to DIA months later, DIA did not correct or rectify the failure to survey the reserve south of the Fulton River as provided in the Minute of Decision, and as required by the Orders-in-Council and by DIA's own April 1927 instructions.
16. The local Indian Agent, not aware that the lands south of the Fulton River had not been surveyed as an Indian Reserve, and not aware that this final step in the

reserve creation process had not taken place, encouraged LBN members to build houses there, and they did so.

17. By the 1930s, provincial officials were seeking to remove LBN members from the Claim Lands.
18. DIA officials investigated the situation, and in 1931, the then Indian Agent recommended that DIA purchase the lands south of the Fulton River which had not been finalized as a reserve as directed by the Orders-in-Council and the minute of Decision. The recommended purchase of these lands south of the Fulton River did not occur.
19. In May 1940, the new Indian Agent reported to the Indian Commissioner about LBN's historic and present use of the Claim Lands south of the Fulton River and asked whether the occupied land could be obtained as an Indian Reserve. The Indian Commissioner wrote to the Province proposing that a portion of the lands south of the Fulton River be purchased for LBN. The Province refused.
20. The Indian Commissioner determined that LBN had "a very strong claim" to the Claim Lands and decided that, if the Province tried to evict LBN members from the Claim Lands, DIA could attempt a stay of action if it could show LBN's continuous possession of the Claim Lands for 60 years. In 1948, several of the LBN residents on the Claim Lands swore statutory declarations in support of their claim of continuous occupation of the Claim Lands for over 60 years.
21. The Province did not attempt to formally evict the residents from the Claim Lands, and as a result DIA did not bring a stay of action. However, LBN members living on the Claim Lands remained vulnerable to harassment and use of the lands by others. The Claim Lands remained unprotected as reserve lands.
22. The last two remaining LBN members living on the Claim Lands passed away in the 1960s. Today, no LBN members live on the Claim Lands and the lands are not an Indian Reserve.

23. On May 18, 2012, LBN filed a Declaration of Claim with the Tribunal, pursuant to the *Specific Claims Tribunal Act*, SC 2008, c 22. On July 31, 2012, Canada filed its Response.
24. On June 27, 2013, the Tribunal issued an order that the hearing of LBN's Claim would proceed in separate stages: validation and compensation.
25. The Claim was heard in phases (evidentiary and legal) between October 2014 and February 2015.
26. On October 19, 2015 the Tribunal released its Decision.
27. In the Decision, the Tribunal concluded that:
 - (a) The Royal Commission was to set aside land Indians habitually used for their settlements and villages, if such use and occupation was current or recent and apparent;
 - (b) LBN's use and occupation of the Claim Lands was not apparent, in the sense of being visible or otherwise known, to the Royal Commission;
 - (c) The Royal Commission did not recognize LBN's interest in land lying on both sides of the Fulton River;
 - (d) The Royal Commission's instructions to the Province to protect lands on both sides of the Fulton River do not reveal an intention to allot LBN reserve lands on both sides of the Fulton River;
 - (e) The Royal Commission allotted LBN a reserve consisting of 128 acres of land south of the Fulton River, as the land north of the Fulton River was not available in 1916 due to the settler's Application to Purchase. The Claim Lands south of the Fulton River were a "contingency";
 - (f) The settler's Application to Purchase was of "questionable validity" as it included an Indian Settlement;

- (g) The Royal Commission had no direct authority to disallow the settler's Application to Purchase;
 - (h) The creation of a reserve north of the Fulton River gave effect to the Royal Commission's intention in the Minute of Decision;
 - (i) Even if Canada owed fiduciary obligations to LBN in relation to the Claim Lands, it met those obligations by acting in LBN's best interest in creating a reserve north of the Fulton River;
 - (j) Canada took reasonable steps to attempt to secure the inhabited lands south of the Fulton River for LBN; and
 - (k) Canada did not breach a legal obligation owed to LBN.
28. Section 34 of the *Specific Claims Tribunal Act* provides that a decision of the Tribunal is subject to judicial review under section 28 of the *Federal Courts Act*, RSC 1985, c F-7.

Grounds for Review

29. LBN says that the Tribunal:
- (a) erred in law in making its Decision, whether or not the error appears on the face of the record;
 - (b) based its Decision on palpable and erroneous findings of fact, including findings of fact made without regard for the material before it; and
 - (c) acted in any other way that was contrary to law.
30. In particular, LBN submits the Tribunal erred by:
- (a) disregarding or not accepting the clear and plain language of the Minute of Decision and the Orders-in-Council, which reveals the express and patent intention to allot LBN a reserve consisting of 128 acres south of the Fulton River;

- (b) not recognizing that the 128 acres of land south of the Fulton River constituted a provisional reserve which required Canada to finalize the reserve creation process; and
- (c) concluding that creating a reserve consisting of 116 acres of land north of the Fulton River gave effect to the Royal Commission's intention expressed in its Minute of Decision to allot 128 acres of land south of the Fulton, and was in LBN's best interest.

31. In addition, LBN submits the Tribunal erred by concluding that:

- (a) the Royal Commission was to set aside lands that Indians habitually used and occupied for their settlements and villages, only if such occupation was current or recent and apparent;
- (b) Indians' cognizable interests in land can only be based on actual residence on the lands at the time of allotment, as opposed to also being based on Indians' use of the lands required for their sustenance and/or support;
- (c) the evidence did not establish LBN's use, occupation and reliance on the Claim Lands from prior to and between 1915-1927, and also erred by concluding that such use, occupation and reliance was not apparent or known to the Royal Commission;
- (d) the Royal Commission did not recognize LBN's interest in lands on both sides of the Fulton River;
- (e) the Royal Commission did not contemplate or have an intention to allot LBN reserve lands on both sides of the Fulton River; and
- (f) the Royal Commission's allotment of 128 acres of land south of the Fulton River was done as a "contingency."

32. The Tribunal made palpable errors of fact in finding that:
- (a) the provincial Surveyor General discussed with DIA officials the idea to survey a reserve north, rather than south, of the Fulton River;
 - (b) there was disclosure to LBN regarding the change in the location of the reserve;
 - (c) LBN received the land they wanted to be reserved.

No such evidence exists on the record.

33. Further, the Tribunal erred by concluding that, if the Canada owed fiduciary obligations to LBN in relation to the Claim Lands, those obligations were met.
34. In the alternative, the Tribunal erred by not recognizing that the Canada breached its fiduciary duty to LBN by not disclosing that the Claims Lands would not be set aside as a reserve and by failing to consult with LBN about how to honourably address its use, occupation and reliance on the lands south of the Fulton River in accordance with its wishes. In doing so, Canada breached its duty as fiduciary and failed to act honourably.

This application will be supported by the following material:

1. Certified copy of the Tribunal's record; and
2. Such other material and affidavits as counsel may advise and this Honourable Court may permit.

The applicant requests the Specific Claims Tribunal to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Tribunal to the applicant and to the Registry: a certified copy of the Tribunal's record in file number SCT-7004-12.

Date: November 18, 2015



Maria Morellato, Q.C.

"Leah Pence"

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