



Court File No.

A-80-16
F-404-16

FEDERAL COURT OF APPEAL

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDEICATIONS
PARTICULIÈRES

March 10, 2016

RECEIVED / REÇU
OTTAWA, ON

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

Applicant

and

AKISQ'NUK FIRST NATION

Respondent

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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.

Date: MAR 7 2016

Issued by:

**ORIGINAL SIGNED BY
FRANK FEDORAK
A SIGNÉ L'ORIGINAL**

(Registry Officer)

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TO: AKISQ'NUK FIRST NATION
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I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of MAR 7 2016 A.D. 20 _____

Dated this _____ day of MAR 7 2016 20 _____



APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal dated February 5, 2016 in the matter of *Akisiq'nuk First Nation v. Her Majesty the Queen in Right of Canada (As represented by the Minister of Indian Affairs and Northern Development Canada)*, 2016 SCTC 3 (the "Decision"). The Decision was first communicated to the applicant on February 5, 2016.

The applicant makes application for:

1. An order quashing or setting aside the Decision;
2. An order substituting the Decision with an order that Her Majesty the Queen in Right of Canada did not breach any legal obligations to the Akisiq'nuk First Nation;
3. Alternatively, an order referring the matter back to the Tribunal to a different decision maker for determination in accordance with such directions as are considered appropriate;
4. Costs; and
5. Such other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

Background

1. In 1871 when the new province of British Columbia joined Confederation, Canada assumed responsibility for "Indians and Lands reserved for Indians" in the province under Article 13 of the *British Columbia Terms of Union, 1871* ("*Terms of Union*").
2. Article 13 of the *Terms of Union* required the cooperation of British Columbia because the lands upon which reserves for Indians were to be established were provincial Crown

lands. British Columbia would transfer to Canada land to be set aside as lands reserved for the use and benefit of the Indians (“Indian reserves”). In case of disagreement between the two governments respecting the quantity of land to be granted, Article 13 provided that the matter could be referred to the Secretary of State for the Colonies.

3. Following Confederation, British Columbia and Canada began extensive negotiations on how to give effect to the policy of setting aside lands for Indians as set out in Article 13 of the *Terms of Union*. In 1876, the Joint Indian Reserve Commission was appointed by both governments to fulfil that mandate.
4. As Canada lacked the unilateral ability to allot, set aside, or create Indian reserves on provincial lands, recommendations of the Joint Indian Reserve Commission had to be approved by both levels of government.
5. Peter O’Reilly was appointed Indian Reserve Commissioner in 1880 and served until his retirement in 1898.
6. In August 1884, O’Reilly arrived in the Columbia Valley with the aim of setting aside reserves for the Akisq’nuk First Nation (formerly known as the Columbia Lake Indian Band) and other Kootenay Indians.
7. After meeting with the chief and representatives of Akisq’nuk, O’Reilly allotted a reserve of approximately 8,320 acres to the respondent. The allotment, as described by metes and bounds, was approved by both levels of government. In September 1886 a surveyor was dispatched to survey the reserve.
8. The survey noted several deviations from O’Reilly’s boundaries. In particular, to the satisfaction of Akisq’nuk members, the surveyor omitted two parcels of land on the mountainous east side of the reserve and added a parcel of pasture land to the south side of the reserve. Although the deviation on the east side excluded 960 acres of land (the “Survey Land”), the total acreage of the reserve as surveyed came to 8,456 acres – a net gain of 136 acres.

9. The surveyor's plans were approved by both levels of government and establish the present boundaries of Columbia Lake Indian Reserve No. 3 ("IR 3").
10. In 1912, the Royal Commission on Indian Affairs for the Province of British Columbia (the "McKenna-McBride Commission") was appointed to investigate the condition of Indian affairs in British Columbia with a view to settling all differences between Canada and British Columbia respecting Indian lands and Indian affairs generally. The McKenna-McBride Commission had the ability to recommend reserve allotments, subject to the approval of both governments.
11. The Commission met with the Akisq'nuk in September 1914. In March 1915 the Commissioners recommended the addition of 2,960 acres to IR 3.
12. On June 31, 1916 the McKenna-McBride Commission released its final report, including the recommendation that a 2,960 acre parcel should be added to IR 3 (the "Additional Land"). By December 1, 1919 Canada had signalled its support for implementing the McKenna-McBride Commission's recommendations, but British Columbia objected.
13. In 1920, the federal and provincial governments established a joint review of the McKenna-McBride Commission's final report (the Ditchburn-Clark review"), pursuant to the *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32 and *British Columbia Indian Lands Settlement Act*, S.C. 1920, c. 51.
14. The federal representative, W.E. Ditchburn, recommended following the recommendation in the McKenna-McBride Commission's final report and adding the Additional Lands to IR 3. The province's representative, Major Clarke, did not.
15. Following a period of further negotiation between Canada and British Columbia, on July 25, 1923 the government of British Columbia approved the amended McKenna-McBride Commission's report. The reference to the Additional Land in the McKenna-McBride Commission's report was crossed out and described as "Disallowed". On July 19, 1924, the Governor in Council approved the same.

16. Following acceptance of the McKenna-McBride Commission's report, a revised schedule of land set aside for reserves was prepared and on July 29, 1938, by provincial OIC 1036, British Columbia transferred administration and control of these lands, including IR 3, to Canada for the use and benefit of the Indians.
17. Pursuant to the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (*SCTA*), on March 14, 2013 the Respondent filed a Declaration of Claim with the Specific Claims Tribunal, alleging that Canada breached its fiduciary duty and legal obligation to ensure that the Additional Land was "surveyed and set aside as a Indian reserve and protected as a reserve for the exclusive use and benefit of the First Nation".
18. Canada filed its Response on June 6, 2013. The claim was heard by the Tribunal on September 23-25, 2014. Evidence was entered by way of an agreed statement of facts and a common book of documents.
19. Nine months following the hearing, on July 8, 2015, the Tribunal issued a Memorandum to Counsel advising the parties that it had consulted portions of three historical treaties not included in the record for the claim, and that the Tribunal might also consider additional treaties and historical documents footnoted in these treaties under the doctrine of judicial notice and knowledge.
20. Canada objected to the Tribunal's reliance on these materials so the Tribunal directed the parties to make submissions.
21. In a decision dated February 4, 2016, the Tribunal dismissed Canada's objection to consideration by the Tribunal of extracts from the treaties and the footnoted materials, and confirmed that in its view, judicial notice could be taken of these materials.
22. The following day, the Tribunal released its decision on the validity of the claim. In relation to the Survey Land the Tribunal held that:
 - a. The Akisq'nuk had a cognizable interest in the Survey Land;

- b. Canada had a discretion in relation to the Survey Land and exercised a discretion throughout the steps taken to achieve the object of Article 13;
- c. Canada failed to seek a correction of the survey of IR 3; and,
- d. Canada breached a legal obligation within the meaning of section 14(1)(c) of the *SCTA* in relation to the Survey Land.

23. In relation to the Additional Land, the Tribunal found that:

- a. The Akisq'nuk had a cognizable interest in the Additional Land;
- b. Canada exercised a discretion throughout the steps taken to achieve the object of Article 13, which gave rise to a fiduciary obligation;
- c. The resulting fiduciary obligation included the more onerous duty of loyalty and forsaking all others, including settlers interests;
- d. Canada breached its fiduciary obligation to the Akisq'nuk in relation to the Additional Land by failing to pursue or consider referring the matter to the Secretary of State for the Colonies for determination pursuant to Article 13; and,
- e. Canada breached a legal obligation within the meaning of section 14(1)(c) of the *SCTA* in relation to the Additional Land.

24. Section 34 of the *SCTA* provides that a decision of the Tribunal is subject to judicial review under section 28 of the *Federal Courts Act*.

Grounds for Review

25. In making the above findings, Canada says that the Tribunal:

- a. Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

- b. Failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- c. Erred in law in making its decision, whether or not the error appears on the face of the record;
- d. Based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it;
- e. Acted in any other way that was contrary to law.

Survey Land and Additional Land

26. In relation to both the Survey Land and Additional Land, the Tribunal erred in law and failed to observe a principle of procedural fairness by considering and relying on material that was not in evidence at the hearing and purporting to take judicial notice of three academic treatises which were not in evidence at the hearing.

Survey Land

27. The Tribunal erred in fact and law by finding that the Akisq'nuk had a cognizable interest in the Survey Land.
28. The Tribunal erred in fact and law by finding that Canada breached a fiduciary obligation to the Aksiq'nuk by failing to seek a correction of the survey of IR 3.
29. The Tribunal erred in fact and law by finding that Canada breached a legal obligation within the meaning of section 14(1)(c) of the *SCTA* in relation to the Survey Land.

Additional Land

30. The Tribunal erred in fact and law by finding that the Akisq'nuk had a cognizable interest in the Additional Land.
31. The Tribunal erred in law by finding that Canada's fiduciary obligations to the Akisq'nuk included the more onerous duty associated with an undertaking of loyalty in the nature of a private law duty forsaking the interests of all others, including settlers' interests.
32. The Tribunal erred in law in failing to find that federal legislation, the *British Columbia Indians Lands Settlement Act*, limited Canada's fiduciary obligations to Akisq'nuk.
33. The Tribunal erred in law by finding that Article 13 of the *Terms of Union* imposed a duty on Canada to refer the McKenna-McBride Commission recommendations not accepted by the province of British Columbia to the Secretary of State for the Colonies.
34. The Tribunal erred in law and failed to observe principles of natural justice and procedural fairness by denying Canada the opportunity to know and answer the case to be met when it found that Canada breached a fiduciary obligation by failing to pursue or consider referring the matter to the Secretary of State for the Colonies for decision pursuant to Article 13.
35. The Tribunal erred in fact and law by finding that Canada breached a legal obligation within the meaning of section 14(1)(c) of the *SCTA* in relation to the Additional Land.

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-7006-12.

DATE: March 7, 2016



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THIS NOTICE OF APPLICATION IS PREPARED ON BEHALF OF THE APPLICANT BY THE DEPUTY ATTORNEY GENERAL OF CANADA WHOSE PLACE OF BUSINESS AND ADDRESS FOR SERVICE IS THE DEPARTMENT OF JUSTICE, 900 - 840 HOWE STREET, VANCOUVER, BRITISH COLUMBIA, V6Z 2S9, TELEPHONE: 604-666-0535, FACSIMILE: 604-666-4062, ATTENTION: SHELAN MILLER