

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDECTIONS
PARTICULIÈRES

January 16, 2017

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OTTAWA, ON

Court File No.

A-17-17

FEDERAL COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

HUU-AY-AHT FIRST NATIONS

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.

**SHEILA DE SANTOS
REGISTRY OFFICER
AGENT DU GREFFE**

Date: _____

JAN 11 2017

Issued by: _____


(Registry Officer)

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APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal (“Tribunal”) dated December 12, 2016 in the matter of *Huu-ay-aht First Nations v. Her Majesty the Queen in right of Canada (As represented by the Minister of Indian Affairs and Northern Development)*, 2016 SCTC 14 (“Stage Two Decision”). The Stage Two Decision was first communicated to the Applicant (“Canada”) on December 12, 2016. This application is brought pursuant to s. 34 of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (“SCTA”), which provides that a decision of the Tribunal is subject to judicial review under s. 28 of the *Federal Courts Act*.

The Applicant makes application for:

1. An order quashing or setting aside the Stage Two Decision;
2. An order substituting the Stage Two Decision with an order that provides a compensation award that is fair and proportionate in accordance with the proper application of the principles of equitable compensation;
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; and
4. Such other relief as counsel may advise and this Honourable Court may deem appropriate.

The grounds for the application are:

Background

1. The Stage Two Decision concerns the assessment of compensation in the present day for breaches of fiduciary duty by Canada to the Respondent (“Huu-ay-aht”) in 1948 related to timber logging on Numukamis Indian Reserve No. 1 (“Reserve”).

2. In 1938, the Huu-ay-aht conditionally surrendered the merchantable timber on the Reserve to Canada in trust to sell on terms most conducive to their welfare. In 1942, a timber license was issued to Bloedel, Stewart and Welch Ltd (“BSW Ltd”) and was renewed every year until logging operations ceased in or about 1970.
3. Pursuant to the *SCTA*, on November 18, 2011 the Huu-ay-aht filed a Declaration of Claim with the Tribunal. The Huu-ay-aht alleged that Canada’s actions regarding the timber license breached the *Indian Act*, the *Indian Timber Regulations*, and fiduciary obligations owed to the Huu-ay-aht.
4. The Huu-ay-aht sought compensation from Canada for the difference between what they actually received in timber revenue between 1948 and 1970 and what they ought to have received had Canada acted in accordance with the Huu-ay-aht’s best interests and in accordance with the *Indian Act* and *Indian Timber Regulations* during that time. They also sought compensation for the diminished value of the Reserve as a result of the breach.
5. Canada admitted that it had breached a fiduciary obligation owed to the Huu-ay-aht with respect to the manner in which it sold the surrendered timber, but the parties did not agree on the operative date of the breach, whether there was a resulting loss, or the amount of the loss.
6. By order dated May 7, 2013, the Tribunal bifurcated the claim into two stages. Stage one would determine the validity of the Huu-ay-aht’s claim related to the timber license and the amount of any historical loss, and stage two would determine the present day quantum of equitable compensation owed to the Huu-ay-aht, if necessary.
7. On July 15, 2014, the Tribunal released its decision for stage one (indexed at 2014 SCT 7; “Stage One Decision”). In the Stage One Decision, the Tribunal found that Canada breached its fiduciary duties owed to the Huu-ay-aht by agreeing to a long-term renewal condition with BSW Ltd, selling the timber on terms outside of the conditional surrender,

failing to consult with the HUU-AY-AHT after 1939, and failing to act diligently to take steps to remedy the breaches.

8. Although the Tribunal determined that Canada breached its fiduciary obligations, it observed that Canada showed considerable concern and attention to the HUU-AY-AHT's best interests and that Canada's objective was to do the best it could for the HUU-AY-AHT in a time of unusual and difficult market circumstances.
9. The Tribunal found that Canada's breaches caused lost timber revenues of approximately \$280,000 as of 1948. The Tribunal also found that Canada's breaches caused a reduction in the value of the Reserve of \$1,510,000 in 2012 dollars. The value in 2016 dollars of the latter issue was resolved by way of an order of the Tribunal based on conferencing of the parties' experts, and does not form part of this application for judicial review.
10. The hearing for stage two took place on February 8 to 12, 2016 and April 19 to 21, 2016 and focussed on the present day assessment of the lost timber revenues. Evidence was entered by way of an agreed statement of facts, a common book of documents, expert reports, and the testimony of lay and expert witnesses.
11. The parties agreed that compensation was to be assessed under s. 20(1)(c) of the *SCTA*, which requires that the Tribunal shall "award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts". The parties agreed that principles of equitable compensation developed by the courts applied to the claim.
12. Through the expert reports, the parties provided the Tribunal with different economic models to assist the Tribunal in determining the appropriate quantum of equitable compensation. In order to produce their estimates of the current value of the HUU-AY-AHT's loss, the parties' experts created hypothetical histories of how the HUU-AY-AHT would likely have used the lost timber revenues that it ought to have received.

13. The hypothetical histories were based on the Huu-ay-aht's actual trust account spending patterns from 1942 to 2011. The experts applied three overarching categories to the Huu-ay-aht's financial records: trust account savings, other investments (e.g. spending on infrastructure, health and education), and consumption (e.g. spending on clothing and fuel). The experts categorized the lost timber revenues into hypothetical savings, investment, and consumption that mirrored the actual savings, investment, and consumption patterns of the Huu-ay-aht.
14. The experts agreed that the vast majority of the Huu-ay-aht's spending during the relevant years was on items that they each classified as consumption.
15. The experts also agreed that consumption spending does not earn interest. Nevertheless, the Huu-ay-aht's expert applied a rate of return compounded annually to hypothetical consumption in his estimate of compensation. He concluded that hypothetical consumption was a type of lost opportunity that was capable of valuation, and he applied a proxy rate of return known as the "marginal rate of substitution" to calculate the current value of hypothetical consumption.
16. In contrast, Canada's experts did not apply a rate of return to hypothetical consumption in their estimate of compensation to reflect the reality that consumption, factually, does not have a value beyond a short-term benefit and does not attract a rate of return.
17. On December 12, 2016, the Tribunal released the Stage Two Decision. The Tribunal assessed the current value of the Huu-ay-aht's historic loss of timber revenues, as of December 31, 2014, at \$13,884,000. The Tribunal held that the award should be updated to the date of judgment at a rate of 0.55% compounded annually.
18. One of the central issues in dispute between the parties, and one of the central findings made by the Tribunal, related to the treatment of hypothetical consumption. Although the experts' methodology differed in respect of their treatment of hypothetical savings and investment, and the specific rates of return compounded annually that were applicable to

each, the calculations generated by the models for these two categories were sufficiently similar that the Tribunal did not need to comment on these aspects of the models in detail.

19. On the central issue of hypothetical consumption, the Tribunal determined that the Huu-ay-aht was entitled to compensation for its lost opportunity to consume. The Tribunal agreed with the Huu-ay-aht's expert that a loss of opportunity to consume should be assessed by applying the proxy rate of return known as the "marginal rate of substitution".
20. In effect, the Tribunal determined that a rate of return compounded annually should be applied to assess compensation for hypothetical consumption because the application of the proxy "marginal rate of substitution" compounds the value of all spending on consumption (items of short-term benefit).
21. The Tribunal rejected Canada's submission that the Tribunal could adjust the value provided by Canada's experts in a principled way by compensating for hypothetical consumption by assessing its value today based on inflation, instead of on a rate of return compounded annually.

Grounds for Review

22. 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.

Compensation for Lost Opportunity to Consume

- 23. The Tribunal erred in law by failing to award compensation based on the principles of compensation applied by the courts, as required by s. 20(1)(c) of the *SCTA*.
- 24. The Tribunal misapplied the principles of equitable compensation, and thereby erred in law, by effectively applying a rate of interest compounded annually to monies that would have been spent on consumption. Rather than placing the HUU-ay-aht in the same position it would have been in but for the breach, as required by equity, the Tribunal's approach placed them in a better position because of the breach.
- 25. The Tribunal misapplied the principles of equitable compensation, and thereby erred in law, by failing to adequately take into account the HUU-ay-aht's factual history and its particular circumstances in assessing equitable compensation for the lost opportunity to consume.
- 26. The Tribunal misapplied the principles of equitable compensation, and thereby erred in law, by failing to provide a compensation award that was fair and proportionate in all of the circumstances.
- 27. The Tribunal erred in fact and law by relying on the concept of "marginal rate of substitution" as a proxy to apply a rate of return compounded annually to the lost opportunity to consume.
- 28. The Tribunal erred in law by assessing compensation for the lost opportunity to consume in a similar manner to compensation for hypothetical savings and investment.

29. The Tribunal erred in law by finding that a rate of return compounded annually for the lost opportunity to consume was a loss that was causally linked to Canada's breaches of fiduciary duty.
30. The Tribunal erred in law by conflating concepts of equitable compensation with concepts of common-law damages.
31. The Tribunal erred in law by failing to make a principled adjustment for the lost opportunity to consume, such as applying an inflationary adjustment to the money that would have been spent on consumption.

Other Errors

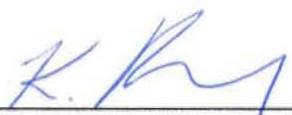
32. The Tribunal also made several errors in its assessment of the economic models put forward by the parties that cumulatively amount to an error in law in the Tribunal's preference for the HUU-AY-AHT's model for assessing compensation, or failed to properly consider the material before it, by:
 - a. Accepting an economic model that failed to apply specific rates of depreciation to hypothetical investment as a realistic contingency;
 - b. Accepting a model that combined two hypothetical trust accounts without distinction for the purposes of assessing equitable compensation;
 - c. Declining to choose between the specific compensation scenarios provided by the HUU-AY-AHT's expert and instead choosing an average of those scenarios; and
 - d. Mischaracterizing the methodology in the economic model of Canada's experts as one of "first in, first out".

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, pursuant to Rule 317 of the Federal Courts Rules, the Specific Claims Tribunal send 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-7006-11.

DATE: January 11, 2017



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