

Court File No. A-81-16

FEDERAL COURT OF APPEAL

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS
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.

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

Date: MAR 7 2016

Issued by: _____

(Registry Officer)

Address of local office: Federal Court of Canada
3rd Floor
701 West Georgia Street
Vancouver, British Columbia
V7Y 1B6

TO: AKISQ'NUK FIRST NATION
as represented by Darwin Hanna and Adam Munnings
Callison & Hanna
2784 Alamein Avenue
Vancouver, British Columbia
V6L 1S2

Tel: 604-222-2374
Email: darwin@chlaw.ca
adam@chlaw.ca

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 MAR 7 2016 day of _____ 20 _____

[Signature]

APPLICATION

This is an application for judicial review in respect of the interlocutory decision of the Specific Claims Tribunal (the “Tribunal”) dated February 4, 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 2 (the “Interlocutory Decision”). The Interlocutory Decision was first communicated to the applicant on February 4, 2016.

The applicant makes application for:

1. An order quashing or setting aside the Interlocutory Decision;
2. An order substituting the decision of the Tribunal with an order upholding Canada’s objection to consideration by the Tribunal of the extracts from treatises;
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. The liability portion of a claim brought before the Tribunal by the Akisiq’nuk First Nation (“Akisiq’nuk”) under ss. 14(1)(b) and (c) of the *Specific Claims Tribunal Act*, SC 2008, c. 22 (“SCTA”) was heard by the Tribunal from September 22 – 25, 2014. The claim brought by Akisiq’nuk (“the Claim”) is based on alleged breaches of fiduciary obligation by Canada dating from the 1880s and the 1920s.

2. During the hearing of the Claim, Akisq'nuk and Canada ("the Parties") made oral arguments relying on evidence and information contained in an agreed statement of facts and a common book of documents comprising some two hundred forty-one documents, both of which were filed in advance of the hearing. The Parties called no witnesses, nor produced any additional evidence at the hearing. At the conclusion of the hearing, the Tribunal took the matter under reserve.
3. By memorandum to the Parties dated July 8, 2015, the Tribunal advised the Parties that in preparing to issue its ruling in the Claim, it had consulted three published historical treatises outside the record, none of which were referenced in the agreed statement of facts nor contained in the Parties' common book of documents. The Tribunal advised that its purpose was to "identify more accurately the historical context essential to the resolution of this claim".
4. The treatises in question were:
 - a. Robert E. Cail, *Land, Man, and the Law: The Disposal of Crown Lands in British Columbia, 1871 – 1913* (UBC Press 1974), Chapters 11 – 13;
 - b. Cole Harris, *Making Native Space: Colonialism, Resistance and Reserves in British Columbia* (UBC Press 2002), at 241 – 261; and
 - c. E. Brian Titley, *A Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (UBC Press 1986), Chapter 8.

Together, these materials comprise approximately one hundred twenty-two pages of scholarly writing.

5. The Tribunal further advised that it may also consider unidentified "historical documents footnoted in the above chapters and pages", amounting to several hundred additional pages of correspondence, sessional papers and academic writing. The Tribunal's July 8,

2015 memorandum added that, in its view, “[r]eliance on this material would ... be within the bounds of judicial notice and knowledge”.

6. At a Case Management Conference (“CMC”) held on July 29, 2015, the Tribunal clarified that although it intended to rely on all of the foregoing materials (the “Additional Materials”) for “historical context”, it proposed to rely specifically on just one historic report footnoted in the materials. On July 31, 2015 the Tribunal transmitted this report to the Parties by email and referenced it in an August 5, 2015 endorsement as the *1927 Report of the Special Joint Committee on the Claims of the Allied Indian Tribes of British Columbia* (the “1927 Report”). As with the other materials, during the July 29, 2015 CMC the Tribunal advised that the 1927 Report would not be entered as documentary evidence, but relied upon for “historical context”.
7. In an August 5, 2015 endorsement the Parties were invited to make submissions outlining any concerns they had about the Tribunal’s proposed use of the Additional Materials, and to provide the Tribunal with any “other authoritative material that they wish the Tribunal to consider in addition to [the Additional Materials]”.
8. In written submissions filed on September 2, 2015, Canada addressed its objection to the Tribunal’s proposed reliance on the Additional Materials. The Claimant responded in a written submission dated September 21, 2015. The Parties agreed there was no need for an oral hearing on the matter.
9. On February 4, 2016 the Tribunal released the Interlocutory Decision, responding to Canada’s objection to the Tribunal’s consideration of the Additional Materials. In the Interlocutory Decision, the Tribunal held that:
 - a. The Additional Materials are “scholarly narratives of fact”, in which “where opinions and conclusions are stated, they are clearly distinguishable from the presentation of factual information”;

- b. A court has the capacity to discern argument and opinion from objective fact in scholarly writing, and “the Tribunal [had] no intention of relying on author opinion in its use of the treatises”;
 - c. Courts may take judicial notice of historical facts, however this rule is limited to facts that are beyond reasonable dispute;
 - d. Where treatises and scholarly articles narrate provable facts by reference to historical documents, “they may be relied on as if proven in evidence, and for the same purposes”;
 - e. The Crown was given the opportunity to contest the reliability of the treatises, or to present alternative sources for the Tribunal’s consideration, but declined to do so;
 - f. Subsection 13(1)(b) of the *Specific Claims Tribunal Act* permits the Tribunal to rely on evidence and “other information” whether or not that evidence or information would be admissible in a court of law;
 - g. Procedural fairness was adequately addressed by notice to the Parties and an opportunity to make submissions.
10. The day after its release of the Interlocutory Decision, on February 5, 2016, the Tribunal released its decision on the validity of the Claim (the “Validity Decision”). The Validity Decision makes extensive reference to the Additional Materials.
11. 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*.

Grounds for Review

12. 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. Acted in any other way that was contrary to law.
13. The Tribunal erred in law and exceeded its jurisdiction by considering material that was not in evidence at the hearing, contrary to the principles of procedural fairness.
14. The Tribunal erred in law and exceeded its jurisdiction by purporting to take judicial notice of the Additional Material, which went beyond indisputable facts of common and general knowledge.
15. The Tribunal erred in law and exceeded its jurisdiction by purporting to admit the Additional Material without providing the Parties with an opportunity to properly introduce the evidence and to have it tested through cross-examination.
16. The Tribunal erred in law and exceeded its jurisdiction by purporting to admit the Additional Material pursuant to subsection 13(1)(b) of the *Specific Claims Tribunal Act* without identifying the precise parts of the material on which it intended to rely, or identifying the question of fact to which the evidence or information pertains, contrary to the principles of procedural fairness.


17. The Tribunal erred in law and exceeded its jurisdiction by failing to admit the Additional Material in a timely manner, instead introducing it some ten months following the conclusion of the hearing of the Claim, contrary to the principles of procedural fairness.

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



William F. Pentney, Q.C.
Deputy Attorney General of Canada
Per: Shelan Miller
Department of Justice
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9
Tel: 604-666-0535
Fax: 604-666-4062

Solicitor for the Applicant

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