Federal Court of Appeal | Cour d'appel fédérale

Date: 20150626

Docket: A-449-14

Citation: 2015 FCA 154

CORAM: **TRUDEL J.A.**
NEAR J.A.
RENNIE J.A.

BETWEEN:

LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on May 20, 2015.

Judgment delivered at Ottawa, Ontario, on June 26, 2015.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NEAR J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review by Lac La Ronge Band and Montreal Lake Cree Nation (the applicants) of a decision of the Specific Claims Tribunal (the Tribunal), issued on September 9, 2014 (2014 SCTC 8, file number SCT-5002-11) by Justice W.L. Whalen, a judge of the Ontario Superior Court of Justice and a member of the Tribunal.

[2] The Tribunal determined that the respondent Crown breached its fiduciary duty to the applicants by permitting unlicensed harvesting of timber on the applicants' reserve lands between 1904 and 1910. The Tribunal found that the Crown did not properly manage the timber on the reserve, in part due to its failure to make use of any of the enforcement measures that were available to it under the *Indian Act*, R.S.C. 1886, c. 43 [*Indian Act 1886*].

[3] Despite having been largely successful before the Tribunal, the applicants seek judicial review of certain parts of the Tribunal's decision and ask this Court to grant an order correcting the alleged errors. The applicants' primary submission is that the Tribunal erred in holding that the Crown's decision whether to prosecute an unlicensed harvester under section 26 of the *Indian Act 1886* was excluded from its fiduciary duty to the applicants based on the principle of prosecutorial discretion. The applicants also submit that the Tribunal erred in concluding that the surrender of the timber on the reserve was valid and further assert that the Tribunal's decision gives rise to a reasonable apprehension of bias on the issue of compensation.

[4] For the reasons that follow, I propose to dismiss the application. No prosecution was commenced under the *Indian Act 1886* in respect of the unlicensed harvesting on the reserve during relevant time period, and, in consequence, the principle of prosecutorial discretion is not engaged in this claim. The Tribunal, in finding that the Crown breached its fiduciary duty, determined that the duty encompassed the power to lay an information under the *Indian Act 1886*. It follows that the Tribunal is entitled to consider the Crown's failure to lay an information when determining compensation and I see no reason to interfere with the Tribunal's reasoning on this point.

[5] On the issue of bias, I am not persuaded that the Tribunal's decision discloses a reasonable apprehension of bias. As for the validity of the initial surrender of timber on the reserve, the parties agree that the surrender was invalid and that the Tribunal erred in concluding otherwise. Until the compensation phase of the proceedings has completed, the claim remains before the Tribunal. As a result, I would not allow the judicial review on this ground but rather ask that the Tribunal take note of the parties' agreement when deciding what compensation, if any, is owed to the applicants.

I. Background

[6] The applicants are bands as defined under subsection 2(1) of the *Indian Act*, R.S.C., 1985, c. I-5 and thus qualify as "First Nations" under section 2 of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 [*SCTA*]. They are located in Saskatchewan and are adherents to Treaty 6. Pursuant to this treaty, reserves were set apart for the applicants' use. The timber harvesting at issue in this claim took place on one of these reserves, known as Little Red Reserve 106A.

[7] The applicants submitted a specific claim to the Minister of Indian Affairs and Northern Development in August 2003, asserting that the 1904 surrender of timber on Little Red Reserve did not comply with the requirements of the *Indian Act 1886* and that the timber was harvested from the reserve in trespass. The applicants claimed that this amounted to a breach of the Crown's fiduciary duty and resulted in losses for which they are owed compensation. Negotiations with the Crown were unsuccessful and the applicants filed their claim with the Tribunal on December 8, 2011.

[8] Following a case management conference in September 2012, the Tribunal bifurcated the claim into two phases: validity and compensation. The Tribunal would first decide the issue of the validity of claim and, assuming the applicants were successful on this point, then consider the amount of compensation owed by the Crown. The decision being challenged in this application concerns only the validity of the applicants' claim.

[9] The applicants in their claim allege that the surrender of timber was taken on January 16, 1904 without the approval of a majority of voting members or the council of either band, as was required under section 39 of the *Indian Act 1886*. Nevertheless, the surrender was approved by Order in Council on February 4, 1904. Later that same year, the Department of Indian Affairs approved the bid submitted by the Canada Territories Corporation (CTC) to harvest the surrendered timber. Due to CTC's failure to pay the balance of its tender on time, however, the Department did not issue a timber license until 1907. Even then, the license was not renewed owing to CTC's inability to meet payment deadlines and provide proper returns.

[10] Despite these irregularities, CTC and its subsidiary, Sturgeon Lake Lumber Company, harvested timber on the reserve from 1904 to 1910. The applicants allege that the Crown allowed the unlicensed cutting to take place and failed to halt CTC's harvesting activities or otherwise take any enforcement measures available under either the *Indian Act 1886* or the *Regulations for the sale of Timber on Indian Lands in Ontario and Quebec*, P.C. 1888-1788, subsequently extended to the entire country except for British Columbia by P.C. 1896-1457 [*ITR*]. The applicants argue that this permissive approach represented a breach of the Crown's fiduciary duty to the applicants. The Crown in its response to the claim denied that it had breached its

fiduciary duty and submitted that it did all that was legally required when managing the timber harvesting.

II. The Tribunal's decision

[11] The Tribunal determined the validity of the applicants' claim based on an agreed statement of facts as well as an agreed statement of issues. The parties submitted to the Tribunal the following issues:

1. Did the Canada Territories Corporation/Sturgeon Lake Lumber Company harvest timber on Little Red Reserve 106A between August 22, 1904 and April 5, 1910, without a licence in writing from the Superintendant [*sic*] General?
2. If so, did the Crown owe a fiduciary duty to the Claimants to prevent unlicensed harvesting and to enforce the provisions of Section 26 of the *Indian Act*, R.S.C. 1886, c. 43; as amended S.C. 1890, c. 29 with respect to any timber harvested from Little Red Reserve 106A between August 22, 1904 and April 5, 1910?
3. If so, did the Crown breach that duty?

[12] The Tribunal noted that there was no dispute that the timber located on the reserve had been validly surrendered to the Crown and that surrender had been accepted (Tribunal reasons at paragraph 27).

[13] The Tribunal held that the bands' conditional surrender of timber on the reserve to the Crown clearly gave rise to a fiduciary obligation in the management of the timber sale and harvesting (Tribunal reasons at paragraph 64). The real dispute, in the Tribunal's view, concerned the extent of the Crown's duty and whether there had been a breach of the duty in this case.

[14] After reviewing the relevant jurisprudence on the Crown's fiduciary duty to Aboriginal peoples and the statutory regime for managing timber harvesting under the *Indian Act 1886* and the *ITR*, the Tribunal determined that Crown's discretionary control over the surrendered timber meant that its fiduciary duty included statutory enforcement powers aimed at preventing trespass and illegal harvesting (Tribunal reasons at paragraphs 99-101). The Tribunal further held that, at the time of the timber harvesting, the applicants did not have standing to bring an action in trespass against CTC or any other unlicensed harvester. As a result, the Tribunal rejected the Crown's argument that the fiduciary duty should be restricted because the applicants were not vulnerable to the Crown's unilateral exercises of power (Tribunal reasons at paragraphs 120-121).

[15] Next, the Tribunal considered the Crown's argument that the recourse (or non-recourse) to enforcement and penalty provisions under the *Indian Act 1886* should be excluded from the fiduciary duty due to the principle of prosecutorial discretion. The Crown posited that section 26 of the *Indian Act 1886,* which imposed fines on anyone who cut timber on a reserve without a license, was a quasi-criminal provision, meaning that the Crown's decision whether to prosecute an offender was protected by the principle of prosecutorial discretion. It followed that the Crown could not be liable for failing to avail itself of this provision.

[16] The Tribunal accepted this argument in part and held that prosecutorial discretion applied to section 26 of the *Indian Act 1886*. The Tribunal also noted, however, that any exception to the Crown's fiduciary duty should be narrowly constructed. Accordingly, prosecutorial discretion would only apply once a prosecution under this section had been initiated and the matter reached

the courts. All steps leading up to that point, including the laying of an information under section 26, would be considered administrative acts falling within the scope of the Crown's fiduciary duty (Tribunal reasons at paragraph 139). The Tribunal concluded that the *Indian Act 1886* and the *ITR* provided the Crown with a range of enforcement "tools" that could be deployed to prevent trespass on the reserve and the unlicensed cutting of timber, of which initiating a prosecution under section 26 was simply one option.

[17] Based on the agreed facts, the Tribunal found that CTC had trespassed on the reserve and been repeatedly non-compliant with directions from the Department of Indian Affairs. The Crown had a fiduciary duty to protect the applicants' reserve from intrusion and exploitation. While the Crown could not be held to a specific outcome, it had to meet the standard of ordinary prudence and reasonable diligence in managing the surrendered timber. In this case, the Crown's permissive approach to CTC's delinquency, particularly in light of the range of non-prosecutorial powers open to it, meant that it fell short of this standard. In essence, the Crown's failure to take any enforcement steps constituted a breach of its fiduciary duty to the applicants (Tribunal reasons at paragraph 193).

III. Legislative provision

[18] Section 26 of the *Indian Act 1886*, the interpretation of which is at issue in this application, reads as follows:

> 26. Every person, or Indian other than an Indian of the band to which the reserve belongs, who, without the license in writing of the Superintendent General, or of some officer or person deputed by him for that purpose, cuts, carries away, or removes from any of the said land, roads or allowances for roads, in the said reserve, any of the trees, saplings, shrubs, underwood, timber or hay thereon, or

removes any of the stone, soil, minerals, metals or other valuables from the said land, roads or allowances for roads, shall, on conviction thereof before any stipendiary magistrate, police magistrate, or any two justices of the peace or Indian agent, incur -

(a.) For every tree he cuts, carries away or removes, a penalty of twenty dollars;

(b.) For cutting, carrying away or removing any of the saplings, shrubs, underwood, timber or hay, if under the value of one dollar, a penalty of four dollars; but if over the value of one dollar, a penalty of twenty dollars;

(c.) For removing any of the stone, soil, minerals, metals or other valuables or other valuables aforesaid, a penalty of twenty dollars, -

And the costs of prosecution in each case:

2. In default of immediate payment of the said penalties and costs, such magistrate, justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as he has authorized in that behalf, may issue a warrant, directed to any person or persons by him or them named therein, to levy the amount of the said penalties and costs by distress and sale of the goods and chattels of the person or Indian liable to pay the same; and similar proceedings may be had upon such warrant issued by the Superintendent General, or such other officer or person as aforesaid, as if it had been issued by the magistrate, justices of the peace or Indian agent, before whom the person was convicted; or such magistrate, or justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as aforesaid, without proceeding by distress and sale, may, upon non-payment of the said penalties and costs, order the person or Indian liable therefor to be imprisoned in the common gaol of the county or district in which the said reserve or any part thereof lies, for a term not exceeding thirty days, if the penalty does not exceed twenty dollars, or for a term not exceeding three months if the penalty exceeds twenty dollars:

3. If upon the return of any warrant for distress and sale, the amount thereof has not been made, or if any part of it remains unpaid, such magistrate, or justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as aforesaid, may commit the person in default to the common gaol, as aforesaid, for a term not exceeding thirty days, if the sum claimed upon the said warrant does not exceed twenty dollars, or for a term not exceeding three months if the sum exceeds twenty dollars;

4. All such penalties shall be paid to the Minister of Finance and Receiver General, and shall be disposed of for the use and benefit of the band of Indians for whose benefit the reserve is held, in such manner as the Governor in Council directs.

IV. Issues

[19] This application raises the following issues:

1. What is the applicable standard of review?
2. Did the Tribunal err in finding that the surrender of timber was valid?
3. Did the Tribunal err in holding that the Crown's decisions when conducting a prosecution under section 26 of the *Indian Act 1886* were excluded from its fiduciary duty on the basis of prosecutorial discretion?
4. Does the Tribunal's decision give rise to a reasonable apprehension of bias on the issue of compensation for the Crown's breach of fiduciary duty?

V. Analysis

A. *Standard of review*

[20] This Court recently determined the applicable standard of review on applications for judicial review of decisions of the Tribunal: *Canada v. Kitselas First Nation*, 2014 FCA 150, 460 N.R. 185 [*Kitselas*]. The Tribunal's findings of fact and mixed fact and law are reviewed on a standard of reasonableness. The specific legal question of the existence and extent of the Crown's fiduciary duty to Aboriginal peoples, by contrast, is subject to a correctness standard (*Kitselas* at paragraphs 22-24).

[21] Accordingly, the Tribunal's determination of the scope of the Crown's fiduciary duty to the applicants shall be reviewed on a standard of correctness. Other findings, such as the Tribunal's ultimate conclusion that the Crown breached its fiduciary duty in this case, attract a more deferential standard of reasonableness.

B. *Did the Tribunal err in finding that the surrender of timber was valid?*

[22] As mentioned above, the Tribunal found that the timber had been validly surrendered, stating that "[t]here is no dispute that the spruce timber on the Reserve had been properly surrendered or that the surrender had been accepted" (Tribunal reasons at paragraph 27).

[23] The parties agree that the Tribunal erred in making this determination. Indeed, the Crown conceded in its response to the applicants' claim, filed with the Tribunal on February 15, 2012, that the surrender taken on January 16, 1904 did not comply with the requirements as set out in the *Indian Act 1886*. While this concession formed part of the record of the proceedings, it was not included in the agreed statement of facts and the parties both acknowledged that the invalidity of the surrender was not brought up during the hearing of the first phase of the claim.

[24] The parties ask this Court on consent for a declaration indicating the Tribunal's error and stating that the surrender did not comply with the relevant statutory requirements. Despite the agreement of the parties, I would decline to make such an order in the circumstances. The Tribunal has yet to hear the second phase of the claim and decide the amount of compensation owed to the applicants. Accordingly, the claim has not been resolved and the matter remains within the jurisdiction of the Tribunal. Moreover, the applicants are not asking this Court to set aside the Tribunal's decision on the issue of validity.

[25] As a result, I would simply take note of the parties' agreement on the invalidity of the surrender and ask that the Tribunal consider this fact when determining the issue of

compensation. It remains up to the Tribunal to decide whether the invalidity of the surrender is relevant in deciding the second phase of the claim.

C. *Did the Tribunal err in applying prosecutorial discretion to limit the Crown's fiduciary duty to the applicants?*

[26] The extent of the Crown's fiduciary duty to the applicants and its interplay with the principle of prosecutorial discretion is the main issue in this application. There is no dispute that the Crown owed a fiduciary duty in its management of the timber harvesting on the reserve. The applicants agree with most of the Tribunal's conclusions and submit only that the Tribunal erred in excluding from the Crown's fiduciary duty any decisions made in the course of a prosecution under section 26 of the *Indian Act 1886.*

[27] As mentioned earlier, the Tribunal held that prosecutorial discretion would apply when the Crown sought a conviction under the *Indian Act 1886*, such as was available under section 26. The Tribunal drew a distinction between the steps leading up to a prosecution, including the laying of an information, and the conduct of the prosecution before the courts. Only decisions made in the latter context were covered by prosecutorial discretion and therefore excluded from the Crown's fiduciary duty.

[28] The applicants submit that the Tribunal erred in reaching this conclusion, given the facts of this particular claim. They argue that, considering such factors as the *sui generis* nature of the Crown's fiduciary duty and its discretionary power over the timber on the reserve, the Tribunal should not have carved out an exception to the fiduciary duty. Instead, the Tribunal should have

found that the Crown breached its duty by not pursuing a prosecution and possible penalties under section 26 of the *Indian Act 1886*. The respondent disagrees and submits that the Tribunal's limitation of the fiduciary duty by the principle of prosecutorial discretion was correct.

[29] Despite counsel's submissions on this point, I do not characterize the issue in the same manner. In my opinion, this application for judicial review does not engage the principle of prosecutorial discretion. The Tribunal did not apply the principle to the facts of this claim for the simple reason that the Crown never attempted to prosecute an individual under the *Indian Act 1886*. Instead, the Tribunal identified a range of non-prosecutorial powers that the Crown could have pursued to protect the reserve and ensure CTC's compliance with its obligations, which included the power to lay an information (Tribunal reasons at paragraph 182).

[30] The Tribunal went on to conclude that the Crown's failure to utilize any of these remedies in the relevant time period resulted in multiple breaches of its fiduciary duty. The Crown could not disregard its legal obligations to the applicants and ignore the provisions of the *Indian Act 1886* and the *ITR*. At the same time, the Tribunal noted that the Crown maintained an overarching discretion in deciding how to fulfill its fiduciary duty. Accordingly, the Tribunal declined to specify which remedial tools the Crown should have employed in this case (Tribunal reasons at paragraph 185). What mattered was that the Crown failed to meet the requisite standard of care as a fiduciary.

[31] The applicants do not dispute any of the Tribunal's important findings. At the hearing, counsel for the applicants noted that the Crown was not required to prosecute CTC or any other operator under section 26. Similarly, they agree there was no actual exercise of prosecutorial discretion here because the Crown never initiated a prosecution under the *Indian Act 1886*. Given the Crown's failure to take the initial step of laying an information, the actual conduct of the prosecution falls into the realm of pure speculation. Finally, the applicants conceded that, even if the Crown's fiduciary duty did encompass prosecutions under section 26, the bands would not be automatically entitled to the full measure of damages under that provision. Indeed, the Crown's fiduciary duty does not require it to achieve a particular outcome, such as a conviction.

[32] Taking these considerations into account, I do not believe that prosecutorial discretion is at issue in this application. At root, the claim concerns allegations of multiple breaches of the Crown's fiduciary duty to the applicants based on its lax approach to CTC's unlicensed timber harvesting. The Tribunal concluded that these allegations were made out and that the claim was valid. I have not been persuaded that the Tribunal erred in coming to this conclusion.

[33] Furthermore, I agree with the Tribunal's statement that the Crown benefits from a wide margin of manoeuvre in deciding how to fulfill its legal obligations. It is generally not appropriate for the judiciary to step in and interfere with this exercise of discretion, nor do I wish to be taken as establishing as a principle that the failure to lay an information constitutes a breach of fiduciary duty. It must remembered that the police, in the investigation and prosecution of potential offences, act independent of the Crown. However, in the circumstances of this claim,

the Tribunal's approach is fully justified. The Crown's total failure to act to correct CLC's delinquency was sufficient to establish the breach of its duty, given the range of options open to the Crown and the standard of care it had to meet. It was not necessary for the Tribunal to go further and specifically assess the various avenues that the Crown could have pursued. In my view, this Court should similarly decline to speculate on how the Crown would have handled a prosecution under the *Indian Act 1886*.

[34] As prosecutorial discretion is not engaged, it is not necessary to balance this principle and the Crown's broader public law duties with its fiduciary obligations to the applicants. I would therefore dismiss this ground of the application.

[35] Before turning to the final issue in this application, I would like to emphasize that prosecutorial discretion might still be relevant to the Tribunal's determination of what compensation, if any, is owed to the applicants. The Tribunal found that the laying of an information under section 26 formed part of the Crown's fiduciary duty. It follows that the Crown's failure to do so and to extract any penalties could be a basis for a compensable loss under the *SCTA*. At the same time, it is impossible to know how the Crown would have conducted this prosecution, much less whether it would have succeeded and what penalties a court might have imposed. Prosecutorial discretion may come into play to account for this contingency and adjust the amount of compensation that would be owed, assuming of course that the Tribunal finds that the Crown's failure to seek penalties under section 26 constitutes a basis for compensation. These remain matters for the Tribunal to decide at the next phase of the claim.

D. *Bias*

[36] The applicants submit that, although the Tribunal did not decide the issue of compensation in its decision, certain comments made by the Tribunal member give rise to a reasonable apprehension of bias. Specifically, these statements suggest that he has prejudged the question of compensation, notwithstanding that they were made in *obiter*.

[37] The impugned comments are found at paragraph 197 of the Tribunal reasons, under the heading "The Question of Loss". For convenience, I reproduce the paragraph in its entirety (emphasis added):

The Respondent submitted that there had been no breach because there had been no loss. The Claimants were eventually paid for all the timber cut, including payment of all fees, dues, ground rents, and interest. It concerned me that there was no proven loss and that this first phase of hearing could end up being an academic exercise with great cost to all involved. However, it had been decided before my involvement that the process would be bifurcated into two phases, with the first phase considering only whether the Claim was valid – i.e. whether the Respondent had breached its fiduciary duty as alleged. The tribunal and the Parties agreed that loss was not a question for consideration in the first hearing phase and that was how the Parties prepared and proceeded. It is possible to have one or more breaches of fiduciary obligation without a loss having been incurred. Loss is not a precondition to proof of a breach of	L'intimée a soutenu qu'il n'y avait eu aucun manquement puisqu'il n'y avait eu aucune perte. Les revendicatrices ont finalement été payées et elles ont notamment reçu le paiement e tous les frais, rentes foncières et intérêts. J'étais préoccupé par le fait qu'aucune perte n'avait été établie et que cette première étape de l'audience puisse finir par avoir été un exercice académique très coûteux pour les parties concernées. Cependant, il avait déjà été décidé avant que je ne sois saisi de l'affaire que le processus serait divisé en deux étapes, la première étape étant consacrée seulement à la question de savoir si la revendication était valide – c.-à-d. si l'intimée avait manqué à son obligation fiduciaire comme le prétendent les revendicatrices. Le Tribunal et les parties sont convenu que la perte n'était pas une question à trancher lors de la première étape de l'audience et c'est sur cette base que les parties se sont préparées et qu'elles

fiduciary duty. A band may believe it has incurred a loss as a result of a breach of fiduciary duty, but it may not succeed in proving it. There is a risk that the first phase will not result in compensation in any event. On the other hand, a compensable loss may be proven if the Claim is valid. The question of compensation cannot be prejudged, and in the meantime the costs of proof of loss are not incurred unnecessarily before validity has been determined. The purpose of bifurcation is to minimize the time and expense of the second phase if it will not be necessary. If no loss is proven, it will be possible to address the result through an award of costs.	ont procédé. Il est possible qu'il y ait un ou plusieurs manquements à l'obligation fiduciaire sans qu'il n'y ait de perte. Il n'est pas nécessaire qu'il y ait eu perte pour prouver qu'il y a eu manquement à l'obligation fiduciaire. Une bande peut croire qu'elle a subi une perte par suite d'un manquement à l'obligation fiduciaire, mais il se peut qu'elle ne puisse pas le prouver. Il est donc possible que la première étape ne donne pas lieu à une indemnisation de toute façon. En revanche, une perte indemnisable peut être établie si la revendication est valide. On ne saurait préjuger de la question de l'indemnisation et, entretemps, les frais engagés pour établir la perte avant que la validité de la revendication ne soit établie ne le sont pas inutilement. La division des procédures vise à réduire la durée de la deuxième étape et les coûts y afférents si elle ne s'avère pas nécessaire. Si aucune perte n'est prouvée, le Tribunal pourra accorder des dépens en conséquence.

[38] Thee applicants point to certain passages as indicators of prejudgment of the issue of compensation, notably the Tribunal's statements that the applicants were eventually fully paid for the harvested timber, that there was no proven loss, and that there was a risk that the first phase would become "an academic exercise". Even though the Tribunal later noted that compensation "cannot be prejudged", the applicants submit that these words do not alleviate the concerns engendered by the other comments.

[39] I disagree with the applicants' contention. When these comments are properly considered together, they do not rise to the level of a reasonable apprehension of bias.

[40] There is no doubt that the duty of impartiality applies to administrative decision-makers, such as members of the Tribunal, who are acting in a judicial or quasi-judicial capacity. The content of this duty varies based on the context and the decision-maker's functions: *Pelletier v. Canada (Attorney General)*, 2008 FCA 1 at paragraph 49, [2008] 3 F.C.R. 40. Given that the Tribunal member is a superior court judge and that the Tribunal fulfills adjudicatory functions, the decision attracts the highest standard of reasonable apprehension of bias.

[41] The Supreme Court of Canada reiterated the standard for a reasonable apprehension of bias in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paragraph 60, [2003] 2 S.C.R. 259 [*Wewaykum*] (quoting *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716):

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:
>
> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[42] At the same time, the Supreme Court emphasized that judicial impartiality is presumed and that the party alleging bias has the burden of supporting its contention (*Wewaykum* at paragraph 59).

[43] I find that the applicants have failed to meet their burden. The Tribunal expressly recognized that the question of loss was not relevant to the first phase of the proceedings and the issue could not be prejudged. These comments are accurate and indicate that Whalen J. has not already determined the applicants' entitlement to compensation. A reasonable person, one who has read the decision and is aware of the nature of the proceedings, including the bifurcation order, would not conclude that Whalen J. would approach the second phase of the claim other than with a fair and an open mind. Moreover, based on the parties' agreed statements of facts, it was reasonable for the Tribunal to believe that the applicants were fully paid for the harvested timber. To the extent that this finding is relevant to the issue of compensation, the applicants will have the opportunity to present evidence at the second phase to challenge it. There is no basis, however, for requiring another member of the Tribunal to hear the remainder of their claim.

[44] In conclusion, I would dismiss the applicants' argument on the question of bias.

VI. Proposed Disposition

[45] For these reasons, I propose to dismiss the application for judicial review with costs and to invite the Tribunal to take note of the Crown's concession that the 1904 timber surrender failed to comply with the relevant statutory requirements of the *Indian Act 1886*.

"Johanne Trudel"
J.A.

"I agree
D. G. Near J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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