



Aboriginal Law Section
Litigation Services
900-840 Howe Street
Vancouver, British Columbia
V6Z 2S9

Telephone: (604) 666-2715
Facsimile: (604) 666-2710
Email: brian.mclaughlin@justice.gc.ca

March 31, 2014

By Tribunal's E-Filing System

Registry of the Specific Claims Tribunal of Canada

400 – 427 Laurier Avenue West
4th Floor, P.O. Box 31
Ottawa, ON
K1R 7Y2

Dear Sirs/Mesdames:

Re: *HMTQ v. Williams Lake Indian Band (I.B. #719)*
Federal Court of Appeal No.: A-168-14
Our File No.: 4657626

Please find attached for service, pursuant to Rule 304(1) of the *Federal Courts Rules*, a copy of the Notice of Application for Judicial Review filed March 28, 2014 for the above noted matter. Please note that pursuant to Rule 317 of the *Federal Courts Rules*, our request for a certified copy of the Tribunal's record as set out in Rule 318 of the *Federal Courts Rules* appears on page 8 of the Notice of Application.

In preparation for our applicant's record, we also request a certified copy of the Reasons for Decision of the Specific Claims Tribunal dated February 28, 2014 in the matter of *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada (As represented by the Minister of Indian Affairs and Northern Development Canada)*, 2014 SCTC 3.

Yours truly,

Brian McLaughlin
General Counsel

BM/jt

Encl.

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS
PARTICULIÈRES

March 31, 2014

RECEIVED / REÇU
OTTAWA, ON



Court File No. A-168-14

FEDERAL COURT OF APPEAL

BETWEEN:

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

Applicant

and

WILLIAMS LAKE INDIAN BAND

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. 28-2014 Issued by: Sandra Matherson
(Registry Officer)

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

TO: WILLIAMS LAKE INDIAN BAND
as represented by Clarine Ostrove / Leah Pence
Mandell Pinder LLP
422 – 1080 Mainland Street
Vancouver, British Columbia
V6B 2T4

Tel: 604-681-4146
clo@mandellpinder.com
leah@mandellpinder.com

APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal dated February 28, 2014 in the matter of *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada (As represented by the Minister of Indian Affairs and Northern Development Canada)*, 2014 SCTC 3 (the “Decision”). The Decision was first communicated to the applicant on February 28, 2014.

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
 - a. did not breach a legal obligation to the Williams Lake Indian Band;
 - b. is not liable for any breaches of legal obligations of the Colony of British Columbia in this claim;
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. At the time that the Williams Lake area was settled by Europeans, the Williams Lake Indian Band (the “Band”) sometimes camped at the west end of Williams Lake, on what became Lots 71 and 72 (now part of the town of Williams Lake), and at the east end of the lake.

2. In January 1860, Governor James Douglas of the Colony of British Columbia (the “Colony”) issued *Proclamation No. 15*, permitting the pre-emption by British subjects and “aliens” taking an oath of allegiance to Her majesty (“settlers”) of unsurveyed lands, provided they were not “the site of an existent or proposed town, or auriferous land available for mining purposes, or an Indian reserve or settlement”.
3. By April 1863, settlers pre-empted approximately one half of the lands in Lots 71 and 72.
4. The Band had not been allotted an Indian reserve when the Colony joined Confederation in 1871.
5. Article 13 of the *Terms of Union* provided that, following Confederation, British Columbia would transfer to Canada land to be set aside as lands reserved for the use and benefit of the Indians (“Indian reserves”). Following Confederation, British Columbia and Canada began negotiations of the process for determining which lands should be transferred to Canada to be set apart as Indian reserves. In 1876, the Joint Indian Reserve Commission was appointed by both governments to fulfil that mandate.
6. Canada lacked the unilateral ability to set aside pre-emptions of provincial Crown lands or to allot, set aside, or create Indian reserves of those lands. Recommendations of the Joint Indian Reserve Commission had to be approved by both levels of government.
7. Indian Reserve Commissioner Peter O’Reilly visited the Williams Lake area in 1881. He allotted a number of Indian reserves at the east end of Williams Lake, including Indian reserve No. 1, comprising over 4,000 acres and including farms from an estate purchased by Canada for the use and benefit of the Band. He also allotted eight graveyard reserves on or near Lots 71 and 72, I.R. Nos. 2 and 3 just north of I.R. No. 1, I.R. No. 4 west of Lot 72, I.R. No. 5 at Chimney Creek, IR No. 6 at the foot of Williams Lake just east of Lot 71. After the Indian reserves were allotted, the Band’s Chief said he was “satisfied and thankful that their land question is now settled”.

8. After reserves for the Band were allotted in 1881, pre-emptions for the remainder of Lots 71 and 72 were filed in 1883. A crown grant for Lots 71 and 72 was not issued until 1885.
9. In 1912, the McKenna-McBride Commission was appointed to investigate the condition of Indian affairs in British Columbia with a view to settling all differences respecting Indian lands and affairs. The Commission visited Williams Lake in July 1914 and although the Band's Chief noted that he wanted to have more room on his reserves, he made no mention of any claim by the Band to Lots 71 and 72.
10. There is no evidence of any complaint by any member of the Band to Canada about the exclusion of Lots 71 and 72 from the reserve allotments between 1881 and February 1994, when the Respondent submitted a specific claim to the Minister of Indian Affairs and Northern Development pursuant to the *Specific Claims Policy*.
11. Pursuant to the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, on October 26, 2011 the Respondent filed a Declaration of Claim with the Specific Claims Tribunal. Canada filed its Response on November 24, 2011.
12. During 2012 and 2013, the parties filed memoranda of fact and law and common books of documents. The claim was heard by Mr. Justice Harry Slade on the respondent's Indian reserve No. 1, near Williams Lake, British Columbia, on October 16 to 19, 2012, June 4 to 6, 2013, with further written submissions in September 2013.
13. In the Decision, the Tribunal held that:
 - a. The Band had an Indian settlement that comprised Lots 71 and 72 and an indeterminate adjoining area;
 - b. *Proclamation No. 15* was legislation pertaining to Indians or land reserved for Indian for the purpose of section 14(1)(b) of the *Specific Claims Tribunal Act*;

- c. *Proclamation No. 15* required the Colony to take steps to identify Indian settlements in consultation with the Indians;
- d. The Colony breached *Proclamation No. 15* by failing to take steps to identify Indian settlements in consultation with the Indians;
- e. The Band's Indian settlements were "anticipatory reserves";
- f. *Proclamation No. 15* gave rise to a fiduciary duty on the part of the Colony to protect the Band's interest in its "anticipatory reserve";
- g. The Colony breached its fiduciary duty by failing to make an inquiry into the extent of the Band's Indian settlements;
- h. Canada is liable for the Colony's breaches set out at (d) and (g) above, pursuant to sections 14(1)(b) and 14(2) of the *Specific Claims Tribunal Act*;
- i. Canada owed a fiduciary duty to the Band in the reserve allotment process. Canada was the exclusive intermediary between First Nations and British Columbia and was thus solely liable for breaches of fiduciary duty in connection with the allotment of Indian reserves;
- j. Canada breached its fiduciary duty by failing to take steps to set aside the pre-emptions on Lots 71 and 72; and,
- k. The allotment of Indian reserves in 1881 by Commissioner O'Reilly did not remedy the above-noted breaches.

14. 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

15. 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.
16. The Tribunal erred in fact and law by finding that the Band had an Indian settlement within the meaning of *Proclamation No. 15*, which comprised all of Lots 71 and 72 and an indeterminate adjoining area.
17. The Tribunal erred in law by finding that *Proclamation No. 15* was legislation pertaining to Indians or lands reserved for Indians for the purpose of section 14(1)(b) of the *Specific Claims Act*. The purpose of *Proclamation No. 15* was to allow settlers to pre-empt unsurveyed agricultural lands.
18. The Tribunal erred in law by finding that *Proclamation No. 15* required the Colony to identify Indian settlements or to prevent settlers from pre-empting them. *Proclamation No. 15* contains no provisions placing a positive obligation on the Colony to identify Indian settlements or to prevent settlers from pre-empting them.
19. The Tribunal erred in law by finding that the Band had “anticipatory reserves” on its Indian settlements.
20. The Tribunal erred in law by finding that *Proclamation No. 15* gave rise to a fiduciary duty. In particular, *Proclamation No. 15* did not confer a discretionary power over an aboriginal interest.

21. Even if a fiduciary duty did arise, the Tribunal erred in mixed fact and law by finding that the Colony breached a fiduciary duty by failing to make an inquiry into the extent of the Band's Indian settlements. There was no requirement that the Colony take this step.
22. The Tribunal erred in law by finding Canada liable for the breaches of the Colony pursuant to sections 14(1)(b) and 14(2) of the *Specific Claims Act*. Canada did not assume responsibility for Colonial liabilities of this nature upon Confederation.
23. The Tribunal erred in law when it found the existence of a fiduciary duty owed by Canada. More specifically, the Tribunal erred by finding the existence of a cognizable Indian interest, discretionary control by the Crown over a cognizable Indian interest, and a fiduciary undertaking based on Article 13 of the *Terms of Union*.
24. The Tribunal erred in mixed fact and law when it concluded that Canada breached its duty by failing to exercise ordinary prudence by taking steps to set aside pre-emptions on Lots 71 and 72. Canada did not have the authority to set aside pre-emptions on provincial Crown lands.
25. The Tribunal erred in mixed fact and law when it concluded that Canada is solely liable for any loss suffered by the Respondent in the claim.
26. In the alternative, the Tribunal erred in law by finding that the allotment of Indian reserves in 1881 by Commissioner O'Reilly did not remedy the breaches.

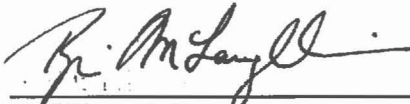
This application will be supported by the following material:

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-7004-11.

DATE: March 28, 2014

for 

William F. Pentney
Deputy Attorney General of Canada
Per: Brian McLaughlin
Department of Justice
900 - 840 Howe Street
Vancouver, British Columbia
V6Z 2S9
Tel: 604-666-2715
Fax: 604-666-2710
File: 2-276206 / 4377946

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: 604-666-2715, FACSIMILE: 604-666-2710, ATTENTION: Brian McLaughlin.