

March 13, 2019

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OTTAWA, ON

Court File No.

A-112-19

FEDERAL COURT OF APPEAL

AHOUSAHT FIRST NATION

Applicant

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN  
DEVELOPMENT

Respondent

APPLICATION UNDER Section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and section  
34(1) of the *Specific Claims Tribunal Act* SC 2008, c. 22

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 (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

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

March 8, 2019

Issued by:   
(Registry Officer) **JOYCE FAN**  
**REGISTRY OFFICER**  
**AGENT DU GREFFE**

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Pacific Centre  
P.O. Box 10065  
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TO: Her Majesty the Queen in Right of Canada  
As represented by the Minister of Indian Affairs and Northern Development  
Department of Justice  
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Vancouver, BC V6Z 2S9  
Tel: 604.666.9219  
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AND TO:  
Specific Claims Tribunal  
c/o Registry of the Specific Claims Tribunal of Canada  
400 427 Laurier Avenue W  
Box 31  
Ottawa, ON K1R 7Y2  
Tel: 613.943.1515  
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## APPLICATION

This is an application for judicial review in respect of:

1. The decision of the Specific Claims Tribunal decision dated February 8, 2019 in the matter of *Ahousaht First Nation v. Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development*, 2019 SCTC 1 (the "Decision").

### **The applicant makes application for:**

2. An order quashing or setting aside the Decision.
3. An order substituting the Decision of the Tribunal with an order that Her Majesty the Queen in right of Canada (the "Crown" or "Canada"):
  - a. through Indian Reserve Commission Peter O'Reilly ("O'Reilly") owed a fiduciary duty to the Ahousaht First Nation in connection with the allotment of reserve land to the Ahousaht First Nation; and
  - b. that it, through O'Reilly, breached its fiduciary duty to the Ahousaht First Nation in failing to allot Lot 363 to the Ahousaht First Nation.
4. 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 to be appropriate;
5. Costs; and
6. Such other relief as this Honourable Court may deem appropriate.

### **The grounds for the application are:**

#### **Background**

1. The Decision concerns O'Reilly's failure to include what became Lot 363 within the boundaries of Marktosis Indian Reserve No. 15 (the "Reserve") when he made that allotment of the Reserve in 1889.
2. The Tribunal found that the Ahousaht First Nation had a cognizable interest in what later became Lot 363 at the time that O'Reilly was allotting the Reserve.
3. The Tribunal further found that the Ahousaht First Nation "has not established, as at 1889, that O'Reilly, despite having made an adequate inquiry, was aware of Ahousaht's cognizable interest in Lot 363. The Crown was not, therefore, capable of determining whether or not to make an allotment". As a result, the Tribunal concluded "the Claimant has not established a breach of lawful obligation on the Crown in relation to Lot 363. Accordingly, the Claim is dismissed".
4. The Honourable Larry Whalen of the Tribunal had conduct of the claim from July 12, 2013 until the Validity Hearing which took place on July 12 and 13, 2018. During that

time, Justice Whalen heard the oral evidence and the expert evidence, attended at a site visit and at the request of the Ahousaht First Nation and Canada conducted a mediation. Pursuant to a Mediation Agreement dated April 13, 2018, the Ahousaht First Nation and Canada agreed that if the mediation was not successful, Justice Whalen would conduct the Validity Hearing on July 11 and 12, 2018.

5. The mediation efforts did not succeed and thus the matter was scheduled to proceed to the Validity Hearing.
6. Pursuant to a Direction dated June 21, 2018, the Tribunal advised that the Honourable Harry Slade would have conduct of the Validity Hearing. Until that date the Honourable Harry Slade had not been involved in this Tribunal claim. By letter dated June 26, 2018, the Ahousaht First Nation raised its concerns regarding the Honourable Slade conducting the Validity Hearing in place of the Honourable Larry Whalen, indicating that this may prejudice the case of the Ahousaht First Nation. Despite this, the Tribunal proceeded with the Validity Hearing with the Honourable Slade presiding.
7. 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, RSC 1985, c F-7.

#### Grounds for Review

In making the above findings, the Ahousaht First Nation says that the Tribunal:

1. Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
2. Failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
3. Erred in law in making its decision, whether or not the error appears on the face of the record;
4. 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;
5. Acted in any other way that was contrary to law.
6. In particular, the Tribunal erred in fact and law, or in the alternative, in mixed fact and law, in failing to find that O'Reilly knew or ought to have known of the Ahousaht First Nation's cognizable interest in what later became Lot 363 and, as a result, failed to include the lands that later became Lot 363 as part of his allotment of the Reserve.
7. In further particular, the Tribunal breached a duty of natural justice and procedural fairness in refusing the Ahousaht First Nation's request that the Honourable Larry Whalen conduct the Validity Hearing and render a decision.

This application will be supported by the following material:

1. A certified copy of the Tribunal's file;
2. Such other material and affidavits as counsel may advise and this Honourable Court

may permit.

The applicant requests that Specific Claims Tribunal send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Specific Claims Tribunal to the applicant and to the Registry: A certified copy of the Tribunal's Record in file number SCT-7005-12.

March 8, 2019



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