Court File No. A-303-19

FEDERAL COURT OF APPEAL

LITTLE BLACK BEAR FIRST NATION

Applicant

and

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION, DAY STAR FIRST NATION, STAR BLANKET FIRST NATION, STANDING BUFFALO DAKOTA FIRST NATION, PEEPEEKISIS FIRST NATION, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA (As represented by the Minister of Indian Affairs and Northern Development)

Respondents

APPLICATION UNDER s. 28(1)(r) of the *Federal Courts Act*, RSC 1985 c F-7, and s. 34 of the *Specific Claims Tribunal Act*, SC 2008, c 22

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU 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 directs otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this appeal be heard at Ottawa, Ontario.

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 of being served with this notice of application.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

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: AUG 2 9 2019 ISSUED BY: ORIGINAL SIGNED BY KEVIN LEMIEUX
(REGISTRY OFFICER) A SIGNÉ L'ORIGINAL

ADDRESS OF LOCAL OFFICE: Federal Court of Canada
635 8 Ave SW
Calgary, Alberta T2P 4H5

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on / and dated.
AOUT AUG 2 9 2019
REGISTRY OFFICER

TO: **Department of Justice Canada**
Prairie Regional Office (Saskatoon)
10th Floor, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6
Attention: Lauri Miller (lauri.miller@justice.gc.ca)
Lawyer for Her Majesty the Queen in Right of Canada

AND TO: **Kawacatoose First Nation, Pasqua First Nation, Piapot First Nation, Muscowpetung First Nation, George Gordon First Nation, Muskowekwan First Nation, and Day Star First Nation**
As Represented by: Knoll & Co. Law Corporation
1678 – 128th Street, Suite 201
Surrey, BC V4A 3V3
Attention: David Knoll (dknoll@knollandco.com)

AND TO: **Star Blanket First Nation**
As Represented by: McKercher LLP
374 3rd Avenue South
Saskatoon, SK S7K 1M5
Attention: Aaron Starr (a.starr@mckercher.ca)

AND TO: **Standing Buffalo Dakota First Nation**
As Represented by: Phillips & Co Barristers and Solicitors
2100 Scarth Street
Regina, SK S4P 2H6
Attention: Merv Phillips/ Leane Phillips
(mervinphillips@phillipsco.ca leanephillips@phillipsco.ca)

AND TO: **Peepeekisis First Nation**
As Represented by: Brass Law
PO Box 33089
Regina, SK S4T 7X2
Attention: Michelle Brass (michelle@brasslaw.ca)

AND TO: **The Specific Claims Tribunal**
c/o Registry of the Specific Claims Tribunal
400 - 427 Laurier Avenue West

PO Box 31
Ottawa, ON K1R 7Y2
Tel: 613.943.1515
Fax: 613.943.0586

APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal ("Tribunal") dated July 30, 2019, in the matter of *Kawacatoose First Nation (et al) v Her Majesty the Queen in Right of Canada (as represented by the Minister of Indian Affairs and Northern Development)*, 2019 SCTC 3 ("Decision"). The Decision was first communicated to the Applicant on July 30, 2019.

The Applicant makes application for:

1. An order quashing or setting aside the Decision;
2. An order:
    a. substituting the Decision of the Tribunal with an order that Little Black Bear First Nation ("Little Black Bear" or the "Band") has an interest in the fishing station reserve, Indian Reserve 80A ("IR 80A"), and that the Band established a valid claim under the provisions of the *Specific Claims Act*, SC 2008 c 22 ("*SCTA*"); or, alternatively
    b. referring the matter back to the Tribunal to a different decision-maker for determination in accordance with such directions as are considered appropriate;
3. Costs; and
4. Such other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

<u>The Background</u>

1. Little Black Bear adhered to Treaty Four on September 15, 1874. The written text of the treaty included a promise that the Indian adherents, including Little Black Bear, had the right to pursue fishing throughout the surrendered tract of land. Further promises were made orally, such as those that affected the way the lands held or used by Indians pre-Treaty would be treated thereafter. For example, oral evidence establishes that such oral promises entitled Little Black Bear to a fishing station; this was because the Band had been given a landlocked reserve, in spite of its tradition of fishing and relying on fish for

sustenance. Little Black Bear's reserve was eventually set apart as Indian Reserve No. 84 in the File Hills, about 19 miles from Fort Qu'Appelle, Saskatchewan, making it a Qu'Appelle Valley Band, geographically.

2. No formal policy directing Canada's approach to setting aside fishing stations for First Nations in Treaty Four has ever been located by any of the parties to this action, nor has the written historical record established any specific promise to provide a fishing station. However, documentary evidence establishes that in 1883, Dominion Lands Surveyor J.C. Nelson identified reserves to be surveyed in the "Qu'Appelle District", and included among those Little Black Bear, as well as a fishing station at Last Mountain Lake for the "Qu'Appelle and Touchwood Indians". At the time, Little Black Bear was part of the Qu'Appelle Indian Agency. In 1885, Nelson surveyed IR 80A, but never listed the specific bands for whom the fishing station was set apart. When IR 80A was confirmed by Order-in-Council on May 17, 1889, it was identified as being for the "Touchwood Hills and Qu'Appelle Valley Indians". No documents have been located that clearly state the Bands included in this descriptor, nor any criteria for what process would have been followed to determine the Bands included.

3. At the time of survey, Last Mountain Lake (upon which IR 80A was located) was the closest body of water to the landlocked Little Black Bear reserve. This remained the case until the Katepwa man-made lakes were made in the 1940s. Little Black Bear members have fished at IR 80A since time immemorial, and continued to do so after IR 80A was created. However, when IR 80A was surrendered in 1918, the Crown did not include the Band as a beneficiary, though government correspondence and documents establish that there has been obvious confusion about which Bands were, in fact, the rightful beneficiaries. This claim flows from Little Black Bear's belief in its entitlement to an interest in IR 80A, which has not been diminished by the Crown's confusion over IR 80A's intended beneficiaries.

4. On June 20, 2013, Kawacatoose First Nation, Pasqua First Nation, Piapot First Nation, Muscowpetung First Nation, George Gordan First Nation, Muskowekwan First Nation, and Day Star First Nation filed a Declaration of Claim with the Specific Claims Tribunal. The Claim alleges that Her Majesty the Queen in Right of Canada ("Canada"), breached its fiduciary obligations regarding the taking of approximately 1,408 acres of the Last

Mountain Indian Reserve 80A on March 23, 1918. In particular, the Claimant First Nations allege the surrender is illegal because it was taken:

a. without consent from all Indian Bands who had an interest in IR 80A;

b. without the consent of eligible voting members of the signatory Indian Bands who were habitual residents on or near IR 80A;

c. without compliance with the surrender provisions of the Indian Act; and,

d. without compliance with Treaty No. 4 which stipulates that the consent of the "Indians entitled thereto" be obtained before the deposition of any reserve lands.

5. On March 31, 2014, the Applicant, Little Black Bear, filed a Declaration of Claim with the Tribunal asserting its interest in IR 80A, and alleging the same fiduciary breaches by Canada. Star Blanket First Nation, Standing Buffalo Dakota First Nation, and Peepeekisis First Nation also filed Declarations of Claim, making the same allegations.

6. The Declaration of Claims were consolidated, and on May 11, 2015, the Honourable W.L. Whalen ordered that the hearing of this consolidated Claim proceed in two stages: the Validity Stage and the Compensation Stage. The Validity Stage was further divided into two sub-phases. It was ordered that the first sub-phase, i.e., the Standing sub-phase, proceed before the Validity sub-phase.

7. The Standing sub-phase was to determine which of the Claimant First Nations were the proper beneficiaries of IR80A. The parties appeared before the Honourable Tribunal on October 10-13, 2018 to make submissions respecting the Standing sub-phase Hearing.

8. The Tribunal considered written and oral submission from the parties. At the hearing, the Applicant asserted that it was one of the intended beneficiaries of IR 80A. This is supported by the language of the Order-in-Council confirming IR 80A, historical notes and documentary evidence, the traditional territory of the Little Black Bear, and the organization of Indian Agencies in place when IR 80A was set apart and thereafter confirmed. The Band had also accepted the setting apart of IR 80A by making use of the fishing station.

The Decision and Grounds for Review

9. On July 30, 2019, the Decision of the Honourable Justice Whelan dismissed Little Black Bear's claim, having analysed the Order-in-Council PC 1151 of May 17, 1889 ("PC 1151"),

and concluded that the phrase "a Fishing Station for the use of the Touchwood Hills and Qu'Appelle Valley Indians" did not include Little Black Bear.

5. Little Black Bear brings this Application for Judicial Review on the basis of the Honourable Tribunal having unreasonably:

    a. erred in defining the issue too narrowly, treating the omnibus Order-in-Council, PC 1151 of May 17, 1889, as if it had created IR 80A, rather than having merely confirmed what had already been created through other indicia of reserve creation. The Honourable Tribunal's task had been to determine which Bands had an *interest* in IR 80A, *confirmed* by PC 1151, not *created* by PC 1151;

    b. erred in neglecting treaty interpretation law, pursuant to the Supreme Court of Canada decisions *R v Marshall,* [1999] 3 SCR 456, *Guerin v R,* [1984] 2 SCR 335, *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, and *Sioui v Quebec (Attorney General),* [1990] 1 SCR 1025. The established law is that the courts must not apply strict rules of interpretation to treaty relationships, as it is unconscionable for the Crown to ignore oral terms and rely exclusively on written terms. Furthermore, the Supreme Court of Canada has approved of the practice of using extrinsic evidence of historical and cultural contexts to resolve any ambiguity on the face of a treaty, to give balanced weight to the aboriginal perspective in treaty interpretation;

    c. erred in law by failing to properly apply *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 ("***Mitchell***") and *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, ("***Osoyoos***"). In so doing, the Honourable Tribunal unreasonably applied an overly narrow, restrictive analysis to interpreting treaty provisions aimed at maintaining Indian reserve entitlements, though the law requires an interpretation that impairs the Indian interests as little as possible when the ambiguity is a genuine one and the interpretation favourable to Indian interests is reasonable, within the legislative purposes of the enactment;

    d. erred by failing to apply proper weight to the Crown's admissions that there is an insufficient documentary record to determine the policies governing fishing stations and their beneficiaries, per the Affidavit of Chander Avasthi;

    e. erred in basing the Decision disproportionately and unreasonably on the imputed knowledge and understanding of one single government official, Surveyor Nelson. The Honourable Tribunal erred in failing to consider that Surveyor Nelson had the knowledge and understanding to differentiate between "Indians" and "Bands", when he wrote that the he had set aside a fishing station "for the Touchwood Hills and Qu'Appelle Valley *Indians*" instead of "for the Touchwood Hills and Qu'Appelle Valley *Bands*" (emphasis added). Thereafter, the Honourable Tribunal erred in

treating the word "Indians" to mean "Bands", applying an overly restrictive analysis to the Order-in-Council in which this phrase appears, contrary to the Supreme Court of Canada's decision in *Osoyoos*;

f. erred in interpreting the sub-phase's issue as "set apart and confirmed", rather than "set apart" and thereafter "confirmed by Order-in-Council PC 1151". An Order-in-Council is not a required element in reserve creation, per *Lac La Ronge Indian Band v Canada,* 2001 SKCA 109 ("*Lac La Ronge*"). The required indicia of reserve creation were present before 1889, such that the reserve had crystallised prior to confirmation by PC 1151. The Honourable Tribunal erred in taking those two steps, "set apart" and "confirmed", as having occurred simultaneously on May 17, 1889, by way of the Order-in-Council;

g. erred in law by deeming that the test in *Lac La Ronge* had "similarities to the *Ross River* test", to show that the courts had placed a great emphasis on the Crown's intentions when evaluating when a reserve comes into existence in law. This error in law led the Honourable Tribunal to draw the unreasonable conclusion that its "legal task is the proper interpretation of the Order in Council, which in light of the law reviewed above, turns on the *Crown's* intention." Thereafter, the Honourable Tribunal erred in neglecting to apply the Supreme Court of Canada's finding in *R v* Sundown, [1999] 1 SCR 393, that requires that any ambiguities or doubtful expressions in the wording of a treaty or document be resolved in favour of the Indians;

h. erred by failing to give proper consideration to the contextual whole of the Applicant's Elder evidence to assess the beneficiaries of IR 80A, flowing from Treaty Four's provisions. This is a breach of *R v Marshall*, as the Honourable Tribunal unconscionably neglected to give the Indigenous perspective weight in considering the Bands whose interest in IR 80A was derived from their understandings of Treaty Four; and

i. erred in excluding Indigenous perspectives relating to IR 80A, when they had not first been communicated and considered by the Crown. By failing to separate "set apart" and "confirm", the Honourable Tribunal created an overly restrictive matrix in which the Indigenous perspective was necessarily excluded if it did not meet the onerous test of there being documentary proof of this perspective having been communicated and considered by governmental officials.

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 that the Specific Claims Tribunal send to the Applicant and to the Registry the following material that is not in the possession of the Applicant but is in the possession of the Tribunal; a certified copy of the Tribunal's record in file number SCT-5001-13.

Date: August 29, 2019

Ryan M. Lake | Aron Taylor, Solicitors for the Applicant
MAURICE LAW BARRISTERS & SOLICITORS
300, 602 – 12th Avenue SW
Calgary, Alberta T2R 1J3

Tel: 403-266-1201
Fax: 403-266-1201