



SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	September 17, 2019  Isabelle Bourassa	D E P O S E
Ottawa, ON	248	

LEGAL OFFICES IN SASKATOON & REGINA

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# F A C S I M I L E

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**Our Reference:** 106105.14  
**Date:** September 17, 2019  
**Pages:** 10, including cover  
**Time:** 2:25 p.m.

**To:** Registrar  
**Organization:** Registry of Specific Claims Tribunal  
**Fax:** 613-943-0586

**Re:** Star Blanket First Nation v. Specific Claims Tribunal of Canada, et al.  
 File No. A-328-19

**Remarks:**

Further to the above noted matter, please find attached for service upon you the Notice of Application for Judicial Review dated September 12, 2019

The original of this facsimile will be:  Placed in our File  Mailed to you  
 Hand Delivered  Couriered

In the event of a problem with this transmission, please contact Mackenzie Wagner at (306) 664-1339 for assistance.

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September 17, 2019

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**ATTENTION: JENILEE GUEBERT/MELISSA NICOLLS VIA EMAIL - [SaskLBBJR@justice.gc.ca](mailto:SaskLBBJR@justice.gc.ca)**

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Dear Sirs and Madams:

PLEASE REPLY TO:

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**Our File Reference:**  
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MEMBER OF RISK MANAGEMENT COUNCIL OF CANADA  
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 MEMBER OF EMPLOYMENT LAW ALLIANCE

McKercher LLP

All parties  
Page 2 of 2

**Re: Star Blanket First Nation v. Specific Claims Tribunal of Canada, et al.  
Federal Court of Appeal File No. A-328-19**

We enclose herewith for service upon you the Notice of Application for Judicial Review of Star Blanket First Nation dated September 12, 2019.

I request a duplicate copy of this letter with service acknowledged be returned to me.

Yours truly,

McKercher LLP

Per:



**Dusty T. Ernewein**

DTE/mrw  
Enclosure

Service hereby acknowledged this 18 day of  
September, 2019.

Print Name: \_\_\_\_\_

(Court File No. ~~A-328-19~~)

FEDERAL COURT OF APPEAL

STAR BLANKET FIRST NATION  
(the "Applicant")

and

SPECIFIC CLAIMS TRIBUNAL OF CANADA

and

KAWACATOOSE FIRST NATION, PASQUA FIRST NATION,  
PLAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION,  
GEORGE GORDON FIRST NATION, MUSKOWEKWAN  
FIRST NATION AND DAY STAR FIRST NATION

and

STANDING BUFFALO FIRST NATION

and

LITTLE BLACK BEAR FIRST NATION

and

PEEPEEKISIS FIRST NATION

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA  
(the "Respondents")

APPLICATION UNDER: Section 28(1)(r) of the *Federal Courts Act*, RSC 1985, c F-7

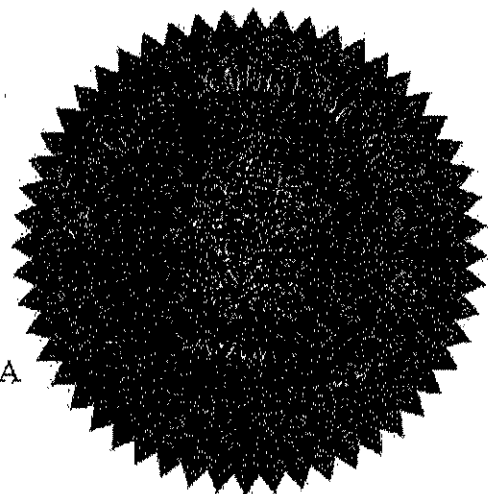
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**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

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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 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)

Issued by: **STEPHEN KNOWLES**  
**REGISTRY OFFICER**  
(Registry Officer) **AGENT DU GREFFE**

Address of local office: \_\_\_\_\_

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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.**

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**Her Majesty the Queen**

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Attention: Lauri M. Miller

## APPLICATION

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

### The Applicant makes application for:

1. An order quashing or setting the Decision;
2. An order
  - a. Substituting the Decision of the Tribunal with an order that the Applicant, Star Blanket First Nation (the "Band"), established a valid claim under the provision of the Specific Claims Tribunal Act, S.C. 2008, c.22 (the "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;
  - c. Costs; and
  - d. Such other relief as this Honourable Court may deem appropriate.

### The grounds for the application are:

#### The Background

3. The Decision arises out of a claim concerning which First Nation bands have a beneficial interest to Last Mountain Lake Indian Reserve 80A ("IR80A"), otherwise known as the IR80A fishing station, located on Last Mountain Lake, Saskatchewan, in what is now present-day Regina Beach, Saskatchewan (the "Claim"). IR80A was created by Order in Council PC 1151 on May 17, 1889 (the "OIC").
4. The Applicant, along with Little Black Bear First Nation, Peepeekeesis First Nation, and Standing Buffalo First Nation (collectively, the "Added Claimants") were granted party status in the original specific claim of Kawacatoose First Nation, Pasqua First Nation, Piapot First Nation, George Gordon First Nation, Muskowekwan First Nation and Day Star First Nation (collectively known as, the "Original Claimants").
5. In this sub-phase of the Claim, the Tribunal was tasked with determining the validity of Added Claimants to the Claim.
6. The Applicant adhered to Treaty Four on The written text of the treaty included a promise that the Indian adherents, including the Applicant, 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 the Applicant to a fishing station; this was because the Applicant had been given a landlocked reserve, in spite of its tradition of fishing and relying on fish for sustenance. The Applicant's reserve was eventually set apart as Indian Reserve No. 83 in the File Hills area.

7. Canada did not have a formal policy or procedure in which fishing stations for First Nations, nor was there any historical record promising of fishing stations. 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, the Applicant 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 the OIC 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.
8. At the time of survey, Last Mountain Lake (upon which IR 80A was located) was the closest body of water to the landlocked Applicant Reserve. This remained the case until the Katepwa man-made lakes were made in the 1940s. The Applicants 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 Applicant 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 the Applicant'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.

#### Grounds for Review

9. The Applicant claims that the Honourable Tribunal unreasonably:
  - a) erred in defining the issue too narrowly, treating the OIC, 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 and not created by the OIC;
  - b) erred in misapplying the law pertaining to proper Treaty interpretation, as outlined by the Supreme Court of Canada in *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 Supreme Court of Canada has directed that strict rules of interpretation of treaty rights must not be followed. The court has approved and directed that extrinsic evidence, whether oral or written, the historical and cultural contexts are vital to the resolution of any ambiguity relating to the proper interpretation of treaty, taking into account the perspective of the band in



treaty interpretation;

- c) failed to reconcile, through evidentiary weight, the Crown's admissions to there being an insufficient documentary record to determine the policies governing the creation and administration of fishing stations, and who are the beneficiaries;
- d) erred in misapply the law as directed by the Supreme Court of Canada in *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 and *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 [*Osoyoos*], unreasonably applying a narrow and restrictive analysis to the interpretation of treaty provisions aimed at maintaining Indian reserve entitlement. It is well-established law that an Indian right or interest should be interpreted in the face of ambiguity as the most minimal impairment to the Indian right or interest;
- e) erred in relying disproportionately, or unreasonable on the imputed knowledge, understandings, and representation of the surveyor, 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 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 OIC in which this phrase appears, contrary to the Supreme Court of Canada's decision in *Osoyoos*;
- f) erred in law by incorrectly relying on the OIC as both the "set apart" of lands, and the "creation" mechanism to IR80A. The Saskatchewan Court of Appeal, in *Lac La Ronge Indian Band v Canada*, 2001 SKCA 109 [*Lac La Ronge*], directs that an Order in Council is not the only indicator of a reserve creation. Factors leading to the "set apart" of IR80A were present prior to the OIC on May 17, 1889. The Honourable Tribunal erred in determining that the "set apart" and "confirmation" of IR80A occurred simultaneously within IR 80A.
- 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 in failing to give proper consideration to the context of the Added Claimants' 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 dismissing the perspectives of the Added Claimants' Elder evidence relating to the creation and understanding of the beneficiaries to IR 80A. The Honourable Tribunal took an overly restrictive approach requiring an onerous test of there being documentary proof of the Elder evidence having been communicated by government officials over the course of time leading up to and after the creation of IR 80A.

The 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 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 at Saskatoon, Saskatchewan this 29th day of August 2019.

**MCKERCHER LLP**

Per:   
Solicitors for the Appellant

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FEDERAL COURT OF APPEAL  
COUR D'APPEL FÉDÉRALE  
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Date 12/26/2019  
Registrar  
Greffier

  
**STEPHEN KNOWLES**  
REGISTRY OFFICER  
AGENT DU GREFFE