Court File No. A-341-18

FEDERAL COURT OF APPEAL

WILLIAMS LAKE INDIAN BAND

Applicant

and

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

Respondent

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

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.

ORIGINAL SIGNED BY
SHEILA DE SANTOS
A SIGNÉ L'ORIGINAL

Date: OCT 15 2018

Issued by: _____
(Registry Officer)

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APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal ("Tribunal") dated September 14, 2018 in the matter of *Williams Lake Indian Band* v. *her Majesty in Right of Canada (as represented by the Minister of Indian Affairs and Northern Development Canada)*, 2018 SCTC 6 ("Decision"). The Decision was first communicated to the Applicant on September 14, 2018.

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 Her Majesty the Queen in Right of Canada ("Canada") breached a legal obligation to the Williams Lake Indian Band (the "Band"), and that the Band established a valid claim under the provisions of the *Specific Claims Tribunal Act*, S.C. 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>

5. The Decision concerns Canada's failure to meets its obligations to the Band in the course of the appropriation of land within the Band's Indian Reserve No. 1 by the Pacific Great Eastern Railway Company ("PGER") in 1914.

6. In 1871, by order of Her Majesty in Council admitting British Columbia into the Union, dated May 16, 1871 (the "*Terms of Union*"), the Colony of British Columbia joined Confederation. Pursuant to Article 13 of the *Terms of Union*,

Canada and British Columbia undertook to reserve tracts of land for the use and benefit of the Province's First Nations.

7. By Orders in Council dated November 10, 1875 and January 6, 1876, Canada and British Columbia established the Indian Reserve Commission to meet their reserve-creation obligations under Article 13 of the *Terms of Union*. The Indian Reserve Commission was to visit the Province's First Nations and "fix and determine" the reserve(s) to be allotted to each. The resulting reserves were to be held in trust for the use and benefit of the Indians. In the event of a material decrease in the membership of a First Nation, its reserves were to be diminished and the excess land was to "revert to the Province".

8. In June 1881, the Indian Reserve Commission set aside a reserve for the Band at the head of Williams Lake (the "Reserve"). As required by the process then governing the Indian Reserve Commission, the provincial Chief Commissioner of Lands and Works approved the Reserve on May 8, 1882 (and again on June 4, 1884). The Reserve was surveyed in 1883, at 4,074 acres.

9. In 1912, Canada and British Columbia signed an agreement (the "McKenna-McBride Agreement") creating the Royal Commission on Indian Affairs (the "Royal Commission") to, *inter alia*, "settle all differences between the Governments of the Dominion and the Province respecting Indian Lands and Indian Affairs generally in the Province of British Columbia". The Royal Commission was given the power "to adjust the acreage of Indian Reserves in British Columbia". The Royal Commission was expected to issue a report at the end of its operation.

10. Section 8 of the McKenna-McBride Agreement anticipated that reserve lands might be required for railway purposes or public works before the Royal Commission could complete its work of adjusting the acreage of reserves. Section 8 provided that if either Government determined that reserve lands were required for such purposes, the matter was to be referred to the Royal Commission and each Government then had to "do everything necessary to carry the recommendations of the [Royal Commission] into effect".

11. The PGER was incorporated on February 27, 1912 pursuant to *An Act to incorporate the Pacific Great Eastern Railway Company,* S.B.C. 1912, c. 36. During the summer of 1914, the PGER sought and obtained the Minister of Railways' certification of tracings and blueprints for a 4.62-acre right-of-way (later revised to 4.37 acres) (the "Railway Parcel") across the Band's Reserve.

12. On September 16, 1914, the PGER wrote to the Royal Commission seeking approval of a plan showing the Railway Parcel on the Reserve, and that same day also applied to the Department of Indian Affairs (the "DIA") for the Railway Parcel and for permission to commence construction at once.

13. By the end of the month, the DIA had referred the PGER's application to the Royal Commission, commissioned a valuation of the Railway Parcel and, on the PGER's undertaking to pay whatever sum the DIA deemed fair, authorized the PGER to begin construction.

14. On October 5, 1914, pursuant to section 8 of the McKenna-McBride Agreement, the Royal Commission issued Interim Report No. 51 recommending that, "subject to compliance with the requirements of the law and due compensation being made", the PGER be permitted to enter the Reserve and acquire the Railway Parcel.

15. In October 1914, Mr. Vaughan, who had conducted the appraisal for the DIA, advised the DIA that he had placed a valuation of $44.35 on the Railway Parcel. Mr. Vaughan informed the DIA that, as the DIA had not answered his request for a blue print of the Railway Parcel, he had completed this valuation using a map showing the approximate route of the right-of-way on the Reserve and an approximate plan of the Reserve that he had compiled from personal notes and rough sketches obtained from the PGER's resident Engineer.

16. Mr. Vaughan advised the DIA that the Indians were satisfied with the valuation but wished to be given an equal area of Crown land on the northern boundary of the Reserve instead of financial compensation. Mr. Vaughan informed the DIA that there was Crown land available along the northern boundary of the Reserve.

17. In November 1914, the DIA requested and received payment of $44.35 from the PGER.

18. By Privy Council Order 3184 dated December 24, 1914, the Governor General in Council formally approved the sale of the Railway Parcel to the PGER on the recommendation of the Superintendent General of Indian Affairs, under section 46 of the *Indian Act* and "upon the consent of the Lieutenant-Governor of the Province of British Columbia being obtained therefor".

19. In February 1915, the DIA began to investigate the matter of securing the exchange lands that the Band had requested. The DIA submitted an application for additional lands to the Royal Commission, who replied that the proper course was for the DIA (i) to arrange instead for the PGER to purchase the exchange lands for the Band, or (ii) to purchase the exchange lands with the compensation monies the PGER had paid.

20. The DIA eventually determined that the compensation it had obtained from the PGER was insufficient to purchase land or even to make a *per capita* distribution amongst the members of the Band. The sum would be applied instead towards the purchase of seeds and implements for the Band.

21. In August 1915, pursuant to the PGER's application, the Minister of Lands recommended to the Lieutenant-Governor that the Province's *reversionary interest* in the Railway Parcel (being Lot 6804) be granted to the PGER pursuant to section 127 of the *Land Act*, R.S.B.C. 1911, c. 129. The Minister of Lands noted that the PGER had already "secured the consent of the Privy Council of Canada to the sale of the said lands" upon the payment of compensation "and upon the consent of your Honour being obtained for the disposal of the said Right-of-Way".

22. Section 127 of the *Land Act* R.S.B.C. 1911, c. 129 indeed authorized the Province to alienate its reversionary interest in Indian Reserves or portions of Indian Reserves. By section 127, the Lieutenant-Governor in Council was authorized "at any time to grant, convey, quit-claim, sell, or dispose of, on such terms as may be deemed advisable, the interest of the Province, reversionary or

otherwise, in any Indian reserve or any portion thereof."

23. By Order in Council dated August 26, 1915, the Lieutenant-Governor acknowledged that Canada had sold the Railway Parcel to the PGER and approved the grant of British Columbia's reversionary interest in the Railway Parcel to the PGER. British Columbia issued a provincial Crown Grant to the PGER of the Province's "interest, reversionary or otherwise" in the Railway Parcel on June 1, 1916.

24. Meanwhile, in September 1915, Canada issued Dominion Patent 17575 for the Railway Parcel to the PGER.

25. The Railway Parcel continues to be used for railway purposes to the present day.

The Decision

26. On January 28, 2016, the Band filed a Declaration of Claim with the Tribunal pursuant to the *SCTA* alleging that Canada had breached legal obligations owed to the Band, causing the Band to lose a portion of the Reserve, and seeking equitable compensation for these breaches. Canada filed a Response to the Declaration of Claim on April 8, 2016, opposing the relief sought in the Declaration of Claim. On November 9, 2016, the Band filed an Amended Declaration of Claim, and Canada filed its Amended Response on November 30, 2016.

27. By order dated November 30, 2016, the Tribunal bifurcated the claim into two stages: validity of and, if necessary, compensation for the claim.

28. Before the Tribunal, the Band made the following submissions with respect to the lack of legal authority for the PGER's appropriation of the Railway Parcel:

    a. Section 34 of the *BC Railway Act* R.S.B.C. 1911 c. 194 [*BC Railway Act*] applied to the PGER and authorized the PGER to acquire Crown land only if the same was "unreserved and unoccupied". The Reserve was occupied within the meaning of section 34 and, whether finally or provisionally established for the Band, was also reserved for the purposes

of the provision. It therefore was not Crown land available for appropriation by the PGER;

b. The limitation of "unreserved and unoccupied Crown land" in the *BC Railway Act* was echoed in the legislation specific to the PGER. By *An Act to Ratify an Agreement*, S.B.C. 1912, c. 34 [*Ratification Act*], which ratified the Province's agreement to provide aid to the PGER for the construction of the railway line, the Province was authorized to aid the PGER with the grant of "vacant" Crown lands;

c. The PGER also had failed to satisfy the procedural requirements of the *BC Railway Act*;

d. Neither British Columbia (with the Crown Grant of its reversionary interest) nor Canada (with its purported sale of the Railway Parcel pursuant to the *Indian Act*) could do an end run on the limitations of the railway legislation, which authorized the PGER to acquire only unreserved and unoccupied (or vacant) Crown land. Both governments were constrained by the limitations of the *BC Railway Act* and could not grant the PGER an interest in land within the Reserve that the PGER was not authorized to acquire;

e. The Royal Commission's recommendation that the PGER be permitted to acquire the Railway Parcel had been "subject to compliance with the requirements of the law" including, the Band said, the *BC Railway Act*. Then or now, the Crown could not rely on the Royal Commission's recommendation to circumvent the limitations of the *BC Railway Act*; and

f. As the governments had exceeded their authority, their instruments had been ineffective in transferring any interest in the Railway Parcel to the PGER. Accordingly, if the Band had held a legal reserve interest in the Railway Parcel at the time of the transaction, this legal reserve interest had been taken in contravention of the *Indian Act* since 1914. Alternatively, if the Band had held a provisional reserve interest at the time, this provisional reserve interest had survived the illegal transaction and had been taken in contravention of the *Indian Act* as of 1938, upon British Columbia's transfer of administration and control to Canada and completion of the reserve-creation process.

29. The Band also submitted to the Tribunal that Canada had breached its fiduciary obligations:

a. to preserve the Reserve, protect it from exploitation and minimize its impairment when it had ratified the PGER's unlawful appropriation of the

Railway Parcel;

b. to obtain adequate compensation by accepting a sum based on a flawed appraisal and that was insufficient to purchase equivalent lands in the same market;

c. to address the Band's request for exchange lands diligently and prudently, when it had investigated the matter only after seeking and accepting financial compensation, and after already having approved of the sale; and

d. to make full disclosure to the Band that the appraisal was based on incomplete information and that a different valuation existed.

30. On September 14, 2018, the Tribunal released its Decision (indexed at 2018 SCT 6), holding that the claim of the Band was not valid. The Tribunal concluded that there had been legal authority for the PGER's acquisition of the Railway Parcel, as follows:

a. The railway legislation – the *BC Railway Act* and the *Ratification Act* - authorized the PGER to acquire only unreserved and unoccupied Crown land (paras. 31-34, 36-37);

b. The Reserve was both occupied and reserved (and not vacant), and the PGER therefore could *not* acquire the Railway Parcel pursuant to the railway legislation (paras. 35);

c. With respect to the reserve status of the land, the Indian Reserve Commission had provisionally, not legally, reserved the land for the Band. This provisional allotment nevertheless had reserved the land for the purposes of section 34 of *BC Railway Act*;

d. The Band's provisional reserve had become fully constituted as an *Indian Act* reserve only as of 1938, upon British Columbia's transfer of administration and control to Canada (paras. 27-30). The *Indian Act* had not applied at the time of the PGER transaction, and Canada's purported consent to the taking in 1914 had had no effect (paras. 30, 59); and

e. Although the railway legislation did not authorize the PGER's acquisition of the Railway Parcel, section 127 of the *Land Act* R.S.B.C. 1911, c. 129 [*BC Land Act*] provided separate authority for the Province's grant of Crown lands to the PGER for railway purposes, notwithstanding the limitation set out in the railway legislation and the fact that the lands were

already reserved for the Band (paras. 39, 46). Section 127 of the *BC Land Act* gave the Province express authority to grant land to the PGER even if the same land was already reserved for Indians (paras. 33, 35, 39, 46, 47).

31. As for the Band's alternative claim that the PGER's failure to comply with procedural requirements had invalidated its appropriation of the Railway Parcel, the Tribunal determined that since the PGER's acquisition was not an expropriation, the procedural requirements of the *BC Railway Act* did not apply (para 48).

32. With respect to the Band's claim that Canada had breached its fiduciary obligations, the Tribunal determined that Canada had met its fiduciary obligations regarding the replacement lands, for the following reasons (paras. 72-76):

    a. the sum received from the PGER was modest;

    b. the Band had been consulted "in the process of establishing compensation" and had consented to the valuation, but also had proposed its preferred alternative of land in lieu;

    c. Canada had advanced the Band's preferred proposal by way of an application to the Royal Commission for additional reserve lands for the Band;

    d. The Royal Commission would not favourably receive the DIA's request for land to replace the Railway Parcel "for which monetary compensation had already been secured", leaving the DIA with two other options for securing replacement lands, both of which relied on the doubtful cooperation of the Province;

    e. the Band was badly in need of money, and the sum received was added to funds used to purchase seeds and implements; and

    f. Canada had weighed the options and applied the compensation to the Band's other needs rather than pursue an unlikely remedy requiring provincial cooperation.

33. The Tribunal held that Canada had acted prudently and honoured the fiduciary duties set out in *Wewaykum Indian Band v Canada,* 2002 SCC 79 (para 76).

Grounds for Review

34. The Band says that the Tribunal:

a. unreasonably concluded that section 127 of the *BC Land Act* governed the PGER's acquisition of Crown land;

b. unreasonably interpreted section 127 of the *BC Land Act* as providing legal authority for the Province's grant of land that was already reserved for the Band;

c. made erroneous findings of fact, including findings of fact made without regard for the material before it, in reaching its conclusion regarding the application and effect of section 127 of the *BC Land Act*;

d. unreasonably concluded that Canada had fulfilled its fiduciary obligations regarding the Band's request for replacement lands; and

e. acted in any other way that was not defensible in respect of the facts and law.

35. Specifically in relation to the findings with respect to the legal authority for the PGER's acquisition of the Railway Parcel, the Band submits that the Tribunal unreasonably:

a. concluded that section 127 of the *BC Land Act* allowed the Province to grant, and the PGER to acquire, occupied and reserved Crown land that the PGER was not authorized to acquire pursuant to its enabling legislation;

b. equated the Province's power to reserve land for railway purposes pursuant section 127 of the *BC Land Act* with the power to grant land to a railway company for railway purposes;

c. interpreted the category of Crown lands that the Province could reserve for railway purposes pursuant to section 127 of the *BC Land Act* as including Crown lands already reserved for Indians;

d. equated the Province's power to alienate its own interest in an Indian reserve or portion thereof pursuant to section 127 of the *BC Land Act* with the power to override, cancel or 'un-reserve' the Indian reserve interest itself;

e. failed to read the provincial Order in Council of August 26, 1915 as

authorizing only the grant of the Province's reversionary interest in the Railway Parcel to the PGER;

f. gave section 127 of the *BC Land Act* a purpose, role and effect that, as the record confirms, the Province itself did not give the provision historically; and

g. concluded that the procedural requirements of the *BC Railway Act* did not apply to voluntary land grants and forms of acquisition other than expropriation.

36. In addition, the Band submits that the Tribunal's conclusions regarding the applicability and effect of section 127 of the *BC Land Act* did not flow from a purposive statutory analysis, including for the following reasons:

a. They depend on an erroneous reading of section 127 that does not accord with the grammatical and ordinary sense of the words used in the provision;

b. They give the words in section 127 a meaning that they did not have historically;

c. They do not read section 127 coherently within its statutory context and the Province's legislative scheme;

d. They do not accord with the legislative evolution and evident purpose of section 127;

e. They do not accord with the use the Province made of section 127 historically, as set out in the record before the Tribunal; and

f. They violate core interpretive principles that apply to statutory provisions affecting Indigenous rights and taking rights away.

37. Specifically in relation to the Tribunal's findings on fiduciary breach, the Band submits that the Tribunal's conclusions were not within the range of reasonable outcomes for the following reasons:

a. in concluding that Canada had acted prudently and diligently in relation to the Band's request for replacement lands in lieu of payment, the Tribunal failed to account for the fact that Canada made inquiries into the Band's request only *after* it had fixed, requested and accepted the monetary compensation and had approved the sale of the Railway Parcel to the

PGER; and

b. in concluding that Canada had fulfilled its fiduciary obligations in relation to the request for replacement lands by purchasing seeds and implements for the Band, the Tribunal, contrary to the Supreme Court of Canada's ruling in *Williams Lake Indian Band v Canada*, 2018 SCC 4, assessed Canada's conduct by reference to the Band's best interests writ large instead of its best interests in relation to the replacement lands.

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-7003-15.

Date: October 15, 2018

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SOR/2004-283, ss. 35 and 38