

Court File No. A-45-23**FEDERAL COURT OF APPEAL**

BETWEEN:

SAULTEAUX FIRST NATION

FEDERAL COURT OF APPEAL		DEPOSED
COUR D'APPEL FÉDÉRALE		
F	February 16	
I	2023	
L	Kevin Lemieux	
E		
D		
CALGARY, AB		1

Applicant

-and-

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

APPLICATION UNDER s. 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 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 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.

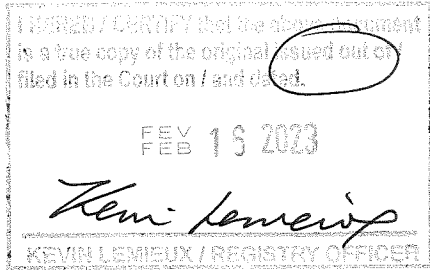
Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

ORIGINAL SIGNED BY
KEVIN LEMIEUX
A SIGNÉ L'ORIGINAL

Date: Feb 16 2023

Issued by: _____
(Registry Officer)



Calgary Local Office
Canadian Occidental Tower
635 Eighth Avenue S.W., 3rd Floor
Calgary, AB T2P 3M3
FCARegistry-CAFGreffe@cas-satj.gc.ca

TO: **HIS MAJESTY THE KING IN RIGHT OF CANADA**
Lauri Miller / Scott Bell
Department of Justice Canada
410 – 22nd Street East, Suite 410
Saskatoon, SK S7K 5T6
Phone: (306) 518-0747 and (306) 518-0742
Fax: (306) 975-4030
Email: saskSCT-5003-13-sault@justice.gc.ca
lauri.miller@justice.gc.ca
scott.bell@justice.gc.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
Phone: (613) 943-1515
Fax: (613) 943-0586
Email: claims.revendications@sct-trp.ca

APPLICATION

This is an application for judicial review in respect of the decision of the Specific Claims Tribunal (“the Tribunal”) dated January 18, 2023, in the matter of *Saulteaux First Nation v His Majesty the King in Right of Canada*, 2023 SCTC 1 (the “Decision”). The Decision was first communicated to the Applicant on January 18, 2023. The Tribunal is governed by the *Specific Claims Tribunal Act*, (S.C. 2008, c. 22) (the “SCTA”).

RELIEF SOUGHT

1. The Applicant makes application for:
 - a. An order quashing or setting aside the Decision;
 - b. An order:
 - i. Substituting the Decision of the Tribunal; or, alternatively
 - ii. 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;
 - d. Such further or other relief as this Honourable Court may deem appropriate.

GROUND FOR THE APPLICATION

Background

2. On February 10, 2008, the Applicant, Saulteaux First Nation (“Saulteaux” or the “First Nation” or the “Band”) filed a specific claim with the Minister of Indian Affairs and Northern Development (then the relevant “Minister”) in relation to the 1960 surrender of 207 acres of IR 159, comprised of two parcels, abutting the shores of Jackfish Lake (“Surrender Land”) in exchange for 4,970 acres of

far less valuable land in the vicinity of Birch Lake (“Exchange Land”) and \$20,000 (the “Claim”).

3. The First Nation filed a Declaration of Claim with the Specific Claims Tribunal on December 3, 2013 (SCT-5003-13). The Declaration of Claim is brought on the grounds that the Respondent breached its statutory and fiduciary duties to the First Nation in the context of the 1960 surrender.
4. The issues to be determined by the Specific Claims Tribunal were:
 - a. Did the Respondent breach any fiduciary duties owed to the Claimant arising from the 1960 surrender of two parcels of land from Saulteaux Indian Reserve No. 159 in exchange for land at Birch Lake? In particular:
 - i. Did the Respondent have an obligation to ensure the Saulteaux First Nation’s understanding of the terms of the surrender and exchange were adequate? If yes, did the Respondent fulfill that obligation?
 - ii. Did the Respondent have an obligation to minimize the impairment of Saulteaux First Nation’s interest in Indian Reserve No. 159? If yes, did the Respondent fulfill that obligation?
 - iii. Was the surrender and exchange transaction foolish, improvident or exploitative, such that the Respondent should have withheld its consent?
 - b. If a valid claim is established under section 14(1) of the *Specific Claims Tribunal Act*, what, if any, compensation is owed by the Respondent to the Claimant under section 20 of the *SCTA*?

5. The Specific Claims Tribunal held a hearing June 13-15, 2022. The Tribunal released its Reasons for Decision on January 18, 2023. The Tribunal held that a valid claim had not been established for the following reasons:
 - a. The surrender and exchange negotiated by the First Nation and Saskatchewan was not foolish nor improvident when viewed from the Band's perspective at the time, and therefore Canada did not breach its fiduciary duty by consenting to the surrender;
 - b. The Band's understanding of the surrender terms was adequate;
 - c. The dealings were not tainted by the Crown which would have made it unsafe to rely on the First Nation's understanding and intention; and
 - d. There was no duty of minimal impairment because this was not an expropriation.

The Decision and Grounds for Review

6. The Saulteaux First Nation brings this Application for Judicial Review on the basis that the Honourable Tribunal made the errors of mixed fact and law and errors of law as set out in detail below.
7. The Tribunal made an error of mixed fact and law, including by making processing errors:
 - a. by its unreasonable finding that the mineral rights on the Exchange Lands were more attractive than the mineral rights on the Surrender Land;
 - b. by the unreasonable determination that the First Nation's access to the fishery at Jackfish Lake was maintained because it retained some shoreline on the nearby Murray Lake and the remaining lake frontage on Jackfish Lake consists of a high cliff; and

- c. when it stated that “the avoidance of exploitative bargains between Indigenous Peoples and incoming settlers is what the Crown’s fiduciary duty is meant to achieve”. The Tribunal erroneously interpreted the law on the scope of the Crown’s fiduciary duty to prevent exploitative bargains as existing only between First Nations and settlers, leading it to apply an incorrect and unreasonable test which required the Crown to exercise “*ordinary diligence ... to avoid invasion or destruction of the band’s quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself*”;;
- d. by its undue and over-reliance on the October 13, 1959, document as evidence of the First Nation’s initiative to seek a surrender and the terms of that surrender. Proper consideration was not given to the weight properly attributable to this document. The Tribunal failed to consider the Cabinet memorandum dated September 29, 1959, which referred to the Province’s “Jackfish Lake Proposal”, and the fact that the memorandum preceded the October 13, 1959 document by two weeks. The Tribunal’s unreasonable acceptance and undue reliance on the veracity of this document permeated its judgment, leading to unreasonable and incorrect findings in law;
- e. by disregarding the significance of the federal Crown’s March 26, 1958 letter to the Province of Saskatchewan in which the federal Crown informed the Province how to induce the First Nation to reverse its unanimous and unequivocal refusal to surrender any of its lands;
- f. when it concluded that the Crown’s conduct achieved a balance between autonomy and protection in the face of evidence that the March 26, 1958 letter was aimed at undermining the Band’s autonomy and the surrender failed to provide the protection set out in the March 26, 1958 letter, which was continued Saulteaux access to its productive fishery;

perspective at the time of surrender and without the benefit of hindsight. This error of law, *inter alia*, led to the Tribunal's rejection of the Subdivision Development Approach as an aid to assessing whether the Governor in Council breached its pre-surrender fiduciary duty by failing to withhold its consent to the surrender on the grounds that the surrender and exchange transaction was foolish, improvident or otherwise amounted to exploitation of the Saulteaux Indian Band;

- d. failed to address whether Canada met its fiduciary duty to advance the best interests of the First Nation in the face of the advocacy of the surrender at the March 17, 1958 meeting, the advice given to Saskatchewan in the March 26, 1958 letter which confirmed that rather than respecting and honouring the decision of the Saulteaux Band declining to sell its reserve lands because they would lose access to its productive fishery and reduce the size of the reserve they resided on, Crown officials instead sought to "induce" the band to surrender its more valuable land at Saulteaux;;
- e. focused on statutory compliance with the requirements for a surrender set out in the *Indian Act* and interpreted procedural compliance as equivalent to free and informed consent of the Band, free of tainted dealings; and
- f. held that the federal Crown's fiduciary duties in a surrender do not extend to ensuring minimal impairment the surrender for lease proposal.

SUPPORTING MATERIAL

- 9. This application will be supported by the following materials:
 - a. Certified copy of the Tribunal's record;
 - b. Such affidavits and further materials as counsel may advise and this Honourable Court may permit.

10. 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-5003-13.

Dated February 16, 2023



Ron S. Maurice
Ryan M. Lake
Sheryl Manychief

Maurice Law Barristers & Solicitors
300, 602 – 12th Avenue, SW
Calgary, AB T2R 1J3
Phone: 403.266.1201
Fax: 403.266.2701
Email: rmaurice@mauricelaw.com
rlake@mauricelaw.com
smanychief@mauricelaw.com

Lawyers for the Applicant