Court File No. A-106-23

FEDERAL COURT OF APPEAL

BETWEEN:

WATERHEN LAKE FIRST NATION

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 in Calgary, Alberta.

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: APR 18 2023

Issued by: ORIGINAL SIGNED BY KINNERY NAIK / A SIGNÉ L'ORIGINAL
(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**
Karen Jones / Brady Fetch
Department of Justice Canada
410 – 22nd Street East, Suite 410
Saskatoon, SK S7K 5T6
Phone: (306) 518-0745 and (306) 518-0806
Fax: (306) 975-4030
Email: Waterhen_Lake_FN_SCT-5001-22@justice.gc.ca
karen.jones@justice.gc.ca
brady.fetch@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

I HEREBY CERTIFY that the above document is a true copy of the original filed in the Court on / and dated

AVR APR 18 2023

KINNERY NAIK / REGISTRY OFFICER

APPLICATION

This is an application for judicial review in respect of the Reasons on Application of the Specific Claims Tribunal ("the Tribunal") dated March 16, 2023, in the matter of *Waterhen Lake First Nation v His Majesty the King in Right of Canada,* 2023 SCTC 3 (the "Reasons"). The Reasons were first communicated to the Applicant on March 16, 2023. The Tribunal is governed by the *Specific Claims Tribunal Act,* SC 2008, c 22 (the *"SCTA"*).

RELIEF SOUGHT

1. The Applicant makes application for:

    a. An order quashing or setting aside the Reasons on the grounds that the Tribunal member erred in finding that the Tribunal lacks jurisdiction to hear the Applicant's Claim filed with the Specific Claims Tribunal;

    b. An order referring the Claim back to the Tribunal to be heard on its merits by a different Tribunal member for determination in accordance with such directions as this Court considers appropriate;

    c. Costs; and

    d. Such further or other relief as this Honourable Court may deem appropriate.

GROUNDS FOR THE APPLICATION

Background

2. This matter relates to a specific claim filed by the Applicant with the Specific Claims Branch seeking compensation for the unlawful taking in 1954 of approximately 4,500 square miles (11,650 square kilometres or 2.9 million acres) for the Primrose Lake Air Weapons Range (hereafter "PLAWR" or "the Range") which prohibited access by the Waterhen Lake Band from lands that were pivotal to the exercise of the Band's treaty rights to hunt, fish, and trap to

earn a livelihood. The Waterhen Lake Band also seeks compensation for the abrogation of treaty rights to hunt, fish, and trap for commercial purposes by the 1930 Saskatchewan *Natural Resources Transfer Agreement* ("*NRTA*") without consultation or compensation to the Waterhen Lake Band. The Applicant maintains that the establishment of the Range amounted to a *de facto* expropriation of a *profit à prendre* and license issued under the Saskatchewan *Fur Act* without any consultation or compensation to the Waterhen Lake Band. The specific claim alleges that the taking up of massive areas of land without due process or compensation and the abrogation of rights to hunt, fish, and trap for food and commercial purposes were breaches of Canada's treaty, fiduciary and honourable obligations, which give rise to outstanding lawful obligations under the Specific Claims Policy.

3. A specific claim relating to the PLAWR was first submitted in 1975. In April 1975, the Waterhen Lake Band (and three others) originally submitted a specific claim to Canada for the taking of approximately 2.9 million acres of lands for the Primrose Lake Air Weapons Range, and the loss of its commercial harvesting rights within the air weapons range. Canada rejected the claim for negotiation in December 1975.

4. In 1993, six First Nations filed the specific claim with the Indian Claims Commission (the "ICC"), an independent review body established by Canada to provide non-binding recommendations on rejected claims. The ICC conducted two inquiries and released its reports in 1994 and 1995. The 1994 Report for the Cold Lake and Canoe Lake First Nations concluded that the Crown breached its treaty and fiduciary obligations to protect the First Nations' rights to hunt, trap and fish within the Range and failed to provide adequate compensation for the loss of those rights (the ICC recommended that Canada enter into negotiations with those groups which Canada ultimately led to a negotiated settlement and payment of compensation to Cold Lake and Canoe Lake only). The March 1995 report related to four other First Nations,

including Waterhen Lake, who were also adversely impacted by the Primrose Lake Air Weapons Range. The ICC recommended that Canada accept the specific claim for negotiation on the basis of a failure to compensate for lost commercial harvesting rights under the Saskatchewan *Fur Act*. Seven years later, in 2002, Canada responded that it would not accept the claim for negotiation.

5. Canada's Specific Claims Policy — from the *Statement on Claims of Indians and Inuit People* in 1973, to *Outstanding Business: A Native Claims Policy* in 1982, to *Justice at Last: Specific Claims Action Plan* in 2007 — remains substantively the same. The *Justice at Last* initiative, however, created the Specific Claims Tribunal to adjudicate on specific claims rejected by Canada under the Specific Claims Policy and was empowered to make binding decisions on liability and to award compensation up to a maximum of $150 million per claim. In order to promote reconciliation and the fair, just and timely adjudication of specific claims on their merits, the Crown is not permitted to plead or rely upon limitation periods or delay as a defence before the Specific Claims Tribunal.

6. In light of changes to the jurisprudence and the abrogation of commercial harvesting rights throughout the Treaty 6 area, the First Nation filed an updated specific claim under Canada's Specific Claims Policy on June 16, 2021. On January 25, 2022, Canada wrote to the First Nation, informing the First Nation of its position that the claim could not be filed with the Minister because it made allegations relating to Aboriginal rights and title or traditional harvesting. The letter also stated that Crown-Indigenous Relations were actively seeking other venues to address the issues raised in the First Nation's claim. More than a year later, there has been no ongoing dialogue or progress regarding other avenues for redress of these alleged breaches of treaty obligations.

7. The First Nation filed a Declaration of Claim with the Specific Claims Tribunal on May 16, 2022 (SCT-5001-22). The Respondent did not file a Response

within the 30 days required under the *Specific Claims Tribunal Act*, SC 2008, c 22 ("the Act"). Instead, the Respondent filed a Notice of Application on September 20, 2022 to Strike the Proceedings on the basis that the Claim was outside the jurisdiction of the Specific Claims Tribunal.

8. The Tribunal held a hearing on the Motion to Strike on January 25, 2023. On March 16, 2023, the Tribunal issued its Reasons, granting the Respondent's Application to Strike on the basis that the Tribunal did not have jurisdiction under the *Specific Claims Tribunal Act* to hear this Claim.

The Tribunal's Reasons and Grounds for Review

9. The Waterhen Lake First Nation brings this Application for Judicial Review pursuant to the provisions of subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7, as amended, on the basis that the Honourable Tribunal refused to exercise its jurisdiction and made errors of law and of mixed fact and law.

Errors of Jurisdiction and Law

10. The Tribunal failed to exercise it jurisdiction and made the following errors of law and mixed fact and law:

    a. the Tribunal failed to properly apply the principles of interpretation applicable to treaties and statutes relating to Indians, and more specifically erred by misinterpreting section 17(a) of the Act which states that a claim may be struck for want of jurisdiction only if the claim is inadmissible "on its face", meaning that it must be "clear and evident by inspection on the plain words" of the Act that the Tribunal lacks jurisdiction to hear the claim;

    b. the Tribunal erred in finding that section 14 of the Act enumerates "finite grounds" for advancing claims that are clear and unambiguous and, in so doing, the Tribunal failed to properly apply the test in the Supreme Court of Canada decision in *Nowegijick* to the interpretation

of the Act, which demands that any ambiguity in a treaty or legislation relating to Indians is to be interpreted in favour of the Indians and that such statutes should be given a large, liberal, and purposive interpretation and seeks to avoid a technical construction. The Tribunal erred by failing to apply the *Nowegijick* principle to the interpretation of subsection 14(2) of the *Specific Claims Tribunal Act*, and instead applied a narrower and technical legal standard of "genuine ambiguity" espoused in a lower level court decision. In any event, the Applicant submits that there is a genuine ambiguity in the wording of subsection 14(2) that demands this claim be heard and determined on its merits by the Specific Claims Tribunal;

c. the Tribunal failed to properly apply the legal test set out in a number of Supreme Court of Canada decisions which places a heavy onus on the Crown as the party moving to strike the claim to prove that it was "plain and obvious" and beyond doubt that the Declaration of Claim "on its face" was "certain to fail" because the pleading "contains a radical defect" and is outside the Tribunal's jurisdiction;

d. The Tribunal struck the Claim on a summary basis without the benefit of a full evidentiary record and legal argument which is of utmost important where the Claim raises important constitutional issues and the interpretation of treaty rights which are entrenched in s. 35(1) of the *Constitution Act, 1982*;

e. the Tribunal failed to understand the Applicant's argument relating to commercial harvesting rights taken in 1930, as opposed to ongoing harvesting rights for food purposes. In particular, the Tribunal failed to properly apply the case law on *profit à prendre* in relation to *sui generis* treaty harvesting rights at issue in this Claim, stating only that it was a novel argument in an ever-changing area of law;

f. The Tribunal erred in finding that it was clear and beyond doubt that the *de facto* expropriation of a *profit à prendre* and license to hunt, fish, and trap does not constitute an "other asset" within the meaning of the Act and failed to properly situate itself and this Claim within the overall context of Canada's longstanding Specific Claims Policy and Parliament's intention in 2007 that updates to that Policy were to reflect jurisprudential advances and to provide for a binding tribunal process as one component of the broader policy, and not to limit its application or exclude claims;

g. The Tribunal erred by concluding that the Claim was identical to litigation filed by the First Nation in the Saskatchewan Court of King's Bench in 1999 and 2007, largely as protective measures, while its Claim was concurrently being assessed within Canada's Specific Claim Policy. The Claim is not identical, and it is irrelevant to the issue of the Tribunal's jurisdiction. In any event, those legal proceedings have been adjourned for many years as required by ss. 15(3)(c) of the Act and the actions remain in abeyance until the Claim can be addressed on its merits by the Specific Claims Tribunal;

h. The Tribunal erred by declining to exercise its jurisdiction to hear the Claim on the pretext that "it would be disappointing and unexpected for Canada to rely on a limitation defence" in light of its stated commitment to reconciliation and there "remains an avenue available to the Claimant to have the merits of the Claim independently and objectively assessed and adjudicated." A cursory review of recent cases advanced by First Nations in the courts shows conclusively that Canada routinely pleads and relies on limitation periods and other technical defences and the courts have struck several claims based on the application of provincial limitation statutes, creating a patchwork quilt of inconsistent and incoherent decisions depending on the province in which the action is

commenced. The Specific Claims Policy and the Specific Claims Tribunal were expressly created as an alternative to the courts to promote access to justice and reconciliation for First Nations in the vindication of claims based on a breach of treaty rights that are constitutionally entrenched and protected by s. 35(1) of the *Constitution Act*, 1982;

i. The Tribunal erred by concluding that the Applicant seeks a determination that commercial harvesting rights are "ongoing" and, therefore, cannot be heard by the Tribunal based on ss. 15(1)(g) of the Act. This is the opposite of what this Claim alleges. The Claimant maintains that its rights to hunt, fish, and trap for commercial purposes were unilaterally abrogated and expropriated by the federal Crown in 1930 when it entered into the terms of the 1930 *Natural Resources Transfer Agreement* without any due process, consultation, or compensation paid to First Nations for the loss of this *sui generis* property and treaty right affirmed under Treaty 6. This failure to understand the fundamental basis of this Claim profoundly affected the Tribunal's incorrect assessment of its jurisdiction;

j. The Tribunal erred by failing to consider or address arguments made by the Applicant relating to jurisdiction, including the 50-year history of the Specific Claims Policy, the 47-year history of this Claim, and the First Nation's legitimate expectation that its Claim fit within the Specific Claims Policy;

k. The Tribunal erred by determining that the decision in *Beardy's & Okemasis Band #96 and #97 v. Her Majesty the Queen in Right of Canada*, 2015 SCTC was binding on this Claim; and

l. The Tribunal erred by incorrectly understanding the Applicant's submissions regarding subsection 20(2) of the *Specific Claims Tribunal Act*.

SUPPORTING MATERIAL

11. 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.

12. The Applicant requests that the Specific Claims Tribunal send to the Applicant and to the Registry a certified copy of the Tribunal's record in file number SCT-5001-22, which is not in the possession of the Applicant but is in the possession of the Tribunal.

Dated April 17, 2023

Ron S. Maurice
rmaurice@mauricelaw.com

Sheryl Manychief
smanychief@mauricelaw.com

Maurice Law Barristers & Solicitors
300, 602 – 12th Avenue SW
Calgary, AB T2R 1J3
Phone: 403.266.1201
Fax: 403.266.2701

Lawyers for the Applicant