

SPECIFIC CLAIMS TRIBUNAL

Between:

Mohawk Council of Kahnawà:ke

Applicant

and

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	D É P O S É
	February 5, 2021	
	Guillaume Phaneuf	
Ottawa, ON		1

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Crown-Indigenous Relations and Northern Affairs Canada

Respondent

**NOTICE OF APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR
DECLARATORY JUDGEMENT**

Pursuant to Section 13 of the *Specific Claims Tribunal Act*, Sections 5, 30, 33 and 34 of the *Specific Claims Tribunal Rules of Practice and Procedure* and Sections 64 and 300-310 of the *Federal Courts Rules*

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 Tribunal at a time and place to be fixed by the Judicial Administrator. Unless the Tribunal orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Ottawa.

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 *Specific Claims Tribunal Rules*, and other necessary information may be obtained on request to the Administrator of this Tribunal at Ottawa (telephone 613-947-3937).

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR

ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

February 5th, 2021

Issued by:

Address of local office: Registry of the Specific Claims Tribunal of Canada

400-427 Laurier Ave W

Box 31

Ottawa, ON, K1R 7Y2

TO: Minister of Crown-Indigenous Relations and Northern Affairs Canada
10 Wellington Street
Gatineau, QC, K1A 0H4

APPLICATION

(SCT File No. SCT-2004-20)

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

Mohawk Council of Kahnawà:ke

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Crown-Indigenous Relations and Northern Affairs Canada

Respondent

APPLICATION FOR LEAVE AND FOR DECLARATORY JUDGEMENT

Pursuant to Section 13 of the *Specific Claims Tribunal Act*, Sections 5, 33 and 34 of the *Specific Claims Tribunal Rules of Practice and Procedure* and Sections 64 and 300-310 of the *Federal Courts Rules*

The present Notice of Application for Leave to commence an Application for Declaratory Judgement is filed pursuant to the provisions of the *Specific Claims Tribunal Act* (the “Act”), and the *Specific Claims Tribunal Rules of Practice and Procedure* (the “Rules”).

I. Relief Sought (Rule 34(a))

1. The Applicant seeks leave of the Specific Claims Tribunal (“SCT”) to commence an Application for a declaratory judgement.
2. In the event that the leave is granted, the Applicant seeks the following judgement by declaration:

That subsection 21(1) of the *Specific Claims Tribunal Act* (“the Act”) does not include or affect Aboriginal rights and title. In the alternative, should this Tribunal find that subsection 21(1) affects Aboriginal rights, treaty rights and title, then it must be struck down for it violates section 35, of the *Constitution Act, 1982* cannot be saved and is without force or effect as per subsection

52(1) of the *Constitution Act, 1982*. In the further alternative, should this Tribunal find the provision ambiguous, a presumption of compliance with the Constitution must apply and the provision should be deemed not to include or affect Aboriginal rights, treaty rights and title.

II. Grounds (Rule 34(a))

In the event that leave is granted, the application for declaratory judgement is to be based on the following grounds:

3. The Applicant seeks a declaratory judgement to obtain clarification and certainty on the scope of the legal effect of subsection 21(1) of the Act. Since the terms “rights” and “interests” are not defined in the Act, the Applicant is concerned about the definition of these terms and the scope of the subsection. The Applicant seeks certainty that subsection 21(1) of the Act does not include any inherent rights, international human rights, Aboriginal rights, treaty rights or title rights that may be protected by subsection 35(1) of the *Constitution Act, 1982*.
4. The Applicant attempted to resolve the dispute over the legal effect of subsection 21(1) with the Respondent by way of a letter dated May 9th, 2016, filed as **Exhibit P-1**. The Respondent refused to enter into any discussions on any matter raised in the letter, as per the response letter, dated November 2nd, 2016 and filed as **Exhibit P-2**.
5. According to the judgement of the Supreme Court in *Canada (Prime Minister) v. Khadr*, [2010] 1 SCR 44, 2010 SCC 3 (CanLII) at para. 46., a court can properly issue declaratory remedy so long as:
 - a. It has the jurisdiction over the issue at bar,
 - b. The question before the court is real and not theoretical, and
 - c. The person raising it has a real interest to raise it.
6. This Tribunal has jurisdiction to hear the issue, because by virtue of the preamble and subsection 13(1)(a) of the *Act*, the *Specific Claims Tribunal Rules of Practice and Procedure*, the *Federal Courts Rules*, analogous federal and provincial procedures, and recent Supreme Court jurisprudence, a declaratory judgement is within its jurisdiction.
7. In particular, the Supreme Court of Canada has confirmed that this Tribunal has the jurisdiction to determine questions of law pertaining to validity and compensation for specific claims, which includes this application pertaining to the legal effect of Tribunal compensation awards.
8. That no claim or action need be open is intrinsic to the nature of a declaratory judgment. The purpose of a declaratory judgement is to avoid a lengthy procedure, including preparation for a trial of fact, when a dispute can be resolved by determination of a legal question alone.
9. This Tribunal is the most appropriate forum to bring this application for a declaratory judgment as it is a specialized Tribunal and best positioned to interpret its constating statute.

10. The question is real and not theoretical and will have a practical utility, because:

- a. The Applicant currently has four specific claims that are eligible to be filed with the Tribunal as evidenced by the Status Report on Specific Claims, attached herewith as **Exhibit P-3**.
- b. The Applicant asserts that the lands subject to these claims are also subject to inherent rights, international human rights and Aboriginal, treaty and title rights within the meaning of section 35(1) of the *Constitution Act, 1982*;
- c. In conformity with Canada's Specific Claims Policy and Process Guide and the Act, the Applicant is not authorized to base a specific claim on any of the rights outlined in paragraph 9 b), and the Act provisions pertaining to compensation do not allow for compensation for impacts to these rights;
- d. The Applicant has no authority to initiate a procedure that might inadvertently and by operation of the law, release or extinguish the Aboriginal rights, treaty rights or title rights of the Mohawks of Kahnawà:ke;
- e. The Applicant has not yet filed a declaration of claim at the Specific Claims Tribunal for the unlawful disposition of land because the legal effects of subsection 21(1) on the rights and interests of First Nations are uncertain;
- f. Furthermore, because subsection 21(1) of the Act purports to apply by operation of law, irrespective of the intent of a First Nation or its members, it is crucial that First Nations know when and how this section applies prior to bringing forth specific claims for the unlawful disposition of land;
- g. This judicial interpretation of subsection 21(1) of the Act will serve the useful purpose of determining whether the Applicant will file its claims at this Tribunal and will likely help other potential litigants determine whether they will do the same.

11. The Applicant has a genuine interest in the resolution of the question, because:

- a. As outlined above, the Applicant has four specific claims that are eligible to be brought before the Specific Claims Tribunal and has unsuccessfully attempted to resolve this issue with the Crown directly;
- b. The Applicant's specific claims pertain to the unlawful disposition of Kahnawà:ke reserve lands to which subsection 21(1) of the Act could apply and over which the Applicant also asserts continuing rights pursuant to section 35(1) of the *Constitution Act, 1982*;

- c. As outlined above, should the Applicant be successful before the Tribunal and obtain compensation, the MCK is concerned about the automatic application and interpretation of subsection 21(1) of the Act;
 - d. There is no legal mechanism for the MCK to avoid or prevent the operation by law of subsection 21(1) of the Act after a Tribunal award is granted and therefore a declaratory judgement is required in advance;
 - e. Resolution of this question will have a concrete effect and enable a decision by the Applicant on whether to file declarations of claim for any of its four eligible claims.
12. The Applicant seeks a declaratory judgment from this Tribunal confirming the Applicant's interpretation of subsection 21(1) of the Act, as unambiguous and without effect on Aboriginal rights, treaty rights and title rights within the meaning of section 35(1) of the *Constitution Act, 1982*.
13. Although broad, the phrase "all of the interests of rights" is clearly circumscribed by way of:
- a. a conditional 'if' statement,
 - b. section 5 and subsections 15(1)(f) and 20(1) of the Act; and,
 - c. and fundamental legal principles,

such that Aboriginal rights, treaty rights and title rights within the meaning of section 35(1) of the *Constitution Act, 1982* are excluded.

14. In the alternative, should this Tribunal find that subsection 21(1) is unambiguous and operates to release Aboriginal rights and title despite their lack of justiciability before it, then the Applicant submits that this Tribunal should find that such an inclusion is contrary to section 35 of the *Constitution Act, 1982* and cannot be saved and declare that it is therefore without force or effect as per subsection. 52(1) of the *Constitution Act, 1982*.
15. In that case, the Tribunal should apply a declaration of unconstitutionality as a discretionary remedy (*Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821) as "an effective and flexible remedy for the settlement of real disputes" (*R. v. Gamble*, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595, at p. 649).
16. In the further alternative, if the Tribunal finds subsection 21(1) is ambiguous and could include Aboriginal rights and title, the presumption of constitutional compliance should be applied and a declaration that subsection 21(1) of the Act has no effect on Aboriginal rights and title is required.

III. Tribunal Direction (Rule 33)

17. The Applicant requests an opportunity to participate in a case management hearing with the Respondent prior to the Tribunal issuing directions to the parties regarding the time and manner in which they will hear arguments and receive evidence in relation to the Application.

18. In addition, should the Tribunal issue directions that the Application will proceed solely in writing, the Applicant requests that it be provided with an opportunity to reply to the Respondent's written submissions.

IV. Consent (Rule 34(b))

19. The Respondent has not consented to the relief sought.

V. Language

20. The Applicant intends to file its submissions in English.

VI. Costs

21. The Applicant also asks that its Application be granted without costs.

DATED at the Mohawk Territory of Kahnawà:ke, this 4 day of February, 2021.



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