Federal Court of Appeal | Cour d'appel fédérale

Date: 20170901

Dockets: A-80-16
A-81-16

Citation: 2017 FCA 175

CORAM: **NADON J.A.**
DAWSON J.A.
GAUTHIER J.A.

Docket: A-80-16

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA

Applicant

and

AKISQ'NUK FIRST NATION

Respondent

Docket: A-81-16

AND BETWEEN:

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Heard at Vancouver, British Columbia, on May 16, 2017.

Judgment delivered at Ottawa, Ontario, on September 1, 2017.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: NADON J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] These consolidated applications for judicial review raise a single issue: were the decisions at issue reached in a manner that violated principles of procedural fairness? This issue arises in the following factual context.

I. The Facts

[2] The Akisq'nuk First Nation (Akisq'nuk) filed a claim pursuant to section 14 of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (Act) arising out of the creation of Columbia Lake Indian Reserve No. 3 (Reserve). The claim asserted that the federal Crown had breached the fiduciary duty it owed to the Akisq'nuk in two respects. First, the claim alleged that the Crown breached its fiduciary duty by excluding from the Reserve, in 1886, 960 acres of land originally allocated by Reserve Commissioner O'Reilly (the Survey Land). Second, the claim alleged that the Crown failed to enforce an order made by the McKenna-McBride Commission in 1915 allocating an additional 2960 acres of land to the Reserve (the Additional Land). Canada denied all allegations of liability.

[3] The proceeding before the Specific Claims Tribunal (Tribunal) was bifurcated into two phases: an initial phase to hold a hearing and render a decision on the validity of the claim followed, if necessary, by a second phase to decide the issue of compensation that may be owed to the Akisq'nuk.

[4] The Tribunal heard the validity phase of the claim over three days. Neither the Akisq'nuk nor Canada adduced oral history or expert evidence. The evidence tendered consisted of an 80-paragraph agreed statement of facts and a book of common documents containing 241 documents. The hearing concluded on September 25, 2014, and the claim was taken under reserve by the Tribunal.

[5] Thereafter, over nine months later, on July 8, 2015, the Tribunal issued a memorandum to counsel. In it, the presiding member of the Tribunal advised counsel that:

> I have consulted historical treatises that are not in the record in order to identify more accurately the historical context essential to the resolution of this claim, in particular:
>
> 1) Robert E. Cail, *Land, Man, and the Law, The Disposal of Crown Lands in British Columbia, 1871 – 1913* (The University of British Columbia 1974), Chapters 11 – 13.
>
> 2) Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press 2002), at 241 – 261.
>
> 3) E. Brian Titley, *A Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (University of British Columbia Press, Vancouver 1986), Chapter 8.
>
> I may also consider historical documents footnoted in the above chapters and pages.
>
> Reliance on this material would, in my present view, be within the bounds of judicial notice and knowledge.

The Parties will have an opportunity to respond.

[6] Canada objected to the Tribunal's proposed reliance on this additional material and a case management conference was scheduled.

[7] At the case management conference the Tribunal advised the parties that it also intended to rely on one historic report cited in the treatises – the 1927 "Report of the Special Joint Committee on the Claims of the Allied Indian Tribes of British Columbia" (Report of the Special Joint Committee). Together, in these reasons, the extracts from the three treatises and the Report of the Special Joint Committee are referred to as the "additional material".

[8] At the case management conference the Tribunal set out a schedule pursuant to which the parties were to exchange written memoranda of fact and law on the issue of the ability of the Tribunal to rely on the additional material. Finally, the Tribunal advised that if the parties have "other authoritative material that they wish the Tribunal to consider in addition to those mentioned" in the Tribunal's memorandum to counsel, counsel "may advise the Tribunal."

[9] In its written memorandum opposing the Tribunal's reliance on the additional material, Canada argued, among other things, that the content of the academic treatises and the 1927 Report was not admissible under the doctrine of judicial notice. Further, Canada argued that the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 (Rules) and the common law principles of procedural fairness required that:

i. the Tribunal should be limited to receiving evidence or information tendered by the parties or from an expert appointed by the Tribunal under Rule 89(1);

ii. in the alternative, if the evidence or information was to be introduced by the Tribunal, procedural fairness required the Tribunal to disclose the evidence or information to be relied upon, to identify the question of fact to which the evidence or information pertained, and to provide the parties with an opportunity to respond; and

iii. if the Tribunal decided to receive the evidence or information, the Tribunal should then provide the parties with an opportunity to be heard in argument and in reply.

[10] The Akisq'nuk responded in their written memorandum that the Tribunal was generally free to take judicial notice of the additional material and that to the extent any of the evidence or information was not covered by the doctrine of judicial notice it might be received and accepted by the Tribunal under paragraph 13(1)(*b*) of the Act or Rule 4 of the Rules. The Tribunal took the issue of the use that could be made of the additional material under reserve on September 21, 2015.

[11] On February 4, 2016, over four months later, the Tribunal issued its decision dismissing Canada's objection to the Tribunal's consideration of the additional material (interlocutory decision).

[12] The next day, February 5, 2016, the Tribunal issued its final decision in which it found that the Akisq'nuk had established a breach of a legal obligation within the meaning of paragraph 14(1)(*c*) of the Act in respect of both the Survey Land and the Additional Land.

[13] Before the Court are applications for judicial review of both the interlocutory and the final decisions. These applications were consolidated by order of the Court dated April 8, 2016, with Court file A-80-16 being the lead application. A copy of these reasons will also be placed on Court file A-81-16.

II. The Tribunal's interlocutory decision (2016 SCTC 2)

[14] The Tribunal began its analysis by citing *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, at paragraph 83 and *R. v. Sioui*, [1990] 1 S.C.R. 1025, at paragraph 60. From these decisions the Tribunal noted that it is well-established that courts may take judicial notice of historical facts and rely on their own historical knowledge and research. Citing *R. v. Bartleman* (1984), 12 D.L.R. (4th) 73 (B.C.C.A.), [1984] 3 C.N.L.R. 114, at paragraphs 12-13, the Tribunal added a caveat: a court is limited to taking notice of facts "that are beyond reasonable dispute" (reasons, paragraph 18). The Tribunal confirmed that it had "no intention of relying on author opinion in its use of the treatises" (reasons, paragraph 19). Further, the Tribunal took into account that Canada "was given the opportunity to contest the reliability of the treatises, or to present alternative sources for the Tribunal's consideration. It declined to do so" (reasons, paragraph 21).

[15] Citing paragraph 13(1)(*b*) of the Act, the Tribunal then wrote at paragraph 25:

> […] Where, as in the present matter, treatises and scholarly articles narrate provable facts by reference to historical documents, they may be relied on as if proven in evidence, and for the same purposes. This is not limited to understanding of context; they may, when considered together with documentary and other evidence, be assessed for reliability and weight in the process of arriving at findings of fact.

[16] The Tribunal then concluded its reasons as follows:

> [26] For example, there are two documents in evidence that are central to the claim of the Akisq'nuk that the Crown breached its fiduciary duty by failing to secure a 1915 addition of 2,960 acres to IR 3, its previously allotted reserve. The addition was ordered by the McKenna-McBride Commission, which had been established by an agreement between the Province and the Dominion in 1912. (McKenna-McBride Agreement, in evidence). Both Parties intended that land allotted by the Commission would be transferred from the Province to the Dominion and held in trust for the Claimant. However, another agreement entered in 1920 (Ditchburn-Clark, in evidence) provided for a review of the Commission's allotments. The 1915 addition was supported by Ditchburn, but disallowed by the Province's representative, Clark. The context, revealed fully by the treatises, was the conflict that lasted from 1871 to 1920, and beyond, over land the Province would transfer to the Dominion to fulfil its obligation under the *Terms of Union*, Article 13. Tracing the source of the conflict requires examination of pre-confederation colonial policy, 1850-1871.
>
> [27] Another example: The Claimant argues that the Crown had the duty to refer the Ditchburn-Clark disagreement to the Secretary of State for the Colonies for a decision, a remedy provided by Article 13. On the face of it, this argument has merit. The Respondent argues that if such a duty existed (which is denied), the Crown had a greater duty to bring an end to the five decades of wrangling over the quantity of land to be transferred by accepting the disallowance of the addition and confirming that the issue over the quantity of land had been resolved. The merits of the Respondent's answer cannot, however, be determined based on the limited evidence. The Harris treatise fills in the evidentiary gap by reference to primary sources, the historical record.
>
> [28] Procedural fairness was, in my opinion, adequately addressed by notice to the Parties and an opportunity to make submissions. The ultimate decision on this question may be for others to make.
>
> [underlining added]

III. The Tribunal's final decision (2016 SCTC 3)

[17] As I have concluded that these consolidated applications turn on principles of procedural fairness, it is not necessary to review the substance of the Tribunal's final decision. Rather, I cite the following brief paragraphs to illustrate the role played by the additional material in the Tribunal's final decision:

> [242] The Claimant had a cognizable interest in the addition. The Crown exercised discretionary control in the process of securing the transfer of the land to Canada as required by Article 13. The Crown had, at a minimum, a duty of ordinary diligence. The beneficiary whose interest was directly engaged was the band now known as the Akisq'nuk First Nation, i.e., the Claimant. Its interest was in the addition being transferred to Canada along with the land allotted by O'Reilly. Canada should have been, at a minimum, ordinarily diligent in pursuing this interest.
>
> [243] The Respondent argues that its obligation to finally settle the "Indian Land Question" in the interest of all "bands" that were allotted reserves over-rode any obligation it may have had to advance the interest of the Claimant by, for example, referring the matter to the Secretary of State for the Colonies for decision. There is, however, no evidence that this would be the result. There could not be, as the Dominion did not take this measure.
>
> [244] The Respondent's theory rests on the proposition, drawn by inference, that measures taken to advance the Claimant's interest would have impeded the progress of or prevented the transfer which ultimately took place 14 years later.
>
> [245] The treatises fill in the picture of the events of the past six decades. With this considered, the Respondent's argument has superficial merit. However, the argument does not stand up to a close examination. The inference suggested by the Crown is not the only reasonable inference from the evidence and the information contained in the treatises. It fails to take into account that the Province had achieved its primary objective, namely the removal of valuable land previously allotted by the JIRC from land to be transferred to Canada. It would not have been in the Province's interest to generally re-open the land question.
>
> […]
>
> [305] On the application of fiduciary law via both avenues identified in *Manitoba Métis Federation* at paragraphs 49-50, I find that the Crown had a duty to propose the referral of the disagreement between Ditchburn and Clark over the addition of 2,960 acres of land to IR 3 to the Secretary of State for the Colonies as provided for in Article 13. Instead, the Dominion abdicated its duty to the Claimant in favour of what may well have been an unnecessary political compromise.
>
> [underlining added]

[18] Having set out the factual background, I now turn to consider the standard of review to be applied to the Tribunal's decisions, the content of the duty of fairness owed by the Tribunal to

the parties and whether the specific participatory rights owed to Canada were violated by the Tribunal.

IV. The standard of review to be applied to the Tribunal's decisions

[19] Canada submits that questions of procedural fairness are reviewed on the correctness standard; counsel for the Akisq'nuk acknowledged this to be correct during oral argument. I agree: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79.

V. The content of the duty of fairness owed by the Tribunal

[20] The concept of procedural fairness is eminently variable, and its content is to be decided in the context and circumstances of each case. The concept is animated by the desire to ensure fair play. The purpose of the participatory rights contained within the duty of fairness has been described to be:

> …to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

(*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 22).

[21] In *Baker*, the Supreme Court articulated a non-exhaustive list of factors to be considered when determining what procedural fairness requires in a given set of circumstances: the nature of

the decision being made and the process followed in making it; the nature of the statutory scheme, including the existence of an appeal procedure; the importance of the decision to the lives of those affected; the legitimate expectations of the person challenging the decision; and, the choice of procedure made by the decision-maker.

[22] Applying these factors, Canada argues that the parties were entitled to "the full ambit of procedural fairness protections" (amended memorandum of fact and law, paragraph 44). Conversely, the Akisq'nuk argue that application of these factors leads to the conclusion that "the extent of procedural fairness required on the questions [*sic*] of admissibility of evidence is limited." (amended memorandum of fact and law, paragraph 41).

[23] It is not necessary for me to fully resolve this debate or to enumerate the participatory rights enjoyed by the parties. Having regard to the adjudicative nature of the decision at issue, the court-like process prescribed by the Rules (particularly Rules 57-103 dealing with pre-hearing disclosure, pre-hearing examinations and pre-hearing evidence taken by way of discovery, oral history or expert evidence, and Rules 104-105 dealing with the hearing procedure), the absence of a statutory right of appeal, and the importance of the decision to the parties, it is sufficient to conclude that the parties were entitled to a meaningful opportunity to present their cases fully and fairly. In turn, this required, at a minimum, that the parties be informed of, and know, the case they had to meet and then be afforded the opportunity to adduce evidence and make submissions responsive to that case.

[24] In so concluding, I am mindful of the need to address the specific claims of First Nations and the need to resolve specific claims so as to promote reconciliation between First Nations and the Crown. As stated in the preamble to the Act, there is a need for an independent tribunal that "is designed to respond to the distinctive task of adjudicating" specific claims.

[25] I am also mindful of the need to respect the choices of procedure made by the Tribunal (*Baker*, paragraph 27). However, the preamble to the Act requires the Tribunal to adjudicate specific claims "in accordance with law and in a just and timely manner." Requiring the Tribunal to afford a meaningful opportunity to present the parties' cases fully and fairly, informed by the knowledge of the case to be met, is consistent with the mandate and special role of the Tribunal. It is also respectful of choices of procedure made by the Tribunal as long as those choices are consistent with affording the parties the meaningful opportunity to participate described above.

VI. Canada's right to meaningfully participate and know the case to be met

[26] Canada argues that it "did not and could not know the case to be met with respect to the judgment ultimately rendered by the Tribunal." (amended memorandum of fact and law, paragraph 61). This is said to flow from:

i. the scope and nature of the additional material;

ii. the Tribunal's failure to particularize the facts or information it proposed to rely upon and to identify the question of fact or issue to which the facts or information pertained; and,

iii. the Tribunal's reliance on the additional material to support its finding that Canada breached its fiduciary duty.

[27] The Akisq'nuk respond that, while "the process followed by the Tribunal might not have been optimal", fairness was accorded so that there is no cause for complaint. This is said to be because Canada has failed to demonstrate factual findings that were directly influenced by reference to the additional material that directly impacted upon the final decision. Put another way, the Akisq'nuk submit that the final decision could have been reached without reliance upon the additional material.

[28] I propose to deal with these submissions by setting out the case asserted against Canada by the Akisq'nuk at the close of the hearing and then reviewing the scope and nature of the additional material. I will then consider whether Canada's participatory right to know and respond to the case against it was violated.

A. *The case against Canada*

[29] Rule 41(*e*) permits a party to file a declaration of claim containing "a brief statement of the facts that form the basis for the specific claim". In its declaration of claim the Akisq'nuk advanced a claim based on two factual premises. First, when Crown Surveyor Skinner surveyed the Reserve he departed from the survey instructions contained in the minutes of decision prepared by Reserve Commissioner O'Reilly. Second, later, the McKenna-McBride Commission allocated 2960 additional acres to the Reserve. However, this allocation was subsequently disallowed by the provincial and federal governments.

[30] While the agreed statement of facts recited the terms of Article 13 of the *British Columbia Terms of Union, 1871*, no facts were admitted about the availability or appropriateness

of this remedy in the period after Chief Inspector Ditchburn submitted his final report on March 27, 1923, reporting that Major Clark, and the provincial Crown, had disallowed the allocation of the 2960 additional acres to the Akisq'nuk.

[31] Later, after the parties had prepared the agreed statement of facts and common book of documents, but before the commencement of the hearing before the Tribunal, the Akisq'nuk filed their amended memorandum of fact and law that set out the factual basis of its claim, the issues raised by its claim, and the legal arguments in support of its claim.

[32] While the memorandum set out the terms of Article 13 of the *British Columbia Terms of Union, 1871*, the memorandum contained no assertion that Canada had a fiduciary duty to refer to the Secretary of State for the Colonies any disagreement between the provincial and federal governments respecting the dimensions of the tracts of land to be conveyed by the province to Canada in trust for the use and benefit of the Indians. The case advanced with respect to the Survey Land was based solely on the failure of Surveyor Skinner to follow the directions of the minutes of decision prepared by Reserve Commissioner O'Reilly. The case advanced with respect to the Additional Land was based on the allegation that after the McKenna-McBride Commission ordered the Additional Land to be set aside, the Additional Land became a reserve. Thereafter, Canada was obliged to protect the interest of the First Nation in the Additional Land. It was further submitted that:

> 102. The *Constitution* and the *Terms of Union* placed an obligation on Canada to protect the interest of the First Nation in the Madias Tatley Lands.
>
> Any ambiguities that exist with respect to the power of Commissioner O'Reilly and the McKenna-McBride Commission to make final allotments of reserves must be resolved in favor of the First Nation. Further, if there is any doubt whether the Cutoff Lands and Madias Tatley Lands constituted a reserve, as

> defined by the *Indian Act*, the doubt should be resolved in favour of the First Nation as directed in *Blueberry, Mitchell v. Peguis Indian Band*, [1990] 3 C.N.L.R. 46 (S.C.C.), *Nowegijick v. The Queen* [1983], 144 D.L.R. (3d) 193 (S.C.C.).

[33] Thereafter, at the hearing the Akisq'nuk made no submission in its argument in chief with respect to a fiduciary duty to refer the dispute to the Secretary of State for the Colonies. The issue was raised by counsel for Canada in her submission to the effect that any fiduciary obligation Canada had in relation to the Additional Land after 1915 was limited to "basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter and acting with ordinary prudence" and that "through its efforts to persuade the province to approve the commission's recommendations Canada demonstrated good faith efforts to discharge its mandate, whether that mandate was expressed under article 13 of the *Terms of Union*, the McKenna-McBride agreement, the 1912 federal OIC giving legal effect to that agreement or the 1920 *Indian Land Settlement Act*." (transcript of closing submissions, September 25, 2015, applicant's record, volume 7, pages 1548-1549).

[34] Counsel then went on to make the following submission, which mirrored the submission made at paragraph 113 of Canada's written memorandum:

> Under article 13 of the *Terms of Union* Canada was to assume trusteeship and management of lands reserved for use and benefit of the Indians. Lands were to be conveyed by BC to Canada in trust for the use and benefit of the Indians on application of the dominion. And in fact article 13 contemplated disagreement between Canada and BC on the very issue that we are concerned with here, the issue of land quantum. And a dispute resolution option was provided. And I'm going to come back to that in a moment. The dispute resolution option was referral of the matter for decision by the secretary of state for the colonies.
>
> Canada's undertaking under article 13 was to make application for lands for the Indians. BC's was to convey the lands. Canada couldn't unilaterally implement article 13 just as it couldn't unilaterally implement the commission's recommendations and create the McKenna-McBride lands as a reserve. But it took

> all appropriate steps to support the addition of the McKenna-McBride lands to Akisq'nuk's IR No. 3, bearing in mind the limits on Canada's negotiating position via-à-vis [*sic*] the allotment of these lands.
>
> Now, as I just noted, one issue we haven't discussed in this hearing, and which I don't believe my friend addressed, is this. Article 13 provided a mechanism by which the parties could bring a reference to the secretary of state for the colonies. Canada submits that its decision not to pursue this course was reasonable in light of the legal uncertainty described above and having regard to the specific facts of the present claim. And I'm just about to say a bit more about that.
>
> Although it argued consistently for the province's approval of the McKenna-McBride lands as reserve lands, Canada could not have been certain that the province had a legal obligation to provide these lands under - - […].
>
> [underlining added]

[35] Thereafter, in reply submissions counsel for the Akisq'nuk referred to Article 13 of the *British Columbia Terms of Union*, 1871 and submitted that:

> Your Honour, with respect to the dispute and disagreement regarding the addition of the Madias Tatley lands, there's no historic reference that the disagreement was referred for a decision of the secretary of state for the colonies. And I would submit, Your Honour, that the failure of Canada to request that the disagreement be referred to the secretary of state is a breach of their duty as it is contrary to the directions provided by the *Terms of Union*.
>
> [underlining added]

[36] Having reviewed the case advanced against Canada as set out in the Declaration of Claim, the agreed statement of facts, and the written argument, and having reviewed how the issue of the duty to refer any dispute to the Secretary of State for the Colonies was raised, I will now describe the scope and nature of the additional material.

B. *The additional material*

[37] As described above, the additional material consisted of excerpts from three academic treatises and the 1927 Report of the Special Joint Committee.

[38] The first treatise was by Robert E. Cail. Chapters 11-13 were referenced by the Tribunal. Together, these chapters deal with Imperial Colonial Indian Policy, Indian Land Policy after Confederation and The Reserve Allotment Commissions. The chapters comprise a total of 74 pages with 201 footnotes.

[39] The Tribunal referenced 20 pages of the Cole Harris treatise, pages 241-261. This is an excerpt from a chapter entitled "Imposing a Solution, 1898-1938". The extract contains 64 endnotes.

[40] The Tribunal referenced chapter 8 of the treatise by E. Brian Titley. Chapter 8 is entitled "Land Claims in British Columbia" and comprises 27 pages and 111 endnotes.

[41] The 1927 Report of the Special Joint Committee is comprised of some 353 pages (found from pages 97 to 450 of the respondent's record). The material includes minutes of proceedings, correspondence, committee reports, witness statements, petitions to Parliament and orders of reference. The material contains correspondence from as early as March of 1861, and minutes of a meeting of the committee held on April 5, 1927. The material thus covers a period of some 65 years.

[42] The topics covered in the material are myriad. To illustrate, at the April 5, 1927 meeting, Commissioner Ditchburn gave evidence about fishing rights, the manner in which Indian agents were selected, police attendance on reserves for the purpose of arresting suspects, the division of water for irrigation purposes, teaching agricultural methods to Indians, aboriginal title, and residential schools. It is fair to characterize the material as voluminous and poorly organized.

[43] Having described the additional material, I next turn to consider whether Canada's participatory rights to know and respond to the case against it were violated.

C. *Were Canada's participatory rights to know and respond to the case to be met violated?*

[44] At paragraph 26 I set out the three grounds Canada relies upon to assert that it did not, and could not, know the case to be met. I will consider each in turn.

(1) The scope and nature of the additional material

[45] As recited above, the parties' arguments at the validity phase of the hearing were grounded in the evidence and information found in the agreed statement of facts and the common book of documents.

[46] A review of the written submissions filed by the parties shows that issues canvassed by the parties included the Akisq'nuk's traditional occupation of the land around what became the Reserve, the legal effect of the allotment and survey of the Reserve, the 1915 allocation of an additional 2960 acres of land by the McKenna-McBride Commission and Canada's actions to

seek implementation of the Commission's allocation. The parties also addressed the source and content of any fiduciary duty owed to the First Nation.

[47] As previously explained, after the claim had been taken under reserve, the Tribunal issued its memorandum advising counsel that it had consulted three academic treatises "in order to identify more accurately the historical context essential to the resolution of this claim" and that it "may also consider historical documents footnoted in the above chapters and pages". At a case management conference held on July 29, 2015, Canada was given until September 4, 2015, to file a memorandum of law on the Tribunal's intended reliance on the additional material. Canada was also permitted to advise the Tribunal if it had "other authoritative material" it wished the Tribunal to consider.

[48] I have described the volume of the additional material, the significant number of footnotes and endnotes that reference source documents which the Tribunal proposed to consider when rendering its final decision and the diversity of the issues dealt with in the additional material.

[49] It is also fair to state that each academic work is a scholarly writing which orders and presents selected facts in support of the author's thesis. To illustrate, Cail commences his discussion of Indian Land Policy after Confederation as follows:

> In drafting article 13 of the Terms of Union, it is possible that neither the dominion nor the provincial negotiators intended to be anything less than candid. Certainly Trutch, Carrall, and Helmcken, the delegates from British Columbia, had full knowledge of the Dominion's Indian policy in the reservation of land. In the light of subsequent difficulties and disclosures, it is doubtful whether the Committee of the Privy Council acting on behalf of Canada possessed equally

> accurate information concerning the Indian policy of the colonial government in British Columbia. Trutch certainly could have given a complete summary of that policy. He had been chief commissioner of lands and works in the colony since 1864, and more recently surveyor general as well. In both functions he had been responsible for severely altering Douglas's principles. Less than three years after Union, the Dominion was to discover that the meaning which it abstracted from article 13 was the opposite of that read into it by the province.

[50] The reference to "Douglas" is to Sir James Douglas, the Chief Factor of the Hudson's Bay Company and Governor of the Colony of Vancouver Island. After setting out the terms of Article 13, Cail continues:

> The wording is reminiscent of Trutch's 1870 memorandum and suggests that he had much, if not everything, to do with the framing of article 13. The evidence leads to the conclusion that he deliberately put in those two contentious and ambiguous phrases, "a policy as liberal as that hitherto pursued by the Government of British Columbia," and "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate."
>
> [underlining added]

[51] The selected facts did not necessarily paint a holistic picture. This complicated Canada's task of responding to the Tribunal about its intended use of the additional material.

[52] The relevance of the scope and nature of the additional material is this. The Akisq'nuk argue that "Canada was given a proper opportunity to respond, and object to specific facts or opinions, and provide any additional material. It chose not to do so". However, the scope and nature of the additional material was such that this was largely an empty opportunity. As explained below, any meaningful opportunity to respond required greater particulars about the proposed use of the additional material than that provided by the Tribunal. For now it is sufficient to state that the volume of information identified by the Tribunal was such that Canada

could not fairly be expected to refute any and all aspects of the information, particularly when the Tribunal's view of the relevance of the information was unknown.

[53] There is one further matter to address when considering the scope and nature of the additional material. This is that, through inadvertence, the Tribunal relied upon portions of the Harris text other than those it gave notice of. Thus, at paragraphs 44 to 55 of the final decision, the Tribunal referenced pages 30-44 and 56-58 of the text. These pages deal with what Harris referred to as "The Colonial Period" and discuss both what is referred to as "The Douglas Years, 1850-64" and native land policies after the departure of Governor Douglas. Pages 30-44 contain an additional 47 endnote references; pages 56-58 contain 20 such references.

(2) The Tribunal's failure to particularize the facts or information it proposed to rely upon

[54] Canada argued before the Tribunal that if the Tribunal was to introduce new evidence, procedural fairness required the Tribunal to identify both the new evidence and the question of fact to which the evidence pertained, and to then provide the parties with an opportunity to:

a. make legal submissions in response to the new evidence or information adduced by the Tribunal;

b. adduce fresh evidence or information in response; and

c. make legal submissions in response to any new evidence or information the party opposite adduced in response to the Tribunal's new evidence or information.

[55] The Tribunal noted Canada's position at paragraph 13 of the interlocutory decision, noting that the objection was procedural in nature "raising procedural fairness by implication".

The Tribunal also observed that Canada did "not dispute the accuracy or reliability of any part or all of the cited texts."

[56] The Tribunal did not deal in any detail in its reasons with Canada's argument about procedural fairness, stating only, at paragraph 28, that in its opinion procedural fairness was "adequately addressed by notice to the Parties and an opportunity to make submissions."

[57] I, respectfully, disagree. The nature and scope of the additional material was such that Canada required notice of what facts the Tribunal proposed to judicially note and notice of what issue each fact pertained to. This is so for at least two reasons.

[58] The first is that the permissible scope of judicial notice varies according to the nature of the issue under consideration. When it is proposed to take judicial notice of adjudicative facts, that is facts going to the "where, when and why" of what is alleged to have happened, stricter admissibility criteria are applied (*R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at paragraphs 53-63).

[59] It follows that Canada needed to know whether the Tribunal intended to judicially note a fact that was adjudicative in nature in order for Canada to be able to make informed submissions about the applicable admissibility criteria for judicially noting such a fact.

[60] The second reason relates to the Tribunal's reliance on the additional material to find a breach of fiduciary duty and will be discussed below.

(3) The Tribunal's reliance on the additional material to support its finding that Canada breached its fiduciary duty

[61] As explained above, the issue of a referral to the Secretary of State for the Colonies was raised by Canada and taken up in reply by the Akisq'nuk. The evidentiary record did not deal with this issue.

[62] The Tribunal's memorandum of July 8, 2015, reveals that it was troubled by what it perceived to be a gap in the evidence. Thus, the Tribunal had consulted additional sources "in order to identify more accurately the historical context essential to the resolution of this claim" (underlining added).

[63] The interlocutory decision demonstrates that the gap in the evidence related to at least two issues. The first was the issue of who bore responsibility for the failure to implement the allocation of land directed by the McKenna-McBride Commission (reasons, paragraph 26). The second issue was whether the Crown had a duty to refer the Ditchburn-Clark dispute to the Secretary of State for the Colonies (reasons, paragraph 27).

[64] The record does not shed light on why the Tribunal failed to advise the parties in its memorandum of July 8, 2015, that it found the evidentiary record lacking on these points and to request that the parties address the evidentiary shortfall. At the same time, the parties could have been requested to provide submissions as to how, if at all, the additional material was relevant to these issues and the extent that facts found in the additional material could be judicially noticed.

The parties would then have been in a position to make meaningful submissions about what other material was relevant or authoritative.

[65] Had the Tribunal proceeded in this manner, I see no impediment to its ability to judicially note facts as directed by the Supreme Court in *Spence*.

[66] The use the Tribunal made of the additional material is evident from the passages in the final decision quoted above at paragraph 17. Contrary to the submission of the Akisq'nuk, the Tribunal proceeded to judicially note and rely upon the additional material to make factual findings that directly led to the final decision.

[67] The additional material was dispositive of the issue of who bore responsibility for the failure to implement the allocation of land recommended by the McKenna-McBride Commission. As evidenced at paragraphs 242-245 of the final decision, the treatises were used to dispel Canada's argument that measures taken to advance the interest of the Akisq'nuk would have impeded or prevented the ultimate transfer of land from British Columbia to Canada.

[68] Similarly, the additional material was used to fill the evidentiary gap surrounding the availability of recourse to the Secretary of State for the Colonies. Canada's submission that it could not unilaterally implement the McKenna-McBride Commission's allocation of land and that, in view of the legal uncertainty about the legal obligation of the province to transfer land, Canada took all appropriate steps to support the addition of the 2960 acres was defeated by the

Tribunal's characterization of its conduct as "what may well have been an unnecessary political compromise" (reasons, paragraph 305).

[69] In summary, the Tribunal found a gap in the evidence with respect to two central issues. It failed to identify that evidentiary gap to the parties. Instead, the Tribunal referred to three academic texts and to the 1927 Report of the Joint Special Committee without particularizing either the facts it proposed to take notice of or the issues those facts related to. In doing so, the Tribunal failed to afford Canada a meaningful opportunity to present its case fully and fairly. Canada did not know the facts and information it was required to respond to, and it was denied a meaningful opportunity to adduce evidence and make responsive submissions.

VII. Conclusion

[70] I have concluded that Canada did not have a meaningful opportunity to present its case fully and fairly. There is no basis on which I can conclude that had Canada known the case it was required to meet it was impossible for it to have put further information before the Tribunal to answer the Tribunal's concerns. It follows that I would allow the applications for judicial review, set aside the interlocutory and final decisions of the Tribunal and direct that the claim be returned to the Tribunal to be re-determined by a differently constituted panel.

[71] Canada does not seek costs and I agree that this is an appropriate case for each party to bear their own costs. Therefore, I would make no order as to costs.

[72] A copy of these reasons shall be placed on each court file.

"Eleanor R. Dawson"

J.A.

"I agree.
M. Nadon J.A."

"I agree.
Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-80-16
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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 16, 2017
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	NADON J.A. GAUTHIER J.A.
DATED:	SEPTEMBER 1, 2017

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