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## INDIGENOUS PEOPLES

### LANDS

#### *Fiduciary duty*

Application for judicial review in which applicant sought to have set aside decision by Specific Claims Tribunal (Tribunal) determining in part that respondent not breaching its pre-surrender fiduciary duty owed to applicant but breaching to some extent its post-surrender duty — Applicant is First Nation located approximately 150 kilometres east of Regina, Saskatchewan — In 1887, applicant adhered to Treaty No. 4 — In 1889, respondent set aside fishing station on Crooked Lake as Reserve, IR 72A, for benefit of members of applicant, whose primary Reserve, IR 72, was landlocked — IR 72, IR 72A were confirmed by same Order in Council issued on May 17, 1889 — In 1944, respondent requested that applicant consent to surrender of small portion of IR 72A for road allowance requested by local municipality — In response, applicant indicated that they wished to surrender whole of IR 72A because they preferred to fish in Round lake, located closer to residential school their children had attended — Contemplated using funds from sale of IR 72A to purchase or lease fishing station on Round Lake — In 1944, applicant surrendered all of IR 72A to respondent for sale upon terms Government deemed most conducive to welfare of applicant's members — Shortly after surrender taken, exchange of correspondence taking place between government officials regarding surrendered lands — Exchange revealed that both expected that surrendered lands abutting Crooked Lake would increase in value since there would be greater demand for cottage lots after war ended; that greater returns might be realized if lands were subdivided, sold as cottage lots than if they were sold in block — One of government officials stated that if lots subdivided, would be more profitable to rent cottage sites than selling lots — By 1944, lands in area were beginning to be leased or sold as cottage lots — Between 1944-1953, respondent doing nothing to further sale of surrendered former IR 72A lands — In 1955, lands were appraised, divided into three lots, offered for sale by public tender — Highest offer for lands accepted — Applicant not consulted about manner of disposition of lands nor asked whether it still desired that lands be sold. — Between 1944-1954, Round Lake Residential School closed — In 2013, applicant filed Declaration of Claim with Tribunal, seeking compensation in respect of several alleged failures by Crown to fulfil its duties owed to applicant with respect to IR 72A, its surrender — In its decision (*Kahkewistahaw First Nation v. Her Majesty the Queen in Right of Canada*, 2022 SCTC 5), Tribunal made several findings — In present instance, applicant sought to have Tribunal's finding regarding pre-surrender fiduciary duty overturned; submitted that Tribunal's conclusion that Crown not breaching pre-surrender fiduciary duty owed to applicant relating to 1944 surrender of IR 72A was unreasonable — Whether Tribunal's Decision on pre-surrender and post-surrender fiduciary duty unreasonable — Principles on respondent's fiduciary obligations to Indigenous peoples as drawn from relevant court, Tribunal cases, examined — Relevant principles include *sui generis* fiduciary duty owed by respondent to Indigenous peoples in context of surrender of reserve land, which duty multifaceted — Such duty including duties of loyalty, good faith, full disclosure, protection of First Nation's interest in reserve lands from exploitative or improvident bargains, managing process in best interests of First Nation, ensuring that First Nation consents to surrender — Second, terms of formal written surrender document not determinative of the scope of respondent's fiduciary obligations; rather, nature of

those obligations to be determined based on all relevant surrounding circumstances — Third, respondent's post-surrender fiduciary obligations may require it to consider, adjust to changed circumstances relevant to surrender where surrendered land has not yet been sold — Tribunal's failure to recognize such principles rendered its decision unreasonable — Regarding pre-surrender breach of fiduciary duty, Tribunal characterized what was said by two government officials in correspondence between them about value of surrendered lands as being views of two individuals, which bore no relevance to adequacy of applicant's understanding of terms of surrender — This characterization was so untenable that it met high bar of being unreasonable because it failed to reasonably account for critical evidence that ran counter to its findings — Knowledge of individuals acting for respondent in such key roles that it was more profitable at time to lease than sell lots was highly relevant to adequacy of applicant's understanding of terms of surrender, to adequacy of respondent's disclosure to applicant — No suggestion that respondent discussed relative merits of leasing versus selling IR 72A lands with applicant before surrender taken — In absence of any discussion by respondent with applicant of comparative value of leasing versus sale of IR 72A lands, it was impossible to conclude that applicant had adequate understanding of terms of surrender or that appropriate disclosure was made by respondent — Tribunal also failed to account for or reconcile its decision in present case with long line of authority from courts, Tribunal itself, holding that respondent's fiduciary duties in such cases include requirement for full disclosure — As to Tribunal's decision on post-surrender breach of fiduciary duty, Tribunal held that respondent not required to consider leasing former IR 72A lands after surrender taken because terms of surrender were for sale — However, in intervening years, during which respondent failed to take any action, reason that prompted surrender in first place disappeared with closure of Round Lake Residential School — In addition, cottage development in area was proceeding apace — These were important changed circumstances that merited consideration by Tribunal, assessment as to whether respondent ought to have consulted with applicant before proceeding with sale, whether possibility of leasing ought to have been discussed — Tribunal's assessment of issues unreasonable — Therefore, Tribunal's decision on impugned issues could not stand — Decision set aside in part, issue of respondent's breach of its pre, post-surrender fiduciary duties remitted to Tribunal for redetermination in accordance with reasons — Application allowed.

KAHKEWISTAHAW FIRST NATION V. CANADA (CROWN-INDIGENOUS RELATIONS) (A-156-22, 2024 FCA 8, Gleason J.A., reasons for judgment dated January 12, 2024, 37 pp.)