

*emd  
J. Ayler  
19-0417*

Court File No. SI-GS-27549

**SUPREME COURT OF PRINCE EDWARD ISLAND  
(General Section)**

BETWEEN:

The MI'KMAQ OF PRINCE EDWARD ISLAND,  
CHIEF MATILDA RAMJATTAN, on her own behalf and on behalf of all of the members of the  
LENNOX ISLAND FIRST NATION, and  
CHIEF BRIAN FRANCIS, on his own behalf and on behalf of all of the members of the  
ABEGWEIT FIRST NATION

APPLICANTS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF PRINCE EDWARD  
ISLAND, 9711864 CANADA INC., and DONALD J. MCDOUGALL

RESPONDENTS

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW**

**TO THE RESPONDENTS**

**A LEGAL PROCEEDING HAS BEEN COMMENCED** by the applicants. The claim made by the applicant appears on the following pages.

**THIS APPLICATION** for judicial review will come on for a hearing before the Supreme Court on a date and at a place to be fixed by the registrar.

**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 lawyer acting for you must prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the registrar, and you or your lawyer must appear at the hearing.

**IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION**, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant and file it, with proof of service, in the office of the registrar within thirty days after service on you of the applicant's application record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

**IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

(SOD.) ELIZABETH MURRAY  
Deputy Registrar

Date: February 8, 2017

Issued by \_\_\_\_\_

Registrar  
42 Water Street  
Charlottetown, PE

TO:

**Her Majesty the Queen In Right of the Province of Prince Edward Island (the "Province")**  
Office of the Deputy Attorney General  
Department of Justice and Public Safety  
Shaw Building, 4th Floor South  
95 Rochford Street  
Charlottetown, PE C1A 7N8

**Donald J. McDougall**  
39 Haig Street  
Stratford, ON N5A 5J4

**9711864 Canada Inc. (the "Company")**  
97 Queen Street - Suite 600  
Charlottetown PE C1A 4A9

#### APPLICATION

This application is precipitated by the proposed sale of property presently held by the Province to a foreign corporate purchaser. The subject property is presently comprised of a golf course and related recreational lands. The Applicants claim that they are entitled to be consulted and accommodated as they are aboriginal title holders of the subject property and that the Province has failed its constitutional and fiduciary obligations and acted contrary to the honour of the

crown in proceeding to dispose of crown lands prior to providing adequate consultation and accommodation.

1. The applicants make application for:
  - (a) A declaration that the Province has failed to adequately consult and / or accommodate the Mi'kmaq of Prince Edward Island ("Mi'kmaq of PEI") with respect to a decision to convey 325.59 acres of land at Woodstock, Lots 5 and 6, Prince County, Province of Prince Edward Island (hereinafter referred to as the "Lands") to the Respondents, Mr. McDougall and the Company;
  - (b) A declaration that Order in Council EC 2017-6 is invalid and is set aside to the extent that it purports to grant permission to Mr. McDougall the right to acquire the Lands from the Province;
  - (c) A declaration that Order in Council EC 2017-12 is invalid and is set aside to the extent that it purports to grant permission to the Company the right to acquire the Lands from the Province;
  - (d) In the alternative, a declaration that Orders in Council EC2017-6 and EC2017-12 are suspended or postponed until the Province has adequately consulted and / or accommodated the Mi'kmaq of PEI;
  - (e) A declaration that the Province is required to consult and / or accommodate the Mi'kmaq of PEI on the process to be followed regarding any transfer of any right to, or interest in, the Lands whether to Mr. McDougall, the Company, or otherwise;
  - (f) An interim injunction, suspending or postponing the operation of Orders in Council EC2017-6 and EC2017-12 and prohibiting the Province from transferring any right to, or interest in, the Lands, whether to Mr. McDougall, the Company, or otherwise, until the Province has adequately consulted and / or accommodated the Mi'kmaq of PEI with respect to the transfer of those Lands;

- (g) A declaration that any transfer of any right to, or interest in, the Lands which has already purported to have taken place is without effect; and
- (h) Costs.

2. The grounds for the application are:

**The Parties**

- (a) The Applicant, the Mi'kmaq of PEI, are the descendants or successors of the historic rights bearing community that exclusively occupied all of the lands and waters of what is now known as the Province of Prince Edward Island including adjacent areas and offshore islands (hereinafter referred to as "**PEI**"), both at the time of first contact with Europeans and at the assertion of sovereignty.
- (b) The Mi'kmaq are a First Nation whose traditional territory, Mi'kma'ki, encompasses all of PEI and Nova Scotia as well as parts of New Brunswick, Quebec, and Newfoundland and Labrador. Mi'kma'ki, therefore, includes, but is not limited to, the traditional territory of the Mi'kmaq of PEI which covers the entire area of PEI.
- (c) The Mi'kmaq Confederacy of Prince Edward Island (the "**Confederacy**") is a nonprofit company incorporated pursuant to the laws of Prince Edward Island with a registered address of 200 Read Drive, Summerside, Prince Edward Island. It represents an alliance of the Lennox Island First Nation and the Abegweit First Nation, which are the two Indian bands which comprise the Mi'kmaq of PEI. The Confederacy is owned by the Lennox Island and Abegweit First Nations and its Board of Directors is comprised of the elected Band Councils of both First Nations.
- (d) The Applicant, Chief Matilda Ramjattan, is a member of the Mi'kmaq of PEI as well as the elected Chief of the Lennox Island First Nation. She is an aboriginal person within the meaning of section 35 of the *Constitution Act, 1982* and an Indian within the meaning of section 91(24) of the *Constitution Act, 1867*.

- (e) The Applicant, Chief Brian Francis, is a member of the Mi'kmaq of PEI and is the elected Chief of the Abegweit First Nation. He is an aboriginal person within the meaning of section 35 of the *Constitution Act, 1982* and an Indian within the meaning of section 91(24) of the *Constitution Act, 1867*.
- (f) The Respondent, the Province (officially "Her Majesty the Queen in right of the Province of Prince Edward Island"), is the person designated for proceedings against the provincial Crown in Prince Edward Island, pursuant to the *Crown Proceedings Act*, R.S.P.E.I. 1988, C-32 and amendments thereto.
- (g) The Respondent, the Company (officially "9711864 Canada Inc.") is a federally incorporated company with a registered office address at 97 Queen Street, Suite 600, Charlottetown, Prince Edward Island.
- (h) The Respondent, Donald J. McDougall, is a businessperson and director of the Company, who resides at 39 Haig Street, Stratford, Ontario.
- (i) The Applicants plead and rely upon Rules 17.02 (a), (h), (i), and (p) of the *Rules of Civil Procedure* for the purposes of serving Mr. McDougall with this Notice of Application for Judicial Review outside of Prince Edward Island and without leave and state that the Application is in respect of real or personal property in Prince Edward Island; is in respect of damages sustained in Prince Edward Island arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence, wherever committed; is for an injunction ordering a party to do, or refrain from doing, anything in Prince Edward Island or affecting real or personal property in Prince Edward Island; and is against a person ordinarily resident or carrying on business in Prince Edward Island, all as indicated in the grounds for the Application herein as well as the Affidavits in support hereof.
- (j) The Applicants also plead the following facts for the purposes of serving Mr. McDougall with this Notice of Application for Judicial Review outside of Prince Edward Island and without leave:

- (i) The subject matter of this proceeding relates to the Lands which are real property located within Prince Edward Island;
- (ii) The Applicants allege that they have suffered damage, in Prince Edward Island, arising from a breach of fiduciary duty;
- (iii) The Applicants are seeking an injunction affecting the Lands, which are real property located in Prince Edward Island; and
- (iv) Mr. McDougall is, either personally or through the Company, carrying on business in Prince Edward Island on the Lands in question in this proceeding.

### **Background**

- (k) The Mi'kmaq of PEI and their ancestors have exclusively occupied and practiced their Aboriginal rights throughout the lands and waters of what is today known as the Province of Prince Edward Island.
- (l) The exclusive occupation and practice of Aboriginal Rights have taken place since before contact and have continued throughout the assertion of sovereignty to the present day.
- (m) The Mi'kmaq of PEI have never been conquered or surrendered their interests or rights with respect to these lands and waters.
- (n) The vast majority of the lands of Prince Edward Island have been systematically transferred or disposed of by the Province without the consent of the Mi'kmaq of PEI.
- (o) What remains of Crown lands throughout PEI is a very small percentage of the entire land mass and in total represents approximately 6% of PEI.
- (p) The Mi'kmaq of PEI have sought meaningful consultation and accommodation from the Province since at least 1997 and, in particular, have objected to any

diminishment of the land resources held by the Province based on their asserted title to those lands.

**The Failure to Consult and Accommodate with Respect to the Lands**

- (q) The Lands which are subject to this application are owned by the Province and have been operated as a golf course and for other recreational activities.
- (r) The Province formed the intention to sell the subject Lands to private interests and informed the Applicants.
- (s) The Applicants requested consultation and accommodation with respect to any proposed sale of the said Lands and informed the Province that traditional activities have taken place on these said Lands.
- (t) Rather than engage in any form of consultation or accommodation with the Applicants, the Province proceeded to negotiate and enter into an agreement with a foreign corporate purchaser for the sale of the Lands.
- (u) When the Applicants became aware of the proposed sale of the Lands, they objected and put forward an alternate proposal which would have allowed the Lands to continue to be operated as a golf course by the proposed purchaser pursuant to a lease and accordingly allow for proper consultation and accommodation prior to conveyance or transfer of the Lands.
- (v) The Province rejected the Applicants proposal and has not offered any alternatives, has not offered any compensation, has not offered any accommodation, and simply decided to proceed with the sale to the foreign corporate purchaser.
- (w) This decision by the Province to sell the Lands without fulfilling its obligations to consult and accommodate the Mi'kmaq of PEI is unconstitutional, a breach of fiduciary duty, and contrary to the honour of the Crown.

- (x) The impugned Orders-in-Council are the mechanism by which the Province authorizes a proposed foreign purchaser to acquire the Land.
- (y) The Mi'kmaq of PEI claim that Orders in Council EC 2017-6 and EC 2017-12 are invalid on constitutional grounds as they were made without any meaningful consultation and / or accommodation with the Mi'kmaq of PEI.

### Legal Basis

- (z) The Province is required to consult, and if appropriate, accommodate a First Nation when it is aware of the First Nation's assertion of Aboriginal rights, and is considering government action which may adversely affect those rights.

*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73

- (aa) The Mi'kmaq of PEI have never surrendered or ceded their interest in the lands of PEI. They have asserted their Aboriginal title and rights with respect to all of the lands of PEI, including the Lands in question.
- (bb) In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, the Supreme Court of Canada resolved much of the legal uncertainty surrounding Aboriginal title. In *Tsilhqot'in* the court wrote as follows:

*[14] The principles developed in Calder, Guerin and Sparrow were consolidated and applied in the context of a claim for Aboriginal title in Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 (S.C.C.). This Court confirmed the sui generis nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession before the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise afterward. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.*

- (cc) In *Tsilhqot'in* the Supreme Court of Canada:
  - (i) Confirmed the test for Aboriginal title established in *Delgamuukw*;

- (ii) Held that sufficiency of occupation must be assessed in a “culturally sensitive” manner and that the notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic;
- (iii) Held that Aboriginal title was not confined to intensively occupied sites but rather extends to larger territories where there has been regular use of the land for hunting, fishing, trapping and foraging;
- (iv) Held that the concept of continuity does not require evidence of an unbroken chain of continuity; and
- (v) Held that exclusivity can be established by proof that others were either excluded or only allowed access with permission and the fact that treaties were made may show intention and capacity to control the land.

*Tsilhqot'in* at paras. 25, 38, 41, 42, 46, and 48

- (dd) The Mi'kmaq of PEI occupied what is now PEI prior to the assertion of European sovereignty. Their occupation was sufficient, has been continuous to present day, and it was exclusive. Their Aboriginal title is not confined to intensively occupied sites but rather covers all the lands of PEI, which were used for hunting, fishing, trapping and foraging. Their occupation was exclusive.
- (ee) In spite of the fact that the Mi'kmaq of PEI are the rightful title holders of the lands of PEI, and have never surrendered or ceded their title, the Province has transferred the majority of the lands of PEI to private property holders and has failed to consult or accommodate the Mi'kmaq of PEI with respect to the intended transfer of the remaining Crown lands to private individuals. In this case the impugned decision of the Province to convey certain Lands without adequate consultation and / or accommodation is being challenged by the Applicants.
- (ff) The present case is strikingly similar to a case from British Columbia in which that Province sought to transfer the lands encompassing a golf course to a third

party. In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128:

- (i) the British Columbia Court of Appeal allowed an appeal brought by the Musqueam Indian Band, who are the descendants of those peoples whose traditional territories encompass much of what is now known as Vancouver and Richmond, British Columbia;
  - (ii) the Musqueam had previously brought a petition for Judicial Review, seeking an order prohibiting the province from proceeding with the sale of the golf course until good faith consultation / accommodation had occurred;
  - (iii) the court recognized that the Musqueam had a shortage of land as their reserve allotment (on a per capita basis) was the smallest of all British Columbia bands, their current reserves were not adequate for either their present or future needs, and the golf course in question was one of the very few remaining parcels of land held by the province within their traditional territory;
  - (iv) as a result the court concluded that the duty owed to the Musqueam tended to the more expansive end of the spectrum described in *Haida* as they had a prima facie case for title and the potential infringement was of significance to them in light of their concerns about their land base; and
  - (v) the court found that if the land was sold to a third party there would likely be no opportunity for the Musqueam to prove their connection to the land again therefore they were entitled to a meaningful consultation process in order that avenues of accommodation could be explored.
- (gg) Another example of a failure to consult prior to disposition of a crown interest in land is found in the case of *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712. The Hupacasath First Nation successfully sought judicial review of a decision made by the provincial

government consenting to the removal of a privately owned property from a tree farm licence. The property was located within the Hupacasath's claimed traditional territory and the removal resulted in a lower level of government intervention in the activities on the property. The court found that this resulted in a reduction in the degree of protection the province could afford to the aboriginal rights of the Hupacasath. Therefore, while the province was contemplating this conduct, which had the potential to adversely affect aboriginal rights, it owed the First Nation a duty to consult in good faith and to endeavour to seek accommodation. As the province had failed to do this, it acted inconsistently with the honour of the Crown.

- (hh) In *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177 the Federal Court of Appeal upheld a successful judicial review by six First Nations bands of the Federal Treasury Board's decision to transfer a property to a federal non-agent corporation which disposes of government property to third parties. From the perspective of the First Nations, the property (a former military barracks in the City of Winnipeg) was unique and important because it represented a large parcel of land that was available for sale and could be redeveloped by the First Nations. The Federal Court had found that the federal government owed a duty to consult these First Nations regarding the transfer and that the duty did not just entail the minimal aspects of notice, disclosure, and responses to concerns that were raised. Rather it found that the federal government needed to be in close and meaningful communication with the First Nations, give them relevant information in a timely way, respond to relevant questions, consider carefully their fully-informed concerns, representations and proposals, and, in the end, advise as to the ultimate course of action it would adopt and why.
- (ii) As in the cases discussed above concerning the impact of the transfer of title of Crown lands to a third party, the Aboriginal title of the Mi'kmaq of PEI will be adversely impacted by the transfer of the Lands in question in this proceeding. This is particularly so in a situation where most of the land base in PEI has

already been transferred to third parties and the remaining Crown land is a very small portion of what remains of the traditional lands of the Mi'kmaq of PEI.

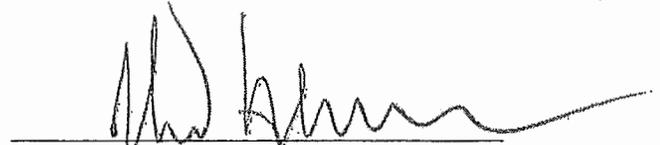
- (jj) Prior to issuing Orders in Council EC 2017-6 and EC 2017-12, the Province was aware of the Mi'kmaq of PEI's assertion of Aboriginal rights and that the transfer of the Lands may adversely impact those rights for the reasons stated above.
- (kk) The honour of the Crown requires the Province to fulfill its duty to consider the impact of the sale of the Lands on the Mi'kmaq of PEI, to consult with the Mi'kmaq of PEI with a view to reaching some accommodation pending final resolution of the validity of their Aboriginal title claim, and to ensure that the sale did not proceed until the Province had taken reasonable measures to ensure that the Mi'kmaq of PEI's interests were appropriately accommodated.
- (ll) By failing to do so the Province has acted dishonourably and infringed the constitutional rights of the Applicants.
- (mm) Rules 12, 14.05(3)(e)(g), 38, 40 and 68.
- (nn) For those reasons, the Applicants are entitled to the relief sought in this application.

3. The following documentary evidence will be used at the hearing of the application:

- (a) Affidavit of Donald K. MacKenzie, sworn February 7, 2017;
- (b) Affidavit of Tammy MacDonald, sworn February 7, 2017;
- (c) Affidavit of Chief Brian Francis, sworn February 7, 2017; and

- (d) Such further and other evidence as counsel for the Applicants shall advise prior to the hearing of the application.

Date: February 8, 2017.



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