

Justice Chambers (JC) – Physical Courtroom 1004

Form 7
[Rule 3.8]

COURT FILE NUMBER 2301-16953

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANTS BEARSPAW FIRST NATION, CHINIKI FIRST NATION AND GOODSTONEY FIRST NATION, COLLECTIVELY KNOWN AS THE STONEY NAKODA FIRST NATIONS

RESPONDENTS TOWN OF CANMORE and HIS MAJESTY THE KING IN RIGHT OF ALBERTA AS REPRESENTED BY THE MINISTER OF INDIGENOUS RELATIONS AND THE MINISTER OF MUNICIPAL AFFAIRS

DOCUMENT **ORIGINATING APPLICATION**



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NOTICE TO THE RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: February 6, 2024
Time: 10:00 am
Where: Calgary Courts Centre, 601 5th Street SW Calgary, AB
Before: Presiding Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

WITH NOTICE TO:

Three Sisters Mountain Village Properties Ltd.
The Attorney General of Canada
Alberta Minister of Justice

Basis for this claim:

The Stoney Nakoda First Nations

1. The Applicants, the Bearspaw First Nation, Chiniki First Nation and Goodstoney First Nation, collectively known as the Stoney Nakoda First Nations (the “**Stoney Nakoda**”), and their members are signatories to Treaty No. 7, are “Aboriginal peoples” within the meaning of s. 35(1) of the *Constitution Act, 1982* and are an Indian “band” within the meaning of the *Indian Act*, RSC 1985 c I-5.
2. The Stoney Nakoda, the *Îyârhe Nakoda* (translated as “People of the Mountains”), share the same culture, values & traditions, and have a distinct language: the Stoney Nakoda language, more precisely described as the Nakoda dialect of the Siouian language.
3. The Stoney Nakoda claim Aboriginal and Treaty rights in Southern Alberta. The Stoney Nakoda are seeking judicial recognition of their Aboriginal and Treaty rights which are the subject matter of the Court of King’s Bench Action No. 0301-19586.
4. Pursuant to the oral and written terms of Treaty No. 7, certain lands were set apart as reserves for the exclusive use and benefit of the Stoney Nakoda. These reserves are the Stoney I.R. 142, 143, and 144 (undivided) near Morley, Alberta. The other reserves are Eden Valley IR 216, Big Horn (special) IR 144A and Rabbit Lake IR 142B.
5. Treaty No. 7 confirms and guarantees a number of the Stoney Nakoda’s rights including but not limited to:
 - (a) The right to harvest resources for sustenance, cultural and livelihood purposes;
 - (b) The right to hunt, fish and trap; and
 - (c) Ancillary and incidental rights, including right to access Treaty No. 7 lands for the purpose of hunting fishing and trapping.
6. The Stoney Nakoda continue to exercise their Aboriginal and Treaty rights throughout the Stoney Nakoda traditional lands and the Treaty No. 7 territory.
7. The Stoney Nakoda’s right to hunt is recognized under paragraph 12 of the *Natural Resources Transfer Agreement (Constitution Act, 1930)*.
8. The Stoney Nakoda’s Aboriginal and Treaty rights are constitutionally recognized and protected under s. 35(1) of the *Constitution Act, 1982*.

Proposed Development in Canmore

9. The Respondent, the Town of Canmore ("Canmore"), is a municipality represented by its elected Council.
10. Canmore is regulated pursuant to the *Municipal Government Act*, RSA 2000, c M-26 ("**MGA**").
11. Canmore is located in the Treaty No. 7 territory and the traditional territory of the Stoney Nakoda.
12. On October 9, 1991, the predecessor in interest to Three Sisters Mountain Village Properties Ltd. ("**TSMVPL**"), applied to the Natural Resources Conservation Board ("**NRCB**") for approval to develop a recreational and tourism project within the boundaries of Canmore (the "**Project**"). The NRCB approved the Project with conditions in November of 1992 as detailed in the Decision Report Application #9103 (the "**NRCB Approval**").
13. At the time the NRCB granted the approval for the Project in 1992, the NRCB did not consider or address the impact of the Project on the Stoney Nakoda's constitutionally protected Aboriginal and Treaty rights. The constitutional requirement to consult was not judicially established until after the NRCB issued the NRCB Approval and to date the duty to consult has never been addressed or exercised.
14. Some 29 years later, relying on the NRCB Approval and s. 619 of the *MGA*, on February 9, 2021, TSMVPL submitted the Three Sisters Village Area Structure Plan ("**Three Sisters Village ASP**") and on April 27, 2021, submitted the Smith Creek Area Structure Plan ("**Smith Creek ASP**") (collectively, the "**ASPs**") to Canmore requesting that Canmore adopt the ASPs as bylaws.
15. Canmore held a public hearing on the proposed ASPs from March 9, 2021 to March 17, 2021. The Stoney Nakoda participated in the public hearing and advised Canmore that the ASPs triggered an obligation to consult, as the ASPs had the potential to adversely impact the Stoney Nakoda's Aboriginal and Treaty rights which are constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.
16. Canmore Council ultimately voted to defeat the ASPs. The Smith Creek ASP was defeated by Canmore on second reading on April 27, 2021, while the Three Sisters ASP was defeated on third reading on May 25, 2021.
17. TSMVPL appealed Canmore's rejection of the ASPs as Bylaws under s. 619(7) of the *MGA* to the Land and Property Rights Tribunal ("**LPRT**"). On May 17, 2022, the LPRT issued its Decisions (LPRT2022/MG0671 and LPRT2022/MGB0673). In the Decisions the LPRT determined that the ASPs were consistent with the NRCB Approval and ordered Canmore to adopt the ASPs as they had been submitted to Canmore in 2021.
18. Canmore sought and was granted permission to appeal the LPRT's Decisions. The Court of Appeal released its memorandum of judgment in the Appeals on October 3, 2023, and is reported as *Canmore (Town of) v Three Sisters Mountain Village Properties Ltd*, 2023

ABCA 278. In its Judgment, the Court of Appeal dismissed Canmore's Appeals determining that the LPRT's Decisions could not be interfered with.

Passing of the Bylaws

19. On or about October 18, 2023, Canmore issued notice for a Special Council Meeting to be held on October 24, 2023 for the purposes of adopting the following bylaws:
 - (a) Three Sisters Mountain Village Area Structure Plan Bylaw 2021-05
 - (b) Smith Creek Area Structure Plan Bylaw 2021-06 (collectively, the "**Bylaws**")
20. On October 20, 2023, the Stoney Nakoda wrote a letter to Canmore and the Honourable Rick Wilson, Minister of Indigenous Relations, with copies to the Aboriginal Consultation Office, Ministry of Municipal Affairs and TSMVPL (the "**Letter**").
21. The Letter stated that the Stoney Nakoda were adversely impacted by the ASPs because:
 - (a) The ASPs cause fragmentation in wildlife habitat thus impacting the Stoney Nakoda's Treaty rights to harvest animals and plants for personal and cultural purposes;
 - (b) The ASPs cause stress on an already fragile environment and reduce the area of lands available for the grizzly bear, a species at risk, and an animal that is sacred to the Stoney Nakoda;
 - (c) The ASPs will result in an expansion of the population of Canmore and the cumulative impacts of further expansion will result in further encroachment into Stoney Nakoda's traditional lands and through which it exercises Treaty and Aboriginal rights; and
 - (d) The ASPs do not acknowledge the Stoney Nakoda's historic occupation of the Canmore area.
22. The Letter requested that Alberta and Canmore further the goal of reconciliation and uphold the honour of the Crown by engaging in consultation with the Stoney Nakoda prior to enacting the Bylaws.
23. The Chief Administrative Officer for Canmore responded to the Letter on October 23, 2023 and advised that the Letter would not be included in the agenda for the October 24, 2023 Special Council Meeting. Canmore took the position that as a result of the LPRT Decisions and the Court of Appeal Judgment, Canmore could not require consultation with the Stoney Nakoda.
24. At the Special Meeting on October 24, 2023, three Canmore Councillors abstained from discussing and voting on the Bylaws, declaring a potential pecuniary interest as a result of being named in a legal action brought by TSMVPL in the Court of King's Bench. The remaining 4 Councillors gave the Bylaws three readings. All readings were carried unanimously.

The Duty to Consult and Accommodate

25. The Crown has a constitutional duty to consult and potentially accommodate Indigenous groups when it contemplates actions that have the potential to affect established or claimed rights of an Indigenous group. This duty includes the obligation to determine whether an Indigenous group's Aboriginal and/or Treaty rights will be affected by a Crown action or decision, and the scope of the Crown's duty to consult in such circumstances.
26. The constitutional duty to consult arises in part from honour of the Crown, which infuses the relationship between the Crown and First Nations.
27. The duty to consult and accommodate the Stoney Nakoda arises whenever the Crown knows or ought to know that an action or decision that it contemplates taking may have impacts on the Stoney Nakoda's Aboriginal or Treaty rights. The duty arises with respect to both rights that have been formally recognized, such as Treaty rights, as well as rights that have been asserted.
28. The content of the duty lies on a spectrum depending on the strength of the rights and scale of impact of the proposed action.
29. The Respondent, His Majesty the King in right of Alberta ("**Alberta**"), has recognized his constitutional duties in various policies and guidelines, including "The Government of Alberta's Policy on Consultation with First Nations and Land and Natural Resource Management, 2013" as amended and "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, updated July 28, 2014".
30. Canmore acts as the Crown in exercising its statutory powers. In certain circumstances Canmore's actions can engage honour of the Crown and an obligation to fulfill the duty to consult and accommodate.
31. As a statutory entity, created by the Legislature of the Province, a municipality's duty to consult will arise if there is a potential for a municipality's actions to adversely impact a constitutionally protected Aboriginal or Treaty right.
32. Canmore's notice of its intention to pass the Bylaws is government action that triggers the duty to consult.
33. In the alternative, if Canmore is not the Crown and does not owe a duty to consult on the Bylaws, then nevertheless the notice of Canmore's intention to pass the Bylaws was a government action that triggered Alberta's obligation to consult with the Stoney Nakoda.

Breach of the Duty to Consult and Accommodate

34. Stoney Nakoda had a legitimate expectation of consultation on the ASPs prior to their being adopted as Bylaws. This legitimate expectation was sourced in:
 - (a) The Crown's constitutional duty as set out above;
 - (b) The honour of the Crown and the goal of reconciliation;

- (c) The Crown's recognition of its duty in its various policies and guidelines;
 - (d) Statutory authority; and
 - (e) Decisions of the courts.
35. The Respondents at all relevant times knew of the content of Treaty No. 7 and the rights thereunder and the hunting rights established under paragraph 12 of the *Constitution Act, 1930*. The Respondents were aware, or ought to have been aware, that the Stoney Nakoda members practice Aboriginal and Treaty rights within the areas where the ASPs are located. The Stoney Nakoda advised Alberta and Canmore of this by, among other means:
- (a) Filing a statement of concern and participating in hearing before the NRCB;
 - (b) Participating in hearing before the then Municipal Government Board in a hearing regarding a dispute between Canmore and MD of Bighorn over the Dead Man's Flats Area Structure Plan;
 - (c) Participating in Canmore's Public Hearing by providing written submissions and evidence from a Panel of Stoney Nakoda Elders; and
 - (d) The Letter provided to Canmore and the Ministers on October 20, 2023.
36. Canmore and Alberta know or ought to have known that the development being contemplated in the ASPs has the potential to cause, among other things, the following adverse impacts to the Stoney Nakoda's Aboriginal and Treaty rights:
- (a) Damage to wildlife habitat and connectivity thus impacting hunting rights;
 - (b) Loss of plant diversity thus impacting gathering and harvesting rights;
 - (c) Increase in land disturbance and habitat fragmentation which could lead to a reduction in flora and fauna harvested by Stoney Nakoda thus impacting hunting, gathering and harvesting rights;
 - (d) Cumulative impacts leading to a reduction in wildlife, importantly the grizzly bear thus impacting hunting rights and access to cultural artefacts;
 - (e) Loss of language and culture of the Stoney Nakoda thus impacting cultural practices;
 - (f) Harm to aquatic habitat through construction and development impacting the right to fish; and
 - (g) Potential harm to cultural sites and potential gravesites located on the lands proposed to be developed by TSMVPL.
37. The constitutional and legal obligation to consult with the Stoney Nakoda was triggered in these circumstances. Passing the Bylaws in absence of fulfilling the duty to consult breaches honour of the Crown and violates s. 35(1) of the *Constitution Act, 1982*.

38. The duty to consult with the Stoney Nakoda has never been fulfilled and remains outstanding.
39. The MGA provides Canmore with powers to mitigate any potential adverse impacts to Treaty and Aboriginal rights associated with the approval of bylaws.
40. Mitigation and accommodation of the adverse impacts to the Stoney Nakoda were not considered or addressed by Canmore or Alberta prior to enacting the Bylaws.
41. The failures of Canmore or Alberta, or both of them, to fulfill the duty to consult prior to enacting the Bylaws, renders the Bylaws void or voidable.

The Bylaws Public Interest

42. Municipal statutory authority is subject to constitutional restraints including s. 35(1) of the *Constitution Act, 1982*. Canmore's authority is sourced in statute in Alberta. Canmore's authority must be exercised in a manner that meets constitutional principles including honour of the Crown and in a manner that furthers the goal of reconciliation.
43. Bylaws must be passed in good faith and for the public interest. A Bylaw that violates the honour of the Crown and breaches constitutionally protected Aboriginal and Treaty rights cannot serve the public interest.
44. The Bylaws do not serve the public interest - they were passed without the duty to consult being considered, let alone fulfilled.

Remedy sought:

45. The Stoney Nakoda seek the following declarations or orders:
 - (a) That each of the Three Sisters Mountain Village Area Structure Plan Bylaw 2021-05 and the Smith Creek Area Structure Plan Bylaw 2021-06 are invalid or void;
 - (b) That the honour of the Crown was breached in purporting to pass the Bylaws;
 - (c) That Canmore and Alberta have not discharged their duties, individually or collectively, to consult with Stoney Nakoda regarding the passing of the Bylaws.
 - (d) That Canmore or Alberta, or both of them, have a duty to consult with the Stoney Nakoda and accommodate the impacts of the Bylaws on Stoney Nakoda's Treaty and Aboriginal rights and interests;
 - (e) That Canmore and/or Alberta must discharge the duty to consult and accommodate prior to any further attempts to implement the ASPs as Bylaws. That until such time that the duty to consult has been fulfilled, then the Bylaws must not be passed or are of no effect.
46. The Stoney Nakoda seeks costs for this Application.
47. Any such further relief that counsel may advise and this honourable Court may consider.

Affidavit or other evidence to be used in support of this application:

48. Affidavit of William Snow, worn on December 15, 2023.
49. Certified Record.
50. Such further materials as counsel may advise and this Honourable Court may allow.

Applicable Acts and regulations:

51. *Alberta Rules of Court*, Alta Reg, 124/2010, Part 1, rr 3.8, 3.15, 10.31 and 10.33.
52. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
53. *Constitution Act, 1930*, *Alberta Natural Resources Act*, SC 1930, c 3.
54. *Municipal Government Act*, RSA 2000 c M-26, ss 633 and 536(1).

WARNING

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.