FILE NO.: SCT-3001-12
CITATION: 2014 SCTC 1
DATE: 20140117

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
AUNDECK OMNI KANING	)	Paul Williams, for the Claimant (Respondent)
Claimant (Respondent)	)	
- and -	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Jenifer Roy and Gary Penner, for the Respondent (Applicant)
Respondent (Applicant)	)	
	)	**HEARD:** April 25, 2013

REASONS FOR DECISION

Honourable Patrick Smith

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[1] The Respondent ("Canada") has brought an Application to dismiss the Claim brought by the Claimant, Aundeck Omni Kaning First Nation ("AOKFN") on the basis that the Specific Claims Tribunal lacks jurisdiction to hear the Claim because the Claim does not comply with the eligibility requirement set out in section (s.) 16(1)(*a*) of the *Specific Claims Tribunal Act* (S.C. 2008, c. 22) ("*SCTA*") because the Minister of Indian Affairs and Northern Development (the "Minister") has offered to negotiate the Claim.

[2] Canada raises three grounds in support of its Application:

- the Claimant has made a Claim under the Specific Claims Process;
- the Claim was accepted by the Minister for negotiation on a "without prejudice" basis on November 25, 2011; and,
- three years have not elapsed since the date the Minister notified the Claimant of his decision to negotiate the Claim and the Claimant's filing of the Claim with the Tribunal.

[3] Further, two (2) additional issues were raised by Canada: (a) the extent to which settlement privilege applies to documents and communications arising in the negotiation process at the Specific Claims Branch; and (b) whether the allegation that Canada breached its treaty obligations in its conduct of the negotiations is properly before the Tribunal since it was never filed with the Minister as required by s. 16(1) of the *SCTA*.

I. BRIEF FACTUAL OVERVIEW

A. The Claim

[4] On November 5, 2008, the Specific Claims Branch of the Ministry of Indian Affairs and Northern Development received a Claim from the AOKFN alleging mismanagement of funds under the *Indian Act*, RSC 1985, c I-5 ("Claim"). On November 25, 2011, Canada informed the AOKFN that the Claim had been accepted for negotiation.

[5] The Claim alleges that George Abotossaway, his wife and minor child were enfranchised in 1909. A second child was born in 1910 and a third in 1912. In 1914, George Abotossaway received five (5) shares of the AOKFN's trust moneys, two (2) of which were

for the two (2) children born after 1909. The combined value of the shares for the two (2) children born after 1909 was $559.63. The Claim alleges that the payments made for the two (2) children born after 1909 were breaches of Canada's fiduciary duty because the children were not members of the AOKFN and therefore not entitled to have shares paid to George Abotossaway on their behalf.

B. The Negotiations

[6] On March 28, 2012, the Crown offered to settle the Claim and indicated that the Crown required a Band Council Resolution ("BCR") accepting the offer by June 28, 2012 (within 90 days). The offer stated that if the BCR was not received by that date, the settlement offer would expire and the file would be closed without further notice.

[7] Between April 9, 2012 and June 12, 2012, the negotiator for the Specific Claims Branch and counsel for the AOKFN exchanged communication regarding Canada's offer.

[8] A BCR was never passed by the Claimant accepting the offer. The AOKFN Band Council met and decided to reject the offer.

[9] On July 24, 2012, Canada wrote to Chief Patsy Corbiere notifying her that the file had been closed.

[10] On August 7, 2012, the AOKFN filed the Claim with the Tribunal.

II. STATEMENT OF THE ISSUES

[11] There are three (3) issues raised in the Claim:

(a) does settlement privilege attach to communications exchanged between the Parties after the Minister accepted the Claim for negotiation?;

(b) does the Tribunal have jurisdiction to hear the Claim where Canada has offered to negotiate and three (3) years have not elapsed since the offer to negotiate was made?; and,

(c) is the allegation contained in paragraphs 6.3 and 6.4 of the Declaration of the Claim that Canada breached its treaty obligations when it offered to settle the

Claim properly before the Tribunal, having never been filed as a Claim with the Minister as required by s. 16(1) of the *SCTA*?

[12] In my view, it is only necessary to decide the second issue with respect to the Application before the Tribunal.

[13] Regarding the issue of settlement privilege, counsel have filed an Agreed Statement of Facts that sets out communications to which no objections are made. Also, during the hearing, the *viva voce* testimony of Canada's Assistant Negotiator was limited to discussions of general policy or process, thereby avoiding testimony relating to any specific conversations that took place during negotiations — conversations in relation to which settlement privilege was being claimed.

[14] With respect to the third issue, counsel for the AOKFN did not address this at the hearing.

[15] The ruling on this Application may have significant relevance to many other claims where offers to settle have been made by Canada in 'small value claims' and deadlines for acceptance imposed by Canada have expired before the passage of three (3) years since the claim was accepted for negotiation.

III. LEGISLATIVE PROVISIONS

> **15.** (1) A First Nation may not file *w*ith the Tribunal a claim that
>
> (*a*) is based on events that occurred within the 15 years immediately preceding the date on which the claim was filed with the Minister;
>
> (*b*) is based on a land claims agreement entered into after December 31, 1973, or any related agreement or Act of Parliament;
>
> (*c*) is based on an Act of Parliament or agreement that is mentioned in the schedule, or an Act of Parliament or agreement for the implementation of such an Act or agreement;
>
> (*d*) concerns the delivery or funding of programs or services related to policing, regulatory enforcement, corrections, education, health, child protection or social assistance, or of any similar programs or services;

(*e*) is based on any agreement between the First Nation and the Crown that provides for another mechanism for the resolution of disputes arising from the agreement;

(*f*) is based on, or alleges, aboriginal rights or title; or

(*g*) is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(*a*) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

(*b*) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;

(*c*) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or

(*d*) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[*SCTA*, *supra*, at s. 15, 16]

IV. THE POSITION OF CANADA

[16] The Crown argues that the Tribunal has no jurisdiction to hear the Claim because the provisions of s. 16(1)(*a*) of the *SCTA* have not been met: "[t]he Minister has not notified the First Nation that the claim would not be accepted into negotiations, as required by section 16(1)(a)".

[17] The Crown submits that the three (3) year period regarding negotiations in s. 16(1)(*d*) of the *SCTA* has not lapsed, and therefore, because the Minister accepted the Claim for negotiation, the Claim is not eligible to be filed with the Tribunal until November 2014.

[18] The Crown further asserts that the AOKFN has withdrawn from the negotiations, and has never requested the consent of the Minister to come before the Tribunal under s. 16(1)(*c*) of the *SCTA*.

V. THE POSITION OF THE AOKFN

[19] The AOKFN argues that the Claim is eligible to be filed with the Tribunal pursuant to s. 16(1)(*a*) of the *SCTA* on the basis that: in applying an expedited process for small value claims, the Crown decided not to negotiate; and while the Crown may have engaged in some aspects of negotiation, the Crown, by refusing to negotiate the substance of the Claim, decided not to negotiate the Claim "in part".

[20] The Claimant asserts that notification of Canada's decision not to negotiate the Claim is found in three (3) documents, namely:

(1) the March 28, 2012 letter from Assistant Negotiator Brendan Blom to Chief Patsy Corbiere containing an offer with a 90 day deadline for acceptance and indicating that otherwise the file would be closed;
(2) the April 10, 2012 email from negotiator Blom to counsel for the Claimant indicating that the quantum of Canada's offer was not negotiable; and,
(3) the July 24, 2012 letter from Michelle Adkins to Chief Patsy Corbiere notifying her that the file had been closed.

[21] Regarding the interpretation of s. 16(1)(*a*) of the *SCTA*, the AOFKN submits that the word "negotiate" must be interpreted to imply "good faith" negotiations consistent with the principle of the honour of the Crown and protection provided by s. 35(1) of the *Constitution Act, 1982*.

[22] The AOKFN further argues that the word "negotiate" should be understood in its ordinary sense, involving an element of mutuality, bargaining or compromise and that the record shows that the Minister had no intention of negotiating the Claim in a manner consistent with this definition of the term.

[23] The AOKFN submits that any ambiguities in the *SCTA*, including the terms "negotiate" and the phrase "in whole or in part", should be interpreted liberally because the *SCTA* is a statute "relating to Indians": *Nowegijick v. Minister of National Revenue*, [1983] 1 S.C.R. 29, at pp. 36 and 41 [*Nowegijick*].

VI. THE SPECIFIC CLAIMS NEGOTIATION PROCESS

[24] Exhibit 1 is a document appearing on the website of the Ministry entitled: A Guide to the Specific Claims Negotiation Process. This guide provides an overview of specific claims and the negotiation process within the Specific Claims Branch including information about the various steps in the process, how negotiators reach an agreement on compensation and how third party interests are taken into consideration when a claim is negotiated.

[25] The guide uses a flow chart to describe the steps usually taken in the negotiation process:

> Step 1: The claim is accepted for negotiation when Canada concludes that it has an outstanding lawful obligation to the First Nation;
>
> Step 2: A joint negotiation protocol agreement is reached. This agreement sets out the process and ground rules for negotiation including timetables and studies;
>
> Step 3: Studies/research on compensation. In this step research and studies help determine the amount of compensation that should be paid to a First Nation when the claim is settled;
>
> Step 4: Discussions on compensation. The negotiators review the studies and work to reach a consensus on how much compensation would be fair to settle the claim;
>
> Step 5: Settlement proposal and drafting a final settlement agreement. The negotiators agree on the key terms of a proposed settlement and draft an agreement;
>
> Step 6: Settlement agreement is initialed by negotiators. Negotiators for the First Nation and Canada initial the agreement;
>
> Step 7: First Nation ratification vote. First Nation members have an opportunity to say yes or no to the settlement agreement through a community vote;
>
> Step 8: Ratification by Canada. If approved by the First Nation membership, the next step is for the First Nation leadership and the Minister of Indian Affairs and Northern Development to sign the settlement agreement;

> Step 9: Implementation of the agreement. In this final step of the process, land is transferred or cash is paid as appropriate.

VII. CLAIMS ASSESSMENT AT THE SPECIFIC CLAIMS BRANCH, ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA (AANDC)

[26] For the purpose of the negotiation of specific claims, Canada divides claims into two categories: 'normal claims' and small value claims.

[27] Exhibit 2 filed during the proceedings is an Agreed Statement of Facts describing, *inter alia*, the claim assessment and review process, the classification of claims as having a normal or small value, and funding for the negotiation process.

[28] When a claim is made by a First Nation, the Specific Claims Branch does a preliminary review to ensure that the claim documents are in compliance with the "Minimum Standard" established by the Minister. If the claim documents are in compliance, the claim then proceeds to a more extensive review.

[29] Assuming compliance with the "Minimum Standard", the claim documents are then referred to the Department of Justice for an opinion as to whether the claim discloses an outstanding legal obligation on the part of the Government of Canada. During this phase, the claim is also referred to the Valuation and Mandating Unit of the Specific Claims Branch to set a preliminary value for the claim. This is the stage where a claim may be categorized as a small value claim, although the preliminary value may be adjusted at a later date.

[30] During his evidence, Assistant Negotiator Brendan Blom described the process involved for determining the initial steps in the categorization of a claim:

> THE WITNESS: During the research and assessment phase of a claim – this is before a determination of whether or not a claim is to be accepted or not accepted for negotiations… whether it is a low value–claim or as we are calling it, a normal–value claim, will be passed on to the Claims Advisory Committee, which is what provides the group of Specific Claims management that will ultimately provide authority or not to negotiate a particular claim.
>
> [*Transcript of the evidence of Brendan Blom*, at p. 9]

[31] A small value claim is one which Canada believes, at the time the letter of acceptance is written, could be settled for compensation of less than three (3) million dollars. Counsel

for Canada submitted that this determination is in keeping with the government policy document, "Justice at Last" which states that "[s]mall value claims will undergo an expedited legal review to quickly conclude whether they will be accepted for negotiation" and "[s]pecial efforts will be made to negotiate small value claims - which account for about 50% of cases now in the system…".

[32] The next step in the process is for the Specific Claims Branch to send its recommendation to the Claims Advisory Committee ("CAC") which is made up of senior officials of the Department of Justice and the Department of Indian Affairs and Northern Development. The preliminary value of a small value claim is included in the recommendation to the CAC.

[33] The CAC then decides whether to recommend to the Senior Assistant Deputy Minister, Treaties and Aboriginal Government that the claim be accepted for negotiation or refused.

[34] If the claim is accepted for negotiation by Canada, the Senior Assistant Deputy Minister writes to the Chief of the First Nation confirming the acceptance of the claim for negotiation, the reasons for its acceptance and the next steps to be taken in the process.

[35] In addition to an Assistant Negotiator, normal value claims generally are assigned a lead negotiator and a Department of Justice lawyer whereas small value claims are not. Normal value claims may also include other members of the staff of the Aboriginal Affairs and Northern Development department or other government departments assigned to the negotiation team (*Transcript of the evidence of Brendan Blom*, at pp. 4 and 5).

[36] For a normal value claim, a First Nation is eligible for loan funding. Funding is not automatically available and a First Nation must first apply for it and sign a loan agreement. Funding may cover the costs of paying the claimant's negotiators, legal counsel, consultants, travel, meeting facilities, meals, accommodation, appraisers, economists, actuaries and ratification of the settlement.

[37] For a small value claim there is no loan funding available because Canada does not expect any significant negotiation activity. Instead, the offer of settlement made by Canada includes a lump sum to cover costs.

[38] In small value claims, offers to settle are open for acceptance for a period of 90 days to allow a claimant to consider the offer and arrange for Band Council approval or for the passing of a BCR accepting the offer.

[39] In the event that an offer is not accepted within 90 days, the file is marked "closed" and may remain closed indefinitely unless it is eventually accepted or there is some new evidence provided by a claimant warranting re-consideration.

[40] When asked what the term "closed" meant, Assistant Negotiator Blom replied:

> Essentially, it means the resources, the internal resources devoted to it will be reassigned elsewhere, to other claimants. And it will be ... on the Specific Claims database on the department website, the file will be marked as closed.
>
> [*Transcript of the evidence of Brendan Blom*, at p. 36]

VIII. THE APPLICATION OF THE SPECIFIC CLAIMS PROCESS TO THE CLAIM OF THE AOKFN

[41] During the hearing, counsel for the Claimant questioned Assistant Negotiator Blom on whether the Specific Claims Process described above was followed regarding the Claim filed by the AOKFN. A summary of that testimony follows.

> Step 1: There is no dispute that Step 1 of the process was followed — the Claim was accepted for negotiation.
>
> Step 2: (Joint Negotiation Protocol Reached) When asked whether Step 2 of the negotiation process was followed, Mr. Blom replied that it was not because it was expected that meetings with the Claimant were not anticipated and would not take place:
>
> > Q. It then describes Step 2: "Joint negotiation protocol agreement reached."
> >
> > Did that happen?
> >
> > A. No.

Q. Why not?

A. Because ordinarily, in a normal–value claim or a more complex claim where a longer series of discussions and meetings is anticipated, a negotiation protocol can help establish guidelines for the parties' conduct throughout that series of meetings and discussions. In this case, such an extended series of meetings was not anticipated.

Q. Were any meetings anticipated?

A. No.

Q. So there was no need for a negotiation protocol? There wouldn't be any meetings, right?

A. Correct.

[*Transcript of the evidence of Brendan Blom*, p. 14]

Step 3: (Studies/Research on Compensation) Research and studies help negotiators determine the amount of compensation that should be paid. A claimant is not consulted or does not participate in the calculation of the preliminary value of a small value claim or the classification of the claim as a small value claim.

When asked if that step was followed, Assistant Negotiator Blom replied:

Q. Was that done?

A. I would say, during the negotiation phase, there was not. There was the prior ... before acceptance, there is the research and assessment phase, which does research into the historical facts of the claim.

Q. But that research determines whether there is an outstanding, lawful obligation, right?

A. Yes.

Q. But here, we are talking about research on compensation that would help negotiators determine the amount; did that happen?

A. Not apart from the research that was done during the research and assessment phase.

Q. Was the claimant involved in that earlier research?

A. It would have involved the initial claim submission.

[*Transcript of the evidence of Brendan Blom*, at p. 15]

Step 4: (Discussions on Compensation) Here negotiators review studies and work to reach a consensus on how much compensation would be fair to settle the claim.

When asked about this step, Assistant Negotiator Blom replied that "[c]ertainly consensus was not reached" (*Transcript of the evidence of Brendan Blom*, p. 16). When describing the extent to which discussions with the Claimant took place regarding compensation, Mr. Blom replied that "[w]ith Mr. Williams, there were a couple of phone calls ... [a]nd a couple of emails exchanged as well" (*Transcript of the evidence of Brendan Blom*, p. 17).

Step 5: (Settlement Proposal and Drafting of a Plan of Settlement Agreement) Negotiators agree on the key terms of a proposed settlement and then draft a proposed settlement. This step was not followed.

Step 6: (Settlement Agreement Initialled by Negotiators) Mr. Blom agreed that this step was not followed.

Step 7: (First Nation Ratification Vote) As explained by Chief Corbiere in her testimony, Band Council reviewed the offer to settle and rejected it.

[42] Four out of the nine (9) steps described in the Specific Claims Process were followed regarding this Claim.

IX. THE COMMUNICATION BETWEEN CANADA AND THE CLAIMANT FROM THE DATE OF THE ACCEPTANCE OF THE CLAIM TO THE CLOSURE OF THE FILE

[43] After Canada classified the Claim filed by the AOKFN as a small value claim, it deemed it appropriate for the expedited settlement process and assigned an assistant negotiator and legal counsel.

[44] The first written communication from the Specific Claims Branch to the Claimant after the letter of acceptance from the Assistant Deputy Minister was a letter dated March 28, 2012, containing an offer of settlement.

[45] The offer of settlement indicated that Canada required a BCR accepting the offer within 90 days (June 28, 2012) and stated that if a BCR was not received by that date, the settlement offer would expire and the file would be closed.

A. Chronology of Communications Between Canada and the AOKFN

[46] A summary of the communication between Canada and counsel for the AOKFN is set out below:

- Nov. 25, 2011 — letter informing the AOKFN that the Claim had been accepted for negotiation, that "criteria for compensation will be guided by the compensation criteria of the policy which are excerpted and enclosed", and that a BCR was required accepting the terms in the letter;

- March 28, 2012 — letter from Canada (Assistant Negotiator Brendan Blom) making an offer to settle the Claim and describing the terms, including the requirement of a BCR by June 28, 2012, as otherwise the offer would "expire" and Canada would "close" the file;

- April 9, 2012 — Mr. Williams, counsel for the AOKFN, left a voicemail for Mr. Blom with settlement privileged content;

- April 10, 2012 — Mr. Blom replied by email to the voicemail providing "additional details on the financial compensation that is being offered". Although most of this email has been redacted, it states in part "we do not anticipate significant negotiations activity, nor the provision of loan funding" and makes an offer to discuss further;

- May 11, 2012 — telephone conversation between Mr. Williams and Mr. Blom of settlement privileged content;

- June 8, 2012 — email from Mr. Williams to Mr. Blom asking him to confirm in writing what they had discussed by telephone "that is, that there is no flexibility in the offer from Canada";

- June 12, 2012 — email from Mr. Blom to Mr. Williams stating that the AOKFN had "not presented Canada with argumentation or evidence that it believes would warrant a re-examination or re-evaluation of the settlement offer"; and,

- July 24, 2012 — letter from Canada to the AOKFN advising that the file had been "closed" and stating that "[s]hould you wish to reconsider Canada's offer of financial compensation and continue settlement discussions, please do not hesitate to contact Mr. Blom".

[47] The AOKFN filed the Claim with the Tribunal on August 7, 2012.

X. THE INTERPRETATION OF SECTION 16(1) OF THE *SCTA*

[48] The essence of Canada's Notice of Application for Dismissal of the Claim is that the Tribunal is without jurisdiction to hear the Claim because the statutory requirements set out in s. 16(1)(*a*) of the *SCTA* have not been met. In its Notice of Application, the Applicant says, "[t]he Minister has not notified the First Nation that the claim would not be accepted into negotiations, as required by section 16(1)(*a*)". Further, the Applicant says that "[t]he claim was accepted for negotiation, negotiations took place, an offer was made and the Claimant First Nation withdrew from the negotiations".

[49] There is no dispute that the requirements of s. 16(1)(*b*) of the *SCTA* have been met and that three years will not have not passed since the filing of the Claim (November 25, 2014). As well, there is no issue that ss. 16(1)(*c*)(*d*) of the *SCTA* apply.

[50] Consequently, Canada argues at paragraph 16 of its Notice of Application that the Claimant First Nation is barred from filing this Claim until three years have passed from the date when the Minister notified the First Nation that the Claim had been accepted for negotiation...".

[51] The Claimant's position is summarized in paragraph 3 of its Reply to Canada's Notice of Application as follows:

a) there was a decision by Canada not to actually engage in any process of negotiations; and in fact there have been no negotiations concerning the claim;

b) there was a decision by Canada not to engage in negotiations in good faith;

c) there was a decision not to negotiate the substance of part of the claim – the amount of compensation; and there have been no negotiations with respect to that part of the claim;

d) there was a decision not to negotiate the substance of another part of the claim – the amount of the claimant's costs of negotiation and settlement – and there have been no negotiations with respect to that part of the claim.

e) Written notice of the decision not to engage in a process of negotiation was provided in the combination of the statement in the November 25, 2011 letter that "Canada's analysis of this claim suggests that it could be resolved in an expedited negotiation process"; the unilateral offer, accompanied by an ultimatum, in the March 28, 2012, letter; the e-mail from Brendan Blom indicating that no loan funding would be available because there would be "no significant negotiation activity," and the confirmation of the closing of the claim file in the letter of July 24, 2012.

f) Written evidence of the decision not to negotiate in good faith, communicated to Aundeck Omni Kaning, is to be found mainly in the letters of March 28, 2012 and July 24, 2012: taken together, they set out a unilateral, take-it-or-leave-it position, with an ultimatum that the claim file would be closed if the claimant failed to accept the stated offer.

g) With respect to the decisions not to negotiate the amount of compensation and the amount of the claimant's costs, two distinct parts of the claim, these decisions were implicit but obvious in the letters of March 28 and July 24, 2012, in the non-negotiable offer that was made.

A. What Does the Word "Negotiate" in s. 16(1)(*a*) of the *SCTA* Mean?

[52] The basic propositions of the ordinary meaning rule in statutory interpretation are threefold:

(1) It is presumed that the ordinary meaning of the legislative text is the intended or most appropriate meaning. In the absence of a reason to reject it, the ordinary meaning prevails;

(2) Even where the ordinary meaning of a legislative text appears to be clear, and the consequences of adopting this meaning. They must take into account all relevant indicators of legislative meaning; and

(3) In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That

> interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.
>
> [Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths Canada, 1994), at p.7]

[53] The word "negotiate" is not defined in the *SCTA* and possible definitions range from merely communicating to communicating with an element of mutuality, bargaining or compromise. The most frequently cited definition of negotiation in Canadian cases defines the word "negotiate" as "to confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise" (*Westward Farms v. Cadieux* (1982), 138 D.L.R. (3d) 137 (Man. C.A.); *International Corona Resources Limited v. Lac Minerals* (1986), 53 O.R. (2d) 737 (H.C.J.)).

[54] Although there is no question that the ordinary meaning or literal approach is a well established one in statutory interpretation, a court will also look to the object or purpose of a statute to better understand and determine what was intended by Parliament.

[55] The object of a statute and its factual setting are relevant considerations when interpreting a word or phrase used in a statute: (*ECG Canada Inc v. MNR*, [1987] 2 FC 415, as cited in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths Canada, 1994), at p. 4 [*Sullivan, "Construction of Statutes"*).

[56] The word "negotiate" has been defined in a variety of ways by Canadian courts depending upon the factual circumstances of each case.

[57] For example, in an insurance case, the Ontario Court of Appeal concluded:

> … the word "negotiate" means to agree through communication or discussion. An element of bargaining or exchange need not be present.
>
> [*Commercial Union Life Assurance Co. of Canada v. John Ingle Insurance Group Inc*., [2002] O.J. No. 3200, at para. 52]

[58] In other areas, concepts such as "reasonable effort" and "good faith" are required elements of negotiation. For example, in an expropriation case, where the relevant municipal statute simply referred to settlement "by agreement", the Saskatchewan Court of Queen's

Bench concluded that "good faith" must be implicit (*Gravelbourg v. Smith* [1983], 149 D.L.R. (3d) 176 (SKQB)).

[59] "Good faith" in the expropriation context has been found to require an "honest effort" (*Baziuk et al. v. City of Edmonton*, [1976] 1 Alta LR (2d) 371, at para. 10).

[60] In a situation where the relevant statute required the expropriating body to make a "reasonable endeavour", the Saskatchewan Court of Appeal concluded that an ultimatum with "no room for negotiations" failed to meet the standard:

> The offers made by Saskatchewan Telecommunications could, in essence, be called ultimatums. There was no room for compromise - no room for negotiations. Nor was there any apparent intention that either should be done. The offers, as stated by its general counsel and Secretary were simply "take it or leave it" propositions. Offers so made, in the absence of evidence justifying such action, cannot be construed as a reasonable endeavour to obtain the land by purchase as contemplated by Section 5(1).
>
> [*Foster v. Saskatchewan Telecommunications*, [1978] 92 D.L.R. (3d) 450 (CA)]

[61] In the labour context, a "reasonable effort" and "good faith" when bargaining are embedded in many Provincial labour codes (George Adams, *Canadian Labour Law,* 2d ed, loose-leaf (consulted May 23, 2013), (Aurora, Ont: Canada Law Book, 2006), at para. 2.3880)).

[62] Where statutory provisions are less explicit in a labour context, the Supreme Court of Canada has affirmed that "good faith" in bargaining activities is an implicit requirement of the *Canadian Charter of Rights and Freedoms* (Schedule B to the *Canada Act 1982*, 1982 C. 11 (U.K.):

> [40] … bargaining activities protected by s. 2(*d*) [of the *Charter*] in the labour relations context include good faith bargaining on important workplace issues (para. 94; see also paras. 93, 130 and 135) [in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391]). This is not limited to a mere right to make representations to one's employer, but requires the employer to engage in a process of consideration and discussion to have them considered by the employer.
>
> [*Ontario (AG) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 40 [*Fraser*]]

[63] In *Fraser*, *supra*, the Court interpreted the statutory provisions in issue, which were part of a separate labour regime for agricultural workers, in light of this constitutional setting. The statute provided that the employer must give an employee association a reasonable opportunity to make representations, including reading or listening and acknowledging the representations (*Agricultural Employees Protection Act*, S.O. 2002, c. 16*,* s. 5 (1), (6), (7) [*AEPA*]). The Court concluded that "good faith" consideration of such representations was implicit in the *AEPA*:

> … a statute should be interpreted in a way that gives meaning and purpose to its provisions. This requires us to ask what the purpose of the requirements in ss. 5(6) and (7) is. There can only be one purpose for requiring the employer to listen to or read employee representations – to assure that the employer will in fact consider the employee representations. No labour relations purpose is served merely by *pro forma* listening or reading. To fulfill the purpose of reading or listening, the employer must consider the submission. Moreover, the employer must do so in good faith: consideration with a closed mind would render listening or reading the submission pointless.
>
> **[***Fraser, supra,* at para. 103]

[64] The Supreme Court also noted that "Parliament and legislatures are presumed to intend to comply with the *Charter*", and at the time the *AEPA* was adopted, the Court had already made clear that meaningful exercise of the right to associate "… requires employers to consider employee representations in good faith. Any ambiguity in the *AEPA* should be resolved accordingly" (*Fraser*, *ibid,* at para. 104).

[65] These examples from commercial, expropriation and labour settings demonstrate that the meaning and content of negotiation activities vary in different policy and constitutional contexts, reflecting differences in the nature of the interests or rights at stake. Due consideration of the context within which a statutory reference to negotiation occurs, is necessary for proper interpretation of the content of the word.

XI. THE INTERPRETATION OF THE WORD "NEGOTIATE" IN AN ABORIGINAL CONTEXT

[66] The interpretation of the word "negotiate" in section 16(1) of the *SCTA* in an Aboriginal context requires consistency with s. 35 of the *Constitution Act, 1982*, the principles of reconciliation and "good faith", and the honour of the Crown. Interpretation

should be liberal and generous with respect to ambiguities, which should be resolved in favour of First Nations.

[67] Section 35(1) of the *Constitution Act, 1982*, affirms existing Aboriginal and treaty rights and provides the constitutional framework for the reconciliation of pre-existing, distinct Aboriginal societies occupying the land with Crown sovereignty (*R. v. Van der Peet*, [1996] 2 SCR 507, at para. 42).

[68] The resolution of specific claims must be approached in a manner consistent with the constitutional protection that treaty rights enjoy. When interpreting legislation, Parliament is presumed to have intended to comply with the *Constitution Act, 1982* (*Fraser, supra*, generally and at para. 104).

[69] The principle of reconciliation is best achieved through "good faith" negotiation as expressed by the Supreme Court in *Delgamuukw*:

> ... the Crown is under a moral, if not a legal duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with sovereignty of the Crown". Let us face it, we are all here to stay.
>
> [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186]

[70] The concept of "good faith" is also implicit when the honour of the Crown is involved as it is in the negotiation and settlement of Aboriginal claims including specific claims.

> It is also the Court's view that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims. This duty to negotiate in good faith ... is an implied part of s. 35 [of the *Constitution Act*, 1982].
>
> [*Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] 2 C.N.L.R. 18 at para. 45 (Fed. Ct. Trial Div.]

[71] The Supreme Court has commented that "[t]he honour of the Crown is always at stake in its dealing with Indian people" (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456) and further, that the term "… is not a mere *incantation, but*

rather a core precept that finds its application in concrete practices" (*Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511).

[72] Recently, the Federal Court held that "... the obligation to negotiate in good faith, ... is derived from the honour of the Crown" (*Mohawks of the Bay of Quinte v. Minister of Indian Affairs and Northern Development*, [2013] FC 669).

[73] Ambiguous statutory provisions or expressions "relating to Indians" should be read liberally, with "doubtful expressions resolved in favour of the Indians":

> … [T]reaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians … In *Jones v. Meehan,* 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but sense in which they would naturally be understood by the Indians"… We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section.
>
> [*Nowegijick, supra*, at pp. 36 and 41]

[74] The *SCTA* does not define the word "negotiate" anywhere in the statute thereby creating room for ambiguity in interpreting the meaning of the word. Canada and the Claimant have widely differing interpretations of the word and whether the Minister decided whether to refuse to negotiate the Claim "in whole or in part".

[75] Ambiguity is "[a]n uncertainty of meaning or intention, as in a … statutory provision" (*Black's Law Dictionary*, Eighth Edition, Bryan A. Garner Editor in Chief, Minnesota, 2004, at p. 88). Ambiguity is further defined in the context of statutory interpretation as "… any kind of doubtful meaning of words, phrases or longer statutory provisions" (*Black's Law Dictionary*, *ibid*, citing Rupert Cross, *Statutory Interpretation,* (1976) at pp.76-77).

[76] At paragraph 16 of Canada's Notice of Application, the Applicant maintains that "[t]he claim was accepted for negotiation, negotiations took place, an offer was made and the Claimant First Nation withdrew from the negotiations".

[77] The AOKFN submits that, Canada, by categorizing its Claim as one of small value and deciding to employ an expedited negotiation process consisting of a single offer and an ultimatum, effectively meant that there were no negotiations. At paragraph 46 of its Reply to Canada's Notice of Application, the Claimant said that "[b]y making an inflexible, non-negotiable offer, and by closing the file when the offer was not accepted, Canada decided not to negotiate the Aundeck Omni Kaning Claim. Its communications to Aundeck Omni Kaning fulfill the requirements of section 16(1)(*a*) with respect to written notice".

[78] The Specific Claims Branch negotiation process immediately determined after the AOKFN had filed its Claim that it was a small value claim suitable for the expedited settlement process.

[79] As described in Exhibit 2, during the initial assessment process as to whether the Claim disclosed an outstanding legal obligation on behalf of Canada, the Claim was referred to the Valuation and Mandating Unit of the Specific Claims Branch to set a preliminary value for the Claim. This was the stage where the Claim was categorized as a small value or normal value claim.

[80] The setting of a preliminary value and categorization of the Claim as having a small value was done without consultation with the AOKFN. It is also unknown how or what information was used for this determination since Canada has asserted a claim of settlement privilege to the process. It is, however, conceded by Canada that a Claimant First Nation is not consulted during this phase of the process nor is it informed of how the Specific Claims Branch and its negotiators arrived at their decisions.

XII. FINDINGS

[81] In deciding to expedite the Claim and deciding that it had a small value, Canada unilaterally foreclosed any consultation or discussion about any of the essential aspects of the Claim in "whole or in part" including its value or how it was calculated. As evidenced by the emails dated April 10, and June 12, 2012 from Mr. Blom to counsel for the Claimant, Canada did not intend to discuss its settlement offer.

[82] Canada's position from the outset and classification of the Claim as a small value claim was essentially a "take-it-or-leave-it" one-time offer with a 90 day time limit for acceptance. Exactly what evidence would warrant Canada reconsidering its offer is unknown because the Claimant was not apprised of the information Canada relied upon to arrive at its offer, and Canada has refused to disclose the evidence upon which it formulated its offer.

[83] I do not accept Canada's argument that its offer was technically open for discussion, even after the file was marked closed, if new evidence became available. Without knowing what evidence formed the basis for the offer in the first place, how would a First Nation possibly know what constituted new evidence?

[84] In addition to the communication Canada had with counsel for the AOKFN, it was clear to Chief Corbiere that the offer was not open for discussion.

> Q. Did you feel that the offer was negotiable?
>
> A. No.
>
> Q. Why is that?
>
> A. Based on the contents of the letter.
>
> [*Transcript, the examination in chief of Chief Patsy Corbiere,* p. 47, lines 18-24]

[85] In my view, the failure to negotiate substantively, in a manner consistent with the honour of the Crown, which implies good faith, was tantamount to a decision not to negotiate, in "whole or in part", within the meaning of s. 16(1)(*a*) of the *SCTA*.

[86] While Canada suggests that the expedited claims process is designed to speed up the settlement process, the process effectively prevented any meaningful negotiation from taking place. Without a meaningful process and by refusing to engage in discussions, Canada was not acting in "good faith", upholding the honour of the Crown, or living up to the principles enshrined in s. 35(1) of the *Constitution Act, 1982.*

[87] I adopt the statement of Justice Melvin of the BC Supreme Court's in *Chemainus First Nation v. British Columbia Assets and Lands Corporation*, [1999] 3 CNLR 8, that "… though the Crown is under no legal duty to negotiate or reach an agreement, once it

commences negotiations it must do so in good faith" (also see: *Mohawks of the Bay of Quinte v. the Minister of Indian Affairs and Northern Development*, [2013] FC 669, at para. 45).

[88] During final argument, counsel for Canada maintained that the *SCTA* provides the Minister with considerable discretion in deciding when to accept, negotiate or not negotiate a claim — essentially "controlling the clock".

[89] I do not agree. This position, along with the process employed by the Specific Claims Branch for small value claims in relation to this Claim, and perhaps many others, is, frankly, paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of "good faith" required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court, in many decisions, has described as being the foundation of Canada's relationship with First Nations.

[90] "Good faith" negotiations cannot be inflexible; otherwise they cannot be considered negotiations. Inflexibility restricts any meaningful discussion and undermines, nullifies and contaminates the process with unfairness.

> ... Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along ...
>
> [*Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, at para. 54]

[91] In deciding to employ a small value claim process, in making an offer to settle without discussion, in refusing to discuss or explain the offer, and in imposing a 90 day deadline and then closing the file, Canada, and specifically the Minister, effectively decided and notified the Claimant that it would not negotiate the Claim.

[92] Accordingly, I find that the Minister has notified the Claimant of his or her decision not to negotiate the Claim "in whole or in part". As such, it is my view that the Claimant has satisfied the requirements of s. 16(1)(*a*) of the *SCTA*, and that their Claim is eligible to be brought before the Tribunal.

XIII. ORDER

[93] Canada's Application is dismissed.

[94] Counsel may address the issue of costs by submitting written argument not to exceed three (3) pages in length to be filed within 30 days from the release of this decision.

PATRICK SMITH

Honourable Patrick Smith
Specific Claims Tribunal Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140117

File No.: SCT-3001-12

OTTAWA, ONTARIO January 17, 2014

PRESENT: Honourable Patrick Smith

BETWEEN:

AUNDECK OMNI KANING

Claimant (Respondent)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent (Applicant)

COUNSEL SHEET

TO: **Counsel for the Claimant AUNDECK OMNI KANING**
As represented by Paul Williams
Barrister & Solicitor

AND TO: **Counsel for the Respondent**
As represented by Jennifer Roy and Gary Penner
Department of Justice