

SPECIFIC CLAIMS TRIBUNAL	
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES
October 16, 2015	
Nicholas Young	
Ottawa, ON	123

**SCT-5001-13**

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**KAWACATOOSE FIRST NATION, PASQUA FIRST NATION, PIAPOT FIRST  
NATION, MUSCOWPETUNG FIRST NATION, GEORGE GORDON FIRST NATION,  
MUSKOWEKWAN FIRST NATION AND DAY STAR FIRST NATION**

CLAIMANTS

-and-

**LITTLE BLACK BEAR FIRST NATION**

CLAIMANT

-and-

**STAR BLANKET FIRST NATION**

CLAIMANT

-and-

**STANDING BUFFALO DAKOTA FIRST NATION**

CLAIMANT

-and-

**PEEPEEKISIS FIRST NATION**

CLAIMANT

-and-

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA,**  
(as represented by the Minister of Aboriginal Affairs and Northern Development Canada)

RESPONDENT

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**REPLY WRITTEN SUBMISSIONS**  
**of Standing Buffalo Dakota First Nation**

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1. The claimant, Standing Buffalo Dakota First Nation [“Standing Buffalo”] replies to the responding Written Submissions of the Respondent Crown and other Claimants that filed materials with respect to the application of Standing Buffalo as follows:

**Correspondence exchanged between Phillips & Co. and the Department of Justice**

2. It appears that it is only the Respondent Crown which has objected to the admittance of the correspondence sought to be admitted by Standing Buffalo with respect to the standing validity stage of the within specific claim.
3. Standing Buffalo submits that the historical summary of the Respondent Crown as disclosed at pages 3 and 4 of the responding submissions do not accurately set out the history between Standing Buffalo and the Respondent Crown.
4. Standing Buffalo engaged in duty to consult discussions with the Crown before the National Energy Board and the pipeline companies leading to the Federal Court jurisprudence about the allyship rights being asserted by Standing Buffalo which led to Standing Buffalo’s participation as an intervener in the *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43. Standing Buffalo’s leave applications before the Supreme Court of Canada were dismissed as a result of the decision in *Carrier Sekani*.
5. The result of this decision meant that Standing Buffalo had to pursue its matters in the Federal Court with regard to all matters through a comprehensive claim that is still proceeding as part of the Federal Court matter in T-1616-11. The Federal Court claim was commenced in 2011.
6. Following issuance of the claim, there was correspondence sent in 2012 by the Respondent Crown suggesting that the Last Mountain 80A claim be dealt with before the Specific Claims Tribunal even though the Respondent Crown knew that T-1616-11 existed. This led to procedural steps being taken between the Respondent Crown and Standing Buffalo which resulted in there being agreement that the forum for resolution of the Last Mountain 80A claim should be the Specific Claims Tribunal to have all

interested parties be present in the Tribunal proceedings. That correspondence in 2012 is not the subject of reliance, it is the subsequent agreement regarding the forum for address of the claim and as a result standing with respect to the claim.

7. That agreement was complete because it was acted upon by both Standing Buffalo and the Respondent Crown through filing of the Declaration of Claim and the amendment of the Federal Court proceedings in T-1616-11 to exclude the Last Mountain 80A claim (the content of the within proceedings). That was a complete agreement as to forum and standing and the Crown cannot deny there is standing for Standing Buffalo and should be estopped from disputing standing for Standing Buffalo on the basis of not only the letters but also the status of the proceedings in T-1616-11 and the within Specific Claims Tribunal proceeding. An additional point is that the steps taken by the Respondent Crown to have Standing Buffalo before the Specific Claims Tribunal is relevant and material—with the denial of same not in keeping with the Honour of the Crown.
8. Standing Buffalo submits in response to the Respondent Crown’s submissions that the correspondence:
  - a. Is relevant to a determination of the issues in the standing validity stage of the within specific claim
  - b. And that settlement privilege does not apply because there is no reference (express or implied) that a “without prejudice” communications occurred
9. The Respondent Crown has referenced at paragraph 16 of its Written Submissions that the correspondence was made “in relation to the specific claim filed previously with the Minister of Indian Affairs and Northern Development pursuant to the *Policy*” and cited the Affidavit of Rodger Redman sworn August 31, 2015 at paragraph 3a.
10. To be clear, Standing Buffalo did not sign any agreement or protocol with respect to the process of negotiations. This is a distinguishing feature from the decision in *Lac La Ronge Band and Montreal Lake Cree Nation*, 2013 SCTC 02. Standing Buffalo had been invited to participate in anticipated negotiations, contained in the February 28, 2012 letter but for other reasons was unable to participate in the negotiations. Standing Buffalo

does not seek admission of this letter as part of its application as it expressly provides for the correspondence to be “without prejudice”. The correspondence sought to be admitted by Standing Buffalo as part of the within application is distinguishable and should be viewed as such especially given that there has been special regard or care to mark certain correspondence by the Crown as “without prejudice” with respect to the claim of Standing Buffalo.

11. The statements made between the parties are relevant to determination of Standing Buffalo’s claim as there is no logical reason to exclude this evidence. The Honour of the Crown and the Respondent Crown’s conduct in the proceedings between T-1616-11 and the within Specific Claims proceedings are relevant and material to the claim, especially since the agreement (regarding participation in the within claim before the Specific Claims Tribunal and exclusion of same from T-1616-11) was completed and acted upon both parties. The Respondent Crown should be estopped from disputing standing for Standing Buffalo as above foresaid.
12. Additionally, a distinguishing feature of the claim by the Crown for settlement privilege is that Standing Buffalo is not attempting to utilize the correspondence with respect to the second stage of the specific claims proceeding, only for the purposes of the first standing validity stage.

**Elders' Evidence in the National Energy Board Transcripts and accompanying Map**

13. Standing Buffalo replies to the submissions filed regarding the admission of the Elders' Evidence contained in the National Energy Board Transcripts and accompanying map by stating the following:
- a. The Elders that were testifying at the hearing were testifying as to the allyship relationship between Standing Buffalo and the Respondent Crown—which as a result of that respect, Standing Buffalo received confirmation including but not limited to set aside of the land to which they currently have as their reserve but also the interest they have in the 80A reserve
  - b. The Elders are not able to provide oral traditional evidence at an oral evidence hearing as the Elders who provided evidence are deceased—establishing the necessity for the admission of the transcripts and map.
  - c. The evidence is considered permissible hearsay evidence pursuant to *Mitchell v MNR*, 2001 SCC 33, which evidence has been subject to cross-examination before the National Energy Board. With respect to the reliability of the evidence, it is a separate analysis by the trier of fact to determine and attribute what weight is considered reasonable in the circumstances.
  - d. With respect to the relevance and probative value of the evidence, the relationship between Standing Buffalo and the Crown is important to the issue of standing for Standing Buffalo. Pursuant to principles outlined by the Supreme Court at paragraph 32 in *Mitchell* with respect to analyzing usefulness/relevance, Standing Buffalo submits this evidence is relevant to providing their perspective on the right being claimed. The use and benefit by Standing Buffalo of the 80A reserve to be established in the Oral Traditional Evidence and otherwise, will confirm the separate principle of the allyship relationship with the Crown as later confirmed by the Order in Council 1151. The Oral Traditional Evidence provides a picture of the position/perspective of Standing Buffalo specifically of the allyship

relationship including at the time use of the 80A reserve occurred by Standing Buffalo.

14. For the foregoing reasons, Standing Buffalo submits that the application should be granted to permit the admission of the correspondence and National Energy Board Transcripts/Maps as evidence with respect to the first standing validity stage of the within specific claim.

All of which is respectfully submitted this 16<sup>th</sup> day of October, 2015

PHILLIPS & CO.



Per:

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