

**FILE NO.:** SCT-7005-12  
**DATE:** 20180403

**SPECIFIC CLAIMS TRIBUNAL  
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

<b>BETWEEN:</b>	)	
	)	
AHOUSAHT FIRST NATION	)	
	)	Stan H. Ashcroft, for the Claimant
	)	
Claimant	)	
	)	
<b>– and –</b>	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT	)	
OF CANADA	)	
As represented by the Minister of Indian	)	Tanya Jorgenson, for the Respondent
Affairs and Northern Development	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	<b>HEARD:</b> March 29, 2018

**ENDORSEMENT**

**Honourable W. L. Whalen**

A Case Management Conference (CMC) was held by teleconference on March 29, 2018, at 12:00 P.M., Eastern Time (Ottawa). Anne Atleo attended, representing the Ahousaht First Nation.

[1] The Claimant and the Respondent confirmed their interest in converting the hearing scheduled for April 17-19, 2018, in Tofino, into mediation of the validity of the Claim. Both

Parties affirmed that their intention was not to cause any delay, but rather to resolve the Claim as expeditiously as possible and in keeping with the goals of reconciliation.

[2] Counsel for the Respondent confirmed that her client would be present if mediation occurs.

[3] The Parties explained that their tentative concept is to make opening statements on the record, caucus separately and privately with the Tribunal, present submissions and evidence on the record, and hear the impressions of the Tribunal in a manner to be agreed. The Parties would then either pursue an agreement on the spot, end the mediation to pursue further discussions on their own, or possibly make further submissions. If after this process the Parties were unable to reach an agreement, their current intention is that they would ask the Tribunal to render a decision on validity based on the record to that date, without holding a further hearing.

[4] The Tribunal expressed a willingness to be flexible and encourage expeditious results that would be satisfying to both Parties. The Tribunal also expressed the following concerns for the Parties to consider prior to the next CMC:

- a. The presiding Member has a limited timeframe to resolve this Claim. The Parties should be aware of the effect of different options on his timeframe for rendering a decision, should one be required.
- b. The Parties envision the presiding Member being the mediator and, if the mediation does not produce a result, rendering a decision on validity. Two considerations of procedural fairness were discussed:
  - i. Each party is entitled an opportunity to be heard. The Tribunal asked the Parties to consider their positions on this aspect of procedural fairness, given that in their proposal, the same Member who hears from a party in private caucus would, if the mediation were not successful, render a decision on validity.
  - ii. “The person who hears must decide.” If acting as mediator disqualifies the presiding Member from rendering a decision on validity, then the Tribunal

noted that another Member would be available to step in as the new presiding Member. Similarly, if the Parties took more than a few months to determine whether they would reach an agreement on validity, the presiding Member would likely be out of time to render a decision. The Tribunal would assign a new presiding Member, who would not have heard all the evidence. The Tribunal asked the Parties to consider their positions on waiving the requirement that “the person who hears must decide”, such that the new presiding Member (if required) would be able to render a decision based on the record. The Tribunal expressed the desire to avoid the result that the Parties would have to hold an entirely new evidentiary hearing and hear submissions anew. The Parties agreed that the latter result was to be avoided.

- c. The *Specific Claims Tribunal Act* specifies the jurisdiction of the Tribunal and provides for decisions on validity and compensation as set out in the *Act*. The bifurcation of the Claim means that even if a mediated result is achieved on validity, the Parties do not yet know whether the matter would eventually proceed to a hearing on compensation. The Parties may wish to turn their minds to the following considerations relating to what would be included in the public record of a mediated result on validity, should such an agreement come to pass, including but not limited to:
  - i. Specification of the grounds under the *Specific Claims Tribunal Act*, subsection 14(1), that would be admitted, including sufficient legal description to allow a future decision-maker to apply the appropriate law when determining compensation.
  - ii. Any aspect of the Claim that needs to be established as a pre-requisite for the assessment of compensation pursuant to section 20 of the *Act*, or that would facilitate the expeditious resolution of compensation under that section.

[5] The Parties agreed to prepare for the next CMC a joint agreement on the process to be followed at the proposed mediation, including any proposed waivers and next steps should a negotiated result not be reached by the end of the time set aside on April 17-19, 2018. The joint

agreement will specify, among other things, how materials presented or created at the mediation may be used in future, should any future decision on the Claim by the Tribunal or a court become necessary. The Parties will ensure that their clients have approved the joint agreement prior to the next CMC.

[6] CMC Briefs are not required for the next CMC, but Counsel for both Parties will include a cover letter with the joint agreement described in paragraph 5, stating that both Parties have agreed to it.

[7] The next CMC will be held by teleconference on **April 9, 2018**, at 4:30 P.M., Eastern Time (Ottawa).

W. L. WHALEN

---

Honourable W. L. Whalen