SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

BEARDY'S & OKEMASIS BANDS #97 and #97

Claimant

v.

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

Respondent

– and –

PREMIERE NATION DES ATIKAMEEKW D'OPITCIWAN, JAMES SMITH CREE NATION (ON BEHALF OF THE CHAKASTAYPASIN BAND OF THE CREE NATION), LITTLE PINE FIRST NATION, LUCKY MAN FIRST NATION, MOOSOMIN FIRST NATION, MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION, MUSKEG LAKE CREE NATION, ONE ARROW FIRST NATION, ONION LAKE CREE NATION, POUNDMAKER CREE NATION, RED PHEASANT FIRST NATION, SWEETGRASS CREE NATION, YOUNG CHIPPEWAYAN FIRST NATION, and THUNDERCHILD FIRST NATION

Intervenors

RESPONSE TO CROWN APPLICATION RE: ADMISSABILITY OF THE EXPERT REPORT PREPARED BY MR. ROBERT METCS

This Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure.*

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I. Introduction

1. The Beardy's & Okemasis Band #96 and #97 (the "First Nation") retained Mr. Robert Metcs to prepare an expert report entitled "Research Report: The Origin, Use and Purpose of Treaty Annuities," (the "Metcs Report"), to assist the Tribunal and the parties in the adjudication of the First Nation's specific claim relating to the termination of treaty annuity payments in the wake of the 1885 Northwest Rebellion (the "Treaty Annuities Claim").

2. The Crown has applied to prevent the admission of the Metcs Report into evidence.

II. Mr. Metcs is a Properly Qualified Expert

3. Mr. Metcs is a properly qualified expert with highly particularized knowledge regarding treaty annuities and the treaty annuity provisions in the various treaties between the Crown and Canada's First Nations.

III. The Metcs Report is Necessary

4. The Metcs report provides specialized evidence which falls outside the knowledge and experience of the trier of fact and is therefore necessary to assist the Tribunal in its adjudication of the Treaty Annuities Claim.

IV. Crown Does Not Have the Requisite Leave of the Tribunal to Amend its Application

5. Paragraph 3 of the Crown's application dated October 9, 2013 (the "Amended Application"), raises an entirely new ground of argument that was not set out in its original application dated June 21, 2013 (the "Original Application").

6. The Crown has not sought leave to amend the Original Application as is required pursuant to Rule 75(1) of the *Federal Courts Rules* (the "Federal Court Rules"),[1] which apply by operation of Section 5 of the *Specific Claims Tribunal Rules of Practice and Procedure* (the "Tribunal Rules").[2]

7. Consequently, the First Nation submits that the new argument raised by Paragraph 3 of the Crown's Amended Application be disregarded.

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[1] *Federal Courts Rules*, SOR 98/106, at s.75(1).

[2] *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, at s.(5).

8. Further, it is respectfully submitted that the Crown should not be granted leave to make application for leave to amend its Original Application (ether retroactively or prospectively) at this late stage of the adjourned hearing where the Tribunal has already heard oral argument from the Crown, because the significant delays and additional costs caused by granting such leave will cause significant prejudice to the First Nation.

V. Facts

9. The Crown applied to prevent the admission of the Metcs Report by way of the Original Application titled *Respondent's Memorandum of Law and Argument Regarding Robert Metcs and the Havlick* [sic.] *Metcs Report*, which was served on the First Nation on June 21, 2013.

10. In its Original Application the Crown argues that the Metcs Report should not be admitted as an expert report because it does not meet two of the four criteria regarding the admissibility of expert evidence set out in the Supreme Court of Canada's decision *R. v. Mohan* ("*Mohan*"). Specifically, the Crown argues that Mr. Metcs is not a "properly qualified expert" and that the Metcs Report does not satisfy the "necessity" criteria.[3]

11. Nowhere in the Crown's Original Application is it argued that the Metcs Report does not satisfy the "relevance" criterion set out in *Mohan*.

12. On July 5, 2013, the First Nation served and filed its response (the "Response") to the Crown's Original Application.

13. In its Response, the First Nation notes that Section 13(1)(b) of the *Specific Claims Tribunal Act*[4] states that the Tribunal may "receive and accept any evidence… whether or not that evidence or information is admissible in a court of law…"[5] and argues that even if the Tribunal were bound by the strict rules of evidence applicable to the courts, that the Metcs Report is admissible because it satisfies the "properly qualified expert" and "necessity" criteria raised by the Crown's Original Application.[6]

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[3] Crown's Original Application, at para. 10.

[4] *Specific Claims Tribunal Act*, S.C. 2008, c. 22.

[5] First Nation's Response, at para 9.

[6] First Nation's Response, at paras 14 — 30.

14. The First Nation's Response does not speak to the "relevance" criterion set out in *Mohan* because there was no reason to do so: the Crown did not raise the "relevance" criterion as an argument.

15. Oral argument regarding the admissibility of the Metcs Report was heard by the Tribunal on September 18, 2013 (the "Hearing").

16. Following oral argument from the Crown, the Hearing was adjourned to allow the First Nation an opportunity to provide a more fulsome report in compliance with Rule 88 of Tribunal Rules, and a brief memorandum highlighting particular passages of the Metcs Report that may be of assistance to the Tribunal with respect to the matter of admissibility.[7]

17. On October 3, 2013, the parties received electronic correspondence from the Registry Officer of the Specific Claims Tribunal regarding a defect in form in the Crown's Original Application. Specifically, the correspondence stated:

> It has come to the Tribunal's attention that a formal application for the Respondent's objection to the filing of the document known as the Metcs Report has not been filed with the Tribunal. Pursuant to Part 4 of the Specific Claims Tribunal Rules of Practice and Procedure a written application must be filed. Please be advised that the Honourable Harry Slade has granted leave to file this application as required by Rule 30.8.

18. Nowhere in the Tribunal's correspondence is the Crown granted leave to file an amendment to its Original Application nor does the Tribunal's correspondence provide any explicit or implicit leave for the Crown to raise entirely new arguments.

VI. Analysis

19. Although the Crown's Amended Application does not set out the relief sought as is required by Rule 34(a) of the Tribunal Rules, the Crown's Original Application is clear that it is seeking to prevent the admission of the Metcs Report into evidence.

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[7] Endorsement of the Honourable Justice Slade, October 3, 2013, at paras. 1–2.

[8] Correspondence from Registrar of the Specific Claims Tribunal dated October 3, 2013.

20. Fundamentally, the Crown's Original and Amended Applications seek to limit the evidentiary record that is available to the Tribunal to assist in its adjudication of the Treaty Annuities Claim.

21. As the Treaty Annuities Claim has proceeded through the adjudication process, the Crown has repeatedly sought to narrow the evidentiary record available to the Tribunal; first, through its decision not to follow through on its undertaking to lead its own expert reports (a decision which was made without notice and only after the First Nation had provided its three expert reports to the Crown), second through its application to prevent the admission of the expert report prepared by Mr. Bryan P. Schwartz, and in the instant case by challenging the admissibility of the Metcs Report.

22. Notwithstanding that Section 13(1)(b) of the *Specific Claims Tribunal Act* gives the Tribunal a very broad and flexible mandate with respect to the admission of evidence, the adjudication of issues surrounding the admissibility of First Nation's evidence and the comprehensiveness of the evidentiary record have taken up a considerable amount of time and cost in the Treaty Annuities Claim.

23. It is clear that timeliness and procedural fairness are key components of the Specific Claims Tribunal process. The preamble of the *Specific Claims Tribunal Act* stresses that a fundamental purpose of the Tribunal is to facilitate the resolution of First Nation's specific claims in a timely manner, stating as follows:

> … there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner…[9]

24. Furthermore, if the Crown is provided with the opportunity to remedy the procedural irregularities of the Amended Application (which itself was only filed for the purposes of remedying the procedural irregularities associated with the Original Application) in order to raise new lines of argument regarding the admissibility of the Metcs Report, it will have to do so by filing an application for leave under Section 75(1) of the Federal Court Rules, which application must be assessed in light of Section 3 of the Federal Court Rules, which states:

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[9] *Specific Claims Tribunal Act*, at Preamble.

> These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.[10]

25. Further, as stated in the seminal decision of the Federal Court of Appeal in *Canderel Ltd. v. R.*[11] regarding amendments pursuant to Section 75(1) of the Federal Court Rules:

> 10 With respect to amendments, it may be stated… that while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties. Provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.
>
> …
>
> 13 As regards interests of justice, it may be said that the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may well be seen as frustrating the course of justice…
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> …
>
> [as discussed by] Bowman T.C.C.J. in *Continental Bank Leasing Corp. v. Canada*, [1993] 1 C.T.C. 2306, 93 D.T.C. 298 (T.C.C.) at page 2310 (D.T.C. 302):
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> > I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful, but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the Court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

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[10] Federal Courts Rules, at s.3.

[11] *Canderel v. R.*, [1993] 2 C.T.C. 213; 1993 CarswellNat 949, at paras. 10 – 14.

> 14 While it is true that leave to amend may be sought at any stage of a trial, it is safe to say that the nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice...

26. The Rules and jurisprudence set out above regarding the judicial assessment of whether a party should be granted leave to amend and raise a new ground of argument clearly mandate that timing is an essential consideration – both in the sense of *when* in the hearing process such leave is sought, and with respect to the delays which will be caused by granting such leave.

27. In this context, the First Nation respectfully submits that the additional time and cost required for the Crown to raise an entirely new line of argument in accordance with the relevant Tribunal Rules and Federal Court Rules is not appropriate at this late juncture in the Tribunal's assessment of the admissibility of the Metcs Report.

28. The Crown has introduced a new argument, improperly and without leave, halfway through the hearing process and only after the Crown had an opportunity to present its oral and written argument to the Tribunal. Each party's arguments have long been delineated and acted upon, and the new argument that the Crown now seeks to introduce was known to it long before the Original Application was filed.

29. Further, if the Crown is granted leave to correct the procedural irregularities with the Amended Application and file an application for leave to amend in accordance with Section 75(1) of the Federal Court Rules, this will cause significant delays to the expeditious hearing of the Crown's Original Application because of the need for a series of new briefs (on the amendment issue), amended briefs (on the admissibility issues), and additional hearings (regarding both).

VII. Relief Sought

30. The First Nation respectfully submits that Mr. Metcs' extensive experience in researching and writing on treaties and treaty annuities properly qualifies him as an expert, and that the Metcs Report should be admitted to the Treaty Annuities Claim proceedings in its entirety as it provides specialized knowledge and information beyond that of the trier of fact, which is logically highly probative and is necessary to assist the Tribunal in its adjudication of the Treaty Annuities Claim.

31. Further, for the reasons set out above, the First Nation respectfully submits that the new argument raised at Paragraph 3 of the Crown's Amended Application should be disregarded, and that the Crown should not be given leave to file an application for leave to amend pursuant to Rule 75(1) of the Federal Court Rules to correct the irregularities of its Amended Application in the middle of the hearing regarding the admissibility of the Metcs Report.

32. Costs of this application to be awarded in favour of the Respondent on a solicitor and own client basis.

Dated this 21st day of October, 2013 at the City of Calgary in the Province of Alberta.

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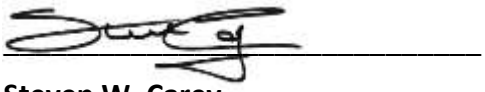

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VIII. List of Authorities

1. *Federal Courts Rules*, SOR 98/106.
2. *Canderel v. R.*, [1993] 2 C.T.C. 213; 1993 CarswellNat 949.