

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
May 16, 2012	
Guillaume Phaneuf	
Ottawa, ON	16

BIG GRASSY (Mishkosiimiiniiziibing) FIRST NATION (Indian Band)

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

Respondent

RESPONSE TO APPLICATION

1. In this Application the Crown applies to the Tribunal for an Order:

“... directing that the Claimant bears the burden of proof to establish that it suffered the losses alleged in its Claim, that those losses were caused in whole or in part by the Crown and the amount of the loss associated with each item in respect of which it claims compensation.”

APPLICABLE PRINCIPLES

2. The Application states that:

“7. It is axiomatic in law that a person who asserts a proposition or fact has the burden of establishing that proposition or fact.”

3. The classic legal text sources in Canadian law do not point toward axiomatic propositions in relation to burden of proof. The core premises have been identified as:

(1) That the onus is always on a person who asserts a proposition or fact which is not self evident; and

(2) That where the subject matter of the allegation lies particularly within the

knowledge of the parties, that party must prove it, whether it be of an affirmative or negative character.

4. The Crown's Application is clearly drawn from premise (1) above, but omits premise (2).
5. Thus the two basic premises above can go in opposite directions. Premise (1) would go in the direction of placing a burden on the Claimant, but premise (2) would go in the direction of placing a burden on the Crown, for reasons in relation to possession and control of evidence, as outlined below.

PROVISIONS OF THE ACT

6. The Act contains no general provisions regarding burden of proof. On the contrary, it contains, with respect to a claim of the type made by the Claimant herein, one specific provision:

20(1) the Tribunal, in making a decision on the issue of compensation for a specific claim,

(a) shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;

(e) shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid."

7. Subparagraph (a) clearly is directed at valuation and quantum matters, not at establishing general burden of proof principles.
8. Subparagraph (e) creates a burden on the claimant to prove particular matters, that the taking was under legal authority and that inadequate compensation was paid. It is not clear why an Order of the Tribunal would be required to affirm a specific statutory

requirement.

9. Other provisions of the Act indicate that no sweeping burden of proof principles should be presumed.
10. Under s.13(1) of the Act the Tribunal has, with respect to all

“... matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may

(a) determine any questions of law or fact in any matter within its jurisdiction under this Act;

(b) receive and accept any evidence ... that it sees fit;

c) take into consideration cultural diversity in developing and applying its rules of practice and procedure...”

11. Claims against Canada by First Nations often do not suit the court process for reasons that are well established, including rules and principles that, although they serve well for most other cases, do not fit cases that are embedded in history. For example:

19. In deciding the validity of a specific claim, the Tribunal shall not consider any rule or doctrine that would have the effect of limiting claims ... because of the passage of time or delay.

POSSESSION AND CONTROL OF EVIDENCE

13. The Order asked for by the Crown is in relation to evidence that is mostly historical and that has been at all relevant times in the possession and control of the Crown.
14. The facts of this claim arose during a time in Canadian history (the 1920's, 1930's and 1940's) when Indians were “wards of the state”.

15. The claim arises out of expropriations of Indian Reserve land. This was a governmental function carried out without the necessity for consent or even consultation.
16. At all relevant times the *Indian Act* has denied Indian bands the power to manage their own lands, in the sense of leasing or licencing to third parties.
17. In connection with expropriation of reserve land Canada is a fiduciary.
18. Where all of the relevant actions were undertaken and all of the relevant historical evidence is or was in the possession and control of a party with fiduciary obligations it is questionable whether “axiomatic” burden of proof principles can be erected against the beneficiary of that duty.

THE SPECIFIC CLAIMS PROCESS

19. In specific claims negotiations, the issues of “validation” (liability) and compensation are in practice bifurcated. The Claimant assembles (usually by research in government archives to which it is given access but which are not fully open and have been first screened by the government) and then submits factual material from this source with its claim.
20. The specific claims process does not include any equivalent of a statement of defence. Nor does it include any requirement upon the Crown to disclose or produce relevant documents in its possession or control. All that the Claimant receives by way of substantive response (often after many years) is a letter stating whether the Crown will or will not negotiate, and if it will negotiate, upon what terms and conditions.
21. Thus in regard to evidence relevant to liability the only historical evidence that the

Claimant has is what it found and presented with its claim. There may well be other evidence in the possession of the Crown that will not be known until after the processes under Parts 8, 9 and 10 of the Tribunal's Rules of Practice and Procedure are complete.

22. In regard to evidence relevant to compensation the Claimant's situation is even worse. In addition to not receiving anything from the Crown, the Claimant searched for no such evidence prior to presenting its claim. The Crown may be in possession of substantial evidence relevant to compensation, but once again that will not be known until after the processes under Parts 8, 9 and 10 of the Tribunal's Rules of Practice and Procedure are complete.
23. It may be that Crown has lost such evidence, or asserts a privilege. Then presumptions would apply that affect the burden of proof.
24. The Crown says at paragraph 29 in its Rule 49 case management brief, dated March 20, 2012, somewhat ominously, that

29. The Crown takes the position that all communications exchanged in the specific claims process from the time that the First Nation provided its specific claim to the Minister, are subject to settlement privilege.

25. It is not self-evident what the above means. If the Crown contends that evidence from the negotiation process cannot be brought before the Tribunal, or that such evidence can be brought before the Tribunal only if the Crown consents, an absurd stand-off could be created. The Crown might say that it will not release the relevant evidence, or consent to it going into evidence, and therefore the claimant must fail because it cannot meet a burden of proof expressed in sweeping terms.

THE APPLICATION IS PREMATURE, AND THE ORDER ASKED IS TOO GENERAL

26. Until the parties have at least gone through the disclosure processes under Part 8 of the Rules, the examinations processes under Part 9 of the Rules, and the evidence taken before the hearing processes under Part 10 of the Rules the Tribunal has no way of knowing whether the governing principle is basic premise (1) or basic premise (2), as set out in paragraph 4 above. It may well be that the most important of these premises for this case or important parts of it is number (2), because the Crown is in possession and control of the evidence and has positive duties with respect to it.
27. The Claimant submits that the Crown's motion is premature, because the table has not yet been fully set for this case.
28. The Claimant further submits that the Order asked for by the Crown is too sweeping and general and is not in accord with the tenor of the Act.

ORDER ASKED BY THE CLAIMANT

The Applicant asks that the Application be dismissed with costs on a full indemnity basis.

Dated: May 16, 2012


Donald R. Colborne
Barrister and Solicitor
1125 Fort Street
Victoria, B.C. V8V 3K9
807-344-6628
Fax 807-983-3079
drcolborne@shaw.ca

TO: Deputy Attorney General of Canada
234 Wellington St. East Tower
Ottawa, Ontario K1A 0H8
Fax: 613-954-1920
Attn. John Syme, counsel