

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

LAC LA RONGE BAND
AND
MONTREAL LAKE CREE NATION

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	February 20, 2013	D É P O S É
Guillaume Phaneuf		
Ottawa, ON		26

Claimants

v.

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

Respondent

NOTICE OF APPLICATION TO ADMIT DOCUMENTS

A. Relief Sought

1. The Claimants seek to file the following documents as part of the Hearing on the issue of the Crown's breach of a lawful obligation by allowing timber from Little Red Reserve 106A to be harvested without lawful authority:
 - The email dated November 17, 2010 from Rita Dagenais, Counsel, DIAND Legal Services Unit, with letter attached to David Knoll dated November 8, 2010, from Rita Dagenais, Counsel.
 - The email dated September 15, 2011 from Perry Robinson, Aboriginal Affairs and Northern Development Canada to David Knoll.

- Letter dated June 14, 2011 from Patrick Borbey, Senior Assistant Deputy Minister, Treaties and Aboriginal Government to Chief Edward Henderson, Montreal Lake Cree Nation.

B. Position on Relief Sought

2. The Respondent opposes the filing of the documents the Claimants seek to admit on grounds of settlement privilege and relevancy. Accordingly there is no consent to the relief sought.

C. Grounds for the Application

Settlement Privilege:

3. In 2004 the Claimants submitted a specific claim that made a number of allegations, namely, that the surrender in 1904 of the spruce timber on Little Red Reserve 106A did not comply with the surrender provisions of the *Indian Act*; that timber was unlawfully taken in trespass; that there was mismanagement of the sale proceeds; and that the sale proceeds were used to acquire supplies which should have been provided under Treaty #6.
4. On December 15, 2006, Canada recognized it had an outstanding obligation as a result of Canada's failure to comply with the surrender provisions of the *Indian Act*. Canada did not reach a finding on the other allegations but stated in the December letter that it, nevertheless, wanted a full, final and formal release on all aspects of the claim, with the exception of the assertion that sale proceeds were used to acquire supplies which should have been provided under treaty. This assertion to be dealt with as a separate specific claim submission.

5. In August, 2007 all parties agreed to proceed with negotiations on the basis of the December 15, 2006 letter, with the understanding that any settlement would, at some point, address all allegations raised, except the allegation related to the sale proceeds used to acquire supplies which should have been provided under treaty.
6. Over the next two years negotiations focused on the quantum of timber harvested and compensation but these negotiations appeared to reach an impasse in September 2010. Attention then turned to the other allegations of trespass and mismanagement which Canada had not previously ruled on.
7. With respect to the trespass issue, the email and attached letter from legal counsel for Canada dated November 8, 2010, found, in part, the Crown breached its fiduciary duty by failing to impose and collect the fines for timber unlawfully cut on Little Red Reserve #106A. Negotiations on compensation for the unlawful harvesting of trees proceeded based on that finding.
8. Almost a year later, following a compensation proposal put forward by the Claimants, the email correspondence from Perry Robinson dated September 15, 2011 took the position Canada was not in breach of its fiduciary duty by failing to prosecute third parties for timber unlawfully cut on Little Red Reserve #106A.
9. Whether or not Canada is in breach of its fiduciary duty by failing to pursue the unlawful harvesting of timber on Little Red Reserve is a question of Crown liability or claim validity under Canada's specific claims policy and not a matter under negotiation protected by settlement privilege.
10. The issue of Crown liability for a breach under the Specific Claims Policy is not a matter that can be negotiated. Canada determines whether there is a breach,

and negotiations proceed accordingly. In this case, Canada initially determined there was a breach of a lawful obligation and negotiations proceeded on that understanding. Negotiations ceased once Canada reversed its position on whether it was in breach.

11. The Claimants are not bringing forward for consideration any of the matters that were under negotiation for almost a year once Canada initially determined they were in breach for permitting timber to be unlawfully harvested.
12. Had Canada determined in 2004, when the claim was accepted for negotiation, that it was or was not in breach of a lawful obligation for failing to impose penalties for timber unlawfully cut on Little Red Reserve, the question of settlement privilege would not have arisen.
13. The fact that six years later, during the course of negotiations, Canada made a determination that it was and then was not in breach for timber unlawfully cut on Little Red Reserve, should not be protected by settlement privilege.
14. To proceed otherwise would enable Canada, in future claim submissions, to accept a claim for negotiation based on one of the allegations a Claimant might raise and then hide behind settlement privilege when it came to determining Canada's liability on the other allegations during the course of settlement negotiations on the claim whose validity had been determined.

Relevance:

15. The letter of June 14, 2011 to Chief Henderson, Montreal Lake Cree Nation, from Senior Assistant Deputy Minister Borbey deals, in part, with recognition by

Canada that it was in breach of a lawful obligation for failing to investigate a complaint of trespass and remove individual trespassers, as well as allowing a third party to unlawfully occupy the reserve prior to a permit being issued.

16. The claim before the Tribunal, brought by the same Cree Nation, along with the Lac La Ronge Band, deals with the same question of Crown liability for failing to deal with a trespass. In this case, allowing a third party to unlawfully cut timber prior to a license being issued.
17. The facts of each claim might be different but the legal principle and argument is the same: was the Crown in breach of a lawful obligation for failing to deal with an unlawful occupancy or cutting of timber on reserve land prior to a permit or license being issued?
18. Much of Canadian law is based on judicial precedent. The Claimants would submit that while a legal position taken by Canada under the Specific Claims Policy is not a judicial precedent, it is certainly a precedent to take into consideration under the Policy and is relevant for that purpose.
19. The effectiveness of resolving outstanding claims under the Policy in a fair and just manner depends in large part, the Claimants would submit, on a consistent legal finding by Canada of the Crown's breach of a lawful or legal obligation, as between claims across Canada, based on similar legal rationale or principles.
20. To proceed otherwise and argue that each claim is different based on the facts, when the legal rationale or principles are the same, would be inconsistent with Canada's position that, under the Policy ("Outstanding Business"), a "lawful obligation" is "derived from the law on the part of the federal government."

21. Canada's finding should not be based on changing positions on the law with respect to different claims when the legal rationale or principles are the same as applied to those claims.
22. The Claimants wish to highlight that, until the September, 2011 letter from Perry Robinson, negotiations proceeded based on what appeared to be a consistent legal position by Canada: that the Crown was in breach of a fiduciary obligation under similar legal circumstances in the timber claim as well as the reserve occupancy claim.

D. Effect of Admissibility

23. The documents the Claimants seek to admit deal with the question of Canada's position, under the Specific Claims Policy, on the extent of Canada's fiduciary obligation in permitting the use and occupation of reserve land without lawful authority. This goes to the question of the claims validity and the extent, the Claimants would submit, to which the Crown is bound by a consistent position on a claim's validity based on similar legal rationale and principles.
24. The jurisdiction and mandate of the Tribunal under the *Specific Claims Tribunal Act* is, in part, "to decide issues of validity" (s.3) by "holding hearings to decide the validity of specific claims" (s.11(1)). The legislation does not circumscribe what factors the Tribunal takes into account in determining the issue of validity.
25. While the Tribunal is not bound by previous legal positions taken by Canada on the issue validity when determining the merits of a claim brought before it, neither is the Tribunal, the Claimants would submit, prevented from determining the issue of validity based on previous legal positions taken by Canada on the question of its liability for a breach under the Policy.

26. The Claimants submit that there is nothing under the *Act* preventing the Tribunal from finding, when considering these documents, that Canada was in breach of a legal obligation in permitting the unlawful cutting of timber on Little Red Reserve. This would be based on a consistent legal position taken by Canada, initially on the timber issue and then on the unlawful occupation issue that it was in breach of its fiduciary obligation in permitting the use and occupation of reserve land without lawful authority.
27. In light of the application of these consistent positions on legal principle when determining a claim's validity for negotiation and settlement purposes, for Canada to subsequently reverse its legal position and look to the Tribunal for a determination on the merits sets a troubling precedent, it is respectfully submitted.
28. Canada could take the position that all claims where it has taken a position on a claim's validity can be reversed or reconsidered during the course of negotiations. These can then be taken to the Tribunal for a determination on their merits, irrespective of similar legal positions Canada has taken in the past on these and other claims.
29. A decision by the Tribunal on the merits in this case raises another troubling issue. A finding by the Tribunal on the question of whether Canada was in breach of its legal obligation by permitting the unlawful cutting of timber on Little Red Reserve without a license could potentially result in Canada reversing its position on the other Montreal Lake Cree Nation claim. This is a claim under negotiation which was accepted as a valid claim based on the unlawful occupation of the Montreal Lake reserve without a permit.

E. Remedy

30. The Claimants would respectfully submit the following:

- That the letter from Rita Dagenais and email correspondence from Perry Robinson be admitted for Hearing purposes on the ground that the issue these documents address goes to the question of a claim's validity and does not deal with negotiation matters protected by settlement privilege.
- That the letter from Senior Assistant Deputy Minister to Chief Henderson, be admitted for Hearing purposes on the ground that it is relevant for determining the question of Canada's position on whether a claim is valid based on a finding that Canada breached a fiduciary obligation by permitting the unlawful occupation of reserve land without proper authorization, which is a similar legal issue considered in the claim before the Tribunal.
- That with the admission of these documents the Tribunal consider ruling on the validity of the claim before it based on Canada's finding, initially on this claim, but subsequently in the Montreal Lake claim, that Canada was in breach of its fiduciary duty by permitting the use and occupation of reserve land without lawful authority; more particularly, in breach for cutting timber on Little Red reserve without lawful authority.
- In the alternative, that the Tribunal take these documents into consideration when determining the merits of the claim.

Dated this 20th day of February, 2013

A handwritten signature in black ink, appearing to read 'David Knoll', written over a horizontal line.

David Knoll, legal counsel for the Claimants

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