

FILE NO.: SCT-6002-13
CITATION: 2013 SCTC 8
DATE: 20130724

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

MIKISEW CREE FIRST NATION
Claimant (Respondent)

– and –

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA
As represented by the Minister of Indian
Affairs and Northern Development
Respondent (Applicant)

Michael Bailey and Steven W. Carey, for the
Claimant (Respondent)

Cynthia Dickins, for the Respondent
(Applicant)

REASONS ON APPLICATION

Honourable W.L. Whalen

ON APPLICATION by the Respondent, Canada, to vary Rule 42 of the *Specific Claims Tribunal Rules of Practice and Procedure*, to allow for an extension of 62 days to file its Response to the Declaration of Claim filed by the Claimant First Nation.

[1] The Mikisew Cree First Nation has filed a claim against the Crown for its failure to provide any of the agricultural benefits owed to the First Nation under the terms of Treaty 8.

[2] The dispute has a long history, beginning with an administrative specific claim launched in 1993. This process involved considerable negotiation, but came to naught and resulted in this proceeding by Declaration of Claim filed with the Tribunal on June 6, 2013, and served on the Crown on June 17, 2013.

[3] The First Nation had also commenced a claim in the Alberta Court of Queen's Bench in December 1996, in which the Crown filed a Statement of Defense in February 1998. Although well developed, the action was ultimately stayed in favour of the administrative specific claims process.

[4] According to Tribunal Rule 42, the Crown must file a Response to a Declaration of Claim within 30 days, i.e. by July 17, 2013, here. Rule 4(1) gives the Tribunal discretion to dispense with compliance with a Rule when considered necessary for the just, timely or cost-effective resolution of a specific claim.

[5] The Crown asked the Claimant for 62 days. Crown counsel says she needs this time to review 4,877 documents (in 4,500 pages) generated by the earlier processes in order to formulate a meaningful response, review it with the client, obtain instructions, and accommodate her long-standing vacation arrangements, which will find her out of the country from August 22 to September 9, 2013.

[6] Crown counsel indicated that she is in Edmonton and that her client is in Ottawa. She also pointed out that while the Department of Justice is an indivisible entity, she was not counsel in the earlier processes and cannot be presumed to be familiar with them or the documents they generated.

[7] The First Nation has acknowledged the need for additional time by offering a 45-day extension, but it refused any further time. It pointed out that the Crown had already articulated a response in the Statement of Defense to the Alberta court action. Moreover, the Crown was well aware of the claim and its position as a result of the decades long administrative process.

[8] By letter of April 4, 2013, the First Nation had advised the Minister of Aboriginal Affairs and Northern Development that it intended to move its claim to the Tribunal if the Minister did not indicate his intention to resume negotiations by or before June 1, 2013. A draft copy of the present Declaration of Claim was also enclosed with the letter. Therefore, the Crown was well aware of the pending litigation, the nature of the claim, the history of its own position, and the Rules of the Tribunal.

[9] The First Nation is clearly and perhaps justifiably frustrated with the government's inactivity on the claim. It rightly points out that the Rule was made for a purpose and that extensions should not be routine. I acknowledge that the First Nation wishes to move the dispute along as quickly as possible to resolution, and that it is quite within its rights to do so.

[10] The Crown pointed out that the Tribunal has granted extensions of 60 days and more in a number of other claims, the suggestion being that the request was not unusual. I was not directed to specific cases or the reasons given for the extensions in those cases. However, I agree strongly with the First Nation that the Rules should be followed and that judicial discretion to relax them should be clearly justified by some circumstance of exceptionality. Application of the 30-day Rule 42 time limit should be the norm, not the exception.

[11] In this case, the First Nation has acknowledged justification of exceptionality by offering a 45-day extension, and it was a reasonable proposal given the considerable history of the matter in the other processes. Indeed, in her oral submissions, Crown counsel indicated that the 45 days would have been sufficient but for the planned holiday.

[12] The First Nation does not dispute that the earlier processes produced voluminous documentation, or that it involved the dynamic of negotiation. While the Crown may have filed a Statement of Defense in the court action, that was over 15 years ago. I have no idea how much of the documentation may have related to the subsequent negotiation at the ministerial level and therefore post-dated the Statement of Defense in the earlier litigation. In fact, while the indivisible Crown was the responding party in the earlier processes, it was very likely represented by a number of individuals according to office and function, so that no one individual may have been fully aware of all that was happening on the two tracks. I accept that present Crown counsel was not involved in the earlier processes and she is therefore in a position

of having to inform herself broadly in order to give meaningful advice and receive instructions. My experience informs me that this is a normal situation given the size of the Department of Justice and its organization.

[13] Therefore, I conclude that the matter is sufficiently complicated (not only in subject matter but by history) to warrant the 45-day extension. I also conclude that the real difficulty here is Crown counsel's personal holiday plans. There was no suggestion that these plans were not real or as presented. The offered 45-day extension would expire on Friday, August 30, 2013, near the middle of Crown counsel's August 22 to September 9, 2013 absence. The 62-day extension would require filing of the Crown's Response by September 17, 2013.

[14] I find no hint of an attempt to delay on the part of the Crown. If I did, I would order accordingly. As I have stated, Rule 42 is clear and should be followed absent good reason to justify an appropriate exception, which exists in this case, as I have described, and which was in fact acknowledged by the Claimant's 45-day proposal.

[15] I also conclude that the personal circumstances of counsel, parties or witnesses may be a source of exceptionality. That seems to be the case here as a result of Crown counsel's vacation plans, which predated the filing of the claim. These plans would frustrate the First Nation's proposed 45-day compromise, because Crown counsel could not take advantage of them. I also think it reasonable that some time may be required for counsel to become re-oriented upon her return. Normally counsel would work these situations out co-operatively as a matter of professional courtesy. However, historical frustration seems to have prevented that here.

[16] But for Crown counsel's vacation plans, I expect that we would not have been here. However, even Crown counsel is entitled to a vacation. The additional 15 days on top of what the First Nation has voluntarily proposed will not cause it great prejudice in the current proceeding. I am certain that the Crown has taken notice of the Claimant's time sensitivity. Also, at this point in time, the Tribunal should be able to accommodate the process expeditiously.

[17] For these reasons, the Crown's request is granted. The Crown is directed to serve and file its Response to the Claim by or before September 17, 2013.

W.L. WHALEN

Honourable W.L . Whalen
Specific Claims Tribunal Canada

**SPECIFIC CLAIMS TRIBUNAL
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OTTAWA, ONTARIO July 24, 2013

PRESENT: Honourable W.L. Whalen

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Claimant (Respondent)

and

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

Respondent (Applicant)

COUNSEL SHEET

TO: Counsel for the Claimant MIKISEW CREE FIRST NATION
As represented by Michael Bailey and Steven W. Carey
Maurice Law Barristers & Solicitors

AND TO: Counsel for the Respondent
As represented by Cynthia Dickins
Department of Justice