FILE NO.: SCT-2006-11 **OFFICIAL TRANSLATION**
CITATION: 2014 SCTC 10
DATE: 20141023

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
ATIKAMEKW D'OPITCIWAN FIRST NATION Claimant (Applicant)	Paul Dionne and Marjolaine Olwell, for the Claimant (Applicant)
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Respondent)	Éric Gingras and Ann Snow, for the Respondent(Respondent)

AMENDED REASONS FOR DECISION

Honourable Johanne Mainville

NOTE: This document is subject to editorial revision before its reproduction in final form.

[1] The Claimant filed an Application to amend the Further Amended Declaration of Claim.

[2] The amendments sought would add two allegations and one conclusion to the Declaration of Claim, based on facts disclosed by the evidence.

[3] The Respondent asks that the proposed amendments be rejected. In the alternative, the Respondent asks that the inquiry be reopened and that the Parties be allowed to agree on a new schedule, particularly so that supplementary expert reports can be submitted.

[4] On September 30, 2014, the Tribunal granted the Claimant leave to file a Notice of Application for Leave to amend the Further Amended Declaration of Claim.

I. FACTS

[5] In this Claim, the Claimant alleges that the Atikamekw of Opitciwan did not receive the amount of reserve land to which they were entitled and claims compensation for the damage and inconvenience resulting from the insufficient area they received. In its Memorandum of Fact and Law, the Claimant writes:

> [TRANSLATION]
>
> 2. On the basis of an area calculated using the formula of 60 acres per family at the time of the final survey plus an allowance of 10% for unoccupied lands, the Atikamekw of Opitciwan claim compensation for the value of the difference between the area they should have received based on that formula and the area of 2,290 acres they did receive, and for the loss of use of this difference in area.
>
> 3. In the alternative, on the basis of the promise of DIA to obtain a 3,000-acre reserve for them, they claim compensation for the value of the difference between 3,000 acres and the area of 2,290 acres they received, and for the loss of use of this difference in area.

[6] On November 15, 2013, the Respondent sent the Claimant the counter expert opinion of Éric Groulx ("Groulx"), whom the Tribunal recognized as an expert surveyor. In that opinion, he states that the calculated area on the plan of the surveyor, Mr. White, is not 2,290 acres, as the plan indicated, but 2,760 acres. At page 19 of his Report, Mr. Giroux writes, in particular:

> [TRANSLATION]

> We cannot explain with certainty why there is a discrepancy between the area shown on Mr. White's plan and the area that we calculated. Could the survey tools and methods used at the time explain this? This hypothesis is plausible. Today, area calculations are done with specialized surveying software, while at that time, everything was done manually, leaving room for more human errors. It is therefore possible that there may be an error in the calculation of the area in Mr. White's plan.

[7] Groulx testified before the Tribunal on January 22, 23 and 24, 2014. On cross-examination by counsel for the Claimant, he confirmed what he had written in his Report, that is, that according to his calculations, the calculated area on Mr. White's plan was 2,760 acres.

[8] On May 22, 2014, at the close of evidence, the Claimant stated that it intended to amend its Further Amended Declaration of Claim, primarily to take into account this fact disclosed by the evidence.

[9] On June 17, 2014, the Parties filed a revised schedule, which the Tribunal approved on June 27, 2014.

[10] On August 19, 2014, in accordance with the schedule approved by the Tribunal, the Claimant filed the proposed amendments.

II. POSITIONS OF THE PARTIES

[11] According to the Claimant, the new fact revealed by the Report and the testimony of expert witness Groulx confirmed that in the initial survey, the Respondent's agent intended to survey for the Atikamekw of Opitciwan an area greater than the 2,290 acres that the federal and provincial governments later took into account when establishing the Opitciwan Indian Reserve.

[12] The Claimant therefore wishes to amend its Further Amended Declaration of Claim so that the facts, the legal basis for the Claim and the conclusions reflect the factual situation that emerged from testimony.

[13] The amendments sought are as follows:

> [TRANSLATION]
>
> 43a. It would appear that Survey Plan No. 1458 prepared by Mr. White has an area of approximately 2,760 acres.
>
> . . .

> 99a. In the further alternative, the DIA also breached its duty of care and due diligence by failing to use the actual area in Mr. White's plan as the basis for discussions with the Ministère des Terres et Forêts du Québec [Quebec department of land and forests] on the area of the Opitciwan Indian Reserve.
>
> . . .
>
> **VII. Conclusions sought**
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> 105. For all these reasons, the Claimant ATIKAMEKW D'OPITCIWAN FIRST NATION claims:
>
> (a) compensation for the value of the difference
>
> . . .
>
> (iii) in the further alternative, between the area of 2,760 acres actually surveyed in 1914 and the area of 2,290 acres received;

[14] The Respondent objects to the amendments for the reasons stated in its Written Submissions dated September 26, 2014. The Submissions state, in particular:

> [TRANSLATION]
> 4. The proposed amendments introduce a new argument that the DIA breached its duty of care and due diligence by failing to use the actual area of Mr. White's plan as the basis for discussions with the Ministère des Terres et Forêts du Québec on the area of the Opitciwan Indian Reserve.
>
> 5. This new argument is based on new facts that emerged during the hearing on the merits, particularly the hearing held on January 22, 2014 . . . ;
>
> 6. According to the Claimant, this new fact confirms that Mr. White intended to survey an area much greater than the 2,290 acres that the federal and provincial governments later took into account when establishing the Opitciwan Indian Reserve;
>
> 7. However, this new argument was never part of the claim that the Minister processed under the *Specific Claims Policy;*
>
> 8. Moreover, the Application for Leave to Amend was filed even though both Parties declared their evidence on the merits closed;

[15] The Respondent also argues that allowing the amendments would force the Parties to consider the nature of Mr. White's mandate and, necessarily, the source of the error raised by expert witness Groulx, that is, why the plan's calculated area is 2,760 acres when the area shown on the plan is 2,290 acres.

[16] According to the Respondent, allowing the amendments would be contrary to the interests of justice and would compromise the rights of the Parties, in that the Respondent would

be precluded from making full answer and defence. Furthermore, reopening the inquiry would prevent the Claim from being resolved in a timely manner, in accordance with the preamble of the *Specific Claims Tribunal Act*, as several months would be needed to file supplementary expert reports from both Parties and to hold additional examinations.

[17] Finally, the Respondent argues that the Claimant alone is to blame because it showed a lack of due diligence in being slow to act on the fact asserted by expert witness Groulx in his Report even though it knew of this fact since November 15, 2013.

III. DISCUSSION

[18] The *Specific Claims Tribunal Rules of Practice and Procedure,* SOR/2011-119, (the "Rules") do not contain any rules concerning amendments.

[19] In such cases, section 5 of the Rules refers to the *Federal Courts Rules,* SOR/98-106, which apply in a suppletive manner.

[20] Section 75 of the *Federal Courts Rules* provides as follows:

> 75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
>
> (2) No amendment shall be allowed under subsection (1) during or after a hearing unless
>
> (*a*) the purpose is to make the document accord with the issues at the hearing;
>
> . . .

[21] Case law recognizes that an amendment should be permitted at any stage of litigation for the purpose of determining the real questions in dispute, provided that this would not result in injustice or prejudice to the other party not capable of being compensated by an award of costs. On this point, in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.), the Federal Court of Appeal states as follows at para. 9:

> . . . 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.

[22] As summarized by counsel for the Claimant at paragraph 17 of its Memorandum of Fact and Law, to determine whether the opposing party will suffer prejudice, the case law considered, in particular, the following criteria:

> [TRANSLATION]
> . . .
>
> • The timeliness of the motion to amend;
>
> • The extent to which the proposed amendments would delay the expeditious trial of the matter;
>
> • The extent to which the position taken originally by one party led another party to follow a course of action in the litigation which would be difficult or impossible to alter;
>
> • Whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits.
>
> *Continental Bank Leasing Corporation et al. v. The Queen* (1993), 93 D.T.C. 298 (T.C.C.), p. 6, *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.), *Valentino Gennarini SRL v. Andromeda Navigation Inc.*, 2003 FCT 567.

[23] The nearer to the end of a matter that an amendment is sought, the more cautious a Court ought to be in granting the amendment: *Apotex Inc. v. Wellcome Foundation Limited*, 2009 FC 949, para. 16.

IV. WHAT IS THE SITUATION IN THE PRESENT CLAIM?

[24] First, the proposed amendments are relevant in that they relate directly to the questions in dispute, notably the area of the reserve. They are related to Mr. White's plan, which both Parties' experts discussed and analyzed at length, and they result from the evidence introduced by the defence's expert, Mr. Groulx. Not only are the amendments relevant, but their purpose is to ensure that the Declaration of Claim reflects the new fact and, incidentally, the questions in dispute. It will be for the Tribunal to determine the probative value of this evidence in due time to decide the merits of the Claim.

[25] Second, the argument that the Application is inadmissible under section 16 of the *Specific Claims Tribunal Act* is without merit. The amendments sought do not change the nature of the action. They are included in the main Application, which concerns a compensation claim arising from a breach of legal obligations of the Crown for failing to provide the reserve area as agreed.

[26] The Respondent's position on this point is particularly surprising because the Respondent itself introduced this evidence through its expert witness. Accepting this argument would mean that the Respondent could enter in evidence facts not analyzed by the Minister and could base arguments on them to support its defence. The Claimant, on the other hand, would not be able to do so. This is nonsensical.

[27] In this Claim, as indicated above, it is a fact related to the Claim. Moreover, the conclusion sought on the basis of this new fact is in the further alternative to the original Application. As counsel for the Claimant argues, there is no doubt that if the Claimant had discovered this fact during negotiations, the Claimant would have raised it.

[28] Third, the Respondent argues that if the Tribunal decides that it can consider this new argument, the amendments should be rejected, as they are contrary to the interests of justice and would compromise the rights of the Parties. On this point, the Respondent submits in particular that the Claimant neglected to act in a timely manner and that the Respondent would suffer prejudice for not having the opportunity to put forward a defence.

[29] It is true that expert witness Groulx raised the discrepancy in area in his Report, which was submitted to the opposing party around November 15, 2013. However, the Claimant cannot be faulted for wanting to validate this fact with the expert witness on cross-examination.

[30] In late January 2014, the hearings were postponed sine die because counsel for the Claimant had a serious health issue. The hearings resumed on May 20 and ended on May 23, 2014. At the end of the hearing on May 23, 2014, the Claimant stated its intention to amend its pleadings in this Declaration and in any other declarations of claim heard on common evidence with this matter. It was therefore agreed that the Parties would file a new schedule, which was completed within the time permitted by the Tribunal. The Tribunal then approved the new schedule proposed by the Parties, taking everyone's summer vacation plans into account. The

amendments and the Application for Leave to Amend were filed within the time limits set in the schedule. In short, taking into account all circumstances, the Application to Amend should not be dismissed on the ground that the Claimant did not act quickly enough.

[31] The Respondent argues that reopening the inquiry will require an adjournment of several months and will necessarily result in the postponement of oral submissions. In the alternative, the Respondent asks that the inquiry be reopened to allow it to file a supplementary expert report and to let the Parties agree on a new schedule.

[32] The Claimant objects to reopening the inquiry. It argues that the cause of the error is irrelevant and that the Respondent is just looking for a needle in a haystack.

[33] At the hearing of the Application to Amend, the Respondent admitted that expert witness Groulx was not qualified to address the impact of the discrepancy on subsequent discussions on the area attributable as a reserve. The Respondent therefore withdrew its request in that regard.

[34] The Tribunal will therefore allow the amendments and reopen the inquiry to allow the Respondent to present its evidence. The additional evidence shall be limited to the nature of Mr. White's mandate and the source of the error raised by expert witness Groulx. Mr. Groulx will therefore be allowed to add to his expert report for this purpose only. The Claimant may, if it so wishes, introduce a second opinion in response to the supplementary expert report of expert witness Groulx.

[35] That said, it is not in the interests of justice or the Parties to prolong the arguments or postpone oral submissions.

[36] To date, the Parties have had all the time required and requested to prepare their evidence and arguments. More than 16 days were spent on the presentation of evidence, from September 9 to September 12, 2013, from January 13 to January 17, 2014, from January 20 to January 24, 2014, and from May 20 to May 23, 2014. Oral submissions are to begin on March 16, 2015, and end on March 27, 2015. The Parties have requested one week for oral arguments. The Tribunal suggested setting aside two weeks, in the event that they take longer than one week.

[37] The Parties therefore have more than five months before oral submissions, which leaves

them ample time to proceed with a supplementary expert report on the new fact.

[38] The amendments stem from the evidence introduced by the Respondent. This concerns a specific and very focused fact that the Respondent has known of for more than a year and a half. Considering the nature and basis of the Claim, the Respondent must have known that the Claimant would raise this fact. As for the Claimant, it has known of this fact since receiving the Report of expert witness Groulx, or at least since reading it.

[39] To date, the evidence submitted to the Tribunal shows that exhaustive research has been done in this Claim to locate documentation on issues related to the area of the reserve and Mr. White's plan. This research was done so that the Claim could be filed and the Minister could review it. Accordingly, repeating that work or searching for documents that do not exist is out of the question. Moreover, the Respondent's expert witnesses have already testified on the issue of Mr. White's mandate. Again, repeating research that has already been completed or revisiting an element about which expert witnesses have already testified is out of the question. A review of Mr. White's mandate will have to be confined to the very narrow framework of the error raised by expert witness Groulx.

[40] The Tribunal has broad discretion in case management. Given the time that has elapsed since the Declaration of Claim was filed, proportionality and efficient management of the Claim justify and even require that oral submissions not be postponed in this Claim.

[41] The Tribunal will therefore establish a schedule so that the agreed-upon dates to bring this Claim to a close are respected.

[42] Taking into account all of the circumstances, the Tribunal will order that the Respondent submit its supplementary expert report to the Claimant by 4:30 p.m. on December 19, 2014. The Claimant will have until March 6, 2015, 4:30 p.m., to respond. The Tribunal will hear expert witness Groulx and, if required, the Claimant's expert witness, on this specific point on March 16, 2015, and if necessary, on March 17, 2015. Oral submissions on the four claims will begin after the experts' testimony. To allow the experts to testify on this supplementary expert report, two days will be added to the hearing schedule, that is, March 30 and 31, 2015.

[43] The Tribunal will allow the Parties to be heard in the event that either of them believes to

have suffered prejudice.

FOR THESE REASONS, THE TRIBUNAL:

ALLOWS the Application for Leave to amend the Further Amended Declaration of Claim so that paragraphs 43a, 99(a) and 105 (a)(iii) are added to the Claim, as they appear in grey in the draft Further Further Amended Declaration of Claim filed with the Registry of the Specific Claims Tribunal;

ORDERS the Claimant to file its Further Further Amended Declaration with the Registry of the Specific Claims Tribunal within five days of these Reasons;

ORDERS the reopening of the inquiry in this Claim, provided that:

- The additional evidence of the Respondent's expert witness deals solely with the nature of Mr. White's mandate and the source of the error raised by expert witness Groulx;

ESTABLISHES the following schedule and **ORDERS** the Parties to comply with it:

- The Respondent shall submit to the Registry of the Tribunal and to the Claimant the supplementary expert report of expert witness Groulx by December 19, 2014, 4:30 p.m.;

- The Claimant shall submit to the Registry of the Tribunal and to the Respondent the response of its expert witness to the supplementary expert report of Mr. Groulx, by March 6, 2015, 4:30 p.m.;

- The expert witnesses' examinations and cross-examinations on this specific point shall take place on March 16, 2015, and if necessary, on March 17, 2015, and oral submissions shall begin after that;

- Two days of hearings are added to the schedule, that is, March 30 and 31, 2015.

WITHOUT COSTS.

JOHANNE MAINVILLE

Honourable Johanne Mainville

Certified translation

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20141023

File No.: SCT-2006-11

OTTAWA, ONTARIO October 23, 2014

PRESENT: Honourable Johanne Mainville

BETWEEN:

ATIKAMEKW D'OPITCIWAN FIRST NATION

Claimant (Applicant)

and

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

Respondent (Respondent)

COUNSEL SHEET

TO:	**Counsel for the Claimant (Applicant) ATIKAMEKW D'OPITCIWAN FIRST NATION** As represented by Paul Dionne and Marjolaine Olwell
AND TO:	**Counsel for the Respondent (Respondent)** As represented by Éric Gingras and Ann Snow