

FILE NO.: SCT-5004-11
CITATION: 2013 SCTC 5
DATE: 20130626

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

KAHKEWISTAHAW FIRST NATION

Claimant

– and –

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

As represented by the Minister of Indian
Affairs and Northern Development

Respondent

Stephen M. Pillipow and Adam Touet, for
the Claimant

Lauri Miller and Donna Harris, for the
Respondent

HEARD: June 3, 2013

REASONS FOR DECISION

Honourable Johanne Mainville

I. INTRODUCTION

[1] The Claimant brought an Application requesting an order that the issues relating to the 1907 Surrender Sale Proceeds as set out in Part I of the Agreed Statement of Issues be bifurcated and heard separately from the remaining issues raised in Parts II – V of the Agreed Statement of Issues.

[2] The Respondent challenges the Application on the grounds that separating expenditures attributed to the Sale Proceeds from the other expenditures credited to the Claimant is not factually achievable and that the requested bifurcation will likely increase costs, delay the proceedings and result in prejudice.

II. BACKGROUND AND CONTEXT

[3] On December 23, 2004, the Claimant submitted a specific claim to the Minister of Indian Affairs and Northern Development known as the Capital and Revenue Account Mismanagement Specific Claim.

[4] In a letter dated March 26, 2010, the Claimant was advised that it was the Minister's decision not to accept this claim for negotiation. Pursuant to the Minister's decision, on December 19, 2011, the Claimant filed a Declaration of Claim with the Specific Claims Tribunal.

[5] This claim concerns the management and expenditure of trust funds or Indian moneys which were held by the Crown of behalf of the Claimant. The Claimant alleges a breach of trust, of trust-like and of fiduciary obligations, a breach of Treaty No. 4 and of the *Indian Act* in force at the time, with respect to the management and expenditure of Indian moneys, including the Sale Proceeds from lands surrendered for sale in 1907 from the Kahkewistahaw Reserve No. 72, totaling 33,281 acres.

[6] The Crown submits that the claim is ill-founded in that it did not breach any lawful obligations owed to the Claimant under the *Indian Act*, Treaty No. 4 or arising from a fiduciary obligation in the administration of Indian moneys. The Crown also denies that the Claimant has suffered any damages.

[7] In adjudicating this claim, the Tribunal will have to determine whether the Respondent breached its fiduciary and legal duties to the Claimant in its administration and expenditure of Indian moneys and, in the affirmative, determine the level of compensation owed.

III. POSITIONS OF THE PARTIES

[8] At pages 6 and 7 of its written Brief, the Claimant summarized the issues raised in Parts I-IV of the Agreed Statement of Issues as follows:

- a. Part I relates to whether the Respondent was required to preserve, protect and invest the Sale Proceeds. This will primarily involve the interpretation of the terms of Treaty No. 4 and of the surrender document.
- b. Part II relates to the specific individual expenditures from the Capital and Revenue Accounts and whether the Respondent breached the provisions of the *Indian Act* in authorizing or making such expenditures. This will primarily involve a determination of whether the expenditures were authorized by the terms of the *Indian Act* and whether the necessary authorities or approvals for the expenditures were provided or obtained.
- c. Part III relates to whether the Respondent had a duty to consult with the Claimant before proceeding with the expenditures of funds in the Capital and Revenue Accounts.
- d. Part IV relates to the wrongful deposit of funds belonging to the Claimant to the credit of other Indian Bands.
- e. Part V relates to the compensation.

[9] The Claimant submits that the issue raised in Part I is separate and distinct from the issues raised in Parts II to IV, and as such, hearing this issue separately will not complicate the proceedings or result in unnecessary overlap. It is the Claimant's position that the bifurcation would be just, timely and cost-effective for the following reasons:

- a. If the Claimant is successful in relation to the Sale Proceeds, the issues in Part II will be limited to expenditures of moneys unrelated to the Sale Proceeds. Therefore, it will not be necessary to determine whether expenditures of the Sale Proceeds were authorized by the terms of the Indian Act since such expenditures will have already been found to have been in breach of the terms of Treaty No. 4, of the trust created under the terms of the surrender document or of the Crown's fiduciary obligations. It will however be necessary to determine whether individual expenditures were from the Sale Proceeds or were from moneys unrelated to the Sale Proceeds, which matter can be addressed in the hearing of the issues in Part II; and
- b. If the Claimant is unsuccessful in relation to the Sale Proceeds, the issues in Part II will include expenditures of both Sale Proceeds and moneys unrelated to the Sale Proceeds. There will be no need to distinguish between expenditures of the Sale Proceeds from other expenditures.

[10] The Claimant submits that the bifurcation of the issues is just and will not create any prejudice to the Crown. It is timely because the issue in Part I is very limited and does not require additional research be conducted by the parties, as is the case for Part II. Consequently, the parties will be able to proceed on the merits of this issue in a few months, instead of waiting until 2014. Bifurcation is cost-effective because a decision on the Sale Proceeds may lead to settlement discussions on the remaining issues and may result in a resolution of the entire claim. In any event, bifurcation will clarify which expenditures must be reviewed and assessed in Part II.

[11] The Claimant also adds that if it is successful in the Sale Proceeds claim, the Tribunal would then be in a position to assist the parties to determine the historical losses suffered by the Claimant.

[12] The Claimant did not refer to any precedents in support of its position.

[13] On the other hand, the Respondent submits that Part I contains issues that are factually intertwined with the remainder of the issues raised by the claim and these issues cannot be severed.

[14] The Respondent further submits that the scope of Canada's fiduciary or trust like obligations in relation to the expenditure of moneys deposited to the Claimant's account is at issue in both Parts of the Agreed Statement of Issues. Bifurcation would consequently prejudice Canada from having a full determination on the merits of its response.

[15] The Respondent adds that the allegations of breach of fiduciary or trust-like obligations will be duplicated, since it is Canada's position that its obligations in relation to the Sale Proceeds and other unrelated expenditures, arose pursuant to the *Indian Act* in force at the time, and that the surrender document did not impose any additional obligations on Canada in managing the Sale Proceeds beyond those found in the *Indian Act*.

[16] Moreover, it adds that if an adjudication on Part I occurs separately, the parties may have to exhaust any rights they may have for judicial review in the Federal Court of Appeal and in an eventual appeal before the Supreme Court of Canada before the hearing on Part II occurs.

[17] Finally, the Respondent refers to subsections 20(1) and (4) of the *Specific Claims Tribunal Act* S.C. 2008, c. 22 ("*SCT Act*") and submits that the issues should be treated as only one claim. It adds that pursuant to paragraph 35(a) of the *SCT Act*, bifurcation may lead to further injustice.

[18] The Respondent disagrees on the scope of evidence required to determine Part I and argues that the bifurcation will result in a duplication of evidence and procedural steps.

IV. ANALYSIS

A. General principles

[19] Subsections 20(1) and (4) and paragraph 35(a) of the *SCT Act* read as follows:

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

(a) shall award monetary compensation only;

(b) shall not, despite any other provision in this subsection, award total compensation in excess of \$150 million;

(...)

(4) Two or more specific claims shall, for the purpose of paragraph (1)(b), be treated as one claim if they

(a) are made by the same claimant and are based on the same or substantially the same facts; or

(...).

35. If the Tribunal decides that a specific claim is invalid or awards compensation for a specific claim,

(a) each respondent is released from any cause of action, claim or liability to the claimant and any of its members of any kind, direct or indirect, arising out of the same or substantially the same facts on which the claim is based; and

(...).

[20] The *Specific Claims Tribunal Rules of Practice and Procedure* (SOR/2011-119) (“*SCT Rules*”) provide for the following:

3. The Tribunal may make any order that is necessary to secure the just, timely or cost-effective resolution of the specific claim.

4. (1) The Tribunal may vary a Rule, dispense with compliance with a Rule, or supplement a Rule, when the Tribunal considers it is necessary to do so in order to secure the just, timely or cost-effective resolution of the specific claim.

10. If validity of the specific claim and any compensation arising from it are both at issue, the Chairperson may order that the hearing of those matters proceed in separate stages.

[21] Bifurcation orders are the exception to the rule that all issues should be determined in the main action: *Elcano Acceptance Ltd v. Richmond, Richmond, Stambler & Mill*, (1986), 55 O.R. (2d), 56 (CA) at para. 11; *State Falls Nation v. Canada (Attorney General)* [2007] O.J. No348; 154 A.C.W.S. (3d) 998 at para. 57; H.D. *Michigan Inc. v. Jamal Berrada*, 2007 FC 995 at paras. 4, 7 and 8. The onus is on the party requesting a bifurcation order. *Realsearch Inc. v. Valon Kone Brunette Ltd.*, [2004] 2 F.C.R. 514, 317 N.R. 38, 31 C.P.C. (4th) 101, 2004 FCA 5 at para. 15.

[22] Factors which the courts have considered as having a bearing on the most just, expeditious and least expensive determination of the proceedings on its merits include: *Realsearch Inc. v. Valon Kone Brunette Ltd.*, *supra*, at para. 15; H.D. *Michigan Inc. v. Jamal Berrada*, *supra*, at para. 5; *South Yukon Forest Corp. v. Her Majesty the Queen*, 2005 FC 670 at para. 4:

- i) The nature of the action, the complexity of issues and the nature of the remedies sought;
- ii) Whether the issues proposed for the first trial are interwoven with those remaining for the second trial;
- iii) Whether a decision for the first trial is likely to put an end to the action altogether, significantly narrow the issues for the second trial or significantly increase the likelihood of settlement;
- iv) Whether the parties have already devoted resources to all of the issues;
- v) Whether the bifurcation of the proceedings will save time or lead to unnecessary delay;
- vi) Whether the parties will suffer any advantage or prejudice;
- vii) Whether the bifurcation request is brought on consent or is objected to by the other party.

B. Application of the principles

[23] In this case, the Respondent is resisting the bifurcation on several grounds.

[24] The Claimant does not seek the bifurcation of the validity of its claim from compensation issues as provided for in Rule 10 of the *SCT Rules*. The Tribunal must thus decide in this case whether to bifurcate by exercising its discretion pursuant to Rule 4 of the *SCT Rules*. This requires the Tribunal to determine if the bifurcation is necessary to secure the just, timely or cost-effective resolution of this specific claim.

[25] The Claimant asserts that the issue in Part I relates solely on whether Treaty No. 4 and the surrender document imposed any obligations on the Respondent in managing the Sale Proceeds. It will not involve an analysis of the obligations which arose pursuant to the *Indian Act*, since these issues will be addressed in Part II.

[26] However, the Respondent alleges at paragraphs 15, 18 and 30 of its Response to the Declaration of Claim that it dealt with the Sale Proceeds and other expenditures pursuant to the *Indian Act* in force at the time. The Respondent also alleges that the surrender document did not impose any additional obligations on the Crown for managing the Sale Proceeds beyond those found in the *Indian Act*.

[27] The Respondent further alleges in defense to the issues in both Parts I and II that it acted

in accordance with legislation and therefore did not breach its fiduciary duty. It relies on the decision of *Ermineskin Indian Band v. Canada* [2009] 1 S.C.R. 222, at para. 128, where the Supreme Court of Canada held that “[a] fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty.”

[28] It is clear that bifurcating the issues will create a prejudice for the Respondent because it will deprive the Crown, in Part I, from making its arguments with respect to the Indian Act as a means of defense to the allegations of breach of fiduciary or trust-like obligations. If this is not what the Claimant is seeking, then bifurcation will lead to duplication of the evidence on the scope of Canada’s fiduciary or trust-like obligations: see the Agreed Statement of Issues, Part I, at para. 3 and Part II at para. 2.

[29] Moreover, historical evidence shall also be duplicated. Katherine O’Connor, historical researcher, has been retained by the Respondent to conduct a historical land sales and trust account analysis, and in particular, to review the accuracy of the reports and studies prepared by Lockart & Associates Consulting and Joan Holmes & Associates Inc. in support of the Claimant’s claim. As it appears in her affidavit dated April 22, 2013, and filed on behalf of the Respondent, she declares that it is not always possible to distinguish expenditures attributed to Sale Proceeds from expenditures from other moneys credited to the Claimant.

[30] The Claimant submits that if the Tribunal concludes that Treaty No. 4 and the surrender document did not impose any obligations on the Respondent in managing the Sale Proceeds, it will not be required to analyse the obligations in Part II, which arose pursuant to the *Indian Act* in relation to the Sale Proceeds.

[31] However, in the event of bifurcation, either party may then attempt to seek judicial review to the Federal Court of Appeal and eventually appeal to the Supreme Court of Canada. Should this be the case, the hearing on Part II may not occur for a number of years.

[32] The Claimant also recognizes that a decision on the Sale Proceeds will not lead to a resolution of the entire claim. The Claimant however submits that a decision on the Sale Proceeds may lead to settlement discussions on the remaining issues and potentially result in the resolution of the entire claim. There is no evidence in the record supporting this submission. At

this stage of the proceedings, any possibility of settlement is purely speculative.

[33] I am not convinced that bifurcation will narrow the issues for the second trial, since the record shows that many issues in Part I are factually and legally interwoven with those issues raised in Part II.

[34] Finally, the record shows that the Claimant has already devoted resources to the preparation of Part II. As it appears in the Amended Endorsement dated February 25, 2013, during a case management conference held on February 13, 2013, the Claimant opposed a request from the Respondent to bifurcate the validity and the compensation arguing that it has received funding to prepare its case on compensation and that the expert's work is well under way.

V. CONCLUSIONS

[35] Therefore, taking into account all of the circumstances, considering the proceedings as a whole, the prejudice which the Respondent may suffer, the resulting duplication of evidence and of procedural steps, the fact that the severance of the issue in Part I will not put an end to the entire claim, and the fact that the Claimant has already devoted resources to the preparation of Part II, I do not consider it appropriate in order to secure the just, timely or cost-effective resolution of this claim, to order a bifurcation of the issues set out in Part I of the Agreed Statement of Issues from the remaining issues raised in Parts II to V.

[36] Therefore, in exercising my discretion pursuant to Rule 4 of the *SCT Rules*, the Application of the Claimant is dismissed.

JOHANNE MAINVILLE

Honourable Johanne Mainville
Specific Claims Tribunal Canada

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

Date: 20130626

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OTTAWA, ONTARIO June 26, 2013

PRESENT: Honourable Johanne Mainville

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Respondent

COUNSEL SHEET

TO: Counsel for the Claimant KAHKEWISTAHAW FIRST NATION
As represented by Stephen M. Pillipow and Adam Touet
Woloshyn & Company

AND TO: Counsel for the Respondent
As represented by Lauri Miller and Donna Harris
Department of Justice