FILE NO.: SCT-2003-20
CITATION: 2023 SCTC 5
DATE: 20231219

OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULÈRES

BETWEEN:

INNU FIRST NATION OF PESSAMIT

Claimant (Applicant)

– and –

HIS MAJESTY THE KING IN RIGHT OF CANADA
Represented by the Minister of Crown-Indigenous Relations

Respondent (Respondent)

Marie-Christine Gagnon and Catherine Ouellet, for the Claimant (Applicant)

Mireille-Anne Rainville and Benjamin Chartrand, for the Respondent (Respondent)

HEARD: via written submissions

REASONS ON APPLICATION

Honourable Danie Roy

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

Cases Cited:

Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada, 2012 SCTC 6; *The Innu of Uashat Mak Mani-Utenam v Her Majesty the Queen in Right of Canada*, 2016 SCTC 13.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 13.

Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-119, rr 5, 110, 111.

Headnote:

This is an application by the Claimant to the Specific Claims Tribunal (the Tribunal) for an award of costs in the Claimant's favour following the Tribunal's decision, rendered orally, dismissing the Respondent's amended application for particulars.

The Tribunal is of the opinion that this case does not have all the elements required to depart from the Tribunal's usual practice, established in *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6, of not awarding costs except in cases where there has been conduct that is an abuse of process, impedes the resolution of the claim, or is reprehensible, egregious or outrageous.

TABLE OF CONTENTS

I. OVERVIEW

[1] On July 23, 2021, the Respondent filed a notice of application for particulars ("Application for Particulars") with the Specific Claims Tribunal (the Tribunal). On December 7, 2022, the Claimant filed an Amended Declaration of Claim, which included the particulars requested. On December 23, 2022, the Respondent filed a notice of amended application for particulars ("Amended Application for Particulars"). The Claimant then filed a response to the Amended Application for Particulars on February 15, 2023.

[2] Since the Respondent was not satisfied with the particulars provided, the Tribunal held a hearing on the issue during the case management conference on March 31, 2023.

[3] On April 17, 2023, during the following case management conference, the Tribunal rendered an oral decision and dismissed the Respondent's Amended Application for Particulars. On May 16 and 17, 2023, the parties submitted written submissions to the Tribunal regarding their positions on awarding costs following the Tribunal's decision.

[4] The issue before the Tribunal is the following: should costs be awarded in favour of the Claimant following the Tribunal's decision dismissing the Respondent's Amended Application for Particulars?

[5] For the following reasons, the Tribunal is of the opinion that this case does not have all the elements required to depart from the Tribunal's usual practice of not awarding costs except in cases where there has been conduct that is an abuse of process, impedes the resolution of the claim, or is reprehensible, egregious or outrageous.

II. FACTS

[6] The Claimant filed the Declaration of Claim with the Tribunal on July 23, 2020, and the Respondent submitted its response on October 23, 2020. Case management conferences were held on January 18, 2021, March 25, 2021, June 15, 2021, and July 20, 2021, to get the case started before the Tribunal.

[7] During the case management conference on July 20, 2021, the Claimant stated it wanted to have certain elders, who were in poor health, testify before the date scheduled for the hearing

on the oral history evidence, and suggested this be done by filing written statements. Since this was the first time this option was raised by the Claimant and the Respondent did not want to waive its right to cross-examine the witnesses, the Tribunal encouraged the parties to agree on a method to take this testimony expeditiously, insisting on a method that would allow the Respondent to cross-examine the witnesses.

[8] During this same case management conference, the parties discussed the applications for particulars that the Claimant and the Respondent planned to file. The Claimant did not respond to the Respondent's draft application for particulars dated April 9, 2021, and still had not submitted its application for particulars regarding the Respondent's response. The Tribunal asked the parties to work together to find common ground on the applications for particulars or, failing that, to file the applications for particulars with the Tribunal by July 23, 2021, at the latest.

[9] The Respondent filed its Application for Particulars with the Tribunal on that date. The Claimant decided not to file an application for particulars.

[10] The hearing of the Application for Particulars was scheduled for September 2, 2021, but was adjourned by the Tribunal pending the appointment of a new Francophone member of the Tribunal.

[11] On October 20, 2021, the Complainant provided some particulars informally, but the Respondent insisted that they were not sufficient and that other particulars were still needed. The Respondent was of the view that the Declaration of Claim had to be amended to formally include these particulars.

[12] Time passed, and the parties could not agree on how to proceed. The Claimant was dealing with delays in obtaining instructions from the band council because of the Claimant's strict public health measures, which remained in force until April 2022, and because of the election of a new band council in August 2022.

[13] In October 2022, the Claimant attempted to set a date with the Respondent for the examination of the elders, with both parties in attendance. The Respondent was of the view that the issues tied to the Application for Particulars should be resolved by the Tribunal before the elders' testimonies were taken, or that another application should be filed with the Tribunal to

authorize taking their testimonies before the hearing of the Application for Particulars.

[14] On December 7, 2022, the Claimant filed the Amended Declaration of Claim with the Tribunal.

[15] On December 23, 2022, the Respondent filed an Amended Application for Particulars with the Tribunal to specify the particulars it was seeking.

[16] On January 20, 2023, the Claimant filed with the Tribunal its application to proceed with the examination of certain elders by written statements prior to the hearing, and reserved the right to seek costs.

[17] On March 31, 2023, a hearing was held on the Amended Application for Particulars during a case management conference.

[18] On April 17, 2023, during the subsequent case management conference, the Tribunal rendered its decision orally and dismissed the Respondent's Amended Application for Particulars. The parties were asked to send the Tribunal their written submissions regarding their positions on awarding costs, which they did on May 16 and 17, 2023.

[19] A hearing on the oral history evidence and a site visit were held June 12 to 16, 2023, presided by the new Francophone member of the Tribunal, in order to preserve the elders' testimonies.

III. PARTIES' POSITIONS

[20] The Claimant is asking the Tribunal to award costs in its favour, following the dismissal of the Respondent's Amended Application for Particulars. It submits that the Respondent's conduct regarding its request to proceed with the examination of elders prior to the hearing and its Amended Application for Particulars justify costs being awarded in its favour.

[21] The Respondent considers that the facts in this case do not meet the standard required for awarding costs against it since its conduct was never reprehensible, scandalous, outrageous or otherwise in bad faith and since, in its opinion, the debate on the particulars was relevant and justified in the context of this case.

IV. ISSUE

[22] The issue before the Tribunal is the following: should costs be awarded in favour of the Claimant following the Tribunal's decision dismissing the Respondent's Amended Application for Particulars?

V. APPLICABLE LAW

[23] Under section 13 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], the Tribunal is authorized to exercise its discretionary power with regard to costs. Paragraph 13(1)(d) of the *SCTA* allows the Tribunal to award costs in accordance with its own rules.

[24] Rules 110 and 111 of the *Rules of Practice and Procedure of the Specific Claims Tribunal*, SOR/2011-119, state the Tribunal's authority when awarding costs. The discretionary nature of awarding costs is noted by the use of the word "may":

> **110(1**) After the hearing of an application, the Tribunal may award costs in relation to that application.
>
> **(2)** After the hearing of the specific claim, the Tribunal may award costs in relation to the proceedings.
>
> **111(1)** When deciding whether [to award costs] under subrule 110(2), the Tribunal must consider the following factors:
>
> **(a)** whether a party has acted in bad faith;
>
> **(b)** whether a party has failed to comply with an order of the Tribunal; or
>
> **(c)** whether a party has refused a reasonable offer to settle.
>
> **(2)** When deciding whether to award costs to the claimant under subrule 110(2), the Tribunal must also consider the following factors:
>
> **(a)** whether the claimant's costs are reasonably incurred but are disproportionate to the amount of compensation awarded; and
>
> **(b)** whether the issues in relation to the specific claim are complex or contain elements that are of public interest. [Emphasis added.]

[25] Rule 5 of the *Rules of Practice and Procedure of the Specific Claims Tribunal*, SOR/2011-119, states that the Tribunal "may provide for any matter or practice or procedure not provided for in these rules by analogy to the *Federal Courts Rules*".

[26] As the parties have noted, *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6 [*Big Grassy*] *First Nation (Indian*

Band), is the case in which the Tribunal first clarified its approach regarding costs.

[27] The Tribunal established that the "loser pays" costs regime in the civil courts of Canada is a barrier to access to justice and would frustrate and impede the specialized mandate of the Tribunal to be "accessible and affordable, providing an environment that focuses on the early resolution of disputes in a cost effective manner proportionate to the needs and resources of the users it was designed to serve" (*Big Grassy First Nation (Indian Band)* at paras 10, 12).

[28] Indeed, the Tribunal concluded that "[s]ave and except for cases of improper conduct or abuse of process, the Specific Claims Tribunal will adopt a no costs regime in relation to applications brought in the course of proceedings before it" (*Big Grassy First Nation (Indian Band)* at para 13).

[29] The Tribunal justified its position regarding costs as follows:

> Zealously pursuing one's case will not justify a costs sanction: "a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and malicious counter-productive conduct, on the other." [footnote omitted]
>
> …
>
> The Tribunal's policy regarding costs must be interpreted in light of its statutory mandate and the distinctive nature of specific claims adjudication. Cost awards can discourage parties from filing claims, contrary to the intent and philosophy of the Act, which was promulgated specifically to have specific claims heard expeditiously and efficiently. Cost awards may impede access to justice and deter meritorious claimants, especially First Nations with limited financial resources.
>
> In claims or applications adjudicated by the Tribunal, circumstances of reprehensible, egregious or outrageous conduct may justify an award of costs. Abuse of process and conduct that impedes the resolution of claims may similarly attract a costs sanction. Otherwise, no costs should be ordered.
>
> A presumption of no costs in cases before the Tribunal is reasonable and fair given the historic difficulty First Nations have faced in having their specific claims addressed, the purpose of the Act, and the substantial risk that traditional cost presumptions would likely deter claimants from making proper use of the Tribunal. There is a financial imbalance in all cases before the Tribunal because the parties are necessarily a First Nation and the Crown with completely different resources at their disposal. It would be manifestly unfair to implement a conventional costs regime given this disparity. [*Big Grassy First Nation (Indian Band)* at paras 37, 40–42]

[30] Since that decision, the Tribunal has applied this principle consistently. While the Tribunal

specifically confirmed the application of this approach in *The Innus of Uashat Mak Mani-Utenam v Her Majesty the Queen in Right of Canada*, 2016 SCTC 13, the general absence of cost awards in claims pending before the Tribunal is even more indicative of its widespread application.

[31] Thus, if one of the parties shows abusive, reprehensible, egregious or outrageous conduct, the Tribunal could disregard its general approach and award costs. In the absence of such conduct, the Tribunal tends to refrain from awarding costs, in order to preserve the purpose and spirit of the *SCTA*.

VI. ANALYSIS

[32] The Tribunal's practice to avoid awarding costs was created with consideration for the Tribunal's unique mandate, the history of inequality between the parties that appear before the Tribunal, and the significant barriers to justice First Nations have historically faced in the adjudication of their claims. These underlying motives therefore aim to protect First Nations from an abuse of the costs mechanism, and to preserve their access to a tribunal that can adjudicate their claims fairly and in a timely manner.

[33] In the case before us, however, it is the First Nation requesting an award of costs in its favour, because of the Crown's conduct. The imperative of protection underlying the Tribunal's practice is therefore not at issue. In fact, it must be acknowledged that the purpose and spirit of the *SCTA* would be better served by awarding costs against the Crown when it engages in conduct that is detrimental to the resolution of the claim, by filing a multitude of applications during the proceeding and creating excessive delays.

[34] The criteria established by Justice Smith in *Big Grassy First Nation (Indian Band)* remain relevant in these circumstances. If the Crown's conduct reaches the threshold of abusive, reprehensible, egregious or outrageous conduct, the Tribunal will be able to award costs.

[35] In this case, however, the Crown's conduct does not meet this threshold.

[36] On the one hand, the delays are attributable to both parties and to factors linked to the departure of the Tribunal member assigned to the case at the time. The Respondent tried to have its application for particulars heard expeditiously, and although the hearing was initially scheduled

for September 2, 2021, the Tribunal had to adjourn it. The Claimant even recognized that it was partially responsible for the delays, at paragraph 18 of the joint status report dated November 7, 2022. The hearing was resumed promptly following the appointment of the undersigned to the Tribunal.

[37] On the other hand, and although the Respondent's insistence that the hearing on the Amended Application for Particulars be held before the testimony of the elders may have delayed the process to take said testimony, its conduct did not cause prejudice to the resolution of the claim. On the contrary, the application was promptly heard by the Tribunal, and all the elders' testimonies were taken properly. In fact, the Tribunal proceeded with the hearing on the oral history evidence and conducted a site visit from June 12 to 16, 2023.

[38] The Respondent did unnecessarily insist that the Claimant file an application to proceed with the examination of certain elders prior to the hearing. The Tribunal acknowledges that the Respondent's positions amount to zealously pursuing a case, and that some of them were not necessary, but the Tribunal does not see in this any conduct that is an abuse of process, impedes the resolution of the claim, or is reprehensible, egregious or outrageous. The Respondent's conduct at this stage of the case does not reach the threshold required to justify costs.

VII. CONCLUSION

[39] It appears from the evidence that this case does not have all the elements required to justify breaking from the Tribunal's usual practice of avoiding awarding costs unless there is conduct that is an abuse of process, impedes the resolution of the claim, or is reprehensible, egregious or outrageous.

[40] The Claimant's application is therefore dismissed.

DANIE ROY

Honourable Danie Roy

Certified translation
Michael Palles

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20231219

File No.: SCT-2003-20

OTTAWA, ONTARIO, December 19, 2023

PRESENT: Honourable Danie Roy

BETWEEN:

INNU FIRST NATION OF PESSAMIT

Claimant (Applicant)

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
Represented by the Minister of Crown-Indigenous Relations

Respondent (Respondent)

COUNSEL SHEET

TO: **Counsel for the Claimant (Applicant) Innu First Nation of Pessamit**
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AND TO: **Counsel for the Respondent (Respondent)**
As represented by Mireille-Anne Rainville and Benjamin Chartrand
Department of Justice