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SPECIFIC CLAIMS TRIBUNAL

FILED — TRIBUNAL DES REVENDICATIONS PARTICULIÈRES — DÉPOSÉ

July 28, 2011

KRR for Guillaume Phaneuf

Ottawa, ON | 4

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant
(Respondent)

v.

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

Respondent
(Applicant)

RESPONSE TO REQUEST FOR LEAVE TO FILE A NOTICE OF APPLICATION FOR THE RESOLUTION OF A PROCEDURAL ISSUE

Pursuant to Rule 35 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure.*

TO: Department of Justice Canada
Prairies Regional Office (Saskatoon)
10th Floor, 123 – 2nd Avenue South
Saskatoon, SK S7K 7E6
Fax: (306) 975-6780
Email: sasspecclaimtribbo@justice.gc.ca
Attention: Daniel J. Kuhlen

I. Response to Leave to file a Notice of Application

1. The Claimant, the Beardy's & Okemasis Band #96 and #97, opposes the application by Her Majesty the Queen in Right of Canada ("the Applicant") for leave to make an application for an Order varying, dispensing with compliance, or supplementing the time for filing of Canada's Response as prescribed by Rule 42 until after the Tribunal has ruled on an application by Canada to strike the within Claim on the grounds that the Tribunal lacks jurisdiction to hear the Claim.

II. Grounds

2. Allowing an extension of time for the Applicant to file a Response to the Declaration of Claim will delay the just, timely and cost-effective resolution of this Claim. The question of whether this claim falls within the scope of the Specific Claims Policy and section 14 of the Act can be raised as a defence in the Response to be filed by the Applicant and addressed by the Tribunal upon receipt of an application to strike.

III. Canada's Request for an Extension to Bring a Motion to Strike the Claim

3. The Applicant takes the position that it should not be required to file a Response to the Claim because it intends to bring an application to strike under section 17 of the Act on the grounds that the Tribunal lacks jurisdiction to hear the matter because (1) it is premature; and (2) the Claim does not fall within any of the permitted grounds for filing a claim under section 14 of the Act.

4. Firstly, Canada would suffer no prejudice by filing its response within the 30 day period contemplated under Rule 42. The jurisdictional grounds can be set out in the Response and dealt with upon receipt of an application to strike from the Applicant. Given the onerous test that has to be met to strike a claim, postponing the filing of a Response by Canada would only serve to potentially delay the fair, just and timely resolution of the substantive issues set out in the Treaty Annuities Claim.

5. It is important to bear in mind that the Applicant will bear a heavy onus in seeking to have the Treaty Annuities Claim struck or summarily dismissed. It is submitted that the test to be met to strike a claim is whether it is plain and obvious that the Claimant has no claim within the meaning of the Act and that they are bound to fail. The jurisprudence establishes that "it must be beyond a reasonable doubt" that the claim will not succeed. The case law is clear that this is an onerous and high threshold test and that the onus of proof lies squarely on the Applicant to prove that the claim is doomed to fail.

6. The Applicant is attempting to deny the Claimants their "day in court" at a very early stage in this proceeding. This is a claim for compensation relating to the unlawful termination of annuities that were promised under Treaty 6. It is trite law that matters involving constitutional rights should not be considered absent a full evidentiary record:

Canada (Attorney General) v. Anishnabe of Wauzhushk Onigum Band, [2002] O.J. No. 3741.

7. The leading case with respect to the test in determining whether a court should strike a cause of action is *Hunt v. Carey Canada Inc* in which Wilson J., for the Court, set out the following test:

> As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out
>
> ….
>
> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general will continue to evolve to meet the legal challenges that arise in our modern society.
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> ***Hunt v. Carey Canada Inc*, [1990] 2 S.C.R. 959 at pp. 979 and 990**

8. In *Fullowka et al. v. Whitford et al.*, a number of important principles with respect to striking pleadings were identified which have relevance to the present matter:

> (a) the impugned pleadings must be read generously;
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> (b) a pleading will not be struck out if the flaws in it are capable of amendment;
>
> (c) a pleading will not be struck out for want of a cause of action unless the flaw is plain and obvious;
>
> (d) the claim advanced must be hopeless to be struck out;
>
> (e) a court must use extreme caution on a motion to strike out a pleading for want of a cause of action;
>
> (f) that the plaintiff will have to make novel arguments is no ground to strike out;
>
> (g) a motion to strike out a pleading is not the appropriate time to decide general important or serious questions of law;
>
> (h) still less should a pleading be struck out by deciding a difficult question of law; and

> (i) the Rule does not say that the court "shall" strike out. It is permissive and never forces the court to strike out a claim or a pleading.
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> ***Fullowka et al. v. Whitford et al.* (1996), 147 D.L.R. (4th) 531 (N.W.T.C.A.); leave to S.C.C. refused, at pp. 537-544**

9. Turning first to the question of whether the Treaty Annuities Claim satisfies s. 14 of the Act, we submit that the subject matter falls clearly within the grounds set out therein:

> **14**(1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (*a*) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> (*b*) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;…

10. The plain and ordinary meaning of the Annuity clause in Treaty 6 confirms that the parties intended that the Crown would pay a $5 annuity to every treaty Indian annually in perpetuity as the *quid pro quo* or consideration for the surrender of the Indians' collective interest in 121,000 square miles of land covered by Treaty 6.

11. A.G. Leslie, the Officer in charge of the administrative work of the Trusts Division, Department of Indian Affairs, made the following statement to the Special Joint Committee of the Senate and House of Commons on July 4, 1946 regarding the distribution of annuities owed under treaty. The fact that annuities were considered money payable to the First Nations "as of right where the tribe to which they belong subscribed to the respective treaty" is evidence that Canada acknowledged that treaty annuities were a collective right owed as consideration for what it viewed as the extinguishment of Indian title:

> It is to be remembered that these funds are not to be regarded as either largess or humanitarian in nature. They are a debt we owe to the Indian people in the same way that instalments are owing on property, for example, a house and lot which is bought by a down payment of part of the purchase price. The cash down payment was made in the case of the Indians at the time the various treaties were negotiated in amounts of $12 per capita or $35 per capita, etc. The Crown agreed at that time to continue instalments at $4 or $5 annually per capita in perpetuity. These payments, then, are part of the purchase price, part of the consideration, for the extinguishment of the Indian title to the lands he once held. The distinction between these moneys and those paid say for medical or welfare services is sometimes overlooked. Annuity money is payable to the Indians as of

> right where the tribe to which they belong subscribed to the respective treaty. The only difficulty we encounter is in our efforts to make sure that all those entitled to them receive the payments.

12. Canada also took the position that the treaty right to annuity payments is collective in nature in *Soldier v. Canada*. The Manitoba Court of Queen's Bench decision in *Soldier v. Canada*,[1] and affirmed by the Manitoba Court of Appeal,[2] support the assertion that the right to annuities under treaty is a collective right. At the Queen's Bench level, the plaintiffs applied for certification of as a class action under The Class Proceedings Act in Manitoba. The plaintiffs, Mr. Soldier and Mr. Bone, members of Treaties 1 and 2 respectively, claimed that the annuities paid were not as promised under the treaties and sought damages from the federal Crown on behalf of all treaty beneficiaries for breach of treaty. They argued that Canada had a continuing obligation to pay each beneficiary under the treaties an annuity amount sufficient to purchase a basket of goods at the current cost price.

13. Canada argued that the plaintiffs do not have standing to advance their claims because treaty rights are collectively held by the bands. Therefore, it is the band as the beneficiary collective which has the right to challenge the interpretation of the treaties. Canada also asserted the fact that although treaty rights may be exercised individually, this does not change the fact that it is a collective right.[3] The Court agreed with Canada's analysis of the authorities on the issue:

> The Supreme Court of Canada has characterized treaty rights as collective and I am not persuaded that the right to an annuity is different from other treaty rights. All treaty rights are part of an intricate set of mutual promises between the parties.[4]

14. Canada also attempted to draw a distinction between issues relating to the interpretation of annuity rights which should be brought by the collective and the enforcement of annuity rights where there had been non-payment which should be brought by individual band members. The Court did not adopt Canada's distinction:

> [E]ntitlement to an annuity is tied to bands. Specifically, membership in a band is required in order to be entitled to an annuity. If a person were to transfer to another band, the individual would receive whatever treaty annuity was payable to registered Indians who were eligible through the new band. Similarly, a person who was to transfer from a treaty band to a non-treaty band would cease to collect treaty annuities.
>
> While the entitlement of a particular individual to recover a payment not made on the basis of a dispute about band membership could be an individual right, I find that the right

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[1] *Soldier v. Canada (Attorney General)*, 2006 CarswellMan 82 (M.B.Q.B.).

[2] *Soldier v. Canada (Attorney General)*, 2009 CarswellMan 36 (M.B.C.A.).

[3] *Solder* at para 32 (M.B.Q.B.).

[4] *Soldier* at para 41 (M.B.Q.B.).

> to the annuity itself and any interpretation of the treaty necessary to determine that right are collective.[5]

15. The *Soldier* case confirms that membership in a band determines entitlement to annuities and, in consequence, the damages flowing from breach of treaty in relation to the wrongfully withheld annuities are essentially collective in nature. The right to the annuity itself and any interpretation of the treaty necessary to determine that right are indeed collective. These rights could never be exercised by nor transmitted to individual claimants after ceasing to be a member, because these rights are "part of an intricate set of mutual promises" made between Canada and their signatory tribes when Canada agreed to pay consideration for the extinguishment of the First Nations' title.

16. In view of the position taken by Canada in the *Soldier* case, it is our opinion that Canada is now estopped from arguing that a claim to treaty annuities does not fall within the scope of the Specific Claims Policy in light of its arguments in Soldier which were adopted as an accurate statement of the law in those decisions. Indeed, it would be contrary to the honour of the Crown for Canada to now advance a contrary position in the context of the Specific Claims Policy solely to avoid its legal responsibilities to First Nations.

17. Given that an application to strike will be purely discretionary, we submit that the question of whether the termination of annuities under Treaty 6 is a proper "claim" within the meaning of section 14(1) should not addressed or disposed of in a summary manner because this will require a careful consideration of the substantive merits of the Claim based on a full evidentiary record.

18. With respect to the question of whether this Claim is premature, the Claimant filed a detailed historical and legal submission under Canada's Specific Claims Policy on December 6, 2001 alleging the unlawful termination of a treaty right to annuities from 1885–1889 with the Minister of Indian Affairs.

19. Six and a half years later, the Specific Claims Branch responded to the claim in a letter dated June 17, 2008 and took the position that the Treaty Annuities Claim fell outside of the scope of the Specific Claims Policy on the grounds that the termination of treaty annuities and other losses were owed to individuals rather than the First Nation as a whole.

20. On November 13, 2008, Maurice Law replied to Canada's letter of June 17, 2008 on behalf of the First Nation outlining its position that the Treaty Annuities Claim fell within the scope of the Specific Claims Policy and seeking confirmation in writing that the Minister had rejected this claim so that it may be filed with the Specific Claims Tribunal.

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5 *Soldier* at paras 42-3 (M.B.Q.B.) [Emphasis Added].

21. By letter dated December 17, 2008 from the Specific Claims Branch to Maurice Law, Canada confirmed that it would not negotiate the Treaty Annuities Claim because the treaty annuities which were terminated were owed to individuals as opposed to the First Nation as a whole and, therefore, this claim fell outside of the scope of the Specific Claims Policy.

22. On February 10, 2010, Maurice Law wrote to the Specific Claims Tribunal and copied the Specific Claims Branch advising that the First Nation wished to file its claim before the Specific Claims Tribunal and to seek a hearing and decision pursuant to section 20 regarding compensation for losses arising from Canada's breach of its treaty obligations and termination of treaty annuities to the First Nation under Treaty 6.

23. According to the status report on the Specific Claims Branch's website on June 15, 2011, the Treaty Annuities Claim shows as "File Closed" and referred to the Specific Claims Tribunal on February 10, 2010.

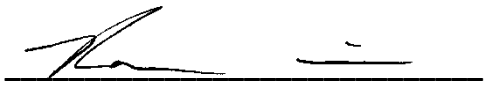
24. If the Claimant's position is that this Claim falls outside the scope of s. 14 of the Act and the Specific Claims Policy, it is cynical for the Applicant to suggest that the Claim is premature and has not been properly filed under the Specific Claims Policy. There is nothing to be served by having the Applicant resubmit its claim with the Specific Claims Branch only to have it rejected again on the grounds that it does not fall within the scope of the policy.

IV. Relief Sought

25. In light of the foregoing, the First Nation requests that the Tribunal reject the Applicant's request to not file a Response pending the outcome of an application to strike the Claim. We also seek costs of this motion.

Dated this 28th day of July, 2011.

MAURICE LAW



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