

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

AUNDECK OMNI KANING

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	October 9, 2012	D É P O S É
Guillaume Phaneuf		
Ottawa, ON		4

Claimant

v.

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

Respondent

RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

TO: Aundeck Omni Kaning First Nation

As represented by:

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OVERVIEW

1. This is the Response of Her Majesty the Queen in Right of Canada (“Canada”) to the Declaration of Claim filed by Aundeck Omni Kaning with the Specific Claims Tribunal on August 7, 2012 pursuant to the *Specific Claims Tribunal Act* (the “Act”).
2. The Claimant purports to have fulfilled the jurisdictional requirement of s. 16(1) of the *Act* on the basis of the wording of s. 16(1)(a), that “the Minister has notified the First Nation in writing of his decision not to negotiate the claim.” Canada’s position is that the Minister did not provide the requisite notice under s.16(1)(a), and consequently, this Tribunal does not have jurisdiction over the claim for compensation advanced in the Declaration on the basis of that statutory provision.
3. The compensation claim advanced in the Declaration is that Canada breached its fiduciary obligations by paying \$559.63 from the First Nation’s Capital trust monies on behalf of individuals not members of the First Nation in 1914.
4. This claim is substantially the same as the claim the First Nation filed with the Minister of Indian Affairs and Northern Development (“the Minister”) on December 10, 2008. On November 25, 2011, the Minister informed the First Nation that this claim had been accepted for negotiation, thereby commencing the negotiation period.
5. Section 16(1)(b) of the *Act* is not relied on by the Claimant, and is in any event not applicable.
6. Section 16(1)(d) of the *Act* requires that three years pass after the date on which the Minister has notified the First Nation in writing of the Minister’s decision to negotiate the claim before this Tribunal has jurisdiction. Three years have not passed since November 25, 2011, the date of the Minister’s notification.

7. Furthermore, the First Nation has made no request and the Minister has not otherwise agreed in writing that this claim should go before this Tribunal despite the negotiations, as required by s. 16(1)(c) of the *Act*.
8. Consequently, as none of the statutory requirements of s. 16(1) of the *Act* have been met, this Tribunal does not have jurisdiction to hear this claim.
9. In the alternative, if this Tribunal does have jurisdiction to hear this claim, the basis upon which this Tribunal may award compensation is set out in s. 20(1)(c) of the *Act*.

The Claimant's Secondary Claim:

10. The Declaration of Claim also alleges that Canada breached treaty obligations and the honour of the Crown when it offered to settle this claim.
11. Canada denies that this Tribunal has jurisdiction to hear the claim that Canada breached a duty in its conduct of the negotiations, since this secondary claim does not meet the criteria for a claim that may be filed with the Tribunal, as outlined in s. 14 of the *Act*.
12. Even if the Tribunal does have jurisdiction to hear the claim that Canada breached a duty in the conduct of the negotiations this secondary claim is not validly before this Tribunal because none of the requirements of s. 16(1) of the *Act* have been met.
13. Section 16(1) of the *Act* states: "A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister." The claim set out in paras. 6.3 and 6.4 were not part of the claim filed with the Minister on December 10, 2008. Consequently, this Tribunal does not have jurisdiction over this claim.

14. Furthermore, the Declaration of Claim pleads as the factual basis for this secondary claim details of the negotiation that are subject to settlement privilege. Consequently, there is no factual basis for this secondary claim that is or can be properly before this Tribunal.

RESPONSE PURSUANT TO RULE 42

I. Status of Claim (R. 42(a))

15. On November 5, 2008, the Specific Claims Branch received a claim from the Aundeck Omni Kaning First Nation (formerly the Ojibways of Sucker Creek). The Claim was filed with the Minister on December 10, 2008.
16. The Claim alleged that George Obbetossaway, his wife and minor child were enfranchised in 1909. A daughter, Donaldda, was born in 1910. Another daughter, Mildred, was born in 1912. In 1914 George received five shares of the First Nation's trust monies. Two of these shares were for Donaldda and Mildred. The combined value of the two shares was \$559.63.
17. The Claim alleges that the payments on behalf of Mildred and Donaldda were breaches of Canada's fiduciary duty, as the two daughters were not members of the First Nation and thus not entitled to have shares paid to George on their behalf.
18. On November 25, 2011, Canada informed the First Nation that the Claim had been accepted for negotiations. Negotiations continued until June, 2012, when the Claimant First Nation unilaterally withdrew from the negotiations. At no time did the Minister advise that the claim was not accepted for negotiation, in whole or in part, as required by s. 16(1)(a) of the *Act*.

II. **Validity of Claim (R. 42(b)).**

Breach of Fiduciary Duty:

19. As set out above, the Minister accepted the original claim for negotiations on November 25, 2011. Thus, Canada accepts the validity of the claim as then filed.
20. On August 7, 2012, the First Nation filed the present Claim with this Tribunal.
21. It is Canada's position that the claim was accepted for negotiation, negotiations took place, and the Claimant First Nation unilaterally withdrew from the negotiations. Consequently, the Claimant First Nation is barred by s. 16(1)(d) of the *Act* from filing this claim until three years have passed from the date when the Minister notified the First Nation that the claim had been accepted for negotiation, or until the Minister consents in writing to the filing of this claim with the Tribunal pursuant to s. 16(1)(c).
22. The three years will not have passed until November 25, 2014. Further, the Claimant First Nation has not requested the Minister's consent in writing to the filing of this claim with this Tribunal, nor has the Minister otherwise consented to the filing of the claim with the Tribunal. Therefore, at the present time this Tribunal does not have jurisdiction to hear the claim that Canada breached its fiduciary duty.
23. There is thus no claim arising from a breach of fiduciary duty in the disbursement from the First Nation's trust monies validly before this Tribunal.
24. In the alternative, if this Tribunal has jurisdiction over the breach of fiduciary duty claim, which is denied, Canada's position on the validity of the claim, solely based on and limited to the facts in the within proceeding and pursuant to s. 31 of the *Act*, is that it admits the validity of claim set out in paragraphs 6.1 and 6.2 of the Declaration of Claim.

Breach of Treaty Duties and other Lawful Obligation:

25. Canada denies the validity of the claim set out in paras. 6.3 and 6.4 of the Declaration of Claim. This claim alleges that Canada breached treaty duties and its lawful obligation to resolve matters in good faith. Canada denies that this Tribunal has jurisdiction over this claim.
26. This secondary claim is not validly before this Tribunal because none of the criteria of s. 14 of the *Act* have been met.
27. Section 14 of the *Act* states:
- 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;
 - (d) an illegal lease or disposition by the Crown of reserve lands;
 - (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or
 - (f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.
28. The claim of a breach of treaty duty and lawful obligation to resolve matters in good faith in the conduct of the negotiation of a specific claim, as set out in paras.

6.3 and 6.4, does not meet the above criteria. Consequently, this Tribunal does not have jurisdiction over this claim.

29. Even if the Tribunal does have jurisdiction to hear the claim that Canada breached a duty in the conduct of the negotiations this secondary claim is not validly before this Tribunal because none of the requirements of s. 16(1) of the *Act* have been met.

30. Section 16(1) of the *Act* states: “A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister.” The claim set out in paras. 6.3 and 6.4 were not part of the claim filed with the Minister on December 10, 2008. Consequently, this Tribunal does not have jurisdiction over this claim.

31. Furthermore, the Declaration of Claim pleads as the factual basis for this claim details of the negotiation that are subject to settlement privilege. Consequently, there is no factual basis for the claim that is or can be properly before this Tribunal.

III. Basis for Compensation (R. 42(c))

32. In the alternative, if this Tribunal does have jurisdiction to hear the breach of fiduciary duty claim, Canada accepts the validity of the claim arising from a breach of a fiduciary duty in the expenditure of trust monies on behalf of individuals not members of the First Nation, as filed with the Minister on December 10, 2008.

33. Rule 42(c) specifies what Canada must include in its Response if it accepts the validity of a claim:

which of paragraphs 20(1)(e) to (h) of the Act may provide the basis for the Tribunal to award compensation[.]

34. Sections 20(1)(e) to (h) state that the Tribunal:

e) shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;

(f) shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid;

(g) shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority; [and]

(h) shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g)[.]

35. All of the above-cited provisions set out the basis for compensation for claims arising from land. The present claim arises from an improper disbursement of trust monies. Consequently, none of 20(1)(e) to (h) can provide an appropriate basis for compensation.

36. Section 20(1)(c) states the applicable principle for compensation for the present claim. The Tribunal:

shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts[.]

37. If this Tribunal has jurisdiction, which is denied, any compensation in this claim would be awarded pursuant to paragraph 20(1)(c).

IV. Allegations of Fact – Declaration of Claim (R. 41(e)): Acceptance, denial or no knowledge (R. 42(d))

38. Canada admits paras. 5.1, 5.2, 5.3, and 5.4.

39. Canada denies that paras. 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.11, and 5.12 are properly before this Tribunal, since they set out details of the negotiations that are subject to settlement privilege.

40. Canada denies paras. 2, 5.7 and 5.13, on the grounds that negotiations took place.

V. Statements of Fact (R. 42(a))

41. Canada accepts the facts as set out in Section I of this Response.

VI. Relief (R. 42(f))

42. Canada seeks the dismissal of the Claim in its entirety.

43. Canada seeks its costs in this proceeding

44. Such further relief as this Tribunal deems just.

VII. Communication (R. 42(g))

45. The Respondent's address for service is:

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Dated this 9th day of October, 2012.



Signature of Lawyer for Respondent

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