SCT File No.: SCT-6004-13

SPECIFIC CLAIMS TRIBUNAL

SPECIFIC CLAIMS TRIBUNAL
FILED
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES
DÉPOSÉ
April 17, 2014
Guillaume Phaneuf
Ottawa, ON
6

B E T W E E N:

KEHEWIN CREE NATION

Claimant

v.

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

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: Ron S. Maurice / Steve Carey
Maurice Law Barristers & Solicitors
Counsel for the Claimant
800, 550 – 11th Avenue SW
Calgary, AB T2R 1M7

Phone: (403) 266-1201
Fax: (403) 266-2701
Emails: rmaurice@mauricelaw.com / scarey@mauricelaw.com

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

1. The Claimant, the Kehewin Cree Nation (the "First Nation") which is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* (the "*Act*"), submitted a claim to the Minister of Indian Affairs and Northern Development (the "Minister"), asserting that the First Nation did not receive all of the land to which it was entitled pursuant to the terms of Treaty 6 (the "TLE Claim").

2. The TLE Claim was first submitted in or about October 1992 and was resubmitted in or about April 2009.

3. Canada states that the criteria contained in section 16(1)(a) of the *Act* are met and this claim is validly before the Specific Claims Tribunal.

II. Validity (R. 42(b) and (c))

4. The First Nation alleges that Her Majesty the Queen in Right of Canada, as represented by the Minister of Indian Affairs and Northern Development ("Canada") has failed to provide the First Nation with its full treaty land entitlement pursuant to the terms of Treaty 6.

5. For the purposes of its Declaration of Claim SCT-6004-13 filed on February 13, 2014 (the "Declaration"), the First Nation relies on s. 14(1)(a) of the *Act*:

    a. A failure to fulfill a legal obligation of the Crown to provide lands or other assets under treaty or other agreement between the First Nation and the Crown.

6. Canada denies the validity of the claim.

7. Further, Canada denies that it failed to provide the First Nation with all of the land to which it was entitled pursuant to the terms of Treaty 6 or that the First Nation has suffered any damages. Canada has fully discharged any Treaty 6 land

entitlement obligations that may be owed to the First Nation in that the First Nation has received its full complement of land as set out in Treaty 6.

8. Further, in the alternative, if the Tribunal should find the First Nation's claim to be valid, paragraphs 20(1)(b) and (c) of the *Act* may provide a basis for the Tribunal to award compensation in respect of the claim.

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

9. Unless expressly admitted or accepted in this Response, Canada denies the facts alleged in the claim.

10. Canada admits that the First Nation is a First Nation within the meaning of the *Act*.

11. Canada admits paragraphs 4, 7 and 12 of the Declaration.

12. Canada admits the facts set out in paragraph 8 of the Declaration only to the extent that it is a term of Treaty 6 that the Crown agrees to lay aside reserves for the benefit of the signatories to the treaty "provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families".

13. In response to paragraph 9, Canada states that the facts are irrelevant to the claim before the Tribunal. The First Nation has not alleged the reserve was located in an area not agreeable to it.

14. Canada admits the facts in paragraph 10 of the Declaration only to the extent that Dominion Lands Surveyor ("DLS") A W Ponton surveyed a reserve for the Kehewin Band (now known as the Kehewin Cree Nation) commencing on October 8, 1884 and has no knowledge of whether this was "at the general

location selected by Chief Kehewin in 1876". The remaining statements are argument, and not fact, and therefore should not be included in the Declaration.

15. Canada admits the facts in paragraph 11 of the Declaration only to the extent that the survey plan prepared by DLS Ponton for Kehewin Indian Reserve 123 consisted of 28 square miles. The remaining statements are argument, and not fact, and therefore should not be included in the Declaration.

16. In response to paragraph 13 of the Declaration, Canada admits the existence of a letter dated March 23, 1904 from Assistant Commissioner J A McKenna but denies the facts as summarized by the First Nation. McKenna's letter is addressed to the Secretary, Department of Indian Affairs and not the Department of the Interior. This letter is in response to a request for a "full report before ordering survey of addition to Kehewin's Reserve", and McKenna states that "the only information we have is contained in this extract from a letter from Mr. Agent Sibbald". McKenna supports this request, writing "as these Indian [*sic*] will have to depend mainly upon cattle raising for a living it is important that they should have plenty of hay."

17. Canada admits the facts set out in the first two sentences of paragraph 14 only and denies the facts as summarized in the last sentence of paragraph 14.

18. In response to paragraph 15 of the Declaration, Canada admits only that Indian Agent Sibbald wrote to the Secretary of the Department of Indian Affairs on November 8, 1906 but denies the remainder of the facts as summarized by the First Nation. Agent Sibbald's letter noted a request was made to him by the Indians now resident on Kehewin Reserve 123 as follows:

> "The request now made is to add to the reserve that portion of land that lies between the present northern boundary and the south shore of the Alkaline Lake and extend the eastern boundary, northwards, a distance equal to the extension of the western to meet the lake.

> The strip of land does not average more than about half a mile wide, and is a particularly good piece of hay land, and was not intended to be cut off the old reserve when the re-survey was made in 1904, and the Indians will miss it if not allowed to cut hay there."

19. In response to paragraph 16 of the Declaration, Canada admits the existence of the letter of December 22, 1909 but denies the facts as summarized by the First Nation. The statement of the Indian Agent that "the area of the reserve is only 28.15 sq. miles and the population is 177 leaving an area short of one sq. mile for every five souls" is only one matter raised by Indian Agent Sibbald in that letter.

20. In response to paragraph 17 of the Declaration, Canada:

    a. admits that Sibbald's letter stated that the present population of the reserve was 188 members and that the reserve size was 18,016 acres but says that the correct date of this letter is August 6, 1910;

    b. admits the existence of a letter dated August 22, 1910 which states, in part, that this band is short nearly ten sections and the "present population" would entitle them to 37 3/5 square miles but states that this letter was sent by the Assistant Secretary, Department of Indian Affairs; and

    c. the remainder of the statements in paragraph 17 are argument, and not fact, and therefore should not be included in the Declaration.

21. Canada admits the facts in paragraph 18 of the Declaration only to the extent that by letter dated December 27, 1911, the Deputy Superintendent General of Indian Affairs authorized Agent Sibbald to take a surrender of the two portions given up in exchange for the reserve as now constituted.

22. In response to paragraph 19 of the Declaration, Canada admits only that on February 16, 1912 a surrender of certain lands was obtained from the Kehewin Band in exchange for other land and the surrender was approved by the Governor in Council by Order in Council P.C. 1359, dated June 5, 1913. Canada denies the remaining facts as summarized by the First Nation and states further that the interpretation of the surrender is a matter of law not fact.

23. In response to paragraph 20 of the Declaration, Canada admits only that Order in Council P.C. 413 dated February 26, 1915, rescinded the description of Kehewin Indian Reserve 123 Order in Council P.C. 1151 of May 1889 and set out a new description for the Kehewin Indian Reserve 123, containing 32 square miles, more or less. Canada denies the remaining facts as summarized by the First Nation and states further that the interpretation of the Order in Council is a matter of law not fact. Canada further states that the statements in the last sentence of paragraph 20 are argument, and not fact, and therefore should not be included in the Declaration.

24. Canada admits the facts in paragraph 23 of the Declaration even though this paragraph is contained in Part VI of the Declaration. Canada does not admit any of the other facts and arguments contained in Part VI of the Declaration.

25. Further, Canada expressly denies paragraph 30, also contained in Part IV of the Declaration. The First Nation has received more land than it was entitled to pursuant to the terms of Treaty 6.

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

26. It is a term of Treaty 6 that the Crown agrees to lay aside reserves for the benefit of the signatories to the treaty "provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families". One square mile is 640 acres of land.

27. A reserve for the First Nation was first surveyed in October 1884 (the "date of first survey") and 28 square miles of land were set aside for the Kehewin Band as Indian Reserve No. 123 by Order in Council P.C. 1151 dated May 17, 1889.

28. In 1904, the First Nation asked for a change in the survey of their reserve "to have a portion of the Northern part cut off and to add an equal area to the Eastern Side" so that they could gain better hay and farming lands.

29. Also in 1904, DLS J L Reid completed the resurvey of Indian Reserve 123 as advised by the Indians of that band but Reid was unable to place the Reserve exactly on a map because there were no other surveys in the immediate area.

30. In 1906, the First Nation asked for a portion of land to the north of Indian Reserve 123 to be added because it was a good piece of hay land and it was not intended to be cut off the old reserve when the re-survey was made in 1904.

31. In 1910, officials in the Department of Indian Affairs wrote to the Department of Interior asking whether the addition sought by the First Nation had been granted.

32. In 1911, the Minister of the Department of the Interior made a submission to council recommending the addition of land to Indian Reserve 123. This submission could not proceed because surrender was required.

33. On February 16, 1912, the Keheewin Band of Indians executed a surrender of a portion of Indian Reserve 123 in exchange for other land to be added to their reserve.

34. By Order in Council P. C. 1359 dated June 5, 1913, the surrender was accepted.

35. Order in Council P.C. 413 dated February 26, 1915 rescinded the description of Indian Reserve 123 and confirmed Indian Reserve 123 setting aside an area of 32 square miles more or less (20,531 acres) for the Kehewin Band.

36. The adjusted population of the First Nation eligible to be counted for the purposes of TLE is 141 members.

37. The land entitlement of the First Nation, calculated in accordance with the terms of Treaty 6, does not exceed 18,048 acres.

V. Relief (R. 42(f))

38. The Crown seeks:

a. dismissal of the First Nation's Declaration of Claim in its entirety;

b. the Crown's costs in this proceeding; and

c. such further relief as this Honourable Tribunal deems just and may allow.

VI. Communication (R. 42(g))

39. Respondent's email addresses for service are:

ursula.tauscher@justice.gc.ca
bryan.wigger@justice.gc.ca

Dated this 17th day of April, 2014.

William F. Pentney
Deputy Attorney General of Canada

Signature of Representative/Solicitor

Ursula M. Tauscher
Department of Justice Canada
300, 10423 – 101 Street
Edmonton, Alberta T5H 0E7
Phone: (780) 495-7153
Facsimile: (780) 495-2964
Email Address: ursula.tauscher@justice.gc.ca