

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	December 17, 2020	D E P O S É
Dragisa Adzic		
Ottawa, ON	6	

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ATIKAMEKSHENG ANISHNAWBEK

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations

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: Atikameksheng Anishnawbek
as represented by
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I. Overview

1. Canada is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. This commitment exists within the context of litigation and beyond. Canada endeavours to embody these principles as it assists the Tribunal in its task of adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. The parties have attempted to resolve this claim outside of court but have not yet reached an agreement. Canada remains willing to engage in further discussions with Atikameksheng Anishnawbek (formerly known as the Whitefish Lake Indian Band) to conclude this matter.
3. This Declaration of Claim (claim) concerns a surrendered timber licence and rights within Atikameksheng Anishnawbek's Indian Reserve No. 6 (I.R. 6). The Tribunal should decline to consider this claim because it has already been substantially adjudicated by the Ontario Superior Court, and because the only issue remaining for adjudication is currently the subject of ongoing proceedings in the Ontario Superior Court. Canada admitted a breach of fiduciary duty, and after a trial, the Ontario Superior Court determined the value of the historical loss. The Ontario Court of Appeal affirmed that decision. The only outstanding issue for adjudication by the Ontario Superior Court is the current value of the historic loss. Should the claim proceed before the Tribunal, it would result in a re-litigation of previously determined issues, contrary to the *res judicata* principle, and abuse of process.
4. Additionally, this Honourable Tribunal may not have jurisdiction to adjudicate this claim, because it is unclear whether the claim complies with the transitional provisions set out at section 42 of the *Specific Claims Tribunal Act (SCTA)*, Atikameksheng Anishnawbek does not appear to have met the conditions precedent to file a claim set out at section 16(1) of *SCTA* and has not adjourned the Ontario court proceedings as required by section 15(3) of the *SCTA*. Submitting this matter to the Tribunal when it is before the Ontario Superior Court is contrary to the principles of judicial economy, and presents a risk of irreconcilable decisions.

II. Status of Claim

5. In response to paragraphs 2, 3, 4, 5, 6, 7 and 8 of the claim, this claim does not fall squarely within the requirements of section 16(1) and 42 and 43 of the *Specific Claims Tribunal Act* (*SCTA*). Atikameksheng Anishnawbek has not submitted a claim to the Minister within the meaning of section 16(1) of the *SCTA*. Sections 42 and 43 do not capture the claim, since it was not being negotiated on the day on which the *SCTA* came into force. The ongoing Superior Court proceedings are substantially advanced and would have to be adjourned as required by section 15(3).
6. The history of the claim is as follows:
 - a) In 1995, prior to the *SCTA* enactment, Atikameksheng Anishnawbek submitted a claim to the Minister of Indian Affairs and Northern Development.
 - b) Following unsuccessful negotiations, in 2002 Atikameksheng Anishnawbek commenced an action in the Superior Court, and obtained judgment as to the 1886 value of the timber licence.
 - c) In 2007, the Court of Appeal affirmed this judgment and sent the matter back to the Superior Court to determine current value only.
 - d) In December 2017, Canada agreed to pursue a negotiated settlement of the current value of the timber licence, communicated in writing on June 8, 2018.
 - e) On December 13, 2017, and on consent of the parties, the Superior Court vacated the trial date of February 12, 2018, and fixed a new trial date of February 25, 2019.
 - f) On November 28, 2018, and on consent of the parties, the Ontario Superior Court vacated the trial date of February 25, 2019, and set a “trial scheduling court” date of December 11, 2019.
 - g) On December 11, 2019, and on consent of the parties, the Superior Court adjourned its trial scheduling court date to December 2, 2020.

7. If the Tribunal process is allowed to proceed, it would amount to a re-litigation of these issues, contrary to the principle of *res judicata*. The claim filed with this Tribunal asserts matters the Superior Court already determined and the Court of Appeal affirmed. The Superior Court has a date to schedule a trial of the remaining issue of current value of the timber licence, and it is too late in those proceedings to change forums.
8. The resulting split of an ongoing claim between the courts and the Tribunal is contrary to the principles of judicial economy and could result in irreconcilable findings with prior court decisions. The claim is based on the same facts as the claim before the Superior Court and seeks equitable compensation for breach of treaty, trust, fiduciary, honourable and equitable duties. A compensation assessment cannot be isolated from the historical and legal issues previously determined by the courts. During a hearing, the Tribunal would hear evidence upon which the courts made findings of facts and legal conclusions. Proceeding in any other forum than the Ontario Superior Court presents a serious risk of irreconcilable decisions.

III. Canada's Position Regarding the Validity of the Claim

9. Canada admitted it breached its fiduciary duty to Atikameksheng Anishnawbek for failing to obtain fair value for the timber licence in 1886. A trial followed on the value of the loss caused by the breach. The Superior Court assessed the 1886 value of the timber licence at \$31,600.00. The Court of Appeal affirmed that judgment, and issued an order in 2017 that the Superior Court determine current value of the loss. The only remaining issue for the Superior Court to determine is the current value of the timber licence.
10. Canada admits that a First Nation may file a claim for compensation for losses arising from the grounds in section 14 of the *SCTA* as set out in paragraph 10 of the claim. The admitted breach of fiduciary duty to Atikameksheng Anishnawbek to obtain fair value in 1886 for the timber licence falls within those grounds. Canada admits that Atikameksheng Anishnawbek received a "bonus payment" of \$316.00 for the licence, and the fair value was \$31,600.00, assessed by the Superior Court and affirmed by the Court of Appeal.

IV. Canada's Position Regarding Allegations of Fact

11. The allegations of fact in the claim are not relevant for assessment of the current value of the timber licence. However, Canada makes the following statements regarding the allegations, as directed by paragraph 42(d) of the *Specific Claims Tribunal Rules of Practice and Procedure*.
12. Canada admits Atikameksheng Anishnawbek is a First Nation within the meaning of paragraph 2(a) of the *SCTA* in the province of Ontario and a signatory to the *Robinson-Huron Treaty*, as stated in the paragraph 1 of the declaration of claim.
13. Canada admits the allegations in paragraphs 12 to 30 with the following clarifications:
 - a) Paragraph 13 is argument and not a statement of fact.
 - b) With respect to paragraph 14, Canada admits Chief Shawenakishick signed the Robinson-Huron Treaty in 1850. Canada has no knowledge of whether Chief Shawenakishik had a son named Mongowin, or whether Mongowin attended the negotiation meetings with Treaty Commissioner Robison at Sault Ste. Marie in 1850.
 - c) With respect to paragraph 16, Canada admits Whitefish Lake Indian Reserve No. 6 (I.R. 6) was surveyed in March 1884 with the assistance and advice of the chief and headmen. I.R. 6 contained approximately 79 square miles.
 - d) With respect to paragraph 18, Canada states that Honoure Robillard corresponded with government officials after submission and in support of the October 13, 1886 application for the right to cut timber on I.R.6.
 - e) With respect to paragraph 19, Canada admits that on or around May 25, 1886, the Deputy Superintendent General of Indian Affairs answered a request for a timber licence by advising that the timber in Township 76, which lay within I.R. 6, was not surrendered and therefore not available.
 - f) With respect to paragraph 22, it is unknown whether MacDonald authored the marginalia Atikameksheng Anishnawbek ascribes to him, whether the marginalia is

accurately transcribed as, “it would be well to press for a surrender & get a decent price for the timber before it is all wasted stolen or burnt, ” or whether the marginalia was intended for or read by Vankoughnet.

- g) With respect to paragraph 23, Canada admits Robillard corresponded with MacDonald on or about May 25, 1886. However, Robillard did not request MacDonald hasten the surrender. Robillard only requested MacDonald authorize an Order in Council for the sale of timber licence no. 68, in the event Atikameksheng Anishnawbek elected to surrender its timber rights.
- h) With respect to paragraph 24, Canada states that Atikameksheng Anishnawbek surrendered its timber rights to Canada in or around July 1886, but the surrender document cannot be found.
- i) With respect to paragraph 25, Canada states that Vankoughnet corresponded with Robillard to advise that Atikameksheng Anishnawbek had surrendered the timber on I.R. 6 to be sold for its benefit. He advised that a licence would not be issued until MacDonald’s return from the Pacific Coast. With respect to mention of “a promise made,” the nature of the promise is not known.
- j) With respect to paragraph 26, Canada admits only that on October 14, 1886, the Superintendent General of Indian Affairs granted a licence to Robillard to cut and carry away the timber situated on I.R. 6 under timber licence no. 68.
- k) With respect to paragraph 27, Canada admits the particulars of the timber licence as set out, but states the licensee was also required to post a bond and sureties and the timber licence was conditional upon the proper and continuous working of the limit.
- l) With respect to paragraph 28, Canada has no knowledge of whether Robillard worked the timber berth. Canada admits Robillard sold the timber licence to Alexander Barnet in 1887, but states no copy of the timber assignment has been located and the price for which it was sold is not known.

- m) With respect to paragraph 29, Canada admits Alexander Barnet sold timber licence no. 68 in 1887 to J.H. Francis, but no copy of the timber assignment has been located and the price for which it was sold is unknown.
- n) With respect to paragraph 30, Canada has no knowledge of whether Frances ultimately worked the timber berth.

V. Canada's Statement of Facts

- 14. In or around July 1886, Atikameksheng Anishnawbek surrendered the timber on I.R. 6 to be sold for its benefit.
- 15. On October 14, 1886, the Superintendent General of Indian Affairs, Sir John A. MacDonald, granted licence no. 68, dated October 7, 1886, to Honoure Robillard to cut and carry away timber situated on I.R. 6. Honoure Robillard paid \$316.00 for the licence.
- 16. In 2005, the Superior Court determined the fair value of the 1886 timber licence to be \$31,600 and in 2017 awarded partial judgment of \$1,095,888.
- 17. In 2007 the Ontario Court of Appeal affirmed the valuation of the 1886 timber licence at \$31,600. However, it found that the trial judge erred in failing to compensate Atikameksheng Anishnawbek in equity for its lost investment opportunity caused by Canada's breach of fiduciary duty. The Ontario Court of Appeal ordered a new hearing on the issue because the deficiencies in the record prevented assessment of that compensation. A date for trial scheduling is on December 2, 2020.

VI. Relief

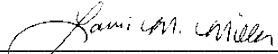
- 18. Canada seeks the following relief:
 - (a) Dismissal of this claim on the basis that the Ontario court proceedings have substantially resolved this claim, by determining liability and historical value of the timber licence, and the Ontario Court of Appeal ordered the Ontario Superior Court to determine the only remaining issue of current value of the timber licence; and,

(b) Costs of this action.

VII. Communication

19. The Respondent's address for the service of documents is:
Department of Justice Canada, 410-22nd Street East, Suite 410, Saskatoon, SK S7K 5T6
20. Facsimile number for service is: (306) 975-4030
21. Email address for service is: saskSCT-3001-20-atikanish@justice.gc.ca

Dated this 17th day of December, 2020.



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