

F I L E D	SPECIFIC CLAIMS TRIBUNAL	D É P O S É
	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
	January 19, 2016	
	David Burnside	
Ottawa, ON	64	

**SCT File No. SCT-7006-11**

**SPECIFIC CLAIMS TRIBUNAL**

**BETWEEN:**

HUU-AY-AHT FIRST NATIONS

Claimant

**AND:**

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

Respondent

**APPLICATION TO WITHDRAW AGREED FACT**

**PART 1 – FACTS**

**A. OVERVIEW**

1. The Claimant seeks to withdraw an agreed fact within the Agreed Statement of Facts reached by the parties in May 2012 prior to the hearing of Stage 1 of this claim (the “Stage 1 ASOF”).
2. The disputed fact states that \$14,000 was distributed to members of the Claimant Huu-ay-aht First Nations (“HFN”) from the lump sum payment of \$32,500 received in 1942 for Timber Licence No. 269 (the “Licence”). The fact was agreed to prior to full document disclosure and review, and has since been found to be incorrect.
3. As support for the disputed fact, Canada cites a 1965 letter of Thomas Berger, counsel for the HFN at the time.
4. However, the ledgers recording deposits into and withdrawals from the HFN trust accounts which have been transcribed and analyzed subsequent to Stage 1, show that there was not any individual or cumulative distribution of \$14,000 from the payment of \$32,500.
5. The Claimant submits that it is appropriate in the circumstances to permit the withdrawal of the disputed fact. Striking the disputed fact from the Stage 1 ASOF ensures that the best

evidence of trust account transactions – the ledgers – are admissible and are relied upon by the parties and the Tribunal regarding distributions.

**B. THE FACTS**

Stage 1 of the Claim: 2011 - 2013

6. This Claim was commenced by HFN with the filing of a Declaration of Claim in June 2011.

7. By January 2012, the parties were in agreement that questions relating to the Crown's liability and the historical value of the timber at issue should be heard and determined first, with evidence and a hearing on the "bring forward" of any historical losses to follow if required.

Reference: Affidavit of J. Hamilton, Exhibit "B"

8. The January 2012 agreement between the parties that the claim should be addressed in phases was formalized by Order dated May 7, 2013:

[1] The hearing of the Claim is severed into two stages as follows:

[1.1] Stage 1: Shall determine Canada's breach of duty regarding Timber Licence #269 and the equitable valuation of the losses to the Claimant resulting from the breach; and

[1.2] Stage 2: Shall determine the quantum of any losses to the Claimant found in Stage 1 including present day valuation;

Reference: Order of the Honourable Patrick Smith, May 7, 2013

9. The Stage 1 ASOF filed with the Tribunal on May 2, 2012.

Reference: Affidavit of J. Hamilton, Exhibits "C" and "D"

10. Paragraphs 30 and 31 of the Stage 1 ASOF state:

30. In November 1942, Canada issued to BSW Timber Licence 269 (the "Licence") for the merchantable timber on the Reserve. The Licence purported to grant a 21-year renewable lease in exchange for a one-time payment of \$32,500 plus \$1 per thousand f.b.m on all species of timber removed and an annual ground rental of \$220.

31. \$32,500 was placed in the HFN's interest-bearing trust account in Ottawa, earning 5% annually. Members of the Nation received cash distributions of \$14,000 from that payment. [underlining added]

Reference: Affidavit of J. Hamilton, Exhibit “D”

11. The disputed fact that the Claimant now applies to withdraw is underlined above (the “Disputed Fact”).

12. The basis for the Stage 1 ASOF were the documents, particularly correspondence available to the parties at the time. Counsel for HFN did not receive the HFN trust account ledgers relevant to the claim until June 2012, after Stage 1 ASOF had been finalized.

Reference: Affidavit of N. Hume, at paras. 4-5, 7, Exhibit “A”

13. Upon receipt of the trust account ledgers counsel for HFN did not the accounts in detail because they were not relevant to the issues to be determined first in the Claim – Canada’s liability and the historical value of the timber harvested under the Licence. Nor were the accounts reviewed to confirm the accuracy of the Stage 1 ASOF.

Reference: Affidavit of N Hume, at para. 6

14. The hearing of Stage 1 of the Claim took place from November 12 - 14, 2013. The trust account ledgers were available to the Tribunal in a separate volume of the Common Book, with no transcriptions.

Reference: Affidavit of Jill Hamilton, Exhibit “E”

15. Judgment in respect of Stage 1 was rendered by the Tribunal on July 15, 2014 (the “Decision”). Paragraph [34] of the Decision states:

[34] The \$32,500.00 cash payment was placed in the HFN’s interest-bearing account in Ottawa, earning 5% per annum. Members of the HFN received cash distributions totaling \$14,000.00 from then, or shortly after.

Reference: *HFN v. HMTQ, supra*, at para. 34

16. Other than the recitation of the Disputed Fact at paragraph 34, the Decision makes no reference to and does not rely on the Disputed Fact.

Stage 2: 2014 - present

17. After the Decision, the parties turned their minds to Stage 2 issues and evidence relating to bringing forward the historical losses found, including undertaking analyses of the trust accounts. The ledgers were transcribed and Canada and HFN had separate analyses of the ledgers carried out – by Public History for Canada (the “Public History Analysis”) and by MNP for HFN (the “MNP Analysis”). The account analyses by MNP and Public History underpin each party’s expert opinion report and it is anticipated that these analyses will be included in the Common Book of Documents for the Stage 2 hearing of this Claim.

18. The Disputed Fact came to counsel for the HFN’s attention on November 12, 2015 upon the delivery of Canada’s expert report regarding the bring forward value of the HFN’s historical losses. In Canada’s report, the experts assert:

We are aware that \$14,000 of the original \$32,500 paid for HFN’s timber rights was distributed in cash to band members or approximately 43% of the proceeds.

Reference: Affidavit of Jill Hamilton, Exhibit “F”

19. The trust account ledgers do not record a distribution of \$14,000 following the deposit of \$32,500 in 1942. Of the distributions made between 1942 and 1948, when further payments for the IR 1 Timber were received, only three are recorded as Timber Distributions: \$8,195 in 1943-44; \$1,600 in 1946-47; and \$1,600 in 1948-49.

Reference: Affidavit of Jill Hamilton, Exhibits “G” and “H”

20. In addition to the deposit in 1942 of \$32,500 for Timber Dues, during the 1942-1948 period, deposits into the HFN trust accounts included Government Interest, West Coast Agency Rentals and Refunds, Department of Transport Rentals, Milligan Bros. Rental and West Coast Agency gravel dues.

Reference: Affidavit of Jill Hamilton, Exhibits “G” and “H”

21. Counsel for HFN advised Canada on November 25, 2015 that the Disputed Fact was to our knowledge incorrect and that if the statement was not properly founded, proposed that the parties agree to its removal from the Stage 1 ASOF.

Reference: Affidavit of J.Hamilton, Exhibit “I”

22. Counsel for Canada advised that the source for the Disputed Fact was a letter of counsel Thomas Berger dated 10<sup>th</sup> December, 1965, which states:

My instructions are that \$75,000 was to be paid to the Band, but only \$32,000 was paid (and only \$14,000 distributed).

Reference: Affidavit of J. Hamilton, Exhibits “J” and “K”

## PART 2 – LAW

23. Formal admissions, including agreed statements of fact, are conclusive as to the matters admitted. Evidence relating to the matter admitted is “precluded as being irrelevant” or will be ignored if evidence is adduced that contradicts the admission. Sopinka’s text on evidence summarizes:

§19.1 A formal admission in civil proceedings is a concession made by a party to the proceedings that a certain fact or issue is not in dispute. Formal admissions made for the purpose of dispensing with proof at trial are conclusive as to the matters admitted. As to these matters, other evidence is precluded as being irrelevant but, if such evidence is adduced, the court is bound to act on the admission even if the evidence contradicts it.[...]

Reference: Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 3<sup>rd</sup> ed. 2009, at 1263

24. However, a fact admitted in an agreed statement of facts may be withdrawn by agreement of the parties or with leave of the court, including when “it would be unjust to accept certain agreed facts that are contradicted by the evidence presented by the plaintiffs who drafted the agreed facts.”

Reference: *Tirling Sheet Metal Ltd. v Troutman Estate*, 2010 BCSC 958, at paras 9 and 8, citing *Patterson v. Scherloski*, [1971] 3 O.R. 753, (1972) 21 D.L.R. (3d) 641, at para. 19

25. Courts have recognized that the rationale for altering agreed statement of fact may be based on that fact that, “as a general rule no court of whatever level should permit itself to be used and knowingly adjudicate upon any issued presented by opposing litigants based on an erroneous premise; to do so would only serve to erode the credibility and prestige of the judicial system.”

Reference: *Tirling Sheet Metal*, at para. 9, citing *Avco Delta Corp. v. Mackay*, 76 D.L.R. (3d) 541, [1977] 5 W.W.R. 4 at 8 (Alta. S.C.)

26. The Federal Court of Appeal confirmed in *Andersen Consulting v R.* that British Columbia's more flexible approach to the withdrawal of admissions is applicable in Federal Court:

13 At the other end, the British Columbia Courts have taken a more flexible approach and have not required as a condition essential to a withdrawal of an admission that the admission in the Statement of Defence be made inadvertently or hastily. Rather, they have adopted as a test that, in all the circumstances of the case, there be a triable issue which ought to be tried in the interests of justice and not be left to an admission of fact. Under such a test, inadvertence, error, hastiness, lack of knowledge of the facts, discovery of new facts, and timeliness of the motion to amend become factors to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice.

14 We prefer the approach taken by the Courts in British Columbia which gives the Court seized with a motion to amend pleadings, including an amendment withdrawing or purporting to withdraw an admission, the needed flexibility to ensure that triable issues are tried in the interests of justice without injustice to the litigants.

Reference: *Andersen Consulting v R.*, [1998] 1 F.C. 605, 1997 CarswellNat 1600 (Fed CA); See also *Charette v. Delta Controls*, 2003 FCA 425, at para. 12

27. No Specific Claims Tribunal caselaw addresses the withdrawal of an agreed fact. The *Specific Claims Tribunal Act*, and its associated Specific Claims Tribunal Rules of Practice and Procedure do not deal specifically with the withdrawal of an agreed fact or an admission. The Specific Claims Tribunal Practice Directives are also silent on the matter.

Reference: *Specific Claims Tribunal Act*, SC 2008, c 22; Specific Claims Tribunal Rules of Practice and Procedure; SOR/2011-119; [http://www.sct-trp.ca/pract/index\\_e.htm](http://www.sct-trp.ca/pract/index_e.htm)

28. Given the Specific Claims Tribunal analogizes to the Federal Court Rules on matters of practice and procedure, so should the Tribunal analogize Federal Courts jurisprudence on procedural matters.

Reference: Specific Claims Tribunal Rules of Practice and Procedure, Rule 5

### **PART 3 - SUBMISSIONS**

29. The Disputed Fact was agreed to by the Claimant in the early stages of the proceeding before all of the relevant documents, and particularly all of the HFN trust account ledgers, had been exchanged and reviewed.

30. Now that a thorough review of the evidence has taken place, it has become clear that the Disputed Fact is without proper foundation.

31. The trust account ledgers refute the Disputed Fact. No single distribution of \$14,000 from the \$32,500 deposited in 1942 occurred. Even if all of the “Timber Distributions” are tallied, the sum of the distributions made in various years between 1942 and 1948 (although not explicitly tied to the \$32,500 received under Licence No. 269) was \$11,395.

32. Simply put, the Disputed Fact of a \$14,000 distribution as recorded in the Stage 1 ASOF and the distributions recorded in the HFN trust account ledgers are inconsistent. They cannot both be correct.

33. It is submitted that the ledgers, as contemporaneous records, should not be ignored. However, that would be result if the Disputed Fact remains as an agree fact.

34. Canada relies upon the 1965 Berger letter as foundation for the Disputed Fact. The Claimant submits that this letter, written 20 years after the distribution that it suggests took place and based on “instructions” in respect of the monies distributed, does not sufficiently support the Disputed Fact and should not be preferred to the HFN trust account ledgers. Regardless, whether the statement in the Berger letter or the ledger entry is correct is a triable issue.

35. It is in the interests of justice to permit the withdrawal of the Disputed Fact. The withdrawal of the Disputed Fact will ensure that the best and most complete evidence of distributions, including the trust account ledgers, is admissible and may be relied upon by the parties and the Tribunal.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of January, 2016



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Counsel for the Claimant  
Huu-ay-aht First Nations