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SPECIFIC CLAIMS TRIBUNAL

FILED — TRIBUNAL DES REVENDICATIONS PARTICULIÈRES — DÉPOSÉ

March 22, 2013

Amy Clark

Ottawa, ON | 16

SPECIFIC CLAIMS TRIBUNAL

BETWEEN

AUNDECK OMNI KANING

Claimant

-and-

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

Respondent

Claimant's Reply to the
Notice of application of the Respondent
Pursuant to Section 17 of the
Specific Claims Tribunal Act

The Application

Her Majesty is applying pursuant to Section 17 of the *Specific Claims Tribunal Act,* to have Aundeck Omni Kaning's claim, filed with the Specific Claims Tribunal, dismissed in its entirety because she asserts that the claim is on its face not admissible under Section 16 of the Act.

It is agreed that:

(a) Aundeck Omni Kaning (formerly known as the Ojibways of Sucker Creek) is a "First Nation" as defined in the Act.

(b) The Aundeck Omni Kaning claim was delivered to Her Majesty (that is, to the Specific Claims Branch of the Department of Indian Affairs and Northern Development) on November 5, 2008. Her Majesty states that the claim was "filed with the Minister" on November 10, 2008.

(c) The claim is that Aundeck Omni Kaning moneys, held in trust for Aundeck Omni Kaning by Her Majesty, were improperly paid to persons who were not members of the Band. The claim comes within Section 14(1)(c) of the Act.

(d) The claim was accepted by the Senior Assistant Deputy Minister on behalf of the Minister, for negotiation on a without prejudice basis on November 25, 2011, on the grounds that the Government of Canada had breached its fiduciary and lawful obligations to Aundeck Omni Kaning.

Canada asserts that since three years have not elapsed since "the date the Minister notified the First Nation of his decision to negotiate the claim and the claimant's filing of the claim with the Tribunal, therefore, the tribunal is without jurisdiction pursuant to Section 16 of the *Specific Claims Tribunal Act*." These are references to Section 16(1)(b) and Section 16(1)(d) of the Act. Aundeck Omni Kaning did not file the claim pursuant to either of those sections: this application is only whether Section 16(1)(a) applies.

Aundeck Omni Kaning filed the claim pursuant to Section 16(1)(a) of the *Specific Claims Tribunal Act*, on the grounds that "the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part."

Aundeck Omni Kaning does not assert that the Tribunal has jurisdiction to hear the claim under any other part of Section 16(1) yet. If Canada continues to delay the proceedings, the Tribunal will gain jurisdiction pursuant to Section 16(1)(d) on November 25, 2014. If Canada succeeds in this application, the only effect would be to delay the resolution of the claim by the Tribunal by a further eighteen months. The order sought is designed to prevent the just, timely and cost-effective resolution of the Aundeck Omni Kaning claim, and to prevent the Tribunal from fulfilling its mandate. It is not in the interests of justice, and it is not consistent with the honour of the Crown.

Specific Claims Tribunal Rules of Practice and Procedure, Rule 2.

Section 16(1)(a)

1. For the Tribunal to have jurisdiction under Section 16(1)(a), the Claimant has to show three things. First, that a claim was previously filed with the Minister. Second, that there was a decision by the Crown not to negotiate the claim, in whole or in part. Third, that written notice of the decision was communicated to the Claimant.

2. It is agreed that the claim was previously filed with the Minister. It is irrelevant for the purposes of this application whether that took place when the Specific Claims Branch received the claim on November 5, 2008 or when, as asserted by Her Majesty, the claim was "filed with the Minister" on November 10, 2008.

3. Aundeck Omni Kaning asserts that Section 16(1)(a) is fulfilled by the following:

a) there was a decision by Canada not to actually engage in any process of negotiations; and in fact there have been no negotiations concerning the claim;

b) there was a decision by Canada not to engage in negotiations in good faith;

c) there was a decision not to negotiate the substance of part of the claim – the amount of the compensation; and there have been no negotiations with respect to that part of the claim;

d) there was a decision not to negotiate the substance of another part of the claim – the amount of the claimant's costs of negotiation and settlement – and there have been no negotiations with respect to that part of the claim.

e) Written notice of the decision not to engage in a process of negotiation was provided in the combination of the statement in the November 25, 2011 letter that "Canada's analysis of this claim suggests that it could be resolved in an expedited negotiation process"; the unilateral offer, accompanied by an ultimatum, in the March 28, 2012, letter; the e-mail from Brendan Blom indicating that no loan funding would be available because there would be "no significant negotiation activity," and the confirmation of the closing of the claim file in the letter of July 24, 2012.

f) Written evidence of the decision not to negotiate in good faith, communicated to Aundeck Omni Kaning, is to be found mainly in the letters of March 28, 2012 and July 24, 2012: taken together, they set out a unilateral, take-it-or-leave-it position, with an ultimatum that the claim file would be closed if the claimant failed to accept the stated offer.

g) With respect to the decisions not to negotiate the amount of compensation and the amount of the claimant's costs, two distinct parts of the claim, these decisions were implicit but obvious in the letters of March 28 and July 24, 2012, in the non-negotiable offer that was made.

4. The issue of whether Aundeck Omni Kaning may file the claim with the Tribunal depends upon the interpretation of the words "negotiate," and "in whole or in part" in Section 16(1)(a) of the *Specific Claims Tribunal Act.*

What does "negotiate" mean?

5. The *Specific Claims Tribunal Act* is a statute relating to Indians.

6. Since it is a statute relating to Indians, the *Specific Claims Tribunal Act*, and specifically the words of Section 16(1)(a), are to be interpreted liberally in favour of the Indian claimants, and any ambiguities are to be resolved in their favour. The principles of *Nowegejick* apply:

> Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In *Jones v. Meehan,* 175 U.S. 1 (1899), it was held that Indian treaties "must ...be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians"… We must, I think, in these cases, have regard to substance and the plain and ordinary meaning of the language used, rather than to forensic dialectics. I do not think we should give any refined construction to the section.
>
> *Nowegejick v. Minister of National Revenue*, [1983] 1 SCR 29 at pp. 36 and 41.

7. The plain and ordinary meaning of the term "negotiate," in Section 16(1)(a), is "to confer with another with a view to compromise or agreement."

8. "Negotiate" is not restricted to stating a willingness to pay compensation in an amount unilaterally determined by the defendant. A negotiated settlement requires conversation or discussion, with the parties seeking a mutual understanding. It requires the parties to "confer," or meet, and implies a willingness to compromise: it is a "bargaining process." The Ontario Court of Appeal defined "negotiation" as "arrangement through communication or agreement: (*Commercial Union Life Assurance v. John Ingle Insurance Group*, 61 OR 3rd 296 at para. 49), while the Manitoba Court of Queen's Bench paid more attention to the definition:

> The term "negotiate" is not defined in the REB Act, but it is defined in The Concise Oxford Dictionary, 5th ed. (Oxford University Press, 1969) at p. 807 as follows:
>
> > NEGOTIATE: 1. Confer with another with a view to compromise or agreement; 2. Arrange, bring about, by negotiating.
>
> In Black's Law Dictionary, 7th Edition (St. Paul: West Group, 1999), it is defined as follows at p. 329:
>
> > NEGOTIATE. 1. To communicate with another party for the purpose of reaching an understanding <they negotiated with their counterparts for weeks on end>. 2. To bring about by discussion or bargaining <she negotiated a software license agreement>.
> > NEGOTIATION. 1. A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. Negotiation usu. involves complete autonomy for the parties involved, without the intervention of third parties. …2. (usu. pl.) Dealings conducted between two or more parties for the purpose of reaching an understanding.
>
> *Aronovitch & Leipsic Ltd. et al. v. Berney et al.,* 2005 MBQB 180

9. The Supreme Court of Canada has indicated that negotiation of Indian claims is preferable to litigation, in order to advance the reconciliation that is the goal of Section 35(1) of the *Constitution Act, 1982*. "Negotiation" in this sense requires good faith.

Delgam'uukw v. British Columbia, [1997] 3 SCR 1010.

The Record of Communications Between the Parties

10. Communication between the parties concerning the claim, after Senior Assistant Deputy Minister Patrick Borbey's letter of November 25, 2011, consists of two letters, two telephone conversations, and three e-mails.

11. The letter of March 28, 2012, consisted of a unilateral take-it-or-leave-it offer, coupled with an ultimatum. If the offer was not accepted in three months, on Canada's terms, Canada would close the claim file.

12. There were two telephone conversations between Brendan Blom, the Assistant Negotiator in charge of the file, and Paul Williams, counsel for Aundeck Omni Kaning. In the first telephone conversation, Williams asked Blom how the figures in the March 28, 2012 offer had been arrived at, and Blom explained the practice applied by the Specific Claims Branch. Williams stated that this practice did not reflect legal principles, and asked Blom to find out if there was any flexibility in the offer. Blom said he would check into this. The e-mail of April 10, 2012 summarizes the approach taken by the Specific Claims Branch to compensation and to paying for the claimant's costs of resolving the claim.

13. In the second telephone conversation, on June 8, 2012, Brendan Blom told Paul Williams that there was no flexibility in the offer. Paul Williams sent an e-mail the following day, requesting confirmation of that message.

14. Contrary to Canada's assertion, there was no "exchange of views" between Brendan Blom on loan funding, the details of the financial compensation being offered, or "a willingness to hear argumentation or receive evidence that the First Nation believed would warrant a re-examination or re-evaluation of the settlement offer." Instead, Paul Williams sought and received information on the basis on which the compensation offer had been formulated; he sought information about whether the offer had any flexibility to it; and he did not inquire about loan funding. This was not "an exchange of views." It was an exercise in information-gathering. There was one exception: Williams did express the view that the practice applied by the Specific Claims Branch to determining the amount of compensation in claims did not reflect the state of the law, and that the equitable approach to compensation set out by the Ontario Court of Appeal in the *Whitefish Lake* decision did reflect the present state of the law, and ought to be applied.

15. In the third e-mail, dated June 8, 2012, Brendan Blom stated that Aundeck Omni Kaning had not provided any argumentation or evidence that would cause the Specific Claims Branch to re-evaluate the offer. That belies any suggestion that communication of views on compensation by Paul Williams had any effect at all.

16. The letter of July 24, 2012 from Michelle Adkins on behalf of Canada was notice to Aundeck Omni Kaning that the claim file had been "updated to 'closed'" because the offer had not been accepted.

17. On August 7, 2012, Aundeck Omni Kaning filed the Claim with the Tribunal.

Canada's Specific Claims Negotiation Process

18. Canada has published a description of the "steps usually taken in the negotiation process for specific claims" on its website, available to the public. The description invites a comparison between these "usual" steps and what took place in the Specific Claims Branch's treatment of the Aundeck Omni Kaning claim.

19. The process is described on the website as involving nine steps: (1) acceptance of the claim for negotiation; (2) reaching a joint negotiation protocol; (3) conducting studies or research on compensation; (4) holding discussions on compensation to "work to reach consensus on how much compensation would be fair to settle the claim"; (5) Settlement proposal and drafting of a final settlement agreement; and (6) Settlement agreement initialed by negotiators; (7) First Nation ratification vote; (8) Ratification by Canada; (9) Implementation of the agreement.

20. This negotiation process has been used by Canada, in various forms, since Minister Jean Chrétien's announcement of a claims policy in 1973.

21. To accomplish the nine steps, the Specific Claims Branch generally appoints a negotiating team, consisting of a negotiator, who conducts the negotiations on behalf of Canada; a Department of Justice lawyer who provides legal advice to the team; and an Assistant Negotiator, who handles administrative tasks.

22. A negotiation protocol sets the rules for the negotiation process. It is, itself, the product of direct negotiations between the parties. It sets the structure, timing, location and administration of the negotiations. Generally, the only binding aspect of the protocol is a provision that negotiation documents and communications shall be confidential and not used in court without the consent of all parties.

23. Studies or research on compensation, where land is involved, require jointly setting the terms of reference for an appraiser and selecting an independent appraiser. Where, as in the Aundeck Omni Kaning claim, the issue is how to calculate fair compensation, it is common for the parties to engage the services of economists. Discussions include the proportions of compound and simple interest to be applied; the rate of return on the money; the rate of interest.

24. Generally, face-to-face meetings are an essential part of the negotiation of claims, where it is important, as an aspect of the sought-for reconciliation, to build relationships, and to build trust between the parties' respective negotiators.

The Decision not to Engage in a Process of Negotiation

25. Internally, and without making it public, Canada's Specific Claims Branch has classified "specific claims" into three categories. The Aundeck Omni Kaning claim was place in the lowest category, that of claims up to $50,000. There was no notification to Aundeck Omni Kaning of this classification, and Aundeck Omni Kaning was not informed of the effect of the classification on the settlement amount of the claim. Placing the claim in this category meant there would be no negotiations. Instead, there would be an "expedited negotiation process": a single offer and an ultimatum.

26. The decision not to negotiate was implied in the November 25, 2011 letter of acceptance, in which it is stated that "Canada's analysis of this claim suggests that it could be resolved in an expedited negotiation process." The decision was indicated in Brendan Blom's e-mail of June 8, 2012, in which he stated that loan funding would not be available, because "significant negotiation activity is not anticipated." The decision is more formally communicated in the letter of March 28, 2012, which stated that "if we do not receive a Band Council Resolution

[accepting this settlement offer] by June 28, 2012, this settlement offer will expire without further notice to you and the file will be closed." The letter left no room for any negotiation process. An "expedited process" meant a single letter offer, and a single band council resolution accepting that offer, or else.

27. The decision not to engage in a process of negotiation is reflected in what actually took place.

28. On March 28, 2012, Canada made an offer to Aundeck Omni Kaning to settle the Claim. There had been no Band Council Resolution accepting the terms of Patrick Borbey's letter, an apparent precondition to the beginning of negotiations. There was no correspondence or communication between the parties between November, 2011 and March, 2012. There were never any meetings between the parties. Canada did not appoint a negotiating team for the claim. It left conduct of the matter in the hands of an Assistant Negotiator – an individual without authority to negotiate, whose function was purely administrative.

29. According to the Ontario Court of Appeal in *Whitefish Lake*, a breach by the Crown of a fiduciary obligation to an Indian band requires compensation based on full compound interest, unless the band's history of spending or investing leads the court to adjust the compensation for reasonable contingencies. This equitable approach to compensation would require the parties to at least discuss Aundeck Omni Kaning's history of use of its trust funds. There was no inquiry into this history; there were no meetings and no communications before the unilateral offer and ultimatum. The issue was never discussed.

30. Before or after the March 28, 2012 offer, there were never any discussions between the parties about Aundeck Omni Kaning's costs of research, development, negotiation or ratification of the Claim.

Negotiation Funding as an indicator of Canada's intent not to negotiate

31. In his e-mail of June 8, 2012, Brendan Blom indicated that there would be no negotiation loan funding, because "no significant negotiation activity is anticipated."

32. In order for claim negotiations to be conducted fairly, the claimant must have the resources to engage fully in negotiations; to secure the legal and expert advice required to make free, full and informed decisions. To that end, Canada's "Justice at Last" claims policy confirms that funding to cover the cost of negotiations would be made available to claimants, and that the amount of such funding would be determined by an office independent of Canada's Specific Claims Branch.

33. An indicator of Canada's intent not to negotiate in any real sense of the word is its treatment of negotiation funding for claims up to $50,000. The Research and Negotiation Funding Branch was heralded as a new, independent body that would provide funding for claimants in the research and negotiation of claims. In fact, its conduct in funding negotiations, or the lack of them, is closely related to and controlled by the Specific Claims Branch. In larger claims, "pre-negotiation" funding, in the form of a grant (usually $15,000) covers the period between the Band Council Resolution accepting the terms set out in the formal federal letter of acceptance and the signing of a negotiation protocol. This funding is not available for claims up to $50,000. That is because Canada does not intend to hold any negotiations: there is no need for a protocol to cover a process that will not take place. In larger claims, the Research and Negotiation Funding Branch makes loans available to the claimants to cover the cost of negotiation of the claim. The loan then becomes forgivable when a settlement comes into effect. For claims under $50,000, no loan funding is available. This is because there are not intended to be any negotiations. Instead, for claims under $50,000, the offer of settlement

that is Canada's only "negotiation" contains an offer of a standard $50,000 to cover all the costs of negotiation and settlement of the claim. If the claimant fails to accept the offer, it will receive no funding to cover the cost of negotiation. This, too, reflects Canada's decision that there is to be no negotiation of claims it has unilaterally classified as being worth under $50,000.

There were no negotiations

34. Canada's written communications, taken together, indicate a decision not to engage in a process of negotiations. Written notice to the claimant reflecting the above decisions not to negotiate was given in the letter of March 28, 2012, in which a unilateral, non-negotiable offer of settlement was made, accompanied with notice that the file would be closed if the offer was not accepted, and the letter of July 24, 2012, in which notice was provided that, as a result of Aundeck Omni Kaning's decision not to accept the March 28 offer, "the status of your claim in the Specific Claims Database has been updated to 'closed'."

35. Canada has suggested that Aundeck Omni Kaning's failure to accept this uninvited, unilateral, take-it-or-leave-it offer was a unilateral withdrawal from negotiations. How could this be? There were no negotiations from which to withdraw. The offer did not "advance the negotiations": it terminated them.

36. The March 28, 2012 letter indicated that if Aundeck Omni Kaning did not accept the offer by July 28, 2012, the file would be closed without any further notice.

37. On July 28, 2012, Michelle Adkins, the Director of Negotiations Operations for the Specific Claims Branch, wrote to Chief Patsy Corbiere, indicating that the status of the Claim file had been updated to "closed." The letter indicated that the file would only be opened again if Aundeck Omni Kaning accepted the offer as made (that is, if it decided to "reconsider Canada's offer").

38. The actions and attitudes inherent in this refusal to meaningfully negotiate, in delivering what amounted to an ultimatum, and in closing the Claim file, are antithetical to the relationship required by law.

> …unilateral Crown action…is the antithesis of reconciliation and mutual respect.
>
> *Mikisew Cree First Nation v. Canada*, [2005] 3 SCR 388 at para. 49 (*per* Binnie, J.).

In whole or in part

39. Aundeck Omni Kaning made a declaration of Claim to the Specific Claims Tribunal on August 7, 2012. The application to the Tribunal was made pursuant to Section 16(1)(a) of the *Specific Claims Tribunal Act*. The section provides that:

> A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, *in whole or in part.*

40. One meaning of the words "in whole or in part" is that they apply to whether Canada admits responsibility for the claim, or part of the claim. Deciding to negotiate a claim "in part," and to refuse to negotiate another part, in this context, can be seen in the practice of accepting part of a claim "for negotiation," and rejecting the rest of the claim. For example, a claim may be made for 100 square kilometres, and Canada will agree to enter into negotiations only in respect of 40 square kilometres. That is, Canada has refused to negotiate in respect of 60 square kilometres: it has decided not to negotiate that claim "in part."

41. An additional meaning of the words “in whole or in part” arises during the course of negotiations. If Canada decides that it will make only one non-negotiable offer with respect to an aspect of a claim, that is a decision not to negotiate that part of the claim.

42. In the case of the Aundeck Omni Kaning Claim, Canada decided not to negotiate with respect to specific parts of the Claim. The parts of the Claim it decided not to negotiate are the amount to be paid as compensation and the amount to be paid in respect of costs. Instead of negotiating, it made a non-negotiable, take-it-or-leave-it offer, accompanied by an ultimatum.

43. Other possible “parts” of a claim settlement include the process of acceptance or ratification; commemorative steps; a signing ceremony; an apology; the timing of payment of compensation; where the compensation will be placed. It is not known whether there were decisions about negotiating (or not negotiating) any of those parts. The file was closed without any conversation concerning them taking place.

44. Written notice that Canada decided not to negotiate the amount to be paid as compensation, and the amount to be paid in respect of costs, was contained in the letters of March 28 and July 28, 2012, and the April 10, 2012 e-mail from Brendan Blom to Paul Williams. Proof of the decision not to negotiate is that, when the claimant did not accept the offer, Canada closed the Claim file. The notice of closure was the final element of the written notice of a decision not to negotiate.

45. The essence of Canada’s actions is that there have been no negotiations, there are no negotiations, and there will not be any negotiations.

46. By making an inflexible, non-negotiable offer, and by closing the file when the offer was not accepted, Canada decided not to negotiate the Aundeck Omni Kaning Claim. Its communications to Aundeck Omni Kaning fulfill the requirements of Section 16(1)(a) with respect to written notice.

"Negotiation" requires respect and good faith:

47. Negotiation, like consultation, requires parties mutually committed to the process of respectful reconciliation. An inflexible negotiation process, like an inflexible consultation process, erodes the viability of any process and undermines its goal:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.
>
> *Mikisew Cree First Nation v. Canada*, [2005] 3 SCR

48. Aundeck Omni Kaning submits that, in the *Specific Claims Tribunal Act*, the undefined term "negotiation" should be read so as to include the principle that negotiation must be conducted in good faith. That is, even if Canada were willing to come to the negotiating table (which is not the case in this claim), the law would still require the negotiations at that table to be in good faith. A decision to negotiate in other than good faith should be taken by the Tribunal under Section 16(1)(a) as a decision not to negotiate.

49. Canada would be required to seriously consider Aundeck Omni Kaning's view, for example, of what legal principles govern compensation in cases of breach of fiduciary obligation. A failure to negotiate properly can be interpreted as a refusal to negotiate, or, in the Act's milder language, a decision not to negotiate.

> It is also the Court's view that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims. This duty to negotiate in good faith…is an implied part of S. 35 [of the *Constitution Act, 1982*].
>
> *Canada (Information Commissioner) v. Canada (minister of Industry)*, [2006] 2 CNLR 18 at paragraph 45 (Federal Court, Trial Division).

50. The resolution of issues through negotiation rather than litigation is a primary aspect of the provisions of the *Constitution Act, 1982* with respect to the recognition of aboriginal and treaty rights. The goal of Section 35(1) is reconciliation, and reconciliation is achieved through good faith negotiation, and not through confrontation, in the courts or elsewhere:

> …the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.
>
> *Delgam'uukw v. British Columbia*, [1997] 3 SCR 1010 at para. 186 (*per* the Chief Justice).

51. Respect, not indifference, on the part of government officials is essential to the resolution of the claims of aboriginal peoples. Good faith negotiations are one essential element of achieving the goal of reconciliation:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that

> indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.
>
> *Mikisew Cree First Nation v. Canada,* [2005] 3 SCR 388 at para. 1 (*per* Binnie, J.)

52. In Canadian labour law, "good faith bargaining" requires meeting, discussing, and each side considering in good faith the representations of the other. The same requirements ought to be applied to good faith negotiations in indigenous claims:

> Thus the employees' right to collective bargaining…requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation. … The parties [must] meet and engage in meaningful dialogue. They must avoid unnecessary delays and make a reasonable effort to arrive at an acceptable contract. …What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process.
>
> *Ontario Ontario (Attorney General) v. Fraser,* [2011] 2 SCR 3 at paras. 41 and 42.

53. Commercial negotiations occur between parties who are at arms' length from one another. The common law requirement of good faith negotiations is less stringent than the requirement of good faith in dealings between a fiduciary and a beneficiary of that trust-like relationship. The relationship between the Crown and Aboriginal peoples, and in this case between Canada and Aundeck Omni Kaning, is a fiduciary one.

54. A fiduciary must not take advantage of the imbalance of power in the relationship, or of his discretion over the assets or life of the beneficiary.

> If the legal relationship is one involving a trust or fiduciary relationship, the notion of good faith takes on particular attributes that are well-known and not the subject of this discussion… The characteristic aspect of the duty of the fiduciary is, within the terms of the relationship, to subordinate its interests in favour of its beneficiary. This subordination will be derived from the degree of power and control and consequent vulnerability of the respective parties in the relationship.
>
> *Good Faith and Australian Contract Law – A Practical Issue and a Question of Theory and Principle*, James Allsop, The 2010 Sir Frank Kitto Lecture.

55. The fiduciary relationship between the parties places a higher duty upon the Crown with respect to negotiations. There is a *constitutional* duty to negotiate in good faith, to contribute to the mutually held goal of reconciliation. The fiduciary relationship is linked to, but not the same as, the honour of the Crown.

The Honour of the Crown

56. The honour of the Crown is engaged in the negotiation of treaties and also the negotiation of claim settlements. It would be unconscionable, and therefore a breach of that honour, for Canada to take advantage of its disproportionate power to force acceptance of a settlement only on its terms. The honour of the Crown is a stand-alone source of obligation.

> *Haida Nation v. British Columbia (Minister of Forests*) [2004] 3 SCR 11.
>
> The honour of the Crown infuses every treaty and the performance of every treaty obligation. [The Treaty] therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights).
>
> *Mikisew Cree First Nation v. Canada*, *supra*, at para. 57.

57. The issue in this application is the interpretation of the intent of Section 16(1)(a) of the *Specific Claims Tribunal Act*. The Tribunal can interpret the section narrowly, concluding that the section applies only to situations in which the Minister has refused to accept a claim (or part of a claim) for negotiation. Or the Tribunal can interpret the section generously, recognizing that the intent of the statute is "to secure the just, timely and cost-effective resolution of specific claims while taking the cultural diversity and the distinctive character of specific claims into account" (Rule 2, *supra.*).

> …had the rights of the Indians been in question here—did that depend on some difficult question of construction or upon some ambiguity of language—courts should make every possible intendment in their favour and to that end. They would with the consent of the Crown and of all of our governments strain to their utmost all ordinary rules of construction or principles of law—the governing motive being that in all questions between Her Majesty and "Her faithful Indian allies" there must be on her part, and on the part of those who represent her, not only good faith, but more, there must not only be justice, but generosity. The wards of the nation must have the fullest benefit of every possible doubt.
>
> *Province of Ontario v. The Dominion of Canada and the Province of Quebec*, [1895] SCR.

Relief Sought

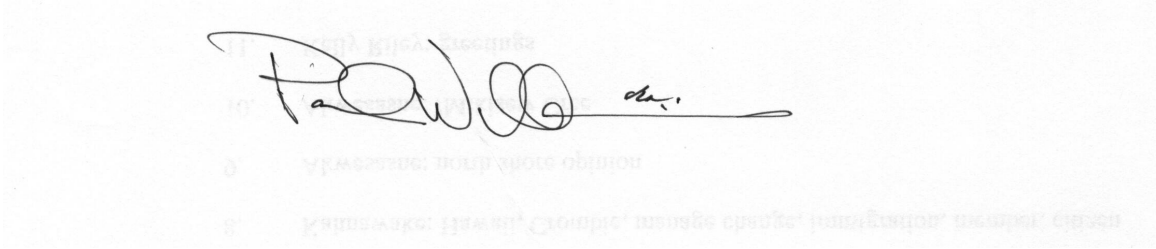
58. Aundeck Omni Kaning seeks confirmation that the Tribunal has taken jurisdiction over the claim, and seeks the dismissal of Canada's application.

59. Aundeck Omni Kaning seeks its costs in this proceeding.

60. Such further relief as this Tribunal deems just.

All of which is respectfully submitted.

Dated at Ohsweken, Six Nations Grand River Territory, this 22nd day of March, 2013.



Paul Williams
Counsel for Aundeck Omni Kaning

Tel. [905] 765-4248
Cel. [905] 516-1755
E-mail: orihwa@gmail.com
File: SCT-3001-12