

FILE NO.: SCT-4002-12
DATE: 20131001

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

BETWEEN:)
)
BROKENHEAD OJIBWAY FIRST)
NATION) Kyle Dear and Kyla Peterson, for the
) Claimant
)
Claimant)
)
- and -)
)
HER MAJESTY THE QUEEN IN RIGHT)
OF CANADA) Jeff Echols, for the Respondent
As represented by the Minister of Indian)
Affairs and Northern Development)
)
)
Respondent)
)
)
) **HEARD:** September 30, 2013

ENDORSEMENT

Honourable W.L. Whalen

A Case Management Conference (CMC) was held by teleconference on September 30, 2013 at 10:00 A.M., Eastern Time (Ottawa).

[1] The primary purpose of the CMC was to review the progress of the Parties with respect to matters addressed in the June 20, 2013 Endorsement of Smith J.

[2] The Parties were agreeable to a bifurcation of the claim into two separate parts, validity and compensation, with the validity aspect to be heard and determined first, followed by compensation, if validity was founded. Bifurcation is often an efficient and cost effective procedure in claims before the Tribunal. However, in this case, as part of the validity hearing, the Respondent proposes to address the values of compensation previously paid for the use of the lands in question, the value of the land use rights permitted under the easement, the reversionary interest and the access to hydro-electric power as a result of the granting of the easement. The argument may be that these aspects had value, which when taken together with the amount paid, made the grant reasonable and fulfilled the Crown's fiduciary obligation, or alternately, reduced it through offset. The Claimant takes the position that this should be part of the compensation hearing (if validity is found) because it involves quantification and valuation. At this point, there is insufficient information to assess either position and therefore determine whether bifurcation is appropriate. It would be helpful to know more about how the Claimant proposes to prove the fiduciary failure it alleges and whether it can be done without reference to amounts of compensation or comparisons of compensation. I am also mindful of costs and whether bifurcation would be cost effective in this case when the possible over-all cost of the proceeding is weighed against the potential amount to be recovered. For this reason, I have concluded that bifurcation is premature at this point, but that it may be addressed again at a future CMC.

[3] The Respondent suggested that Notices be sent to Manitoba and Manitoba Hydro pursuant to Section 22 of the *Act* on the basis that if the claim succeeds, it may affect Manitoba and Manitoba Hydro in respect of interest in the easement or attribution of fault. The Claimant expressly indicated that it was not questioning the validity of the easement. In view of this statement, the Respondent will review its position, the Parties will confer and the question will be revisited at the next CMC, along with a discussion on whether an application will be necessary to resolve the issue.

[4] It is premature to commence preparation on an Agreed Statement of Facts and Common Book of Documents until documentary disclosure is complete. The Respondent has voluntarily produced documents to the Claimant on a without prejudice basis. The Respondent indicated that privilege was not asserted with respect to any of these documents, but indicated they may not all

be relevant. The Parties agreed to review the documents with a view to preparing a Common Book of Documents, for which they will provide a progress report at the next CMC.

[5] The Claimant expressed interest in Canada's conduct with relation to other easement agreements and/or lease agreements entered into by Canada from 1945 to 1960. The Respondent expressed concern with the breadth and relevance of this demand, but will review its records, discuss the question with the Claimant and seek instructions. The Parties will report their progress at the next CMC.

[6] Upon consent of the Parties, the hearing will take place in the community, provided that a suitable and adequate facility can be identified and arranged. The Registry will work with the Parties in exploring and resolving this question, which will be reviewed at the next CMC.

[7] The Claimant is still considering whether it intends to call oral history. It has been delayed because of a recent fire in the community that has required urgent and ongoing attention. The issue will be reviewed at the next CMC.

[8] The Claimant indicated that it intends to engage an expert. It has not done so yet because who it retains will depend to some extent on the documents ultimately produced. If the Claimant retains an expert, the Crown may retain a responsive expert. This question will be reviewed at the next CMC.

[9] The next CMC will be held in February 2014, at a date and time to be coordinated by the Registry.

W.L. WHALEN

Honourable W.L. Whalen
Specific Claims Tribunal Canada