FILE NO.: SCT-5001-14
CITATION: 2017 SCTC 6
DATE: 20171219

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION Claimant	Aaron Christoff, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Lauri M. Miller and Scott T. Bell, for the Respondent
	HEARD: December 13, 2017

REASONS FOR DECISION (ADJOURNMENT APPLICATION)

Honourable Harry Slade, Chairperson

NOTE: This document is subject to editorial revision before its reproduction in final form.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22 s 20.

[1] This Claim relates to the surrender of very significant acreages of reserve land in 1905 and sales of the land in or about 1906, 1908, and 1910.

[2] The Claimant, Mosquito Grizzly Bear's Head Lean Man First Nation says that the surrender was not in conformity with the provisions of the *Indian Act*, and, if the Claim is found valid, compensation is payable under paragraphs 20(1)(g) and (h) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] based on current unimproved value plus loss of use from the time of the surrender up to the date on which there is a determination by the Tribunal of liability of the Respondent Crown.

[3] The Claimant says in the alternative that the surrender, if valid, was in breach of fiduciary duty as improvident and obtained in circumstances that implicate officers of the Crown in wrongdoing.

[4] The Respondent points to evidence that the surrendered lands were sold for less than market value and, if proven, the Claimant nevertheless received compensation. Hence paragraph 20(1)(f) of the *SCTA* would apply such that compensation would be represented by the shortfall, as proven on the evidence, and there would be adjustment taking account of the time value of money as it might be determined in the compensation phase of the proceeding.

[5] The Parties have done considerable work to ready this matter for hearing. There was an oral history evidence hearing in January 2015 in the Claimant's community. Both the Claimant and Respondent have filed expert reports. The historical report of the Claimant authored by Dr. Peggy Martin McGuire, was filed with the Tribunal on May 8, 2015. The Respondents report in response, authored by Mr. Norris Wilson, was filed on April 4, 2017.

[6] The McGuire report goes mainly to the validity of the Claim based on a surrender without proper statutory authority, although it addresses other matters that may go to the question of breach of fiduciary duty.

[7] The Respondents' report of Dr. Derek Whitehouse-Strong responds to Dr. Martin McGuire's report, it, like the McGuire report, appears to be thorough. Areas where the experts differ are identified.

[8] It seems on a quick reading that these reports will assist the Tribunal in making determinations of fact. However, neither expert has been examined on their report.

[9] I turn now to the appraisal reports; Mr. Norris Wilson's, filed on April 4, 2017, and Mr. Hal Love's responsive report, filed on September 15, 2017.

[10] Here, again, on a review of those reports, I can see that they would be helpful in enabling the Tribunal to reach conclusions of fact on the issue over whether the Claimant was adequately compensated at the time of the taking or the sales, as the case may be.

[11] With respect to the appraisal reports, none have been tested by cross-examination. A hearing of the experts and examination by opposing Counsel is scheduled to commence in Saskatoon, Saskatchewan on January 8-12, 2018. A hearing of closing submissions on validity of the Claim is scheduled for January 23-24, 2018.

[12] In preparation for the hearing, the Parties filed a Common Book of Documents comprised of 16 volumes in October 5, 2017. There is no agreement on a Common Statement of Issues, and no agreement on a Common Statement of Facts. However, the pleadings are quite thorough and, to the extent that certain of the allegations are admitted, those could form the basis for an Agreed Statement of Facts.

[13] The Parties have filed a joint Brief in preparation for this Case Management Conference. The Parties ask that the January hearings be adjourned generally in order to explore settlement possibilities. No compelling reason has been offered to warrant an adjournment. The Parties say only that the cost of proceeding would not be justified if they reach a settlement.

[14] The only tasks not yet completed are preparation of agreements on the issues for determination and a statement of facts. While these are desirable, their absence does not justify an adjournment of the hearing of the Claim in the validity phase of the proceeding.

[15] If the matter goes ahead as scheduled for closing submissions on January 23 and 24, 2018 there is ample time to prepare an Agreed Statement of Facts.

[16] I have outlined the issues in the course of this Case Management Conference, so the hearing will not be affected by want of understanding of the issues.

[17] Now, I'll discuss the proposal that the matter be adjourned to permit the Parties to enter exploratory settlement possibilities.

[18] I understand, based on the discussion we've had today, that the Respondent Crown has not secured from the Minister a written acceptance of the Claim for negotiation. This, in the Specific Claims Process administered by the Specific Claims Branch, is the *sine qua non* of negotiations, Ms. Miller, for the Respondent, assures me that adequate authority has been given for exploratory discussions, which she has characterized as negotiations. This I understand is from the Specific Claims Branch of the Ministry of Indian Affairs and Northern Development, now known, apparently without an official name change, as the Ministry of Crown-Indigenous Relations and Northern Affairs Canada.

[19] Ms. Miller informed me, when asked, that the negotiation involves the Specific Claims Branch and the Litigation Resolution Management Branch.

[20] The Parties have not provided or spoken of the existence of a formal agreement to enter and advance a negotiation. Tribunal members have, when presented with joint requests to hold the Tribunal process in abeyance, been told that this, described as a "Negotiation Protocol", is necessary before the Parties commence negotiation of terms of settlement. I understand that this formal protocol would give mutual assurances of good faith, set the agenda for tasks, timing and frequency of meetings, and describe the internal measures required by government policy to conclude a settlement and perform its terms. One member has been given an estimated time of one year to settle the "Negotiation Protocol" and another two to five years to reach and perform the terms of settlement.

[21] Tribunal members hearing joint requests for holding claims filed with the Tribunal in abeyance have also been told that there are hundreds of claims in negotiation. This may explain why these matters become so protracted.

[22] There has, in the present matter, been no exchange of settlement proposals. Counsel have indicated that they don't anticipate the type of negotiation where there is an offer and a counter offer without each presenting to the other some form of analysis of the issues and their respective views of the probable outcomes. Cross-examination of the experts would, I think, better enable

the Parties to narrow the issues.

[23] There is no date proposed for the actual commencement of negotiation toward settlement of the present Claim, and no commitment to making best efforts within a firm plan to conclude a settlement within a reasonable period of time.

[24] If the matter does not settle it will return to the Tribunal for a decision on validity. The unknowns in that event include the availability of witnesses and of me as the presiding Tribunal member. As I have heard evidence I am seized unless the Parties agree that the matter may proceed before another member. Hence, either party could force a full rehearing.

[25] The Tribunal's mandate is the expeditious, just and final resolution of specific claims. Considering the state of the discussion among counsel thus far, and taking it into account that the Parties are well advanced in a process governed by rules under which the Tribunal can impose time limits for completion of pre-hearing tasks, I am by no means satisfied that continuing with the scheduled hearing of the experts and the scheduled hearing of closing submissions, including the time taken to render a decision, would be less expeditious or cost effective than leaving the Parties to determine whether they will actually enter negotiations and, if so, proceed with diligence.

[26] We know that, should the matter go to a full hearing as scheduled, a decision will result. It is difficult to say how long it would take for that, but the issues here, although they involve much documentary evidence, oral history, and expert reports, do not in the light of the thoroughness of the expert reports appear to me as the sort that would present an unusual challenge to the Tribunal in arriving at findings of fact and findings on the law as pertain to the validity of the claim.

[27] This is not the only matter before the Tribunal in which the Tribunal has become concerned about protracted periods of discussion that start with parties jointly requesting that claims be put in "abeyance" for fixed periods of time on the basis that they are in "exploratory settlement discussions". These requests have generally been accommodated. Without exception there have been repeated requests for extensions of the period of "abeyance". Some of these Claims have been held in "abeyance" for over two years.

[28] Nevertheless, having seen claims put in “abeyance” for negotiation and apparently languish for periods of years, I do not consider it in the interests of justice, as measured against the mandate of the Tribunal to bring matters expeditiously to a close, to adjourn the evidentiary hearing set for January 8, 2018 and the hearing of closing submissions set for January 23, 2018. Moreover, no reason has been advanced as to why negotiations could not proceed while the matter remains active before the Tribunal. An adjournment would remove the pressure of an imminent decision on the validity of the Claim.

[29] However, recognizing that negotiation is a preferred pathway to the ultimate resolution of claims brought by Indigenous Peoples, which include specific claims and comprehensive claims, I will invite counsel at the conclusion of the validity hearing to make submissions directed to the question I will now raise: Do they wish the Tribunal to postpone for a fixed period the delivery of reasons and findings with respect to the validity of the Claim? I have in mind a period of three months in order that the Parties may enter into and conclude negotiations. There would be leave to apply for an extension, which would require evidence, without inappropriate disclosure, that progress is being made.

[30] In the course of negotiations I would, should counsel request, make such interim rulings on the evidence as they may wish in the interest of facilitating negotiation and narrowing the potentially enormous gap between compensation based on current value plus loss of use and that based on inadequate compensation for the land at the time of the surrender and dates of sale.

HARRY SLADE

Honourable Harry Slade, Chairperson

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Date: 20171219

File No.: SCT-5001-14

OTTAWA, ONTARIO December 19, 2017

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION**
As represented by Aaron Christoff
Maurice Law, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Lauri M. Miller and Scott T. Bell
Department of Justice