FILE NO.: SCT-3002-11
CITATION: 2012 SCTC 6
DATE: 20121129

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
BIG GRASSY (MISHKOSIIMIINIIZIIBING) FIRST NATION (INDIAN BAND) Claimant	Donald R. Colborne, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	John Syme, for the Respondent
	HEARD: via written argument

REASONS ON APPLICATION

Honourable J. SMITH

OVERVIEW

[1] The narrow issue before the Tribunal is whether costs should be awarded in favour of the Claimant following its success in having an application brought by the Respondent dismissed; and, more generally, what is the policy of how the issue of costs will generally be addressed by the Specific Claims Tribunal.

THE FACTS

[2] The Claimant, Big Grassy First Nation ("**Big Grassy**") filed a claim with the Tribunal regarding the building of a road through their reserve in the 1930s - a road which continues to be in use today.

[3] Big Grassy seeks compensation for a range of damages including damages for expropriated land, building and maintenance materials taken from the reserve to build the road, rents for buildings and parking on the land in question, and lost income and equivalents due to the detrimental effects on hunting, trapping, game birds and wild rice harvests occasioned by the road building activities.

[4] The Respondent, Her Majesty the Queen in Right of Canada, ("**The Crown**") in its Response asserts that the claim should be limited to compensation for land taken for the road, and that damages should be restricted to the period circa 1933.

[5] The Crown subsequently brought an application requesting an order clarifying that Big Grassy had the onus of proof and burden of establishing entitlement to and of quantum of the alleged damages. The Crown requested costs on the application.

[6] In July 2012, the Tribunal dismissed the Crown's application stating that the order requested was premature and would have the effect of setting an unwarranted precedent.

[7] The Claimant asserts that full indemnity costs should be awarded because the Claimant was successful in the application, the Crown should have withdrawn its application, the results were not divided, and, the matter was important and complex.

[8] The Crown asserts that no costs should be awarded on the application as there was a question of public importance before the Tribunal and, alternatively, if costs are awarded, full

indemnity costs should not be awarded, reserving the same strictly for instances of reprehensible and improper conduct.

SUMMARY OF DECISION

[9] This is the first occasion on which the Tribunal has been asked to address the issue of costs.

[10] A universal barrier to access to justice has been the cost of legal services including the "loser pays" regime present in the civil courts of Canada.

[11] Parliament established the Tribunal as a special forum to provide access to justice to the First Nations of Canada to expedite the resolution of many historic, unresolved specific claims. A traditional costs regime would serve to frustrate and impede this purpose and exacerbate the feeling of isolation and marginalization that many First Nations have experienced for decades.

[12] The Tribunal must be accessible and affordable, providing an environment that focuses on the early resolution of disputes in a cost effective manner proportionate to the needs and resources of the users it was designed to serve.

[13] Save and except for cases of improper conduct or abuse of process, the Specific Claims Tribunal will adopt a no costs regime in relation to applications brought in the course of proceedings before it.

RELEVANT LEGISLATION AND RULES

[14] Section 13 (1)(d) of the *Specific Claims Tribunal Act* provides the statutory authority for the Tribunal to make awards of costs in accordance with its rules:

> *The Tribunal has…all the powers, rights and privileges that are vested in a superior court of record and may (d) award costs in accordance with its rules of practice and procedure*[1].

[15] Rules 110 and 111 of the *Rules of Practice and Procedure of the Tribunal* provide:

> *110 (1) After the hearing of an application, the Tribunal may award costs in relation to that application.*

[1] *Specific Claims Tribunal Act*, SC 2008, c 22.

> *(2) After the hearing of the specific claim, the Tribunal may award costs in relation to the proceedings.*
>
> *111 (1) When deciding whether to award of costs under subrule 110(2), the Tribunal must consider the following factors:*
>
> > *(a) whether a party has acted in bad faith;*
> >
> > *(b) whether a party has failed to comply with an order of the Tribunal; or*
> >
> > *(c) whether a party has refused a reasonable offer to settle.*
>
> *(2) When deciding whether to award costs to the claimant under subrule 110(2), the tribunal must also consider the following factors:*
>
> > *(a) whether the claimant's costs are reasonably incurred but are disproportionate to the amount of compensation awarded; and*
> >
> > *(b) whether the issues in relation to the specific claim are complex or contain elements that are of general public importance*[2] .

[16] Where the *Tribunal Rules* do not provide for any matter of practice or procedure the Tribunal may refer by analogy to the *Federal Courts Rules*[3].

[17] Part II of the *Federal Courts Rules* sets out the practice and procedure regarding costs generally and provides for full discretion over the amount, allocation and determination of by whom costs are to be paid if so ordered:

> *400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.*
>
> > *(6) Notwithstanding any other provision of these Rules, the Court may*
> >
> > > *(a) award or refuse costs in respect of a particular issue or step in a proceeding;*
> > >
> > > *(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;*
> > >
> > > *(c) award all or part of costs on a solicitor-an-client basis; or*
> > >
> > > *(d) award costs against a successful party*[4].

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[2] *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Tribunal Rules*].
[3] *Ibid*, r 5; *Federal Courts Rules*, SOR/98-106.
[4] Ibid, r 400(1), (6).

DISCUSSION

[18] With respect to the issue of costs, there is an important distinction between administrative tribunals and courts of law. Administrative tribunals with statutory authority to order costs may exercise their discretion in a manner differing from a civil court, and will be accorded deference in doing so[5].

[19] In *Bell Canada v Consumers' Association of Canada*[6], the Supreme Court of Canada considered whether the Canadian Radio-Television and Telecommunications Commission (CRTC) was bound by the principle of indemnification when ordering costs. Le Dain, J., stated:

> *Courts of appeal in three provinces have held that in the exercise of the discretion to award costs under provisions in essentially the same terms as s. 73 of the National Transportation Act regulatory tribunals were not bound by the principles and rules governing the award of costs in the courts...*[7]

[20] Le Dain, J., cited with approval the decision of Truman, J.A., in *Northern Engineering & Dev. Co. v Philip*:

> *Proceedings before the board belong to a different category and are necessarily dealt with from a point of view that has no place in litigation between parties. The status and risks of suitors in an action are fixed by practice and authority. No rule has been laid down by the board that persons appearing by counsel before the board shall, subject to the board's discretion, have costs in event of their success or pay costs in event of their failure. Whether such a rule should be adopted or not is a matter wholly for the board...*[8]

[21] The court also cited with approval Gushue, J.A., in *Newfoundland & Labrador Hydro v. Newfoundland & Labrador Federation of Municipalities*:

> *The manner in which the costs are arrived at, and awarded, is a matter strictly within the discretion and competence of the Board, and this Court has no jurisdiction to interfere with that discretion, unless of course improperly exercised.*

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[5] *Georgia Strait Alliance v Canada (Minister of Oceans and Fisheries)*, 2012 FCA 40 at para 87, 33 Admin LR (5th) 243 [*Georgia Strait*].
[6] *Bell Canada v Consumers' Association of Canada*, [1986] 1 SCR 190 [*Bell Canada*].
[7] Ibid at 204. Section 73 of the *National Transportation Act* (RSC 1970, c N-17) provided that costs were "in the discretion of the Commission" and allowed the Commission to order "by whom and to whom any costs were to be paid," and to prescribe a scale.
[8] *Ibid* at 204-205, citing *Northern Engineering & Dev. Co. v Philip* , [1930] 3 DLR 387 at 390.

> *The fact that a litigant in a court proceeding is subject to various rules relating to costs is of no relevance here.*[9]

[22] In *Bell Canada*, the court held that the CRTC was entitled to "take a broad view of the application of the principle of indemnification or compensation." [10]

[23] The reasoning in *Bell Canada* has been widely adopted and followed in many subsequent cases. For example, in *Erlendson v Ashern Freighters Ltd*., an appeal concerning costs awarded in a licensing hearing, Philp, J.A., stated:

> *... firstly, that a board or commission exercising discretion under statutory provisions similar to s. 56(1) of the Act is not bound in the same way that the court or a judge is bound, to act judicially; secondly, the principle of indemnification or compensation that guides the exercise of the court's discretion in awarding costs should also guide the board or commission, although a board or commission may take a broad view of the application of the principle; and thirdly, that a board or commission must act reasonably. And at all times there is the overriding requirement that a board or commission must act fairly.*[11]

[24] To provide one further example, in *Re Township of Innisfil* the Ontario Municipal Board ruled:

> *The granting of costs, this board considers as much the exercise of its administrative jurisdiction as the disposition of any other matter validly before it.*[12]

[25] In sum, there is ample case law supporting an administrative tribunal diverging from the presumptive rule that costs follow the event. While articulated more frequently in the context of regulatory hearings, the principle also remains applicable in proceedings more analogous to litigation where, for example, compensation for an expropriation is in issue. A tribunal's exercise of discretion must, however, be principled, fair and reasonable.

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[9] *Bell Canada, supra* note 6, at 206, citing *Newfoundland & Labrador Hydro v Newfoundland & Labrador Federation of Municipalities* (1979), 24 Nfld & PEIR 317 at 325 (CA) (available on QL).
[10] *Bell Canada, supra* note 6, at 207.
[11] *Erlendson v Ashern Freighters Ltd*. (1989), 58 Man R (2d) 250 at para 15-16 (CA) (available on QL) [*Erlendson*]. The relevant statutory provision stated: "The cost of, and incidental to, any proceeding before the board, except as herein otherwise provided, are in the discretion of the board, and may be fixed in any case at a sum certain or may be taxed" (*Public Utilities Board Act*, RSM 1987, c P-280, s 56(1)).
[12] *Re Township of Innisfil* (1981), 26 CPC 309 at 314 (Ont Munic Bd), 13 OMBR 111 (*sub nom Leidel v Innisfil* available on QL).

THE UNIQUE CIRCUMSTANCES OF THE SPECIFIC CLAIMS TRIBUNAL

[26] In exercising its discretion whether to award costs, the policy and intent of its enabling statute are relevant factors for the Tribunal to consider.

[27] The Tribunal has authority pursuant to s. 13 of the *Act* to exercise its discretion with respect to costs in so far as its decisions remain principled, fair and reasonable[13].

[28] The Government of Canada recognized in its policy, *Specific Claims: Justice At Last,* that the pre-existing system for addressing specific claims was insufficient or ineffective and concluded: "To rectify this situation, Canada will reengineer the system and retool the specific claims process to contemporary standards." [14]

[29] Parliament's response was to establish an independent tribunal with a distinct task, expressed in the preamble: "there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner." [15]

[30] The preamble further reflects the importance of addressing the backlog of claims: "it is in the interests of all Canadians that the specific claims of First Nations be addressed."[16]

[31] The Tribunal has a mandate and a broad discretion to implement approaches that will best accomplish the intent of the legislation, uphold the integrity of the process and encourage the fair and expeditious resolution of claims. This mandate and discretion extends to developing a policy with respect to the issues of costs.

WHAT CIRCUMSTANCES MAY ATTRACT COST SANCTIONS?

The Civil Litigation Model

[32] In civil litigation proceedings, the presumption is that costs follow the event, but a

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[13] *Erlendson, supra* note 11.
[14] *Minister of Indian Affairs and Northern Development, Specific Claims: Justice At Last* (Ottawa: Minister of Public Works and Government Services Canada, 2007) at 8 [*Justice At Last*].
[15] *Act, supra* note 1, preamble.
[16] *Ibid.*

successful litigant has no right to costs.[17] Many circumstances justify a departure from this general rule leading courts to award elevated costs, no costs, or costs against a successful party.

[33] To depart from the general rule of costs followed by courts in civil litigation proceedings, the conduct of one of the parties must be "unconscionable rather than merely neglectful... reprehensible, motivated by bad faith, or bordering on chicanery; the conduct must be egregious, even within the context of hard-fought litigation."[18]

[34] There will be circumstances where costs will be ordered by the Tribunal; however, costs ought not, unless justified by the conduct of one of the parties, be ordered. In these circumstances, reference may be made to costs orders made in the context of civil litigation, where courts have ordered costs based on full indemnity.

[35] Generally, circumstances where a higher level of costs are awarded were described by McLachlin, J. (as she then was) for the Supreme Court in *Young v Young*:

> *Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.*[19]

[36] A higher level of costs has been awarded in instances where the proper resolution of the proceedings has been impeded through abuses of process[20], resisting a reasonable settlement[21] and pursuing unnecessary further proceedings.[22] Elevated costs have also been given for deceptive conduct[23] and unfounded allegations of wrongdoing.[24]

[37] Zealously pursuing one's case will not justify a costs sanction: "a distinction must be made between hard-fought litigation that turns out to have been misguided, on the one hand, and

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[17] Mark Orkin, *The Law of Costs*, looseleaf (consulted on Nov. 21, 2012) 2nd ed (Toronto: Canada Law Book, 2012) at 2-17 [*Orkin*].
[18] *Ibid.*
[19] *Young v Young*, [1993] 4 SCR 3 at 134.
[20] Including: taking "steps taken to deliberately frustrate or delay the administration of justice through abuse of or consistent failure to adhere to the rules" (*Orkin*, supra note 24 at 2-218); concealing documents and later relying on them; failing to produce a document in a timely way; prolonging the proceedings by obstruction; delay tactics; or bullying (*Ibid* at 2-227).
[21] *Ibid* at 2-215 and 2-234.
[22] *Ibid* at 2-217, 2-218 and 2-227.
[23] *Ibid* at 2-226.
[24] *Ibid* at 2-221 to 2-225.

malicious counter-productive conduct, on the other." [25]

[38] Mistake of judgment is similarly insufficient, as is an adverse finding of credibility.[26] Furthermore, the fact that a case may be weak,[27]or even without merit,[28] does not, in itself, justify added costs. In *Abdijama (Litigation Guardian of) v McDonald's Restaurants of Canada, Ltd.*, portions of the plaintiff's pleadings were struck for failing to disclose a reasonable cause of action, yet the court declined to order substantial indemnity costs, stating: "the vitality of our common law principles, and their responsiveness to changing circumstances, requires that innovation and flexibility in pleadings, even if unsuccessful, not be stifled by the threat of penal cost awards." [29]

ACCESS TO JUSTICE

[39] The courts and tribunals of Canada are vital to our system of justice and democratic principles. To be effective, they must operate efficiently and proportionally to the needs and resources of the users they were created to serve. Most importantly, the system of justice must be accessible. As stated by Chief Justice McLachlin:

> *The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.*[30]

[40] The Tribunal's policy regarding costs must be interpreted in light of its statutory mandate and the distinctive nature of specific claims adjudication. Cost awards can discourage parties from filing claims, contrary to the intent and philosophy of the *Act*, which was promulgated specifically to have specific claims heard expeditiously and efficiently. Cost awards may impede access to justice and deter meritorious claimants, especially First Nations with limited financial resources.

[41] In claims or applications adjudicated by the Tribunal, circumstances of reprehensible, egregious or outrageous conduct may justify an award of costs. Abuse of process and conduct that

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[25] Clarington (Municipality) v Blue Circle Canada Inc., 2009 ONCA 722 at para 45, 312 DLR (4th) 278 (sub nom Davies v Clarington (Municipality) available on QL).
[26] Orkin, supra note 17, at 2-238 and 2-244.
[27] Young v Young, supra note 19 at 134.
[28] Abdijama (Litigation Guardian of) v McDonald's Restaurants of Canada, Ltd., [2004] OJ no 4312 (QL) (Ont Sup Ct J).
[29] Ibid at para 7.
[30] Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face" (remarks delivered at Empire Club of Canada, Toronto, 8 March, 2007).

impedes the resolution of claims may similarly attract a costs sanction. Otherwise, no costs should be ordered.

[42] A presumption of no costs in cases before the Tribunal is reasonable and fair given the historic difficulty First Nations have faced in having their specific claims addressed, the purpose of the *Act*, and the substantial risk that traditional cost presumptions would likely deter claimants from making proper use of the Tribunal. There is a financial imbalance in all cases before the Tribunal because the parties are necessarily a First Nation and the Crown with completely different resources at their disposal. It would be manifestly unfair to implement a conventional costs regime given this disparity.

[43] This approach affirms the "fundamental principle of access to justice"[31] and also addresses the need, expressed by Minister Jim Prentice when introducing *Specific Claims: Justice At Last*, to "...restore confidence in the integrity and effectiveness of the process." [32]

[44] The Tribunal has been designed to facilitate access to justice. The implementation of a conventional cost regime based on the litigation model would run counter to this purpose:

- The *Tribunal Rules* are simplified and user friendly, having been collaboratively drafted by stakeholders and users.
- The electronic Registry is interactive and transparent, allowing access by remote First Nations.
- The *Tribunal Rules* call for early identification of legal issues, hands on case management with facility for mediation and judicial alternative dispute resolution.

[31] *Boucher v Public Accountants Council for the Province of Ontario* (2004), 71 OR (3d) 291 (CA) at para 37, 48 CPC (5th) 56. The case involved a judicial review that was abandoned before it was heard. The respondents were awarded costs, which were reduced on the appeal as the amount was not fair and reasonable. Armstrong, J.A. stated: "The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."
[32] *Justice At Last*, *supra*, note 14 at 1.

- Video and teleconferencing is available to encourage the participation of First Nation communities. Hearings are scheduled with a First Nations community whenever possible.

COST OF A PROCEEDING

[45] Decisions on costs at the conclusion of a hearing of a claim on the merits may take account of the considerations set out above. The factors set out in Rule 111 will also apply.

DECISION

[46] The facts of this case do not meet the necessary standard attracting an award of costs. There was nothing untoward about the Crown's conduct nor can it be classified as "reprehensible, scandalous, or outrageous" in the words of Chief Justice McLachlin in *Young v Young*. [33]

[47] There is, therefore, no reason for the Tribunal to depart from a presumptive rule of no costs, and none are ordered.

PATRICK SMITH

Honourable Patrick Smith
Specific Claims Tribunal of Canada

[33] Young v. Young, supra note 19.

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20121129

File No.: SCT-3002-11

OTTAWA, ONTARIO November 29, 2012

PRESENT: Honourable Patrick Smith

BETWEEN:

BIG GRASSY (MISHKOSIIMIININIIZIIBING) FIRST NATION (INDIAN BAND)

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 BIG GRASSY (MISHKOSIIMIININIIZIIBING) FIRST NATION (INDIAN BAND)**
As represented by Donald R. Colborne
Barrister and Solicitor

AND TO: **Counsel for the Respondent**
As represented by John Syme
Department of Justice