FILE NO.: SCT-5001-11
CITATION: 2012 SCTC 4
DATE: 20120706

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
BEARDY'S & OKEMASIS BAND #96 AND #97 Claimant	Ron S. Maurice and Steve Carey, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Daniel J. Kuhlen et David J. Smith, for the Respondent
–and –	
PREMIÈRE NATIONS DES ATIKAWEKW D'OPITCIWAN Intervenor	
	HEARD: July 6, 2012

CROWN APPLICATION TO STRIKE CLAIM: REASONS REMITTING APPLICATION TO HEARING ON THE MERITS

Honourable Harry Slade

[1] Treaty No. 6, entered in 1876, calls for the payment of annuities to individual members of the Band:

> And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall, in every year ensuing the date hereof, at some period in **each** year, to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each **Indian person** the sum of $5 per head yearly. [Emphasis added]

[2] The Claimant alleges that in 1885, at the outset of the Riel rebellion, the Crown discontinued the payment of Treaty Monies (annuities) to members of the Band. The payments recommenced in 1889.

[3] The essential facts are not in dispute.

[4] The Crown applies under section 17 of the *Specific Claims Tribunal Act* for an order that the claim be struck out on the ground that it:

a. is, on its face, not admissible under sections 14 to 16;

[5] The primary ground for the application is the provision of section 14(1) that "…a **First Nation** may file with the Tribunal a claim…for compensation for **its** losses…" [Emphasis added]

[6] The Crown acknowledges that annuities are a treaty right, but maintains that the loss is to the individual member of the Band and not the collective. The Crown relies on *Soldier v. Canada* 2009 MBCA 12, [2009] 4 W.W.R. 455:

> Unlike the right to hunt, which belongs to the band collectively, **the right to this particular annuity belongs to each individual**. The payments are not made to the band or to the chiefs. **There is a specific benefit in a specific amount to be paid to members of the band as individuals**. If a certain individual entitled to his or her annual treaty payment failed to retrieve that payment from the Crown, the First Nation was not provided with those funds. While Mr. Sundown could not exclude another member of the band from using the cabin, only Soldier or Bone could collect their particular annuity payment. The dispute here is as to the amount to be paid. [Emphasis added, para. 55]

[7] In reliance on the above paragraph, the Crown contends that the present claim does not come within the jurisdiction of the Tribunal as only a First Nation may bring a claim and any

such claim must be based on "its losses".

[8] Counsel for the claimant sought to rely on the contents of the Claimants Written Submissions to the Minister of Indian Affairs in support if its Treaty Annuity Specific Claim. This had been filed with the Specific Claims branch under Canada's Specific Claims Policy on December 6, 2001. This material appears to be a thorough review of the events that led to the inclusion of the provision for annuities contained in the text of Treaty 6. This includes numerous extracts from correspondence and reports. Counsel intended to rely on material in the Claimant's Submission as an aid to the interpretation of Treaty 6. The focus would be on the question whether the annuities clause is properly considered a collective right, albeit payable to individuals, and whether the aggregate of the losses are losses of the collective.

[9] The Claimant's Submission was filed and served on the Crown the day before the commencement of the hearing of the application to strike. It is 189 pages long. Counsel for the Crown, quite understandably, resisted the suggestion that the Tribunal could consider this material. A further difficulty arose in that the material contains extracts from documents relied on by the claimant as evidence going to the interpretation of the treaty, and in particular the issue of collective versus individual interests and losses.

[10] The Crown has not received proper notice of the claimant's reliance on contents of the Claimant's Submission. If the application were to proceed, the Tribunal would have, as the evidentiary base, only the wording of Treaty 6.

[11] In *Soldier, supra,* Steel J. A. said the following:

> 92 The certification judge held that in many respects the plaintiffs were appropriate representatives for the class. They are entitled to treaty annuity payments and do not appear to have an interest that conflicts with the interests of the other members of the proposed class.
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> 93 However, the judge also held that they would not be appropriate representatives because plaintiffs' counsel advised the court that they did not intend to adduce any expert or historical evidence to assist in interpreting the treaties. Rather, they intended to rely solely on the wording of the treaties.

> 94 In the court's view, given the complexity of treaty interpretation and the need for evidence related to the intention and understanding of the treaty signatories as well as the circumstances surrounding the signing of the treaties, such evidence was required. The Supreme Court of Canada has affirmed that the negotiation context cannot be ignored in treaty interpretation. As the Supreme Court of Canada stated in *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915 (S.C.C.) (at para. 18):
>
> > .... This means that the promises in the treaty must be placed in their historical, political, and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time.
>
> See Marshall, at para. 14

[12] Recently, the Supreme Court summarized the principles governing treaty interpretation, *Quebec (AG) v. Mosses* [2010] 1 S.C.R. 557. These include:

> 1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 78; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 Alta. L. Rev. 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997), 36 Alta. L. Rev. 149.
>
> 2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon, supra*, at p. 402; *Sioui, supra,* at p. 1035; *Badger, supra*, at para. 52.
>
> 3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui, supra*, at pp. 1068-69.
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> 4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger, supra,* at para. 41.
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> 5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger, supra,* at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907.
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> 6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: Badger, supra, at paras. 53 *et seq*.; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36.
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> 7. A technical or contractual interpretation of treaty wording should be avoided: *Badger, supra*; *Horseman, supra; Nowegijick, supra*.

> 8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" [page616] or realistic: *Badger, supra*, at para. 76; *Sioui, supra*, at p. 1069; *Horseman, supra*, at p. 908.
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> 9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown, supra*, at para. 32; *Simon, supra*, at p. 402.

[13] Although the Claimant's Submission refers to material that may establish the context for the treaty promise of annuities, and assist the Tribunal in a determination of the characterization of the right, it is necessary that the record include the relevant documents.

[14] I take notice that there are numerous historical treaties that make provision for annuities payable to members of the collective. The intervenor says that other treaties contain non-monetary provisions that may be characterized as conferring benefits to individuals.

[15] The Tribunal has received notice of the intention on behalf of 13 First Nations with potential claims related to annuities to apply to intervene in the present matter.

[16] Substantive fairness calls for the ability of the claimant to advance its claim based on evidence that may assist in interpreting the treaty. Moreover, the issue is one that may affect other claims.

[17] The central issue before the Tribunal is the question whether the annuity clause establishes a collective right, or merely an individual right. There is no contest around the termination of the payment of annuities between 1885 and 1889. Of course the evidence relevant to the central issue may touch on matters that are not in issue. The evidentiary record is likely to be substantially the same whether the matter goes to a full hearing on the Crown Application to Strike or a full hearing on the merits of the claim.

[18] In the circumstances, I direct that the claim proceed to a full hearing on the merits. It will be for the Crown to determine whether it wishes to characterize its motion on the hearing of the claim as an Application to Strike or simply argue that, on the evidence, the claimant has not established a legal obligation of the Crown to provide assets to a First Nation under a treaty

(*Specific Claims Tribunal Act* s. 14(1)(a)). The question in either case is whether the claimant has, on a determination of the legal nature of the treaty promise, established a basis for compensation due to the non-payment of annuities.

HARRY SLADE

Honourable Harry Slade
Chairperson, Specific Claims Tribunal
Canada

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OTTAWA, ONTARIO, July 06, 2012

PRESENT: Honourable Harry Slade

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BEARDY'S & OKEMASIS BAND #96 AND #97

Claimant

and

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

Respondent

and

PREMIÈRE NATIONS DES ATIKAWEKW D'OPITCIWAN

Intervenor

COUNSEL SHEET

TO: **Counsel for the Claimant BEARDY'S & OKEMASIS BAND #96 AND #97**
As represented by Ron S. Maurice et Steve Carey

AND TO: **Counsel for the Respondent**
As represented by Daniel J. Kuhlen et David J. Smith