FILE NO.: SCT-7007-11
CITATION: 2014 SCTC 4
DATE: 20140625

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
DOIG RIVER FIRST NATION Claimant (Respondent)	Allisun Rana, for the Claimant (Respondent)
– and –	
BLUEBERRY RIVER FIRST NATIONS Claimant (Respondent)	James Tate and Ava Murphy, for the Claimant (Respondent)
-and-	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent (Applicant)	Brett C. Marleau, for the Respondent (Applicant)
	HEARD VIA WRITTEN ARGUMENT

REASONS FOR DECISION

Honourable Patrick Smith

I. OVERVIEW

[1] On May 29 and 30, 2013, a two day hearing was held at the Doig River First Nation community centre.

[2] The hearing, styled as a motion to strike, focused on two issues: (1) whether the Crown had been released from liability to the Claimants' mineral rights claim as a result of a Release and Indemnity Agreement signed as part of the settlement of *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, concerning the surrender of IR 172; and (2) whether the claim for mineral rights was barred by the doctrine of *res judicata.*

[3] The decision of the Tribunal was released on February 20, 2014. The First Nations were successful on both issues.

[4] Submissions on costs were requested and have been received and reviewed.

II. THE FACTS

[5] The decision of the Tribunal fully sets out the factual background of this Claim and need not be repeated here.

III. APPLICABLE RULES REGARDING COSTS

[6] Rule 110(2) of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119 [*Rules*] provides authority for the Tribunal to make an order with respect to costs following a hearing on the merits.

[7] Rules 111(1) and (2) of the *Rules* set out the criteria that the Tribunal must consider when deciding whether to award costs.

[8] Rule 111(2)(*a*) of the *Rules* provides that, when costs are claimed by First Nations, the Tribunal must consider whether the costs "are reasonably incurred but are disproportionate to the amount of compensation awarded."

[9] Rule 111(2)(*b*) of the *Rules* directs the Tribunal to consider the complexity and public importance of the issues raised in the claim.

[10] The list of criteria set out in Rule 111 of the *Rules* is not exhaustive. Rule 5 of the *Rules* allows the Tribunal to refer to the *Federal Courts Rules*, SOR/98-106 to provide for "any matter of practice or procedure" not set out by its own costs rules.

[11] The criteria for costs in the *Federal Courts Rules* are set out in Rule 400(3) and include reference to the result obtained in the proceeding, the importance and complexity of the issues and any other matter that is relevant to the case.

IV. GENERAL PRINCIPLES OF AWARDS FOR COSTS

[12] The general rule in civil litigation is that costs should follow the event. As stated in *The Law of Costs:*

> In general, it can be said that when a motion is properly brought costs should be awarded to the moving party, if successful, otherwise to the responding party subject always to the discretion of the judge of judicial officer. [Mark Orkin, *The Law of Costs*, loose-leaf, (Aurora, Ont: Canada Law Book, 1987), s 402 at 4-1]

[13] There are three fundamental purposes of modern cost rules:

- to indemnify successful litigants for the cost of litigation;
- to encourage settlements; and
- to discourage and sanction inappropriate behaviour by litigants.

V. PRIOR COST DECISIONS OF THE TRIBUNAL

[14] In 2012, the Tribunal issued its first decision on costs in *Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) v Her Majesty the Queen in Right of Canada*, 2012 SCTC 6 [*Big Grassy*].

[15] The Big Grassy First Nation had claimed costs against Canada pursuant to Rule 110(1) of the *Rules* after successfully defeating Canada's motion, brought via Rule 29 of the *Rules*, regarding the issue of what party had the onus of proof on a point of law and fact.

[16] In *Big Grassy*, the Tribunal made a decision not to order costs and adopted a presumptive "no costs" regime for interim applications.

[17] Paragraphs 26-31 and 39-44 in *Big Grassy* set out the rationale for the Tribunal's decision. Fundamental to its decision was the view that, if the Tribunal were to adopt a principle that 'costs should follow the event,' it may serve to impede access to justice by placing a significant financial barrier on impoverished First Nations lacking financial resources and impose a financial barrier preventing the matter being heard on its merits.

VI. THE POSITIONS OF THE PARTIES

[18] The Claimants take the position that the hearing, notwithstanding it was styled as a motion to strike, was in fact a complex hearing on the legal merits of the Claim rather than an interim application because it decided two key components of Canada's response to the Claim.

[19] Canada's position is that this was an interim hearing and that there is no reason for the Tribunal to depart from a presumptive rule of no costs particularly when its conduct was neither improper or an abuse of process.

VII. DECISION

[20] For the reasons that follow, costs are awarded to the Claimants on a partial indemnity basis, in accordance with Column III of the *Federal Courts Rules*, *Tariff B*, the total not to exceed the amount of any federal funding received towards their legal costs and expenses in relation to this hearing

[21] While the hearing was styled as a motion to strike, I agree with the submissions of the Claimants that, in reality it was a hearing on the merits of two fundamental defenses to the Claim and for this reason it was not an interim hearing and accordingly the presumptive no costs rationale adopted in *Big Grassy* should not apply.

[22] The Tribunal considered a substantial volume of evidence and heard extensive complex legal argument that went to the essence of the Claim.

[23] An award of costs is in keeping with the goals and philosophy of the Tribunal and with Rule 111(2) of the *Rules*, and Rule 400(*c*) of the *Federal Court Rules*.

[24] An award of costs is also in the public interest in that it encourages First Nations to bring their specific claims before the Tribunal thereby promoting the resolution of long standing

grievances and the overall principle of reconciliation of Aboriginal and non-Aboriginal interests.

[25] In the event that the Parties are unable to resolve the quantum of costs, they shall make further submissions or seek directions from the Tribunal.

PATRICK SMITH

Honourable Patrick Smith

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140625

File No.: SCT-7007-11

OTTAWA, ONTARIO June 25, 2014

PRESENT: Honourable Patrick Smith

BETWEEN:

DOIG RIVER FIRST NATION

Claimant (Respondent)

and

BLUEBERRY RIVER FIRST NATIONS

Claimant (Respondent)

and

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

Respondent (Applicant)

COUNSEL SHEET

TO: **Counsel for the Claimant (Respondent) DOIG RIVER FIRST NATION**
As represented by Allisun Rana
Rana Law, Barristers & Solicitors

AND TO: **Counsel for the Claimant (Respondent) BLUEBERRY RIVER FIRST NATIONS**
As represented by James Tate and Ava Murphy
Ratcliff & Company LLP

AND TO: **Counsel for the Respondent (Applicant)**
As represented by Brett C. Marleau
Department of Justice