FILE NO.: SCT-5001-22
CITATION: 2023 SCTC 3
DATE: 20230316

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

WATERHEN LAKE FIRST NATION

Claimant (Respondent)

Ron Maurice, Sheryl Manychief, Melanie Webber, Antonela Cicko and Rosemary Irwin, for the Claimant (Respondent)

– and –

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent (Applicant)

Karen Jones and Brady Fetch, for the Respondent (Applicant)

HEARD: January 25, 2023

REASONS ON APPLICATION

Honourable Victoria Chiappetta, Chairperson

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

Cases Cited:

Knight v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 45; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, 74 DLR (4th) 321; *Hodgson v Ermineskin Indian Band No. 942*, 2000 CarswellNat 2918, [2000] FCJ No 2042 (FCA); *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *George Gordon First Nation v Saskatchewan,* 2022 SKCA 41, 2022 CarswellSask 136; *British Columbia v Tener*, [1985] 1 SCR 533, 17 DLR (4th) 1; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3; *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 6; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 2, 14, 15, 17 and 20.

Constitution Act, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

Authors Cited:

House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Evidence, 39-2, No 12 (6 February 2008) at 15:45 (Chuck Strahl).

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I. OVERVIEW

[1] The Waterhen Lake First Nation (Claimant) has filed a Claim with the Specific Claims Tribunal (Tribunal) seeking compensation for losses from the taking of commercial harvesting rights by section 12 of the 1930 Saskatchewan *Natural Resources Transfer Agreement* (*NRTA*), for the taking of 2,900,000 acres of traditional lands for the Primrose Lake Air Weapons Range (PLAWR) and for the loss of lands on which the First Nation held commercial trapping licences. The Tribunal was established by the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. The *SCTA* details and enumerates the finite grounds for establishing the jurisdiction of the Tribunal. The Respondent has brought an Application pursuant to section 17 of the *SCTA*. It submits that the Claim is outside of the Tribunal's jurisdiction and should be struck. I have presumed the facts pleaded are true. I have interpreted the *SCTA* broadly and liberally, recognizing the remedial purpose and process of the Tribunal. I have considered the fact that this is a novel claim in the context of a continuing evolving area of law. The Tribunal's jurisdiction is prescribed by the *SCTA*, however, without ambiguity. For reasons set out below, I have concluded that the Claim does not fall within the scope of the legislated jurisdiction. For this reason, it is plain and obvious, and beyond doubt that the Claim cannot succeed before the Tribunal. The Application is therefore granted.

[2] The substance of the Claim is substantially before the Saskatchewan Court of King's Bench in *Chief Richard Fiddler et al v Attorney General of Canada and the Government of Saskatchewan,* QB No. 1867 of 1999. Canada has filed its Statement of Defence and has not pled a limitation period or a jurisdictional defence. A second action before the Saskatchewan Court of King's Bench, *The Government of Waterhen Lake Cree Nation v Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province of Saskatchewan*, QB No. 158 of 2007, seeks damages which include compensation for the unlawful occupation and appropriation of land for the PLAWR, to quash the PLAWR lease and to eject the Crown from the PLAWR's lands. Canada has yet to file a Statement of Defence in the second action. Given Canada's response to the first action and its stated commitment to reconciliation however, it would be disappointing and unexpected for Canada to rely on a limitation defence in response to the second action. Importantly, while the Application to strike the Claim for want of jurisdiction is granted, there remains an avenue available to the Claimant to have the merits of the Claim independently and

objectively assessed and adjudicated.

II. DISCUSSION

[3] Pursuant to subsection 17(a) of the *SCTA*, the Respondent asks the Tribunal for an order that the Claim be struck in whole, without leave to amend, on the ground that it is, on its face, not admissible for want of jurisdiction. The Respondent bears the onus of satisfying the Tribunal that it is plain and obvious, and beyond doubt that the Claim will fail (*Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17, [2011] 3 SCR 45; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980, 74 DLR (4th) 321; *Hodgson v Ermineskin Indian Band No. 942*, 2000 CarswellNat 2918, [2000] FCJ No 2042 (FCA)).

[4] The Claim raises important constitutional issues and significant treaty rights issues. The Claimant seeks compensation for lost commercial harvesting rights as a result of the 1930 *NRTA* and for lost access to its traditional lands impacting harvesting rights after the PLAWR was established on April 1, 1954. The Claimant pleads that it was neither consulted nor compensated when the *NRTA* modified First Nations' commercial harvesting rights. It alleges that it lost its rights to hunt and trap in the portion of Fur Block A-37 that was taken-up by the PLAWR and that it was neither consulted nor compensated when it lost its ability to exercise harvesting rights within these lands. The Claimant argues that matters involving constitutional rights and treaty rights should not be considered by the Tribunal absent a full evidentiary record and fulsome argument. Treaty rights are recognized and affirmed by section 35 of the *Constitution Act,* 1982, c 11. I agree that determining the extent of treaty rights does not, in the ordinary course, lend itself to resolution in a summary fashion. The purpose of this Application, however, is not to consider or adjudicate the merits of the allegations pled. Rather, the Tribunal is to accept the assertions made in the Claim as true and consider whether they fall within the Tribunal's jurisdictional boundaries as prescribed by the *SCTA* (*Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45). The analysis is limited to determining whether it is beyond doubt that the Claim will fail for want of jurisdiction. To this end, a full evidentiary record and fulsome argument beyond the specific issue raised by section 17 of the *SCTA* is neither required nor appropriate.

[5] The process of the Tribunal is remedial. It was established as an independent tribunal to resolve historical specific claims between First Nations and the Crown as part of the process of

reconciliation. It follows that the *SCTA* that governs the Tribunal must be interpreted broadly and liberally. Adopting a narrow or technical interpretation of the *SCTA* would defeat its purpose to provide First Nations with access to justice in resolving specific claims in a cost-effective and timely manner. That the *SCTA* is to be liberally construed, however, does not negate the reality of its clearly defined scope. The jurisdiction of the Tribunal is limited to claims that fall within those grounds enumerated in section 14 of the *SCTA*. As will be discussed further below, the relevant sections of the *SCTA* are not ambiguous. Read together with the *SCTA* as a whole, the intention is that claims based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights, are not eligible to be filed with the Tribunal. In 2008, when Bill C-30, *An Act to establish the Specific Claims Tribunal and to make consequential amendments to other Acts*, 2nd Sess, 39th Parl, 2008 (assented to 18 June 2008), was introduced in Parliament, the Honourable Chuck Strahl, Minister of Indian Affairs and Northern Development, stated in evidence in the Standing Committee on Aboriginal Affairs and Northern Development that "[t]he specific claims process is simply not the appropriate forum to deal with the broader issues of <u>ongoing</u> treaty rights", and that these issues would be dealt with in other initiatives (emphasis added; House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, Evidence, 39-2, No 12 (6 February 2008) at 15:45 (Chuck Strahl, introduction of Bill C-30)). The Claimant is seeking compensation from Canada for the abrogation of harvesting rights by the *NRTA* and the taking of non-reserve lands over which it had harvesting rights for the PLAWR, without compensation or consultation. Such a claim falls outside of the jurisdiction of the Tribunal.

[6] The legislative framework of the Tribunal to accept claims is prescribed by sections 14 to 16 of the *SCTA*. As noted above, the grounds upon which a First Nation may file a claim with the Tribunal are enumerated in section 14 of the *SCTA*. The Claimant submits that its Claim is filed with the Tribunal based upon the grounds set out in paragraphs 14(1)(a) and (c).

[7] Paragraph 14(1)(a) provides that a claim may be filed with the Tribunal based on a "failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown." The Claimant argues that the language of this paragraph is sufficiently ambiguous to include their Claim. In *Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193, the court held that "statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian." In *George Gordon First*

Nation v Saskatchewan, 2022 SKCA 41, 2022 CarswellSask 136, the Saskatchewan Court of Appeal held that if there was no genuine ambiguity in legislation, then the principle identified in *Nowegijick v The Queen*, [1983] 1 SCR 29, did not apply. In my view, the language of the paragraph lacks a genuine ambiguity. Rather, it clearly directs an analysis of whether a claimant has pled a failure by the Crown to provide land or other assets under a treaty. The Claimant pleads and relies upon Treaty No. 6. Under Treaty No. 6, the Claimant gave up its rights to a large tract of non-reserve land in exchange for specified reserves and the right to continue harvesting resources throughout the tract surrendered, with certain restrictions.

[8] Pursuant to the land cession provision, the signatory First Nations gave up their rights to a large tract of land:

> The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits, that is to say:
>
> Commencing at the mouth of the river emptying into the north-west angle of Cumberland Lake; thence westerly up the said river to its source; thence on a straight line in a westerly direction to the head of Green Lake; thence northerly to the elbow in the Beaver River; thence down the said river northerly to a point twenty miles from the said elbow; thence in a westerly direction, keeping on a line generally parallel with the said Beaver River (above the elbow), and about twenty miles distant therefrom, to the source of the said river; thence northerly to the north-easterly point of the south shore of Red Deer Lake, continuing westerly along the said shore to the western limit thereof; and thence due west to the Athabasca River; thence up the said river, against the stream, to the Jaspar House, in the Rocky Mountains; thence on a course south-easterly, following the easterly range of the mountains, to the source of the main branch of the Red Deer River; thence down the said river, with the stream, to the junction therewith of the outlet of the river, being the outlet of the Buffalo Lake; thence due east twenty miles; thence on a straight line south-eastwardly to the mouth of the said Red Deer River on the south branch of the Saskatchewan River; thence eastwardly and northwardly, following on the boundaries of the tracts conceded by the several treaties numbered four and five to the place of beginning.
>
> And also, all their rights, titles and privileges whatsoever to all other lands wherever situated in the North-west Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada. [emphasis added; Copy of Treaty No. 6; Claimant's Book of Authorities, Tab 38]

[9] Pursuant to the reserve creation provision, Canada committed to set aside reserves for the signatory First Nations:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them. [emphasis added]

[10] Pursuant to the harvesting rights provision, the signatory First Nations retained the right to continue to hunt and fish throughout the tract surrendered, with certain restrictions. Under this provision, Canada also had the right to "tak[e] up" lands as required for settlement, mining, lumbering or other purposes:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government. [emphasis added]

[11] Treaty No. 6 obligated the Crown to set aside reserve lands for the signatory First Nations. The Claim, however, is grounded in the harvesting rights provision of the Treaty. The Claim does not allege a failure by the Crown to provide land under Treaty No. 6 to the Claimant. Rather, it challenges Canada's right to take up surrendered land upon which the Claimant retained harvesting rights, for the PLAWR, without consultation or compensation and seeks further compensation for the abrogation of harvesting rights by the *NRTA*, without consultation.

[12] Paragraph 14(1)(c) of the *SCTA* provides that a claim may be filed with the Tribunal based on "a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands … or other assets of the First Nation." The Claimant argues that the use of the term "other assets" in paragraphs 14(1)(a) and (c) is ambiguous and properly interpreted to include harvesting rights and trapping licenses as well as its claim concerning the taking up the lands for the PLAWR. (It is agreed that none of the assertions in the Claim are grounded in the "provision or non-provision of reserve lands," which includes "unilateral undertakings" or the Crown's "administration of reserve lands.")

[13] The Claimant submits that commercial harvesting rights are assets of a *sui generis* nature, analogous to the common law property law concept of *profit à prendre*. The Claimant relies on *Cherry v Petch*, [1948] OWN 378 (Ont HC) at 380, as cited in *British Columbia v Tener*, [1985] 1 SCR 533 at 541, 17 DLR (4th) 1, to describe *profit à prendre* as an interest in the land itself that permits someone to enter upon land owned by someone else and fish, hunt, or trap thereon, and to remove those tangible spoils from the land. The *profit à prendre*, it is submitted, is a means to an end; namely, the acquisition of tangible objects to be used for self-sufficiency or trade, essential to the survival and the maintenance of the First Nation. The Claimant submits that because tangible property is gathered during the exercise of the harvesting right and later converted to cash or other tangible property, the right itself is an asset, as defined in the *SCTA*. This is a novel argument put forward in the context of an ever-evolving area of law. It is not supported, however, by the Tribunal's governing statute.

[14] It cannot be said that there is a genuine ambiguity in the language of the relevant legislated sections, when read as a whole. Section 2 of the *SCTA* defines the term asset as tangible property. The Tribunal has defined "tangible property" as property that has physical form and characteristics, or things that can be seen or touched or that are otherwise perceptible to the senses (*Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at para 295, citing *Black's Law Dictionary*, 10th ed, *sub verbo* "tangible property"). Paragraph 15(1)(g) of the *SCTA* states that a First Nation may not file with the Tribunal a claim that is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights. Subsection 15(2) of the *SCTA* states that nothing in paragraph 15(1)(g) prevents a claim that is based on a treaty right to lands or assets to be used for activities, such as ammunition to be used for hunting or plows to be used for cultivation, from being filed.

[15] In *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2015 SCTC 3 at paras 289, 294, the Tribunal determined that treaty annuities were "assets" pursuant to section 2 and paragraph 14(1)(a) of the *SCTA*. Chairperson Slade J (as he then was), held that "[i]n the sense in which the signatories to the treaty would naturally have understood it, cash, like a cow or plow, is an asset … [t]he cash had a physical existence. It was in the hands of the Indian agent, as were other assets promised by the treaty before delivery to the band." Importantly, Slade J relied in part upon the fact that treaty annuities were not included in the

categories of potential claims that may not be brought before the Tribunal in subsection 15(1) of the *SCTA*, stating that it would not be appropriate to create an exclusion for these claims based on the definition of "assets" as this was not Parliament's intention (paras 406–07). Unlike claims based on treaty annuities, however, the *SCTA* specifically excludes the jurisdiction of the Tribunal from hearing a claim based on treaty harvesting rights. It was Parliament's intention to specifically exclude treaty harvesting rights claims. Subsection 15(2) of the *SCTA* saves a claim related to treaty harvesting rights from being excluded if it were <u>also</u> a claim to a treaty right to lands or assets. The *SCTA* preserves the jurisdiction of the Tribunal to hear a claim based on treaty rights to those tangible assets required to exercise the treaty harvesting rights, like ammunition and plows.

[16] The Claimant argues that in this case, it cannot be said that the harvesting rights at issue are treaty rights of an ongoing and variable nature because it is alleged that they were taken in 1930. They are no longer ongoing, it is submitted, such that the legislated jurisdictional exclusion does not apply. The nature of the treaty right described in the *SCTA*, however, relates to the character of harvesting rights. The right to harvest is a collective right, exercised by individuals (*Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 6 at para 567; *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385). In essence the Claimant is seeking a finding that its Treaty No. 6 harvesting rights are ongoing despite the *NRTA* such that compensation for their abrogation is warranted. The Claimant's alleged loss of the treaty right to harvest grounds its claim for compensation and therefore it falls squarely within the clearly legislated exclusionary language of paragraph 15(1)(g).

[17] The Claimant further submits that subsection 20(2) of the *SCTA* is sufficient to establish the Tribunal's jurisdiction. Subsection 20(2) provides that when the Tribunal awards compensation for a claim, "[it] may consider losses related to activities of an ongoing and variable nature, such as activities related to harvesting rights." The jurisdiction of the Tribunal to consider the validity of a claim, however, is wholly determined by section 14 of the *SCTA*. Section 15 guides the application of section 14 with specific examples when a First Nation may not file a claim with the Tribunal. Section 20 of the *SCTA* provides the basis and limitation for rendering decisions on the issue of compensation for a specific claim once the Tribunal has assumed jurisdiction and found the claim to be valid. For reasons set out above, I have concluded that the Claim is not admissible

under section 14 of the *SCTA* and it is specifically excluded by paragraph 15(1)(g) of the *SCTA*. Section 20 of the *SCTA* is therefore of no assistance when considering whether harvesting rights may form the substance of a claim before the Tribunal.

III. CONCLUSION

[18] For reasons set out above, the Respondent's Application to strike the Claim is granted.

VICTORIA CHIAPPETTA

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Honourable Victoria Chiappetta, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20230316

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OTTAWA, ONTARIO March 16, 2023

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