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| SPECIFIC CLAIMS TRIBUNAL | |
| TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES | |
| F I L E D | January 23, 2017 |
| David Burnside | |
| Ottawa, ON | 4 |

SCT File No.: SCT – 3002-16

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

OJIBWAYS OF ONIGAMING FIRST NATION (INDIAN BAND) and
BIG GRASSY (MISHKOSIMIINIIZIIBING) FIRST NATION (INDIAN BAND)

Claimants

v.

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

Respondent

RESPONSE

**Pursuant to Rule 42 of the
*Specific Claims Tribunal Rules of Practice and Procedure***

This Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

TO: Big Grassy First Nation
as represented by:
Donald Colborne
Barrister & Solicitor
1125 Fort Street
Victoria, BC V8V 3K9
Telephone: (807) 344-6628
Facsimile: (807) 983-3079
E-mail: dcolborne@shaw.ca

Overview

Big Grassy (Mishkosiminiiziibing) First Nation and Ojibways of Onigaming First Nation (Indian Band) (the Claimants) allege that the Crown had a legal obligation to stop timber harvesting on pre-reserve lands with the boundaries of Ontario. Canada denies any obligation or authority to do so. If there is any legal liability, it lies with Ontario, which had jurisdiction over the land and issued the timber license. Moreover, Canada ensured that Ontario paid the Claimants the monies

received for all of the timber removed from the lands. Thus, the Claimants are entitled to no further compensation as they were already fully compensated.

I. Status of Claim (R. 42(a))

1. The Claimants, Ojibways of Onigaming First Nation and Big Grassy (Mishkosiimiiniiziibing), jointly submitted their Claim on January 16, 1996 and it was filed with the Minister on October 16, 2008.
2. On August 11, 2009, the Minister notified the First Nations in writing that their Claim had not been accepted.
3. On December 21, 2016, Big Grassy First Nation and Ojibways of Onigaming First Nation filed a joint Declaration of Claim with the Specific Claims Tribunal.

II. Validity (R. 42(b) and (c))

4. The Crown denies the validity of the Claimant's Claim, including, but not limited to:
 - a) That Canada's actions in this Claim in anyway amounted to a breach of treaty, the *Indian Act*, fiduciary duty, the honour of the Crown, or any other legal obligation;
 - b) That pre-1915 Canada had any legal control over the lands from which the timber was removed;
 - c) That Canada had any obligation to secure compensation for the timber removed;
 - d) That Canada's role in the Fuller lease resulted in any legal breach or resulted in any timber being removed;
 - e) That Canada failed to deal effectively and in a reasonable time with the disputed territory issues with Ontario and that the Crown's actions exposed the Claimants' land interests to loss;
 - f) That Canada dealt incorrectly in its role in having IR 35J confirmed by Ontario;
 - g) That Canada had any obligation or authority to interfere with the logging carried out;
 - h) That the logging was not legally authorized by Ontario;
 - j) That Canada failed to protect the Claimants' interests;

- k) That the Claimants were not adequately compensated by Ontario for the timber taken; and
- l) That the Claimant had a cognizable legal interest, or any legal interest, in the land pre-1915.

5. Alternatively, the Crown says if the Tribunal finds the Specific Claim to be valid, pursuant to S. 20(3) of the *Act*, the Crown is entitled to a setoff.

6. Alternatively, the Crown says if the Tribunal finds the Specific Claim to be valid, liability lies in whole or in part with the Province of Ontario, and any compensation awarded should be reduced accordingly, pursuant to s. 20(1)(i) of the *Act*.

III. Allegations of Fact – Declaration of Claim (R. 41(e)): Acceptance, denial or no knowledge (R. 42(d))

7. The Crown denies all of the facts and law in the manner alleged by the Claimants. The Crown says the facts are as follows under Section IV.

IV. Statements of Fact (R. 42(e))

The Claimants

8. The Claimants are members Saulteaux Tribe of Ojibway Indians. At the relevant times, they made up the Assabaska Band. In 1964 they split into their respective current Bands.

The Selection of IR 35J

9. Treaty 3 was concluded on October 3, 1873 between Her Majesty The Queen and the Saulteaux Tribe of Ojibway Indians. Pursuant to Treaty 3, the Saulteaux Tribe surrendered their interest in a 55,000 square mile tract of land described in the Treaty. As consideration, Treaty 3 provided, among other things, for the creation of reserves.

10. Although Treaty 3 did not itself create particular reserves for the various bands, it provided a procedure for doing so. The salient portions of Treaty 3 provided that reserves, whether for farming or other purposes, would be:

- “selected and set aside”
- “by the officers of the said Government appointed for that purpose”
- “after conference with the Indians”.

11. The reserves of the Assabaska Band were to be located on several tracts of land, including various islands, in the neighborhood of the Northwest Angle of the Lake of the Woods.

12. The selection of Treaty 3 reserves was conducted by S.J. Dawson and R.J.N. Pither (Reserve Commissioners), who were assigned this responsibility on July 8, 1874. Dawson consulted with the Treaty 3 Ojibway and submitted a report to the Ministry of the Interior (then responsible for Indian Affairs), which indicated a plan showing the location of the reserves for Lake of the Woods had been submitted to the Surveyor General. The reserves were provisionally approved by Order-in-Council 164, dated February 27, 1875, subject to final confirmation by Governor General in Council after the completion of any additional surveys, as required. The lands that today comprise IR 35J were surveyed in 1890 by A.W. Ponton (Dominion Land Survey).

13. The Assabaska had been informed that their reserve lands could not be made final until confirmed by the Governor General in Council, as recorded in Dawson’s letter to Meredith, dated January 28, 1875.

Lands were reserved as IR 35J in 1915

14. The process for creation of Treaty 3 reserves in Ontario was complicated by issues regarding the location of Ontario’s boundaries, its jurisdiction over lands and its role in confirming Treaty 3 reserves. In 1870, the Dominion purchased Rupert’s Land from the United Kingdom. Discussions ensued between Canada and Ontario regarding the precise location of Ontario’s northern and western boundaries with Rupert’s Land. On June 26, 1874 Canada and Ontario signed a “*Memorandum of Agreement for Provisional Boundary in Respect of Patents of Lands*” pursuant to which the two governments provisionally agreed to northern and western

boundaries of Ontario, and to a system for regulating the sale of lands and disputed rights in the territory claimed by both governments. In 1884, the Judicial Committee of the Privy Council (JCPC) decided the correct position of the northwestern boundary of Ontario, and ordered that this be implemented. In 1889, the boundary was confirmed by legislation. Within the new provincial boundaries of Ontario lay a portion of the lands covered by Treaty 3, including the lands that were to become IR 35J.

15. In 1888, *St. Catherine's Milling and Lumber Co. v The Queen* was decided. The JCPC held that upon surrender of the lands in Treaty 3, the beneficial interest in that portion of the surrendered lands situated in Ontario was held by the Province, subject only to the legislative power of the Dominion over lands reserved for the Indians.

16. As some Treaty 3 reserves were selected and identified prior to resolution of the above boundary issue in 1889, Canada and Ontario each passed virtually identical legislation in 1891 authorizing the two governments to conclude a formal agreement regarding the administration of Indian reserves in Ontario. On April 16, 1894 Canada and Ontario concluded such an agreement (the *1894 Agreement*), which was set out in reciprocal legislation. The recital to the *1894 Agreement* states that since the conclusion of Treaty 3, the true boundaries of Ontario had been ascertained, that these included part of the territory covered by Treaty 3; that prior to the definition of the boundary, Canada had selected and set aside certain reserves in accordance with Treaty 3, but that Ontario had neither been involved in nor concurred with such selections. The *1894 Agreement* acknowledged that Ontario's concurrence in reserve creation was necessary. It outlined a process for obtaining such concurrence, and provided that full inquiry would be made by the Province in order to avoid dissatisfaction among the Indians.

17. In 1903, the JCPC decided another important case regarding federal-provincial jurisdiction concerning Indian reserves. In *Ontario Mining Co. v Seybold*, the Court referred to its earlier decision in *St. Catherine's*, and held that provincial involvement was necessary in the creation of reserves in Ontario.

18. In December 1913, Canada and Ontario agreed that Ontario would confirm most of the reserves previously set aside by Canada, subject to certain conditions. One condition was that Canada pay Ontario for what the latter felt was an amount of reserve land in excess of what it was legally obligated to provide. Canada agreed in principle to pay for the “excess” acreage at a reasonable rate, and discussions ensued in order to determine the excess acreage and the amount to be paid.

19. In 1915, by *An Act to Confirm the Title of the Government of Canada to Certain Lands and Indian Lands*, (the *1915 Act*) Ontario transferred to Canada the lands that had been laid aside for the Indians by the Government of Canada. According to the *1915 Act*, the lands transferred to Canada were those in relation to which plans of survey had been produced and had been deposited by Canada in the Department of Lands, Forests and Mines Ontario.

20. The effect of *St. Catherine's*, *Seybold* and the *1915 Act*, is that land selected as reserve land in the disputed area, later confirmed to be within the boundaries of Ontario, did not receive reserve status until surveyed and confirmed by Ontario and transferred to Canada in 1915.

21. IR 35J was included in the original schedules sent to Ontario. Accordingly, the lands at issue were reserved as IR 35J in 1915.

1892 Timber Lease

22. Prior to the signing of Treaty 3, in January of 1872, a timber limit had been granted by Canada to Fuller & Co. for lands on the east shore of Lake Manitoba to be selected after surveys of the area were completed. On November 29, 1872, Fuller requested an equal area on Lake of the Woods, as it was unable to fulfill the terms of the original lease granted as there was not enough timber. An Order in Council was passed on February 17, 1873, revising the location of the timber limit to “be granted when the Indian title is quieted.”

23. In June of 1874, the Surveyor General instructed surveyor Lachlan Kennedy to survey the limit granted to Fuller & Co., and during the summer of 1874, Kennedy obtained consent from the Assabaska for the lease of lands in the northern part of the lake as part of the limit granted to

Fuller. The consent was submitted to the Governor General in Council in 1875, and an Order in Council authorized the lease to Fuller & Co. The lands did not include the area where the islands of IR 35J were located.

24. In 1879 Fuller & Co. merged and the new company, called Keewatin Lumbering and Manufacturing Company (KLMC), assumed ownership of the Fuller lease.

25. In 1882, KLMC approached Canada to amend the Fuller lease again, as the islands included in the original lease contained less timber than expected. An Order-in-Council dated December 14, 1882, authorized these changes, but subsequently a dispute arose between the parties regarding the boundaries of the lease. Ultimately, it was decided that the land included the islands on which IR 35J would later be located, among other lands. However, the revised lease was not accepted by an Order-in-Council because the JCPC had released its decision that supported Ontario's boundary claim, which encompassed the reserves where the limit was located.

26. In 1889, after the *St. Catherine's Milling* case, Ontario moved to take control over the area and bring timber operations in line with other operations elsewhere in the Province.

27. In 1891, the Province and KLMC came to an agreement that KMLC would receive licenses, the timber limit to include IR 35J, among other lands. The licenses were issued in 1892.

28. Ontario did not notify the Department of Indian Affairs that the licenses were issued.

29. In 1898, Chief Naitemequan of the Assabaska Band informed A. Leveque, Inspector of Indian Agencies at Rat Portage, that white men had built camp on IR 35J and were cutting timber and the Indians believed this to be an unwarranted trespass. Leveque was informed that the cutting of timber was being undertaken under contract to KLMC and that KLMC claimed the right to take the timber from the island. The agent was asked, as a precautionary measure, to keep separate records of the timber removed from the reserve.

30. Canada secured the timber dues owed to the Claimants, although it did not have any legal obligation to do so. Discussions took place over the years between Leveque, MacLean at DIA, White at DLC Ontario, Mather at KLMC, and others concerning the matter of the licenses, respective governmental responsibilities, and the ultimate collection of dues payable to DIA on behalf of the Assabaska Band.

31. The discussions began in 1898, continued off and on until April 1922, when the Province of Ontario agreed to forward the sum of \$3,544.28 to the Department of Indian Affairs to deposit in the Assabaska capital account. The amount represented the dues collected by the Province from KLMC for the 1896/1897 season.

32. Thus, the Claimants have been fully compensated for the timber taken from IR 35J.

33. As noted above, the lands comprising IR 35J did not become reserve and did not come under the operation and control of Canada until 1915, at which time the lands were transferred to Canada under the *1915 Act*. As a result, *the Indian Act*, and related timber regulations did not apply to the 1892 timber license.

34. Prior to the confirmation of reserves pursuant to the *1915 Act*, Ontario continued to exercise the Constitutional authority to issue land patents and timber licenses throughout the entire Treaty 3 territory. This included the authority to issue the 1892 timber license which included IR 35J.

35. The decisions in *St. Catherine's Millings* and *Seybold* determined that title to lands surrendered by the Indians under Treaty 3, which included IR 35J, fell within the Constitutional authority of the Province of Ontario. Pursuant to s. 92(5) of the *Constitution Act, 1867*, Ontario's constitutional powers included "[t]he Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon." Ontario's statutory authority to issue the 1892 license was set out in *An Act Respecting Timber on Public Lands*. The 1892 license was expressly issued under this authority.

36. Consequently, Canada did not have any authority or obligation to prevent Ontario from issuing the 1892 timber license, as to do so would have constituted an infringement of the proprietary rights of the Province.

37. At no time were Canada's actions contrary to the honour of the Crown.

38. Canada dealt effectively and in a reasonable time with the disputed territory issues with Ontario.

39. Canada was diligent in having IR 35J lands selected, surveyed and confirmed by Ontario under the *1915 Act*.

40. Canada's actions did not expose the Claimants to loss or damage in relation to timber on IR 35J.

V. Relief (R. 42(f))

41. The Crown seeks dismissal of this Claim.

42. To the extent that the Tribunal may find this Claim to be valid, liability lies in whole or in part with the Province of Ontario, and any compensation awarded should be reduced accordingly, pursuant to s. 20(1)(i) of the *Act*.

43. To the extent that the Crown may be found liable to pay any compensation for losses incurred by the Claimants as a result of this Claim, the Crown seeks an offset pursuant to s. 20(3) of the *Act*.

44. The Crown seeks costs in these proceedings.

45. Such other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

The Respondent's address for service is:

Lisa.Cholosky@justice.gc.ca
Department of Justice
Suite 301, 310 Broadway
Winnipeg, MB R3C 0S6
Tel: (204) 984-5218
Fax: (204) 984-5910

Dated: January 23, 2017

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Prairie Regional Office
301 – 310 Broadway
Winnipeg, MB R3C 0S6
Fax: (204) 984-5910

Per: *Lisa Cholosky*
Lisa Cholosky
Tel: (204) 984-5218
Email: lisa.cholosky@justice.gc.ca

Solicitor for the Respondent