FILE NO.: SCT-3001-12
CITATION: 2014 SCTC 5
DATE: 20140625

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
AUNDECK OMNI KANING	)	
	)	Paul Williams, for the Claimant (Respondent)
	)	
Claimant (Respondent)	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Jennifer Roy, for the Respondent (Applicant)
	)	
	)	
Respondent (Applicant)	)	
	)	
	)	
	)	
	)	**HEARD VIA WRITTEN ARGUMENT**

REASONS FOR DECISION

Honourable Patrick Smith

I. OVERVIEW

[1] On January 17, 2014, the Tribunal released its decision in this matter, *Aundeck Omni Kaning v Her Majesty the Queen in Right of Canada*, 2014 SCTC 1 [*Aundeck*], and requested the Parties to provide written argument regarding the issue of costs.

[2] The submissions of both Parties have been received and reviewed.

[3] The *Aundeck* decision fully sets out the history and evidence regarding this Claim and need not be repeated here in any detail. As stated in paragraph 1:

> The Respondent ("Canada") has brought an Application to dismiss the Claim brought by the Claimant, Aundeck Omni Kaning First Nation ("AOKFN") on the basis that the Specific Claims Tribunal lacks jurisdiction to hear the Claim because the Claim does not comply with the eligibility requirement set out in section (s.) 16(1)(a) of the *Specific Claims Tribunal Act* (S.C. 2008, c. 22) ("SCTA") because the Minister of Indian Affairs and Northern Development (the "Minister") has offered to negotiate the Claim.

[4] Canada admitted that it had breached its fiduciary obligation owed to the Claimant by making improper payments out of trust funds it held.

II. APPLICABLE RULES REGARDING COSTS

[5] In the Tribunal's decision on costs recently released in *Doig River First Nation and Blueberry River First Nations v Her Majesty the Queen in Right of Canada*, 2014 SCTC 4, the rules and principles that apply to the issue of costs were reviewed. They are equally applicable to this Claim and bear repeating.

[6] Rule 110(2) of the *Specific Claims Tribunal Rules of Practice and Procedure,* SOR/2011-119 [*Rules*] provides broad discretionary 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.

III. 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 or 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.

IV. 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* at paragraph 13, the Tribunal made a decision not to order costs and adopted a presumptive "no costs" regime for interim applications "[s]ave and except for cases of improper conduct or abuse of process."

[17] Paragraphs 26-31 and 39-44 in *Big Grassy* set out the rationale for the Tribunal's decision and need not be repeated here except to emphasize that, 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 from being heard on its merits.

V. THE POSITION OF THE PARTIES

[18] The position of the Claimant is that, in view of the public importance and complexity of the issues, the fact that this was the first occasion requiring an interpretation of section 16 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], and the conduct of Canada, an award of costs should be made.

[19] Canada argues that no costs should be awarded in keeping with the Tribunal's decision in *Big Grassy*. Specifically, Canada submits that this is not a situation of improper conduct or abuse of process, but rather a legitimate and novel jurisdictional issue that it was entitled to zealously pursue.

VI. DECISION

[20] For the reasons that follow, costs are awarded to the Claimant on a partial indemnity basis, in accordance with Column III of the *Federal Courts Rules*, *Tariff B*.

[21] The conduct of Canada justifies a departure from the presumption that no costs are to be awarded in an application ruled on by the Tribunal.

[22] Paragraph 89 of the *Aundeck* decision comments on Canada's process of identifying a small value claim and states that:

> This position, along with the process employed by the Specific Claims Branch for small value claims in relation to this Claim, and perhaps many others, is, frankly, paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of "good faith" required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court, in many decisions, has described as being the foundation of Canada's relationship with First Nations.

[23] There is merit to Canada's argument that section 16 of the *SCTA* was ambiguous, however, in making the choice to defend its small value claims protocol, Canada continued to act in bad faith and failed to uphold the honour of the Crown and promote reconciliation.

[24] Rather than simply entering into discussions with the Claimant with the aim of achieving a fair monetary settlement of a small value claim that it had already acknowledged was valid, Canada chose to challenge the jurisdiction of the Tribunal thereby putting a small First Nation with what was represented by Claimant's Counsel as being meager financial resources to the expense of a hearing and further delaying the resolution and reconciliation of a long standing grievance. Canada's conduct went beyond zealously pursuing one's case. Other options were available to Canada to prevent the financial cost and cost to the efficiency of proceedings resulting from an application of this nature. For example, under s 16(1)(c) of the *SCTA,* the Minister could have consented in writing to the Claimant bringing its claim before the Tribunal, without requiring an embarkation in what reconciliation, efficiency and expediency may view as an unnecessary interpretive exercise of various provisions of the *SCTA*. There was a better way to deal with the situation at hand, a way that would have respected the spirit of reconciliation, expediency and cost effectiveness. An award of costs in favour of the Claimant is thereby justified.

[25] An award of costs is in keeping with the Tribunal's decision in *Big Grassy*, the goals and philosophy of the *SCTA*, with the general principle of cost awards, and with Rule 111(2) of the *Rules*, and Rule 400(*c*) of the *Federal Court Rules*.

[26] An award of costs is also in the public interest in that it upholds the honour of the Crown, supports access to justice by encouraging First Nations to bring Specific Claims before the Tribunal and, most importantly, is in keeping with the overall principle of reconciliation of Aboriginal and non-Aboriginal interests.

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

PATRICK SMITH

Honourable Patrick Smith

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140625

File No.: SCT-3001-12

OTTAWA, ONTARIO June 25, 2014

PRESENT: Honourable Patrick Smith

BETWEEN:

AUNDECK OMNI KANING

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) AUNDECK OMNI KANING**
As represented by Paul Williams
Barrister & Solicitor

AND TO: **Counsel for the Respondent (Applicant)**
As represented by Jennifer Roy
Department of Justice