

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
August 31, 2017		
Stephanie Duffy		
Ottawa, ON	181	

BETWEEN:

**KAWACATOOSE FIRST NATION, PASQUA FIRST NATION,
PIAPOT FIRST NATION, MUSCOWPETUNG FIRST NATION,
GEORGE GORDON FIRST NATION, MUSKOWEKWAN FIRST NATION
and DAY STAR FIRST NATION**

CLAIMANTS

AND:

LITTLE BLACK BEAR FIRST NATION

CLAIMANT

AND:

STAR BLANKET FIRST NATION

**CLAIMANT
(APPLICANT)**

AND:

STANDING BUFFALO DAKOTA FIRST NATION

CLAIMANT

AND:

PEEPEEKISIS FIRST NATION

CLAIMANT

AND:

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

RESPONDENT

**RESPONSE TO CLAIMANTS' APPLICATION TO EXAMINE THE
RESPONDENT FOR DISCOVERY**

The Respondent provides the following Response to Little Black Bear First Nation's application submitted June 22, 2017:

1. The Applicant's application to examine for discovery a representative of the Respondent is inappropriate both procedurally and substantively.
2. The Respondent requests the Tribunal dismiss the application or limit the scope of discovery to questions relevant to any unadmitted allegation of fact.
3. The application is procedurally inappropriate because:
 - a. The application is prejudicial to the Respondent and other Claimants. This claim is with respect to issues arising in relation to a specific area of land, Indian Reserve 80A (IR 80A), its surrender and the Respondent's fiduciary duties pre and post surrender. The written questions for the Respondent proposed by the Applicant raise some new issues at a time in the proceedings when most of the witnesses have already provided evidence and there is no opportunity to ask questions about the new issues, for example the alleged "unwritten promise of Treaty 4".
 - b. If successful, this application will unduly delay these proceedings as it could take several months for Canada to identify and procure an appropriate deponent. The deponent would not have personal knowledge of events from over 130 years ago and would have to rely on the documentary record already produced to the Claimants.
 - c. The Affidavit of Emily Guglielmin, an associate of the law firm representing the Applicant, that was filed with the application is improper for the following reasons:
 - i) Rule 81 of the Federal Court Rules demands that statements in affidavits must provide the deponent's belief with the grounds for it. Ms. Guglielmin has not provided grounds for the statements in paragraph 15 and 16 that Canada has undisclosed information.
 - ii) The Federal Court does not look favourably on affidavits deposed by counsel that refer to contentious issues of substance (*Bell Helicopter Textron Canada Ltée v. Eurocopter* (2013), 116 C.P.R. (4th) 161, 452 N.R. 193, 2013 CarswellNat 4333, 2013 FCA 261; see also *Polaris Industries Inc. v. Victory Cycle Ltd.* (2007), 60 C.P.R. (4th) 194, 2007 CarswellNat 2140, 2007 FCA 259).

There are a number of contentious issues in the affidavit including the assertion that the questions are of fundamental importance to the within claim (paragraph 8) and the affiant's belief that the Respondent has not disclosed relevant evidence within its power, possession and control (paragraph 16).

- iii) Paragraphs 11 to 16 deal with the process which applied to the specific claim submission to the Minister of Indian Affairs and Northern Development (as it was then) by the applicant under the Specific Claims Policy which is not relevant to the Tribunal proceedings. Relevancy to the Tribunal of the specific claim submission to the Minister is limited to the requirements in s. 16 of the Specific Claims Tribunal Act for filing a claim with the Tribunal.
- iv) The affidavit appends "without prejudice" correspondence to which the applicant is not a party.

4. The application is substantively inappropriate because:

- a) The majority of the Applicant's proposed questions for the Respondent are irrelevant to the claim before the Tribunal, for example, the issues raised in questions 10, 11 and 12 about a fishing station for Little Black Bear First Nation.
- b) Proposed questions 6 and 12 are inappropriate for a deponent because they request the deponent to offer legal opinion.
- c) The application appears to challenge the decision of the Acting Senior Assistant Deputy Minister of Treaties and Aboriginal Government to not accept for negotiation the Applicant's specific claim under the Specific Claims Policy. The Tribunal is not the proper venue for such a challenge.
- d) The application correctly indicates there is uncertainty about which First Nations IR 80A was intended it for when it was set aside. That is the very question for the Tribunal to decide and it is inappropriate to ask a deponent to answer questions in this regard (proposed question 9).

5. If there were evidence of exactly which First Nations were entitled to use the reserved fishing station that is subject of this claim, or which First Nations were “Touchwood Hills and Qu’Appelle Valley Indians”, there would be no need for a standing subphase of the validity hearing. It appears there is no such clear evidence. The Applicant’s May 2, 2017 Case Management Conference brief says “Based on the research completed to date by a historical expert retained by the Applicant, it appears the historical record does not shed any further light on Canada’s policy or the historical use of ‘Qu’Appelle Valley Indians’. Paragraph 6 of the affidavit of Emily Guglielmin says a historical expert already undertook extensive research and was “unable to determine Canada’s policy and rationale for setting aside fishing reserves in Treaty 4 territory or elsewhere...”
6. It is unlikely an examination for discovery of the Respondent would assist with the question of entitlement to IR 80A. As the survey was in 1885 and the Order in Council confirmed the reserve in 1889, there is no one alive with personal knowledge of the events or the “deficiency in the record” identified by the Applicant. It appears even the attempt by the expert retained by the Applicant to address the deficiency was not fruitful.
7. Paragraph 6 of the application alleges the Respondent has not disclosed any relevant evidence and paragraph 8 of the application challenges the Respondent’s decision to not provide expert evidence. The Respondent says in response:
 - a) The Respondent served the Applicant with four Affidavits of Documents listing all relevant documents in the Respondent’s power, possession or control.
 - b) There would be no utility in the Respondent contracting with another historian when one historical expert has already conducted extensive research.

8. The Respondent respectfully requests that the Tribunal dismiss the application in its entirety.

Dated this 30th day of August, 2017.



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