
INDIAN CLAIMS COMMISSION

Interim Ruling: Athabasca Denesuline Treaty Harvesting Rights Inquiry

Ruling on Government of Canada Objections

PANEL

Chief Commissioner Harry S. LaForme
Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Carol A. Dutcheshen
Commissioner P.E. James Prentice, QC

COUNSEL

For the Athabasca Denesuline
David Knoll / David Gerecke

For the Government of Canada
Robert Winogron / Bruce Becker / François Daigle

To the Indian Claims Commission
Bill Henderson / Ron S. Maurice

MAY 7, 1993

BACKGROUND

On December 21, 1992, the Athabasca Denesuline, comprising Black Lake, Hatchet Lake, and Fond du Lac First Nations (the "Claimants"), requested that the Indian Claims Commission "conduct an inquiry into the denial of our Specific Claim by Canada." The Athabasca Denesuline argue that the terms of Treaties 8 and 10 include provision for, and protection of, their rights to hunt, fish, and trap in areas of the Northwest Territories which are north of the 60th parallel and outside the fixed boundaries described in those treaties.

The Athabasca Denesuline further contend that the Minister of Indian Affairs and Northern Development (the "Minister") has rejected their claim. On June 8, 1989, Mr. John F. Leslie of the department advised the Denesuline that "your proposal [for funding] does not constitute a specific or comprehensive claim." On June 12, 1991, then Deputy Minister Harry Swain wrote to Tribal Chief A.J. Felix saying: "our legal advice is that your aboriginal rights in land north of 60 [degrees] were surrendered by Treaties 5, 8 and 10 and that actual treaty harvesting rights do not extend beyond the boundary of those treaties." On September 10, 1991, the Minister wrote to the same effect: "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights . . ."

On January 22, 1993, the Commission agreed to conduct this inquiry and notices of that decision were sent to the parties on January 25, 1993.

The Commission is not being asked to investigate any claim based on unextinguished aboriginal or native title; nor is the Commission being asked to review the Nunavut Agreement. The fact that the Commission would not pursue such lines of inquiry was communicated to the parties at a meeting held in Toronto on April 1, 1993.

At that meeting, Mr. Winogron, counsel for the Government of Canada in this matter, indicated that government may object to the jurisdiction of the Commission to conduct this inquiry. He was advised by Commission counsel at that time, and subsequently by letter dated April 5, 1993, that any objection should be made to the Commissioners in a timely fashion (the date of April 13 was suggested) setting out detailed grounds for the objection coupled with a request for a ruling from the Commissioners.

Timeliness is a factor in this matter since a panel of the Commission, consisting of Chief Commissioner Harry S. LaForme, Commissioner Carole T. Corcoran, and Commissioner Carol A. Dutchshen, is scheduled to commence the community phase of this inquiry at Fond du Lac, Saskatchewan, on Monday, May 10, 1993.

On May 6, 1993, a panel consisting of Chief Commissioner Harry S. LaForme together with Commissioners Carole T. Corcoran, Carol A. Dutchshen, P.E. James Prentice, Daniel J. Bellegarde, and Roger J. Augustine, convened to hear the jurisdictional objection raised by the Government of Canada.

THE OBJECTION

Mr. Winogron wrote to the Chief Commissioner on April 13, 1993, to formally advise of the objection. His letter is attached. The grounds of objection may be summarized as follows:

1. The Claimants seek a declaration of rights as opposed to compensation or damages arising from a breach of lawful obligation on the part of Government. Such a declaration is not envisioned, defined, or otherwise provided for by the Specific Claims Policy (the "Policy") and is not the proper subject matter of a specific claim.
2. The Claimants' request does not involve an "outstanding lawful obligation" as contemplated by the Policy.
3. The Claimants have not submitted this claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

The mandate of this Commission is set out in Order in Council PC 1992-1730, which states the following:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
- (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.

RULING

Mr. Winogron submits that the Commission should stop this inquiry.

His first objection is that we have no power to make a declaration of rights or to grant declaratory relief. In our view, we have not been asked to do that. The Commission has in fact been asked only to conduct an inquiry into the denial of the Bands' specific claim. Reference may be had in that regard to the December 21, 1992, letter from the Bands' legal counsel.

Our mandate is to inquire into and report on "whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister." When we have conducted an inquiry, we are "directed" by the order in council "to submit our findings and recommendations to the parties" and to report to the Governor in Council. We propose to do that and nothing more.

Mr. Winogron then argues that we should not consider the claim because the Claimants have not submitted it to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development. The order in council creating this Commission refers expressly to a rejection of a claim by the Minister. There is nothing in those terms of reference that confines the Commission to claims rejected in a particular way. Moreover, Mr. Winogron acknowledges that the Bands are entitled to regard the Department of Indian Affairs and Northern Development response of June 8, 1989, as a rejection of their claim.

Apart from that, the above argument is a somewhat extraordinary submission in the circumstances of this claim. The department's rejection resulted from a request for funding to pursue the claim through the very process to which Mr. Winogron points. The department refused to provide funds to allow the claim to go through the process. Mr. Winogron now argues that because the claim has not gone through the process we cannot consider it. With respect, we disagree.

Finally, Mr. Winogron submits that the claim is not one provided for in the Policy because it does not involve an "outstanding lawful obligation" as contemplated by that Policy.

We have been asked by the Claimants to inquire into their claim that they have rights under Treaties 8 and 10 to harvest by hunting, fishing, and trapping in areas of the Northwest Territories north of the 60th parallel.

The term "specific claim" is defined in the booklet setting out the 1982 Policy, *Outstanding Business*, which is incorporated into our terms of reference. Mr. Winogron accepts that the definition of "specific claim" is found in *Outstanding Business*. On page 7 of *Outstanding Business*, "specific claim" is defined as referring "to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties." This definition is repeated on page 19

under the general heading "The Policy: A Renewed Approach to Settling Specific Claims."

On page 20, *Outstanding Business* states "[t]he government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation.'"

Outstanding Business goes on to say:

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

The Claimants' position is that the government has refused on more than one occasion to "recognize" this claim to treaty rights and that the Minister has specifically rejected the Bands' claim that these treaty rights exist. They rely on letters written by the Minister or on his behalf which they have filed to demonstrate this.

The government position is that in order to fall within the Policy, as stated in *Outstanding Business*, a claim must be one that can be compensated by way of land or money. Mr. Winogron argues that because *Outstanding Business* contemplates compensation for a breach of lawful obligation in terms of land or money, that is the only kind of claim into which the Commission is authorized to inquire. Mr. Winogron submits that this is not such a claim.

This Commission has been mandated to inquire into and report on whether Claimants have a valid claim under the specific claims Policy in circumstances where the Minister has rejected the claim. We consider it premature to dispose of Mr. Winogron's argument that this claim does not fall within *Outstanding Business* until such time as we have completed the inquiry. The very purpose of the inquiry is to decide whether or not there is a valid specific claim and whether it has been rejected. The issue which Mr. Winogron raises we regard as an important issue which we must consider as part of the overall inquiry.

Mr. Winogron argues that this Commission must be satisfied that the facts of this case fall squarely within the Policy before this Commission proceeds to an inquiry. We disagree. In our view, the Commission must, at this juncture, examine the circumstances of the case and need only be satisfied that:

1. the claim has been advanced to the government;
2. the Claimants allege non-fulfilment of federal obligations under Treaties 8 and 10, to which they are parties;
3. the claim has been rejected by the Minister as a specific claim;

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4. the claim has been advanced before this Commission by the Claimants as a matter still in dispute; and
5. the Claimants have an arguable case that their claim fails within the Policy.

The Commissioners take the view that these requirements have been met and that the Commission has properly embarked upon its inquiry.

Throughout the inquiry, the Commission will keep in mind the points Mr. Winogron has raised, and it may be that we will have to return to them at a later point.

This matter was considered in Saskatoon on May 6, 1993, by the following Commissioners:

Chief Commissioner Harry S. LaForme
Commissioner Roger J. Augustine
Commissioner Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Carol A. Dutcheshen
Commissioner P.E. James Prentice, QC

Dated this 7th day of May, 1993

Harry S. LaForme, Chief Commissioner
for the INDIAN CLAIMS COMMISSION

- a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

The Government's policy on specific claims states that it will:

"recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfilment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land."

Based upon the above, our objections are as follows:

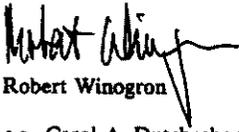
- 1) The claimant is not claiming any compensation or damage arising from the breach of a lawful obligation by the Crown. The claimant's request is not one which can be defined as a claim under the policy, but rather, they seek a declaration of treaty rights. Declaratory relief is properly a subject matter for the Federal Court of Canada and is not properly the subject matter of a specific claim under the Specific Claims Policy. The Commission's empowering Order-in-Council authorizes it to inquire into and report on whether the claimants have a valid claim on the basis of the policy. On the basis of the policy there can be no claim for declaratory relief since the policy does not provide for it, define it nor envision it.
- 2) The claimant's request is not a claim as provided for in the Specific Claims Policy. This request does not involve an "outstanding lawful obligation" as contemplated by the Policy.
- 3) The claimant has not submitted a claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

INDIAN CLAIMS COMMISSION PROCEEDINGS

As a result the Commission is without jurisdiction to inquire into and report on a matter which is not a claim.

As per the instruction in Mr. Henderson's letter of April 5, 1993, we are requesting a ruling from the Commissioners with respect to this matter.

We look forward to hearing from you.



Robert Winogron

c.c. Carol A. Dutcheshen
Carole Corcoran
Bill Henderson
David Knoll

RW/nvc