

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

BUNIBONIBEE CREE NATION,

Plaintiff,

- and -

**THE GOVERNMENT OF MANITOBA, CAMBRIAN CREDIT UNION LIMITED,
RESORT MANAGEMENT & CONSULTANTS LTD., and
PAYBACK LIMITED PARTNERSHIP,**

Defendants.

MOTION BRIEF

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I. INTRODUCTION

1. The Government of Manitoba ("Manitoba") submits that this motion should be dismissed because:
 - a. The assignment of a lease for collateral purposes, or the assignment of a lease to a purchaser for value, is not a "Disposition" of a Crown interest of Manitoba within the meaning of the Manitoba Treaty Land Entitlement Framework Agreement ("TLE Framework Agreement");
 - b. Miscellaneous Lease 3482 is a Third Party Interest, which may only be available to be Selected and set apart under the TLE Framework Agreement where the interest is resolved to the satisfaction of all parties, in accordance with Article 10 of the Framework Agreement;
 - c. The TLE Framework Agreement provides a comprehensive method of dealing with issues relating to implementation of the TLE Framework Agreement, including an Implementation Monitoring Committee with an Independent Chairperson, a Senior Advisory Committee and a formal Dispute Resolution process. Those processes are to apply to issues or matters in dispute under the TLE Framework Agreement and the Treaty Entitlement Agreements relating to specific Entitlement First Nations.

II. LIST OF DOCUMENTS TO BE RELIED ON BY MANITOBA

1. Affidavit of Harley Jonasson, filed February 6, 2006;
2. Treaty Land Entitlement Framework Agreement, attached as Appendix "A" to Affidavit of Tim Muskego, sworn January 31, 2006;
3. Treaty Entitlement Agreement between Oxford House First Nation, Treaty Land Entitlement Committee of Manitoba Inc., Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of Manitoba, attached as Appendix "B" to Affidavit of Tim Muskego, sworn January 31, 2006.

III. LIST OF CASES AND STATUTORY AUTHORITIES

1. Section 23 of *The Crown Lands Act* (Tab A)

Section 23 of *The Crown Lands Act* provides for assignments of interests held under a Crown land lease or permit to be registered in the Crown Lands Register for those interests to have priority in the order of registration.

2. *Assiniboine Credit Union v. Canadian Imperial Bank of Commerce*, [1984] M.J. No. 171 (Man. C.A.) (Tab B)

IV. POINTS TO BE ARGUED

a. "Disposition" under TLE Framework Agreement

1. An Assignment for collateral purposes is not a "disposition" as defined in the TLE Framework Agreement. "Disposition" is defined as follows under the TLE Framework Agreement:

"Disposition" means an act by Manitoba whereby Crown Land or a right, interest or estate in Crown Land is granted or disposed of, or by which Manitoba creates a right, interest or estate in, divests itself of or permits the use of Crown Land, but does not include:

- (a) a renewal of or consent to the assignment of a right, interest or estate in or permit to use Crown Land which is subject to renewal as a matter of law, established practice or the policy of Manitoba as at the Date of Execution;
 - (b) a Mineral Disposition; or
 - (c) a quarry permit issued under *The Mines and Minerals Act* to authorize the use of a specific volume of quarry minerals for a specific period of time from a specific quarry site for a specific project or activity for public purposes;
2. The assignment of a lease from one lessee is not an act whereby Manitoba grants or disposes a right, interest or estate in Crown land. The Crown interest was granted or disposed when the lease was entered into, in 1993, before the TLE Framework Agreement or the Treaty Entitlement Agreement was entered into and before Bunibonibee Cree Nation made a selection of TLE Site # 1-2000.
 3. As well, paragraph (a) of the definition of "Disposition" expressly excludes the consent by the Crown to an assignment or a renewal of an interest, where the interest is intended to be a continuing interest, by virtue of a right of renewal.

Miscellaneous Lease 3482 is subject to renewal as noted in Part 10 of the Lease (Tab C to Affidavit of Mr. Jonasson).

4. Paragraph 17 of the Affidavit of Mr. Jonasson notes that assignments of Crown leases as collateral are established practices or policies of Manitoba in effect as of May 29, 1997 – the date of the TLE Framework Agreement.

5. The purpose of enabling assignments for collateral purposes is to allow commercial businesses to be able to secure financing. Lands held under Crown land leases are not subject to mortgages or caveats that may be filed in the Land Titles Office. Instead, registrations of assignments for collateral purposes are registered in the Crown Lands Register to protect security in these interests.
(Paragraph 12 of Affidavit of Mr. Jonasson)

6. The holders of security by way of assignment must be able to realize on their security where necessary. The policies and procedures of Lands Branch is to require an assignee for collateral purposes to provide a Statutory Declaration committing to take processes to ensure that arrangements are made to provide a purchaser of the lease interest within six months of realizing on the security.

(Tab H to Affidavit of Harley Jonasson, which contains excerpts from Operations Procedure Manual; Tab J to Affidavit of Harley Jonasson, a letter from Mr. Jonasson to Booth Dennehy, setting out the practices associated with assignments for collateral purposes.)

7. *Assiniboine Credit Union Ltd. v. Canadian Imperial Bank of Commerce* [1984] M.J. No. 171 (Man. C.A.) (Tab B) illustrates the process of registering assignments of Crown leases and the legal significance of assignment.

8. Subsection 6.02(6) of the TLE Framework Agreement provides that Manitoba will not make further Dispositions on lands Selected under the Agreement. But lands that have already been disposed of, including rights and renewal are not to be affected. The effect of this is that further interest in those lands, including for example, mines and minerals, other leases or interests, will not be granted. Note in this case, the area under Miscellaneous Lease 3482 is a comparatively small portion of the site selection by Bunibonibee Cree Nation. The effect of Subsection 6.02(6) is that Manitoba has registered the Selection and has withdrawn the remainder of the site from further disposition.

(Paragraph 25 of Affidavit of Harley Jonasson)

9. This matter does not raise any issues relating to “Mineral Dispositions” under the TLE Framework Agreement. “Mineral Dispositions” are differentiated from “Dispositions” under the TLE Framework Agreement in two main ways:
 - a. Section 5.02 of the Agreement provides that Manitoba will give notice to an Entitlement First Nation of proposed “Dispositions”, but not “Mineral Dispositions”, within a “Community Interest Zone” established for that Entitlement First Nation;

- b. Section 11.03 deals specifically with lands subject to a "Mineral Disposition".

b. Third Party Interests

10. Miscellaneous Lease 3482 is a "Third Party Interest" as defined under the TLE Framework Agreement.
11. Article 3 of the TLE Framework Agreement sets out "Principles for Land Selection and Acquisition". These "Principles" are to provide guidelines applicable to Selection of land by TLE First Nations (Subsection 3.01(2) of the TLE Framework Agreement.)
12. Among these Principles are 3.03(2) and (3) of the TLE Framework Agreement:
- Land not affected by a Third Party Interest:*
- (2) An Entitlement First Nation may Select land not affected by a Third Party Interest.
- Land affected by a Third Party Interest:*
- (3) An Entitlement First Nation may Select land affected by a Third Party Interest, subject to the Third Party Interest being resolved in accordance with Article 10.
13. These Principles mean that Entitlement First Nations may Select land that is not subject to a Third Party Interest, but where the land is subject to a Third Party Interest that Third Party Interest is to be resolved in accordance with Article 10 of the TLE Framework Agreement.

14. Article 10 of the TLE Framework Agreement addresses the methods of resolving Third Party Interests. Subsection 10.01(2) provides that a Third Party Interest must be resolved to the satisfaction of all parties: Canada, Manitoba, the Entitlement First Nation and the holder of the Third Party Interest. The principle is that the interest of the third party which pre-dates the Selection will not be affected unless the third party consents to the method of resolving the interest.

15. Section 10.02 of the TLE Framework Agreement sets out a range of options available to address Third Party Interests, which may be used where acceptable to all four parties. Section 10.02 is designed to expressly allow for alternatives to enable the parties to resolve Third Party Interests in a way that respects the interests of all parties. It is noteworthy that some of the ways of resolving a Third Party Interest provide for the interest continuing on the land after the land is set apart as reserve or being replaced by a Replacement Interest granted by Canada.

16. Even if the Lease is assigned to a new party, Bunibonibee Cree Nation will be in exactly the same position as it was before the assignment. It has made a Selection, a portion of which includes an area subject to a third party interest in Miscellaneous Lease 3482. That interest remains to be resolved in accordance with Article 10 if the entire site is to be eligible to be set apart as reserve for the use and benefit of Bunibonibee Cree Nation. The assignee of the lease obtains no greater interest than what the earlier holder of the lease had.

17. Further, only a small portion of TLE Site #1-2000 Selection by Bunibonibee Cree Nation is affected by the Third Party Interest. Approximately 1,408.49 acres of a Selection of approximately 1,511.09 acres is unaffected; that area could be considered to be set apart as Reserve under the TLE Framework Agreement.
(Paragraph 24 of Affidavit of Mr. Jonasson)

18. It should be noted that Article 20 of the TLE Framework Agreement includes an allocation of \$8,862,171.00 to a Third Party Interest Account as a contribution toward the costs anticipated to be incurred by Entitlement First Nations in discharging, replacing or accommodating Third Party Interests.

19. Section 20.06 provides for authorized disbursements from the Third Party Interest Account. Section 20.07 provides for the process for Entitlement First Nations to apply for funds from the account in order to discharge, replace or accommodate a Third Party interest.

c. Methods of Resolving Disputes under TLE Framework Agreement

20. The TLE Framework Agreement contemplates a process to resolve disputes through the Implementation Monitoring Committee, the Senior Advisory Committee and a formal Dispute Resolution process. It does not contemplate that disputes among the parties would be resolved through civil litigation in the Courts.

21. Section 3.11 of the TLE Framework Agreement provides that issues or matters in dispute not resolved by the parties may be referred to the Implementation Monitoring Committee.
22. Subsection 28.03(3) of the Treaty Entitlement Agreement between Oxford House First Nation, Treaty Land Entitlement Committee of Manitoba Inc., Canada and Manitoba (Tab B to Affidavit of Tim Muskego) confirms that issues or matters in dispute arising out of the Agreement (which incorporates the TLE Framework Agreement) are to be resolved under the processes set out in Sections 34 to 36 of the TLE Framework Agreement.
23. The Dispute Resolution process involves first the Implementation Monitoring Committee considering a matter. Under paragraph 34.07(1)(d), the Implementation Monitoring Committee is generally responsible for making recommendations for resolving matters in dispute. The Implementation Monitoring Committee is comprised of two representatives of the Treaty Land Entitlement Committee of Manitoba Inc., one representative of Canada, one representative of Manitoba and an Independent Chairperson. (34.01 of the TLE Framework Agreement)
24. Under subsection 34.09(5) the Chairperson of the Implementation Monitoring Committee has responsibility to assist in resolving issues or matters in dispute by consensus and proposing solutions to matters in dispute.

25. Under s. 34.09(8) where a matter is not resolved by the Implementation Monitoring Committee, a matter is to be referred to the Senior Advisory Committee, consisting of senior representatives of Canada, Manitoba and the Treaty Land Entitlement Committee of Manitoba Inc.

26. Where the Senior Advisory Committee does not resolve the matter, the Senior Advisory Committee is to refer the matter back to the Implementation Monitoring Committee and the Implementation Monitoring Committee is to refer the matter to a formal Dispute Resolution mechanism (34.10(8) of the TLE Framework Agreement).

27. Under section 35.01 of the TLE Framework Agreement, a specific Dispute Resolution mechanism is to be determined by the Implementation Monitoring Committee, which is appropriate to the issue in consideration. These methods are to be progressive and to lead ultimately to binding arbitration, but only if there is no consensual resolution in an earlier stage.

All of which is Respectfully Submitted February 8, 2006.

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