

FILE NO.: SCT-7005-11
CITATION: 2016 SCTC 5
DATE: 20160412

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

BETWEEN:)
)
POPKUM FIRST NATION)
)
) Allan Donovan, John Burns and Amy Jo
) Scherman, for the Claimant
Claimant)
)
- and -)
)
)
HER MAJESTY THE QUEEN IN RIGHT)
OF CANADA)
) Rosemarie Schipizky and Aneil Singh, for
As represented by the Minister of Indian)
Affairs and Northern Development)
)
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Respondent)
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) **HEARD:** March 10, 2016

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Popkum First Nation v Her Majesty the Queen in Right of Canada, 2014 SCTC 6.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 20, 14.

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I. REQUEST: DETERMINATION OF APPLICABLE COMPENSATION PRINCIPLES UNDER SECTION 20 OF THE *SPECIFIC CLAIMS TRIBUNAL ACT*

[1] The proceedings in the Claim were bifurcated into a validity phase and, if the Claim was found valid, a compensation phase.

[2] The Parties, Popkum First Nation (“Claimant”) and Her Majesty the Queen in Right of Canada (“Respondent”), request that the Tribunal determine the applicable compensation provisions under the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA] flowing from the Tribunal’s findings on validity in the decision of Justice Patrick Smith (the “Judge”) issued June 27, 2014: *Popkum First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 6 (“Reasons for Decision”).

II. THE DECISION ON VALIDITY

[3] The Judge found, in conclusion, that:

The action of the Crown in divesting Popkum of its one-seventh interest in the SI Reserve without compensation and distributing part of its one-seventh share in the Seabird Island trust monies to non-beneficiaries was a breach of the Crown’s ordinary accountability as a fiduciary and a breach of the Crown’s duty to preserve and protect the Claimant’s confirmed reserve interest from exploitation by the Crown. [Reasons for Decision, at para 205]

[4] Under the heading “Discussion”, the Judge set out the basis in law on which the Crown may be found to owe fiduciary duties in relation to the interest of a “band”, as constituted under the *Indian Act*, in land set apart as a reserve. The Judge concluded that the Claimant had an interest in the land in issue, the Seabird Island Reserve. The Claimant was one of the seven bands for which the Seabird Island Reserve had been created.

[5] At issue was whether, by invoking section 17 of the *Indian Act* to establish the Seabird Island Reserve as a reserve of a newly formed band, namely the Seabird Island Band, the Crown had exercised its discretion in a manner that breached its fiduciary duty to the Claimant.

[6] The “re-allocation” of the Seabird Island Reserve to the Seabird Island Band deprived the Popkum Band of its interest in the Seabird Island Reserve.

[7] Under the heading “Findings”, the Judge held:

For the reasons that follow, I find that the Minister did not administer the Claimant's assets with the diligence and prudence that was required, the Minister treated the confirmed reserve as if it was available for reallocation *de novo* as the Minister saw fit, and consequently, the Minister breached the Crown's fiduciary duties to the Claimant. I will address the breaches relating to the SI Reserve and the trust funds separately. [Reasons for Decision, at para 165]

[8] At paragraphs 166 to 174 the Judge discussed the failure of officials of the Department of Indian Affairs to determine whether there were Popkum Band members residing on the Seabird Island Reserve.

[9] Having found no evidence of a "familial connections alleged between Popkum and the [Seabird Island] Residents" (at paragraph 174) the Judge found at paragraphs 175 and 193 that:

The Minister's reallocation of Popkum's one-seventh interest in the SI Reserve to the SI Band was a reallocation from a confirmed reserve holder, Popkum, to a non-beneficiary of Popkum's interest. The discretion afforded by section 17(2) does not extend this far.

...

In sum, I find that the Minister breached the fiduciary duties owed to the Claimant with respect to the Claimant's interest in the SI Reserve, including the ordinary accountability of a fiduciary and the duty to preserve and protect reserve land from exploitation by the Crown when she transferred the Claimant's one-seventh interest in the SI Reserve to the SI Band in 1959. [Reasons for Decision]

III. THE MATTER FOR DETERMINATION

[10] Do the findings in the validity phase bring into play:

- 1) Sub-section 20(1)(g) and (h) of the *SCTA*, which provides for compensation based on the current value of the Claimants one-seventh interest in the Seabird Island Reserve (the "land"), and for loss of use between the date of the breach and the date that compensation is assessed, or;
- 2) Sub-section 20(1)(c) of the *SCTA*, which provides for compensation for the loss as the Tribunal considers just, based on the principles of compensation applied by the courts, or;

3) Sub-section 20(1)(e) of the *SCTA*, which provides for compensation for damage to the land, determined at the time of the breach of duty, brought forward to current value?

IV. POSITION OF PARTIES

[11] The Claimant submits that sub-section 20(1)(g) and (h) of the *SCTA* apply, or, in the alternative, sub-section 20(1)(c) of the *SCTA*. The Claimant submits that the Reasons for Decision stand for the proposition that the Minister's redistribution of Seabird Island Reserve lands amounts to a taking without legal authority. Sub-section 20(1)(e) of the *SCTA* does not apply.

[12] The Respondent submits that sub-section 20(1)(e) of the *SCTA* applies. The Respondent's view is based on an interpretation of the Reasons for Decision wherein the Seabird Island Reserve lands were taken under the Minister's statutory legal authority. Sub-section 20(1)(g) and (h) of the *SCTA* does not apply. The Respondent further submits that "inadequate compensation" as articulated in sub-section 20(1)(e) of the *SCTA* includes circumstances where no compensation was paid.

[13] The Parties disagree on the interpretation of the key findings in the Reasons for Decision and their impact on the determination of applicable compensation principles.

V. ANALYSIS

A. Claimant's Position

[14] The Claimant points to the discussion (Reasons for Decision) of the purpose of section 17 of the *Indian Act*:

My reading of section 17 and its purpose is that it is intended to give the Minister authority to manage the redistribution of an "existing band's" assets when a "new band" is being created from that "existing band or part thereof" that is, when descent-derived interests arise. [at para 149]

[15] Among the seven distinct breaches of duty found by the Judge, six were breaches of fiduciary duty, and one was expressed as acting in excess of the discretion of the Crown under section 17(2) of the *Indian Act*. These are summarized by the Claimant thusly:

- a. Canada failed to meet the required fiduciary standard of ordinary prudence and accountability when it failed to identify the true beneficiaries of the Reserve, and instead transferred Popkum’s interest in the Reserve to non-beneficiaries (paras 177-178);
- b. Canada breached its fiduciary duty to protect and preserve a confirmed reserve from exploitation when Canada prioritized its interest in avoiding administrative complexities related to the Reserve over Popkum’s ownership interest in the Reserve (para 184);
- c. Canada breached its fiduciary duty to evaluate, fully inform, seek directions, and reject improvident transactions with respect to Popkum’s interest in the Reserve (para 181);
- d. Canada exceeded its statutory discretion under s. 17(2) of the *Indian Act*, and further breached its fiduciary duty, when it transferred Popkum’s interest in the Reserve to non-beneficiaries (para 177);
- e. Canada breached its fiduciary duty by divesting Popkum of its interest in the Reserve without any compensation (para 205);
- f. Canada breached its fiduciary duty by distributing trust monies to non-beneficiaries (para 197); and
- g. Canada breached its fiduciary duty by distributing trust monies on a *per capita* basis, rather than on a *per band* basis (paras 203-204). [Claimant’s Written Submissions at para 8; emphasis added]

[16] Paragraph 177, in full, says:

The Minister breached the ordinary accountability of a fiduciary when she reallocated Popkum’s one-seventh interest in the SI Reserve to the SI Band in 1959. The Minister failed to exercise her statutory discretion with ordinary prudence when she failed to identify the true beneficiaries, exceeded her statutory authority pursuant to section 17(2) and divested the Claimant of its reserve interest. [Reasons for Decision; emphasis added]

[17] Paragraph 178, in full, says:

The Minister failed to administer the Claimant’s assets for the benefit of the Claimant when she transferred the Claimant’s assets to the SI Band, which was not a beneficiary by descent and also included individuals who, until 1959, had been members of bands to whom the SI Reserve was never allotted or confirmed. Upholding a non-beneficiary as having a superior entitlement to a beneficiary does not reflect ordinary prudence regarding the management of the SI Reserve. [Reasons for Decision; emphasis added]

[18] The Claimant argues that the Judge’s statement that the Minister “exceeded her statutory authority pursuant to section 17(2)”, read together with the understanding expressed in

paragraph 148 of the purpose of section 17(2), references to an absence of “familial relations” and “beneficiaries” between Popkum band members and Seabird Island Residents, and the absence of evidence placing Popkum members at Seabird Island at the time of the Minister’s decision, invite the application of sub-section 20(1)(g) and (h) of the *SCTA*, which provide that the Tribunal:

...

(g) shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;

(h) shall award compensation equal to the value of the loss of use of a claimant’s lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); and

B. Respondent’s Position

[19] The Respondent argues that the Claimant is left with the very basis for compensation it pled in the Declaration of Claim, namely:

20. (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,

...

(f) shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid; [emphasis added]

[20] The Respondent submits that the Claimant cannot, at this stage of the proceeding, maintain that the Crown acted without legal authority when it transferred the interest of the Popkum band in the Seabird Island Reserve to the Seabird Island Band. The Claimant had advanced its case in the validity phase on the basis that there was statutory authority for the actions of the Crown. The Claimant rested its case on the allegations that, in proceeding under statutory authority, it owed fiduciary duties to the Claimant (beneficiary) and failed, to the detriment of the Claimant, to perform its duties.

[21] The Respondent refers to page 68 from the Claimant's written submissions at the hearing on validity:

As in many of the fiduciary duty cases that will be canvassed in this argument, when Canada divested Popkum of their land and trust funds in 1959, they did so in accordance with legal authority. The problem with Canada's actions is that its conduct must also be in accordance with Canada's private law fiduciary duty which overlies the public function of statutory implementation (*Guerin*). Because statutes create relationships of exacerbated power imbalance, exercising statutory authority without regard for the overlying fiduciary obligation can readily, as here, result in a breached fiduciary duty and resulting damage to a beneficiary. [emphasis added]

[22] The Respondent refers to passages in the Declaration of Claim which state that the Claim is based on alleged breaches of fiduciary duty and the Prayer for Relief which asserts a claim for compensation based on value of the loss at the time of the breach, adjusted to represent current value. The latter is said to reveal, by implication, that there is no reliance on a theory that the Crown acted without statutory authority.

[23] Ms. Schipizky, Counsel for the Respondent, says that the change in the Claimant's position on the question of statutory authority at the compensation phase would be prejudicial, as it would have prepared its case differently if the question had previously been raised. It would have called evidence of the presence of Popkum members on the Seabird Island Reserve at the date of the re-allocation, and have addressed the matter in submissions before the Judge. This I accept.

[24] It would, I find, be prejudicial and unfair to the Respondent to base compensation on the application of sub-section 20(1)(g-h) of the *SCTA* on the basis that the Minister acted without statutory authority.

[25] However, sub-section 20(1)(f) of the *SCTA*, which is advanced by the Respondent as governing the assessment of compensation, seems to apply only where it is established that damage has been done to the Claimant's reserve land.

[26] A statutory provision rendering the Crown liable for not securing adequate compensation to a band for damage caused to its reserve land contemplates the continued interest of the band in the land. If the land is no longer "its reserve land" due to the actions of the Crown

under legal authority, sub-section 20(1)(f) of the *SCTA* may not apply. For reasons set out below it is not necessary to decide the matter.

C. On What Legal Ground was Validity Decided?

[27] The Claimant relies primarily on the statement in paragraph 177 of the Reasons for Decision that “[t]he Minister...exceeded her statutory authority pursuant to section 17(2)..” (emphasis added). But in the same paragraph, and the paragraph following, the Judge also referred to breaches of fiduciary duty:

The Minister breached the ordinary accountability of a fiduciary when she reallocated Popkum’s one-seventh interest in the SI Reserve to the SI Band...The Minister failed to exercise her statutory discretion with ordinary prudence when she failed to identify the true beneficiaries,...and divested the Claimant of its reserve interest.

The Minister failed to administer the Claimant’s assets for the benefit of the Claimant when she transferred the Claimant’s assets to the SI Band,...Upholding a non-beneficiary as having a superior entitlement to a beneficiary does not reflect ordinary prudence regarding the management of the SI Reserve. [at paras 177, 78)

[28] It is not clear from the Reasons for Decision, at least up to this point, whether the Judge based his finding that the Claim is valid based on breach of fiduciary duty, acting without statutory authority, or both.

[29] The matter is, however, resolved further along in the Reasons for Decision. In my opinion, the *ratio* for the decision of the Judge is found in the paragraph under the heading “Conclusion”. The Claim was found valid on the ground of breach of fiduciary duty, not lack of statutory authority:

The action of the Crown in divesting Popkum of its one-seventh interest in the SI Reserve without compensation and distributing part of its one-seventh share in the Seabird Island trust monies to non-beneficiaries was a breach of the Crown’s ordinary accountability as a fiduciary and a breach of the Crown’s duty to preserve and protect the Claimant’s confirmed reserve interest from exploitation by the Crown. [at para 205; emphasis added]

[30] The Judge found numerous breaches of fiduciary duty in the administrative measures taken to re-allocate the Seabird Island Reserve to the newly formed Seabird Island Band. This brings the matter within the grounds for a claim under sub-section 14(1)(c) of the *SCTA*:

...

(c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

[31] The Claimant pled breach of fiduciary duty and reliance on the sub-section 14(1)(c) ground. The fiduciary duty issue was fully argued in the hearing on validity. Lack of statutory authority was not pled or argued in the hearing on validity. The Judge would not have based his decision on a lack of statutory authority without first inviting submissions.

D. Compensation Criteria under the *Specific Claims Tribunal Act*

[32] The Claimant submits, in the alternative, that compensation may be assessed on the application of the *SCTA*, sub-section 20(1)(c):

20. (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,

...

(c) shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;

[33] As the finding on validity rests solely on the ground of breach of fiduciary duty the matter falls squarely within the sub-section 14(1)(c) ground, and is compensable under sub-section 20(1)(c) of the *SCTA*.

[34] It is of no consequence that the Claimant pled reliance on sub-section 20(1)(e) of the *SCTA* in the Prayer for Relief. The Claimant relied on fiduciary law and the Parties made full submissions. No prejudice to the Respondent results, as the applicability of section 20 compensation criteria in the present matter turns on the question fully canvassed, namely fiduciary duty.

E. Principles of Compensation Applied by the Courts

[35] The Parties will make submissions on applicable principles of compensation in the course of proceedings in the compensation phase.

HARRY SLADE

Honourable Harry Slade, Chairperson

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

Date: 20160412

File No.: SCT-7005-11

OTTAWA, ONTARIO April 12, 2016

PRESENT: Honourable Harry Slade

BETWEEN:

POPKUM FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: Counsel for the Claimant POPKUM FIRST NATION
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As represented by Rosemarie Schipizky and Aneil Singh
Department of Justice