

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

POPKUM FIRST NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIERES	
F I L E D	September 6, 2016
David Burnside	
Ottawa, ON	68

Claimant

v.

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

Respondent

AMENDED DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

October 27, 2011

(Registry Officer)

Date of Amendment: August 25, 2016

TO:

Assistant Deputy Attorney General, Litigation, Justice Canada
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Ottawa, Ontario K1A 0H8
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I. Claimant (R. 41(a))

1. The Claimant, POPKUM FIRST NATION, confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province of British Columbia.

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;

3. On 21 August 2007, the Popkum First Nation filed the Seabird Island Specific Claim with the Department of Indian Affairs, Special Claims Branch. The claim related to breaches of duty by Canada that resulted in the Popkum First Nation's loss of its entitlement to the Seabird Island Reserve.
4. In a letter received from the Department of Indian and Northern Affairs Canada on 30 October 2009, the Popkum First Nation were informed of the Minister of Indian Affairs and Northern Development's decision not to accept for negotiation the Popkum First Nation's Seabird Island Indian Reserve specific claim.

III. Claim Limit (Act, s. 20(1)(b))

5. For the purposes of the claim, the Claimant does not seek compensation in excess of \$150 million.

IV. Grounds (Act, s. 14(1))

6. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

(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;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority;...

V. Allegations of Fact (R. 41(e))

The setting aside of the Seabird Island Reserve for the joint use of seven Bands

7. Commissioner Sproat was vested with final authority to set lands apart for Indian Bands of the Yale District. On 13 June 1879 Sproat set aside Seabird Island Reserve (``the Reserve``) for the joint use and benefit of seven Bands including the Popkum First Nation. Sproat described these Bands as ``all the Indians between Cheam and Spuzzum - namely Popkum, Skawtits, Ohamil, Ska-wah-look, Hope, Union Bar, and Yale Indians.``

8. The Reserve, containing some 4,500 acres, was surveyed in September 1881.

9. Sproat specified that the Indians had six year from the date of the allotment (to June 1885) to make use of the Reserve and that, after the six year period had elapsed, Canada would have the option of reducing the size of the Reserve to reflect the Indians' use of the land.

Canada's confirmation of the Reserve

10. Canada actively exercised its discretion pursuant to Sproat's condition and decided to retain the Reserve for Indian purposes.

Canada's recognition of the "In common" feature of the allotment

11. Without exception and in the course of a number of transactions from the time of the allotment until 1917, Canada treated the Reserve as a Reserve set apart for the common use and benefit of the seven Bands, including the Popkum First Nation.
12. For example, in 1896, the Department of Indian Affairs ("the Department") suggested that the seven Bands lease half of the Reserve. The transaction did not proceed as it was only supported by five of the seven Bands. Both the Department Indian Affairs and the Department of Justice required the consent of each of the seven Bands for this transaction to proceed.

Timber sale and treatment of the Reserve as if it belonged only to the residents

13. In 1917, the Department invited a number of logging companies to submit offers for timber on the Reserve. Representatives of the seven Bands entitled to the Reserve objected to the proposed sale of the timber. On August 27, 1918, The Department issued an invitation for tenders for the timber. The non-residents again objected.

14. In October 1918, Canada sold the timber to the Dominion Lumber & Timber CO on the recommendation of Departmental Timber Inspector Bury. Bury explained that 10% of the proceeds from the timber sale should be distributed to the residents of the Reserve.

Canada again acknowledged the entitlement of the claimants to the Reserve

15. After the timber had been sold, Canada once again began to acknowledge the entitlement of the seven Bands to the Reserve. In its 1943 Schedule of Indian Reserves, Canada listed the Seabird Island Reserve as belonging to the seven Bands, including the Popkum First Nation.

Canada acknowledged that it could not unilaterally eliminate the seven Bands' entitlement to the Reserve.

16. In 1949, in the context of a provincial application for a road right-of-way on the Reserve, Canada acknowledged that it could not unilaterally eliminate the seven Band's entitlement to the Reserve.

17. In 1951, Acting Superintendent Letcher wrote to Chief Harry Joseph of the residents of the Reserve confirming that the Crown's conduct in 1917-1918 had been inconsistent with the entitlement of the seven Bands to the Reserve.

18. From 1951 to 1957, the Department assessed the feasibility of transferring the Reserve to the residents, and confirmed that such transfer would require the consent of each of the seven beneficiary Bands.

Canada repeatedly attempted to obtain the seven Bands agreement to relinquish the land

19. Canada repeatedly attempted to obtain the seven Bands' agreement to relinquish the land. The seven Bands persistently refused to give up the Reserve and advanced their own proposals regarding the situation.
20. In the context of a proposed long-term lease on the Reserve, the Department met with the seven Bands in 1956. The Bands did not accept the Department's proposal that they surrender the Reserve for long-term leasing. Those present from the seven Bands advanced their own proposal which Canada did not accept.

The Commission

21. In 1957, Canada established a Commission to inquire into and make recommendations on the application of section 17 of the Indian Act which authorized the Minister to constitute a new band from existing Band lists and to set aside lands and funds for the use of the new Band.
22. Acting Superintendent Letcher recommended that Oscar Peters (for the seven Bands) and Vincent Harris (for the residents) be appointed to the Commission. Indian Commissioner Arneil agreed. George Cassady, Q.C. was appointed chairman.

Incorrect information was provided to the chairman of the Commission

23. The Department provided Cassady with incorrect information, including the following:
 - a. The Department advised Cassady that repeated but unsuccessful efforts had been made to work out an agreement with the various groups of

Indians. In fact, the only option the Department had put to the seven Bands involved extinguishing their entitlement to the Reserve and when the seven Bands suggested an alternative solution, it was not accepted by the Department; and

- b. Cassady was told that the Department had decided in 1918 to create a separate Band from the resident Indians and to transfer the Reserve to this new entity but that a departmental solicitor had “expressed the view” that this decision did not meet legal requirements. The Department informed Cassady that the Department’s decision had been based on the allotment condition (Indians to use the land sufficiently by 1879). In fact, the Department had actively considered the allotment condition and had reached the opposite conclusion – that the Reserve should be retained for the use of the seven Bands in common.

Claimants were unrepresented and underprepared at the Commission hearing

- 24. The seven Bands were underprepared for the Commission hearing on June 19, 1958, and were the only unrepresented parties at the hearing.

The claimants were not given all relevant information

- 25. After the Commission’s hearing, Andrew Paull, representing the Indians residing on the Seabird Island Reserve, sent Commissioner Arneil a letter containing additional information for Cassady and MacKinnon, the Commission’s counsel. This letter was not provided to the seven Bands.

Canada implements the recommendations of the Commission

- 26. Canada implemented the recommendations of the Commission, effective January 1, 1959: That the residents of Seabird Island be constituted into the new Seabird

Island Band; that the Reserve be turned over to this new Band for its exclusive use and benefit, and; that the capital and revenue accounts be distributed amongst the new Band and the seven Bands on a per capita basis.

The Popkum Nation protests this outcome

27. The Popkum First Nation has, since 1959, been deprived of its interest in the Reserve.

VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

28. This claim is based upon Canada's breaches of:

- a. A common law fiduciary duty arising by virtue of Canada's special relationship with aboriginal peoples with respect to their interests in land; and
- b. A duty of care arising by virtue of the relationship between Canada and the aboriginal people.

29. We submit that Canada breached the fiduciary duty and duty of care that it owed to the Popkum First Nation when dealing with the Band's legal interest in the Reserve. In particular:

- a. The procedure of the Commission deprived the Popkum First Nation of its right to a fair, open, and meaningful procedure:
 - i. The seven Bands were given insufficient notice of the hearing;
 - ii. The composition of the Commission was unfair;
 - iii. The seven Bands were the only party without representation at the hearing;

- iv. The Department disseminated false information relevant to the issue at hand, or allowed others' false information to stand. The Department did not make the seven Bands aware of this information or give them an opportunity to respond to it.

- b. Section 17 of the Indian Act was improperly applied in order to establish the Seabird island Band and to assign the Reserve to this new entity:
 - i. Canada applied section 17 of the Indian Act in contravention of the seven Band's wishes to retain the Reserve, as well as its own policy to invoke the provision only with the consent of the Bands entitled to the Reserve in question.
 - ii. Canada's application of section 17 was in breach of the requirement in section 17(1) that the Minister's decision be "desirable". The meaning given to this term must accord with the basic scheme of the Indian Act, which is to preserve and protect the Indians' interests in their reserves. Here, Canada applied section 17 to further its own interests rather than the interest of the Bands entitled to the Reserve.

- c. In accepting the Commission's recommendation:
 - i. Canada failed to preserve and protect as much of the Popkum First Nation's interest in the Reserve as it could;
 - ii. Canada failed to pay compensation to the Popkum First Nation for the loss of its interest in the Reserve; and
 - iii. Canada permitted the per capita division of the Seabird Island funds. Popkum First Nation ought to have received an equal share of the Reserve's capital and revenue accounts.

VII. Relief Sought.

30. In light of the foregoing, the Popkum First Nation seeks equitable compensation from Canada equal to:

- ~~a.~~ The market value of the Popkum First Nation's 1/7 interest in the Reserve at the time it was taken, brought forward to the current value of the loss;
- ~~b.~~a. Such amounts for the loss of Popkum First Nation's 1/7th interest in the Reserve determined by the Tribunal to be in accordance with the principles of equitable compensation and restitution applied by the courts, and as set out by s. 20(1)(c) of the *Specific Claims Tribunal Act*;
- ~~e.~~b. The difference between the *per capita* share of the capital and revenue funds of the Reserve received by the Popkum First Nation and the Popkum First Nation's 1/7th interest in these funds, brought forward to the current value of the loss, in accordance with s. 20(1)(c) of the *Specific Claims Tribunal Act*; and
- ~~d.~~c. Such other damage or compensation as this Honourable Tribunal thinks just.

Dated this 27th day of October, 2011

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AMENDMENT dated this 25th day of August, 2016.



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