

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

POPKUM FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENdicATIONS PARTICULIÈRES		
F I L E D	November 25, 2011	D É P O S É
Guillaume Phaneuf		
Ottawa, ON	3	

CLAIMANT

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

RESPONDENT

RESPONSE

Pursuant to Rule 42 of the

Specific Claims Tribunal Rules of Practice and Procedure

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

TO: **POPKUM FIRST NATION**
As represented by Allan Donovan
Donovan & Company
6th floor, 73 Water Street
Vancouver, BC V6B 1A1
Email: allan_donovan@aboriginal-law.com

I. Status of Claim (R. 42(a))

1. The Popkum First Nation (the “Claimant”) submitted a claim to the Minister in 2007 alleging that the Crown breached its fiduciary duty and duty of care in connection with the Crown’s handling in 1958 of the Claimant’s interest in the Seabird Island Indian Reserve (the “Reserve”) and the funds in the Seabird Island account.

2. The Minister notified the Claimant in writing on October 30, 2009 of his decision not to accept the claim for negotiation.

II. (a) Validity (R. 42(b) and (c))

3. The Crown does not accept the validity of the claim set out in the Declaration of Claim, namely that the Crown breached a fiduciary duty or duty of care to the Claimant in connection with its handling in 1958 of the Claimant’s interest in the Seabird Island Reserve and the Seabird Island account.

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

4. In reply to paragraph 7 of the Declaration of Claim, the Crown denies that Commissioner Sproat was vested with final authority to set aside lands for Indian Bands of the Yale District and, in any event, the question of whether Sproat had final authority is not relevant to this claim. The remaining facts in paragraph 7 are admitted.

5. In reply to paragraph 8, the Crown admits that the Reserve was surveyed in September 1881 and determined to be 4511.5 acres at that time.

6. In reply to paragraph 9, the Crown admits that Commissioner Sproat specified a six-year period from the date of allotment for the Indians to sufficiently use the land in the opinion of the Government of Canada. However, Commissioner Sproat specified that upon the expiry of the six-year period in June 1885, any unused portion would cease to be Indian land.

7. In reply to paragraph 10, the Crown denies it actively exercised its discretion pursuant to Commissioner Sproat’s condition in June 1885. Rather, the six-year period envisioned by

Commissioner Sproat passed without any action taken by the Crown at that time in relation to altering the land base of the Seabird Island Reserve.

8. The Crown denies the facts set out in paragraph 11 of the Declaration of Claim.

9. In reply to paragraph 12, the Crown states that in 1896 it asked the bands interested in the Reserve if they wished to surrender a portion of Seabird Island for lease. Because each band did not agree to surrender its interest in the Reserve, the transaction did not complete. With respect to the reference to the Department of Justice, the content of any advice is subject to solicitor-client privilege and, in any event, is irrelevant to the breaches of duty alleged in this claim.

10. In reply to paragraph 13, the Crown denies that the seven bands, namely the Popkum, Skawtits, Ohamil, Skawahlook, Hope, Union Bar and Yale Indians (the “Seven Bands”) were “entitled to the Reserve” as stated by the Claimant. The Crown admits the remaining facts in paragraph 13.

11. The Crown admits the facts in paragraphs 14 and states that Bury’s recommendation that 10% of the funds from the timber sale be distributed to the residents of Seabird Island was in accordance with the Seabird Island Band’s resolution dated July 19, 1918.

12. In reply to paragraph 15, the Crown denies that immediately after the timber had been sold that “Canada once again began to acknowledge the entitlement of the Seven Bands to the Reserve”. The Crown admits that in the 1940s it acknowledged that the Seven Bands held the legal interest to the Reserve but states that the Crown also acknowledged the interest of the residents of Seabird Island in the Reserve throughout the period in question. The Crown admits that the 1943 schedule of Indian reserves in the Dominion of Canada indicated that Seabird Island had been allotted to the Seven Bands.

13. In reply to paragraph 16, the Crown admits that Indian Affairs in 1949 acknowledged that the Seven Bands owned the Reserve in common. Because of this complex situation, the Crown recommended an expropriation of the Reserve lands required for road purposes rather than attempting to obtain the consent of each of the Seven Bands for a transfer of the lands.

14. In reply to paragraph 17, the Crown admits that Acting Superintendent Letcher wrote to Chief Joseph but Letcher stated that the decision of the Deputy Superintendent General of Indian Affairs in 1918 to establish the residents of the Seabird Island as a new band and to allot the Reserve to that band had apparently overlooked the original allotment of the Reserve to the Seven Bands.

15. In reply to paragraph 18, the Crown denies that Indian Affairs confirmed that the transfer of the Seabird Island Reserve to the Seabird Island Band would require the consent of each of the Seven Bands. During this period, Indian Affairs focussed on obtaining surrenders from each of the Seven Bands. It was not until 1957 that section 17 of the *Indian Act* was considered as a solution to the impasse.

16. In reply to paragraph 19, the Crown admits that it attempted to obtain the Seven Bands' agreement to relinquish the Reserve in favour of the residents of Seabird Island. The Crown denies that the Seven Bands persistently refused to give up the Reserve. Three of the Seven Bands - the Claimant, Union Bar and Yale – relinquished their interests in the Reserve. The Claimant did not advance its own proposal, either on its own or as one of the Seven Bands, for the resolution of the situation.

17. In reply to paragraph 20, the Crown admits that in 1956 it met with three of the Seven Bands about a proposed long-term lease of part of the Reserve for agriculture. The Claimant was not one of the three. The Claimant was not present at the meeting and was not one of the bands who advanced alternative lease terms. The Crown has no knowledge of the Claimant's position on the proposal to enter into the long-term lease, which did not proceed. The Crown denies that it did not accept the alternative lease terms that had been proposed by the three of the Seven Bands.

18. In reply to paragraph 21, the Crown admits that the Governor in Council appointed a three-member commission under the *Inquiries Act* to inquire into and make recommendations on the desirability of establishing a new band and the reserve lands and funds held for such a new band if established, pursuant to section 17 of the *Indian Act* (the "Commission"). The Commission was not established in 1957, rather the Governor in Council appointed the Commission on February 18, 1958.

19. The Crown admits the facts in paragraph 22 but states that Superintendent Letcher (no longer in an acting capacity) put forward the names of six individuals from various bands for two of the three commissioner positions.

20. In reply to paragraph 23, the Crown denies that Indian Affairs provided Chairman Cassady with incorrect information.

21. The Crown denies the facts in paragraph 24. Five of the Seven Bands participated in the Commission hearings and three of these, including the Claimant, were represented by their chiefs. The other two were represented by members of their respective band councils. The Hope First Nation was represented by Chief Oscar Peters, who was also one of three Commissioners. The residents of Seabird Island were represented by Andrew Paull, President of the North American Indian Brotherhood. The only party with legal representation was the Commission itself.

22. In reply to paragraph 25, the Crown has no knowledge of whether the letter from Andrew Paull to Chairman Cassady and Commission counsel was provided to Commissioner Oscar Peters or any other representatives of the Seven Bands.

23. The Crown admits the facts in paragraph 26, except that the Seabird Island Band had been regarded by the residents of Seabird Island and the Seven Bands as a separate band since at least 1918 and the Crown did not “implement” the recommendations of the Commission. The Minister responsible for Indian Affairs gave careful consideration to both the majority and minority reports of the Commission and approved most of the majority’s recommendations, which also included, in addition to the matters pleaded in paragraph 26, allowance for any members of the Seven Bands to transfer to and enjoy full membership in the Seabird Island Band. The Minister altered the majority’s recommendation with respect to the deadline for making application for band membership without requiring the consent of the Seabird Island Band.

24. In reply to paragraph 27, the Crown denies that the Claimant has had any interest in the Reserve since 1959.

IV. Statements of Fact (R. 42 (a))

Allotment of Seabird Island Reserve

25. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the Terms of Union, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission. It was established in 1876 and was comprised of three commissioners, one of whom was Commissioner Gilbert Sproat ("Commissioner Sproat"). The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.

26. In June of 1879, Commissioner Sproat allotted Seabird Island Reserve "for all the Indians between Cheam and Spuzzum – namely Popkum, Skawtits, Ohamil, Skawahlook, Hope, Union Bar and Yale Indians".

McKenna-McBride Commission

27. On September 24, 1912, Canada and BC established the Royal Commission on Indian Affairs for British Columbia (the "McKenna-McBride Commission") whose task was to review the land requirements of Indian bands in the province and to add to or reduce land from existing reserves.

28. In November of 1914, the McKenna-McBride Commission met with various individuals, including representatives from the Seven Bands and the residents of Seabird Island who gave evidence that they had an interest in the Island. Many of the residents of Seabird Island regarded themselves as a separate band, having severed ties with the bands from which they originally came. Indeed, in 1913, all heads of families on Seabird Island participated in the selection of their own Chief.

29. Based upon its meetings, the McKenna-McBride Commission found in its 1916 Final Report that Seabird Island belonged to the Seven Bands.

Steps to Establish Seabird Island Band and Trust Account

30. In 1918, a recommendation to establish a separate Seabird Island Band and Trust Account was approved by the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, so that the residents of the Seabird Island Reserve could derive full benefit from the revenues of the timber sale and access more freely the money which they required.
31. When money from timber sales was to be distributed in 1918, both residents of the Reserve and non-residents from the Seven Bands claimed an entitlement to the funds, leading to discussions among government officials as to whom the funds ought to be distributed.
32. In March 1919, the funds were distributed to the residents of the Seabird Island Reserve.
33. As of 1919, there was at least one family from the Claimant residing on the Seabird Island Reserve and considered to be a member of the Seabird Island Band.

Seabird Island Band accepted by the Seven Bands

34. Despite the decision of Deputy Superintendent General Scott to establish the residents of Seabird Island as a band in 1918, the Seabird Island Band did not have official band status. Although the Seabird Island Band lacked official status, from 1918 until 1959 the residents of Seabird Island and the Seven Bands regarded the residents of Seabird Island as a separate band.
35. Residents of Seabird Island who had once been members of the Seven Bands generally no longer considered themselves as having any further rights in the bands or reserves from which they had come, a view shared by the Seven Bands.

Regularizing the beneficial interest in Seabird Island

36. Beginning in 1951, upon learning that the Seven Bands retained an interest in the Reserve, the Seabird Island Band pressed Indian Affairs to obtain certainty of title to Seabird Island Reserve and the funds associated with the Reserve. As a result, the Crown approached the Seven Bands to surrender their interests.
37. In 1951 and 1952, the Claimant, Yale and Union Bar agreed to relinquish their interests in the Reserve in favour of the residents of Seabird Island. While Yale and Union Bar

relinquished their interest in the Reserve provided they received their *per capita* shares of the capital funds in the Seabird Island Account, the Claimant appears to have agreed to fully relinquish its interest in the Seabird Island Account.

38. While three of the Seven Bands relinquished their interests in the Reserve, Indian Affairs was unable to obtain the agreement of the other Seven Bands to relinquish their interest. The Seabird Island Band Council continued on its own behalf to press for the sole interest in the Reserve and its associated funds so that they might be in a better position to manage and improve the land.

39. Indian Affairs supported the efforts of the residents of Seabird Island but a resolution could not be achieved consensually. Chief Oscar Peters of the Hope Band adamantly insisted that the Seven Bands' interest in the Reserve (which included a veto for each band over land use decisions) and the Seabird Island capital funds should not be disturbed.

40. The Crown was unsuccessful in transferring the beneficial interest in the Reserve to the Seabird Island Band by consent of all of the Seven Bands.

Seabird Island constrained in its development

41. From as early as 1946 until 1959, numerous activities, transactions and proposals did not proceed or were suspended in relation to Seabird Island due to the controversy over the beneficial interest in the Reserve, including:

- (a) estates, in particular land transactions, were unable to be settled;
- (b) monies could not be released from the Seabird Island capital account to rebuild the church, which was in serious need of repair, as the church could not be said to benefit all Seven Bands;
- (c) revenue monies were frozen as the required resolutions from each of the Seven Bands for distribution of these funds to the Seabird Island Band could not be obtained. As a result, Seabird Island Band did not have monies for necessities;

- (d) given the prime agricultural land on the Reserve, potential loss of a long-term agricultural lease which would have cleared a large tract of the Reserve and provided jobs for its residents; and
- (e) no outside Indians could be transferred into Seabird Island Band and no enfranchisements of residents of Seabird Island could occur.

42. In addition, the Seven Bands took no active interest in the management or long-term planning of the Reserve.

Section 17 of the Indian Act

43. The idea of employing section 17 of the *Indian Act* to resolve the impasse was expressly raised within Indian Affairs for the first time in April 1957.

44. Section 17, which was enacted for the first time in 1951, authorized the Minister responsible for Indian Affairs to constitute new bands from existing band lists or the general list, and to set aside such portion of reserve lands and funds as he or she determined for the use of the new band.

45. In June 1957, Andrew Paull petitioned Indian Affairs on behalf of the residents of Seabird Island, requesting that they be constituted a band according to the provisions of section 17 and that the Reserve be transferred to them.

The appointment of a commission of inquiry

46. The Crown agreed to formally consider the possibility of invoking section 17 and, to that end, the Minister recommended that an independent commission be established.

47. In February 1958, the Governor in Council established a commission of inquiry pursuant to the *Inquiries Act* comprised of George Cassady, Q.C. as Chairman, Chief Oscar Peters of the Hope Band, and Chief Vincent of the Seabird Island Band as Commissioners (the "Commission").

48. The Commission was appointed to inquire into and report on (a) the desirability of establishing the Seabird Island Indian Band in accordance with section 17(1) of the *Indian Act*,

composed of those Indians residing on Seabird Island; and (b) the reserve lands and funds which should, in accordance with section 17(2), be held for the use and benefit of such new band should it be established. The Commission controlled its own procedures and the conduct of the inquiry.

49. The Commission conducted hearings on March 27, June 19, 20, and 24 1958. The hearings took place on Seabird Island. Representatives and members from the Seven Bands were in attendance. Commissioner Peters personally arranged for various members of the Seven Bands to be in attendance. All parties were invited to submit any testimony or argument they wished.

50. Chairman Cassady delivered the Commission's majority report on behalf of himself and Commissioner Harris on August 25, 1958. The majority report recommended:

- (a) the establishment of the residents of Seabird Island as a band in accordance with section 17(1)(a) of the *Indian Act*;
- (b) that all the Seabird Island Reserve be held for the use and benefit of the newly established Band;
- (c) that the funds in the Seabird Island capital and revenue accounts be distributed on a *per capita* basis among the members of the Seven Bands and the Seabird Island Band; and
- (d) that any member of the Seven Bands may, within two years from the date of the establishment of the new Band, transfer to and enjoy full membership in the newly established Band.

51. On August 26, 1958, Commissioner Peters submitted his minority report. He agreed with the majority's recommendation that the Indians on Seabird Island Indian Reserve be constituted a band. But he recommended that:

- (a) the Seven Bands retain their common interest in the Seabird Island reserve and the Seabird Island capital account;

- (b) the revenue account be provided to the new Seabird Island Band for the development of their welfare, habitation and farm implements;
- (c) that any members of the Seven Bands who desire to take up land on Seabird Island Reserve be admissible at all times; and
- (d) that the evidence from the inquiry hearings be disregarded.

The decision of the Minister

52. The Minister responsible for Indian Affairs at that time, Ellen Fairclough, accepted the majority recommendation with one alteration, that any members of the Seven Bands who wished to be included in membership in the Seabird Island Band may make an application to have their names added to the list, and such application would be considered, provided the application was submitted before January 1, 1959. After that date, in accordance with the *Indian Act*, the concurrence of the Seabird Island Band Council would be required. She further decided that the Seabird Island Band would be established effective January 1, 1959.

53. In making her decision, Minister Fairclough considered the situation of the residents of Seabird Island and the views of those opposed to the transfer of the Reserve and any part of the capital funds to the Seabird Island Band. She also considered the reserve lands and funds held by the Seven Bands.

54. The eight bands interested in Seabird Island varied greatly in population in 1958. The Claimant was the smallest of the eight, with only five members. The Seabird Island Band was the largest, with 212 members. Of the other Seven Bands, the Hope Band was the largest with 114 members and the others ranged in size from 25 to 53 members.

55. The Claimant had the most reserve land per capita in 1958 among the eight interested bands. Popkum had over 71 acres per capita, while the other bands varied from 7 to 28 acres per capita. Seabird Island's acreage, which had eroded over the years, at 16.5 acres per capita was almost equivalent to the average of the eight bands, namely 16.9 acres per capita.

56. The Claimant also had the most band money per capita in 1958 among the eight interested bands. Popkum had over \$1700 per capita. Seabird Island had the second lowest per capita funds at \$211. The average of the eight bands was \$307.

57. The membership of the Seven Bands and the residents of Seabird Island were notified of the Minister's decision on October 1, 1958. No members of the Seven Bands applied to transfer into the new Band. In January 1959, the funds in the Seabird Island accounts were divided on a *per capita* basis amongst the Seabird Island Band and the Seven Bands and distributed.

58. No court proceeding was brought at the time (or at any time) with respect to the establishment of the residents of Seabird Island as a band, the determination by the Minister that the Reserve be held for the use and benefit of Seabird Island Band, or the distribution of the Seabird Island accounts amongst the eight bands.

V. Relief (R. 42(f))

59. The Crown seeks to have the claim dismissed in its entirety.

60. The Crown seeks its costs in the proceedings.

61. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

Respondent's address for service: Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Attention: Rosemarie Schipizky

Fax number address for service: (604) 666-2710

E-mail address for service: rosemarie.schipizky@justice.gc.ca

Dated: November 25, 2011



Signature of
 Respondent lawyer for Respondent
Myles Kirvan,
Deputy Attorney General
Per: Rosemarie Schipizky
Department of Justice
British Columbia Regional Office