

SPECIFIC CLAIMS TRIBUNAL

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	December 5, 2016
David Burnside	
Ottawa, ON	32

BETWEEN:

WE WAI KAI NATION

Claimant

v.

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

Respondent

---

**FURTHER AMENDED DECLARATION OF CLAIM**

Pursuant to Rule 41 of the  
*Specific Claims Tribunal Rules of Practice and Procedure*

---

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

[DATE]

---

(REGISTRY OFFICER)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building 234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
Fax: (613) 954-1920

**I. Claimant (R. 41(a))**

1. The Claimant, WE WAI KAI NATION, also known as the Cape Mudge Indian Band, 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.
2. The First Nation's Representative is Allan Donovan, Donovan & Company, 6<sup>th</sup> floor, 73 Water Street, Vancouver, BC, V6B 1A1. Telephone number: (604) 688-4272. Email address: allan\_donovan@aboriginal-law.com.

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

3. 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 within 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.
4. On December 11, 1998, and in the supplementary submission on May 24, 2009, the We Wai Kai Nation filed the Rebecca Spit Specific Claim with the Department of Indian Affairs, Specific Claims Branch. The claim related to the breaches of duty by Canada that resulted in the We Wai Kai Nation's Drew Harbour Indian Reserve not including lands the Indian Reserve Commission had intended to include in the reserve. ~~loss of its entitlement to a portion of the Drew Harbour Indian Reserve.~~
5. In a letter dated December 24, 2010, the Department of Indian and Northern Affairs Canada informed the We Wai Kai Nation of the Minister of Indian Affairs and Northern Development's decision not to accept for negotiation the We Wai Kai Nation's Drew Harbour Indian Reserve specific claim.

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

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

**III. Grounds (Act, s. 14(1))**

7. 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 the 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; and

~~(d) an illegal lease of disposition by the Crown of reserve lands.~~

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

**Use of the Rebecca Spit Area by the We Wai Kai**

8. At the time of the British Columbia reserve creation process, and for many years prior, the Rebecca Spit was an important area for the We Wai Kai. The We Wai Kai used Rebecca Spit as a defensive site and lookout point for invaders and harvested a wide range of marine resources from the area. At the time of reserve allotment, there were small We Wai Kai houses at the end of Rebecca Spit.

### *Original Allotment of Drew Harbour Indian Reserve*

9. ~~8.~~ On October 13, 1879, Reserve Commissioner Sproat wrote his Minutes of Decision ~~of for~~ Laich Kwil Tach Indians (We wai a Kay subgroup), Drew Harbour Indian Reserve (~~“the Reserve”~~). Sproat’s allotment was never surveyed and was disallowed by British Columbia.

### *Survey of Rebecca Spit*

10. ~~9.~~ On August 28, 1884, Mr. E. Priest carried out a survey of 54 acres of Rebecca Spit (Lot 33) for Mr. J. Miller. The survey noted the existence of the Reserve at Drew Harbour. The Reserve was shown to lie south of Rebecca Spit in accordance with Sproat’s disallowed 1879 allotment.

11. ~~10.~~ The survey, taken at high tide, began southwest of Rebecca Spit and proceeded northeast to encompass the whole of the spit. The plan notes that, up to the northernmost tip of the spit, the shoreline is unbroken and there is no existence of any passage or other interruption in the shoreline.

11-12. ~~Miller did not proceed to apply for land at Rebecca Spit and Priest’s survey was not registered with the British Columbia Surveyor General’s Office.~~

### *Re-Allotment and Approval of the Reserve*

13. ~~11.~~ On October 7, 1886, O’Reilly and Ashdown Green of the Indian Reserve Commission visited Drew Harbour for the purpose of setting aside reserves for the We Wai Kai Nation. On October 8, 1886, O’Reilly drafted a Minute of Decision for Drew Harbour Reserve. Some unknown time after the Minute of Decision was created, a sketch was drafted that accompanied O’Reilly’s Minute of Decision (the “1886 Sketch”).

12-14. On October 29, 1886, Indian Reserve Commissioner O’Reilly enclosed his Minutes of Decisions and sketches to the Chief Commissioner of Land and Works. In his Minutes of Decision, O’Reilly included Rebecca Spit as part of the Drew Harbour Reserve, stating in writing that the Reserve’s northern boundary was outlined by “following the shore” to the

place of commencement. The reserve so indicated would include the entire area of important We Wai Kai use. The ~~sketch~~ 1886 Sketch that accompanied O'Reilly's Minutes of Decision showed the Reserve encompassed only a portion of Rebecca Spit up to an indicated narrow passage. The 1886 Ssketch indicated that the land north of that passage was not part of the Reserve. The 1886 Ssketch would have excluded from the reserve an area of important We Wai Kai use.

~~13-15.~~ 12. On November 5, 1886, William Smithe, Chief Commissioner of Lands and Works for British Columbia, informed O'Reilly of his approval of his reserve allotments to the Laich kwil tach Indians, as described in O'Reilly's Minutes of Decisions and sketches. This approval included the Drew Harbour Reserve. The interpretation of the Minutes of Decision and 1886 Sketch ~~sketch~~ of the Drew Harbour reserve that best reconciles the reserve allotment documents and We Wai Kai use of Rebecca Spit is that O'Reilly intended to include Rebecca Spit in the Drew Harbour Reserve.

#### ***Provincial Crown Sale of Lot 33 to William P. Sayward***

~~14-16.~~ 13. In the November, 1886 edition of the BC Gazette, William P. Sayward announced his intention to apply to purchase Lot 33 land at Rebecca Spit ("Sayward's Notice").

~~15-17.~~ 14. On January 29, 1887 the Surveyor General for British Columbia plotted Priest's 1884 Survey on behalf of Sayward.

~~16-18.~~ 15. On February 10, 1888 British Columbia's Ministry of Lands and Works issued Crown Grant 287/29 to W.P. Sayward for ~~the a~~ 54 acre Lot lot describing it as Lot 33.

~~19.~~ 16. There is no evidence that Canada, through its agents, O'Reilly or B.C. Indian Superintendent Powell protested the fact that the Province's issuance of a Crown Grant for Rebecca Spit to William Sayward overlapped with the boundaries as described in O'Reilly's Minutes of Decisions which had been approved by the Chief Commissioner of Lands and Works on November 5, 1886.

### *Survey of the Reserve*

~~17.20.~~ 17. On April 28, 1888, Indian Reserve Commission Surveyor Ashdown Green instructed Indian Affairs Department Surveyor E. M. Skinner to survey the Drew Harbour Reserve.

~~18.21.~~ 18. On July 28, 1888, Skinner surveyed the Reserve. Skinner, following O'Reilly's Minutes of Decision, followed the eastern shore of the Reserve north towards Rebecca Spit but ~~concluded that he was unable to continue as~~stopped after he encountered the southern boundary of Sayward's Crown Grant, Lot 33. As such, Skinner did not continue his survey so as to include the whole of Rebecca Spit nor the portion of Rebecca Spit depicted in the 1886 Sketch that accompanied O'Reilly's Minute of Decision.

~~19.22.~~ 19. Skinner reported to O'Reilly that he had completed the surveying of the Euclataw [Laich kwil tach] reserves. He commented on alterations he had made to two of these reserves, but made no mention of changes made to the ~~the fact that he was unable to survey the~~ boundaries of Drew Harbour Indian Reserve as described in O'Reilly's Minutes of Decision. The survey he submitted, however, did not include the full Drew Harbour Reserve as described by the Indian Reserve Commissioner in his Minutes of Decision. Neither did it include all of the land up to the perceived passage noted on the 1886 sSketch that accompanied O'Reilly's Minutes of Decision.

### *Approval of the Reserve as Surveyed*

~~20.23.~~ 20. On May 18, 1889, F.G. Vernon, Chief Commissioner of ~~the Department of~~ Land and Works and O'Reilly signed and approved Plan ATBC 184 of the surveyed Laich-kwil-tach Indian Reserves, Sayward and Coast Districts.

~~21.24.~~ 21. On August 14, 1914, The Royal Commission of Indian Affairs of BC (McKenna-McBride Commission) issued a Minutes of Decision confirming Drew Harbour Indian Reserve as surveyed by Skinner. This Minutes of Decision was approved by BC Order in Council 911 on July 25, 1923 and by OCPC 1265 on July 19, 1924.

### *The We Wai Kai Nation's Loss of a Portion of the Drew Harbour Reserve*

~~22.25.~~ 22. The We Wai Kai Nation has, since the 1888 Crown Grant to Sayward, been deprived of its interest in the entire Rebecca Spit as part of its Drew Harbour Indian Reserve.

~~23.26.~~ 23. In the alternative, the We Wai Kai Nation has, since the 1888 Crown Grant to Sayward, been deprived of its interest in the lower portion of Rebecca Spit up to the perceived passage shown in the 1886 sSketch that accompanied O'Reilly's Minutes of Decision for the Drew Harbour Indian Reserve.

**VI. The Basis in Law on Which the Crown is said to have Failed to Meet or Otherwise Breached a Lawful Obligation:**

~~24.27.~~ 24. This claim is based upon Canada's breaches of:

- a. A statutory duty to appropriately administer its laws in relation to reserve creation; and
- b. A common law fiduciary duty arising by virtue of Canada's special relationship with aboriginal peoples with respect to their interests in land.

~~25.28.~~ 25. The We Wai Kai Nation submits that Canada breached its statutory and fiduciary obligations owed to the We Wai Kai Nation when dealing with the Band's legal interest in the Reserve. ~~In particular:~~

- ~~a. The reserve approval mechanism set out in Order in Council PC 1334 appointing Commissioner O'Reilly was a mandatory and statutory process.~~
  - ~~i. As a result of PC 1334, only two options were available to the provincial and federal governments upon their review of O'Reilly's allotments: agreements with the allotment, or referral of their disapproval to the Lieutenant Governor for resolution.~~
  - ~~ii. It was not open to either government to unilaterally alter or veto O'Reilly's allotments. The Provincial Government purported to unilaterally alter the~~

~~boundaries of O'Reilly's allotment at Rebecca Spit, and the federal Crown itself took no step to ensure compliance with or enforce the mechanism set out in PC-1334.~~

~~b.—During the allotment of the Reserve:~~

~~i.—Canada had a fiduciary obligation of loyalty, good faith and full disclosure to the We Wai Kai Nation.~~

~~ii.—Canada had an obligation to act reasonably and with diligence in the best interests of the We Wai Kai Nation.~~

~~iii.—Canada failed to act reasonably and diligently in representing the Band's land interest in Rebecca Spit.~~

~~iv.—In the alternative, Canada failed to act reasonably and diligently in representing the Band's land interest in the lower portion of Rebecca Spit up to the perceived passage shown in the 1886 sketch that accompanied O'Reilly's Minutes of Decision.~~

~~e.—In accepting the Provincial Crown Grant to Sayward and Skinner's survey of the Reserve:~~

~~i.—Canada failed to preserve and protect as much of the We Wai Kai Nation's interest in the Reserve as it could; and~~

~~ii.—Canada failed to obtain compensation to the We Wai Kai Nation for the loss of its interest in the Reserve.~~

~~26.29. 26.—In the alternative, if the Reserve was not created at law in 1886, this land The Drew Harbour Reserve was provisionally allotted as an Indian Reserve when the Chief Commissioner of Lands and Works approved O'Reilly's Minutes of Decision.~~

- a. Through the establishment of a provisional reserve, a cognizable Indian interest was created in relation to these lands, which Canada assumed discretionary control over.
- b. In the provisional reserve context:
  - i. Canada had a fiduciary obligation of loyalty, good faith, full disclosure and ordinary prudence with a view to the best interest of the We Wai Kai Nation.
  - ii. Canada had an obligation to act reasonably and with diligence in the best interests of the We Wai Kai Nation.

c. In particular, Canada failed to fulfil its fiduciary duty to the We Wai Kai Nation when:

1. Canada, through its agents, created the erroneous 1886 Sketch that accompanied O'Reilly's Minute of Decision for Drew Harbour Reserve that;

a. depicted Rebecca Spit as an island;

b. did not abide by O'Reilly's Minute of Decision; and

c. failed to reference the Admiralty Charts of the time that clearly depicted Rebecca Spit as a spit at Drew Harbour.

2. Canada, through its agents, failed to note the discrepancy between his Minute of Decision for Drew Harbour Reserve and the 1886 Sketch;

3. Canada, through its agents, failed to diligently compare the 1886 Sketch with the known maps of Drew Harbour which clearly identified Rebecca Spit as a spit at Drew Harbour.

e.d. Before accepting the Provincial Crown Grant to Sayward and Skinner's survey of the Reserve, Canada breached its fiduciary duty to We Wai Kai Nation when:

i. ~~Canada breached its fiduciary duty when~~ it failed to request the Province to suspend all alienations within the We Wai Kai Nation's region pending the allotment of reserves there.

ii. ~~Canada breached its fiduciary duty when~~ it failed to advise the Provincial Government that the lands sought by Sayward were located within a reserve allotted to the We Wai Kai Nation.

iii. ~~Canada failed to fulfil its fiduciary duty when~~ it did not inquire into, protest nor react in any way to, Sayward's Notice and application for Rebecca Spit.

iv. it did not avail itself of the reserve approval mechanism and corresponding dispute resolution process set out in Order in Council PC 1334.

iv.v. ~~Canada breached its fiduciary duty when~~ it failed to rely upon the statutory provisions in place at the time that disallowed a Crown Grant over reserve lands.

vi. ~~Canada failed to fulfil its fiduciary duty to the Band when~~ it omitted to inform the We Wai Kai Nation that a Crown Grant was sought for a portion of the reserve allotted for its use, benefit and enjoyment.

e. Canada failed to fulfill its fiduciary duty to the Band during the survey process when:

1. Skinner completed the survey of Drew Harbour Reserve without following O'Reilly's Minute of Decision that directed him to include Rebecca Spit;

2. Skinner erroneously surveyed the southern boundary of District Lot 33 as the northern boundary of Drew Harbour Reserve;
3. Skinner failed to notify O'Reilly of the discrepancy between the Minute of Decision and his survey of the reserve;
4. Skinner failed to notify O'Reilly of the discrepancy between the 1886 Sketch and his survey of the reserve; and
- 4.5. Canada, through its agents, approved of Skinner's survey without identifying and resolving the survey error of not including Rebecca Spit in Drew Harbour Reserve.

d.f. Once the Province issued a Crown Grant to Sayward, Canada breached its fiduciary duty to the We Wai Kai Nation when:

- i. ~~Canada breached its fiduciary duty to the We Wai Kai Nation when it failed to take any steps to respond to and rectify the issuance of a Crown Grant on reserve land.~~
- ii. ~~Canada failed to fulfil its fiduciary duty to the We Wai Kai Nation it omitted to inform the Band that a Crown Grant had been issued within its allotted Reserve; and-~~
- iii. it failed to act to protect We Wai Kai Nation's interest in Rebecca Spit by failing to identify and address the discrepancy between a) Skinner's survey of Drew Harbour Reserve and b) the Minutes of Decision and 1886 Sketch for Drew Harbour Reserve.

g. During the McKenna McBride Commission, Canada failed to fulfil its fiduciary duty when:

- i. it failed to identify the error in the 1886 Sketch compared to Green's map created for the Commission; and

ii. did not correct the error in favour of the We Wai Kai Nation by seeking the inclusion of Rebecca Spit in Drew Harbour Reserve or by taking any other step to address the issue;

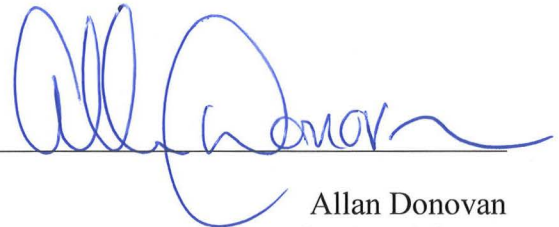
e.h. Any further breaches of fiduciary duty that may arise from the totality of evidence produced at hearing and in response to Canada's submissions in the hearing of the matter.

## VII. Relief Sought

27.30. ~~27.~~ The We Wai Kai Nation seeks:

- a. Equitable compensation from Canada ~~to compensate~~ for Canada's breaches of lawful obligation determined in accordance with section 20(1)(c) of the Specific Claims Tribunal Act; and
- b. Such other damages or compensation as this Honourable Tribunal thinks just.

Dated this 5<sup>th</sup> day of December, 2016



Allan Donovan  
Solicitor for the Claimant  
Donovan & Company  
6<sup>th</sup> Floor, 73 Water Street  
Vancouver, BC V6B 1A1  
Tel. (604) 688-4272  
Fax. (604) 688-4282  
allan\_donovan@aboriginal-law.com