

SPECIFIC CLAIMS TRIBUNAL

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| SPECIFIC CLAIMS TRIBUNAL | |
| TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES | |
| F I L E D | September 21, 2018 |
| David Burnside | |
| Ottawa, ON | 29 |

B E T W E E N:

KITASOO XAI'XAIS 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 Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

Original Declaration of Claim filed: January 22, 2016

Amended Declaration of Claim filed: October 31, 2016

Further Amended Declaration of Claim filed: February 21, 2018

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, Kitasoo Xai'Xais Nation ("Kitasoo Xai'Xais) 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 April 27, 2012, Kitasoo Xai'Xais caused its Royal Commission on Indian Affairs Additional Land Applications Specific Claim (the "Claim") to be sent to the Canada.
4. On June 1, 2012, Canada advised Kitasoo Xai'Xais that the Claim had been filed with the Minister on May 2, 2012.
5. On February 2, 2015, Canada advised Kitasoo Xai'Xais that the Minister had decided to not negotiate the Claim.

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

6. For the purposes of the Claim, Kitasoo Xai'Xais does not seek compensation in excess of \$150 million.

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

7. The following are the grounds for the Claim, as provided for in s. 14(1) of the *Specific Claims Tribunal Act*:

(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.

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

Indian Reserve Creation in British Columbia

8. When British Columbia entered into Canada in 1871, it did so in accordance with the *Terms of Union*.

9. Pursuant to Article 13 of the *Terms of Union*, Canada undertook the responsibility as exclusive intermediary with British Columbia in advancing the Indian interest in having Crown land in British Columbia set apart as reserve land. British Columbia agreed to convey tracts of land for Indian reserve purposes to Canada "in trust for the use and benefit of the Indians." Article 13 further provided that where Canada and British Columbia could not agree on the quantity of land to be granted, "the matter shall be referred for the decision of the Secretary of State for the Colonies."

10. 8. Indian reserve creation in British Columbia spanned in excess of 60 years, from 1871 to 1938.

11. 9. Provincial legislation during the 1871 to 1938 period included a general prohibition preventing Indigenous people from pre-empting land.

~~10.~~ The federal government was the exclusive intermediary between Indigenous people and the Province of British Columbia in the reserve creation process.

~~12.~~ Indian reserves were initially set aside by the Indian Reserve Commission, established by the federal government and the Province of British Columbia to, *inter alia*, fix and determine for each Indian Nation the number, size and location of reserves.

~~13.~~ The federal government and the Province of British Columbia had difficulty agreeing about the size and number of reserves to be created in British Columbia.

~~14.~~ To resolve this impasse, the federal government and British Columbia created the Royal Commission on Indian Affairs in 1912.

Kitasoo Xai'Xais Reserves

~~15.~~ Kitasoo Xai'Xais occupies a Territory and holds reserves in and around Klemtu, British Columbia.

~~16.~~ In 1882 Reserve Commissioner O'Reilly set aside two reserves for Kitasoo Xai'Xais:¹ Kitasoo IR No. 1 at Klemtu and Canoona IR No. 2 at the mouth of the Canoona River. O'Reilly also gave Kitasoo the right to fish the Canoona River, for a distance of two miles from its mouth.

¹ At that time Kitasoo Xai'Xais were sometimes referred to as the China Hat Indians.

Royal Commission on Indian Affairs

17. ~~16.~~ In 1912, Canada and British Columbia established the Royal Commission on Indian Affairs, pursuant to an Agreement between Special Reserve Commissioner J.A.J. McKenna, on behalf of the federal government, and Sir Richard McBride, Premier of the Province of British Columbia (the “Royal Commission”).
18. ~~17.~~ The Royal Commission process represented the Kitasoo Xai’Xais’ last opportunity to secure an adequate reserve base. As the final investigation into the reserve creation process in British Columbia, the Royal Commission was established to "settle all differences between the Government of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia".
19. ~~18.~~ The Royal Commission was tasked with determining the land needs of the various Indian bands in British Columbia and making recommendations for the creation, expansion or reduction of reserves to meet those needs.
20. ~~19.~~ To fulfill this task, the Royal Commission travelled throughout the Province of British Columbia and met with the various Indian bands to discuss their existing reserves and their requests for additional lands. The Royal Commission sought information from both Indian bands whose reserve interests and needs they were inquiring into, and from Canada’s representatives responsible for the management of Indians and lands reserves for Indians: the Inspector of Indian Agencies and the Indian Agents.
21. The Royal Commission on Indian Affairs released its report in June 1916 (the “1916 RCIA Report”) recommending various adjustments to the quantity and size of lands reserved for Indian Bands.

22. In 1920, in an effort to try and resolve disagreements concerning the quantity and size of lands reserved for Indian Bands, Canada and British Columbia agreed to a procedure whereby each government would appoint a representative to review the 1916 RCIA Report and propose amendments as necessary. Canada appointed W.E. Ditchburn and British Columbia appointed J.W. Clark (the “Ditchburn Clark Review”).

23. The 1916 RCIA Report was eventually amended in accordance with the recommendations of the Ditchburn Clark Review (the “Final Report”).

24. The Final Report was approved by British Columbia by Order-in-Council on July 26, 1923 and by Canada by Order-in-Council on July 19, 1924.

Role of Canada’s Indian Agents in Royal Commission Process

25. ~~20.~~ Canada’s Indian Agents were charged with various duties. First and foremost, they were given the duty to protect the interests of the Indians under their charge. The Indian Agents were also required to protect the Indians in the possession of their lands, fishing and other rights, to prevent trespass upon or interference with the same, and to make periodic visits to the Indians.

26. ~~21.~~ The process followed by the Royal Commission was one that relied heavily on information provided by Canada and Canada’s Indian Agents.

27. ~~22.~~ When the Royal Commission could not visit remote reserves, it relied, *inter alia*, on information provided by Indian Agents.

28. ~~23.~~ After the Royal Commission visited reserves and met with Indian bands, it examined the Inspector of Indian Agencies and the Indian Agent (“Canada’s Agents”) under oath.

~~29. 24.~~ The Inspectors of Indian Agencies and the Indian Agents accompanied the Commissioners through their respective Agencies.

~~30. 25.~~ During the winter months, the Royal Commission met with Canada's Agents to obtain additional detailed information about reserves and additional land applications.

~~31. 26.~~ The Royal Commission generally followed the Indian Agent's recommendations when deciding whether or not to grant additional land applications. For the 44 additional land applications in the Bella Coola agency spoken to by Indian Agent Fougner, the Royal Commission only deviated from his recommendations once.

Royal Commission Meeting with Kitasoo Xai'Xais

~~32. 27.~~ On September 12, 1912 Kitasoo Xai'Xais had submitted a letter to Commissioner McKenna with a list of lands that Kitasoo Xai'Xais sought for reserves. These lands were used and occupied by the Kitasoo Xai'Xais for generations.

~~33. 28.~~ On July 16, 1913 the Royal Commission's Secretary wrote to Indian Agent Fougner, advising of the Royal Commission's impending visit to the Bella Coola agency.

~~34. 29.~~ The Royal Commission met with Kitasoo Xai'Xais on August 26, 1913. At the time of its meeting with Kitasoo Xai'Xais, the Royal Commission had the September 12, 1912 list of Kitasoo Xai'Xais additional land applications.

~~35. 30.~~ Canada's Agents failed to prepare themselves or Kitasoo Xai'Xais for their meetings with the Royal Commission.

36. ~~34.~~ The Kitasoo Xai'Xais were unable to locate their additional land applications on the Royal Commission's maps. As a result, the Royal Commission arranged for Mr. Tyson, the Inspector of Indian Agencies, and Indian Agent Fougner to "make proper enquiries from the Indians, with a view to locating these several places".

Information Provided by Canada's Agents

37. ~~32.~~ Canada's Indian Agent Fougner travelled throughout the Bella Coola Agency of the Royal Commission.

38. ~~33.~~ The Royal Commission interviewed Indian Agent Fougner on September 4, 1913. During this interview, Mr. Fougner stated that the Kitasoo Xai'Xais were "worse off" with respect to the allocation of fishing stations than other First Nations.

39. ~~34.~~ On September 27, 1913, Mr. Young, counsel for the Dominion, reported that plans had been handed to Mr. Tyson and Mr. Fougner for the purpose of locating the Kitasoo Xai'Xais additional land applications.

40. ~~35.~~ On September 27, 1913, the Royal Commission sent a letter to Inspector of Indian Agencies Tyson, reminding him of his and Indian Agent Fougner's task - to make proper enquiries from the Indians with a view to locating the additional land applications - and asking them to make the necessary inquiries forthwith. On September 29, 1913, Mr. Tyson informed the Royal Commission that he had not been able to gather the required information.

41. ~~36.~~ On September 30, 1913, the Royal Commission wrote to Mr. Tyson again, requesting him to attend to the matter of locating the Kitasoo Xai'Xais additional land applications on the plans.

- ~~42. 37.~~ On November 7, 1913, the Royal Commission sent Mr. Tyson a telegram requesting information on the Kitasoo additional land applications.
- ~~43. 38.~~ On November 12 and 13, 1913, Mr. Tyson was interviewed by the Royal Commission in Victoria. He advised the Royal Commission that he visited eight of the ten sites Kitasoo Xai'Xais were seeking as additions to reserve. In addition to the original additional land applications, he provided the Royal Commission with a number of other sites Kitasoo Xai'Xais had requested.
- ~~44. 39.~~ After their November 12 and 13, 1913 meetings with Mr. Tyson, the Royal Commission informed the BC Department of Lands of 11 parcels of land which should be reserved for Kitasoo Xai'Xais.
- ~~45. 40.~~ The Royal Commission interviewed Indian Agent Fougner again on September 10, 1915. At that time, Indian Agent Fougner was unable to provide information about the Kitasoo Xai'Xais additional land applications, stating that he had no personal knowledge about the applications. He offered, however, to try to make "a personal examination of all the land covered by all applications on the Coast" and report back to the Royal Commission.
- ~~46. 41.~~ On November 18, the Royal Commission wrote to Indian Agent Fougner, inquiring whether he had completed the investigations he undertook.
- ~~47. 42.~~ On November 24, 1915, Indian Agent Fougner advised the Royal Commission that he had now "looked into the wants of the Indians at China Hat [Kitasoo Xai'Xais] and Hartley Bay as to new reserves in accordance with the wishes of the Commission".
- ~~48. 43.~~ On December 9, 1915, the Royal Commission interviewed Indian Agent Fougner for the third time, expecting him to have visited and informed himself about the Kitasoo Xai'Xais additional land applications.

~~49.~~ ~~44.~~ At this interview, Indian Agent Fougner provided the Royal Commission with a list of further additional land applications based on his interactions with Kitsoo Xai'Xais.

~~50.~~ ~~45.~~ In total, Kitsoo Xai'Xais had 32 additional land applications. These consisted of fishing stations, hunting bases, gardens and old village sites, and many included from one to three houses.

~~51.~~ ~~46.~~ The Royal Commission asked Indian Agent Fougner about each of the now 32 additional land applications of Kitsoo Xai'Xais. Indian Agent Fougner recommended against additional land application numbers 14, 15, 16, 17, 18, 20, 26, and 28 because he had not visited them and consequently did not recommend them. In addition, Indian Agent Fougner recommended against additional land application numbers 21, 22, 24, 25, 29 and 30, with no explanation or further information to support this recommendation.

Royal Commission Determination

~~52.~~ ~~47.~~ In the 1916 RCIA Report, the Royal Commission allotted a total of 12 new reserves to Kitsoo Xai'Xais. They did not allot reserves over any of the sites Indian Agent Fougner recommended against.

~~53.~~ ~~48.~~ Where land was available, the Royal Commission deviated from Indian Agent Fougner's recommendation on the Kitsoo Xai'Xais additional land applications in only one instance: despite Indian Agent Fougner's recommendation that additional land application No. 19, for *Laich* Mussel Inlet, should be granted, the Royal Commission determination was that the reserve was not required.

54. 49. In two instances where Indian Agent Fougner recommended the allotment of a reserve, the Royal Commission declined to grant the additional land application because the land was unavailable.
55. 50. In every instance where Indian Agent Fougner recommended against the allotment of a reserve, the Royal Commission declined to grant the additional land application.
56. After the Royal Commission released the 1916 RCIA Report, the Kitsoo Xai'Xais continued to request that those lands used and occupied be granted as reserve lands.
57. In August 1922, the Kitsoo Xai'Xais met with a representative of the Allied Tribes requesting that certain previously applied for sites be granted as additional reserve lands.
58. The Allied Tribes submitted the Kitsoo Xai'Xais request for additional reserve lands to the Ditchburn Clark Review.
59. Ditchburn recommended that 10 acres at each of 5 additional sites be approved. Clark objected to the inclusion of any additional sites for the Kitsoo Xai'Xais.
60. Ultimately, Canada agreed with Clark's recommendations and the Ditchburn Clark Review did not support the inclusion of any additional sites for the Kitsoo Xai'Xais.
61. In the Final Report, there were no amendments to the 1916 RCIA Report in relation to the Kitsoo Xai'Xais additional lands

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

62. ~~51.~~ Canada breached its fiduciary obligation to Kitasoo Xai'Xais in the context of the Royal Commission process, resulting in the non-provision of reserve lands.
63. ~~52.~~ Kitasoo Xai'Xais had a cognizable interest in the land it identified to the Royal Commission and to Canada's Agents in its additional land applications.
64. ~~53.~~ As a fiduciary, Canada had an obligation to ensure that Kitasoo Xai'Xais' cognizable interests in land were protected throughout the reserve creation process.
65. ~~54.~~ The Royal Commission specifically instructed Inspector of Indian Agencies Tyson and Indian Agent Fougner to provide additional information about the additional lands sought by Kitasoo Xai'Xais, and Mr. Tyson and Agent Fougner undertook to provide this information. Not once did Canada's Agents suggest to the Royal Commission that providing this additional information was beyond their mandate or not in keeping with their relationship to Kitasoo Xai'Xais or other obligations they may have felt they had.
66. ~~55.~~ By virtue of his mandate, Indian Agent Fougner was specifically instructed to, first and foremost, protect the interests of the Indians under his charge.
67. ~~56.~~ Canada's Agents had agreed to investigate the Kitasoo Xai'Xais additional land applications further and provide information to the Royal Commission. As a result of this undertaking, they owed a fiduciary obligation to Kitasoo Xai'Xais to represent the interests of Kitasoo Xai'Xais in the Royal Commission process.

~~68. 57.~~ Kitasoo Xai'Xais was dependent upon Indian Agent Fougner to provide accurate and adequate information to the Royal Commission. Kitasoo Xai'Xais had only one opportunity to meet with the Royal Commission. At that time, Kitasoo Xai'Xais was unable to locate their additional land application on the Royal Commission maps.

~~69. 58.~~ The Royal Commission directed Canada's Agents to work with Kitasoo Xai'Xais to locate those lands and provide this information to the Royal Commission.

~~70. 59.~~ As a result of how the Royal Commission carried on its business, and the role that Canada's Agents played in the Royal Commission process, Kitasoo Xai'Xais was peculiarly vulnerable to how Canada's Agents exercised their discretion in performing the tasks assigned to them by the Royal Commission and in making representations with respect to Kitasoo Xai'Xais' additional land applications.

~~71. 60.~~ Canada's Agents had an opportunity and ability to affect the outcome of the Royal Commission process.

~~72. 61.~~ The representations that Canada's Agents made to the Royal Commission between 1913 and 1915 had a direct impact on the final outcome of the Royal Commission process and on the reserve base of the Kitasoo Xai'Xais.

~~73. 62.~~ Canada's Agents failed to complete their allotted task in a manner befitting a fiduciary. Indian Agent Fougner advised the Royal Commission that he had obtained the necessary information. When he met with the Royal Commission however, he disclosed that either he had not visited the various lands sought by Kitasoo Xai'Xais and therefore did not recommend, or simply did not recommend without any further explanation. ~~He then recommended against the granting of reserves over these lands because he had not bothered to visit them.~~

74. ~~63.~~ Indian Agent Fougner's actions were in direct contravention of the instructions to Indian Agents, generally, and the instructions issued to him by the Royal Commission; instructions he accepted without protest.

75. ~~64.~~ Canada's Agents, in particular Indian Agent Fougner, failed to act diligently with a view to the best interests of the Kitasoo Xai'Xais during the Royal Commission process:

- a. He failed to prepare Kitasoo Xai'Xais adequately in advance of the Royal Commission's only meeting with the Kitasoo Xai'Xais;
- b. He failed to follow the Royal Commission's direction to visit the sites sought by the Kitasoo Xai'Xais;
- c. He undertook to make a personal examination of the Kitasoo Xai'Xais additional land applications and reported back to the Royal Commission in the absence of Kitasoo Xai'Xais, thereby becoming the exclusive intermediary between Kitasoo Xai'Xais and the Royal Commission with respect to Kitasoo Xai'Xais' additional land applications;
- d. He failed to make the promised personal examination of a number of Kitasoo Xai'Xais additional land applications;
- e. By failing to make the promised personal examination, he also failed to act with ordinary prudence with a view to the best interests of Kitasoo Xai'Xais; and
- f. He put his own interests before those of Kitasoo Xai'Xais by telling the Royal Commission he was ready to report back when he, in fact, had not visited all the Kitasoo Xai'Xais additional land applications.

76. ~~65.~~ Indian Agent Fougner thereby failed to discharge Canada's fiduciary obligations to Kitasoo Xai'Xais.

77. Further, Canada's Agents failed to discharge Canada's duty to act with ordinary prudence with a view to the best interests of Kitasoo Xai'Xais when they failed

to refer the disagreement between Ditchburn and Clark to the Secretary of State for the Colonies as provided for in Article 13 of the *Terms of Union*.

78. ~~66.~~ As a result of Canada's breaches, the Royal Commission did not allot reserves pursuant to Kitasoo Xai'Xais additional land application numbers 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26, 28, 29 and 30.

79. ~~67.~~ Kitasoo Xai'Xais has suffered a loss in the form of being deprived of necessary reserves and seeks compensation for this loss.

Original Declaration of Claim dated the 21st day of January, 2016

Amended Declaration of Claim dated this 31st day of October, 2016

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Further Amended Declaration of Claim dated this 21st day of February, 2018



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