SCT-1001-16

SPECIFIC CLAIMS TRIBUNAL

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David Burnside

Ottawa, ON | 5

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

EEL RIVER BAR FIRST NATION

Claimant

-and-

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

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*.

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1. This is the Crown's Response to the Declaration of Claim ("Claim") filed by the Eel River First Nation ("Claimant") with the Specific Claims Tribunal ("Tribunal") on December 7, 2016 pursuant to the *Specific Claims Tribunal Act* (the "Act").

2. The Claim relates to the removal of sand, gravel and other non-metallic substances and the consequent damage to the Eel River First Nation reserve land ("Reserve"). The Claimant alleges that sand and gravel was removed without its consent and without sufficient compensation, and that when compensation was collected, it was not properly administered. The Claimant further claims damages for trespass and for the damages caused to the Reserve by the removal of the sand and gravel.

3. In August 1929, there was a valid surrender of sand and gravel from the Reserve by the Claimant. An implied term of the surrender was that the sand and gravel be sold for 25 cents a cubic yard ("c.y."). The Crown admits that in selling the sand and gravel for less, it breached its post-surrender fiduciary duty owed to the Claimant. Accordingly, the Crown accepts the validity of that portion of the Claim and, prior to it being filed, made an offer of settlement to the Claimant, which was refused.

4. It is the Crown's position that the remainder of the Claim regarding the illegal removal of sand and gravel without consent and sufficient compensation, or with compensation that was not properly administered, is unsubstantiated, as is the claim for trespass and for the alleged damages to the Reserve due to the removal of sand and gravel.

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

5. On May 26, 1998, the Claimant submitted its claim to the Minister of Indian Affairs and Northern Development ("Minister").

6. On May 17, 2011, the Claimant was advised in writing that the Minister accepted a portion of the claim for negotiation regarding the price it obtained for the sale of sand and gravel from the Reserve post surrender. The remainder of the claim was not accepted for negotiation.

7. On November 23, 2011, the Crown made an offer of settlement to the Claimant for that portion of the claim that was accepted for negotiation. The Claimant never responded.

8. On December 7, 2016, the Claimant filed its Declaration of Claim.

9. The Crown accepts that the criteria contained in section 16(1)(a) of the Act are met and that the Claim is properly before the Tribunal.

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

10. The Crown accepts the validity of the Claim with respect to the allegation that it had a post-surrender fiduciary duty to obtain the price requested by the Claimant

for the removal of sand and gravel. While not a written term of the surrender, the Crown was aware that this was a condition of the surrender. Compensation for this breach would be determined in accordance with paragraph 20(1)(e) of the Act.

11. The Crown does not accept the validity of the remainder of the Claim or that the Claimant has suffered any damages.

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

12. Denials: The Crown denies the facts alleged in the Claim, other than those expressly admitted herein.

13. Admissions: The Crown admits the facts as set out in paragraphs 1, 2, 5, 6, 7, 8, 13, 14, 16, 17, 31, 37 and 66 of the Claim.

14. Admissions/Denials Qualified:

a) With respect to paragraph 3, the Crown admits that it breached its post-surrender fiduciary duty in failing to collect 25 cents/c.y. for the sale of the sand and gravel after the 1929 surrender. However, the Crown denies the remainder of the allegation that it failed to properly supervise, record and administer the sale of the sand and gravel. The Crown also denies the allegation that its management of the removal of sand and gravel caused damage to the Reserve.

b) With respect to paragraphs 10, 11 and 12, the Crown admits that November 23, 2011 may be taken as the date giving rise to this application with respect to the portion of the Claim accepted for negotiation. However, the Crown denies that there were no efforts made to negotiate the portion of the Claim that was accepted for negotiation. The letter dated November 23, 2011 demonstrates the Crown's attempt to settle that portion of the Claim that was accepted for negotiation. The Claimant never responded to the offer.

c) With respect to paragraph 18, the Crown admits that from 1870 onwards, there were several additions made to the Reserve and one surrender. The Crown says that there were four additions to the Reserve after 1870 and up to May 1930 that added 221 acres to the Reserve's original 220 acres. There was one surrender of 3.5 acres in 1929. By May 19, 1930, when the 1.7 acre piece of land was purchased from the Wallaces, the Claimant had a total of 437.5 acres of land for its use.

d) With respect to paragraphs 23 and 24, the Crown agrees that a surrender was required for the removal of sand and gravel from the Reserve. The Crown agrees that on August 6, 1929, members of the Eel River First Nation surrendered the sand and gravel on the Reserve but denies that the surrender was invalid. The Crown agrees that, pursuant to the surrender, it had an obligation to seek payment of the sand and gravel at a rate of 25 cents/c.y.

e) In reply to paragraph 26, the Crown agrees that on March 31, 1910, Chief Louis Jerome wrote to J.D. McLean, the Secretary of the Department of Indian Affairs ("DIA") to report that sand was being removed from the Reserve by Hilliards Lumber Company. The Crown says that Chief Jerome acknowledged that the prior Chief gave permission for the removal. The Crown says that the letter from Chief Jerome was the first notice it had of sand being removed by Hilliards Lumber Company in 1910. On April 9, 1910, J.D. McLean wrote to Chief Jerome suggesting that the matter be brought to the Indian Agent's attention. The Crown received no further communication from Chief Jerome regarding the removal of sand and gravel by Hilliards Lumber Company in 1910.

f) In response to paragraph 27, the Crown admits that in a letter dated May 9, 1910, the Indian Agent advised the Secretary of the DIA about the removal of sand and gravel by Credit Foncier Canadian ("CFC"). However, the Crown denies that the Indian Agent advised that the sand and gravel was taken from the Reserve, but says instead that he advised that the sand and gravel was taken from the tideway opposite the Reserve.

g) In further response to paragraph 27, the Crown admits that on June 14, 1928, James Pictou, a member of the Eel River First Nation sought information regarding the price of sand being considered for removal from the Reserve by the International Paper Mill Company. The Crown says that A.F. MacKenzie, Acting Assistant Deputy and Secretary of Indian Affairs ("Secretary MacKenzie") responded that the price depends on local circumstances and that no removal could occur without the Claimant's consent and after a fair price was established by the DIA. There is no indication that sand and gravel was removed by the International Paper Mill Company at that time.

h) In reply to paragraph 28, the Crown admits that the Claimant did contact the Crown regarding the removal of sand from the Reserve in June of 1929. The Crown denies that it failed to respond to the complaint and says that it did investigate. It is unclear whether the sand was removed from in front of the Reserve or on the Frontage Lot owned at the time by the Wallaces. In any event, the Crown says that the Claimant was compensated for the removal of the sand at issue.

i) In response to paragraph 29, the Crown has no knowledge of sand and gravel being removed from the Reserve without compensation prior to the surrender. The Crown also has no knowledge of any agreements that may have been reached by the Claimant directly with third parties regarding the sale of sand and gravel from the Reserve prior to the surrender.

j) With respect to paragraph 30, the Crown admits that on May 14, 1929, the secretary of the DIA, J.D. McLean, sanctioned the sale of sand for 10 cents/c.y. on the condition that the Claimant's members be employed. The

Crown says that this was in reply to a request forwarded by the Indian Agent on behalf of the Claimant who had asked if they could sell the sand from the shore of the Reserve to the companies building a mill in Dalhousie. However, there is no evidence that the sale ever took place.

k) With respect to paragraph 31, the Crown admits the existence of a telegram dated June 25, 1929 from James Pictou wherein he complains of sand and gravel being removed by Arthur Levesque. The Crown says that it investigated the complaint but determined that the removal of sand and gravel was legal as it was coming from Mr. Wallace's land, not the Reserve. The Crown denies having prior knowledge or authorizing the removal of sand and gravel from the Reserve.

l) With respect to paragraphs 33 and 34, the Crown denies that CFC removed sand and gravel from the Reserve in 1910 but says it was removed from the tide-way opposite the Reserve. The Crown also denies that it approved this removal of sand and gravel by CFC but says that when it became aware of its removal, it sought compensation from CFC on the Claimant's behalf. The Crown admits that it determined five cents a barrel, which is approximately the same as 5 cents/c.y., was reasonable under the circumstances.

m) In response to paragraphs 36, 38, 39 and 45, the Crown agrees that on August 6, 1929, the Claimant surrendered sand and gravel and that an unwritten term of the surrender was that the sand and gravel be sold for 25 cents/yard, or c.y. The Crown denies that the surrender was invalid and that it breached a condition of surrender that only the sand and gravel on the beach be surrendered. However, the Crown admits it breached a post-surrender fiduciary duty owed to the Claimant to ensure that the sand and gravel was sold for 25 cents/c.y.

n) With respect to paragraph 46, the Crown agrees that the Wallaces owned a lot adjacent to the reserve at the time of the surrender that was only accessible by crossing reserve land. The Crown denies that it breached its legal obligations to the Claimant in relation to the removal of sand and gravel from this lot.

o) In reply to paragraph 48, the Crown agrees that it purchased land from Mr. Wallace. In 1928, the Crown purchased the northern portion of a piece of land owned by Mr. Wallace for the Claimant's benefit. The Wallaces reserved a 1.7 acre portion of beachfront from this lot for their own use (the "Frontage Lot"). On May 19, 1930, the Crown purchased the Frontage Lot for the Claimant's benefit. Mr. Wallace was selling sand from the Frontage Lot at the time of the surrender. The Crown denies that it had a legal obligation to the Claimant respecting the removal of sand from this lot before it was purchased in 1930.

p) With respect to paragraphs 50-54, the Crown agrees that when Mr. Wallace sold the first portion of his lot to the Crown in 1928, he retained rights of ingress and egress over the Reserve to access the Frontage Lot which he retained until 1930. The Crown optioned the land in July 1929 and the purchase closed in May 1930. The option required the Crown to honour the existing contract for sand removal entered into between Mr. Wallace and the Levesque Bros. The Crown denies that the rights of ingress and egress were not properly retained by Mr. Wallace. The Crown also denies it breached any legal duties owed to the Claimant respecting the negotiation and purchase of the Frontage Lot.

q) With respect to paragraphs 58 and 59, the Crown admits that on May 8, 1952, the Claimant asked the Crown to stop the sale of sand and gravel from the Reserve. The Crown says that it did not authorize or have knowledge of any further sale of sand and gravel after this date.

r) With respect to paragraphs 66-70, the Crown admits that following the surrender, it did not personally supervise the removal of sand and gravel from the Reserve. However the Crown denies that there was under-reporting of the amount removed, a corresponding loss of revenue to the Claimant and increased environmental damage to the Reserve. The Crown also denies that it breached a lawful obligation owed to the Claimant in relying on the companies or individuals who were removing the sand and gravel to accurately report how much was being removed.

s) In reply to paragraph 72, the Crown denies that the sand and gravel removed by the CFC in 1910 was from the Reserve but says that it was removed from the tideway opposite the reserve. The Crown says that it only became aware of the removal of sand and gravel after the fact, and as it was from lands that were of interest to the Reserve, sought payment in the amount of 5 cents/barrel. The Crown denies collecting payment for this removal of sand and gravel and says that, at the Claimant's request, the money was paid directly to them by the CFC.

t) In reply to paragraph 76, the Crown agrees that the majority of the sand and gravel that was removed from the Reserve was taken from the portion of the Reserve adjacent to the Bay of Chaleur and the Eel River. The Crown denies that this is the main residential area of the Reserve.

u) In reply to paragraph 81, the Crown admits that several letters were received from members of the Eel River First Nation complaining about the removal of sand and gravel from the reserve. The Crown says that efforts were undertaken to investigate the complaints and that no damage was found to have occurred.

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

15. The Reserve was created in 1807 by an Order-in-Council ("OIC") of the province of New Brunswick. The specific acreage of the Reserve was not described in the OIC. All subsequent surveys mapped the original Reserve at 220 acres entirely on the north side of the Eel River.

16. At the time the Reserve was created, the lot immediately to its north (Lot 6) was not made part of the Reserve and was later granted to Robert Ferguson. Through inheritances, it was divided and became the property of the Wallaces and the Wrights.

17. In 1908, the Crown purchased a 79.9 acre portion of Lot 6 from the Wallaces. In May 1928, the Crown also purchased a 124.4 acre portion of Lot 6 from the Wallaces, who reserved the Frontage Lot for themselves, which ran along the length of the beachfront of the original Lot 6. In reserving this land, they also reserved the right of ingress and egress along the public road.

18. In August 1928, the Crown purchased a 15 acre portion of what was Lot 6 from the Wrights. In February 1929, a 3.5 acre piece of the Reserve was surrendered by the Claimant for the New Brunswick International Paper Company pipeline right-of-way.

19. Finally, in May 1930, the Crown purchased the Frontage Lot from the Wallaces. While none of these additions was formally added to the Reserve until 1972, the land had the requisite indicia of reserve land at the time of purchase. This brought the total acreage of land set aside for the Claimant's benefit at the time of the surrender in August 1930 to 437.5 acres.

20. On March 31, 1910, Chief Louis Jerome of the Eel River First Nation reported to the DIA that sand was being removed from the Reserve by the Hilliards Lumber Company and asked how it should be stopped. Chief Jerome advised that permission to remove the sand had been granted by the previous chief.

21. The Crown did not have knowledge that sand was being removed by Hilliards Lumber Company and did not authorize it. The Secretary of the DIA wrote to Chief Jerome suggesting the matter be brought to the attention of the Indian Agent. There is no indication that Chief Jerome notified the Indian Agent or that Hilliards Lumber Company removed any sand after this time.

22. In May 1910, the Crown became aware that the CFC was removing sand and gravel from the tideway opposite the reserve. Upon learning of the removal, the Indian Agent at the time wrote to the Secretary of the DIA asking if he should charge anything for the removal of the sand. He believed the CFC would be willing to pay 5 cents/barrel. Secretary J.D. McLean determined that, as the Claimant was interested in the land in question, payment should be made at 5 cents/barrel.

23. CFC did make payment of 5 cents/barrel for the sand that was removed. However, at the request of the Claimant, payment was made directly to the Claimant to be distributed among its members. Secretary McLean did not approve of the irregular distribution and advised that any further proceeds of sand and gravel be sent to the DIA.

24. In June 1929, the Crown received a complaint from the Claimant regarding the removal of sand and gravel by the Levesque brothers. The Crown did not have prior knowledge of the removal and did not authorize it. The Crown investigated the complaint, but it appeared the sand was not taken from the Reserve but from the Frontage Lot, which was at the time owned by the Wallaces. In any event, the Claimant was paid for the small amount of sand removed, being 467 c.y.

25. On August 6, 1929, the Claimant signed a valid surrender of sand and gravel from the Reserve. The surrender document was signed by the Chief and two other male members of the Eel River First Nation in front of the Indian Agent. The Indian Agent and the Chief swore before a Notary Public that a majority of the male members of the band had voted in favour of the surrender at a duly called meeting and that the other requirements of the *Indian Act* were met.

26. Following the surrender, the Crown authorized the sale of sand and gravel on behalf of the Claimant on several occasions. The Crown admits that it had a legal obligation to collect 25 cents/c.y. for the sale of sand and gravel from the Reserve but did not. While the Crown accepted a lower amount for the sand and gravel, these amounts were properly collected and administered for the Claimant's benefit.

27. In 1952, the Claimant asked the Crown to stop the removal of sand and gravel from the Reserve. The Crown complied with the request, which effectively brought an end to the surrender signed in 1930. The Crown did not authorize the removal of any sand and gravel from the Reserve after this time.

V. Relief (R. 42(f))

28. The Crown seeks dismissal of the entirety of the claim with the exception of that portion that was accepted for negotiation, being the allegation that the Crown breached its post-surrender fiduciary obligation to sell the sand and gravel from the reserve at a rate of 25 cents/c.y.

29. The Crown seeks the costs of responding in this proceeding.

30. The Crown pleads and relies on the Act, and the *Rules of Practice and Procedure* made pursuant thereto.

VI. Communication (R. 42(g))

31. Email address for the service of documents: Patricia.MacPhee@justice.gc.ca

DATED at Halifax, Province of Nova Scotia, this 27th day of February 2017.

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