

SPECIFIC CLAIMS TRIBUNAL

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| SPECIFIC CLAIMS TRIBUNAL | |
| TRIBUNAL DES REVENDICATIONS PARTICULIÈRES | |
| F I L E D | December 4, 2017 |
| David Burnside | |
| Ottawa, ON | 1 |

B E T W E E N:

BIRCH NARROWS FIRST NATION

Claimant

v.

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

Respondent

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*.

December 4, 2017

David Burnside

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, Birch Narrows First Nation (“BNFN” or “the Claimant”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province of Alberta.
2. Specifically, the predecessor of BNFN, the Clear Lake Band (“Clear Lake”), adhered to Treaty 10 in 1906 and BNFN is a successor to Clear Lake as a result of the division of Clear Lake into the BNFN and the Buffalo River Dené Nation in 1972.

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

3. The following condition precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, has 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.

4. On or about December 9, 2009 BNFN filed this claim under Canada’s Specific Claim Policy, asserting that Canada has failed to provide BNFN with the agricultural and economic benefits BNFN is entitled to under the terms of Treaty 10 (“Agricultural and Economic Benefits Claim”).
5. On or about April 7, 2009 Canada informed BNFN that its Agricultural and Economic Benefits Claim met the Specific Claims Policy’s minimum standards, and had been assigned an effective date of filing with the Minister of April 7, 2010.

6. On or about August 28, 2012 Canada informed BNFN in writing of the Minister's decision not negotiate any part of the Agricultural and Economic Benefits Claim.
7. The Minister refused to negotiate the Agricultural and Economic Benefits Claim based on the consideration that under Treaty 10 Canada had wide discretion as to the provision of agricultural assistance and Canada had provided BNFN with some agricultural benefits,

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

8. BNFN does not seek compensation in excess of one hundred and fifty million (\$150,000,000) dollars.

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

9. The following is the ground for BNFN's claims, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

14(1) (a): a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown.

10. Specifically, Canada has failed to fulfill its legal obligations to provide BNFN with the agricultural and economic benefits to which BNFN is entitled under Treaty 10.

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

Preparation for Treaty 10

11. While there had been periodic requests for a treaty to cover northern Saskatchewan since the late 1870s, Canada's decision to negotiate such a treaty did not occur until 1905, the year in which Saskatchewan was created as a Province with a northern boundary of 60° North Latitude.
12. One suggestion made by federal officials involved in the negotiation and administration of Treaty 8 was to extend the eastern boundary of Treaty 8, negotiated in 1899, to take in the untreated territory. This recommendation was based on the observation that the Aboriginal residents of the proposed new treaty area were closely related to residents of Treaty 8 and followed the same means of obtaining a livelihood.
13. However, the Indian Commissioner for Manitoba and the North-West Territories recommended that a new treaty be negotiated to reflect the consideration that while the residents of Treaty 8 were "mixed farming and hunting Indians", the residents of the proposed new treaty area were "entirely hunting and fishing Indians."
14. Notwithstanding the opinion of the Indian Commissioner, evidence throughout the last half of the nineteenth century established that the lands inhabited by the ancestors of BNFN members were suitable for and had been used for the growth of barley, oats, hay, and garden vegetables,
15. In July 1906, the Superintendent General of Indian Affairs recommended to the Governor-General-in-Council that a new treaty (Treaty 10) be made to cover the lands east of Treaty 8, west of Treaty 5, and north of Treaty 6 and parts of Treaty 5.

16. Among the terms included in the Order-in-Council approving the proposed treaty negotiations was one providing “that such assistance as was found necessary would be provided to advance the Indians in farming and stock-raising and other work.”
17. In order to draft the terms of Treaty 10, the Secretary of the Department of Indian Affairs provided the Deputy Minister of Justice with a copy of Treaty 8 to use as a template..
18. The Deputy Minister of Justice replicated the text of Treaty 8 in his draft of Treaty 10, but he removed the paragraph setting out in detail the description and quantity of the agricultural implements, materials, machines, and livestock that would be provided to on a one-time basis to each band that elects to cultivate the soil or raise livestock.
19. The Deputy Minister of Justice replaced the wording he removed with a provision based on the wording of the Treaty 10 Order-in-Council, which read “Further His Majesty agrees to furnish such assistance as may be found necessary or advisable to aid and assist the Indians in agriculture or stock-raising or other work.”
20. The Deputy Minister of Justice advised that the wording he had added was intended to be a substitute for the wording he had removed.

Negotiation and Execution of Treaty 10, 1906-1908

21. J. A. J. McKenna was appointed by Canada to negotiate Treaty 10, and the pre-printed form of the Treaty used by McKenna in negotiations with First Nations included the wording proposed by the Deputy Minister of Justice.

22. The forerunner of BNFN, Clear Lake, adhered to and executed Treaty 10 at Île-à-la-Crosse on August 28, 1906, although some of the members of the Clear Lake Band received their treaty annuities at Buffalo Narrows on September 16, 1906.
23. During the negotiations that preceded the execution of Treaty 10, the Treaty Commissioner received a request for cattle and both cattle and farming equipment were discussed at Île-à-la-Crosse.
24. When a second Treaty Commissioner met the Clear Lake Band at Île-à-la-Crosse in 1907, he received a request for agricultural implements and seed. At least some of these were received by Clear Lake before the 1908 annuity payment, at which further specific requests were received,

Subsequent Events

25. In 1909, an Inspector of Indian Agencies attending the annuity payments observed that the surrounding country was well sheltered, the soil generally fertile, and the rainfall abundant and he predicted that members of Clear Lake could make an excellent livelihood by agricultural pursuits.
26. For the four decades after 1909, the reports of Indian Agents and other Crown representatives described the progress made and the challenges faced by Clear Lake with regard to agricultural pursuits and stock raising.
27. Between 1909 and 1930, records maintained by the Government of Canada reveal that agricultural assistance provided to Clear Lake, four other Treaty 10 Bands, and three Treaty 6 Bands was limited and inconsistent. Agricultural assistance to the eight Bands in the Île-à-la-Crosse Agency was as little as \$2.74 in one year and never exceeded \$1,000 in any year.

28. Records specifically related to Clear Lake reveal repeated occasions on which assistance was requested by the Band (in some cases endorsed by the Indian Commissioner), but there is no record of this assistance being provided.
29. Despite the agricultural and stock-raising potential of the area surrounding Clear Lake and the documented efforts of Clear Lake members to take up these pursuits, and the Annual Returns for the Department of Indian Affairs show no progress in the development of agricultural and ranching pursuits anywhere in the Île-à-la-Crosse Agency as late as 1930 and very limited progress after 1930.

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

30. The conclusion reached during the preparations for the negotiation of Treaty 10 that the land to be included in the proposed treaty was less conducive to agriculture than the Treaty 8 area was incorrect, particularly as it related to the area within which the Clear Lake Band lived and supported themselves.
31. The form in which the drafted version of Treaty 10 was completed was faithful to the Order-in-Council authorizing the negotiation of a treaty. The relevant provision of Treaty 10 was, in the eyes of the Department of Justice, intended to represent the same undertaking described in the excised provisions of Treaty 8.
32. The agricultural/economic assistance provision of Treaty 10 was less prescriptive than the corresponding provision in Treaty 8, but the obligation of the Crown under Treaty 10 arguably exceeds that in Treaty 8.
 - There is no suggestion in Treaty 10 that the Crown's obligations were of a "once and for all" nature.
 - There is no arbitrary checklist that can be used to argue that the Crown's treaty obligations have been fulfilled.

- The determination of when the treaty obligation is crystallized is not a matter of Crown discretion. The agricultural/economic assistance provision of Treaty 10 should be interpreted as meaning
 - there is an objective element in the determination of when the obligation arises; and
 - there is an objective element in the determination of when (and if) the obligation is fulfilled.
33. The request by the Claimant for assistance in accordance with the treaty is documented.
34. The evidence that virtually no assistance was provided to the Claimant in the decades after Treaty 10 was signed and the absence of progress in agriculture that could be expected in light of:
- the agricultural potential of the region; and
 - the documented success of members of the claimant in maintaining their own gardens

establishes both the Crown's failure to fulfill its treaty obligation and the consequences of this failure for the Claimant.

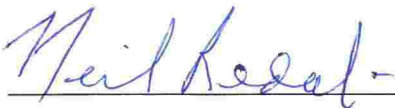
- 35 The Treaty 10 obligation is not limited to assistance with agriculture and ranching, but also includes assistance with "other work". As such, assistance under Treaty 10 extends to a wide range of non-agricultural pursuits, including without limitation commerce, manufacturing, industry, transportation, and resource extraction.

36. The agricultural/economic assistance obligation imposed on Canada by Treaty 10 is an ongoing one, and as such both the obligation and the breach of it are ongoing.
37. BNFN pleads the principles of treaty interpretation, specifically that the fulfillment of treaty rights is evolutionary rather than frozen in time, and that compensation arising from Canada's past and continuing failure to fulfill the obligation to provide BNFN with Agricultural and Economic Benefits pursuant to Treaty 10 must reflect this principle.
38. The honour of the Crown requires Canada to act fairly and honourably during treaty implementation, and it has not done so in this case.

VII. Relief Sought

39. BNFN seeks monetary compensation for Canada's failure to fulfill its legal obligations under Treaty 10 regarding Agricultural and Economic Benefits in an amount that reflects the evolutionary nature of treaty rights.
40. BNFN also seeks costs of this proceeding.

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