

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KWAKIUTL

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	August 9, 2017
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Ottawa, ON	1

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian 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*.

DATED the 09 day of August, 2017.

Natalie Lowe

(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The Claimant, Kwakiutl, 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 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 notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part.

3. On or about February 29, 2012, Kwakiutl filed a claim according to Canada's Specific Claim Policy, asserting that:

- (a) the Crown breached the Fort Rupert Treaties of 1851 ("the Fort Rupert Treaties") by failing to set aside as a reserve for Kwakiutl the Suquash village site which included a coal mine operated by Kwakiutl;

- (b) in failing to set aside the Suquash village site as a reserve for Kwakiutl, the Crown breached their fiduciary duty owed to Kwakiutl; and

- (c) as a result of these breaches, the Crown has been unjustly enriched (together the "Claim").

4. By a letter from the Senior Assistant Deputy Minister dated February 2, 2015, Kwakiutl was informed of the Minister of Aboriginal Affairs and Northern Development's decision to reject the Claim.

5. The provisions of paragraph 16(1)(a) of the *Specific Claims Tribunal Act* have been met as Canada informed Kwakiutl in writing of their refusal to accept any obligations regarding the Fort Rupert Treaties and the setting aside of the Suquash village site as a reserve for Kwakiutl.

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

6. Kwakiutl has not subsequently resolved any part of its claim regarding the Suquash village site with Canada.
7. For the purposes of this claim, Kwakiutl does not seek compensation in excess of \$150 million.

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

8. The following are the grounds for the specific claim, as provided for in s. 14(a) of the *Specific Claims Tribunal Act*:
 - (a) a failure to fulfil 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.

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

The Fort Rupert Treaties

9. Between 1850 and 1854, James Douglas, chief factor of Fort Victoria and Governor of the colony, made a series of agreements with Aboriginal peoples on Vancouver Island (the “Douglas Treaties”).
10. In 1851, the Quakeolth and the Queackar signed treaties with James Douglas. These two treaties were part of the fourteen Douglas Treaties and are commonly referred to as the Fort Rupert Treaties (the “Fort Rupert Treaties”).
11. Kwakiutl is the modern day successor to the Quakeolth and the Queackar who signed the Fort Rupert Treaties.
12. The Fort Rupert Treaties provide land entitlement as follows:

Know all men, that we the chiefs and people of the Tribe called Queackers/Quakeolths who have signed our names and made our marks to this deed on the eighth day of February, one thousand eight hundred and fifty-one, do consent to surrender, entirely and for ever, to James Douglas,

the agent of the Hudson's Bay Company in Vancouver Island, that is to say, for the Governor, Deputy Governor, and Committee of the same, the whole of the lands situated and lying between McNeill's Harbour and Hardy Bay, inclusive of these ports, and extending two miles into the interior of the Island.

The conditions of our understanding of this sale is this, that our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly (emphasis added).

13. The Fort Rupert Treaties permitted Kwakiutl to keep its "village sites and enclosed fields" immediately. The Fort Rupert Treaties also committed the Crown to survey those lands after the making of the treaties. These are distinct and separate treaty promises.

Suquash Village Site

14. Kwakiutl occupied and used the Suquash village site prior to and after the Fort Rupert Treaties, which included multiple residences, a coalmine, and a fishing station at and near the mouth of Suquash Creek on Vancouver Island that included the foreshore.
15. Trade in coal at the Suquash village site developed between the Kwakiutl and the Hudson's Bay Company in the 1830's. At all material times prior to the signing of the Fort Rupert Treaties in 1851, the Kwakiutl mined the coal entirely independently of the Hudson's Bay Company.
16. In or about 1836, Duncan Finlayson of the Hudson's Bay Company "visited the Quaquills where the coals are situated" and stated "I do not think the mine can be worked without building an Establishment at it, there being a very populous village of Quaquill Indians, consisting of from 50 to 60 houses within 2 ½ miles of it."

17. In or about 1840, James Douglas recorded in his journal that the “Quakeeolth” at “Coal Mine” [Suquash] and the “Queechaw” [Kweeha] at Beaver Harbor were “numerous.” He further noted that “Coal Mine” was the “Place of Residence” of the Fort Rupert Tribes.
18. In 1849, Sir George Simpson also recorded “the Indians occupying that part of the coast near which the coal mine is situated are numerous.”
19. There are shell midden deposits at the mouth of Suquash Creek, indicating the presence of occupation and residence at the Suquash village site. The government of the province of British Columbia has acknowledged this area as a place of archeological significance, registering the shell midden deposits as archaeological site EdSt-2.
20. The place name, “Suquash” is an Anglicization of the Kwawkwala name *sa^εgwa’s*, meaning ‘place of meat carving’ in reference to seal hunting.
21. In or about August 1851, the Hudson’s Bay Company moved their coal mining operations to Suquash.
22. At the time of the Fort Rupert Treaties, the Suquash village site included houses of residence, a Kwakiutl-operated coalmine and a fishing station that included the foreshore, where sealing and other fishing activities took place.

Policy informing the Fort Rupert Treaties

23. The language “cultivated land and enclosed fields” used in the Fort Rupert Treaties was based on the language used in agreements between the Maori and the Crown in New Zealand. The concept of “cultivated lands and enclosed fields” was foreign to the Kwakiutl who sustained themselves primarily on fishing. Gardens and fenced fields were not part to their traditional way of life. At the time of the Fort Rupert Treaties, the Crown and the Hudson’s Bay Company were aware that Kwakiutl had no enclosed fields *per se*.

24. In 1849, the Governor and Committee of the Hudson's Bay Company instructed James Douglas as to the policy he should follow regarding the natives stating:

“with respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such lands only as they occupied by cultivations, or had houses built on at the time when the Island came under the undivided sovereignty of Great Britain in 1846...”

25. On October 14, 1874, in a letter to Indian Commissioner Powell, James Douglas described his policy of establishing Indian Reserves in the colonies of British Columbia and Vancouver Island. The letter illustrates how Douglas applied the reserve policy to suit the circumstances and customs of the coastal tribes of British Columbia and Vancouver Island, notwithstanding the borrowed language of “cultivated lands and enclosed fields”:

...in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases, was to leave the extent & selection of the land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instruments to meet their wish in every particular & to include in each reserve the permanent Village sites, the fishing stations, & Burial grounds, cultivated land & all favorite resorts of the Tribes, & in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour”.

26. Under the Douglas' policy, the provision of “village sites and enclosed fields” in the Fort Rupert Treaties was to include not just residential areas, but “every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour.”
27. The Crown's obligations under the Fort Rupert Treaties crystallized when the treaty was signed in 1851. Kwakiutl had been occupying the Suquash village site since at least 1830, residing there, and operating an active coalmine and a fishing station that included the foreshore. Kwakiutl had acquired an equitable title to the

Suquash village site through continuous occupation, tillage, and investment of labour.

28. As a result, the Suquash village site constituted a Kwakiutl “village site and enclosed field” pursuant to the Fort Rupert Treaties and colonial policy. Once the Fort Rupert Treaties were signed, the Suquash village site was reserved for Kwakiutl’s use and benefit by operation of law through the exercise of royal prerogative.
29. However the reserve at the Suquash village was never “properly surveyed” by the Crown as required by the Fort Rupert Treaties.
30. The *Terms of Union of May 16, 1871* provided that Canada would be liable for the debts and liabilities of British Columbia at the time of the union. The *Terms of Union* also provided that the *Constitution Act, 1867* would apply as if British Columbia were one of the original provinces of Confederation. The *Terms of Union* further provided that “the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit” would be assumed by Canada. The government of Canada thus became bound to the terms of the Fort Rupert Treaties and became responsible as a fiduciary to Kwakiutl with regard to the Suquash village site reserved under the Fort Rupert Treaties.

Failure To Survey and To Set Aside the Suquash Village Site as a Reserve for Kwakiutl

31. Alternatively, if further steps were required by law to set aside the Suquash village site as a reserve for Kwakiutl, the Crown has never taken those steps thereby depriving Kwakiutl of a valuable asset and the use, benefit, and enjoyment of that asset.
32. When British Columbia entered Confederation in 1871, no land was shown as reserved for Kwakiutl on the 1871 *Return of Indian Reserves* prepared by B.W. Pearse, Chief Commissioner of Land and Works.

33. In or about 1879, Indian Reserve Commissioner Sproat visited Fort Rupert to allot reserves for the Kwakiutl. In or about 1886, Sproat's successor Peter O'Reilly made additional reserve allotments. Neither Sproat nor O'Reilly allotted the Suquash village site as a reserve to the Kwakiutl.
34. In 1912, Canada and British Columbia agreed to establish a joint Commission on Indian Affairs for British Columbia. Canada and British Columbia granted the McKenna-McBride Royal Commission ("Royal Commission") the power to adjust the acreage of Indian reserves in British Columbia. Between 1913 and 1916 the Royal Commission conducted hearings in Indian communities through the province of British Columbia with a view to confirm existing reserves, and to adding to or reducing reserve lands. In 1914, Kwakiutl submitted a list of 14 village sites to be set aside as reserves, including the Suquash village site, to the Royal Commission. However, the Suquash village site was not recommended to be surveyed and set aside as a reserve for Kwakiutl in the Royal Commission's final report.
35. In 1920, Canada and British Columbia appointed representatives to review and approve or disapprove the recommendations for Indian reserve allotments set out in the final report of the Royal Commission. Canada appointed W.E. Ditchburn and British Columbia appointed Major Clark. As part of its representations before the Ditchburn-Clark inquiry in September 1922, Kwakiutl requested "a mile square at Suquash with all the resources on it". The Ditchburn-Clark inquiry did not recommend that the Suquash village site be surveyed and set aside as a reserve for Kwakiutl.
36. On July 25, 1923, the Lieutenant Governor-in-Council of British Columbia approved and confirmed the Royal Commission report and amendments thereto by way of order-in-council OC 1923/911. On July 19, 1924, the Governor-in-Council did the same by way of order-in-council PC 1924-1265. On July 29, 1938, British Columbia confirmed and conveyed reserves in British Columbia to Canada. The Suquash village site was not set aside as a reserve for Kwakiutl.

37. Notwithstanding these requests to the Crown to have the Suquash village site surveyed and set aside as a reserve, the Crown made, and continues to make, no effort to survey and to set aside the Suquash village site as a reserve for Kwakiutl.

Crown Grants

38. The Crown provided two grants that partially covered the Suquash village site, the details of which are as follows:
- (a) In or about 1888, the Crown granted to Francis Gilbert Richards Jr. the East Fractional Half of Section 15. In or about 1890, the Crown granted to Alfred Alexander Green Section 2, Township 5, Rupert District (together, the “Properties”);
 - (b) In or about 1911, the Properties were conveyed to Pacific Coast Coal Mines Limited; thereby depriving Kwakiutl of a valuable asset and the use, benefit and enjoyment of that asset.
 - (c) In or about 1924, West Coast Collieries Limited acquired the Properties, but in 1939 the Properties were forfeited to the Crown; and
 - (d) In 1988 West Coast Collieries Limited acquired the Properties in fee simple. West Coast Colliers Limited continues to own the Properties.

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

39. This claim is based on the Crown’s breach of the Fort Rupert Treaties, the Crown’s breach of its fiduciary duty owed to Kwakiutl, the Crown’s failure to rectify those breaches, and the Crown’s failure to uphold the honour of the Crown.

Assertions of Breach of Treaty

40. The Fort Rupert Treaties required the Crown to survey Kwakiutl’s village sites and enclosed fields, including every piece of ground to which Kwakiutl had acquired an equitable title through continuous occupation, tillage, and other investment of its labour.

41. The Crown was required to make good faith and best efforts in performance of this treaty obligation.
42. The Crown failed to survey the Suquash village site as a reserve for Kwakiutl. The Crown thereby breached its obligation to do so under the Fort Rupert Treaties.
43. In the alternative, if the Suquash village site was not reserved by operation of law through the exercise of royal prerogative for Kwakiutl's exclusive use and benefit upon the signing the Fort Rupert Treaties, then the Crown failed to survey and to set aside the Suquash village site as a reserve for Kwakiutl, thereby breaching its obligation to do so under the Fort Rupert Treaties.
44. The Crown's failure to survey (or, in the alternative, to set aside) the Suquash village site deprived Kwakiutl of a valuable asset and the use, benefit, and enjoyment of that asset.

Breach of Fiduciary Duty

45. The Crown's obligation under the Fort Rupert Treaties to survey the Suquash village site for Kwakiutl is a specific Aboriginal interest over which the Crown has discretionary control, giving rise to a fiduciary duty.
46. The Crown was under a positive legal obligation pursuant to the Fort Rupert Treaties to survey the Suquash village site for Kwakiutl and, thereby, to protect the Suquash village site, to which Kwakiutl had acquired an equitable title through continuous occupation, tillage, and other investment of its labour, from preemption or Crown grants to third parties.
47. The Crown's fiduciary duty was not a general obligation to survey any lands but a specific duty to survey the Suquash village site for Kwakiutl given that Kwakiutl had acquired equitable title to that site through its continuous occupation, tillage, and other investment of its labour.

48. The Crown as a fiduciary owed Kwakiutl a duty of loyalty and care in discharging this obligation under the Fort Rupert Treaties. This demanded, among other responsibilities, that the Crown did not compromise the interests of Kwakiutl in surveying the Suquash village site. Kwakiutl placed itself at the mercy of the Crown's discretion.
49. The Crown failed to survey the Suquash village site for Kwakiutl. By doing so, the Crown breached its fiduciary obligation to Kwakiutl.
50. In the alternative, if the Suquash village site was not reserved by operation of law through the exercise of royal prerogative for Kwakiutl's exclusive use and benefit upon the signing the Fort Rupert Treaties, then the Crown's obligation under the Fort Rupert Treaties to survey and to set aside the Suquash village site as a reserve for Kwakiutl is a specific Aboriginal interest over which the Crown has discretionary control, giving rise to a fiduciary duty, which the Crown breached by failing to survey and to set aside the Suquash village site as a reserve for Kwakiutl.
51. The Crown's failure to survey (or, in the alternative, to set aside) the Suquash village site deprived Kwakiutl of a valuable asset and the use, benefit, and enjoyment of that asset.

Unlawful Crown Grant

52. The Properties were granted to third parties pursuant to the *Crown Lands Act*, 47 Vict., c. 16. (1884).
53. The Crown granted the Properties to third parties in the knowledge of its obligation to survey (and, in the alternative, to set aside) the Suquash village site as a reserve for Kwakiutl in accordance with the Fort Rupert Treaties.
54. Instead of protecting Kwakiutl's interest in the Suquash village site according to the Fort Rupert Treaties from pre-emption and Crown grants to third parties, the Crown granted the Properties to third parties.

55. Canada did not challenge the Crown grants of the Properties under the *Terms of the Union* (by seeking arbitration from the Secretary of State per Article 13) nor did Canada challenge the province's lack of constitutional jurisdiction over the Properties that were subject to an Indian interest.
56. Those Crown grants were unlawful because they were breaches of the Fort Rupert Treaties and breaches of the Crown's fiduciary duties to Kwakiutl, and thereby deprived Kwakiutl of a valuable asset and the use, benefit, and enjoyment of that asset.

Failure to Rectify

57. The Crown knew or ought to have known that the colonial government made no attempts to survey (and, in the alternative, to set aside) the Suquash village site as a reserve for Kwakiutl in accordance with the Fort Rupert Treaties.
58. The Crown knew, through the Royal Commission process and the Ditchburn-Clark inquiry, that Kwakiutl made repeated requests for the Suquash village site to be surveyed and set aside as a reserve in accordance with the Fort Rupert Treaties.
59. Notwithstanding this knowledge, the Crown made no attempt to rectify this problem by surveying and setting aside the Suquash village site as a reserve for Kwakiutl when the Crown had the opportunity to do so, through the Royal Commission process and the Ditchburn-Clark inquiry. As a result, the Crown further breached the Fort Rupert Treaties.
60. The failure of the Crown to rectify the breach when it had the opportunity to do so, through the Royal Commission process and the Ditchburn-Clark inquiry, was a further breach of the Crown's fiduciary obligation to Kwakiutl.

Honour of the Crown

61. The obligation to survey (and, in the alternative, to set aside) the Suquash village site as a reserve for Kwakiutl was a solemn promise made by the Crown under the terms of the Fort Rupert Treaties.
62. The Honour of the Crown required that the Crown take a broad, purposive approach to the interpretation of its promise to survey (and, in the alternative to set aside) the Suquash village site as a reserve for Kwakiutl and act with diligence in pursuit of its obligations.
63. The Crown's conduct showed a persistent pattern of errors, indifference, and negligence that frustrated the purpose of the Fort Rupert Treaties to survey (and, in the alternative, to set aside) the Suquash village site as a reserve for Kwakiutl, thereby breaching the Honour of the Crown.
64. This breach of the Honour of the Crown deprived Kwakiutl of a valuable asset and the use, benefit, and enjoyment of that asset

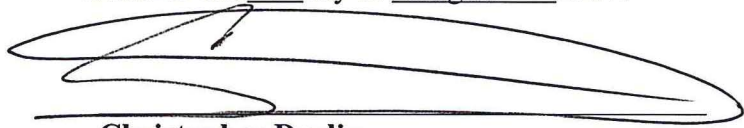
Relief Sought

65. The Suquash village site was a known asset of Kwakiutl at all material times prior to the signing of the Fort Rupert Treaties in 1851. After the treaty was made, the Crown had discretionary control over the surveying (or, in the alternative, the setting aside) of the Suquash village site as a reserve for Kwakiutl pursuant to the treaty and failed to do so. The Crown's failure to survey (or, in the alternative, to set aside) the Suquash village site as a reserve deprived Kwakiutl of that asset, and the opportunity to use, enjoy, or benefit in any way from those lands, including but not limited to the commercial trade of coal, after the treaty was made.
66. The Crown has been unjustly enriched by its failure to perform the land entitlement provisions of the Fort Rupert Treaties. The Crown obtained an incontrovertible benefit from the Fort Rupert Treaties and, as a result of that

incontrovertible benefit, the Crown has been able to sell and lease the Properties and other lands, and to collect royalties from third parties, thereby profiting from the unlawful alienation of the Suquash village site.

67. Given Kwakiutl's lost opportunity to enjoy, benefit, and use the Suquash village site due to the Crown's failure to survey (or, in the alternative, to set aside) the Suquash village site as a reserve, Kwakiutl is entitled to be put in the position it would have been in but for the Crown's breaches of treaty, trust, fiduciary, and equitable duties.
68. Kwakiutl seeks compensation for the Crown's failure to survey (and, in the alternative, to set aside) the Suquash village site as a reserve for Kwakiutl, including compensation for:
- (a) breach of treaty, trust, fiduciary, and equitable duties;
 - (b) interest;
 - (c) costs; and
 - (d) other such damages or compensation as this honourable Tribunal deems just.

DATED this 9 day of August 2017.



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