SCT File No.: SCT-7001-17

Amended April 9, 2018 pursuant to *Specific Claims Tribunal Rules of Practice and Procedure*, Rules 5, 42 and *Federal Court Rules*, Rules 78, 204.

SPECIFIC CLAIMS TRIBUNAL
FILED
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES
DÉPOSÉ
April 10, 2018
Guillaume Phaneuf
Ottawa, ON
12

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KWAKIUTL

CLAIMANT

v.

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

RESPONDENT

AMENDED RESPONSE
Original filed October 6, 2017
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

TO: KWAKIUTL
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I. Status of Claim (R. 42(a))

1. The Kwakiutl Indian Band, also known as the Kwakiutl First Nation (the "First Nation") submitted a claim to the Minister on or about March 5, 2012 alleging, among other things, that the federal Crown ("Canada") breached fiduciary obligations and obligations under the 1851 Fort Rupert Treaties by failing to set aside an area ("Suquash") 12.75 km southeast of Fort Rupert, at the mouth of Suquash Creek, as a reserve.

2. The Minister notified the First Nation in writing on February 2, 2015 of his decision not to accept the claim for negotiation.

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

3. Canada does not accept the validity of any of the claims of Kwakiutl (the "Claimant") in the Amended Declaration of Claim filed March 9, 2018 and in particular denies the alleged failure to fulfil a legal obligation of Canada to provide lands or other assets under a treaty or other agreement between the Claimant and Canada.

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

4. In reply to paragraph 3 of the Amended Declaration of Claim, Canada has no knowledge of the Suquash village site as illustrated in Appendix "A".

5. Canada admits the facts as set out in the following paragraphs of Part V of the Amended Declaration of Claim: 9, 16, 18, 20, 21, 32 and 33.

6. Canada has no knowledge of the facts as set out in the following paragraphs of Part V of the Amended Declaration of Claim: 14, 15, 22 and 26.

7. In reply to paragraph 10 of the Amended Declaration of Claim, Canada:

a. admits that on February 8, 1851 the Quakeolth and Queackar tribes each signed a separate treaty with the Hudson's Bay Company ("HBC"), which became known as the Fort Rupert Treaties; and

b. denies that these treaties are "part of" any of the other Douglas Treaties.

8. In reply to paragraph 11of the Amended Declaration of Claim, Canada:

a. admits that the First Nation is the modern day successor of the Quakeolth and the Queackar tribes; and

b. has no knowledge of the relationship between the First Nation and the Claimant.

9. In reply to paragraph 12 of the Amended Declaration of Claim, Canada admits the accuracy of the passage quoted in paragraph 12 from the Fort Rupert Treaties. DELETED.

10. In reply to paragraph 13 of the Amended Declaration of Claim, Canada:

a. denies that the Fort Rupert Treaties permitted the Claimant to "keep its 'village sites and enclosed fields' immediately"; and

b. admits that the Fort Rupert Treaties required that village sites and enclosed fields of the Quakeolth and Queackar tribes be "properly surveyed".

11. In further reply to the last sentence of paragraph 13 of the Amended Declaration of Claim, the relationship of one Fort Rupert Treaty promise to another is a matter of legal interpretation, not fact.

12. In reply to paragraph 17 of the Amended Declaration of Claim, Canada has no knowledge as to whether:

a. the reference to "Coal Mine" in the 1840 journal of James Douglas refers to Suquash;

b. "Coal Mine" as referenced in Douglas' 1840 journal was the place of residence of the Quakeolth and Queackar tribes; or

c. there were "numerous" Indians resident there.

13. In reply to paragraph 19 of the Amended Declaration of Claim, Canada:

a. admits that the Province of British Columbia has identified shell middens at the mouth of Suquash Creek and has registered these middens as archaeological site EdSt-2;

b. denies that these shell middens are necessarily linked to a "Suquash village site"; and

c. has no knowledge:

i. of the dates these shell middens were created; or

ii. whether they were created by members of the Quakeolth and Queackar tribes.

14. In reply to paragraph 23 of the Amended Declaration of Claim, Canada:

a. denies the first sentence of paragraph 23 because the phrase "cultivated land and enclosed fields" is not used in the Fort Rupert Treaties; and

b. has no knowledge of the facts contained in the remainder of paragraph 23.

15. In reply to paragraph 24 of the Amended Declaration of Claim, the Crown admits the content of the excerpt of the instruction by the Governor of the Committee of the Hudson's Bay Company. DELETED.

16. In reply to paragraph 25 of the Amended Declaration of Claim, Canada:

a. admits the accuracy of the excerpt of James Douglas' October 14, 1874 letter to Indian Commissioner I.W. Powell; DELETED.

b. denies that this excerpt, written ten years after Douglas' retirement and referring to the allotment of reserves throughout the Colony of

British Columbia, accurately describes Colonial policy or practice in relation to Douglas Treaty First Nations; and

c. has no knowledge of the "borrowed language of 'cultivated lands and enclosed fields'" in relation to the Fort Rupert Treaties, Douglas' 1874 letter or at all.

17. In reply to paragraph 27 of the Amended Declaration of Claim, Canada has no knowledge of the facts set out in the second sentence of this paragraph.

18. In further reply to paragraph 27 of the Amended Declaration of Claim the statements in the first and third sentence of this paragraph are matters of legal interpretation, not fact.

19. In reply to paragraph 28 of the Amended Declaration of Claim, Canada has no knowledge of the existence of a "Suquash village site", and the whole of this paragraph constitutes legal interpretation, not fact.

20. In reply to paragraph 29 of the Amended Declaration of Claim, Canada:

a. has no knowledge of the existence of a "Suquash village";

b. admits that Suquash was never surveyed for the purpose of reserve creation; and

c. denies that such a survey was required in the absence of a "village site or enclosed field" belonging to the Quakeolth or Queackar tribes.

21. In reply to paragraph 30 of the Amended Declaration of Claim, Canada admits that:

a. Article 1 of the *British Columbia Terms of Union* ("*Terms of Union*") provided, among other things, that Canada would be liable for the "debts and liabilities of British Columbia existing at the

time of the Union" and that upon joining the Union, British Columbia would be subject to the *Constitution Act, 1867*; and

b. Article 13 of the *Terms of Union* provided, among other things, that "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit" would be assumed by the Dominion government.

22. In further reply to paragraph 30 of the Amended Declaration of Claim, Canada has no knowledge of the existence of a "Suquash village site", and the last sentence of paragraph 30 is legal argument, not fact.

23. In reply to paragraph 31 of the Amended Declaration of Claim, Canada has no knowledge of the existence of a "Suquash village site" and the whole of this paragraph constitutes legal interpretation, not fact.

24. In reply to paragraph 34 of the Amended Declaration of Claim, Canada:

a. admits the first sentence;

b. denies the second and third sentences to the effect that the Royal Commission on Indian Affairs ("Royal Commission") had the power to "adjust", "confirm", "add to" or "reduce" Indian reserve acreages in British Columbia, because the Royal Commission's recommendations were subject to the approval of both levels of government;

c. denies the fourth sentence, in that the list submitted to the Royal Commission requested eighteen places and "Suquash", along with three others, appears to have been struck from the list; and

d. with respect to the fourth and fifth sentences, has no knowledge of the existence of a "Suquash village site".

25. In reply to paragraph 35, Canada:

a. admits the first, ^ second and third sentences in the paragraph;

b. DELETED; and

c. with respect to the fourth sentence, has no knowledge of the existence of a "Suquash village site".

26. In reply to paragraph 36 of the Amended Declaration of Claim, Canada

a. DELETED.

b. admits the first and second sentences in the paragraph;

c. denies the third sentence because British Columbia did not "confirm" reserves but rather transferred provincial Crown lands to Canada for the purpose of reserve creation; and

d. with respect to the fourth sentence, has no knowledge of the existence of a "Suquash village site".

27. In reply to paragraph 37 of the Amended Declaration of Claim, Canada:

a. has no knowledge of the existence of a "Suquash village site"; and

b. denies that there were requests, as alleged in paragraphs 34 and 35 of the Amended Declaration of Claim, to have the "Suquash village site" surveyed and set aside as a reserve, because there was no mention of a "Suquash village site" in the Kwakiutl representations to the Royal Commission or to W.E. Ditchburn.

28. In reply to paragraph 38 of the Amended Declaration of Claim, Canada:

a. admits the facts of the conveyances described in (a) through (d); and

b. has no knowledge of:

i. the relationship between these Rupert District properties and the Suquash village site; or

ii. the village site.

29. In further reply to paragraph 38 of the Amended Declaration of Claim, the portion of the sentence in (b) following the semicolon is argument, not fact.

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

30. The Colony of Vancouver Island came into being in 1846 as a result of the Treaty of Washington, which divided the Pacific Northwest into British and American territories along the 49th parallel. In order to minimize the expenditure of funds for Colonial purposes, in 1849 the British Colonial Office granted the whole of Vancouver Island to the HBC. A portion of the Vancouver Island grant reads as follows:

> ... the [HBC] shall ... dispose of all lands hereby granted to them, at a reasonable price except so much thereof as may be required for public purposes; and that all monies which shall be received by [the HBC] for the purchase of such land, *and also from all payments which may be made to them for or in respect of the coal* or other minerals to be obtained in the said island ... shall (after ... a deduction of 10 percent) be applied towards the colonization and improvement of the island ... [emphasis added]

31. In 1849 the HBC began to build Fort Rupert in Beaver Harbour, as a base from which to develop the coalfields in the region. The HBC's presence at Fort Rupert was directly aimed at taking ownership of the coal and the primary purpose of Fort Rupert was to secure and mine the known coal deposits in the area.

32. When Fort Rupert was established at Beaver Harbour, four tribes, the Quakeolth, Queackar, Walas Kwakiutl and Komkiutis, as well as the Mamalillikulla tribe, moved to Fort Rupert. These tribes set up villages adjacent to the fort and crews from the tribes worked on the fort's construction. They also provided the fort with fresh fish and game.

33. On February 8, 1851, HBC Clerk George Blenkinsop, HBC Captain William Henry McNeill and Master of the SS Beaver Charles Dodd signed agreements with two of the tribes living at Fort Rupert: the Queackar and Quakeolth tribes. These agreements became known as the Fort Rupert Treaties.

34. Under the Fort Rupert Treaties, the Queackar and Quakeolth tribes consented to surrender "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". In exchange, their village sites and enclosed fields were to be "left for [their] own use" and "properly surveyed". The tribes were paid £150 worth of HBC goods for the surrendered lands.

35. During the Colonial period (1849 – 1871), no Indian reserves were surveyed or otherwise established for the Fort Rupert Treaties signatory tribes.

36. On November 10, 1875 Canada Order-in-Council PC ("OCPC") 1088 approved the creation of a Joint Indian Reserve Commission ("JIRC") to settle the Indian Lands Question in British Columbia.

37. On January 6, 1976, Provincial OIC 1876-1138 approved the appointment of three Commissioners to the JIRC to set aside reserves for First Nations in British Columbia. By 1878, Commissioner Malcolm Sproat was the sole Commissioner.

38. On November 21, 1879, Commissioner Sproat set aside reserves for the "Kwah-kewlth" Indians. On July 27, 1880, Commissioner Sproat set aside two additional reserves at Fort Rupert. Commissioner Sproat did not set aside a reserve at Suquash. There is no evidence that the Kwah-kewlth Indians asked Commissioner Sproat for a reserve at Suquash. Commissioner Sproat's allotments of reserves were not approved. On March 3, 1880, Commissioner Sproat resigned as Joint Indian Reserve Commissioner.

39. On July 19, 1880, Canada Order-in-Council 1880-1334 appointed Peter O'Reilly as the new Joint Indian Reserve Commissioner. On October 20,

1886, Commissioner O'Reilly allotted seven reserves for the "Fort Rupert Indians". Commissioner O'Reilly did not allot a reserve at Suquash. There is no evidence that the Fort Rupert Indians asked Commissioner O'Reilly for a reserve at Suquash.

40. On November 27, 1912 by Dominion Order in Council 1912-3277, the Royal Commission on Indian Affairs for the Province of British Columbia ("Royal Commission") was established to settle the differences between Canada and British Columbia with respect to the Indian Land Question in British Columbia. All the decisions of the Royal Commission were considered to be recommendations which required the approval of the Provincial and the Federal Crown.

41. On June 1, 1914 the Royal Commission heard from Chief Owahagaleese, Head Chief of the "Kwawkewlth Nation" and on June 2, 1914, the Royal Commission met with the Kwawkewlth representatives. A list presented to the Royal Commission by these representatives referred to Suquash as a "sealing place". However, it appears that the reference to Suquash was struck off the list. Immediately above Suquash on the list is "Kluksiwi R", which is described as a "Village & Fish" place. On this list, the Kwawkelth representatives did not identify Suquash as a village, although they listed the entry above it as a village.

42. On July 1, 1916, the Royal Commission released its final report ("Final Report").

43. Pursuant to the Final Report, the Royal Commission recommended that the seven reserves allotted for the Fort Rupert Indians by Commissioner O'Reilly in 1886 be confirmed. None of the applications for additional land requested by the Kwawkewlth representatives, including the Kluksiwi application, were recommended because the lands were not available. However, the Royal Commission recommended, as an

"alternative" to those applications, the allotment of 480 acres of land on Malcolm Island as a new reserve for the "Kwawkewlth Tribe".

44. The recommendations in the Final Report were not approved by Canada and British Columbia. To resolve their differences, Canada and British Columbia appointed W.E. Ditchburn and J.W. Clark, respectively, to review the Final Report and to collect additional evidence and testimony. On September 11, 1922, Kwawkewlth representatives submitted a request to Ditchburn for additional lands, including Suquash. On July 26, 1923, pursuant to Order-in-Council 911, British Columbia and, on July 19, 1924, pursuant to Order-in-Council PC 1265, Canada approved the Final Report as amended by Ditchburn and Clark.

45. On July 29, 1938, by Provincial Order-in-Council 1036, British Columbia transferred all the First Nation reserves in British Columbia to Canada, including seven "Fort Rupert-Kwawkewlth" reserves and one "Kwawkelth" reserve, Malcolm Island, as follows:

a. IR 1 - Fort Rupert or Tsa-Kis (village of Taxis)
b. IR 2 - Kippase
c. IR 3 - Shell Island
d. IR 4 - Tsulquate
e. IR 5 - Thomas Point
f. IR 6 - Keogh
g. IR 7 - Klickseewy
h. IR 8 - Malcolm Island

V. Relief (R. 42(f))

46. Canada seeks to have the claim dismissed in its entirety.

47. If Canada is liable, which is not admitted but denied, the Province of British Columbia contributed to the acts or omissions and any losses

arising therefrom as set out in subparagraph 20(1)(i) of the Specific Claims Tribunal Act (the "Act").

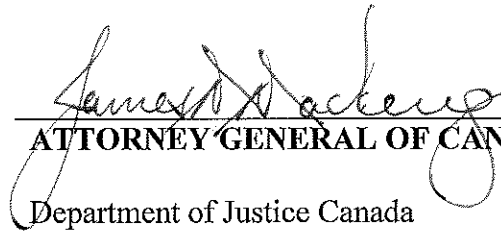
48. If Canada is liable, which is not admitted but denied, Canada denies that the Claimant suffered a loss as a result and further denies that it owes the Claimant compensation and/or damages, as claimed at paragraph 68 of the Amended Declaration of Claim or at all.

49. If Canada is liable, which is not admitted but denied, the Tribunal should deduct from the amount of any compensation calculated under paragraph 20(1) of the Act the value of any compensation already received by the Claimant as set out in paragraph 20(3) of the Act.

50. Canada seeks its costs of the proceedings.

Original Response dated October 6, 2017

Amended Response dated April 9, 2018



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