

SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENdicATIONS PARTICULIÈRES November 17, 2020 Dragisa Adzic	D É P O S É
Ottawa, ON	13

SCT File No.: SCT -6003-19

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ENOCH CREE NATION #440

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations and Northern Affairs

Respondent

DECLARATION OF CLAIM
FRESH AS AMENDED BY CONSENT OF PARTIES
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*.

November 17, 2020

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building, 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
Fax: (613) 954-1920

I. Claimant (R. 41(a))

1. The Claimant, Enoch Cree Nation #440 (hereinafter referred to as the “First Nation” or “Enoch”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band” within the meaning of *Treaty No. 6* (hereafter “Treaty 6”) and the *Indian Act*, R.S.C. 1985, c. 1-5, as amended. Enoch is located in the Province of Alberta.

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. Enoch filed a Treaty Land Entitlement (TLE) claim submission dated March 23, 2010 with the Specific Claims Branch alleging that insufficient land was set aside as reserve land for it pursuant to the provisions of Treaty 6.

4. Canada assessed the claim submission and supplementary materials provided by the First Nation on January 31, 2013. On April 2, 2013, Canada advised that its position is the claim does not disclose a TLE shortfall.

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

5. The First Nation does not seek compensation in excess of \$150 million.

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

6. The First Nation submits that the specific claim falls within s. 14(1)(a) of the *Specific Claims Tribunal Act* which states that:

14(1) Subject to sections 15 and 16, a First Nation may file with the Tribunal based on any of the following grounds, for compensation for its losses arising from those grounds:

(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;...

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

Treaty 6 and the Survey of the Enoch Reserve

7. Treaty 6 between her Majesty the Queen and Plains, Wood Cree and other tribes was signed at Fort Carlton on August 23, 1876 and Fort Pitt on September 9, 1876. The Treaty provided for the surrender of aboriginal title to 121,000 square miles of land in exchange for various promises and benefits to be provided by the Crown, including reserve lands to be set aside for each band in the amount of one square mile for each family of five (or 128 acres per person).

8. The ancestors of the Enoch Cree Nation were first paid annuities at Edmonton from 1879 to 1882 ~~as stragglers.~~ On September 20, 1882 they were paid at Stony Plain under the Chief Tommy LePotac (“Lapotac”) Band which later would be known as the Enoch Band. The Annual Report of 1881 listed the Tommy LePotac Band under Farming Agency 17 and stated that there were approximately 25 Indians living on their reserve and that the reserve included “1 dwelling, 1 granary, 2 stables, 1 large root house”.

9. On July 16, 1883 the Clerk of the Edmonton District, J. Ausdell Macrae, wrote to the Indian Agent at Edmonton stating that he had carried out an inspection of Tommy LePotac’s reserve and that “The Proposed reserve, as located includes, in my opinion, the best tract of farming land in the district ...it is unsurpassed. If it is intended to create a band from this collection of “Stragglers”, the immediate survey of their location is desirable, as it has so many attractions for settlers, that complications may possibly otherwise occur.” Macrae reported that there were 57 family heads paid in 1882 under Tommy LePotaeLapotac and that seventeen had already settled. Macrae wrote that it was likely 51 of the families would settle on the reserve and that there waswere 34 families that had yet to be induced to settle.

10. On August 20, 1883 Indian Commissioner Edgar Dewdney wrote to the Superintendent General of Indian Affairs recommending that the Tommy LePotaeLapotac band be given a reserve; “In 1880 I made arrangements with Tommy le Potac, who is the son of an old Chief from the Plains, that should he collect a large number Indians, at that time living about Edmonton claiming no Chief, I would recommend that he be placed in charge of them & given a Reserve. This he did & moved to a piece of land about 8 mile from Edmonton where he had previously established himself and made some cultivation. I now send a report of his progress, which shows he has carried out his part of the arrangement. I would therefore recommend that he be given a Reserve at the point mentioned.”

11. John A. Macdonald, Superintendent General of Indian Affairs, approved the request for a reserve for the Tommy LePotaeLapotac Band on August 30, 1883. A marginal note dated September 1 from Macdonald to the Deputy Superintendent General of Indian Affairs suggested the size of the reserve be limited; “The Reserve should be made and surveyed at once. If should be limited in size as from its proximity to Edmonton a larger Reserve ~~that~~than is actually required for the Band would (injure) that part of the country.”

12. On September 30, 1883 Dominion Land Surveyor in Charge of Indian Reserve Surveys, John C. Nelson, instructed Dominion Land Surveyor Samuel Lucas to survey a reserve for Tommy LePoteeLapotac with “as little delay as possible.” Nelson instructed Luca that “The extent of the reserve for the Tommy LePotac is to be ten and two tenth square miles such being one square mile to each family of five souls in the band or in that proportion in the manner fixed by Treaty.” The 10.2 square miles or 6,528 acres was enough land 51 people based on the Treaty 6 formula. In 1883 there were 214 individuals paid under Tommy LePotaeLapotac.

13. There is no evidence that Lucas did any survey work on the Tommy LePotaeLapotac reserve. In September of 1884 it was the head if-of Indian reserve surveys John C. Nelson who conducted the survey. Nelson laid out a reserve of 44.5 square miles which would have been enough land for 222 individuals. There is no indication how the size of the reserve was calculated nor whether there were consultations with the band regarding the size and location.

14. In 1887 John C. Nelson, under instructions from Indian Commissioner Edgar Dewdney, prepared a collection of survey plans and description of Indian reserves. The Tommy ~~LePotaeLapotac~~ reserve was described as being 44.5 square miles with the number of families being 57 for the “Tommy’ alias “Enoch La Potac band situated on the left bank of the Saskatchewan River, about six miles south-west of Edmonton on the trail to Stony Plain” and designated Indian Reserve No. 135. This reserve was confirmed by Order in Council dated May 17, 1889.

15. An additional 4.94 acres known as reserve 135A was confirmed by Order in Council on February 14, 1895.

~~Surrender of the Passpassechase and Amalgamation~~

~~16. Reserve No. 136 containing 39.91 square miles or 25,600 acres was surveyed for the Passpassechase Band in September of 1884 by Nelson.~~

~~17. In 1885 and 1886 a total of 114 individuals were discharged from the Passpassechase Band and on December 30, 1886 the Indian Agent at Edmonton reported that the remaining members of the Passpassechase Band wished to join the Enoch Band. On January 24, 1887 the Deputy Superintendent General of Indian Affairs consented to the amalgamation on condition that the Passpassechase members consented and gave a formal surrender of their reserve.~~

~~18. The 1887 paylists for Passpassechase noted that members were Transferred to Enochs. However the surrender of the Passpassechase reserve was not signed until November 19, 1888. The document was only signed by three male members from Passpassechase who were all reported to already be living at Enoch. The payroll for that year indicated that there were in fact seven male heads of families from Passpassechase living at Enoch. The surrender of the Passpassechase reserve was approved by Order in Council on October 12, 1889.~~

~~19. An agreement was signed on January 24, 1894 providing for the admission of the remaining Passpassechase Band members to the Enoch Band. There is no evidence that the Department considered adding additional lands to the Enoch reserve to accommodate the new members.~~

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

~~20.16.~~ The TLE Claim is brought on the grounds that the Crown breached its treaty and fiduciary obligations to the First Nation by failing to satisfy the Band’s full entitlement to reserve land under the terms of Treaty 6. Canada’s lawful obligation remains outstanding to the present.

The 1998 Historic Treaty Land Entitlement Shortfall Policy

~~21.17.~~ In October 1998, Canada adopted the Adjusted Date of First Survey approach as outlined in the *Historic Treaty Land Entitlement Shortfall Policy* (the “1998 Historic TLE Shortfall Policy”). The 1998 Historic TLE Shortfall Policy sets out the criteria used to determine a First Nation’s treaty land entitlement. The First Nation has an outstanding shortfall of reserve land provided under Treaty 6 based on an application of legal principles and the criteria set out in the 1998 Historic TLE Shortfall Policy as modified to reflect changes in Canadian law since 1998.

Date of First Survey for the Enoch Band

~~22-18.~~ The first survey of reserve land for the Enoch Cree Nation is 1884 based on the survey conducted by Nelson in September of 1884. According to the *1998 Historic TLE Shortfall Policy* the ~~October 15, 1884~~September 28, 1883 payroll would be the base payroll for calculating the Enoch Cree Nation's outstanding TLE claim.

Quantum of Reserve Land Set Aside for the Enoch Band under Treaty 6

~~23-19.~~ The "reserve clause" in Treaty 6 provides that one square mile for every family of five should be set aside for bands under Treaty 6 which amounts to 128 acres per person. When Nelson surveyed the reserve in September ~~of~~ 1884 he set aside 44.5 square miles or 28,480 acres of land. In 1895 an additional 4.94 acres was added as reserve 135A. The total acreage received for the Enoch Cree Nation was 28,485.94 or enough land for approximately 222 individuals.

The Band's Population at DOFS for Treaty Land Entitlement Purposes

~~24-20.~~ The 1998 Historic TLE Shortfall Policy provides that it is necessary to "Determine the population used to assess a band's TLE, including the DOFS population and "late additions" as defined under the policy." The 1998 Historic TLE Shortfall Policy sets out the following categories of individuals which may be counted in determining the population of a band for treaty land entitlement purposes:

- the number of Indians appearing on DOFS payroll;
- those individuals who remained with the band for a short time at DOFS (unless there is stronger evidence that they were members of another band);
- Arrears: those absent at DOFS but who appear on subsequent paylists and are paid arrears for the DOFS payroll;
- Absentees: those individuals absent at DOFS payroll but present in paylists before and after demonstrating that they were band members at DOFS;
- Late Additions: Indians bound by and eligible to receive the benefits of treaty but who had not yet appeared on any band's payroll or been included in any TLE and treaty Indians who were originally members of a landless band.

~~25-21.~~ The above criteria are substantially in accord with *Lac La Ronge Indian Band v. Canada* [2001] SKCA 109 where the Saskatchewan Court of Appeal identified the "overriding principle" inherent in a treaty that "each living Indian will be counted once for the purpose of the land entitlement."

Enoch's Treaty Land Entitlement Shortfall

~~26. — Extensive research and payroll analysis have been completed by the parties prior to the commencement of the within proceeding.~~

~~27. — The Date of First Survey population, inclusive of Arrears and Absentees, is at least 172 individuals. The First Nation submits that the actual count for the purposes of calculating treaty land entitlement is 189 individuals.~~

~~28. — Two hundred and fifty three (253) Late Additions between 1885 and 1954 were assessed. At least 97 of these late additions should be included. The First Nation submits that the actual count for the purposes of calculating treaty land entitlement is 235 late additions.~~

~~29.22.~~ -The First Nation submits that the total Date of First Survey population plus late additions is equal to at least 424 310 individuals who must be counted in satisfaction of the Crown's treaty land entitlement promise pursuant to Treaty 6.

~~30.23.~~ These 424310 individuals constitute a reserve land entitlement equal to at least 39,680 54,272 acres (128 acres x 424-310 persons).

~~31.24.~~ The First Nation only received approximately 28,480-28,485 acres. Therefore, there is a treaty land entitlement short shortfall of 25,792-11,195 acres.

VII. Relief Sought

~~32.25.~~ In light of the foregoing, the Claimant seeks the following relief:

- (a) A determination that the Claimant has established a treaty land entitlement shortfall of 25,792-11,195 acres of reserve land pursuant to Treaty 6 or such other amount as may be proven at a hearing before this Honourable Tribunal;
- (b) Compensation for Canada's breach of its treaty, trust, and fiduciary duties and failure to satisfy the Claimant's full treaty land entitlement in a fair and timely manner;
- (c) Damages for loss of use of lands that should have been set apart for the use and benefit of the Enoch Cree Nation #440 by Canada from to the present;
- (d) Equitable interest or restitution on historical losses suffered by the Claimant;
- (e) Such other damages or compensation as this Honourable Tribunal deems just; and
- (f) Costs in relation to the specific claims process.

Dated this ~~December 10, 2019~~ November , 2020 at the City of Calgary in the Province of Alberta.

MAURICE LAW

Ron S. Maurice
Neil Reddekopp Ryan M. Lake
Melanie Webber

Lawyers for the Claimant

Maurice Law Barristers & Solicitors

300, 602-12 Ave SW

Calgary, Alberta T2R 1J3

Phone: (403) 266-1201

Fax: (403) 266-2701

Email: rmaurice@mauricelaw.com

nreddekopp@mauricelaw.com

mwebber@mauricelaw.com

Our File: 469.04