

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

'NAMGIS FIRST NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	D É P O S É
April 20, 2012	
Chantal Houle-Mrak	
Ottawa, ON	1

**Claimant**

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

**Respondent**

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**DECLARATION OF CLAIM**

**Pursuant to Rule 41 of the**

***Specific Claims Tribunal Rules of Practice and Procedure***

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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*.

April 20, 2012

Chantal Houle-Mrak

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(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development

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**I. Claimant (R. 41(a))**

1. The Claimant, 'NAMGIS FIRST NATION ("Namgis") 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 the *Indian Act*, R.S.C. 1985, c. I-5, as amended, in the Province of British Columbia.

**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

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. Namgis initially filed this claim with the Minister on or about September, 1987 in respect of breaches by Canada in failing to refer the disallowance of Mr. Sproat's allocation of more than 1000 acres of Cormorant Island as a reserve to a judge of the British Columbia Supreme Court, as was provided in the Order in Council and in related documentation appointing Mr. Sproat as Indian Reserve Commissioner (the "Cormorant Island Claim").
4. In April 1994, Canada rejected the Cormorant Island Claim and Namgis appealed to the Indian Claims Commission.
5. In March 1996, the Indian Claims Commission recommended "that the claim of the 'Namgis First Nation with respect to Cormorant Island be accepted for negotiation under the Specific Claims Policy".

6. On May 11, 2001, Robert Nault, the Minister of Indian Affairs and Northern Development wrote to 'Namgis declaring that the Cormorant Island Claim had not been accepted for negotiation on the basis that "there is not an outstanding lawful obligation owed to the Namgis First Nation in respect of the subject matter of this claim".

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

7. 'Namgis does not seek compensation in excess of \$150 million for the purposes of the Cormorant Island Claim.

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

8. The following are the grounds for the Cormorant Island Specific Claim, as provided for in s. 14 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;
  - (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians- of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
  - (c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
  - (d) an illegal lease or disposition by the Crown of reserve lands.

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

9. On August 3, 1870, Mr. A.W. Huson, Mr. E.T. Huson, Mr. U. Nelson and Mr. E.A. Wadhams, purported to obtain a lease for all of Cormorant Island from the government of the Colony of British Columbia, with the following terms:

- a. the lease was signed by the Assistant surveyor General, acting in the temporary absence of the Chief Commissioner of Lands and Works (“CCLW”), Joseph Trutch;
  - b. although the lease stipulated that all of Cormorant Island was to be included, the description stated that the area involved was 600 acres, more or less, however, the actual area of the island is closer to 1600 acres;
  - c. the term was to be for twenty-one years;
  - d. forty dollars (\$40.00) per year, paid semi-annually;
  - e. any or all of the island could be resumed by the government upon presentation of two months’ notice to the lessees;
  - f. in the event of a resumption of any part of the island, a proportionate reduction of rent should be arranged;
  - g. the lessees were not to “assign these presents or underlet the premises hereinbefore mentioned or any part thereof without the consent in writing of the said Chief Commissioner or his successors in Office”;
  - h. provided that all conditions were met by the lessees, a renewal privilege on the same terms was included; and
  - i. “if the yearly rent hereby reserved shall be unpaid for the space of thirty days after the same shall become due and the same shall be demanded upon or after the expiration of such thirty days and not be paid at the time of such demand then these presents shall cease and determine and be of none effect and it shall be lawful for the said Joseph William Trutch or his successors...to re-enter and the same to have again repossess...their former estate and interest....”.
10. On October 17, 1873, the CCLW for British Columbia wrote to Mr. A.W. Huson requesting payment of \$100.00 under the lease, representing rent from January 1, 1871 to June 30, 1873. There is no evidence that the \$100.00 was ever paid other than in a letter from Mr. A.W. Huson of November 24, 1881.

11. The Joint Reserve Commission was created pursuant to a Federal Privy Council Order ("OIC") passed November 10, 1875 and Provincial Order-in-Council on January 6, 1876. The Joint Reserve Commission did not last long and it was dissolved. Initially it was suggested that the Indian superintendent of each district be charged with allotting Indian reserves; however, in the end, it was recommended by David Mills, the Minister of the Interior that "the present Joint Commissioner Mr. Sproat be appointed to discharge that important duty subject to the approval of the Commissioner of Lands and Works of British Columbia and in the event of any difference between the Commissioner and Mr. Sproat the matter to be referred to one of the Judges of the Supreme Court". This recommendation was accepted by the dominion government and Mr. Sproat was appointed sole Indian Reserve Commissioner by OIC dated March 8, 1878. There was no reciprocal provincial Order.
12. In a letter dated March 28, 1878 Mr. Sproat reported to the Superintendent General, "you will observe that the Chief Commissioner of Lands does not consider that any Provincial Order in Council is required to empower me". By a telegram dated April 4, 1878, the Minister of the Interior sought from Lieutenant Governor Richards' clarification of Mr. Sproat's authority.
13. On April 17, 1878, Lieutenant Governor Richards replied to Secretary of State R.W. Scott stating:

Government are not prepared to regard settlement of Reserves by Sproat as final but will not interfere with his action except in extreme cases. The Dominion Government to pay all expenses of Sproat and half the costs of referee. Answer.
14. On April 24, 1878, Mr. Scott accepted the proposal put forth by the Province of British Columbia.
15. On January 2, 1880, Mr. Sproat issued a Minute of Decision allotting all of Cormorant Island with the exception of 320 acres to the "Nimkeesh Indians".

The 320 acres excepted were split into two: 160 acres for Mr. A.W. Huson and 160 acres to Reverend Hall who had applied for that land for a mission.

16. Mr. Sproat resigned as Indian Reserve Commissioner on July 19, 1880 and Peter O'Reilly was formally appointed Indian Reserve Commissioner.
17. Mr. A.W. Huson wrote to the CCLW on January 4, 1881, giving his approval of the application of Reverend Hall.
18. On November 24, 1881, Mr. A.W. Huson wrote to, Mr. Walkem, the CCLW, referring to Mr. Sproat's allotment and stated "the Indians are consequentially now in possession of the land for which I am paying a yearly rental of \$40...I bring the facts before you, with the request that the reserve as laid out by Mr. G.M. Sproat be not allowed or that the Government will give me a Crown Grant to 160 acres in consideration of my relinquishing or cancelling my lease".
19. Mr. Walkem wrote to I.W. Powell, Indian Superintendent for B.C., on January 28, 1882, advising that the Provincial Government was rejecting Commissioner Sproat's allotment of most of Cormorant Island to 'Namgis. The two grounds given were Mr. Walkem's previously protesting and advising Mr. Sproat that he would not accept "any Indian reservations made by him on the North West Coast" and "as the whole Island has been leased ever since August, 1870 by the Government to Messrs. Huson and others, at a yearly rental which has been regularly paid up to the present time".
20. On January 31, 1882, Mr. Powell wrote to the Superintendent General of Indian Affairs advising of Mr. Walkem's rejection of the reserve. The letter stated the following points:
  - a. He indicated that "Mr. Sproat informed me at the time, that the reserve he made at Cormorant Island was subject to the conditions of the lease

referred to by Mr. Walkem, and was not intended to interfere in any way with the same until its time limit had expired”;

- b. Mr. Sproat had originally decided to allot more of Cormorant Island as reserve but reduced it by 160 acres at the request of Reverend Hall;
- c. He also advised that “It is also desirable to inform you that a large tribe of Indians have a village on Cormorant Island upon the land leased to Mr. Huson”;
- d. He recognized the ‘Namgis’ need for reserve lands in stating the following: “Cormorant Island is just opposite the mouth of the Nimpkish River, which although small, has always been a most important fishing stream for the Indians...The Nimpkish river is however a small stream at best, but as a large number of Indians derive their supply of food from there, it is all the more necessary to protect not only their fishing rights, but to make suitable reservations for them which in the future may be free from encroachments. In view of the prospective establishment of other Canneries, the statement communicated to Mr. Sproat in August 1879 and now referred to in the enclosed letter i.e. that the reserves made by Mr. Sproat on the North West Coast would not be recognized by the Provincial Government should have, in my opinion, immediate consideration, and the necessary steps taken to provide a satisfactory solution of the apparent difficulty”.

- 21. The Federal Government then referred the matter for review to Joseph Trutch, who had been the CCLW when the lease to Mr. Huson and the others was signed in 1870, as he was now the “Confidential Agent on Indian Affairs and Railways Matters” in Victoria for John A. Macdonald, Superintendent General of Indian Affairs. Joseph Trutch gave his opinion to John A. Macdonald stating that Mr. Walkem’s second objection to the allotment, that being “because the whole of Cormorant Island was then, and had been for ten (10) years before, included in a lease from the Crown to Messrs. Huson and others, which is still in force”...”is to my mind clearly valid and insurmountable. I cannot understand upon what

grounds Mr. Sproat could have assumed discretion to appropriate any portion of this Island as an Indian Reservation, if he was aware of the fact that the whole of the Island had been long previously placed under lease right, which was then still existing... All the conditions and agreements have been observed, and performed by the Lessees, and there is the (sic) question that this Lease right is now in full force”.

22. On February 14, 1884, George Blenkinsop, Indian Agent for the Kwawkewlth Agency, complained to Mr. Powell about the Provincial Government’s rejection of Mr. Sproat’s allotment saying “There is, however, abundant evidence to prove, both by living testimony and by the remains and relics of bygone days, that Alert Bay was, formerly, the home of a large Indian population. In fact, they abandoned the place only in 1837-1838, on the first appearance of smallpox, when great numbers of them perished...The action of Mr. Sproat in 1880 was entirely brought about by Mr. Huson the then lessee, as he preferred having definite claims for himself, the Mission, and the Indians, and surrendered his lease to accomplish those objects”.
23. On February 28, 1884, Commissioner Peter O’Reilly wrote to the Superintendent General of Indian Affairs stating “I may further state for your information, that a portion of the land under consideration, is the site of a large Indian village, and as such should never have been included in the lease granted to Mr. Huson”.
24. Reverend Hall set forth his position in a letter to the CCLW dated March 27, 1884 wherein he stated:

In 1880 the Church Missionary Society proposed establishing a Mission for the Indians on Cormorant Island with the consent and invitation of A.W. Huson then the lessee of the island. At this time Mr. G. Sproat was laying off Indian reserves in our neighbourhood, and I informed him of my desire to commence a mission on this island. Mr. Huson proposed to Mr. Gilbert Sproat that the Government should cancel his lease, give him a free grant of 160 acres and make the balance an Indian Reserve. In Mr. G.

M. Sproat's map of the island two sections of 160 acres each were marked off as land to be applied for by A.W. Huson and A.J. Hall...In Jan. of this year A.W. Huson sold his lease to T. Earle and S. Spencer...your predecessor in office was satisfied with A.W. Huson's letter although he saw the names of three others attached to the lease. For ten years they have abandoned the place and have no partnership with A.W. Huson who alone paid the lease money till Mr. G.M. Sproat's action in 1880. He never paid a cent after that date.

25. Ultimately 'Namgis was allotted a total of 52 acres of land on Cormorant Island pursuant to a Minute of Decision of Indian Reserve Commissioner Peter O'Reilly of October 20, 1884 which was approved by W. Smithe, CCLW by letter dated December 2, 1884.
26. Canada failed to challenge the CCLW's rejection of the allotment of most of Cormorant Island to 'Namgis by Commissioner Sproat. It should have required that the matter be referred to a Judge of the Supreme Court of British Columbia for resolution which was the procedure agreed to by both the Federal and Provincial governments.

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

27. This claim is brought on the grounds that Canada breached its legal obligations and/or fiduciary obligations to 'Namgis, or in the alternative was negligent, due to its failure to refer the rejection of Commissioner Sproat's allotment of Cormorant Island to a Judge of the British Columbia Supreme Court.

28. 'Namgis seeks compensation from Canada for damages for the value of the land that was not allotted on Cormorant Island as result of the rejection of Commissioner Sproat's allotment and such other damage or compensation as this Honourable Tribunal thinks just.

Dated this 20<sup>th</sup> day of April, 2012



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Signature of Solicitor

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