

SPECIFIC CLAIMS TRIBUNAL

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	D É P O S É
February 22, 2022		
Alexandre Bois		
Ottawa, ON		19

B E T W E E N:

SNAW-NAW-AS NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

FURTHER AMENDED DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

DATE:

Registry Officer

TO: Her Majesty the Queen in Right of Canada
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, Snaw-naw-as Nation (Nanoose First Nation), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 in the Province of British Columbia, and a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended.

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;

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

3. Snaw-naw-as does not seek compensation greater than \$150,000,000.

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

4. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

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

(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;

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

5. Snaw-naw-as is a First Nation whose traditional territory is situated in and about Nanoose Bay on Vancouver Island.
6. European contact with the Indigenous peoples of Vancouver Island began in or about 1778, with the arrival of James Cook in Nootka Sound. Cook claimed Vancouver Island for the British and a single building trading post near Yuquot was established.
7. The Spanish also arrived at Vancouver Island around this time and asserted competing claims to Vancouver Island on behalf of Spain.
8. The Spanish recognized British sovereignty over Vancouver Island in or about 1794. The Indigenous people of Vancouver Island did not recognize or agree to this assertion of sovereignty.
9. Thereafter, representatives of the Hudson's Bay Company dealt with the Indigenous people of Vancouver Island, including the Snaw-naw-as. James Douglas, who was the Chief Factor of the Hudson's Bay Company in this area, recorded a census of the Snaw-naw-as at Nanoose Bay in his personal papers as early as 1839.
10. Snaw-naw-as was historically referred to as Nanoose, Noonas, and Noonoa.
11. Likely as early as 1839 and certainly by the 1840's, Hudson's Bay Company officials and colonial officials were aware that Snaw-naw-as was situated in Nanoose Bay; by the 1850's they were aware that Snaw-naw-as' primary village site was situated in and around the head of Nanoose Bay.

12. The Hudson's Bay Company established the first settlement on Vancouver Island in 1843 at what is now Victoria.
13. In 1846, the competing American claim to sovereignty over Vancouver Island was settled in favour of the British assertion of sovereignty by the Oregon Treaty, signed in Washington on June 15, 1846.
14. The Colony of Vancouver Island was established in 1849 and leased to the Hudson's Bay Company. James Blanshard initially served as the Colony's governor for about a year, after which he resigned in the face of the overwhelming practical authority of the Hudson's Bay Company. Thereafter, James Douglas became Governor while remaining Chief Factor of the Hudson's Bay Company.
- ~~15. Prior to Snaw-naw as being recognized as a separate band, it was a part of the Saalequun Tribe and they signed a treaty, now referred to as the Saalequun-Douglas Treaty, in or around 1854.~~
- ~~16. The Douglas Treaty provided that the Saalequun Tribe's "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."~~
17. In 1849, W. Colquhoun Grant undertook an expedition to explore south-eastern Vancouver Island. At that time, he identified the Noonoo Indians as being situated at the head of what is now known as Nanoose Bay. A report of his expedition and a map showing the Noonoo's location was published in 1857.
18. In 1861, Governor Douglas promulgated *The Land Proclamation*, Colony of Vancouver Island, S.B.C. 1861, c. 27 which opened certain lands on Vancouver Island for pre-emption but provided specific protection for "Indian villages and settlements." This was extended to all lands on Vancouver Island by *The Land Proclamation*, Colony of Vancouver Island, S.B.C. 1862, c. 9 but again was subject to the proviso that Indian villages and settlements were protected from pre-emption. Collectively, these are referred to herein as the "*Land Proclamations*".

19. Sometime in or about 1863, the Government of the Colony of Vancouver Island identified a reserve for Snaw-naw-as (the “Noonas”) at the head of the Nanoose Bay. This reserve was reported by the Surveyor-General to the legislature in 1863 as being 3470 acres in size (the “Original Reserve”).
20. There are no presently known records describing how the Original Reserve was identified. However, a number of factors indicate that it is more likely than not that the Original Reserve was identified and described in consultation with Snaw-naw-as and reflects Snaw-naw-as’ intention with respect to the location, size, and boundaries of its reserve. These factors include:
 - a. the location of the Original Reserve;
 - b. its proximity to the Snaw-naw-as village site;
 - c. the history of dealings between officials of the Hudson’s Bay Company and the Colony of Vancouver Island with Snaw-naw-as; and
 - d. the explicit identification of the band for which the reserve was set aside.
21. In addition to being reported in the records of the legislature, the location and the boundaries of the Original Reserve were recorded on an admiralty chart prepared in 1863.
22. In 1864, Robert Brown headed the Vancouver Island Exploring Expedition and observed evidence of continued occupation of the head of Nanoose Bay and the site of the Original Reserve by Snaw-naw-as, including cultivated potato fields, a log cabin, and Indigenous persons engaged in hunting.
23. The Colony of Vancouver Island took no further steps to survey and properly record and demarcate the Original Reserve.
24. In 1866, the Colony of Vancouver Island and the Colony of British Columbia were merged into the United Colonies of Vancouver Island and British Columbia.
25. Under the laws that were then in effect, “Indian” village sites were protected from pre-

emption in the expectation that, subject to consultation with the relevant Indigenous people and the direction of the government, they would be set-aside as reserves.

26. The government of the United Colonies of Vancouver Island and British Columbia took no steps to properly survey the Original Reserve.
27. In 1871, the United Colonies of Vancouver Island and British Columbia joined Canada and became the Province of British Columbia.
28. In 1873, British Columbia published a return of Government Reserves, which again identified the reserve at the head of Nanoose Bay and identified it as being 3470 acres in size.
29. In 1876, British Columbia and Canada established the Joint Indian Reserve Commission to identify and make recommendations concerning the setting aside and establishment of Indian reserves in British Columbia.
30. The Joint Indian Reserve Commission visited Nanoose Bay in 1876. The Commission:
 - a. did not make inquiries concerning the existence of previous decisions or commitments to set aside a reserve for Snaw-naw-as;
 - b. was not provided with the documents connected with the decision or commitment to set aside the Original Reserve; and
 - c. was not aware of the decision or commitment to set aside the Original Reserve.
31. When the Joint Reserve Commission came to Snaw-naw-as, they found a village situated on the south side of Nanoose Bay. However, when they arrived the Snaw-naw-as were not there. Based on observations of the village existing at the time and their estimate of the population of Snaw-naw-as at the time, the Joint Reserve Commission sketched a proposed reserve of approximately 140 acres including the then existing houses and fields (the “New Reserve”).

32. The New Reserve did not coincide with the Original Reserve and was situated to the east of the Original Reserve.
33. The Joint Indian Reserve Commission subsequently met with a number of Snaw-naw-as members at Nanaimo and discussed the boundaries of the New Reserve as shown on a sketch with them. Based on this discussion the Joint Indian Reserve Commission determined that the New Reserve was satisfactory. The Joint Indian Reserve Commission did not:
- a. discuss the Original Reserve with the Snaw-naw-as; or
 - b. review the size and the boundaries of the New Reserve with Snaw-naw-as at the proposed site of the New Reserve.
34. When the Joint Indian Reserve Commission met with Snaw-naw-as, Snaw-naw-as expressed concerns about encroachments by settlers. The Commission did not return to Nanoose Bay with Snaw-naw-as to investigate these concerns but instead minimized them by describing the concerns to be about cattle grazing.
35. On December 15, 1876, the Joint Indian Reserve Commission recommended, by Minute of Decision, the establishment of the New Reserve. The New Reserve was surveyed in 1878.
36. At no point after this did Canada take any steps to investigate, survey, or establish the Original Reserve. The lands comprising the Original Reserve have either been alienated to private landowners or have been put to uses incompatible with the use of the land as a reserve.

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

Statutory Obligations in Respect of Original Reserve

37. Under colonial law and policy, including *The Land Proclamations*, the colonial government was required, as a matter of legislation, to protect Snaw-naw-as's village

sites and settlements, including their village site at the head of Nanoose Bay, from pre-emption.

38. The failure on the part of colonial government and the Crown in Right of Great Britain (collectively the “Imperial Crown”) to protect the Snaw-naw-as village site at the head of Nanoose Bay from pre-emption breached its statutory duty under the *Land Proclamations*.
39. The *Land Proclamations* also gave rise to a fiduciary duty on the part of the Imperial Crown to act as a person of ordinary prudence with a view to protecting the interests of Snaw-naw-as in their village lands. Such ordinary prudence would include:
 - a. properly surveying and recording the boundaries of the Original Reserve;
 - b. taking proper steps to record the existence and status of the Original Reserve;
 - c. taking reasonable measures to ensure that the Original Reserve was set aside for the Snaw-naw-as in a timely fashion; and
 - d. taking reasonable measures to ensure the Original Reserve lands were protected from pre-emption.
40. The Imperial Crown failed to satisfy any of these requirements and as a result breached its lawful obligations in respect of the Original Reserve.
41. This gives rise to liability under s. 14(1)(b) of the *Specific Claims Tribunal Act* for which Canada is responsible pursuant to the extended meaning of the “Crown” provided for under s. 14(2) of the *Specific Claims Tribunal Act*.

Fiduciary Duty Arising from Provisional Establishment of Original Reserve

42. The 1863 records of the Original Reserve being set aside as a reserve for the Snaw-naw-as Indians is sufficient to establish that they reserve had been provisionally established by the Crown and was reserved for the purpose of being set aside for Snaw-naw-as.

43. The provisional establishment of the Original Reserve gave rise to a fiduciary duty on the part of the colonial government and the Crown in Right of Great Britain (the “Imperial Crown”) Imperial Crown to act as a person of ordinary prudence with a view to interests of Snaw-naw-as with respect to the management of that reserve. In this case such ordinary prudence would include:

- a. properly surveying and recording the boundaries of the Original Reserve;
- b. taking proper steps to record the existence and status of the Original Reserve;
- c. taking reasonable measures to ensure that the Original Reserve was set aside for the Snaw-naw-as in a timely fashion; and
- d. taking reasonable measures to ensure the Original Reserve lands were protected from pre-emption.

44. The Imperial Crown failed to satisfy any of these requirements and as a result breached its lawful obligations in respect of the Original Reserve.

45. This gives rise to liability under s. 14(1)(c) of the *Specific Claims Tribunal Act* for which Canada is responsible pursuant to the extended meaning of the “Crown” provided for under s. 14(2) of the *Specific Claims Tribunal Act*.

Obligations of Canada in the Joint Reserve Creation Process

46. In undertaking the process of establishing reserves in British Columbia pursuant to s. 13 of the British Columbia Terms of Union, Canada was obliged to:

- a. make reasonable efforts to identify village sites required to be protected from pre-emption by *The Land Proclamations*;
- b. make reasonable inquiries so as to determine what reserves may have been provisionally set aside for Snaw-naw-as;
- c. make reasonable efforts to ascertain whether the Original Reserve could or should be set aside as a reserve for Snaw-naw-as;

- d. make reasonable inquiries of Snaw-naw-as as to whether or not the Original Reserve should or could have been set aside for Snaw-naw-as and obtain their properly informed agreement in the event that the Original Reserve was not set aside as a reserve;
 - e. set aside such lands as reserve for Snaw-naw-as, absent good reasons not to; and
 - f. provide reasons in the event that the Original Reserve was not to be set aside as a reserve for Snaw-naw-as.
47. The records of the existence and setting aside of the Original Reserve for Snaw-naw-as were of sufficiently public character that Canada knew or ought to have known that these lands had been provisionally set aside as reserve lands for Snaw-naw-as.
48. Canada breached its duty to properly inform itself of the fact that the Original Reserve had been provisionally set aside for Snaw-naw-as. As a result of this breach, the Joint Reserve Commission failed to:
- a. examine the lands that were set aside as the Original Reserve to determine if they could or should have been set aside as a reserve for Snaw-naw-as;
 - b. discuss the Original Reserve with Snaw-naw-as to ascertain whether or not Snaw-naw-as believed the Original Reserve should have been set-aside as a reserve for them; and
 - c. determine whether or not the Original Reserve should have been set aside as a reserve.
49. These failures constitute a breach of Canada's lawful obligation by failing to set aside the Original Reserve as a result of the non-provision of reserve land and gives rise to liability under s. 14(1)(c).

~~The Failure to Provide Reserve Land under the Saalequun Douglas Treaty~~

50. ~~The Saalequun Douglas Treaty obligated Canada, the Crown in right of Great Britain,~~

~~and the colonial government to set aside reserves at each of the village sites to be held for the signatory nations. The Original Reserve was situated at the location of one of these village sites.~~

~~51. The Saalequun Tribe was and continues to be composed of two distinct subgroups—the Snaw-naw-as and the Snuneymuxw. The two sub-groups have separate village sites and separate reserves set aside for them. The Original Reserve was supposed to have been set aside for the Snaw-naw-as.~~

~~52. The Original Reserve has been alienated and/or set aside for purposes not compatible with use as reserve lands and not set aside as a reserve for the Snaw-naw-as.~~

~~53. The failure to set aside the Original Reserve as a reserve for Snaw-naw-as was a breach of a lawful obligation to set aside a reserve under the Saalequun Douglas Treaty and gives rise to liability under s. 14(1)(a) and s. 14(2) of the *Specific Claims Tribunal Act*.~~

Remainder of page intentionally left blank

Relief Sought

54. Snaw-naw-as Nation seeks the following remedies:

- a. A declaration that it has been deprived of the value and ongoing use and benefit of the Original Reserve by virtue of the Crown's breaches of its lawful obligations described above;
- b. Damages and equitable compensation based on these losses, including compensation for being deprived of the benefit and use of the land;
- c. Costs of this proceeding, and in the Specific Claims Process, on a substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, s. 110.
- d. Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 22 day of February, 2022, at the City of Victoria in the Province of British Columbia.



For: Robert Janes, QC
816-1175 Douglas Street
Victoria, British Columbia
V8W 2E1
P. 250-888-5269
F. 250-381-8567
E. rjanes@jfkllaw.ca