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| SPECIFIC CLAIMS TRIBUNAL | |
| F I L E D | TRIBUNAL DES REVENDICATIONS PARTICULIÈRES |
| October 7, 2019 | |
| Isabelle Bourassa | |
| Ottawa, ON | 1 |

SCT File No: SCT-6001-19

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 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*.

October 7, 2019

Isabelle Bourassa

Registry Officer

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The Claimant, Enoch Cree Nation #440 (hereafter “Claimant,” “ECN”, the “Band” or the “First Nation”) is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 as it is a “band” within the meaning of the *Indian Act*, RSC 1985, c 1-5 as amended, in the province of Alberta.

II. Conditions Precedent

2. The instant claim has satisfied the following conditions precedent, as set out in s. 16(1) of the *Specific Claims Tribunal Act*:

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. The Claimant submitted its Specific Claim for Wrongful Expenditures by the Crown of Band Funds for Medical Purposes (1909-1938) (the “Claim”) on July 15, 2010. The Claim alleges that Canada breached its obligations under Treaty 6 as well as its statutory and fiduciary duties by expending monies from the Claimant’s capital and revenue accounts for medical expenses from 1909 to 1938.

4. On August 28, 2012, Aboriginal Affairs and Northern Development Canada advised the Claimant that the Claim would not be accepted for negotiation under the Specific Claims Policy on the basis that Canada did not breach any obligations it owed to the Claimant.

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

5. The Claimant does not seek compensation in excess of one hundred and fifty million dollars (\$150,000,000) in relation to this Claim.

IV. Grounds

6. The grounds for this Claim are laid out in s. 14(a) and (c) 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;

...

(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

Treaty 6 and the Medicine Chest Clause

7. In 1876, Treaty 6 was entered into between the Crown and the Plains and Wood Cree Indians in an area that now constitutes central Alberta and Saskatchewan. The Enoch Cree Nation adhered to Treaty 6 in 1880 under Chief Tommy Lapotac.

8. Under the terms of Treaty 6, the Crown promised to provide the following assistance and benefits to the Indians:

That in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them.

...

A medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians at the discretion of such agent.

9. The health care clauses are unique to Treaty 6 and were an integral part of the negotiations. They were adopted in direct response to clear concerns and requests voiced by the Chiefs during

the 1876 treaty negotiations. In 1870, an epidemic raged throughout Cree territories, followed by great starvation and the poverty resulting from the near extinction of the buffalo.

10. Treaty negotiations took place at Fort Carlton between August 15th and 23rd, 1876 and the resulting Treaty placed binding obligations on both the Cree Chiefs and the Crown. The Crown sought access to the vast tract of land in Treaty 6 and peace with the Crees to facilitate the settlement of the West. The Cree Chiefs sought a secure agricultural livelihood in the face of the extinction of the bison.

11. The solemnity of Treaty 6 derives from this mutual respect and mutual intention to create a binding relationship. As Treaty Commissioner Alexander Morris reported, the Crees understood that Treaty 6 was to “last as long as the sun shines and the river runs.”

12. Although a draft of Treaty 6 had been prepared and provided to the Commissioners prior to the treaty negotiations, the insistence of the Cree Chiefs on health assistance led to the addition of the health care clauses to the written treaty. The Chiefs expressly requested medicines “free of cost” or a “free supply of medicines.” In addition to medical help, the Chiefs also requested aid in case of “troubles seen and unseen,” or “when we can’t help ourselves in case of trouble,” or “in case of extremity,” or “general famine.”

13. Treaty Commissioner Alexander Morris specifically addressed the assembled Chiefs regarding the health care clauses, promising that the Queen would come to their aid in times of “national calamity” or “unforeseen circumstances,” and cited several examples where the Crown had assisted other Indians. Morris told them to trust in the Queen’s generosity:

... if any great sickness or general famine overtook you, that on the Queen being informed of it by her Indian agent, she in her goodness would give such help as she thought the Indians needed.

...

A medicine chest will be kept at the house of each Indian agent, in case of sickness amongst you.

14. Peter Erasmus, a translator present at the negotiations, noted that Alexander Morris had agreed that a medicine chest would be placed at the house of each Indian agent for the “free use of the band.”

Illness, Famine and Pestilence on the Enoch Reserve

15. From 1909 to 1938, the Claimant's members experienced much illness, famine and pestilence on reserve including:

- i. in the winter of 1909, there was an epidemic of influenza and tuberculosis;
- ii. in 1911, the Claimant suffered an epidemic of measles that caused a few deaths, and an outbreak of small-pox that was swiftly contained and caused no deaths;
- iii. in 1913, five of the Claimant's members died of small pox;
- iv. in 1915, the Claimant was noted to have many cases of sickness, primarily pneumonia, grippe and measles with some cases leading to deaths;
- v. in 1916, the reserve had a notable amount of cases of pneumonia and grippe, with some cases leading to deaths;
- vi. from 1918-1920, tuberculosis, pneumonia, and scrofula were prevalent among the Indians of Alberta, causing heavy mortality rates in some bands;
- vii. in 1919, bands across Alberta suffered heavily from a severe epidemic of influenza. Annual Reports noted difficulty in providing care to Indians in outlying regions; and
- viii. an influenza outbreak occurred in the winter of 1937 and became widespread among Indian populations.

VI. Misexpenditure of ECN Trust Funds for Medical Purposes

16. Approximately \$41,871.11 was expended from the trust accounts managed by the Department of Indian Affairs on medical expenses between 1909 and 1938.

17. Neither the documents relating to the transfer of funds from the sale of reserve lands surrendered in 1888, 1902, and 1908, nor any subsequent Band Council Resolutions authorize the expenditure of capital or interest funds managed by the Department of Indian Affairs for medical purposes.

18. Further, expenditures authorized by the Crown were inadequate. As a general rule, Indian Agents were instructed to provide relief and medical expenses only to destitute Indians where absolutely necessary. As a result, expenditures of Enoch trust funds from 1909 to 1938 are a conservative reflection of the medical needs of Enoch at the relevant time, and that to satisfy its obligations the Crown should have expended far more.

VII. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation

19. The Crown owes statutory and fiduciary duties to the Claimant to properly administer the trust funds held for its benefit by the Crown. At all times during the Crown's expenditure of the Claimant's trust funds for medical expenses, the Crown exercised power and discretion over ECN trust monies pursuant to the *Indian Act*. The First Nation stood in a position of complete vulnerability to the Crown and to the unilateral exercise of its powers.

20. Pursuant to the health care clauses of Treaty 6, the Crown also had a lawful obligation to provide the Band with sufficient medicine for the Band's needs. This obligation required the Crown to supply medicine for the Band using Crown funds. It also required the Crown to ensure Band trust funds expended at the discretion of an Indian Agent or other Crown officials were not used to buy medicine for Band members.

21. The Crown had a fiduciary obligation to the Band with respect to the administration and management of its trust accounts. By using the Claimant's trust funds for medical expenses, the Crown breached its fiduciary duty to the Claimant with regards to the management of trust monies. In particular, the Crown had a duty to manage the Claimant's trust funds in the best interests of the Claimant and to act as a prudent and competent fiduciary. Using trust funds for expenditures

that were the responsibility of another party – the Crown itself – constituted an unjust enrichment to the Crown and a breach of its fiduciary duties to the Band.

22. ECN submits that the Crown breached the following duties in withdrawing moneys from the First Nation's trust funds in order to provide medical assistance to the First Nation during the years 1909 to 1938:

- i. the duty to fulfill the terms and promises of the Crown under Treaty 6, and in particular the Medicine Chest Clause while administering trust funds held on behalf of the Band;
- ii. the duty to manage the Band's trust funds in the best interests of the Band;
- iii. the duty to act as a prudent and competent trustee or fiduciary;
- iv. the duty to prefer the Band's interests over its own financial interests; and
- v. the duty to exercise appropriate diligence to protect and preserve the Band's rights, interests and property giving rise to an unjust enrichment of the Crown.

23. In sum, using the Band's trust fund account for the \$41,871.11 in medical expenses from 1909 to 1938 was a breach of the terms of Treaty 6, a breach of the Respondent's trust and fiduciary obligations, and an unjust enrichment.

VIII. Relief Sought

24. In light of the foregoing, the First Nation seeks the following relief:

- i. repayment of the principal amount improperly expended by the Crown in the amount of \$41,871.11;
- ii. opportunity cost of the moneys wrongfully expended since the time of each initial disbursement from the First Nation's trust funds, in the form of compounded interest to the date of judgment;
- iii. solicitor-client costs of this proceeding, and the costs incurred in the Specific Claims Process; and

iv. any other compensation that this Honourable Tribunal may deem just.

All of which is respectfully submitted this 7th day of October, 2019.



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