Court File No: T-328-20

FEDERAL COURT OF CANADA

Between

THE SHUSWAP INDIAN BAND

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

STATEMENT OF CLAIM
(Section 48)

FEDERAL COURT
COUR FÉDÉRALE
FILED
MAR 2 2020
DEPOSÉ
FRANK FEDORAK
VANCOUVER, BC

Date: MAR - 2 2020

Issued by: ORIGINAL SIGNED BY FRANK FEDORAK A SIGNÉ L'ORIGINAL

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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the
day of MAR - 2 2020 A.D. 20
Dated this day of MAR - 2 2020 20

FRANK FEDORAK
REGISTRY OFFICER
AGENT DU GREFFE

I. FACTS

The Parties

1. The Plaintiff, the Shuswap Indian Band (the Plaintiff or "**Shuswap**"), is a First Nation located in and around Invermere, British Columbia, and has approximately 300 band members. Shuswap has one reserve, IR No. 0, which is approximately 1070 hectares in size.

2. The Defendant, Her Majesty the Queen in right of Canada as represented by the Attorney General of Canada (the Defendant or "**Canada**"), holds the bare interest in IR No. 0 for the benefit of Shuswap.

The Designations and Original Tenures

3. In and around the mid to late 1990's, Shuswap began making arrangements to commercially develop IR No. 0.

4. To that end, several designations in respect of IR No. 0 were issued and/or amended by Canada pursuant to section 38(2) of the *Indian Act*, RSC 1985, c I-5 (the "***Indian Act***"), including a 1996 designation registered in the First Nations Land Registry ("**FNLR**") as document number 279042, and a 1997 designation amendment registered in the FNLR as document number 252681 (expanding upon and amending FNLR document number X12449) (collectively the "**Designations**"). These Designations authorized using the lands for, among other things, commercial and residential leasing purposes. Furthermore, all leases pursuant to the Designations were to be for the benefit of the band or on such terms as Canada deemed most conducive to the welfare of the Shuswap people.

5. In and around the same time, and in accordance with the Designations, Canada, as represented by the Minister of Indian and Northern Affairs at the time, proceeded to enter into several head leases with Shuswap owned corporate entities for various lots on IR No. 0, some of which were subsequently also subleased to third parties (these head leases and subleases will be hereinafter referred to as the "**Original Tenures**").

Replacement of Original Tenures with Current Head Leases

6. In and around early 2000, IR No. 0 was re-surveyed / sub-divided to facilitate further development.

7. Accordingly, on or around September 30, 2004, the Original Tenures were replaced by a series of nominal rent head leases from Canada to a wholly owned and

controlled Shuswap entity called named KDC Holdings Village Ltd. ("**KDCHV**") (the "**Current Head Leases**").

8. The Current Head Leases – most of which contained very similar substantive provisions – include, but are not limited to, the following FNLR document numbers: 323843; 323844; 323946; 323847; 323845; 323846; 323855; 323854; 323853; 323850; 323873; 323849; 323852; 323857; 323931; and 323935.

9. During the drafting of the Current Head Leases, and after some discussion, Canada agreed to remove a provision requiring that all subleases flowing from the Current Head Leases achieve fair market value rent (which provision was usually included in head leases between Canada and First Nations in or around the time that the Current Head Leases were entered into) (the "**Standard FMV Requirement**"). As such, the Current Head Leases do not explicitly require that Shuswap receive fair market value for the leasing of its reserve land to third parties.

10. The Current Head Leases do, however, include a provision at clause 8.1 requiring that all subleases of the interests covered by the Current Head Leases obtain the consent of Canada before they constitute binding obligations (the "**Head Lease Consent Requirement**").

The Backroom Deal

11. On February 17, 2004 and September 30, 2004, two wholly owned Shuswap entities named, respectively, Kinbasket Development Corporation and Kinbasket Water & Sewer Company Ltd. (collectively the "**Shuswap Entities**") entered into a contract with another entity called North Rock Holdings Inc. ("**North Rock**"), whereby the Shuswap Entities professed to transfer the leasehold interest in fourteen (14) lots on Shuswap IR No. 0 – all of which were held at that point by KDCHV as a consequence of the Current Head Leases also executed on September 30, 2004 – to North Rock until 2095 (the "**Backroom Deal**"). The Backroom Deal also required North Rock to pay the Shuswap Entities $550,000.00 in exchange for the transfer of the fourteen (14) serviced lots, and further required that the cost of servicing these lots was to be borne entirely by the Shuswap Entities (a cost which amounted to over $1 million, and thus significantly outstripped the $550,000 payment for the purported transfer of the lots).

12. The Backroom Deal acknowledged that the bulk of the consideration for a series of subsequent subleases to North Rock (below) was contained in the Backroom Deal.

13. Canada knew, or ought to have known, about the Backroom Deal.

The Current Subleases and the Uncertain Rent Provision

14. On October 1, 2004, and in accordance with the Head Lease Consent Requirement, Canada provided its consent to a series of sublease between KDCHV and North Rock (the "**Current Subleases**"). The Current Subleases include, but are not limited to, the following FNLR document numbers: 323899; 323900; 323947; 323903; 323901; 323902; 323912; 323911; 323910; 323907; 323916; 323906; 323908; 323914; 323939; and 323943.

15. Many of the Current Subleases profess to sublease the very same lots that were the subject of the Backroom Deal the day before.

16. Many of the Current Subleases also contain identical provisions, including the following provision regarding rent at clause 5.1(a): "The Tenant [North Rock] has paid or, shall pay [to KDCHV], the following amounts, all of which shall be deemed to be Rent: a) pre-paid fair market rent under the Original Sublease; ..." [emphasis added] (the "**Section 5.1(a) Rent Clause**").

17. The term 'Original Sublease' is not defined within the body of the Current Subleases. Rather, the term is only defined in a band council resolution that is attached as a schedule to the Current Subleases, which definition reads as follows: "...a sublease dated September 28, 1999 and registered in the Indian Land Registry under number 274530 (the 'Original Sublease')" (the "**Original Sublease No. 274530**").

18. The explicit rental provision found at clause 3.1 of the Original Sublease No. 274530 does not define 'fair market rent'. However, clause 1.11 of the Original Sublease No. 274530 states that the schedules therein attached – including Schedule 1 being the head lease associated with the Original Sublease No. 274530 (the "**Schedule 1 Head Lease**") – form part of the sublease itself. The Schedule 1 Head Lease goes on to provide a definition of 'Fair Market Rent' at clause 1 (h) (thus making it the likely material definition for the purposes of the Current Subleases), which definition reads as follows: "Fair Market Rent" means, for any particular Period [*i.e.* 19 consecutive 5 year periods over the life of the leasehold interest], the amount of annual rent for which a willing and knowledgeable lessor would rent the Lands in the free and open commercial market to a willing and knowledgeable lessee ...".

Lack of Prepaid Fair Market Rent

19. Fair market rent was not prepaid by North Rock to KDCHV in advance of the Current Subleases being entered into by North Rock, KDCHV and Canada. In addition, no ongoing fair market rent, or fair market rent of any kind, has ever been paid by North Rock to KDCHV, Shuswap or the Shuswap Entities in respect of the Current Subleases.

20. North Rock has subsequently assigned or sublet several of the Current Subleases to various third parties (the "**Transferees**"). The Transferees paid considerable sums of money to North Rock for these transfers on the basis that North Rock held, and was assigning/transferring, fully prepaid tenures. Hence, the Transferees have also never paid any ongoing fair market rent to KDCHV, Shuswap or any of the Shuswap Entities.

21. Ultimately, Shuswap's only reserve has been alienated as a consequence of the Current Subleases, and Shuswap has received virtually no value for this alienation.

Land Code

22. In February of 2015, the Shuswap Indian Band Land Code (the "**SIB Land Code**") came into effect, and all the lands on IR No. 0 became subject to the same.

II. LEGAL ARGUMENT

Canada's Consent to Current Subleases and Associated Breaches

23. When considering pre-land code dispositions of leasehold reserve interests, Canada has a fiduciary obligation to ensure that the contemplated transaction is in the best interest of the band, that it preserves and protects the value of the reserve, and that it is not an improvident disposition of the reserve interest.

24. Additionally, when considering pre-land code dispositions in respect of land that has been designated pursuant to the *Indian Act*, Canada has a statutory obligation to ensure that the contemplated disposition aligns with the purpose of the designation(s) in question, as defined by the Order in Council.

25. Furthermore, pursuant to section 34 of the *First Nations Lands Management Act*, SC 1999, c 24, (the "***FNLMA***"), Canada is liable for any of its acts or omissions that occurred in respect of a First Nation's land prior to land code coming into force, provided that such acts or omissions have caused, or are causing, harm to the First Nation in question.

26. The facts above establish that Canada breached its fiduciary duty to Shuswap in that it appears to have consented to the Current Subleases while knowing about the Backroom Deal, and further accepting that the payment made thereunder constituted rent for the purpose of the Current Subleases (*i.e.* Canada accepted that the $550,000 paid under the Backroom Deal was the rent required by the Section 5.1(a) Rent Clause).

27. More specifically, Canada knew that the Current Subleases required some form of prepaid rent. Therefore, it would have needed to satisfy itself that such a

pre-payment was in fact made before consenting to the Current Subleases. The only payment actually exchanged between North Rock and the Shuswap Entities in advance of entering into the Current Subleases (and hence in advance of Canada consenting to the same) was the payment made pursuant to the Backroom Deal on the day before the Current Subleases were executed. Given this, it must have been that Canada knew about the Backroom Deal payment (*i.e.* the $550,000) and determined that this constituted "pre-payment" of rent for the purposes of the Current Subleases.

28. In doing so, however, Canada breached its fiduciary and statutory duties in several respects.

29. First, the payment of $550,000 in exchange for fourteen (14) serviced lots simply did not satisfy the 'fair market' requirement of the section 5.1(a) Rent Clause, especially if one considers the over $1 million in associated servicing costs to be borne by Shuswap (which ultimately meant that Shuswap sold the lots at a significant loss, and Canada consented to the same). By accepting that the payment for the Backroom Deal was 'fair market' rent for the purpose of the Current Subleases, Canada thus breached its duty to prevent a highly improvident transaction, to act in the band's best interest, to preserve and protect the reserve asset, and to ensure the transaction aligned with the welfare of the Shuswap people, per the Designations.

30. Furthermore, by accepting or agreeing to the $550,000 payment under the Backroom Deal, Canada effectively consented to the Backroom Deal itself, which in turn resulted in a transference to North Rock of the very same interests purportedly covered by the Current Sublease. In other words, when Canada provided its consent to the Current Subleases, it was consenting to something that had already been leased the day before by way of the Backroom Deal (*i.e.* the Current Subleases were *nemo dat*). These actions thus put into motion a chain of illegitimate sub-leases (*i.e.* the Current Subleases), as well as the associated illegitimate sub-subleases and assignments to third parties that flowed from the same, none of which can be said to be in the best interest of the band or protective of the reserve interest.

31. In the alternative, if Canada did not in fact know about the Backroom Deal or the $550,000 payment made thereunder, then Canada breached its fiduciary and statutory duties by providing its consent to the Current Subleases without so much as turning its mind to how the rental obligation therein had been satisfied. This failure in turn directly facilitated the disposition of the reserve interest in the absence of any fair market rent.

32. More specifically, Canada consented to the Current Subleases containing the Section 5.1(a) Rent Clause, requiring 'prepaid fair market rent' under the 'Original

Sublease'. Per the facts above, this ultimately meant that what was likely required under the Current Subleases was the securing of prepaid fair market rent, where 'fair market rent' was defined by the Schedule 1 Head Lease: that is, rent paid by a willing buyer and a willing seller in a free and open market, and reviewable on a five-year basis.

33. However, there is no evidence that Canada took any steps to ensure that such rent had in fact been prepaid, or was forthcoming. Put differently, Canada carried out no due diligence – as required by its statutory and fiduciary obligations – to satisfy itself that the basic assertion made in the leasing instruments (*i.e.* that rent had already been provided to compensate Shuswap for the disposition of a significant portion of its reserve interest) was in fact true. Again, the result was not only an improvident disposition and a failure to protect the reserve interest, but also a failure to ensure that the requirements of the Designations were met (*i.e.* protecting the best interest of the band and the welfare of the Shuswap people).

34. In the further alternative, if Canada did not have knowledge of the Backroom Deal and hence did not breach its fiduciary and statutory duties by consenting to the Current Subleases in light thereof (contention # 1, above), and if Canada also did not breach its duties by failing to satisfy itself that the prepayment of fair market rent – as dictated by the 5.1(a) Rent Clause, the Original Sublease No. 274530, and the Schedule 1 Head Lease – had in fact been carried out (contention # 2, above), then Canada breached its fiduciary and statutory duties by consenting to the Current Subleases despite an ambiguous and nonsensical rental provision.

35. That is, the Section 5.1(a) Rent Clause dictated 'prepaid fair market rent' per the 'Original Sublease', but then failed to clearly define within the body of the Current Subleases what in fact was meant by 'prepaid fair market rent' or 'Original Sublease'. Rather, when trying to interpret the provision, one is forced to consider a variety of different documents, including BCRs, attached Schedules, and several other head leases and subleases. Yet even after following this thread of documents, one is still left with two possible interpretations of the Section 5.1(a) Rent Clause: either (1) it was meant to refer to the rent set out at s. 3.1 of the Original Sublease No. 274530; or (2) it was meant to refer to the "Fair Market Rent" set out in the Schedule 1 Head Lease, to be prepaid prior to each 5-year term.

36. Neither interpretation, however, is particularly convincing. Clause 3.1 of the Original Sublease No. 274530 refers to nominal rent, which does not align with the 'fair market rent' requirement in the Section 5.1(a) Rent Clause. Moreover, the Schedule 1 Head Lease refers to "Fair Market Rent" as a defined term, yet "fair market rent" is not defined in the Section 5.1(a) Rent Clause. In short, the clause is ripe with ambiguity and uncertainty.

37. This uncertainty in turn allowed North Rock to take the position most favorable to it: that the rent owing was nominal, per clause 3.1 of the Original Sublease No. 274530. Consequently, Shuswap was left without any fair market rent for its many reserve dispositions, which, to be sure, is entirely improvident and a result that is far from the band's best interest.

38. In sum, and as a result of Canada's above-mentioned statutory and fiduciary breaches, Shuswap has suffered significant loss and harm, including the loss of the use and control of the lands associated with the Current Subleases, as well as the loss of fair market value of these lands.

39. Furthermore, as a consequence of providing its consent to aforementioned transaction(s), Canada carried out an 'act' which resulted in corresponding loss, and for which Canada is liable pursuant to section 34 of the *FNLMA*.

Breach re Removal of Fair Market Rent Requirement from Current Head Leases

40. As yet a further alternative, if Canada did not breach its statutory and fiduciary duties (including the duty to act in the best interest of the band, prevent improvident transactions, protect the reserve interest, and ensure the purpose of the Designations were met) when it provided its consent to the Current Subleases in spite of all of the above (*i.e.* despite knowing about the Backroom Deal; or despite not taking any steps to see what, if any, fair market rent was paid; or despite being aware of how nonsensical the rental provision was), then it breached the same duties when it allowed for the removal of the Standard FMV Requirement in the Current Head Leases, and thereby removing the requirement that all associated subleases be for fair market rent.

41. More specifically, even if it could be asserted that Canada's role at the sublease stage was merely one of technical oversight and hence it was under no obligation to scrutinize the particular rental provision or carry out any due diligence in that regard (which assertion Shuswap wholly rejects), the same cannot be said at the head lease stage. At the head lease stage, Canada was directly and integrally involved in the drafting and execution of the Current Head Leases, as both a party to the leases and as a fiduciary in respect of the land being leased.

42. Indeed, correspondence on this matter illustrates that during the drafting stages, Canada discussed and considered the effect of the removal of the Standard FMV Requirement at length (presumably because Canada knew it would, by the very act of allowing for its removal, be breaching its fiduciary and statutory duties). Nevertheless, Canada eventually agreed to remove the requirement therefrom.

43. By agreeing to remove the Standard FMV Requirement at the head lease stage –

particularly where the head leases were to being issued to a wholly owned band entity for nominal rent and hence the real value was to be obtained at the sublease stage – Canada acted contrary to the best interest of the Shuswap people. That is, it removed from the leasing scheme the one provision that guaranteed that the scheme would in fact provide a benefit to the band: meaningful and fair rent.

44. As such, removing the Standard FMV Requirement from the Current Head Leases constitutes not only a fiduciary and statutory breach which resulted in loss to Shuswap, but it is also an 'act' for which Canada is liable pursuant to s. 34 of the *FNLMA*.

III. RELIEF SOUGHT

45. The Plaintiff therefore claims as follows:

    a. Damages in excess of $50,000, including but not limited to:

        i. compensatory damages;
        ii. special damages;
        iii. punitive and aggravated damages; and
        iv. equitable damages, including but not limited to restitutionary damages;

    b. costs;

    c. interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 79 and amendments thereto; and

    d. such further and other relief as this Honourable Court may deem just.

IV. APPLICABLE AUTHORITIES

46. In addition to the common law, the Plaintiff pleads and relies on the following legislation, all as amended from time to time:

    a. The *Indian Act*;

    b. The *First Nations Land Management Act*; and

    c. Such other legislation as the Plaintiff deems necessary and as this Honourable Court will allow.

V. TRIAL LOCATION

47. The Plaintiffs propose that this action be tried at Vancouver, British Columbia.

Dated at the City of Vancouver in the Province of British Columbia this 27th day of February, 2020.

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