

December 1, 2022

We Wai Kai Nation
P.O. Box 220
Quathiaski Cove, BC V0P 1N0

Dear We Wai Kai Nation Members:

**Re: Information Session on Alienation of Drew Harbor IR #9 Land Prior to Survey –
Rebecca Spit Specific Claim**

We Wai Kai Nation and Canada have negotiated a Settlement Agreement that will, if approved, resolve We Wai Kai Nation’s Alienation of Drew Harbor IR #9 Land Prior to Survey – Rebecca Spit Specific Claim (the “Rebecca Spit Specific Claim”) and provide We Wai Kai Nation with financial compensation and the ability to apply to add up to 20 acres to We Wai Kai Nation’s reserve base. To approve the Settlement Agreement, a majority (over 50%) of those voting must vote “yes”.

This briefing note provides further details about the proposed settlement.

THE REBECCA SPIT SPECIFIC CLAIM

Background

The Rebecca Spit Specific Claim examined Canada’s conduct in the course of Canada’s failure to protect the Rebecca Spit for the use and benefit of We Wai Kai Nation, contrary to its fiduciary duties to We Wai Kai Nation.

On October 7, 1886, Peter O’Reilly and Ashdown Green of the Indian Reserve Commission visited Drew Harbour for the purpose of setting aside a reserve for We Wai Kai Nation. On October 8, 1886, by way of a Minute of Decision, O’Reilly confirmed the allotment of the Drew Harbour Reserve for We Wai Kai Nation. The Minute of Decision appended a sketch map (the “Sketch Map”), which showed that the Drew Harbour Reserve encompassed a portion of Rebecca Spit up to an indicated narrow passage.

On October 29, 1886, O’Reilly provided the Minute of Decision and the Sketch Map to William Smithe, Chief Commissioner of Lands and Works for British Columbia. On November 5, 1886, Smithe informed O’Reilly of his approval of the allotment of the Drew Harbour Reserve in accordance with the Minute of Decision and the Sketch Map.



In November 1886, William P. Sayward, an industrialist with extensive forestry interests, announced his intention to apply to purchase land at Rebecca Spit. On February 10, 1888, British Columbia's Ministry of Lands and Works issued Crown Grant 287/29 to Sayward for a 54-acre lot, described as Lot 33, at Rebecca Spit. The Crown Grant overlapped with the boundaries of the Drew Harbour Reserve, as described in O'Reilly's Minute of Decision and the Sketch Map.

On July 28, 1888, Indian Affairs Department Surveyor E.M. Skinner surveyed the Drew Harbour Reserve in accordance with O'Reilly's Minute of Decision. While Skinner followed the eastern shore of the Drew Harbour Reserve north towards Rebecca Spit, Skinner stopped the survey once he encountered the southern boundary of Sayward's Crown Grant. As such, Skinner's survey did not include the whole of Rebecca Spit nor the portion of Rebecca Spit, up to the narrow passage, as depicted in the Sketch Map.

The Specific Claims Process

Specific claims deal with past wrongs committed against First Nations by Canada. These claims (made by First Nations against Canada) relate to the administration of land and other First Nation assets and to the fulfilment of historic treaties and other agreements. It is important to note that specific claims are separate and distinct from comprehensive land claims or modern treaties.

The specific claims process is a less adversarial and less expensive option to resolve historical grievances with Canada outside of the court system. It is also the only option to resolve claims that are time-barred by the courts.

Once a First Nation files a specific claim with Canada, Canada has three years to determine whether to negotiate a settlement. If Canada decides not to negotiate a settlement, the First Nation may file the specific claim with the Specific Claims Tribunal to have its claim determined.

In 1998, We Wai Kai Nation submitted its Rebecca Spit Specific Claim to Canada. Within the Rebecca Spit Specific Claim, We Wai Kai Nation alleged that that Canada failed to take steps to have Rebecca Spit included within the boundaries of the Drew Harbour Reserve, in breach of its fiduciary duty, statutory duty and duty of care to We Wai Kai Nation.

In 2009, We Wai Kai Nation submitted a further supplemental submission in support of the Rebecca Spit Specific Claim to Canada.

On December 24, 2010, Canada advised We Wai Kai Nation that, in its view, the Rebecca Spit Specific Claim was invalid and refused to negotiate a settlement. We Wai Kai Nation subsequently challenged that rejection at the Specific Claims Tribunal.

The Specific Claims Tribunal Process

In its 2007 Specific Claims Action Plan, the Government of Canada developed legislation that came in to effect on October 16, 2008 creating the Specific Claims Tribunal. The Specific Claims Tribunal is an independent adjudicative body that provides First Nations with a further alternative to settle specific claims. As indicated above, the Specific Claims Tribunal has jurisdiction over specific claims that Canada has refused to negotiate, that have not been accepted for negotiation within three years of submission or, if accepted, have been in negotiation for three years without a settlement being reached.

On June 23, 2014, We Wai Kai Nation filed the Rebecca Spit Specific Claim with the Specific Claims Tribunal. Canada filed its Response on September 22, 2014. Both parties' filings were amended several times between 2015 and 2017.

In order to expedite the process, the parties requested that the Specific Claims Tribunal "bifurcate" (split) the matter and order that the hearing of validity and compensation proceed in separate stages. If validity was established in the first stage, the issue of compensation would then be dealt with either through negotiations or through a compensation hearing before the Specific Claims Tribunal (as a finding of validity is a precondition to the determination of compensation). The Specific Claims Tribunal granted the request to bifurcate the matter on January 20, 2015.

Validity

Throughout the validity phase, We Wai Kai Nation asserted that Canada failed to protect the Rebecca Spit for the use and benefit of We Wai Kai Nation, contrary to its fiduciary obligations to We Wai Kai Nation. In the alternative, We Wai Kai Nation argued that Canada failed to protect the southern 20 acres of Rebecca Spit (before the narrowing) for the use and benefit of We Wai Kai Nation, contrary to its fiduciary obligations to We Wai Kai Nation.

Canada maintained its position that the Rebecca Spit Specific Claim was invalid. In the alternative, Canada asserted that even if the Specific Claims Tribunal were to determine that the Rebecca Spit Specific Claim is valid, the Specific Claims Tribunal should refuse to validate the Rebecca Spit Specific Claim on the basis that the wrongdoing occurred over a century ago.

The validity phase of the Rebecca Spit Specific Claim was largely heard by the Specific Claims Tribunal at Cape Mudge: the Specific Claims Tribunal heard oral evidence on December 5, 2017; expert evidence from April 24 to 26, 2018; and legal submissions on October 18 and 19, 2018.

During the oral evidence stage, We Wai Kai Nation Elder Daniel Billy provided important evidence about We Wai Kai Nation's historic use and occupation of Rebecca Spit. He also spoke at length about his visits to Rebecca Spit with We Wai Kai Nation Elders when he was a child. We Wai Kai Nation Elder Daniel Billy gave his evidence and cross-examined by legal counsel for Canada.

The hearing also included a site visit to Rebecca Spit. Canada initially resisted the site visit on the basis that, in Canada's view, it was unnecessary. The Specific Claims Tribunal disagreed and shortly thereafter, legal counsel for the parties, We Wai Kai Nation leadership, We Wai Kai Nation Elder Daniel Billy and the presiding Judge all visited the Rebecca Spit.

During the expert evidence stage, each party hired a surveyor to prepare a detailed expert report to review and assess the survey of the Drew Harbour Reserve. The experts then attended the expert evidence hearing, where they presented their respective reports and were examined and cross-examined.

Once the expert evidence stage was complete and in advance of the legal submissions hearing, legal counsel for the parties prepared and filed extensive written arguments with supporting caselaw. During the legal submissions hearing, legal counsel presented their respective written arguments and answered questions from the Specific Claims Tribunal. Closing submissions were then heard throughout a multi-day process at Cape Mudge and then via teleconference on November 27, 2018.

Upon the conclusion of closing submissions, the Specific Claims Tribunal reserved its decision. Then, on November 5, 2019, the Specific Claims Tribunal issued a 35-page decision concluding that the Rebecca Spit Specific Claim was valid.

Although the Specific Claims Tribunal found that Canada did not intend to include the entire Rebecca Spit as part of the Drew Harbour Reserve, the Specific Claims Tribunal held that Canada breached its fiduciary duty to We Wai Kai Nation in failing to protect the southern 20 acres of Rebecca Spit (up to the narrowing) from alienation by settlers.

In particular, the Specific Claims Tribunal held that Canada had a duty to take reasonable care in the circumstances and to act reasonably in We Wai Kai Nation's best interests. This would have required Canada to take steps to protect the 20 acres for the use and benefit of We Wai Kai Nation. Since Canada failed to protect the 20 acres from alienation, the Specific Claims Tribunal concluded that Canada breached its fiduciary duty to We Wai Kai Nation.

The Specific Claims Tribunal also rejected Canada's alternative argument that the Specific Claims Tribunal should refuse to validate the Rebecca Spit Specific Claim on the basis that the wrongdoing occurred over a century ago. The Specific Claims Tribunal concluded that this alternative argument was legally unsound, the argument. The Specific Claims Tribunal also concluded that it was dishonourable for Canada to assert it at all.

The following is a map of the Drew Harbour Reserve and of Rebecca Spit. The section of Rebecca Spit marked in red is the area that Canada failed to protect:



Compensation

As set out above, during the validity stage, the Specific Claims Tribunal determined that Canada owes an outstanding legal obligation to We Wai Kai Nation in relation to Canada's failure to protect the 20 acres at the base of Rebecca Spit from alienation. The Specific Claims Tribunal held that in order to address its outstanding legal obligation, Canada must compensate We Wai Kai Nation for the losses that are attributable to Canada's conduct.

The compensation stage was required to determine the amount of compensation owed by Canada to We Wai Kai Nation. During this stage, Canada advanced a number of factual and legal arguments in an effort to minimize the compensation owed to We Wai Kai Nation.

Both parties retained a number of experts to prepare reports to assist with the determination of the compensation owing from Canada to We Wai Kai Nation as a result of Canada's breaches.

We Wai Kai Nation retained an appraisal expert to prepare a report estimating: (a) the current market value of the lost lands; and (b) the value of the loss of use in relation to the lost lands from the time of the wrongdoing to present. This report was filed with the Specific Claims Tribunal on April 12, 2021.

The appraisal report did not address potential forestry losses (because that issue was beyond the expertise of the appraiser). Accordingly, We Wai Kai Nation retained a forestry expert to provide a focused report to deal specifically with this issue. The forestry expert's report was filed with the Specific Claims Tribunal on August 31, 2021. Since the report identified additional losses, We Wai Kai Nation's appraisal expert prepared an addendum to their appraisal report. We Wai Kai Nation filed the addendum with the Specific Claims Tribunal on September 14, 2021.

On November 8, 2021 and February 7, 2022, in response to We Wai Kai Nation's appraisal report, forestry report and addendum, Canada filed its expert appraisal reports on the current market value of the lost lands and loss of use with the Specific Claims Tribunal.

We Wai Kai Nation's appraisal expert then prepared a reply report in response to Canada's report on the current market value of the lost lands. This reply report was filed with the Specific Claims Tribunal on March 29, 2022.

In light of changes in land values since the date of We Wai Kai Nation's appraisal report, We Wai Kai Nation's appraisal expert also prepared an addendum, entitled Updated Value Estimates (Current Unimproved Market Value & Loss of Use). This addendum was filed with the Specific Claims Tribunal on April 19, 2022.

We Wai Kai Nation's appraisal expert also prepared a reply report in response to Canada's report on loss of use. This reply report was filed with the Specific Claims Tribunal on May 13, 2022.

On August 9, 2021, the Specific Claims Tribunal directed the parties' appraisal experts to engage in a "without prejudice" discussion regarding the current market value of the lost lands; to identify points of agreement and disagreement; and, where possible, to narrow the issues for hearing. During this discussion on December 9, 2021, the parties' experts succeeded in narrowing some of the issues for hearing.

Additionally, in and around July 9, 2020, We Wai Kai Nation sent a letter to the Minister of Justice and Attorney General of Canada and the Minister of Crown-Indigenous Relations expressing concerns with the adversarial approach adopted by Canada with respect to the Rebecca Spit Specific Claim and requesting that compensation be resolved through negotiation.

Although the parties took extensive steps to prepare for a hearing on how compensation should be calculated, no such hearing was ultimately required because, in April 2022, the parties agreed to negotiate a settlement instead.

The settlement negotiation process is now complete, and Canada has made a formal settlement offer.

If We Wai Kai Nation votes in favour of the proposed settlement and if the Minister of Crown-Indigenous Relations signs the Settlement Agreement, the Rebecca Spit Specific Claim will be settled, and compensation will be paid by Canada in the agreed amount to We Wai Kai Nation.

THE SETTLEMENT OFFER

The negotiated settlement between We Wai Kai Nation and Canada involves Canada paying We Wai Kai Nation fifteen million dollars (\$15,000,000). In addition to this cash payment, the Settlement Agreement includes an Addition to Reserve provision, which will allow We Wai Kai Nation to apply for reserve status for up to 20 acres of land that We Wai Kai Nation may acquire.

In return, We Wai Kai Nation agrees that We Wai Kai Nation's claim for compensation for the Rebecca Spit Specific Claim has been settled and releases Canada from all legal responsibility related to the Rebecca Spit Specific Claim. We Wai Kai Nation also agrees to indemnify (compensate) Canada if the Rebecca Spit Specific Claim is recommenced at some future point. In other words, if any members of We Wai Kai Nation or any other parties commence a legal action against Canada for any aspect of the Rebecca Spit Specific Claim, We Wai Kai Nation will have to pay Canada's legal costs along with any awards against Canada, if the action is successful.

THE SETTLEMENT AGREEMENT

Here is an overview of the main terms of the Rebecca Spit Specific Claim Settlement Agreement as well as the main legal implications of entering into the Settlement Agreement:

- Section 2.1: Canada will provide We Wai Kai Nation with compensation in the amount of \$15,000,000 (which includes negotiation and ratification costs).
- Section 3: We Wai Kai Nation is entitled to make one or more applications to have one or more parcels of land that do not exceed 20 acres in total set apart as reserve land. We Wai Kai Nation will be responsible for any and all costs related to the acquisition and setting apart of any additional lands as reserve lands.
- Section 4: We Wai Kai Nation will release Canada from all legal responsibility with respect to Canada's breaches, as set out in the Rebecca Spit Specific Claim and summarized above. Under the Settlement Agreement, We Wai Kai Nation agrees not to pursue legal action against Canada for: any aspect of the Rebecca Spit Specific Claim; costs (negotiation costs and Specific Claim Tribunal costs); the negotiation and approval procedures set out in the Settlement Agreement; the adequacy of the compensation to be provided by Canada; the deposit and any use of the compensation, including any financial losses resulting from a financial institution's failure; or the use and management of the settlement funds by We Wai Kai Nation.

This means that once the Rebecca Spit Specific Claim Settlement Agreement is signed, We Wai Kai Nation and its members cannot bring any claims in the future, or try to sue Canada, for any aspect of the Rebecca Spit Specific Claim, or anything related to it. This includes not being able to bring claims against Canada for: the amount of compensation paid, the negotiation costs and the way on which We Wai Kai Nation's compensation money is invested.

- Section 5: We Wai Kai Nation agrees to protect Canada through an "indemnity clause". This means that if any past, present or future We Wai Kai members or other parties commence a legal action against Canada, its Ministers or employees for the matters that We Wai Kai Nation has provided a release for,

then We Wai Kai Nation will have to pay Canada's legal costs along with any damages awarded against Canada, if the action is successful. The terms of the Settlement Agreement ensure that if a party sues Canada, then Canada must use all reasonable effects to defend itself. The Settlement Agreement also protects We Wai Kai Nation's right to participate in any lawsuit.

- Section 7: We Wai Nation ratifies (approves) of the Settlement Agreement and authorizes Council to sign the Settlement Agreement if a majority (over 50%) of the members voting at the ratification vote in favour of the Settlement Agreement. If the required approval is not obtained, the Settlement Agreement will be void (i.e., not valid or legally binding).
- Sections 2.3 and 10: Once the Settlement Agreement is signed by both Canada and We Wai Kai Nation, the money will be released within 45 days into We Wai Kai Nation's bank account.
- Sections 2.2, 4.1(e) and 11.1(g): Once the compensation funds have been released into We Wai Kai Nation's bank account, Canada is not be responsible in any way for how that money is spent or what kind of interest We Wai Kai Nation gets on that money. Other than paying the money to We Wai Kai Nation, Canada has no other responsibilities or obligations in respect of the money.
- Section 11.1(h): We Wai Kai Nation represents that it intends to use the settlement funds for the benefit of We Wai Kai Nation.

QUESTIONS AND ANSWERS

1. How was the compensation figure determined?

Both sides hired appraisal experts to put forward their view of the appropriate damages figure. Both sides had different legal theories about how damages should be calculated. Canada's initial position was that the Rebecca Spit Specific Claim should be resolved for \$10,150,000. We Wai Kai Nation's position was that the Rebecca Spit Specific Claim was worth much more, with a maximum "best case" scenario of approximately \$18,000,000.

We Wai Kai Nation leadership and legal counsel advocated for the highest compensation possible and ultimately convinced Canada's negotiator to seek a mandate of \$15,000,000. The requested mandate was approved by Canada and subsequently incorporated into the settlement offer.

It is important to note that there were additional risks associated with proceeding to a hearing on compensation instead of negotiating the settlement.

First, Canada advised that it intended to make factual and legal arguments before the Specific Claims Tribunal in an effort to reduce any compensation owed to We Wai Kai Nation, below the amount put forward by Canada's appraisal expert. Such arguments included asserting that: the compensation should be reduced since British Columbia was responsible, at least in part, for the wrongdoing; the compensation should not be brought forward to today's dollars on the basis advanced by the appraisal experts; and that contingencies should have been factored into appraisal expert's reports that would have further reduced the compensation amount.

Second, proceeding to a hearing carried with it the risk that the Rebecca Spit Specific Claim, which had already been under consideration for approximately 23 years, could remain unresolved for years to come. The parties would have to expend considerable time preparing for and attending the hearing and waiting for the Specific

Claims Tribunal decision on compensation. The parties would then have the right to seek a review of the decision by the courts in the event that they were of the view that the decision was unreasonable.

2. How was the Addition to Reserve amount calculated?

The Addition to Reserve amount (20 acres) is based on the findings of the Specific Claims Tribunal. The Specific Claims Tribunal found that Canada breached its duties to We Wai Kai Nation in failing to protect the southern 20 acres of Rebecca Spit (before the narrowing) from alienation by settlers.

3. Is We Wai Kai Nation required to use the funds to purchase lands?

No. This is a decision for We Wai Kai Nation to make. We Wai Kai Nation must, however, use the funds for the benefit of We Wai Kai Nation.

4. Does Canada have to provide reserve status to any lands selected?

No. The Settlement Agreement provision simply provides assistance in securing additional reserve lands. While it does not guarantee an outcome, it provides We Wai Kai Nation with a significantly greater likelihood that Canada will provide reserve status to any lands selected.

5. Does this settlement have anything to do with the BC treaty process?

No. The specific claims process is entirely separate from the treaty process.

6. Does this settlement affect the Aboriginal rights or title of We Wai Kai Nation?

No. The settlement is strictly limited to the resolution of the Rebecca Spit Specific Claim. In other words, it relates to Canada's breaches of legal obligation involved in the improper alienation of 20 acres from the Drew Harbour Reserve.

7. What does voting "yes" to the Settlement Agreement mean?

Voting "yes" is voting in favour of resolving the Rebecca Spit Specific Claim. If a majority (over 50%) of those voting vote "yes" and Canada proceeds to execute the Settlement Agreement, We Wai Kai Nation will receive:

- compensation in the amount of \$15,000,000; and
- the ability to apply to add up to 20 acres to We Wai Kai Nation's reserve base.

8. What does voting "no" to the Settlement Agreement mean?

Voting "no" to the Settlement Agreement is voting against resolving the Rebecca Spit Specific Claim on the current terms, as set out above. With a "no" vote, it is highly unlikely that Canada would be willing to negotiate further on this Specific Claim. Therefore, We Wai Kai Nation would almost certainly be required to complete the process at the Specific Claims Tribunal in order to resolve the Rebecca Spit Specific Claim.

9. Are there any alternatives to a settlement?

We Wai Kai Nation could complete the Rebecca Spit Specific Claim at the Specific Claims Tribunal. This would take *at least* another year. The result could be lower than or equal to the negotiated dollar figure. It could also be higher, though this outcome is considered unlikely. We Wai Kai Nation or Canada could then challenge the Specific Claims Tribunal's findings in court, which could add years to the resolution process.

10. Who can vote?

You can vote if:

- you are registered on the We Wai Kai Nation member list;
- you will be 18 years of age or older on the day of the vote; and
- you are not disqualified from voting at band elections.

11. What is the recommendation of Chief and Council with respect to the Settlement Agreement?

Chief and Council view this Settlement Agreement as highly beneficial and recommend that members vote “yes” to ratify the Settlement Agreement.

12. How can I get more information?

For further information, you can attend a public Information Meeting, in person or virtually, scheduled for the following time and place:

Saturday, December 10, 2022, from 1:00pm to 3:00pm at Quinsam Recreation Hall, 2005 Eagle Drive, Campbell River, BC.

The link to the virtual Zoom meeting is: <https://us06web.zoom.us/j/87104084967>.

We would be pleased to answer any questions that you may have about any of the above, either at the Information Meeting or at any time afterwards.

13. What is the number of votes required to approve the settlement?

The settlement will be approved if a majority (over 50%) of those voting, vote “yes”.

CONCLUSION

After years of research, litigation at the Specific Claims Tribunal and negotiation with Canada, We Wai Kai Nation has arrived at a proposed settlement of the Rebecca Spit Specific Claim. We Wai Kai Nation encourages all eligible members to vote.

Yours truly



Nisha Sikka
First Peoples Law LLP