**SCT File No.:** SCT – **4002-12**

**SPECIFIC CLAIMS TRIBUNAL**

| SPECIFIC CLAIMS TRIBUNAL | | |
|---|---|---|
| FILED | TRIBUNAL DES REVENDICATIONS PARTICULIÈRES<br>February 18, 2013<br>Amy Clark | DÉPOSÉ |
| Ottawa, ON | | 6 |

BETWEEN:

BROKENHEAD OJIBWAY FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

---

**RESPONSE**
**Pursuant to Rule 42 of the**
***Specific Claims Tribunal Rules of Practice and Procedure***

---

This Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure.*

TO: Brokenhead Ojibway First Nation
As represented by
Paul B. Forsyth / Kyle Dear
Taylor McCaffrey LLP
9th Floor – 400 St. Mary Ave.
Winnipeg, Manitoba R3C 4K5
Telephone: (204) 988-0458
Facsimile: (204) 953-7169
E-mail: pforsyth@tmlawyers.com

## I. Status of Claim (R. 42(a))

1. Brokenhead Ojibway First Nation ("the First Nation") submitted a specific claim to the Minister of Indian Affairs and Northern Development ("the Minister") on April 19, 2006. The claim was deemed to be filed with the Minister on October 16, 2008, pursuant to section 42(1) of the *Specific Claims Tribunal Act*. The Claim alleged that the Crown breached obligations to the First Nation in relation to a transmission line easement granted to the Manitoba Hydro-Electric Board ("Manitoba Hydro") in 1952.

2. On September 28, 2011 Patrick Borbey, Senior Assistant Deputy Minister, Indian Affairs and Northern Development Canada, notified the First Nation in writing that its Specific Claim had not been accepted for negotiation.

## II. Validity (R. 42(b) and (c))

3. The Crown denies the validity of the First Nation's Specific Claim and that the First Nation has suffered any losses or damages resulting from the right of way granted in 1952.

Specifically the Crown denies:

a. any breach of Treaty, the *Indian Act* or obligations arising from the Crown's fiduciary duties; and

b. that there are any consequential losses or damages.

## III. Allegations of Fact – Declaration of Claim (R. 41(e)): Acceptance, denial or no knowledge (R. 42(d))

4. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the Claim and puts the Claimant to the strict proof thereof.

5. The Crown admits the facts set out in paragraphs 1, 2, 4, 5, 9, 10, 11, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, and 38 of the Claim.

6. The Crown admits the facts set out in paragraph 3, with the exception that the Claim relates not only to the conduct of Canada but also the involvement and knowledge of the First Nation.

7. The Crown states that excepting the fact of the submission of the First Nation's Specific Claim to the Minister and any un-edited historical documents exchanged by the parties, all documents or communications referred to in paragraph 6 are without prejudice, privileged and irrelevant to the Claim.

8. In response to paragraph 8, the Crown acknowledges that the grounds identified by the First Nation are included in sub-sections 14(1)(b)(c) and (e) of the *Specific Claims Tribunal Act*, but denies any liability on these grounds.

9. In response to paragraph 12, the Crown does not dispute the existence or content of the February 11, 1950 letter from Superintendent Allan to Director Gyles but denies that the letter describes the easement lands as "agricultural in nature". The Crown states that some of the lands were identified as potentially suitable for agriculture and some were identified as unsuitable for agriculture.

10. The Crown admits paragraph 25 subject to correction of the quotation from Superintendent Olson's letter which stated: "A fee of $3.00 per **acre** is payable, **once only**...", not "A fee of $3.00 per **acres** is payable, **only once**...".

11. The Crown admits the fact and contents of Superintendent Allan's letter of December 1, 1951 as referenced in paragraph 31 but denies the remainder of that paragraph.

12. In response to paragraph 33 the Crown says its contents are argument and conjecture which the Crown is not required to admit or deny.

13. The Crown denies the allegations in paragraphs 39, 46 and 47.

14. The contents of paragraphs 18, 19, 40, 41, 42, 43, 44, and 45 are legal argument which the Crown says it is not required to admit or deny.

15. In response to paragraph 48, the Crown denies that the First Nation is entitled to an award of compensation, damages or interest in this Claim.

## IV. Statements of Fact (R. 42(a))

16. On February 12, 1952, a federal Order in Council ("OIC) granted to Manitoba Hydro a hydro transmission line easement across Brokenhead Reserve No. 4 (the "Reserve") on condition of payment of $979.25 and "further terms, conditions and provisions as the Minister of Citizenship and Immigration may deem necessary and advisable."

17. The hydro transmission line was to carry power over an 85 kilometer (53 mile) route from the generating station at Pine Falls to serve public purposes in Manitoba.

18. The easement granted to Manitoba Hydro was for a corridor of 100 feet in width and amounting to 55.97 acres across uncultivated lands of various quality in the Reserve.

19. The authority for the grant of right of way and its terms are:

- the *Manitoba Hydro-Electric Development Act*, SM 1949, C.49;
- the *Indian Act*, SC 1951, C.29;
- the Brokenhead Band Council Resolution, December 1, 1951;
- Order in Council PC 807, February 12, 1952;
- Easement Indenture, February 12, 1952
- Manitoba Order in Council 277/52, February 26, 1952;
- Manitoba Hydro payment, April 22, 1952.

20. The process leading to the grant of easement was initiated in 1949 by the Manitoba Department of Mines and Natural Resources ("DMNR"). DMNR acted as the administrative agency charged with overseeing power development in Manitoba until administrative responsibility was transferred to the Manitoba Hydro-Electric Board following its establishment in 1951.

21. Between 1949 and 1951 there were communications between DMNR and officials in the Indian Affairs Branch (IAB) of the Department of Citizenship and Immigration regarding the right of way. IAB officials communicated that the policy preference was to grant an easement rather than to sell reserve lands for a right of way, and that the First Nation's advice on acceptable compensation would be sought.

22. IAB rejected an initial compensation proposal of $3.00 per acre, having considered that per acre rates paid for other lands along the transmission line route ranged from $4 for Manitoba Crown lands to $25 for uncultivated lands, and up to $50 for cultivated lands. Information provided by DMNR at the time was that this range of per acre rates applied to both fee simple title and reversionary easements.

23. In November, 1951, Manitoba Hydro sent a compensation proposal to IAB in respect of the proposed easement. According to the Manitoba Hydro proposal, 20 acres of swamp land would be compensated at $4 per acre and 35.97 acres of scrub land would be compensated at $25 per acre, making up the total of $979.25 paid for the 55.97 acres affected by the easement. Manitoba Hydro advised that the easement would not affect cultivated land.

24. On December 1, 1951, IAB discussed the Manitoba Hydro proposal with the First Nation. In response, some members of the First Nation, including the Chief, expressed a preference for a lease and an annual payment on a lease rental basis. They also requested that an indemnity be obtained from Manitoba Hydro in respect of any damages to property and buildings that might be caused by the transmission line.

25. On December 20, 1951, the Council of the First Nation passed a Band Council Resolution, approving the "out-right sale of 55.97 acres of reserve land to the Manitoba Power Commission." The First Nation also requested that IAB distribute the proceeds of the sale among individual Band members.

26. Instead of proceeding with an "out-right sale", the Crown granted a right of way in the form of a reversionary easement indenture which terminates when the lands are no longer required for the purposes of the transmission line.

27. Manitoba Hydro is limited in its use of the easement to transmission line purposes. The lands cannot be fenced and the First Nation has retained free access, use and benefit of the lands since the easement was granted.

28. The compensation paid by Manitoba Hydro was deposited in the First Nation's Capital Account on April 22, 1952.

29. A further benefit provided to the First Nation as a result of and in connection with the right of way was the extension of electric power service to residences and other facilities on the Reserve beginning in 1954.

## V. Relief (R 42(f))

30. The Crown seeks dismissal of the claim.

31. To the extent that the Crown may be found liable to pay compensation in this claim, the Crown seeks an offset pursuant to s.20(3) based on the value of compensation previously paid to the First Nation for use of the easement lands and the value of the land use rights, reversionary interest and access to hydro-electric power preserved and facilitated for the First Nation through the grant of easement.

32. The Crown seeks costs in these proceedings.

33. The Crown seeks such other relief as this Honourable Tribunal deems just.

**Communication (R. 42(g))**

The Respondent's address for service is:

jeff.echols@justice.gc.ca
Department of Justice
Suite 301, 310 Broadway
Winnipeg, MB R3C 0S6
Tel: (204) 984-7590
Fax: (204) 984-5967

Dated: February 14, 2013

Signature of Representative/Solicitor
William F. Pentney
Deputy Attorney General of Canada
Per: Jeff Echols
Suite 301, 310 Broadway
Winnipeg, MB R3C 0S6
Tel: (204) 984 -7590
Fax: (204) 984-5967
Solicitors for the Respondent