

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

TSLEIL-WAUTUTH NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
April 5, 2012	
Guillaume Phaneuf	
Ottawa, ON	1

Claimant

v.

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

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*.

April 5, 2012

Guillaume Phaneuf

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
As represented by the Minister of Aboriginal Affairs and Northern Development
Suite 600- 1138 Melville Street
Vancouver, BC V6E 4S3
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I. Claimant (R. 41(a))

1. The Claimant, TSLEIL-WAUTUTH NATION (“TWN”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, in the Province of British Columbia.

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

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister’s decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. TWN initially filed this claim with the Minister on or about June 8, 2000 in respect of breaches by Canada relating to the 1930’s expropriation of approximately 8.79 acres of land from Burrard Inlet Indian Reserve No. 3 (“IR#3”) for the purposes of what is now the Dollarton Highway (the “Highway”).
4. On June 27, 2000 TWN made further submissions to the Minister as result of additional documentation being located.
5. On April 23, 2007, Michel Roy, Assistance Deputy Minister, Claims and Indian Government, wrote to TWN stating that “Canada accepts for negotiation the Tseil Waututh Nation’s specific claim on the basis that the claim discloses an outstanding lawful obligation related to the taking of the road from Burrard Inlet IR 3 without payment of compensation for the land”.

6. Negotiations commenced as between the TWN and Canada but the parties have failed to settle the matter and therefore no part of the Dollarton Highway Specific Claim has been resolved. It has been more than three years since the Minister notified TWN in writing of the Minister's decision to negotiate the claim.

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

7. TWN does not seek compensation in excess of \$150 million for the purposes of the Dollarton Highway Specific Claim.

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

8. The following are the grounds for the specific claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:
 - (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;
 - (d) an illegal lease or disposition by the Crown of reserve lands;
 - (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority;

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

9. A portion of IR#3 was established by the Governor of the colony of British Columbia in September of 1869 and a public notice appeared in the November 27, 1869 Government Gazette establishing 111 acres as IR#3.
10. In 1877 the Joint Reserve Commission ("JRC") confirmed the original reserve and increased it by "forty chains" and in 1880 the survey of IR#3 stated that the

reserve was 275 acres. On June 30, 1916, the Royal Commission issued Minutes of Decision confirming all 275 acres of IR#3 that was allotted by the JRC in 1877.

Expropriation by the District of North Vancouver

11. In or about 1912, there was a taking of 4.65 acres of IR #3 by the District of North Vancouver for road purposes ("Apex Road") which was never constructed.

Expropriation by Province of British Columbia for Dollarton Highway (the "Highway")

12. The Province made application to Indian Commissioner Ditchburn ("Ditchburn") on October 18, 1930 for the right of way for the Highway. Ditchburn responded outlining all of the problems with the location of the Highway:

"the road will traverse cultivated land, the Indian village, as well as some unimproved although otherwise valuable land. It is also noted that the road would cut off some dwellings and the chicken-house of Chief George, who is an extensive chicken rancher.

So far as the road itself is concerned, I am given to understand that it will answer no useful purpose to the Indians but on the otherhand [sic] will be a detriment, as it will sever their holdings."

He further stated that if it was to proceed the proper course was to make application for the expropriation of the area required for the right-of-way pursuant to section 48 of the *Indian Act* and the matter of compensation could be settled between the district manager and Captain F.J.C. Ball who was the Indian Agent.

13. In a letter from Indian Agent Ball to Ditchburn dated November 11, 1931, he stated:

So much damage is caused in every case by severance. The road will leave a narrow strip between it and high water and on account of the grade, will leave a steep bank along most of the right-of-way, making it

difficult, if not impossible, to carry goods up and down. To people who have enjoyed quiet possession of their land and easy access to the water's edge, these road operations...most...and damaging."

14. On December 8, 1930 the Right of Way Agent wrote to the Chief Engineer providing a breakdown of the compensation to be paid for the improvements on IR#3 but nothing for the land stating "1/20th of the area of the Reserve has not been taken for highway purposes and there is, therefore, no claim in respect to land".
15. A formal application was submitted by Chief Engineer Philip on January 21, 1931 to the Department of Indian Affairs for the transfer of 8.79 acres to the Province stating compensation was being paid only for improvements. On the same day, Secretary MacKenzie wrote to Ditchburn requesting his recommendation and in reply he referred to the "agreement with the government of British Columbia dated 22nd March, 1929" as the source of the Province's power to take the 8.79 acres without payment of compensation. He did not relay any information regarding the detrimental impact of the Highway to the Secretary.
16. The Province was relying on the terms of the *Memorandum of Agreement arrived at between Dr. Duncan C. Scott and Mr. W.E. Ditchburn on Behalf of the Dominion Government, and Mr. Henry Cathcart and Mr. O.C. Bass on Behalf of the Provincial Government* which is dated March 22, 1929 and signed by each of the named representatives (the "Scott-Cathcart Agreement") which states that 1/20th of reserve lands could be resumed for the purpose of roads, utilities, etc. however, that "no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings". The Scott-Cathcart Agreement was approved and ratified by the Dominion on February 3, 1930 with the enactment of OIC PC 208 and by the Province on September 24, 1930 with the enactment of OIC 1151.

17. On April 30, 1931, the Department of Public works published a Notice in the provincial Gazette announcing the establishment of the Highway pursuant to six plans deposited in the Land Registry office however, there was no reference to Plan No. 2428 which was the portion of the Highway traversing through IR#3.
18. On May 8, 1931, Order-in-Council P.C. 1036 ("OIC 1036") was issued stating that the 8.79 acres taken by the Province for a road known as the Dollarton Highway was taken pursuant to the provisions of section 48 of the *Indian Act*.
19. Section 48 of the *Indian Act* R.S.C. 1927, c. 98 states that "no portion of any reserve shall be taken for the purpose of any...road...without the consent of the Governor in Council" and "[i]n any such case compensation shall be made therefor to the Indians of the band".
20. In 1964 it was discovered that a portion of the right-of-way overlapped with a portion of the District's right-of-way. Ultimately a new Plan No. 51546 was accepted as the definitive plan of the Highway as 7.73 acres substituting Plan No. 2428 for 8.79 acres and annotations on the documents were made to that effect.

Impact of the Highway on the TWN

21. The Highway was constructed right through the TWN's village site, near the waterfront, effectively dividing the residential area in half. Residents on the north side of the Highway were impeded in their access to the foreshore, while residents on the south side of the Highway were cut off from the Church.
22. In 1956, Indian Superintendent Anfield acknowledged in a letter to the District that "the danger to children [on the Reserve] from traffic on the Dollarton Highway is an ever present problem. The hazard posed by the Highway intensified as the traffic level increased with the development of the District".

23. In 1971, the TWN sought the relocation of the Highway due to the dangers it posed and the problem of redevelopment of their village. Instead plans were commenced to re-construct the Highway through the Reserve. Eventually an agreement was reached whereby the TWN granted 15 easements to the Corporation of the District of North Vancouver for a further 1.31 acres.

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

24. This claim is based on the Crown's breach of the *Indian Act* and of the Crown's fiduciary obligations at common law relating to the improper taking of IR#3 lands and the failure to obtain any compensation for the taking of IR#3 lands.

25. TWN seeks compensation from Canada for:

- a. the IR#3 lands that were taken for the Highway, including injurious affection to adjacent lands;
- b. damages for the failure to withhold consent to the Highway's location and to insist on an alternate site; and
- c. damages for the failure to impose terms and conditions requiring the implementation of protective measures to:
 - i. safeguard the Reserve residents from the hazards posed by the Highway; and
 - ii. ensure safe access to amenities cut-off by the Highway for the residents of the IR#3.

- d. the timber that was taken from IR#3 in order to build the Highway and future lost timber revenues.

Dated this 5th day of April, 2012



Signature of Solicitor

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