SCT File No.: SCT-7001-13

SPECIFIC CLAIMS TRIBUNAL

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FILED	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES May 6, 2013 Guillaume Phaneuf	DÉPOSÉ
Ottawa, ON		1

B E T W E E N:

HALALT FIRST NATION

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.*

May 6, 2013

Guillaume Phaneuf

(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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I. Claimant (R. 41(a))

1. The Claimant, Halalt First Nation ("Halalt") confirms that it is a First Nation within the meaning of s. 2 (a) of the *Specific Claims Tribunal Act* ("*SCTA*"), 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 *SCTA*, 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
>
> (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. On October 5, 1998 Halalt filed the E&N Railway Right-of-Way Specific Claim (the "Claim") with the Specific Claims Branch. On June 29, 2011, Canada notified Halalt of its decision not to negotiate the Claim in part.

4. Canada accepted negotiation of the Claim in respect of the amount of compensation received in relation to the 1885 expropriation, and a portion of the lands taken by the Company in 1912. Canada rejected the bulk of the claim for negotiation, including in respect of the following:

   a. That each of the 1885 and 1912 expropriations were not conducted in compliance with the expropriating legislation, and were therefore void *ab initio*;
   b. That Dominion Order-in-Council PC 1963-1411 is void and ineffective in legitimizing the expropriations because it attempts to do so retroactively without statutory authority;
   c. That Canada's actions in relation to PC 1963-1411 constituted equitable fraud and a breach of Canada's fiduciary obligations to Halalt;
   d. That Canada breached its fiduciary duty to Halalt when inadequate compensation was recovered for some of the lands expropriated in 1912;

e. That Canada breached its fiduciary duty to Halalt in allowing more lands than were required to be taken in 1912; and

f. That compensation was owing for lands injuriously affected by the takings.

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

5. Halalt does not seek compensation in excess of $150 million for the purposes of the Claim.

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

6. The following are the grounds for the Claim, as provided for in s. 14 of the *SCTA*:

> (*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; and
>
> (*f*) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

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

Background

7. Halalt Reserve No. 2 (the "Reserve") was confirmed as an Indian Reserve in the April 1877 Minutes of Decision of the Joint Commission on Indian Reserves in British Columbia.

8. On August 28, 1883, the Canada entered into an agreement with the Esquimalt and Nanaimo Railway Co. (the "Company") to construct a railway for south-eastern Vancouver Island (the "E&N Railway").

9. The Province enacted legislation specific to the E&N Railway titled the *Island Railway, Graving Dock and Railway Lands Act, 1884*, and section 17 of this legislation incorporated the *Consolidated Railway Act, 1879* by reference.

10. Canada passed a companion act on April 19, 1884. Section 2 of the federal act incorporated the Federal-Provincial agreement regarding the E&N Railway, and section 15 of the agreement said that the E&N Railway would be subject in every respect to the provincial *Island Railway, Graving Dock and Railway Lands Act.*

The 1885 Taking

11. Construction crews camped on the Reserve in March 1885, and began clearing the E&N Railway right-of-way before compensation was agreed upon and paid to Halalt. Band members refused to allow clearing through their potato patches.

12. On March 20, 1885 Indian Agent Lomas told Superintendent Powell that he had advised the Company to continue working outside of cultivated land, and that Lomas' opinion was that the timber alone on the Halalt reserve was worth more than the $10 per acre that the Company was offering as compensation.

13. On April 9, 1885, Superintendent Powell noted that compensation was a course "followed by the Company [the E&N] in respect of white settlers, and the Indians cannot understand the reason of delay in arranging with them." By April 24, 1885, E&N compensation had been settled with everyone except the Indians.

14. On May 8, 1885 Indian Agent Lomas advised that he had agreed to compensation for Halalt reserve lands at the rate of $80 per acre for 1.1 acres, $1 per acre for 4.2 acres, and $5 per acre for 9.88 acres, which was "good land, but heavily wooded".

15. Lomas did not consider the damage, losses and inconvenience sustained from Halalt's point of view (i.e. uses other than farming). Lomas did not compare the value of the Reserve lands to other lands taken for the E&N Railway, compare values with other recent sales or surrenders of reserve lands in the area, nor did he undertake to value the timber located on the right-of-way. Lomas' reduction in value for the alleged benefit of the construction is unsupportable in fact.

16. The majority of compensation was divided among band members who Lomas claimed had an interest in the lands taken, not applied for the benefit of the band.

17. A railway crossing or access agreement was not established as was contemplated for other land owners under the 1883 *Act to Further Amend the Consolidated Railway Act, 1879*, impeding Halalt's use and enjoyment of part of the Reserve.

18. On September 23, 1885, Indian Agent Lomas wrote to the Company regarding its digging of an unauthorized channel through the Reserve that altered the course of the Chemainus River. The construction was undertaken to protect the E&N Railway, and flooded parts of the Reserve. The Chemainus River has not been restored to its former state.

19. Lomas identified three or four families that would sustain considerable loss caused by the diversion and subsequent taking of reserve lands, but only one Indian was compensated for improvements. No compensation was paid to the band for the ongoing damage to the Reserve caused by the channel.

20. A description of the powers to be exercised and Reserve land to be taken by the diversion of the Chemainus River was not provided in a plan or Book of Reference. Notice was not provided to Halalt, Canada, or the public. Compensation was not agreed upon prior to the diversion of the Chemainus River.

21. Plans of the E&N right-of-way on the Reserve were not registered with the federal or provincial governments until 1960. A Book of Reference was not

certified and deposited with the Clerks of the Peace in the districts or counties where the lands were located, prior to construction of the railway, or ever.

22. Consent was not granted for the 1885 takings, and fee simple title to the 1885 right-of-way did not transfer to the Company until the passage of Dominion Order-in-Council 1963-1411.

23. The transfer of an interest lesser than fee simple title was possible under the *Consolidated Railway Act, 1879*.

24. The Governor-in-Council never consented to the taking of or damage to lands caused by the diversion of the Chemainus River for the benefit of the Company.

The 1912 Taking

25. In November of 1911, the Superintendent of the E&N Railway made an application to acquire "some right of way" to 5.2 acres across the Reserve for the construction of the railway line to Crofton: the land applied for represented a fork in the track (the "Wye", or the "Crofton Spur") and the area within the fork.

26. Sometime between November 27 and December 18, then again on December 28, 1912 the Department of Indian Affairs requested that the Railway Commission certify that the land was necessary for the purposes of the Railway, rather than asking the Railway Commission to consider whether the land within the Wye was in fact necessary.

27. A plan of the branch line to Crofton was certified as necessary by the Board of Railway Commissioners on January 4, 1912, "as requested in [McClean's] letter".

28. On January 9, 1912 the railway's solicitor requested that the Company purchase only 2.29 acres of the Reserve (only the right-of-way, not the wye). On January 20, 1912 the Department accepted a $1000 deposit for the 2.29 acres in advance

of a final determination of compensation, "in order that construction work may be proceeded with".

29. On January 11, 1912, the Department of Indian Affairs gave permission to the Company to enter the lands and begin construction.

30. On January 16, 1912, Superintendent McLean explained to Indian Agent Robertson that Halalt should get at least $350 per acre taken up by the E&N Railway, and should get an additional amount due to the severing effect of the Wye. An internal Indian Affairs document dated January 31, 1912 clearly stated that the land to be taken was valued at $350 per acre, and Indian improvements would need to be compensated in addition to the base amount.

31. On February 12, 1912 Indian Agent Robertson reported that he had valued unimproved Reserve land at $250 per acre. He further observed that the Indians objected to more land being taken than was necessary for the right-of-way, and that Halalt would require a railway crossing through the Wye in any event.

32. On February 20, the Company sought permission to establish a camp of workers on the Reserve. Compensation was not agreed upon until March 14 nor paid until March 28, 1912. Consent of the Governor in Council was not obtained until April 27, 1912 by way of Dominion Order in Council 279. Letters Patent No 16740 were issued October 1, 1912.

33. Canada allowed the entire taking, without requiring a railway crossing. Compensation was not offered for the land that was severed.

34. Order in Council 279, the Letters Patent, and compensation monies paid were for a different amount of land than was actually taken by the railway. The railway occupied 5.47 acres of land, rather than the 5.2 acres of land granted.

35. On August 4, 1922 the Department of Indian Affairs notified the Canadian Pacific Railway Company (the "CPR") that the Crofton Spur occupied more land than

was applied for and granted in 1912. The CPR denied occupying more of the Reserve than they were entitled to: the issue was left unresolved for forty years.

36. In April 1956, the Department of Indian Affairs authorized a re-survey of the E&N rights-of-way through the Reserve.

37. In November 1957 Indian Affairs observed that no definite action had been taken to transfer title in favour of the CPR, and that Indian Affairs required that a survey be completed prior to completing the transaction.

38. By May 1959, Indian Affairs had confirmation that the E&N Railway occupied a much wider strip of land than what had been authorized. Rather than insist of further compensation, the Department advised the CPR that because title had never been registered, 'the most convenient procedure by which the railway can be granted the area it desires would be for the railway to quit-claim its existing patent to the Crown and be granted a new patent according to the subject plan".

39. Halalt was not told about the discrepancy and did not receive any compensation for the additional .27 acre that had been taken by the E&N Railway.

PC 1963-1411

40. On February 27, 1961 Superintendant Bethune told the Indian Commissioner to ask the Halalt if they would agree to the re-patent of lands and to tell them that "no land is involved other than land which has been made long ago". Bethune was well aware that the letters patent to be issued for different Reserve lands than had been granted under patent no. 16740.

41. The Department of Indian Affairs understood that it required consent from Indian Bands prior to transferring title pursuant to section 35 of the Indian Act.

42. The Band Council Resolution was drafted by Indian Affairs. On March 27, 1961 the Halalt Band Council adopted the Band Council Resolution approving the transfer of title of the E&N Railroad right-of- way through the Reserve.

43. Halalt was not made aware of the requirements of the expropriation legislation, of Canada's failures to ensure that the requirements of expropriating legislation had been complied with, of the common law regarding the conditions under which expropriations had been found to be void, of the difference in location and amount of lands proposed then actually taken for the Wye, of Canada's ability to refuse to consent to the transfer of fee simple to the right-of-way, or of Canada's ability to transfer an interest less than fee simple. In short, Canada did not explain the legal consequences of its failure to comply with the relevant statutes.

44. On September 26, 1964 federal consent for the 1885 and 1912 expropriations came in the form of PC1963-1411.

IV. COMPENSATION SOUGHT

45. The expropriations of the Reserve lands were *void ab initio*, as they were done without compliance with the expropriating legislation, including but not limited to, securing the consent of the Governor in Council prior to, or concurrent with the taking. The expropriations were in breach of the Crown's fiduciary duty to Halalt.

46. In light of the foregoing, Halalt seeks compensation from Canada for:

    a. Damages equal to the current unimproved market value of the lands that were taken without legal authority;
    b. Damages equal to the value of Halalt's loss of use of its lands;
    c. Damages for breach of fiduciary duty;

d. Damages for injurious affection;

e. Interest; and

f. Such further and other relief as this Honourable Tribunal thinks just.

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

47. This claim is based upon equitable fraud, as well as the Crown's breach of:

a. Statute, including

i. the *Indian Act* 1880, *Indian Act* 1906 and *Indian Act* 1952;

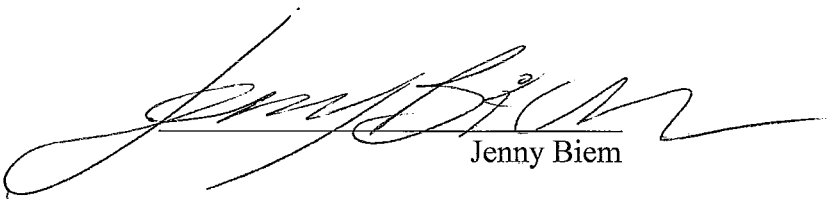
ii. the *Consolidated Railway Act* 1879, or alternatively the *Government Railways Act* 1881;

b. Fiduciary obligations relating to the taking of Reserve lands in general;

c. Fiduciary obligations regarding the passage of PC 1963-1411 in particular; and

d. In the alternative, fiduciary obligations to obtain adequate compensation for the taking of the Reserve lands.

Dated this 6 day of May, 2013.



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