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SPECIFIC CLAIMS TRIBUNAL

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January 14, 2015

Nicholas Young

Ottawa, ON | 48

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

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

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

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

TO: HALALT FIRST NATION

As represented by Jenny Biem of
Woodward & Co. Lawyers LLP
844 Courtney Street, Second Floor
Victoria, BC V8W 1C4

Email: jenny@woodwardandcompany.com

I. Status of Claim (Rule 42(a))

1. The Claimant, Halalt First Nation ("Halalt"), submitted a claim to the Minister of Indian Affairs and Northern Development Canada ("Minister") on or about October 9, 1998 ("Original Specific Claim") alleging, among other things, that the federal Crown breached its fiduciary obligations to the Halalt in respect of two takings of land from Halalt Indian Reserve No. 2 ("I.R. No. 2") in 1885 and in 1912 for the construction of a railway ("Railway").

2. By letter dated June 29, 2011, the Minister accepted the Original Specific Claim, in part, for negotiation on a without prejudice basis.

3. The Original Specific Claim has not been resolved.

II. (a) Validity (Rule 42(b) and (c))

4. Canada, solely based on and limited to the facts in the within proceeding and pursuant to the *Specific Claims Tribunal Act* ("*Act*"), section 31, admits the validity of the Halalt claim set out in the Further Amended Declaration of Claim dated ~~May 6, 2013~~ ~~March 31, 2014~~ December 15, 2014 ("Further Amended Declaration"), only in so far as it is based on the ground set out in the Further Amended Declaration, paragraph 6(e) and ~~59(d)~~ 64(e), that Canada:

    i. failed to provide adequate compensation for 10.95 acres of I.R. No. 2 lands taken under legal authority in 1885; and

    ii. failed to provide compensate for an additional .27 acres of IR No. 2 lands taken under legal authority in 1912.

5. Her Majesty the Queen in the Right of Canada ("Canada") denies the validity of the claims based on all other grounds in the Further Amended Declaration, including but not limited to paragraphs 6, ~~45, 46, and 47,~~ ~~57, 58, 59(a) (c)~~ 62, 63, 64(a)-(e) and 65, and in particular, denies:

    a. that the 1885 and 1912 expropriations were void *ab initio*;
    b. subject to the admission in paragraph 4 above, that the manner in which the 1885 and 1912 takings was carried out was unlawful and

in breach of statutory requirements; ~~and~~

c. any breach of a legal obligation based on equitable fraud in respect of either the 1885 or 1912 taking; and

d. any breach of fiduciary obligation in relation to the "Crofton Spur Land", as defined in paragraph 49 of the Further Amended Declaration.

(b) Basis for the Tribunal to Award Compensation (Rule 42(c))

6. Compensation for those breaches outlined in paragraph 4 above would be determined in accordance with paragraph 20(1)(e) of the *Act*.

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

7. Canada admits the facts in the Further Amended Declaration, paragraphs 1, 2, 3, 9, 11, 12, 13, 16, ~~22~~, 25, 26, 28, 32, 35, ~~29,~~ 36, 38, 39, ~~34,~~ 41, ~~36,~~ 42, 43,~~37~~ ~~44~~, 47, ~~and~~ 48, 49 and ~~42~~, ~~52~~.

8. In reply to paragraph 4, Canada admits that the Minister accepted the Specific Claim, in part, by letter dated June 29, 2011 ("Acceptance Letter"). Beyond this fact the contents of the Acceptance Letter are irrelevant and privileged.

9. Canada has no knowledge of the facts set out in paragraph 5.

10. In reply to paragraph 7, Canada admits that a January 18, 1877 Minute of Decision of the Joint Commission on Indian Reserves ("JIRC") in British Columbia ("Province") purported to establish Halalt I.R. No. 2. The Minutes confirm that 100 acres of IR No. 2 was an existing pre-Confederation reserve ("Pre-Confederation Reserve").

11. Canada admits the facts in paragraph 8 only to the extent that on August 20, 1883 Canada and various named individuals ("Contractors") made and entered into articles of agreement ("Agreement"). The Agreement was in respect of the construction of a railway ("Railway") from Esquimalt to Nanaimo. Under the

Agreement, the Contractors agreed to be incorporated under the name, Esquimalt and Nanaimo Railway Company ("Company").

12. In response to paragraph 10, Canada ~~denies the facts in paragraph 10 and further~~ says, on April 19, 1884, Parliament assented to an *Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion* (referred to as the "*Settlement Act, 1884*"). The Agreement was appended as a schedule to the *Settlement Act*. Section 2 of the *Settlement Act* approved and ratified the Agreement and authorized the Governor in Council to carry out the provisions of the Agreement. Further, the Agreement, section 15, provided that the land grants made by Canada for the purpose of constructing the Railway:

> shall be subject in every respect to the several clauses, provisions and stipulations referring to or affecting the same, respectively, contained in the aforesaid Act passed by the Legislature of the Province of British Columbia, in the year 1883, entitled "*An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province*".

~~13. Canada has no knowledge of the facts set out in paragraph 13.~~

13. Canada admits the facts set out in paragraph 14 but says the facts are contained in a letter dated May 18, 1885.

14. Canada has no knowledge of the facts set out in paragraphs 15 and 17 and further says that these paragraphs are argument.

15. Canada admits the facts set out in paragraph 18 only to the extent that by letter dated September 23, 1885, Indian Agent Lomas wrote to ~~the~~ Joseph Hunter, Company, Chief Engineer regarding a channel being cut through the Halalt Indian Reserve to alter the course of the Chemainus River. By letter dated October 3, 1855, ~~the Company, Chief Engineer~~ Mr. Hunter wrote to Indian Agent Lomas stating that the diversion of the Chemainus River was to protect the Railway and would save reserve land from being washed away. Canada has no knowledge of the last ~~two~~ sentence~~s~~ in paragraph 18.

16. Canada admits the facts set out in paragraph 19 only to the extent that by letter dated September 23, 1885 Indian Agent Lomas wrote to BC Superintendent I.R. Powell and stated, "should the whole course of the river be changed a portion of the Reserve may be benefitted but in the meantime three or four families will sustain considerable loss". Canada further says that one individual band member was paid to assist in the removal of "houses and fences". Canada has no knowledge of any ongoing damage to IR No. 2

17. Canada has no knowledge of the facts set out in paragraph~~s~~ 20 ~~and 21~~.

18. Canada has no knowledge of the facts set out in paragraph 21 and further says that the Department took steps to obtain plans for the right-of-way from the Railway in April of 1885.

19. Canada admits the facts set out in paragraph 22 only to the extent that consent was not required for the taking of IR No. 2 lands in 1885 but denies the remainder of this paragraph.

20. Canada has no knowledge of the facts in paragraph~~s~~ 23 ~~24, 26 and 28~~ and further says that paragraph 23 is argument.

21. Canada admits to the facts in paragraph 24 only to the extent that GIC did not consent to the 1885 taking. Canada has no knowledge of any damage to lands caused by the diversion of the Chemainus River.

22. Canada has no knowledge of the facts in paragraph 27, 29, 30, and 31. ~~and 33~~.

23. In response to paragraph 33, Canada admits that in November of 1911, the Department of Indian Affairs requested that the Board of Railway Commissioners certify that the land was necessary for the purpose of the Railway. The remainder of paragraph 33 is argument.

24. Canada admits the facts set out in paragraph ~~27~~ 34 only to the extent that the Board of Railway Commissioners certified the "required" Railway branch line. Their certification appears to have been erroneously dated January 5, 1911. ~~Canada has no knowledge of the remainder of paragraph 27.~~

25. Canada admits the facts set out in paragraph ~~30~~ 37 but says that the $350 per acre was only a preliminary valuation of the land ~~denies the remainder of the facts in paragraph 30~~.

~~26. Canada has no knowledge of the facts set out in paragraph 31 and further says, by letter dated March 14, 1912, Canada advised the Company that IR No. 2 land was valued at $250 per acre~~.

~~27. Canada admits the facts set out in paragraph 32 only to the extent that on April 27, 1912, Dominion Order in Council 279 ("OIC 279") approved the granting of 5.2 acres of land to the Company and Dominion Letters No. 16740 were issued on October 1, 1912. Canada has no knowledge of the remainder of the facts in paragraph 32~~.

26. Canada has no knowledge of the facts set out in paragraph ~~33~~ 40 ~~and 35~~.

27. Canada admits the facts in paragraph ~~38~~ ~~45~~ 44 only to the extent that by letter dated May 25, 1959, Indian Affairs Branch was notified by the Surveyor General that the Company wished to acquire more land upon which it presently occupied. Further, by letter dated September ~~14~~6, 1959, Chief, Reserves & Trusts, Department of Indian Affairs wrote to the Company and stated:

> It has been suggested that perhaps the most convenient procedure by which the Railway could be granted the desired area would be for the present survey to cover the entire rights in the reserve and following approval, the Company would be granted letters patent for this. It is of course understood that the Company would be required to re-convey to us the area previously granted by letters patent 16740, and to pay for any additional land utilized over and above that previously agreed upon.

28. Canada admits the facts set out in paragraph ~~39~~ ~~46~~ 45 only to the extent that Canada did not obtain compensation for the additional .27 acre of land.

29. Canada has no knowledge of the facts set out in paragraph ~~47~~ 46.

30. Canada has no knowledge of the facts set out in paragraphs 50 - 53, other than that on May 18, 1993 a researcher wrote to Canada requesting information on the status of the "Crofton spur section of the E&N Railway", and on July 13, 1993 Canada responded that no transfer of these lands to Halalt had occurred.

31. Canada admits the facts set out in the first sentence of paragraph ~~490~~ 54~~.~~ ~~only to the extent that by letter dated February 27, 1961 Superintendent Bethune wrote to the A/Indian Commissioner stating that the Company was being asked to re-convey the 5.2 acre right-of-way purchased in 1912 in exchange for letters Patent for the entire area of right-of-way. Superintendent Bethune requested that this matter be referred to the Cowichan, Chemainus and Halalt Bands with a request to approve transfer of the right-of-way to the Company.~~ Canada has no knowledge of the remainder of the facts set out in paragraph ~~490~~ 54.

32. Canada admits the facts set out in the first sentence of paragraph ~~50~~ 55. In response to the last sentence, Canada says that efforts were made to have the Company attend to maintenance of railway crossings.

33. Canada has no knowledge of the facts set out in the first sentence of paragraph ~~51~~ 56, and says that the second and third sentences are argument.

34. In response to ~~Canada denies the facts set out in~~ paragraph 57 ~~52 41 and further~~ Canada says that ~~consent from Halalt was not required pursuant to~~ section 35 of the *Indian Act*, RSC 1952, c. 149, only required the consent of the Governor-in Council. Canada further says that it obtained an executed Band Council Resolution from Halalt with its consent to transfer title.

35. Canada admits the facts set out in first sentence of paragraph ~~53 42~~ 58. ~~only to the extent that by Band Council Resolution dated March 27, 1961, Halalt Indian Band approved the transfer of title of a right-of-way purchased by the Company, "in the 1880's and 1912" as indicated on Lands and Survey Records Plan 50185 ("Plan 50185").~~ ~~Canada has no knowledge of the remainder of the facts set out in paragraph 53 42~~. In response to the remainder of paragraph 58, an executed version of the Band Council Resolution is filed in the Indian Land System.

36. Canada ~~has no knowledge of~~ denies the facts set out in paragraph 59 ~~54 43~~ and further says that paragraph 59 ~~54 43~~ is argument.

37. In response to paragraph ~~55 44~~ 60, Canada admits that by Dominion Order in Council PC 1963-1411 ("OIC 1963-1411") dated September 26, 1963 the Governor General in Council consented to the transfer of right-of-way indicated on Plan 50185.

38. In response to paragraph ~~56~~ 61, Canada says that PC1963-1411 sets apart the W~~w~~ye, as defined in paragraph 32 of the Further Amended Declaration of Claim, and the triangle of land within the W~~w~~ye, totalling 5.2 acres, as an addition to IR No.2 and authorizes the issuance of letters patent to the Company.

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

Halalt Indian Reserve No. 2 and Allotment of Reserves Generally

39. In or about 1867, the original 100 acres of "Al-Halt Indian Reserve" was gazetted by colonial authorities ("Pre-Confederation Reserve").

40. On July 20, 1871, the Province joined Confederation.

41. Following the Province's entry into Confederation, and pursuant to Article 13 of the Terms of Union, Indian reserve commissions were established to allot Indian

reserves in British Columbia. The first commission was the JIRC established in 1876.

42. By JIRC Minute of Decision dated January 18, 1877, an additional 187 acres of provincial Crown land was allotted in addition to the Pre-Confederation Reserve. IR No. 2 as these lands came to be known, was surveyed later that year at 287 acres.

43. The additional acreage allotted by the JIRC in 1877 was not transferred to Canada as reserve land until 1938. Pursuant to British Columbia Order in Council 1036 dated July 29, 1938, the Province transferred administration and control of provisionally approved reserve lands, including the additional provincial Crown lands allotted to IR No. 2 in 1877, to Canada.

The 1885 Right-of-Way

44. Pursuant to the Settlement Act, 1884, a large portion of south-eastern Vancouver Island, including the Halalt area, was set aside for the construction of the Railway.

45. In or about March of 1885, the Company began construction of the Railway through IR No. 2. At that time, the Company offered the sum of ten dollars per acre for the right-of-way ("1885 Right-of Way") through timber lands on IR No. 2.

46. The 1885 Right-of-Way passed through both the 100 acre Pre-Confederation Reserve and the additional provincial Crown lands allotted in 1877. Plan RR1136 indicates that the 1885 Right-of -Way occupied 10.95 acres.

47. In or about May of 1885, Canada acknowledged receipt of plans of the location of the Railway and $176.45 in compensation for the 1885 Right-of-Way.

48. By letter dated May 18, 1885, Indian Agent Lomas accounted for the lower value assigned to the "heavily wooded" land on the 1885 Right-of-Way: "[t]he [acreage] valued at $5.00 per acre was good land but heavily wooded and a higher price would have been asked had it not been for the fact that this Reserve will be very much benefitted by a ditch which the Railway contractors have to make".

49. In the same May 18, 1885 letter, Agent Lomas suggested that of the $176.45 received, $143.00 be paid to individual Halalt members for improvements damaged by construction of the Railway and the remaining $53.45 be expended for the benefit of the Halalt Band. Trust account records indicate that $53.45 was distributed for payment of the purchase of 3,563 lbs. of seed potatoes on April 20, 1886.

50. In or about September 1885, the Company cut a channel through IR No. 2 to divert the Chemainus River in order to protect the Railway. Canada requested compensation from the Company in the amount of $100 for damage caused by the diversion.

The 1912 Right-of-Way

51. In November of 1911, the Company requested 5.2 acres of additional right-of-way across IR No. 2 for the construction of an additional Railway line to Crofton ("1912 Right-of-Way"). The 1912 Right-of-Way was located on the additional provincial Crown lands allotted to I.R. No. 2 in 1877 less approximately .1 of an acre, which is located on the Pre-Confederation Reserve.

52. On January 5, 1912 the Board of Railway Commissioners certified Plan 1136A showing an additional Railway line through IR No. 2. Subsequently, Canada preliminarily valued the IR No. 2 land required for the additional Railway line at $350 an acre.

53. In February 1912, in light of objections raised by Halalt, Canada corresponded with the Company as to the necessity of taking land from within the W~~w~~ye, in

addition to land required for the right-of-way itself. The Company pointed out that the land within the Wwye was required for an engine shed and station site and that, in any event, the severed land would be of little use to Halalt.

54. In March of 1912, Canada permitted the Company to enter IR No.2 for the purpose of constructing the additional Railway line and requested $250 per acre for a total of $1323.45 to be paid in compensation.

55. By OIC 279 dated April 27, 1912, Canada approved the granting of 5.2 acres of IR No. 2 for the additional Railway line and Letters Patent 16740 conveyed the 5.2 acres to the Company.

56. By letter dated November 26, 1914, Indian Agent Robertson wrote to Department of Indian Affairs Secretary McLean advising that the Halalt Band requested that out of the $1323.45 paid by the Company, for the additional Railway line, $650 be paid to Halalt "pro rata". On December 9, 1914, $650 was transmitted to Indian Agent Robertson from Department of Indian Affairs Secretary McLean to be distributed at an "even per capita rate" to the Halalt members.

57. In 1943, the Dominion Schedule of Indian Reserves lists the 1885 Right-of-Way taking of IR No. 2 as amounting to 10.95 acres although the transfer of title was listed as pending and the 1912 Right-of-Way taking of IR No. 2 as amounting to 5.2 acres (a combined total of 16.15 acres).

58. In 1958, a survey was conducted of the 1885 Right-of-Way and 1912 Right-of-Way through I.R. No. 2 ("Plan 50185"). Plan 50185 indicated that the total acreage for the IR No. 2 lands taken in 1888 and 1912 was 16.42 acres.

59. Subsequently, it was found that the railway Wwye branching from the main railway line, resulting from the 1912 Right-of-Way taking, occupied .27 acres more than was included in the 1912 Right-of-Way.

60. On March 27, 1961, a Halalt Band Council Resolution approved the transfer of title of the 16.42 acre right-of-way through IR No. 2, as indicated on Plan 50185, and under the provisions of section 35 of the Indian Act.

61. By Dominion Order in Council PC 1963-1411 dated October 7, 1963, Canada consented to the issue of letters patent granting 16.42 acres of IR No. 2 to the Company. Canada sought no compensation for the additional .27 acres occupied by the ~~railway~~ W~~w~~ye created by the 1912 Right-of-Way.

62. In early 2006, legal title to the Crofton Spur Land was transferred to the Island Corridor Foundation ("Foundation"). The Foundation is a non-profit society incorporated in 2003 as a partnership between Vancouver Island First Nations along the Railway corridor, including Halalt, and area local governments. Halalt is represented on the Board of Directors of the Foundation.

63. At present, the Foundation is the registered owner in fee simple of both the Railway mainline and the Crofton Spur Land.

V. Relief (R. 42(f))

64. Canada seeks the dismissal of all claims set out in the Further Amended Declaration except for those outlined in paragraph 4 above, namely that Canada:

    i. failed to provide adequate compensation for 10.95 acres of I.R. No. 2 lands taken under legal authority in 1885 and;

    ii. failed to compensate for an additional .27 acres of IR No. 2 land taken under legal authority in 1912.

65. If Canada is liable for any of the grounds set out in the Further Amended Declaration, which is not admitted, then Canada asserts that the Tribunal shall deduct from the amount of any compensation calculated under paragraph 20(1) of the *Act* the value of any compensation already received by Halalt in respect of the 1885 Taking or 1912 Taking as set out in paragraph 20(3) of the *Act*.

VI. Communication (R. 42(g))

Respondent's address for service:	Department of Justice Canada 900-840 Howe Street Vancouver, BC V6Z 2S9 Attention: Judith Hoffman
Fax number for service:	(604) 666.2710
Email address for service:	judith.hoffman@justice.gc.ca

Original Response dated: July 3, 2013

Amended Response dated: April 2, 2014

Further Amended Response dated: January 14, 2015

Signature of lawyer for Respondent
William F. Pentney, Q.C.
Deputy Attorney General of Canada
FOR **Per: Judith Hoffman**
Department of Justice
British Columbia Regional Office