

F I L E D	SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES April 27, 2016 Stephanie Duffy	D É P O S É
	Ottawa, ON	

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SKUPPPAH INDIAN BAND

Claimant

v.

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

Respondent

AMENDED 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*.

Date Originally Filed: November 1, 2013

Date Amended: April 27, 2016

(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building
234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
Fax number: (613) 954-1920

I. Claimant (R. 41(a))

1. The Claimant, the Skuppah Indian Band (the “Band”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (“Act”).

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent, as set out in s. 16(1) of the 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

(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. In or about 1991 or 1992 the Band filed a specific claim relating to the taking of lands from Inklyuhkinatko IR No. 2 (“Inklyuhkinatko IR 2”) and Skuppah IR No. 4 (“Skuppah IR 4”) for a right of way for the Canadian Pacific Railway (the “Claim”) with the Specific Claims Branch West (“SCBW”). The Claim made reference to a paper entitled *Canadian Pacific Excessive Right of Way: The Dispute and Settlement with the Department of the Interior* that had been submitted by the Nlaka’pamux Nation Tribal Council (“NNTC”) to the Office of Native Claims (which later became SCBW) in June of 1990.
4. In 1993 the SCBW completed a review of the Claim.
5. In 1995 the Band submitted to SCBW additional legal arguments relating to the Claim.
6. The Claim was deemed filed with the Minister of Indian and Northern Affairs Canada (the “Minister”) on October 16, 2008.

7. In May 2009 the Band filed additional legal arguments.
8. On August 19, 2011 the Minister advised the Band that it accepted only the allegations in the Claim relating to Canada's failure to pay the Band adequate compensation in a timely manner for lands taken and damages suffered. The Minister rejected all of the other allegations in the Claim.

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

9. For the purposes of the Claim, the Band does not seek compensation in excess of \$150 million.

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

10. The following are the grounds for the Claim, as provided for in s. 14 of the 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; and,

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))

Inklyuhkinatko IR 2 and Skuppah IR 4

11. The Band is part of the Nlaka'pamux Nation, who traditionally used and occupied land traversed by the Fraser, Thompson, Nicola and Skagit Rivers in south-central British Columbia and northern Washington State.

12. Prior to and at 1870 the Band had a village site and fishing spots approximately five miles below Lytton, in the Fraser Canyon.
13. At 1870, the lands occupied by the Band on the banks of the Fraser River were used for a variety of purposes including hunting, fishing, harvesting, and mining. The Band also used the flat land for ranching and agriculture.
14. In 1870, the Colonial Government plotted and surveyed a 58-acre reserve for the Band on the left (east) bank of the Fraser River, at the Waggon Road, at the location of what is now Skuppah IR 4.

14.1 British Columbia joined Confederation pursuant to the *Terms of Union, 1871*, by which Canada assumed under Article 13 the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit".

15. On June 18, 1878 Indian Reserve Commissioner G. M. Sproat ("Sproat") confirmed the allotment of Skuppah IR 4.
16. At this time Sproat also allotted the Band Inklyuhkinatko IR 2, which is located approximately one mile north of Skuppah IR 4. Inklyuhkinatko IR 2 included and was bounded on the north by Sawmill creek, and was traversed on the south by In Kly-uk-Kinatko creek.
17. Inklyuhkinatko IR 2 and Skuppah IR 4 are in the Yale District. Sproat's decisions regarding these reserve allotments were final.
18. Skuppah IR 4, which is situated at the location of the Band's old village site, extends high above the Fraser River. The majority of the area is steep, treed land. But there are also terraces or flats on the west side of the reserve, which are separated from the Fraser River below by a steep cliff. Skuppah creek runs through the reserve, close to the northern boundary. There is a trail through the southern end of Skuppah IR 4 that leads to the Band's dipnet fishing site, which is located a quarter mile south of the reserve.

19. Inklyuhkinatko IR 2 consists of steep, sparsely treed areas, with two narrow benches or flats suitable for cultivation. One bench is located at the southeast end of the reserve and was used by the Band for growing hay and vegetables. The other bench is located at the northwest end of the reserve and was used by the Band for agriculture, mining, and grazing animals. Four of the Band's gillnet fishing sites are located along the shoreline of Inklyuhkinatko IR 2.
20. W. S. Jemmett ("Jemmett") surveyed Inklyuhkinatko IR 2 and Skuppah IR 4 in 1885. Inklyuhkinatko IR 2 was surveyed as comprising 169 acres. Skuppah IR 4 was surveyed as comprising 59 acres.
21. Jemmett's 1885 survey shows a railway track cutting through the lengths of both reserves.

The Building of the Canadian Pacific Railway

22. During the late 1870s and early 1880s, the Dominion and provincial governments were taking a number of steps to further the completion of a transcontinental railway, the Canadian Pacific Railway ("CPR"), linking British Columbia with the rest of Canada, as was provided for in Article 11 of the *Terms of Union, 1871*.
23. In particular, in May 1880 (through the operation of *An Act to authorize the grant to certain Public Lands on the Mainland of British Columbia to the government of the Dominion of Canada for Canadian Pacific Railway Purposes*, S.B.C. 1880, c. 11) the Railway Belt, a strip of land twenty miles on either side of the proposed CPR track, was conveyed to the Dominion government to aid in the building of the CPR railway line.
24. Inklyuhkinatko IR 2 and Skuppah IR 4 are located within the Railway Belt. In the early 1880s the CPR track was constructed through these reserves.

25. Plan 33117 showing land required for the CPR right of way ("Plan 33117") was prepared in 1884, and registered on behalf of the Minister of Railways and Canals in July 1885.
26. Plan 33117 showed the area of right of way through Inklyuhkinatko IR 2 as being 60 acres, and the area of right of way through Skuppah IR 4 as being 17 acres. The right of way therefore took up just over a third of the land in Inklyuhkinatko IR 2, and just under a third of the land in Skuppah IR 4. The right of way through Inklyuhkinatko IR 2 varied in width from approximately 600 feet to approximately 800 feet. The right of way through Skuppah IR 4 was approximately 600 feet in width.

Determining the Value of Land Taken by the Canadian Pacific Railway

27. On March 11, 1890 A. P. Bradley, the Secretary of the Department of Railways and Canals ("DRC"), submitted to the Deputy Superintendent-General of the Department of Indian Affairs ("DIA"), L. Vankoughnet ("Vankoughnet"), valuations for lands taken by the CPR from Indian Reserves in British Columbia, including valuations for the land taken from Inklyuhkinatko IR 2 and Skuppah IR 4. The valuation for the 17 acres taken from Skuppah IR 4 was \$17; and the 60 acres taken from Inklyuhkinatko IR 2 was \$60 (i.e. \$1 per acre).
28. On September 11, 1890, Indian Agent MacKay ("MacKay") submitted the valuations to A. W. Vowell, Indian Superintendent ("Vowell"). The schedule of valuation again noted that the 17 acres taken from Skuppah IR 4 was valued at \$17, and the 60 acres taken from Inklyuhkinatko IR 2 was valued at \$60.
29. On July 28, 1891 Vowell accepted the valuations for the CPR right of way and requested that payment be made.
30. On August 20, 1891 the Acting Minister of DRC wrote to the Clerk of the Privy Council regarding certain Indian Reserve Lands that were traversed by the CPR, including Inklyuhkinatko IR 2 and Skuppah IR 4. He indicated that a valuation

for such lands had been “arrived at based on valuations of similar lands” and that such valuations had been accepted by DIA. He recommended that authority be given for the purchase of the lands in question, and that the lands be transferred to DRC in order to be transferred to the CPR.

31. On August 25, 1891, Order in Council P.C. 2006 authorized the transfer of 60 acres in Inklyuhkinatko IR 2 and 17 acres in Skuppah IR 4 (as well as land from nine other reserves) from DIA to DRC upon payment of compensation. DRC would then transfer the lands to the CPR.
32. On January 13, 1892 DIA paid \$77 into the Band’s trust account.

Early 1900s: Resurveying the CPR Right of Way, Complaints about Excessive Width, Testimony to Royal Commission on Indian Affairs, and Issuance of Letters Patent

33. Because Plan 33117 was inadequate to accurately define the lands to be conveyed to the CPR, the right of way was resurveyed in 1904 by James F. Garden (Plan 11195/287/RR2006) (the “Garden Plan”).
34. The Garden Plan, which was registered in 1905, showed the right of way required through Inklyuhkinatko IR 2 as being 58.72 acres (later corrected to 53.52 acres), and the right of way required through Skuppah IR 4 as being 18.35 acres.
35. In the early 1900s, settlers and residents along the CPR track began complaining to the Department of the Interior about the width of the right of way through their land, as the CPR was claiming an average of 400 feet.
36. The Department of the Interior began investigations into whether the CPR had taken an excessive right of way, and also initiated negotiations with the CPR on behalf of the settlers. DIA, however, did not take any action to examine or investigate the CPR right of way through Inklyuhkinatko IR 2 or Skuppah IR 4.

37. Order in Council P.C. 953 dated April 19, 1912 authorized the conveyance of rights of way through Indian Reserves between Kanaka Bar and Lytton, including 58.72 acres through Inklyuhkinatko IR 2 and 18.35 acres through Skuppah IR 4.
38. On October 12, 1911, Canada issued Letters Patent to the CPR for a right of way containing 58.72 acres through IR 2. On July 5, 1912, Canada issued Letters Patent to the CPR for a right of way containing 18.35 acres through IR 4.
39. On November 16, 1914, members of the Band testified before the Royal Commission on Indian Affairs that there was insufficient land and water on Skuppah IR 4. Members also testified about fires that had been started near the CPR railway track and that had burned the trees on Skuppah IR 4. With regard to Inklyuhkinatko IR 2 members of the Band testified that the CPR had killed livestock and not properly compensated Band members for their loss.
40. On April 10 and 12, 1928, Canada re-issued the Letters Patent. The revised Letters Patent for Inklyuhkinatko IR 2 conveyed the actual right of way area of 53.25 acres.

VI. The Basis in Law on which the Crown is Said to Have Failed to Fulfil or Otherwise Breached a Legal Obligation

41. The Crown had a legal obligation to safeguard the Band's interest in its reserve lands and to deal with the lands in the best interests of the members of the Band. The Crown had a fiduciary duty to only grant to the CPR the minimum interest it required for the purposes of construction, maintenance and operation of the railway, and to ensure minimal impairment to the use and enjoyment of the reserve lands by the Band.
42. At the latest, as of the conveyance of the Railway Belt to Canada and the surveys of Inklyuhkinatko IR 2 and Skuppah IR 4, the lands were Indian Reserves under the *Indian Act*. Prior to that time, Canada owed to the Band **fiduciary** obligations of loyalty, good faith, full disclosure, and reasonable diligence in its management

of the Band's lands. Upon the survey of the reserves, at the latest, Canada's obligations expanded to include the protection and preservation of the Band's interest in Inklyuhkinatko IR 2 and Skuppah IR 4. As a fiduciary, the Crown was also obligated to ensure that it did not let the public interest in the building of the railway trump the Indians' interest in their lands.

43. In 1878, Skuppah IR 4 was enlarged to comprise 59 acres, and Inklyuhkinatko IR 2 was allotted at 169 acres. At this time, there was no CPR track traversing through the lands.
44. At no time following the allotment of the reserves and prior to or during the granting of the right of way and construction of the CPR track did any federal official acting on behalf of the Band, and looking out for the Band's best interests, explain to the Band the CPR's plans, visit their lands, or listen to any concerns Band members may have had about the impact of the railway track on the lands and their use of them.
45. In particular, the Crown breached the legal obligations owed to the Band as it:
 - a. failed to disclose to the Band the CPR's plans for the right of way and track;
 - b. failed to investigate, inquire or ascertain whether the land requested by the CPR was in excess of what was required for railway purposes;
 - c. failed to visit the lands and meet with the Band to understand their use of the lands and the value they placed on the lands in order to value the lands;
 - d. failed to properly value the land including: failing to specify a method of valuation; failing to consider the value of the improvements; failing to consider the nature of the lands (riparian or agricultural); and failing to

value injurious affection to remaining reserve lands on Inklyuhkinatko IR 2 and Skuppah IR 4;

- e. failed to consider the impact on the Band's use and enjoyment of their lands of having approximately one third of their lands within Inklyuhkinatko IR 2 and Skuppah IR 4 granted to the CPR and used for railway purposes;
- f. prioritized the CPR's interests in building the railway over the Band's interests in their lands; and,
- g. failed to inquire into or obtain replacement lands for the Band.

46. Canada breached its fiduciary obligations, its legal obligations under the *Indian Act* and failed to comply with the provisions of federal railway legislation by transferring more land than required from Inklyuhkinatko IR 2 and Skuppah IR 4;
and, in the alternative, Canada also breached these obligations by failing to obtain adequate, appropriate or timely compensation for land taken and damages suffered.

Dated this 31st day of October, 2013.



Signature of Solicitor

Clarine Ostrove
Mandell Pinder LLP
Barristers and Solicitors
422 – 1080 Mainland Street
Vancouver, B.C. V6B 2T4
Tel.: (604) 681-4146
Fax: (604) 681-0959
clo@mandellpinder.com