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SPECIFIC CLAIMS TRIBUNAL

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August 26, 2016

David Burnside

Ottawa, ON | 51

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SISKA INDIAN BAND

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

DATE Originally Filed: July 31, 2014

Amended Filed: March 25, 2015

Further Amended Filed: August 25, 2016

_____
(Registry Officer)

TO: SISKA INDIAN BAND
As represented by Darwin Hanna
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I. Status of Claim (R 42(a))

1. Canada admits that the Siska Indian Band (the "Band" or "Siska") is a First Nation within the meaning of section 2 of the *Specific Claim Tribunal Act,* S.C. 2008, c.22 (the "Act") as pleaded in paragraph 1 of the Declaration of Claim (the "Claim").

2. In response to paragraph 2, Canada admits that the Claim is eligible to be filed with the Specific Claims Tribunal pursuant to section 16(1) (a) of the Act.

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

3. In response to paragraph 3, Canada admits that in May 1991 the Band filed two specific claims with the Minister of Indian Affairs and Northern Development (the "Minister") relating to the taking of lands from Zacht IR 5 ("IR 5") and Nahamanak IR 7 ("IR 7") for a right of way for the Canadian Pacific Railway ("CPR").

4. In response to paragraph 4, Canada admits that, for the purposes of the Act, these specific claims were deemed to be filed with the Minister on October 16, 2008.

5. In response to paragraph 5, Canada says that the contents of the letter dated May 11, 2011 from Canada to the Band are either irrelevant to this proceeding or, if relevant, are subject to settlement privilege.

6. In response to paragraph 6, Canada says that the contents of the Band's letter dated February 17, 2012 are either irrelevant to this proceeding or, if relevant, are subject to settlement privilege.

7. In response to paragraph 7, Canada says that the contents of the letter dated April 23, 2012 from Canada to the Band are either irrelevant to this proceeding or, if relevant, are subject to settlement privilege.

8. In response to paragraph 9, Canada admits that it breached a legal obligation owed to Siska by failing in 1925 to credit Siska's trust account with the interest payable on the compensation for the right of way through IR 5, and that this constitutes grounds for a specific claim pursuant to section 14(1)(c) of the Act. Except as specifically admitted in this Amended Response, Canada does not accept that this specific claim discloses a valid claim in accordance

with any of the grounds set out in section 14 of the Act.

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

9. In response to paragraph 10, Canada does not know if the Band is part of the Nlaka'pamux / Nlhakápmx Nation, and whether the Band traditionally used and occupied a shared traditional territory encompassing both sides of the Fraser River south of Lytton, British Columbia.

10. In response to paragraph 11, Canada admits that in 1878, Indian Commissioner Gilbert Sproat ("Sproat") allotted IR 5 and IR 7.

11. In further response to paragraph 11, Canada admits that IR 5 and IR 7 are within the Railway Belt. Canada further admits that they were surveyed by W.S. Jemmett, but says that they were surveyed in 1885 rather than 1886. Canada denies that W.S. Jemmett was a Dominion Land Surveyor, and further says that only Dominion Land Surveyors were entitled to survey Dominion Lands.

11.1 In response to paragraph 12, Canada admits that British Columbia joined Confederation in 1871 pursuant to the *Terms of Union, 1871*.

12. In response to paragraph ~~12~~ 13, Canada admits that a survey plan showing the location of the CPR right of way was signed by engineer George Keefer but says that it was dated November 30, 1884 rather than November 4, 1884. Canada says, however, that George Keefer was an engineer employed by the Department of Railways and Canals rather than the Canadian Pacific Railway Company (the "CPR Company").

13. In further response to paragraph ~~12~~ 13, Canada admits that the survey plan signed by George Keefer was deposited in the provincial land registry. Canada says that this occurred on or about July 14, 1885.

14. In further response to paragraph ~~12~~ 13, Canada denies that the survey plan signed by George Keefer made any reference to IR 7 at the time the plan was signed, as IR 7 was not surveyed until 1885 nor approved by the provincial government until 1887. IR 7 was plotted on the Keefer survey plan in or about 1889, and the railway right of way area through IR 7 was calculated at

that time. IR 5 was never plotted on the Keefer plan, which was the original CPR location plan also known as Plan 33117.

15. In response to paragraph ~~13~~ 14, Canada says that in 1888 the Department of Indian Affairs became aware that it had not received payment for rights of way through various reserves including IR 7. The Department of Indian Affairs asked the Department of Railways and Canals to arrange for the payment of compensation. Canada does not know about any suggestion in 1888 concerning a "special survey" to clarify the location of the right of way.

16. In further response to paragraph ~~13~~ 14, Canada admits that it gave a land value of $89.60 for the 89.6 acres taken for the CPR right of way. Canada further admits that no value was provided for improvements on IR 7. Canada denies that no land appraisal of IR 7 was carried out by Canada. Canada says that the Department of Railways and Canals provided a valuation of the lands, which was confirmed in September 1890 by the Indian Agent based on a personal tour of lands in his agency. With respect to IR 5, Canada took no steps to obtain payment for that reserve because federal officials had no knowledge until at least 1904 that the right of way included any land in IR 5.

17. In response to paragraph ~~14~~ 15, Canada admits that, by Order in Council P.C. 2006 dated August 25, 1891, the Governor in Council approved the recommendation of the Minister of Railways and Canals that authority be given for the purchase of 89.6 acres of IR 7 and that, upon deposit of the purchase money of $89.60, the lands be transferred to the Department of Railways and Canals for transfer to the CPR Company.

18. In further response to paragraph ~~14~~ 15, Canada admits that the sum of $89.60 was credited to the Band's trust account on January 13, 1892.

19. In response to paragraph ~~15~~ 16, Canada admits that the original location plan was inadequate to accurately define the lands to be conveyed to the CPR Company. Canada further admits that the right of way was re-surveyed by James Garden (the "Garden Plan"), but says that this survey took place in or about 1904 rather than 1903.

20. In further response to paragraph ~~15~~ 16, Canada admits that the Garden Plan was the first time that lands within IR 5 are shown on any document as being included within the CPR right of way. Canada further admits that the Garden Plan showed the CPR right of way through IR 5 and 7 as .08 and 89.51 acres respectively. Canada admits that the Garden Plan was certified by the

Department of Railways and Canals as "the lands of the Government to be conveyed to the Canadian Pacific Railway Company" pursuant to the contract between Canada and the CPR Company. Canada further admits that the Garden Plan was deposited in the Land Registry Office in 1905. Canada denies that it did not obtain a copy of the Garden Plan until 1923.

21. In response to paragraph ~~16~~ 17, Canada admits that in 1912 it valued the .08 acre area occupied by the CPR right of way through IR 5 at $20 per acre, amounting to compensation of $1.60. Canada further admits that the Department of Railways and Canals forwarded this amount to the Department of Indian Affairs in 1925, with an amount for interest for the period from 1886 to 1925.

22. In further response to paragraph ~~16~~ 17, Canada says that the sum of $1.60 was credited to Siska's trust account on July 31, 1925, but admits that the interest payable to Siska on this amount was mistakenly credited to the account of the Nicomen Indian Band.

23. In response to paragraph ~~17~~ 18, Canada admits that it issued Letters Patent for .08 acres of IR 5 on December 11, 1925 and then cancelled and re-issued the Letters Patent on July 20, 1927. Canada further admits that the 1927 Letters Patent specifically refer to Orders in Council passed by the Governor in Council on January 18, 1886 and March 15, 1886 as authority for the payment of compensation for the construction, operation and maintenance of the CPR.

24. In response to paragraph ~~18~~ 19, Canada says that Order in Council P.C. 953 dated April 19, 1912, according to its terms, authorized the issuance of Letters Patent to the CPR Company for rights of way "as constructed" through five Indian Reserves, including 89.51 acres through IR 7.

25. In further response to paragraph ~~18~~ 19, Canada admits that on July 5, 1912, Canada issued Letters Patent for a right of way of 89.51 acres through IR 7. Canada further admits that, on April 10, 1928, Canada issued new Letters Patent to the CPR Company, for 89.51 acres through IR 7.

26. In response to paragraphs ~~19 and 20~~ 20, 21, 22, 24 and 25, Canada denies that it breached any legal or fiduciary duty to the Band, as alleged or at all, except as expressly admitted in this Further Amended Response.

27. In further response to paragraphs ~~19 and 20~~ 20, 21, 22, 23, 24 and 25, Canada denies that IR 5 or IR 7 were fully constituted reserves within the meaning of

the *Indian Act* at the time the Railway Belt was finally conveyed to Canada in 1883 or upon the survey of the reserves in 1885.

27.1 In further answer to paragraph 23, and all of the Amended Declaration of Claim, Canada says that the construction of the CPR main line was constitutionally mandated by Article 11 of the *Terms of Union, 1871* and that Canada was required to weigh and balance the interest of the Siska Band in the lands at issue at the time of the takings, along with the national interest in establishing a rail link between BC and the rest of Canada.

28. Canada further says that IR 5 and IR 7 did not become reserves within the meaning of the *Indian Act* until August 1, 1930, following the passage of Order in Council P.C. 208 by the Governor in Council and the implementation of P.C. 208 by federal-provincial agreement and Imperial legislation.

29. In the alternative to paragraph ~~27~~ 28 herein, Canada says that IR 5 and IR 7 became reserves within the meaning of the *Indian Act* no earlier than January 25, 1913, when the Governor in Council withdrew these reserves from the operation of the general Railway Belt land regulations pursuant to Order in Council P.C. 205.

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

Establishment of the Railway Belt

30. When British Columbia joined Confederation in 1871, one of the conditions of its entry was that Canada would arrange for the construction of a railway joining the new province with the rest of the country. The construction of such a railway was considered at the time a matter of profound national importance.

31. The government of British Columbia agreed to convey land to Canada to support the construction of the railway. To this end, the Province granted the Railway Belt to Canada: a 40-mile wide strip of land along the route of the main line of the CPR from Port Moody on the coast to the BC-Alberta border.

32. The transfer of the Railway Belt happened in two steps. First, in 1880, the Legislative Assembly of British Columbia enacted *An Act to Grant Public Lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, S.B.C. 1880, c. 11. However, the route originally conceived was not

ultimately followed for the entire line. As a result, the second step was that the 1880 Act was amended in 1883 to provide that twenty miles on each side of the line – wherever it was finally located – would be granted to Canada.

Creation of Zacht IR 5 and Nahamanak IR 7

33. On June 18, 1878, Indian Reserve Commissioner Sproat allotted IR 5 and IR 7 for the Siska.

34. W.S. Jemmett surveyed the boundaries of both IR 5 and IR 7 in August 1885. IR 5 contained 60 acres and IR 7 contained 362 acres of land.

35. In June 1887, the Province's Chief Commissioner of Lands and Works approved Jemmett's surveys of IR 5 and IR 7.

36. In Order in Council P.C. 205, passed on January 25, 1913, the Governor in Council withdrew IRs 5 and 7, along with many other reserves in the Railway Belt, from the operation of the Dominion's general regulations governing the administration and disposal of lands within the Railway Belt. These regulations were administered by the Department of Interior and applied to all lands in the Railway Belt under federal administration and control.

37. IRs 5 and 7 were officially confirmed by the provincial government in July 1923 through provincial Order in Council 911. The federal government confirmed the allotment of these reserves in July 1924 through Order in Council P.C. 1265.

38. Notwithstanding this long history, the matter of reserve creation in British Columbia, including within the Railway Belt, remained incomplete. In or about 1928, the federal and provincial governments entered into negotiations for the return of the Railway Belt lands to provincial administration.

39. The re-transfer negotiations between Canada and British Columbia involved a number of matters, including the status of Indian reserves within the Railway Belt. With respect to Indian reserves, they agreed that reserves in the Railway Belt "shall continue to be vested in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208)."

40. The agreement between Canada and British Columbia on all matters relating to the re-transfer, including the status of Indian reserves, was brought into

force by reciprocal provincial and federal legislation, and subsequently by an Act of the Parliament of the United Kingdom, the *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, which conferred constitutional status on the agreement.

41. The terms and conditions set out in P.C. 208 were the result of another federal-provincial agreement, the 1929 Scott-Cathcart Agreement. Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, and Henry Cathcart, the provincial Superintendent of Lands, had been designated by their respective governments to, among other things, recommend conditions for the re-transfer of the Railway Belt. Scott and Cathcart agreed upon the terms of the "tenure and mode of administration" of the Indians Reserves in the Railway Belt.

42. The Scott-Cathcart Agreement, P.C. 208, and the federal-provincial agreement on the re-transfer finally settled the matter of reserve creation in the Railway Belt once they were implemented by Imperial legislation on August 1, 1930.

43. According to P.C. 208, Canada retained 60 acres for IR 5 and 362 acres for IR 7.

Construction of the Canadian Pacific Railway 1880-1886

44. In 1880, Canada entered into contracts with Andrew Onderdonk to build the western segment of the CPR from Savona's Ferry (near Kamloops) to Port Moody. Contract 61 dated February 10, 1880 dealt with the line from Boston Bar to Lytton, which included the lands at issue in this claim.

45. In 1881, pursuant to *An Act Respecting the Canadian Pacific Railway* S.C. 1881, c.1 Parliament granted a charter to the CPR Company and approved the CPR Company's contract with Canada dated October 21, 1880 (the "CPR Contract"). Under the CPR Contract, Canada agreed to construct the western section of the CPR mainline from Kamloops to Port Moody, and to convey the railway and right of way to the CPR Company.

46. Between 1881 and 1884, Canada, acting through the Department of Railways and Canals, prepared location plans (including Plan 33117 pertaining to the lands in this claim) for the mainline and the right of way.

47. Plan 33117 was filed in the Land Registry Office in Victoria on July 14, 1885, pursuant to the *Government Railways Act*, S.C. 1881, c. 25., before the allotments of IR 5 and IR 7 were surveyed in August 1885 and before the surveys were approved by the provincial government in June 1887.

48. The CPR right of way through the lands that would ultimately become known as IR 5 and IR 7 was 300 feet on the upper side of the centre line of the railway. The right of way on the lower side of the centre line went to the bank of the Fraser River, and accordingly varied in width depending on the curvature and variation of the bank.

49. The construction of the western section of the CPR railway was completed by July 1885 and the railway was in operation starting June 1886. On November 2, 1886, pursuant to an agreement between Canada and the CPR Company and Order in Council P.C. 1935, the Governor in Council authorized the conveyance of the portion of the CPR right of way that Canada was required to construct and convey to the CPR Company pursuant to the CPR Contract.

Valuation of land taken for the CPR and payment of compensation for IR 7

50. In December 1879, the Governor in Council appointed Joseph Trutch as Canada's "Resident Agent for British Columbia." Trutch's functions were to assist the Department of Interior in the administration of railway lands, and to oversee the construction of the CPR under the instructions of the Department of Railways and Canals. One of his duties in this capacity included advising the government on the valuations of and compensation for lands to be taken for the railway.

51. To aid in the valuation of the lands taken for the right of way, "official valuators" were appointed to appraise the right of way through settler holdings and Indian reserves. The valuators visited the lands and assessed compensation based on the quality and value of the land, the value of any improvements affected by the right of way, as well as damages attributable to severance.

52. On August 3, 1885, Trutch provided valuations of those segments of the railway right of way that traversed Indian reserves between Savona's Ferry and Port Moody, excluding lands which had not yet been surveyed or authoritatively allotted for the use of Indians. Trutch did not provide valuations for IR 5 and IR 7 because they had not yet been surveyed or authoritatively allotted by this date. Moreover, with respect to IR 5, Trutch

and other federal officials had no information indicating that the right of way impinged on a corner of IR 5.

53. In 1888, DIA became aware that the CPR had passed through other reserves in addition to those for which valuations had been provided in 1885. DIA submitted a list of these reserves, which included IR 7, to the Department of Railways and Canals for an assessment of the compensation payable for these lands.

54. In March 1890, following an exchange of correspondence between DIA and the Department of Railways and Canals to clarify the boundaries of the reserves, the Department of Railways and Canals provided valuations for the reserves in question, including IR 7, to DIA.

55. DIA sent the proposed valuation – $89.60 for 89.6 acres from IR 7 – to the Indian Superintendent in BC for review. The Superintendent forwarded the valuations to Indian Agent J.W. MacKay, in whose agency IR 7 was situated.

56. There was some delay on the part of Indian Agent J.W. MacKay in responding to the proposed valuations. MacKay was required to "make a tour of a large portion of his agency in order to provide the desired information." In September 1890 Agent MacKay found that there was no basis to change the valuations for any of the lands taken, including IR7. DIA accepted Agent MacKay's opinion, and advised the Department of Railways accordingly on July 28, 1891.

57. On August 25, 1891, pursuant to P.C. 2006, the Governor in Council authorized the payment of funds from the Department of Railways and Canals to DIA for various reserves including IR 7.

58. On January 13, 1892, $89.60 was deposited into the Siska Band's trust account administered by the Department of Indian Affairs as compensation for the lands taken for the CPR right of way.

Re-survey of the CPR Right of Way: The Garden Plan

59. In the 1890s, discussions commenced among the Department of Railways and Canals, DIA, the Surveyor General, and the CPR Company regarding the process for conveying the right of way lands to the CPR Company and the issuance and form of the Letters Patent.

60. In 1903, Canada determined that a re-survey of the CPR right of way was required to provide for the identification and adequate definition of the lands to be conveyed to the CPR Company. The Garden Plan was prepared in 1904 for this purpose. The Garden Plan was certified by the Chief Engineer, Department of Railways and Canals as showing "the lands of the Government to be conveyed to the Canadian Pacific Railway Company."

61. The Garden Plan showed that the CPR right of way comprised .08 acres of IR 5 and 89.51 acres of IR 7. As stated above at paragraphs 22 and 24, Letters Patent were later issued to the CPR Company for these areas.

62. Due to the ongoing dispute between British Columbia and Canada about the legal status of reserve lands – British Columbia claimed an underlying reversionary interest in Indian reserve lands – British Columbia refused to register Dominion Letters Patent in provincial land registry offices. It was not until the late 1920s, when agreement was reached between Canada and British Columbia for the return of the Railway Belt to British Columbia that Letters Patent were finally registered.

Compensation for IR 5

63. In 1910, the CPR Company made inquiries with the DIA about obtaining Letters Patent for the right of way through a list of reserves in the western section of the CPR from Savona's Ferry to Port Moody. Zacht IR 5 was on the list.

64. In 1912, DIA advised the CPR Company that it had no record of payment for the .08 acres of right of way through IR 5.

65. DIA took the position that the lands had been used for the CPR since 1885 and had been inadvertently omitted from previous transactions. DIA concluded that the lands should be valued as of ~~that~~ 1885 with interest thereon at five per cent per year.

66. Indian Agent H. Graham examined the lands in the company of members of the Siska Band and valued the lands at $20 per acre, or $1.60 for .08 acres. Agent Graham also calculated that interest at $2.16 (5% interest per year on $1.60 for 27 years).

67. Owing to uncertainty about the status of reserve lands in the British Columbia and the provincial government's refusal to register patents for rights of way

through Indian reserves, no action was taken on the payment of this amount (and other amounts payable for rights of way through various reserves) until 1923.

68. On July 30 1925, the Department of Railways paid DIA for the rights of the way through IR 5 and other reserves for which compensation had not previously been paid, plus interest. Payment for the right of way itself- $1.60 - was credited to Siska's trust account on July 31, 1925.

69. In or about July 30, 1925, the Department of Railways also paid interest on the value the right of way through IR 5. The interest payment was mistakenly commingled with interest payable to the Nicomen Indian Band for the right of way through its Sackum Indian Reserve Number 3. This error was never corrected.

Recent events

70. Siska was party to litigation (*Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1993] 1 F.C. 74) that arose as a result of a dispute regarding the jurisdiction of several bands, including Siska, to levy property taxes against the CPR Company with respect to the CPR right of way through various reserves, including IR 5 and IR 7. Siska had levied taxes against the CPR Company pursuant to the Band's December 5, 1991 taxation and assessment by-laws, which were passed pursuant to section 83(1)(a) of the *Indian Act*, as amended in 1988.

71. On June 25, 1999, in an appeal by several bands not including Siska, the Federal Court of Appeal (*Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [2000] 1 F.C. 325) held that the CPR rights of way through various reserves are "in the reserve" for the purposes of section 83, and that the appellant bands have jurisdiction to levy property taxes.

72. On March 11, 2004, the electors of Siska successfully voted to designate the railway right of way lands through its reserves, including IR 5 and IR 7, pursuant to section 38(2) of the *Indian Act*.

73. On September 23, 2004, the Governor in Council accepted Siska's designation of the railway right of way lands by Order in Council P.C. 2004-1040, passed pursuant to section 40 of the *Indian Act*.

V. Relief (R. 42(f))

74. Other than its acknowledged breach of a legal obligation for failing to ensure that interest was credited to Siska's trust account in 1925, for which Siska is entitled to compensation, Canada seeks to have the claim dismissed in its entirety.

75. Canada seeks its costs in the proceedings.

Communication (R. 42(g))

Respondent's address for service:	Department of Justice 900 – 840 Howe Street Vancouver, BC V6Z 2S9 Attention: ~~Chris Elsner and~~ Heather Frankson
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Dated: ~~March 17, 2015~~ August 25, 2016

Signature of
☐ Respondent ☒ lawyer for Respondent
William F. Pentney,
Deputy Attorney General of Canada
Per: ~~Chris Elsner and~~ Heather Frankson
Department of Justice
British Columbia Regional Office