

SPECIFIC CLAIMS TRIBUNAL

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	November 9, 2016
David Burnside	
Ottawa, ON	12

BETWEEN:

WILLIAMS LAKE INDIAN BAND

Claimant

v.

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

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]

(REGISTRY OFFICER)

TO:

Geoffrey Bickert, Q.C.
Assistant Deputy Attorney General, Litigation,
Justice Canada
50 O'Connor Street
Ottawa, Ontario K1A 0H8
Telephone: (613) 670 6357
Fax: (613) 941 1972
email: geoffrey.bickert@justice.gc.ca

I. Claimant (R. 41(a))

1. The Claimant, the WILLIAMS LAKE INDIAN BAND [also, the “Band”], confirms that it is a First Nation within the meaning of s. 2 (a) of the Specific Claims Tribunal Act, 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

(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 April 24, 2012, the Williams Lake Indian Band filed the Williams Lake Pacific Great Eastern Railway on I.R. No. 1 Specific Claim [the “Claim”] with Indian and Northern Affairs Canada, Special Claims Branch. The Claim related to breaches of lawful obligation by Canada that resulted in the loss of lands from Williams Lake I.R. No. 1.
4. By a letter from the Senior Assistant Deputy Minister dated June 4, 2015, the Williams Lake Indian Band was informed of the Minister of Aboriginal Affairs and Northern Development’s decision to reject the Claim on the ground that it failed to reveal an outstanding lawful obligation on the part of Canada.

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

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

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

6. The following are the grounds for the Claim, as provided for in s. 14 of the Specific Claims Tribunal Act:

14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

- (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))

The Band's use and occupation of the lands at the head of Williams Lake

7. At all times material to the Claim, the lands at the head of Williams Lake were an important area for the Band. The Williams Lake people occupied these lands for residential purposes; to grow hay, cultivate gardens, harvest berries and medicinal plants; and to trap, hunt and fish, including in the area of the San Jose River.

The setting aside of Williams Lake I.R. No. 1 at the head of Williams Lake

8. In 1881, Canada purchased lands at the head of Williams Lake [the "Bates Estate"] for the purpose of establishing a reserve for the Williams Lake Indian Band. On June 16, 1881, Indian Reserve Commissioner O'Reilly set aside Williams Lake I.R. No. 1, consisting of the Bates Estate and additional Crown lands [the 'Reserve'].
9. The Reserve was surveyed in 1883.
10. The Province's Chief Commissioner of Lands and Works ["CCLW"] approved the Reserve on May 8, 1882 and again on June 4, 1884.

The PGER and its enabling legislation

11. The Pacific Great Eastern Railway Company [the "PGER" or the "Company"] was incorporated pursuant to the Pacific Great Eastern Incorporation Act, S.C.B. 1912, c. 36 [the "PGER Act"], amended by S.B.C. 1913, C. 62.

12. Pursuant to the PGER Act:
 - (a) The PGER was authorized to lay out and operate certain railway lines in the Province of British Columbia (section 3); and
 - (b) The PGER and the railway constructed by the PGER were made subject to the provisions of the British Columbia Railway Act, R.S.B.C. 1911, c. 194 [the "BC Railway Act 1911"] (section 17);
 - (c) The PGE was authorized to "expropriate, purchase, hold, use and enjoy such lands" as "shall be necessary for the purpose of securing sufficient lands for terminals, stations, or gravel-pits, and for constructing, maintaining or using the said railway, also for any other purpose connected with the said railway", and also to "sell and convey the same or parts thereof from time to time as they may deem expedient" (section 32); and
 - (d) The PGER was authorized to lease the railway lines of, and to lease its own line to, other companies (section 13-14).
13. The BC Railway Act 1911 authorized the acquisition of land "for the construction, maintenance and operation of the undertaking" (section 32(c)) and contained a number of provisions respecting the procedure railway companies had to follow, before construction, to locate a railway line or revise the location of a railway line (sections 16-19, 24-27, 53(a)).
14. The BC Railway Act 1911 also specified the type of land the Company was authorized to take. With respect to Crown land, the Company was authorized to take, with the consent of the Minister of Railways and "for the use of its undertaking, so much of the unoccupied and unreserved lands in

the Province ...as have not been granted or sold” (underline added; sections 34, 35).

15. The PGER’s powers were also circumscribed by An Act to ratify an Agreement bearing the Date the Tenth Day of February 1912, between His Majesty the King and Timothy Foley, Patrick Welch and John W. Stewart, and an Agreement bearing Date the Twenty-Third Day of January, 1912, between the Grand Trunk Pacific Railway Company and the Grand Trunk Pacific Branch Lines Company and said Foley, Welch and Stewart, S.B.C. 1912, c. 34 [“An Act to Ratify an Agreement”]. This statute ratified and “confirmed and declared to be binding...upon the parties thereto” two agreements relating to the PGER’s incorporation and its arrangements with other railway companies. One of these agreements (Schedule A to An Act to Ratify an Agreement) stipulated, *inter alia*, that the PGER would not be authorized to “alienate, sell, lease or dispose of the line hereby aided unless such Company shall first obtain the consent thereto of the Lieutenant Governor in Council” (section 7(k)).

The PGER’s application for lands within the Reserve

4516. In September 1912, Canada and British Columbia established the Royal Commission on Indian Affairs [the “Royal Commission”] to review and adjust the acreage of Indian reserves in British Columbia. The governments agreed that the Royal Commission should also be able to address applications for reserve lands required for public works purposes.

4617. By letter dated September 14, 1914, the PGER submitted its right of way plan to the Royal Commission for approval, and requested prompt action in the matter.

4718. By letter dated September 16, 1914, the PGER applied to the Department of Indian Affairs [the "DIA" or the "Department"] for a railway right-of-way on the Reserve consisting of 4.62 acres [the "Railway Parcel"] and for permission to begin construction at once.

4819. The PGER advised the DIA that it was prepared to pay such sum as the DIA thought fair.

Canada's Response to the PGER's Application

4920. Upon receipt of the PGER's application, the DIA replied to the PGER that its application would receive the Department's immediate attention.

2021. A week or so after receiving the PGER's September 16, 1914 application, the DIA (i) asked the Royal Commission, at the PGER's urging, to take action with respect to the PGER's application at as early a date as possible; (ii) commissioned a valuation of the Railway Parcel; and (iii) at the PGER's urging, instructed the Indian Agent to permit the PGER to begin construction on the Reserve.

2422. By Interim Report issued on October 5, 1914, the Royal Commission recommended to the federal and provincial governments that the PGER be given permission to enter upon the Reserve and to acquire the Railway Parcel for right-of-way purposes subject, however, to compliance with the requirements of the law and to due compensation being made.

2223. The "requirements of the law" includes those set out in the BC Railway Act 1911.

2324. Also on October 5, 1914, the Royal Commission informed the PGER and the DIA of its decision to recommend acceptance of the PGER's application.

The valuation and the payment

2425. Under cover of a letter dated October 27, 1914, Mr. Vaughan of Vaughan Realty Co. sent the DIA his valuation of the Railway Parcel: \$44.35 for the 4.62 acres purportedly involved.

2526. Mr. Vaughan's correspondence with the DIA indicates that the DIA had not given him either a plan of the right of way or a plan of the Reserve. Mr. Vaughan explained that, as the Reserve's survey lines were practically obliterated, he had had to make an approximate plan (compiled from his personal notes and from rough sketches provided by the PGER's resident engineer) to determine where the right of way entered and left the Reserve.

2627. Mr. Vaughan's valuation report noted that the Band was satisfied with the valuation but preferred to receive replacement lands - on the northern boundary of the Reserve and equivalent to the lands taken - instead of monetary compensation.

2728. At the time, there were available Crown lands on the northern boundary of the Reserve.

2829. The DIA made no mention, either internally or to the PGER, about the Band's preference for land instead of a cash payment. Instead, having received the valuation report, the DIA asked the PGER to forward \$44.35 in payment for the Railway Parcel.

2930. The PGER paid the compensation owing in November 1914, but asked Canada not to issue the Crown Grant pending completion of the survey plan and confirmation of the lands required.

3031. While the PGER's application and payment had been for the 4.62-acre Railway Parcel, the completed survey plan depicted a 4.37-acre right of way on the Reserve.

The Grant to the PGER

3132. In December 1914, on the DIA's recommendation, the Governor in Council approved the 'sale' of 4.62-acre Railway Parcel to the PGER upon the consent of the Lieutenant Governor of the Province of British Columbia, and pursuant to section 46 of the Indian Act R.S.C. 1906 c. 81, as amended by S.C. 1911 c. 14 s.1 [the "Indian Act"].

33. Section 46 of the Indian Act permitted a railway company holding statutory power to take or use land or any interest in land without the owner's consent to exercise such power on-reserve "for the purpose of" the railway, with the consent of the Governor in Council, and subject to the terms and conditions imposed by such consent.

3234. In March 1915, the PGER provided an amended survey plan to the DIA, showing a revision in the location of the right-of-way. As a result of this revision, the DIA reimbursed the PGER the sum of \$0.65.

The Matter of the Replacement Lands

3335. By letter dated February 18, 1915 – well after the Governor in Council had approved the transfer of the Railway Parcel to the PGER, and after the PGER had paid for the same - the DIA informed the Royal

Commission that the Band had asked to be compensated for the PGER requirement by way of a land exchange instead of a monetary payment. The DIA asked the Royal Commission to consider this request as an additional lands application of the Band.

| 3436. The Royal Commission ultimately decided that this was a matter for the Department to address but, in the meantime, suggested to the DIA, in August 1915, that the PGER purchase the replacement lands for conveyance to the DIA in trust for the Band, or that the DIA purchase these replacement lands with the compensation monies received from the PGER.

| 3537. The DIA asked the Indian Agent to advise whether it was possible to purchase the land desired by the Indians, but noted that the sum the PGER had paid for the Railway Parcel on the Reserve was “a very small sum to be invested in land”. There is no further evidence of action by the Department to investigate or meet the Band’s request for replacement lands.

| 3638. The DIA had opined that the sum paid to the Band for the Railway Parcel was insufficient to purchase replacement lands. The DIA also concluded that this sum was insufficient even for a *per capita* distribution to the members of the Band. The DIA ultimately suggested that the sum the PGER had paid - for lands that had been designated for the use and benefit of the Band’s current and future membership - be applied instead to the purchase of “seeds and implements”.

Provincial Consent and Grant

3739. In August 1915, the Lieutenant Governor for British Columbia approved the Crown Grant of the Province's reversionary interest in the parcel to the PGER, upon completion of the details of survey.

3840. The PGER obtained a Dominion Patent to the right of way lands on September 30, 1915, and a provincial Crown Grant on June 1, 1916.

3941. The lands continue to be used for railway purposes to the present day.

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

4042. This claim is based upon Canada's breaches of a common law fiduciary duty Canada owes aboriginal peoples with respect to their interests in lands legally or provisionally reserved for their use and benefit, as well as upon the breach of its obligation to act with legal authority when transferring land, or an interest in land, out of an Indian Reserve..

4143. At all times material to this Claim, the Reserve, including the Railway Parcel, was:

(a) "lands reserved for the Indians" within the meaning of section 91(24) of the Constitution Act, 1867;

(b) a reserve

(i) legally established and subject to the Indian Act; or

(ii) provisionally established and withdrawn from other inconsistent uses.

- (c) a cognizable and specific Aboriginal interest of the Band, over which the Canada had assumed discretionary control; and
- (d) reserved and occupied for the purposes, and within the meaning, of the BC Railway Act 1911.

4245. Canada owed the Band:

- (a) in relation to the Band's provisional or legal interest in the Reserve, the fiduciary obligations to act with loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regarded as the best interest of the Band; and
- (b) if the Reserve was legally established, the additional fiduciary obligation to protect the Band's interest in the Reserve from invasion or destruction; and
- (c) the obligation to act lawfully and within its statutory powers when transferring land in the Reserve, or an estate or interest in land in the Reserve, to the PGER.

46. Canada breached its obligation to act lawfully and within its statutory powers as follows:

- (a) Since the PGER was not authorized to exercise its power of expropriation on the Reserve (as the land was not "unreserved and unoccupied") and/or failed to comply with the statutory procedure governing the expropriation, by purporting to transfer any land, or interest in land, within the Reserve to the PGER; or

(b) If the PGER could and did exercise its power of expropriation on the Reserve, by purporting to transfer more than a limited interest or estate in land within the Reserve.

4347. Canada breached its fiduciary obligations to the Band as follows:

(a) by failing to oppose or challenge the application of the BC Railway Act 1911 to the Reserve:

(i) if the Reserve was only provisionally established, on the ground that the lands within the Reserve were “lands reserved for the Indians” under Canada’s exclusive legislative jurisdiction and/or withdrawn from inconsistent uses;

(ii) whether the Reserve was provisionally or legally established, on the ground that the lands within the Reserve were not “unreserved and unoccupied” Crown lands, and therefore were not available for expropriation pursuant to the BC Railway Act 1911.

(b) If the BC Railway Act 1911 applied to permit the PGER to take the Railway Parcel, by failing to ensure compliance with the statutory requirements and procedure for a lawful expropriation of land for railway purposes;

(c) by failing to comply with the Royal Commission’s recommendation that the PGER be permitted to enter the Reserve and acquire the Railway Parcel subject to “compliance with the requirements of the law and to due compensation being made”;

- (d) by purporting to transfer to the PGER lands within the Reserve that the PGER was not authorized to take, or a greater interest in lands within the Reserve than was required for the PGER's purposes;
- (e) by failing to investigate at all, or sufficiently and in a timely manner, the scope and location of the PGER's requirement for lands within the Reserve;
- (f) by failing to ensure that it did not transfer more land than the PGER required;
- (g) by failing to investigate or consider other forms of tenure for the PGER's use of the Reserve;
- (h) by facilitating and encouraging the PGER's premature entry and construction on the Reserve;
- (i) by failing to exercise care and diligence, and to act reasonably, when seeking, reviewing, and acting upon the valuation report;
- (j) by failing to consult adequately or at all with, and to make full disclosure to, the Band with respect to the valuation of the lands and the method of compensation;
- (k) by failing to investigate adequately or at all, and in a timely fashion, the availability and cost of the replacement lands the Band sought; and
- (l) by failing to seek and secure proper compensation for the Railway Parcel.

4448. As a result of Canada's breaches, the Railway Parcel was removed from the Reserve without legal authority, and the Band has lost the use and benefit of the same without proper compensation.

VII. Relief Sought

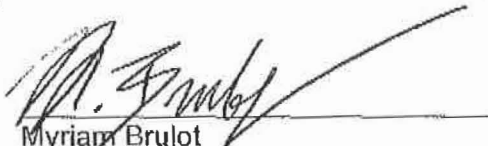
4549. The Williams Lake Indian Band seeks:

(a) Equitable compensation from Canada to compensate for Canada's breaches of lawful obligation; and

(b) Without limiting the generality of the foregoing, compensation pursuant to section 20(1)(c), 20(1)(g)(h) or 20(1)(e) of the Specific Claims Tribunal Act; and

~~(b)~~ (c) Such other damages or compensation as this Honourable Tribunal thinks just.

Dated this 27th day of January 9th day of November, 2016



Myriam Brulot
Solicitor for the Claimants
Donovan & Company
6th Floor, 73 Water Street
Vancouver, BC V6B 1A1
Tel. (604) 688-4272
Fax. (604) 688-4282
myriam_brulot@aboriginal-law.com



Niki Sharma
Solicitor for the Claimants
Donovan & Company
6th Floor, 73 Water Street
Vancouver, BC V6B 1A1
Tel. (604) 688-4272
Fax. (604) 688-4282
niki_sharma@aboriginal-law.com