

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIERES	
F I L E D	October 10, 2024
Alexandre Bois	
Ottawa, ON	5

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

BIRDTAIL SIOUX FIRST NATION

Claimant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations

Respondent

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, SC* 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure, SOR/2011-19*.

October 10, 2024

TO: BIRDTAIL SIOUX FIRST NATION
As represented by Rangi Jeerakathil / Jessica Buhler
MLT Aikins LLP
Suite 1202 – 409 3rd Ave S
Saskatoon, SK S7K 5R5
Tel: (306) 975-7100
Fax: (306) 975-7145
Email: rjeerakathil@mltaikins.com
jbuhler@mltaikins.com

Overview

1. The Respondent, His Majesty the King in right of Canada (Canada), is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada endeavours to embody these principles as it assists the Specific Claims Tribunal (the Tribunal) in its task of adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. While Canada did not accept this claim for negotiations under the Specific Claims Policy, Canada will continue to pursue all appropriate forms of resolution as the Tribunal process proceeds.
3. Canada acknowledges Birdtail Sioux First Nation is a part of the Dakota Sioux First Nation (Dakota) and acknowledges Birdtail Sioux First Nation's right to Birdtail Creek Indian Reserve No. 57 (Birdtail IR 57).
4. This claim relates to Birdtail Sioux First Nation's assertion that Canada breached statutory and fiduciary obligations by the taking of portions of Birdtail IR 57 for railway purposes for the Grand Trunk Pacific Railway Company (Grand Trunk Pacific) in 1905 and 1907 (1905 Taking and 1907 Taking, respectively). Grand Trunk Pacific built a railway line through Birdtail IR 57 and required a right of way on Birdtail IR 57 for that railway line (Right of Way).
5. This claim is for the 1905 and 1907 Takings and is asserted to be for 88.72 acres. The 1905 and 1907 Takings add up to a total of 84.58 acres, not 88.72 acres. It was not until a further taking in 1938 for the Right of Way (1938 Taking) that an additional 4.14 acres were taken, resulting in a cumulative total at that time of 88.72 acres. The Claim does not include facts regarding the 1938 Taking.
6. Canada acknowledges that its relationship with Birdtail Sioux First Nation is a fiduciary one and, in certain circumstances, the relationship may give rise to and

require the performance of specific fiduciary duties by Canada. However, in the circumstances of this case, Canada says that if it owed Birdtail Sioux First Nation any fiduciary duties for the 1905 or 1907 Takings, it did not breach any fiduciary duties as asserted by Birdtail Sioux First Nation.

7. Canada says that the 1905 and 1907 Takings were reconveyed to Canada, and then transferred to Canadian National Railway (CN) in 1958 (1958 Taking). The 1958 Taking was not before the Minister of Indian Affairs and Northern Development, now the Minister of Crown-Indigenous Relations (Minister).

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

8. Canada admits that the requirements in paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008 c 22 (*SCTA*) are satisfied as pleaded in paragraphs 2-4 of the Declaration of Claim (Claim) for the 1905 and 1907 Takings. The particulars are:
 - a. Birdtail Sioux First Nation's specific claim was filed with the Minister on November 12, 2009.
 - b. On February 6, 2012, Canada notified Birdtail Sioux First Nation that its specific claim did not disclose an outstanding lawful obligation on the part of Canada.
9. Canada acknowledges that Birdtail Sioux First Nation does not seek compensation in excess of \$150 million for the purposes of this claim, as stated on paragraph 5 of the Claim.

II. Canada's Position Regarding the Validity of the Claim (R. 42(b) and (c))

10. Canada denies the validity of the claim regarding the 1905 and 1907 Takings set out in the Claim and denies that it breached, or failed to comply with, any lawful obligation, statute or fiduciary duty in consenting to the disposition of lands to the Grand Trunk Pacific for railway purposes. Canada further denies that it acted without lawful authority.
11. Should the Tribunal find the claim to be valid, Canada says that paragraphs 20(1)(a) to (c) of the *SCTA* may provide the basis for the Tribunal to award compensation. This is subject, however, to any applicable deduction or set-off from such compensation calculated in accordance with subsection 20(3) of the *SCTA*.

III. Canada's Position Regarding Assertions of Fact in the Declaration of Claim (R. 42(d))

The Claimant

12. In response to paragraph 1 of the Claim, Canada admits that Birdtail Sioux First Nation is a First Nation within the meaning of section 2(a) of the *SCTA* and is located in the Province of Manitoba.
13. In response to paragraph 7 of the Claim, Canada admits that Birdtail IR 57 was set aside for the use and benefit of Birdtail Sioux First Nation in 1889.

The Dakota

14. In response to paragraphs 8-9 of the Claim, Canada says that Birdtail Sioux First Nation is part of a group descended from the Oceti S'Akowin Nation who have, since time immemorial, used, lived on, occupied and drawn life, spirituality and culture from the vast territories within what is now North America. Canada says that as a result of armed conflict with the United States beginning in 1862, many

Dakota came to what is now Canada. Canada admits that it considered these Dakota “refugees”. Canada admits that the Dakota residing in Canada in the early 1870s sought lands for their own use. Canada admits that it agreed to provide the Dakota reserve lands. Canada considered that the Dakota had no territorial rights and did not enter into treaties with the Dakota.

15. In response to paragraph 10 of the Claim, Canada says that the geographic location of Birdtail IR 57 falls within the area covered by Treaty No. 2.
16. In response to paragraph 11 of the Claim, Canada admits an Order in Council (OIC) on January 4, 1873 authorized a reserve be set apart for the Dakota of 12,000 acres. Canada denies that the 12,000 acres was based on a formula. Canada says the OIC noted that for 80 families, 6,400 acres would “suffice”. This would be 80 acres per family. The OIC recommended a reserve of some 12,000 acres, with the understanding that an additional quantity would be reserved dependent upon the number of families, to allow for some inferior land and that there may be more than 80 families. Canada admits that Treaties No. 1 and 2 provided for 160 acres per family of five and Treaty No. 4 provided for 640 acres per family of five.
17. In response to paragraph 12 of the Claim, Canada admits that an OIC on April 24, 1873 authorized the Lieutenant Governor of Manitoba, Alexander Morris, to place the Dakota on a reserve in the vicinity of Lake Manitoba. Canada admits that the Dakota refused to accept that location. Canada says that J.A.N. Provencher, Indian Commissioner, reported on August 27, 1873 that the representatives of the Dakota who were to go with the surveyor to the reserve by Lake Manitoba refused to continue the journey to the reserve. He reported that the Dakota representatives had been warned by another group of First Nations, residing in the area, that the Dakota would not be allowed to live in their neighbourhood and must look for another place.

18. In response to paragraph 13 of the Claim, Canada admits that an OIC on April 27, 1874 recommended a second site where the reserve for the Dakota should be located, as described in that OIC.
19. In response to paragraph 14 of the Claim, Canada admits the Dakota wanted reserves at different locations. Canada says in September 1874 Lieutenant Governor Morris discussed reserve locations with Chief “Echewe”. Chief “Echewe” had been to the reserve site proposed in the April 27, 1874 OIC and he observed the lack of wood. He proposed that he and about 155 others have a reserve on the Assiniboine at Birdtail Creek.
20. In response to paragraph 15 of the Claim, Canada currently has insufficient knowledge to admit or deny that by October 1874 Birdtail Sioux First Nation rejected the proposed reserve site from the April 27, 1874 OIC. Canada says in October 1874, Lieutenant Governor Morris reported meeting with “White Eagle”, a chief from Portage la Prairie, who noted the lack of wood on the proposed reserve site from the April 27, 1874 OIC. Lieutenant Governor Morris recommended that the Dakota be allowed to settle in different localities.
21. In response to paragraph 16 of the Claim, Canada admits that an OIC on November 12, 1874 authorized the selection of two or three reserves for the Dakota, based on the formula of 80 acres per family of five. Canada says this OIC also cancelled the April 27, 1874 OIC.

Establishment of Birdtail IR 57

22. In response to paragraph 17 of the Claim, Canada admits that Dominion Land Surveyor William Wagner’s August 1875 survey report describes the boundaries of a reserve at Birdtail Creek for “Enoch’s band”.
23. In response to paragraph 18 of the Claim, Canada admits that a memorandum dated July 22, 1878 stated that “Enoch’s band” had about 86 families.

24. In response to paragraphs 19-20 of the Claim, Canada admits that by OIC on May 17, 1889 it set aside a reserve for Birdtail as described.

Grand Trunk Pacific Railway Company

25. In response to paragraph 21 of the Claim, Canada admits that the Grand Trunk Pacific began expanding into western Canada in the early 1900s. Canada denies that the Grand Trunk Pacific began this expansion in the late 1800s. Canada admits that the Grand Trunk Pacific is now part of the Canadian National Railway (CN).
26. In response to paragraph 22 of the Claim, Canada admits that on July 29, 1903 an agreement was made between Canada and Grand Trunk Pacific (Grand Trunk Pacific Agreement). Canada admits that the Grand Trunk Pacific Agreement was attached as a schedule to the *National Transcontinental Railway Act, 1903, 3 Edward VII, c 71 (National Transcontinental Railway Act)*. Canada admits the preamble of that act stated the intention to build a “common railway highway” across Canada.
27. In response to paragraphs 23-26 of the Claim, Canada admits these paragraphs regarding the content of the Grand Trunk Pacific Agreement and the *Act to incorporate the Grand Trunk Pacific Railway Company, 1903, 3 Edward VII, C 122 (Grand Trunk Pacific Act)*.

1905 Taking

28. In response to paragraph 27 of the Claim, Canada admits that on December 16, 1904, Indian Agent Wheatley advised the Department of Indian Affairs (the Department) that Grand Trunk Pacific had run two trial lines across Birdtail IR 57. Canada admits that on December 28, 1904 Secretary J.D. McLean responded, directing Agent Wheatly to ensure that no construction commence until he had been notified that the right of way had been duly arranged.

29. In response to paragraph 28 of the Claim, Canada says that the Department had a rule that no railway company should be permitted to do any work of construction on an Indian reserve until the right of way had been duly arranged.
30. In response to paragraphs 29 of the Claim, Canada currently has insufficient knowledge to admit or deny a special meeting of Cabinet on August 4, 1905.
31. In response to paragraphs 30-32 of the Claim, Canada admits that on August 10, 1905 an OIC approved the proposed location of that portion of Grand Trunk Pacific's line and noted that the local interests expressed by the Towns of Birtle and Brandon would not interfere with the selection of the route. It is noted on this OIC that it went to "R+C" on August 14, 1905.
32. In response to paragraph 33 of the Claim, Canada admits that on September 30, 1905 the Board of Railway Commissioners approved a route plan, which included the planned route through Birdtail IR 57.
33. In response to paragraph 34 of the Claim, Canada currently has insufficient knowledge to admit or deny that work had already begun on the section at issue by September 1, 1905.
34. In response to paragraph 35 of the Claim, Canada says that on October 4, 1905, J.A.J. McKenna telegraphed the Secretary of the Department of Indian Affairs that Grand Trunk Pacific had begun construction on Birdtail IR 57. Canada admits that on October 5, 1905, Secretary McLean warned the Vice President and General Manager of the Grand Trunk Pacific, Frank W. Morse, that contractors would be seen as trespassers unless Grand Trunk Pacific provided certified plans and payment.
35. In response to paragraph 36 of the Claim, Canada admits that a map dated October 6, 1905 from Grand Trunk Pacific showed the route for the Right of Way, and that

the land required for the Right of Way was 79.17 acres. The map was certified by the Deputy Minister and Chief Engineer, Department of Railways and Canals.

36. In response to paragraph 37 of the Claim, Canada admits that Grand Trunk Pacific sent the plan of the proposed route through Birdtail IR 57 to the Department on October 9, 1905. Canada says that Grand Trunk Pacific also noted that the line was on broken ground, unsuitable for agriculture and valued the land at \$1 per each of the 79.17 acres required. Grand Trunk Pacific sought authorization to take possession of the Right of Way without delay.
37. In response to paragraph 38 of the Claim, Canada admits that on October 10, 1905 correspondence from the Department to Grand Trunk Pacific indicated a willingness to grant permission to Grand Trunk Pacific to build a line across Birdtail IR 57, upon receipt of a deposit of \$79.17.
38. In response to paragraphs 39-40 of the Claim, Canada admits that the Department rejected the first and second cheque for \$79.17 provided by Grand Trunk Pacific, as those cheques indicated that the “payment was in full”, and the Department had indicated the price to be paid was to be adjusted later.
39. In response to paragraph 41 of the Claim:
 - a. Canada admits that on October 27, 1905, Vice President and General Manager Morse wrote to the Department’s Assistant Secretary Stewart, enclosing a cheque for \$79.17. Canada says the letter provided the cheque was for “covering payment on [hand written, initialed insertion “on account”] purchase of right-of-way”. He requested that the work of the contractors proceed without further delay.
 - b. Canada currently has insufficient knowledge to admit or deny that on October 12, 1905, Assistant Secretary Stewart telegraphed Agent Wheatley telling him to allow work to proceed on the Right of Way.

- c. Canada says that on October 24, 1905, Deputy Superintendent General Pedley telegraphed Agent Wheatley that he was to allow Grand Trunk Pacific contractors to work through Birdtail IR 57. On October 25, 1905, Assistant Secretary Stewart wrote to Agent Wheatley, confirming the telegraph and that the Grand Trunk Pacific had made a deposit of \$1 per acre to be applied toward the payment of the right of way. A plan of the right of way was enclosed, and Agent Wheatley was requested to place a fair valuation of the land, and on the improvements that may be affected. These valuations were to be provided separately as payments for improvements would be paid to the individual owners.
40. In response to paragraph 42 of the Claim, Canada admits that on November 10, 1905, Agent Wheatley provided the Secretary of the Department his valuation of the Right of Way. The total valuation for both individual improvements and the reserve land was \$378.68.
41. In response to paragraph 43 of the Claim, Canada admits that on November 15, 1905, Secretary McLean criticized Agent Wheatley's valuation of the individual improvements and directed him to make a new valuation. Canada says that Secretary McLean stated that the individual band members were entitled to the full value of the improved interest.
42. In response to paragraph 44 of the Claim, Canada admits that on November 22, 1905, Agent Wheatley forwarded to Secretary McLean an amended valuation for the Right of Way. This amended valuation provided separate valuations for the improvements of the individual members of the band and for the remainder to be credited to Birdtail Sioux First Nation, increasing the total to \$395.18.
43. In response to paragraph 45 of the Claim, Canada says that on November 28, 1905 the Superintendent General of Indian Affairs recommended that Grand Trunk Pacific's request for the 1905 Taking of 79.17 acres be approved. Canada admits

- that on November 29, 1905, an OIC approved the 1905 Taking, citing s. 35 of the *Indian Act*, as amended by s. 5 of Chapter 33, 50-51 Victoria.
44. In response to paragraph 46-47 of the Claim, Canada admits the 1886 *Indian Act*, as amended in 1887 by s. 5, of Chapter 33, 50-51 Victoria and the *Railway Act*, 1888, 51 Victoria, c. 29 (*Railway Act*, 1888) contain provisions about the takings of portions of “Indian reserves”.
 45. In response to paragraph 48 of the Claim, Canada admits the *Railway Act*, 1888, s. 101 had slightly different wording in the *Railway Act*, 1903, 2 Edward, c. 58 (*Railway Act*, 1903), s. 136 as stated.
 46. In response to paragraph 49 of the Claim, Canada admits that on December 6, 1905, Secretary McLean sent the land valuation to Morse of Grand Trunk Pacific. Canada says Secretary McLean advised that a patent for the Right of Way would be issued on receipt of the OIC that had been applied for and the balance of the sum due. Canada admits that Secretary McLean drew Morse’s attention to requirements for fencing the right of way.
 47. In response to paragraph 50 of the Claim, Canada admits that on December 13, 1905, Morse of Grand Trunk Pacific indicated that Grand Trunk Pacific was prepared to comply with “the requirements of section 199 of the ‘Railway Act’ and section 357 of the ‘Indian Act’, in the matter of fences.” Canada says Morse also indicated his intention to provide payment of \$316.01.
 48. In response to paragraph 51 of the Claim, Canada admits the *Railway Act*, 1903 has several obligations regarding fencing for when the land on either side of the railway was improved or settled, and “inclosed”.
 49. In response to paragraph 52 of the Claim, Canada currently has insufficient knowledge to admit or deny that Secretary McLean stated that the Department of

Indian Affairs would not approve the sale of any right of way unless Grand Trunk Pacific had proper fencing.

50. In response to paragraph 53 of the Claim, Canada admits that on January 12, 1906 Grand Trunk Pacific provided the balance of \$316.01 for the Right of Way.
51. In response to paragraph 54 of the Claim, Canada currently has insufficient knowledge to admit or deny that the Right of Way was never fenced.
52. In response to paragraph 55 of the Claim, Canada says that on January 29, 1906 Letters Patent for the Right of Way were issued (“1906 Letters Patent”). Canada denies that the 1906 Letters Patent are dated January 13, 1906.

1906 Additional Takings

53. In response to paragraph 56 of the Claim, Canada admits that Grand Trunk Pacific ended up taking additional acreage for the Right of Way and informed the Department in November 1906, as well as submitting a new map. Canada currently has insufficient knowledge to admit or deny the contents of a letter dated November 22, 1906 to Secretary McLean. Canada says that on November 22, 1906 Grand Trunk Pacific’s Assistant Solicitor wrote to Deputy Superintendent General of Indian Affairs Pedley to enclose the existing patent for cancellation, and to seek a new patent to conform to the enclosed amended location.
54. In response to paragraph 57 of the Claim, Canada admits that an amended map of the Right of Way dated November 12, 1906 indicates that the amount of land required for the Right of Way was 84.58 acres more or less.
55. In response to paragraph 58 of the Claim, Canada admits that on November 26, 1906 Secretary McLean wrote to Agent Wheatley requesting a valuation of the additional land and any improvements. Canada admits that on December 12, 1906 Agent Wheatley responded with his valuation of the land.

56. In response to paragraph 59 of the Claim, Canada admits that on January 12, 1907 an Assistant Solicitor for the Grand Trunk Pacific provided to Deputy Superintendent General Pedley a letter enclosing a voucher for \$20 and requested an amended patent. Further, Canada acknowledges that an amended patent was issued for the expanded right of way on January 29, 1907 (“1907 Letters Patent”), and that this patent was corrected a year later. Canada currently has insufficient knowledge to admit or deny the contents of the 1907 Letters Patent.
57. In response to paragraph 60 of the Claim, Canada admits that on February 22, 1907 an OIC approved the Grand Trunk Pacific’s acquisition of an additional 5.41 acres (1907 Taking), as Grand Trunk found that the area required for the Right of Way was 84.58 acres instead of 79.17 acres.
58. In response to paragraphs 61-62 of the Claim, Canada admits that on March 6, 1907 Secretary McLean wrote to Assistant Solicitor of Grand Trunk Pacific for an additional \$1.64 for the 0.41 acres that had not yet been paid for, and that on April 2, 1907 this sum was provided by Grand Trunk Pacific.
59. In response to paragraph 63 of the Claim, Canada admits that the Deputy Superintendent General of Indian Affairs directed that the 1907 Letters Patent be cancelled due to a wrong description of the land required, and a new letters patent issued.
60. In response to paragraph 64 of the Claim, Canada admits that new letters patent were issued on March 31, 1908 and December 15, 1938, which collectively conveyed 88.72 acres to Grand Trunk Pacific. Further:
 - a. Canada says that on March 31, 1908, letters patent for the Right of Way were issued for 84.58 acres (1908 Letters Patent). Canada denies that the 1908 Letters Patent were for 88.72 acres.

- b. Canada says that on December 15, 1938, letters patent were issued to Grand Trunk Pacific for additional strips of land required for railway purposes totaling 4.14 acres (1938 Letters Patent). Canada says that this additional 4.14-acre parcel was not part of the 1905 Taking or the 1907 Taking that are the subject of this Claim.
- c. Canada says that neither the 1908 or the 1938 Letters Patent recognized CN as the successor in title to Grand Trunk Pacific.

Reconveyance of Entire Right of Way

- 61. In response to paragraph 65 of the Claim, Canada says that at the time of the August 21, 1958 OIC, CN had already reconveyed the Right of Way to Canada. The OIC consented to the new letters patent being issued to CN. Canada says that 88.72 acres is referenced in this OIC as being the total of the lands contained in the 1908 and 1938 Letters Patent.

Other

- 62. In response to paragraph 66 of the Claim, Canada admits that the railway line goes through Birdtail IR 57. Canada currently has insufficient knowledge to admit or deny the effect of the Right of Way on the usefulness of the remaining portions of Birdtail IR 57.
- 63. In response to paragraph 67 of the Claim, Canada admits no surrenders were taken for the 1905 or 1907 Takings.
- 64. In response to paragraphs 68-70 of the Claim, Canada admits that the *Indian Act* provisions regarding surrenders and takings for public purposes were amended as stated in the Claim.
- 65. In response to paragraphs 71-79 of the Claim, Canada states that these paragraphs contain no facts to admit or deny but rather consist of legal argument.

66. In further response to paragraphs 73-75, Canada denies that it breached its statutory obligations as asserted by Birdtail Sioux First Nation.
67. In further response to paragraphs 76-79 of the Claim, Canada acknowledges that its relationship with Birdtail Sioux First Nation is a fiduciary one and that, in certain circumstances, the relationship may give rise to and require the performance of specific fiduciary duties by Canada. However, in the circumstances of this case, Canada says that if it owed Birdtail Sioux First Nation any fiduciary duties for the 1905 or 1907 Takings, it did not breach any fiduciary duties as asserted by Birdtail Sioux First Nation.
68. In response to paragraph 80 of the Claim, Canada states that any compensation owed to Birdtail Sioux First Nation must be assessed in accordance with the prevailing legal principles and s. 20 of the *SCTA*.

IV. Canada's Statement of Facts (R. 42(e))

69. Canada relies upon the facts set out in section III.

The Railway Statutory Regime

70. In 1903, a formal agreement was made between the federal government and the Grand Trunk Railway, which contemplated the creation of Grand Trunk Pacific (Grand Trunk Pacific Agreement). The Grand Trunk Pacific Agreement was made a schedule to *The National Transcontinental Railway Act*. Consequently, the Grand Trunk Pacific was incorporated by federal statute in 1903 by the *Grand Trunk Pacific Act*.
71. The Grand Trunk Pacific, subject to any special exceptions in its operating legislation, was subject to the *Railway Act*, 1903 and then the *Railway Act*, 1906, as per sections 3-5 of both of those acts.

The 1905 and 1907 Takings

72. In 1889, Birdtail IR 57 was confirmed as a reserve for the use and benefit of Birdtail Sioux First Nation.
73. In 1905, Grand Trunk Pacific sought a right of way through Birdtail IR 57. The Department approved the Right of Way for 79.17 acres, subject to payment based on the valuation by the local agent of the land and individual improvements. The Department and the Governor in Council relied upon section 35 of the 1886 *Indian Act*, as amended in 1887 by Section 5, of Chapter 33, 50-51 Victoria, as the legal authority for the taking.
74. On January 29, 1906, letters patent were issued for 79.17 acres. The 1906 Letters Patent stated that the Grand Trunk Pacific “contracted and agreed to and with Our Superintendent General of Indian Affairs duly authorized by Us in this behalf for the absolute purchase...” Further, it stated “We by these Presents, do grant, sell, alien, convey and secure unto” the Grand Trunk Pacific and their successors and assigns “forever” the Right of Way.
75. Section 134 of the *Railway Act*, 1903 stated:
134. No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council; but with such consent, any such company may, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, *but not alienate*, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, [...] (emphasis added)
76. In 1906, the Grand Trunk Pacific sought an additional 5.41 acres of Birdtail IR 57 from the Department for an amended plan of the Right of Way. This request was granted upon payment of compensation. On February 22, 1907 an OIC noted “the Company finds the area required is 84.58 acres instead of 79.17” and approved the Grand Trunk Pacific’s acquisition of the additional 5.41 acres.

77. In 1907, letters patent were issued for the 1907 Taking, but were corrected one year later due to an incorrect description of land. On March 27, 1908, on a file listed as “[illegible number]68 502”, Deputy Superintendent General of Indian Affairs ordered both the cancellation of the 1907 Letters Patent and the issuance of new letters patent.
78. In a handwritten marginalia on the top left corner of the 1906 Letters Patent it states: “Cancelled by Order 27th [illegible], file 268502”.
79. On March 31, 1908, corrected letter patents were issued for 84.58 acres. The 1908 Letter Patent stated that the Grand Trunk Pacific “contracted and agreed to and with Our Superintendent General of Indian Affairs duly authorized by Us in this behalf for the absolute purchase...”. Further, it stated “We by these Presents, do grant, sell, alien, convey and secure unto” the Grand Trunk Pacific and their successors and assigns “for ever” the Right of Way.
80. Section 172 of The *Railway Act*, 1906 stated:
- 172.** No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the Governor in Council.
2. Any company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate, for the use of its railway and works, so much of the lands of the Crown lying on the route of the railway as have not been granted or sold, and as is necessary for such railway, and also so much of the public beach, or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.
3. *The company may not alienate any such lands so taken, used or occupied.* [...] (emphasis added)

The 1938 Taking

81. In 1938, 4.14 additional acres were requested for the Right of Way for ditching purposes. The request was granted by the Department upon payment of

compensation. Separate letters patent were issued on December 15, 1938 for those 4.14 acres. The 1938 Letters Patent identified the exact locations of the strips of land, and stated they were shown on plan Number RR700A, being a copy of portion of a plan filed in the Neepawa Land Titles Office as Number 40 S.L.

The 1958 Taking

82. In 1955 and 1956, CN made two requests for additional acreage for the Right of Way. Band surrenders were taken for those proposed additions to the Right of Way on June 15, 1955 and March 5, 1956 respectively.
83. On April 5, 1956, CN Regional Manager G.G. Baird advised Superintendent W.C. Bethune of the Indian Affairs Branch that CN may need an additional 1.38 acres. He noted that he was arranging for a survey of all the parcels required and the necessary approvals to conduct a survey.
84. On April 10, 1956, CN Regional Land Surveyor L.H. Bousfield wrote to Mr. R. Thistlethwaite, Surveyor General, advising that CN required additional acres for the Right of Way and requesting authority to conduct a legal survey to determine the lands required. Further, Bousfield advised that the original Crown Grant of the Right of Way, dated March 31st, 1908, for 84.58 acres with a plan registered in the Neepawa L.T.O. as No. 40 SL, was not a good plan by modern standards. Bousfield suggested it would be desirable to resurvey the entire right of way, stating:

This would allow us to reconvey our present holdings to the Indian Dept. and allow a new Grant to issue based on the new plan. Compensation for the difference in acreage could be settled.

85. On October 18, 1956 Superintendent Bethune wrote to Surveyor General Thistlethwaite acknowledging receipt of the enclosed print of the plan of survey. Bethune informed Thistlethwaite that the proposed transaction had been approved, and that the CN would reconvey the old right of way and would then be granted letters patent for the new right of way upon paying for the extra required land. The

enclosed plan of survey noted it was for the “Right of Way and Extra Right of Way including resurvey of all of reg’d plan No. 40 S.L. Neepawa L.T.O.”

86. On August 7, 1957, Regional Counsel of the CN sent to Superintendent of Reserves and Trusts, Indian Branch, the Duplicate Certificates of Titles Nos. 100881 and 101888 and requested a “new Crown grant based upon the new plan”.
87. The District Registrar for Neepawa Manitoba issued Title No. 10081. Dated August 1, 1957, it granted Her Majesty the Queen in Right of Canada “an estate in fee simple...” for the strips of land, including the exact legal description, and that it was found on Plan No. RR. 700A, being a copy of a portion of a plan filed in the Neepawa Land Titles office as No. 40 S.L.
88. The District Registrar for Neepawa Manitoba, issued Title No. 101888 also on August 1, 1957. It granted Her Majesty the Queen in Right of Canada “an estate in fee simple...” for:

All those Portions of Township Fifteen and Range Twenty-Seven West of the Principal Meridian in Manitoba shown as Sioux Indian Reserve, taken for the Right of Way of the Grand Trunk Pacific Railway, according to a Plan, registered in the Neepawa Land Titles Office as No 40 S.L.

89. On August 21th, 1958 OIC P.C. 1958-1165 accepted the report of the Minister of Citizenship and Immigration that advised letters patent had issued on March 31st, 1908 and December 15, 1938 for lands on Birdtail IR 57 having an area of 88.72 acres that were conveyed to Grand Trunk Pacific for railway purposes. It noted that CN was the successor in title to Grand Trunk Pacific. Further:

That on a re-survey of the aforesaid lands, errors and discrepancies were found in the original surveys and for the purpose of correcting the same, the Canadian National Railway Company has agreed to re-convey to Her Majesty in right of Canada...the lands originally granted to the Grand Trunk Pacific Railway Company the lands within [Birdtail IR 57] included within the railway right-of-way as now constitute and determined by the Surveyor General of Canada.

90. The OIC noted that the Birdtail Sioux First Nation Council approved the transfer of additional land on March 5, 1956. Also, CN was a corporation empowered by statute to take or use lands or any interest therein without the consent of the owner. The Committee recommended that pursuant to the *Indian Act*, s. 35 consent be given to CN to exercise its statutory powers in relation to the lands described and that letters patent issue conveying the land to CN, excepting mineral rights.
91. On December 17, 1958, Bethune advised Surveyor General Thistlethwaite that letters patent were issued to CN, dated October 8, 1958. Canada currently has insufficient knowledge to state the contents of the 1958 Letters Patent.
92. CN currently operates an active railway line on the Right of Way.

V. Canada's Statement of Relief (R. 42(f))

93. Canada seeks the following relief:
 - a. Dismissal of the Claim for the 1905 and 1907 Takings for 84.58 acres as Canada did not breach any fiduciary, statutory or other obligations it may have owed related to these takings;
 - b. Dismissal of the Claim for the 1938 Taking for 4.14 acres as no facts or arguments were advanced in the Claim regarding any breaches with this taking;
 - c. If this Honourable Tribunal finds any portion of the claim to be valid, set-off under subsection 20(3) of the *SCTA*;
 - d. Canada may decide not to seek costs upon the final determination of the proceedings, however it reserves the right to seek such costs; and

- e. Such further relief as counsel may request and this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

94. Respondent's address for service:

Department of Justice Canada
601-400 St Mary Ave
Winnipeg, MB R3C 4K5
Attention: Kristine Whittaker

Fax number address for service: (204) 983-3636

Email address for service: Kristine.Whittaker@justice.gc.ca
Zoe.Stevens@justice.gc.ca

Dated this October 10, 2024



Kristine Whittaker / Zoe Stevens
Litigation Counsel for the Respondent
Department of Justice Canada
Prairie Regional Office
601-400 St Mary Ave
Winnipeg, MB R3C 4K5

Tel: (204) 599-1037 / (431) 279-5665