

SPECIFIC CLAIMS TRIBUNAL

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	Guillaume Phaneuf	É
Ottawa, ON		1

B E T W E E N:

TOBACCO PLAINS INDIAN BAND

Claimant

v.

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

Respondent

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*.

_____ April 29 , 2014

Guillaume Phaneuf

(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, TOBACCO PLAINS INDIAN BAND, (the “Band”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, 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. The Band filed the I.R. No. 2 Roosville Customs House Specific Claim with the Department of Indian Affairs, Specific Claims Branch on November 25, 2010. The claim related to the breach of legal obligation by Canada that resulted in the taking of 2.97 acres of land (the “Customs Land”) from Tobacco Plains Indian Reserve No. 2 for the Roosville Customs House for the Department of Customs and an area of land across I.R. No. 2 used for the water pipeline and ditch of approximately 170 feet in length (“Water Right-of-Way”) for the Roosville Customs House.
4. By letter, dated October 28, 2013, the Minister notified the Band of his decision to partially accept the Claim in relation to Canada’s failure to obtain compensation for the Water Right-of-Way from 1918 to 1970. The Minister decided not to negotiate the other allegations in the claim.

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

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

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

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

14. (1) (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; or

(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))

Customs Land

7. By a Minute of Decision, dated December 16, 1884, Reserve Commissioner O’Reilly allotted the Tobacco Plains Indian Reserve No. 2 (the “Reserve”), consisting of 10,560 acres, for the Band.
8. By letter, dated September 15, 1914, the Department of Customs (“DOC”) inquired with the Department of Indian Affairs (“DIA”) about placing a Customs building on the Reserve. On September 25, 1914, Dominion Land Surveyor prepared a plan of the required parcel showing a 2.97 acre parcel contiguous to the International Boundary line.
9. On October 5, 1914, the DOC applied to the DIA for the purchase of the lands for the Customs building.

10. By letter, dated October 15, 1914, Assistant Deputy and Secretary wrote A. Megraw, Inspector of Indian Agencies, to examine the Customs Land required by the Department of Customs and was to “consult with the Indian Council and endeavour to obtain their concurrence in such reasonable valuation ...”.
11. On October 24, 1914, the Royal Commission on Indian Affairs issued Interim Report No. 52, which recommended:

... subject to such compliance with the requirements of the law and subject also to the conditions that proper compensation be made to the Indians, permission be given to the said Department of Customs of Canada to enter upon the said Tobacco Plains Indian Reserve No. 2 ... and to acquire the said 2.97 acres for the purpose of erecting a Customs Building thereon ...
12. On December 5, 1914, A. Megraw, Inspector of Indian Agencies, stated in his valuation report, “... I think [Chief] Paul can be got to agree to the generous valuation of \$150 for the whole plot of ground to be taken.”
13. By Memorandum, dated December 18, 1914, from Chief Surveyor, S. Bray, to Superintendent General Scott, DIA, stated that the consent from the Band was not required. By telegram, dated December 22, 1914, Superintendent General Scott advised Inspector Megraw that the Band’s consent was not necessary and approved the valuation.
14. On December 26, 1914, John McDougald, Commissioner of Customs, processed a cheque for \$150 in favor of the DIA for the sale of the Customs Land.
15. On January 16, 1915, Order in Council, P.C. 114, approved the taking of the Customs Lands to DOC pursuant to section 46 of the *Indian Act* for the purpose of erecting a Customs building for \$150. By letter, dated January 22, 1915, Inspector Megraw reported that Chief Paul was not willing to accept the valuation.
16. By Memorandum, dated February 1, 1915, Chief Surveyor Bray recommended that of the \$150 for the Customs Land, \$135 be sent to the Indian Agent to pay Chief Paul and \$15

be placed to the credit of the Band. On February 9, 1915, the DIA informed the DOC that it was now authorized to take possession of the Customs Land.

17. The Royal Commission on Indian Affairs by Minute of Decision, dated March 24, 1915, confirmed Tobacco Plains Indian Reserve No. 2, less the 2.97 acres of the Customs Land transferred to the DOC for the Customs building.

Water Right-of-Way

18. On November 22, 1917, George Dingsdale for the Department of Customs sent Mr. Nicholas, Acting Collector for Customs, a sketch plan showing the location of the right-of-way for a ditch, one foot six inches wide, to cover a pipeline 141 feet in length across the Reserve from the spring to the Customs building.
19. On November 26, 1917, J.D. McLean, Assistant Deputy and Secretary, DIA, wrote to R.L.T. Galbraith, Indian Agent, informing him that a Conditional Water Licence No. 2778 was issued in favor of the Department of Customs to take water from a spring located on the Reserve for the Customs building.
20. On November 27, 1917, H.L. Nicholas, Acting Collector of Customs, wrote the Superintendent General of Indian Affairs requesting the Water Right-of-Way for the Conditional Water Licence No. 2778.
21. On June 17, 1918, R.L.T. Galbraith, Indian Agent, informed Assistant Deputy Secretary, DIA, that Chief Paul required all the water he could get for irrigation and wanted compensation for the use of the water.
22. By letter, dated July 4 1918, J.D. McLean, Assistant Deputy and Secretary, DIA, stated to K.L. Nicholson, Acting Collector of Customs, "In view of the Agent's report I have to say that the pipe line may be continued in operation during the pleasure of the Superintendent General." No *Indian Act* authorization was ever provided for the Water Right-of-Way. The Band never received compensation for the Water Right-of-Way from 1918 to 1970.

VI. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation

23. This claim is based on the Crown's breach of its common law fiduciary duty and legal obligation under the *Indian Act* for authorizing a taking of the Customs Land by the Department of Customs without adequate compensation and authorizing the Water Right-of-Way without complying with the *Indian Act* and without compensation. The Crown had an obligation to protect the Band's interest in the Reserve and to deal with the Reserve lands in the best interests of the Band. As a fiduciary, the Crown was obligated to ensure it did not let the public interest in the building of the Customs building to supersede the Band's interest in the Reserve.
24. The Crown breached the legal obligations owed to the Band as it:
- a. failed to minimally impair the Band's interest in the Customs Land;
 - b. failed to properly value the land taken by the Department of Customs;
 - c. failed to ensure the Band received adequate compensation from the Department of Customs for the Customs Land and the Water Right-of-Way;
 - d. failed to consult with and obtain the consent of the Band regarding the amount of compensation paid by Department of Customs in respect to the Customs Land;
and
 - e. failed to ensure compensation was paid by the Department of Customs to the Band upon the existence of the Water Right-of-Way through the Reserve.

VII. Relief Requested

25. The Band seeks compensation from the Crown for:
- a. compensation from the Crown for failure to uphold its legal obligations to the Band arising from the Crown's administration of the Reserve by the disposition of the 2.97 acres of the Customs Land to the Department of Customs and the failure to obtain compensation for the Water Right-of-Way;

b. interest; and

c. such other damages or compensation as this Honourable Tribunal deems, just.

A handwritten signature in cursive script that reads "Darwin Hanna".

Dated this 29 day of April, 2014.

Signature of Solicitor

Darwin Hanna

Callison & Hanna, Barristers & Solicitors

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