

Filed September 10, 2018 pursuant to the Direction of Justice Slade dated July 27, 2018

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

KANAKA BAR INDIAN BAND

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	September 7, 2018
David Burnside	
Ottawa, ON	5
D É P O S É	

Claimant

v

ATTORNEY GENERAL OF CANADA

As represented by the Minister of Indian Affairs and Northern Development Canada

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* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

TO: KANAKA BAR INDIAN BAND

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

1. The Kanaka Bar Indian Band (the "Band"), filed a specific claim with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada (the "Claim") on December 10, 1990.
2. The Claim concerns the 'taking' of land within Whyeek IR 4 for a right of way for the Canadian Pacific Railway ("CPR").
3. On May 25, 2009, the Band submitted the Claim refreshed to Canada including additional supporting documents and information.
4. On May 17, 2011, Canada advised the Band by letter of the partial acceptance of the Claim for negotiation.
5. On April 23, 2012, Canada informed the Band by letter that their specific claim was 'closed'.

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

6. Canada denies the validity of the claims based on all grounds in the Declaration of Claim filed July 10, 2018 ("Declaration of Claim") and, in particular, denies the validity of the claims in paragraphs 10 and 42 – 69.

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

7. Unless expressly admitted, Canada denies each and every allegation of fact or law in the claim and puts the Band to the strict proof thereof.
8. Canada admits the facts in the Declaration of Claim, paragraphs 1 – 3, 5 – 6, 14 – 15, 18 – 24, 26, 29, 34, and 38.
9. Canada has no knowledge of the facts set out in the Declaration of Claim, paragraphs 4, 11, 27, 35, and 41.

10. In response to paragraphs 7 and 8 of the Declaration of Claim, the contents of the January 11, 2012 and February 16, 2012 letters are irrelevant to this proceeding. If they are relevant to the matter at issue, then the contents of the letter are subject to settlement privilege.
11. In response to paragraph 12 of the Declaration of Claim, Canada admits that Whyeek IR 4 was allotted to the Band by Indian Reserve Commissioner Sproat in June 1878. Canada denies that Commissioner Sproat also allotted the Band "their old right of fishing of both banks of the Fraser at this point".
12. In response to paragraph 13 of the Declaration of Claim, Canada admits that Commissioner Sproat felt Whyeek IR 4 could be the main settlement of Kanaka Bar if it could be irrigated and that Whyeek IR 4 contained a burial site and a fishing camp. Canada has no knowledge whether the burial site is historic or the fishing camp was important. Canada denies that Whyeek IR 4 was a principal residence of the Kanaka Bar people or was central to the Kanaka Bar economy. Canada has no knowledge whether, in 1914, the local Indian Agent described Whyeek IR 4 as "hilly and brushy, fishing camp and pasture on the right bank of the Fraser."
13. In response to paragraph 16 of the Declaration of Claim, Canada admits the first sentence. Canada says that the remainder of the paragraph is legal argument, not fact.
14. In response to paragraph 17 of the Declaration of Claim, Canada admits that the right of way cuts through the reserve and includes all the land between the CPR rail bed and the river's edge at the northern end of the reserve. Canada has no knowledge whether the pasture and cultivatable lands in the reserve were severed as a result of the CPR right of way, or what impact that had on settlement, agriculture, or irrigation. Canada also has no knowledge whether the right of way cuts off access to a portion of the fishery.
15. In response to paragraph 25 of the Declaration of Claim, Canada admits that in 1928 new Letters Patent were issued for 111 acres. Canada admits that the difference in acreage from that shown on the Garden Plan was apparently due to inaccuracies in Garden's survey. Canada has no knowledge whether this change was due to more accurate township plans being completed.

16. In response to paragraph 28 of the Declaration of Claim, Canada admits that JW Trutch was appointed as Dominion Land Agent in BC and hired valuers. Canada has no knowledge of the other facts in paragraph 28.
17. In response to paragraph 30 of the Declaration of Claim, Canada denies that there is no record of any specific investigation to determine the values for these rights of way. Canada says that Indian Agent JW Mackay made a tour of the reserves in his agency, including Whyeek IR 4, in the summer of 1890 to assess the valuations provided by the Department of Railways and Canals. Canada admits the other facts in paragraph 30.
18. In response to paragraph 31 of the Declaration of Claim, Canada admits that heads of damages, including severance, smoke, noise, and vibration, and other damages were not included in the Schedule, nor were any calculations for loss of riparian lands. Canada has no knowledge whether or not this is “notable” or whether such damage is normally regarded as compensable injurious affection.
19. In response to paragraph 32 of the Declaration of Claim, Canada admits that the Schedule did not provide any detailed information concerning the calculations of value at Whyeek IR 4. Canada also admits that the CPR took riparian lands. Canada has no knowledge whether any improvements were affected by the passage of the CPR through Whyeek IR 4 or whether the CPR took good pasture lands or agricultural ditches.
20. In response to paragraph 33 of the Declaration of Claim, Canada has no knowledge whether there were valuations of Whyeek IR 4 taken six or seven years prior to 1890. Canada admits the other facts in paragraph 33.
21. In response to paragraph 36 of the Declaration of Claim, Canada denies that, in 1910, residents of Boston Bar IR 2 and homesteaders between North Bend and Keefers began complaining to the Department of Interior about the excessive width of the rights of way through their lands. Canada says that the Department of the Interior began receiving complaints from homesteaders in 1912. Canada has no knowledge whether or not the homesteaders assumed the CPR right of way through their land was 99 feet, or whether the CPR was claiming on average 400 feet, or whether this claim usually

included the only arable parcels on their lands. Canada admits that the Department of Interior investigated and began negotiations with the CPR on behalf of the settlers.

22. In response to paragraph 37 of the Declaration of Claim, Canada admits that the Department of Indian Affairs (“DIA”) was informed of the Department of Interior’s investigation into the width of the CPR right of way insofar as the investigation concerned an Indian homesteader on what is now Skuppah IR 2A. Canada denies that the DIA was informed of the Department of Interior’s investigation beyond that specific instance. Canada admits that no action was taken by the DIA to examine the CPR right of way through any other reserves in the area traversed by the CPR.
23. In response to paragraph 39 of the Declaration of Claim, Canada admits that a new plan, the Doupe Plan, was prepared showing “portions of the right of way to be ceded to settlers, portions required for the CPR main line, and portions required for double tracking” between Boston Bar and Boothroyd. Canada admits that the CPR wished to retain the right of way for the purpose of laying a second track at some future date. Canada admits that the Doupe Plan superseded the Garden Plan for the portion of the line that it covered, although Canada also says that Whyeek IR 4 were not included in this re-survey. Canada has no knowledge whether the right of way was “unusually wide”. Canada has no knowledge whether the CPR solicitors sent a copy of this plan to the DIA Secretary in 1921.
24. In response to paragraph 40 of the Declaration of Claim, Canada has no knowledge whether 99 feet was the “normal” right of way width. Canada admits the other facts in paragraph 40.

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

Establishment of the Railway Belt

25. When British Columbia (“BC”) joined Confederation in 1871, Article 11 of the *Terms of Union* stipulated that Canada would arrange for the construction of a railway joining

the new province with the rest of the country within ten years. The construction of this railway was considered at the time a matter of profound national importance.

26. The Government of BC agreed to support the construction of the railway and 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.
27. 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*, SBC 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 grant Canada twenty miles on each side of the line, wherever it was finally located.

Creation of Whyeek IR 4

28. Whyeek IR 4 was set aside by Indian Reserve Commissioner Gilbert Malcolm Sproat on June 18, 1878, although it was not surveyed until 1885.
29. Along with setting the landmarks for surveying the reserve, Sproat also stated that the Band should have a fishery on the right bank of the Fraser.
30. According to Sproat's Field Minutes, he thought that Whyeek IR 4 could become the main reserve for the Band, but noted that irrigation was a concern and that the use of the reserve by the Band would depend upon the availability of water. Sproat negotiated with two settlers in order to obtain some water to irrigate the reserve for the Band.
31. In his Field Minutes Sproat also noted that the railway might cross through the reserve.
32. The land set aside by Sproat to be Whyeek IR 4 was transferred from the Government of BC to Canada in 1883, as part of the transfer of the Railway Belt lands.
33. Whyeek IR 4 was surveyed by WS Jemmett in July 1885 and determined to be 351 acres. The survey marked a fishery at the south end of the reserve.
34. Sproat's allotment and Jemmett's survey were confirmed by the Province's Chief Commissioner of Lands & Works in June 1887.

35. On December 29, 1911, the administration of the reserves within the Railway Belt was transferred to the DIA by Dominion Order in Council PC 2983.
36. On January 25, 1913 Whyeek IR 4 was officially withdrawn from the operation of the regulations for the administration and disposal of lands within the Railway Belt by Dominion Order in Council PC 205.
37. In 1924, Dominion Order in Council 1924 – 1265 noted that the lands in the Railway Belt were under the sole jurisdiction of the Dominion and that the findings of the Royal Commission on Indian Affairs for the Province of BC (the “McKenna-McBride Commission”) with reference to reserves in the Railway Belt were confirmed without any reductions or cut-offs to any reserves in the Railway Belt.
38. By Dominion Order in Council 1930 – 208, Canada returned the Railway Belt lands to the Province of BC, but retained all the Indian reserves within the Railway Belt, including Whyeek IR 4 when the remaining lands in the Railway Belt were transferred back to BC.

The Construction of the CPR

39. To further advance its constitutional obligation to construct a national railway, Canada entered into contracts with Andrew Onderdonk to build the western segment of the CPR from Savona's Ferry 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.
40. In 1881, pursuant to the *Canadian Pacific Railway Act*, SC 1881 (44 Vict), c 1 (“*CPR Act*”), 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 Act* and 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. In exchange, the CPR Company agreed to maintain, work, and run the CPR.
41. The railway was subsequently constructed and operated under the authority of the *Government Railways Act*, SC 1881, c 25.

42. A survey plan, dated November 30, 1884, entitled *CPR Contract No. 61 Plan shewing land required for Right of Way 1884* signed by "Government Engineer" George Keefer (the "Keefer Plan") showed the location of the CPR right of way through the land which would become Whyeek IR 4 and indicated a proposed width of 600 feet. The plan also showed that the right of way only covered the river bank at the far north end of the reserve.
43. The Keefer Plan was deposited in the provincial Land Registry in Victoria on July 14, 1885 on behalf of the Minister of Railways and Canals pursuant to the *Government Railways Act*.
44. Whyeek IR 4 was plotted on the Keefer plan at some point after it was first surveyed in 1885.
45. The construction of the western section of the CPR was completed in 1885 and the railway was in operation starting June 1886.

Transfer of the right of way to the CPR Company

46. On November 2, 1886, by Dominion Order in Council PC 1935, the Governor in Council authorized the conveyance to the CPR Company of the portions of the CPR railroad that Canada was required to construct and convey pursuant to the CPR Contract and *CPR Act*.
47. On August 25, 1891, Dominion Order in Council PC 2006 recommended that on payment by the Department of Railways and Canals to the DIA for the land within the CPR right of way, including the right of way land in Whyeek IR 4, the DIA transfer the land to the Department of Railways and Canals so that it could be transferred to the CPR Company.
48. In 1903, Canada determined that a re-survey of the CPR right of way was required to identify and define the lands to be conveyed to the CPR Company. To this end, the Garden Plan was prepared in 1904 showing "the lands of the Government to be conveyed to the Canadian Pacific Railway Company."

49. The area required for the railway through Whyeek IR 4 shown on the Garden Plan was calculated as 107.0 acres. The width of the railway was noted to be 300' on either side of the center line through most of the right-of-way.
50. On April 19, 1912, the Minister of Indian Affairs recommended via Dominion Order in Council PC 953 that the CPR Company be granted letters patent to the right of way through the Whyeek IR 4, as the chief engineer of the Department of Railways and Canals had certified the right of way through the reserve as being required for railway purposes. These Letters Patent were issued on July 5, 1912.
51. Dominion Order in Council PC 953 also noted that payment was received from the "Company" for rights of way through five reserves, including Whyeek IR 4. This was corrected in 1929 when the Department of Indian Affairs advised the solicitors for the CPR Company that the Company was incorrectly cited as having paid the funds to the DIA; in fact the Department of Railways & Canals had paid the compensation to the DIA.
52. Around the same time as Letters Patents were being issued to the CPR Company for the right of way, a dispute arose between the Company and the Departments of Interior and Justice over whether the land taken by the Company under the *Government Railways Act* was excessive. According to correspondence between 1914 and 1916, all parties agreed that the CPR Company was entitled to at least a 99 foot right of way, but disagreed as to where the Company was entitled to more than that. The matter was settled when the CPR Company accepted a narrower right of way in accordance with the findings of the company's engineer and the government. The right of way through Whyeek IR 4 was not adjusted.

Valuation of land taken for the CPR and payment of compensation for Whyeek IR 4

53. 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 included advising the government on the valuations of and compensation for lands to be taken for the railway.

54. To aid in the valuation of the lands taken for the right of way, official valuers were appointed to appraise the right of way through settler holdings and Indian reserves. The valuers 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.
55. 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. Whyeek IR 4 was not included as it had only been surveyed in July 1885, too late to be included in Trutch's valuation.
56. In 1888, the DIA became aware that the CPR passed through other reserves in addition to those for which valuations had been provided in 1885. The DIA submitted a list of these reserves, which included Whyeek IR 4, to the Department of Railways and Canals for an assessment of the compensation payable for these lands.
57. In March 1890, following an exchange of correspondence between the DIA and the Department of Railways and Canals to clarify the boundaries of the reserves, the Department of Railways and Canals provided valuations to the DIA for the CPR right of way through the reserves in question.
58. The Department of Railways & Canals valuation indicated that 110 acres was taken from Whyeek IR 4 and the value of the land was \$110.00.
59. The DIA reviewed the valuations provided and then recommended that AW Vowell, Indian Superintendent for BC, and the Indian Agents in whose agencies the reserves were situated, assess the valuations and make amendments if necessary.
60. JW MacKay, Indian Agent for the Lytton Agency, made a tour of the reserves in his agency, including Whyeek IR 4, in the summer of 1890. He informed Vowell that there did not appear to be any reason to amend the valuations provided to him. MacKay's

report indicated values for fences, trees, and buildings taken in several of the reserves. No value was given for improvements taken in Whyeek IR 4.

61. On August 25, 1891, Dominion Order in Council PC 2006 recommended the payment of \$640.65 by the Department of Railways and Canals to the DIA for lands within certain Indian reserves traversed by the CPR.
62. By December 22, 1891 the Department of Railways and Canals had deposited the funds with the DIA, and on January 13, 1892, the sum of \$110.00 was credited to the Kanaka Bar Band's account.

McKenna – McBride Commission’s consultation with the Band

63. In 1912 the McKenna-McBride Commission was created to settle the disagreements between Canada and British Columbia “respecting Indian Lands and Indian affairs generally”.
64. In November 1914, Commissioner Shaw met with the Band at Kanaka Bar. Although the Commission had its mandate and issues to address, the Commission allowed members of the Band to raise their issues of concern.
65. During his opening remarks, Chief Charlie did not raise any complaint or concern regarding the railway. Similarly, when specifically discussing Whyeek IR 4, he made no comment regarding the railway traversing the reserve.
66. Based upon the testimony of the Chief, Whyeek IR 4 was originally intended to be used as a fishing site. At the time of the Commission, it was being used as pasturage for horses and the cultivation of two small gardens. The Chief stated that more of the land was cultivatable than was currently being used and that he intended to use it. The Chief also stated that for irrigation there was a spring and plenty of water in Whyeek Creek, and that it would not be difficult to bring the water from the creek to the reserve because there was already an old miner’s ditch built near the reserve.
67. When asked by the Commissioner, the Chief confirmed that he understood there to be enough water available to support the cultivation of the available land on Whyeek IR 4.

Recent events

68. On June 25, 1999, in an appeal by several Indian bands not including the Band, the Federal Court of Appeal (*Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325) held that the CPR rights of way through various reserves are "in the reserve" for the purposes of section 83 of the *Indian Act, 1985* and that the appellant bands have jurisdiction to levy property taxes.
69. On September 19, 2003 the electors of the Band successfully voted to designate the railway right of way lands through Whyeek IR 4 pursuant to section 38(2) of the *Indian Act, 1985*.
70. On November 8, 2003, the Band, via an Instrument of Designation, designated the right of way area through Whyeek IR 4 so that a right of way could be granted to the CPR Company.
71. On December 3, 2003, the Governor in Council accepted the Band's designation of the railway right of way lands by Dominion Order in Council PC 1944, passed pursuant to section 40 of the *Indian Act, 1985*.

V. Relief (R. 42(f))

72. The Crown seeks a dismissal of all claims set out in the Declaration of Claim.
73. If the Crown is liable, which is not admitted, the Province of British Columbia caused or contributed to the alleged acts or omissions and any losses arising therefrom, pursuant to the *Specific Claims Tribunal Act* ("Act"), section 20(1)(i).
74. If the Crown is liable, which is not admitted, the compensation received by the Band from the DIA for the land should be deducted from the amount of compensation, pursuant to the *Act*, section 20(3).
75. The Crown pleads and relies on the *Act*, section 20.
76. Such further and other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

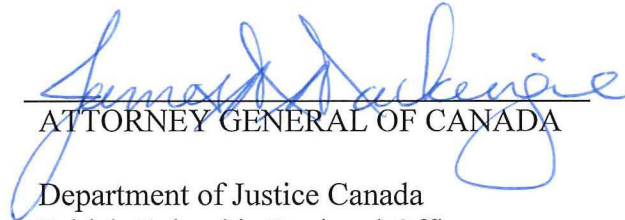
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Dated: September 7, 2018



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