

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

HUU-AY-AHT FIRST NATIONS

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	March 10, 2015	D É P O S É
Nicholas Young		
Ottawa, ON	16	

Claimant

v.

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

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: March 10, 2015

Nicholas Young
(Registry Officer)

TO: HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development
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I. Claimant (R. 41(a))

1. The Claimant, HUU-AY-AHT FIRST NATIONS (“HFN”) confirms that it is a First Nation, within the meaning of s. 2(b) 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

...

(d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister’s decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. HFN initially filed this claim with the Minister on June 4, 2004 in respect of breaches by Canada of lawful obligations relating to the construction, use and decommission of logging roads constructed and used on the HUU-AY-AHT First Nations’ Numukamis Indian Reserve No. 1 (“IR 1”) between at least 1947 and 1983 (the “IR 1 Road Claim”).
4. On June 23, 2008, Canada accepted negotiation of the IR 1 Road Claim in respect of Canada’s lawful obligation that HFN was not compensated for the timber that was cut and removed during the construction of branch roads 103 and 640, but rejected the rest of the IR 1 Road Claim, including in respect of the following:
 - a) Canada failed to lease the lands on which the logging roads were built in accordance with the law and on terms that were in the best interests of HFN;
 - b) Canada failed to ensure that the value of the leased lands would be protected and that the lands would be returned to HFN in the same condition as when the logging roads were constructed on IR 1;

- c) Canada applied undue influence over members of HFN during the negotiation of the leases;
 - d) Canada failed to require the lessee to decommission and reforest the leased lands upon the expiration of the leases;
 - e) Canada failed to ensure that the lessee adhered to industry practices and standards in constructing the roads; and
 - f) Canada failed to ensure that HFN was compensated for the timber that was cut and removed from the leased lands during the construction of the mainline logging road.
5. The acceptance for negotiation is deemed to be on October 16, 2008 as per s. 42(2)(c) of the *Specific Claims Tribunal Act*.
6. As of October 16, 2011, three years have elapsed since the Minister was deemed to have notified HFN of its decision to negotiate part of the IR 1 Road Claim. No part of the IR 1 Road Claim has been resolved by a final settlement agreement, as a result this claim falls under s. 16(1)(d) of the *Specific Claims Tribunal Act*.

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

7. HFN does not seek compensation in excess of \$150 million for the IR 1 Road Claim.

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

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

...

(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;

(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))

NUMUKAMIS IR 1

9. IR 1, at the mouth of the Sarita River on the West Coast of Vancouver Island, was set aside as reserve land for HFN (then the "Ohiet Band of Indians") in 1882. In 1916 the Royal Commission on Indian Affairs reduced IR 1 from approximately 1700 acres to 1100 acres.
10. When it was set aside, IR 1 was thickly timbered, covered in large spruce, fir and cedar, and a variety of other species, including balsam, hemlock, and white pine.
11. IR 1 was also strategically located because it controlled access to the timber stands further up the Sarita River Valley.
12. In January 1938, the HFN surrendered all of the remaining timber on IR 1.

CONSTRUCTION OF THE MAINLINE AND BRANCH ROADS

13. Bloedel, Stewart & Welch Limited (the "Company") was granted Licence 269 to harvest timber on IR 1 in 1942. Licence 269 granted the Company "the right of conveying away the said Timber through any ungranted or waste Indian Lands". The Licence provided no authority other than in respect of timber on IR 1.
14. The Company began to construct the main logging road on IR 1 (the "Mainline Road") in or around September 1947. The Mainline Road cuts across the width of IR 1, running from the south-west corner, up to and then along the Sarita River, and exiting IR 1 at the

south-east corner. The Mainline Road is approximately 100 feet wide. A bridge built across the Sarita River connected to the Mainline Road.

- 14.1 By 1948 it was apparent that large quantities of timber obtained off of IR 1 would be transported through it, and by at least the winter of 1948 the Company had begun to transport logs across IR1.
15. The Company had no legal authority to construct the Mainline Road other than to access and convey away the IR 1 timber. HFN had not surrendered the land for the Mainline Road to Canada, as required by the *Indian Act*.
16. Prior to 1969, the Company also built numerous branch roads throughout IR 1 (the “Branch Roads”). To the extent that the Branch Roads were built or used for any purpose other than in relation to IR 1 timber, they were without authorization. The timeline of construction of the Branch Roads is unknown to HFN. However, at least Branch Road 103 had been built by the end of 1947, and at least 22.2 acres of Branch Roads were constructed prior to 1969.
17. As of 1947, Canada knew, or reasonably ought to have known, that the Company had constructed and was using the Mainline and Branch Roads (the “Roads”) without authorization and contrary to the *Indian Act*.
18. In early 1948, HFN communicated to Canada their express desire to be consulted regarding any logging roads on IR 1. In at least February and August 1948, the Indian Superintendent, N.W. Garrard, was advised of HFN’s concerns in respect of the Mainline Road in particular.

LEASE AND SURRENDER OF LANDS FOR THE MAINLINE ROAD

1948 – Offer for Lease

19. In January 1948, HFN specifically stated to Canada that:

- a) the agreement of the HFN ought to be obtained in respect of roads built or used on IR 1;
 - b) the HFN sought to be compensated, at rates to be approved by HFN, for roads built or used on IR 1; and
 - c) HFN sought to be compensated, at rates to be approved by HFN, for use of the IR1 foreshore and impacts upon HFN's riparian rights by any use of IR1 foreshore.
20. HFN's desire to be consulted and properly compensated for the construction and use of roads on IR1, as well as for the use and impacts on the foreshore were repeated in HFN's letter to Canada dated February 1948.
 21. On September 8, 1948, after having already constructed at least the Mainline Road and Branch Road 103, the Company applied to Canada for the lease of a road right of way through IR 1. The Company stated that the proposed right of way would be used to haul logs from the Company's timber holdings outside IR 1 to the log dump at Christie Bay, in the Sarita Bay area.
 22. In November 1948, Canada offered the Company a lease of the lands on which the Mainline Road had been built (the "Mainline Road lands") for \$625/year (\$25 per acre).
 23. HFN responded that they sought \$1000 per year for the 25 acre right of way applied for by the Company.
 24. Canada was aware of significantly higher rates paid including approximately \$100/acre on another Band's reserve.
 25. However, instead of negotiating with the Company on behalf of and in the best interests of the HFN, Canada acted to persuade HFN to accept the low deal. Moreover, Canada did so by threatening:

- a) that the Company would relocate the right-of-way, leaving the HFN with damaged land, no compensation for remediation and no compensation for the use already made of the land;
- b) that the provincial government would expropriate the land for the Mainline Road; and
- c) that any delay would result in the loss of 5% interest on the rentals.

26. Canada knew or ought to have known that:

- a) the strategic location of IR1 and the fact that the Company had already constructed and was using the Mainline Road made relocating the right-of-way very unlikely and put Canada, on HFN's behalf, in a strong negotiating position; and
- b) British Columbia did not have the lawful power to expropriate the lands, including because the Mainline Road was not a public road and was too wide to fall under the authority of the Provincial *Forest Act*.

27. Canada did not act in HFN's best interests with regard to obtaining appropriate compensation for the Mainline Road. Instead of attempting to achieve a fair market rate for a lease of the lands, Canada tried to persuade HFN to accept a rate well below market value that was to the benefit of the Company and the detriment of HFN. In doing so Canada used illegitimate pressure, and acted contrary to its fiduciary duty to act in HFN's best interests.

1950 – Approval of Lease with no Surrender

28. As a result of Canada's sustained pressure, HFN agreed to the terms pressed by Canada. HFN passed a Band Council Resolution ("BCR") dated November 22, 1950 accepting the terms of a lease of the Mainline Road lands for a period of five years back dated to June 1, 1948 (the "1950 Lease"). The Company made no payment for the use of the Mainline Road at that time.

29. However, HFN had not surrendered the Mainline Road lands prior to the BCR of November 22, 1950. As a result, the Company's construction and use of the Mainline Road remained unlawful, and the BCR accepting the 1950 Lease was of no lawful effect.
30. Canada knew or ought to have known that the Company's construction and use of the Mainline Road remained unlawful and not in the best interests of the HFN.
31. The Company was not satisfied with a five-year lease and continued to discuss a long term lease with Canada. After further sustained pressure from Canada, in September 1951, HFN accepted a lease term of 21 years for the Mainline Road lands with an annual rent of \$625. HFN had still not surrendered the Mainline Road lands in 1951 and thus this lease was not lawful. Once again, the Company made no payment for the use of the Roads at that time.

1953 - Surrender identified as necessary

32. It was not until November 1953 that Canada expressed that a surrender in accordance with the *Indian Act* was a necessary prerequisite to the lawful lease of the Mainline Road lands. Despite HFN's request to revisit the lease terms at that time, Canada did not do so, and instead began to pressure HFN for an unconditional surrender of the lands.
33. On January 26, 1955, HFN executed an unconditional surrender of 24.6 acres of land on IR 1 to lease "upon such terms as the Government of Canada may deem most conducive" to the welfare of HFN and its members.
34. From 1947 to 1955, the Mainline Road was used unlawfully, in trespass, and without compensation.
35. Between 1947 and 1955, the Company used the Mainline Road to transport timber removed from IR1, as well as to haul timber across IR1 from other tenures. The volume of timber hauled across IR1 is known to Canada, but not to HFN.

36. From 1947 to 1955 Canada could have negotiated an agreement in HFN's best interests for the fair market rent for the Mainline Road lands, but failed to do so. Canada could have obtained significant and fair compensation for HFN for reasons including that:
- a) the Mainline Road was already constructed at a significant cost to the Company, therefore it was very unlikely the Company would abandon this investment to avoid paying a fair market price;
 - b) IR 1 was strategically located, providing key access to the Company's valuable timber stands further up the Sarita Valley, and was therefore uniquely important to the Company's broader logging activities; and
 - c) the Company may have incurred liability for the unlawful construction and use of the Mainline Road.

The 1955 Lease (backdated to 1948)

37. Canada finalized a lease in respect of the Mainline Road lands on April 15, 1955 (the "1955 Lease"), almost seven years after the Mainline Road was constructed. Prior to the 1955 Lease, the Company had been permitted by Canada to construct and use the Mainline Road without a surrender, without lawful authority, and without compensation to HFN.
38. Key terms of the 1955 Lease were as follows:
- a) a term of 21 years, with a right of renewal for a further 21 years "at such rental as may then be agreed upon otherwise upon the same terms and conditions as herein contained";
 - b) backdated to 1948; and
 - c) an annual rent of \$625 per year.
39. The 1955 Lease did not protect or advance the HFN's interests and did not include any compensation for timber hauled across IR1.

40. When the 1955 Lease was finalized, the Company made a lump sum payment of \$4,375 to HFN representing the \$625 annual rent for the seven-year period during which the Company used the Mainline Road without authority. Canada did not require and the Company did not pay interest or additional charges on this amount.
41. In negotiating the 1955 Lease, Canada did not act on or take into account the express requests and intentions of the HFN, and failed to negotiate on behalf of the HFN to protect and to further HFN's best interest.
42. Rather, Canada threatened HFN with expropriation, and made baseless suggestions that HFN would receive less or possibly even no compensation if they did not accept the Company's terms. In doing so, Canada breached its duty of loyalty to HFN, and left HFN with no apparent choice but to accede to the 1955 Lease and the surrender against its wishes.

The 1969 Mainline Permit

43. In 1969, the Company entered into another 21-year agreement regarding the Mainline Road with rent reviews every five years for the use of the Mainline Road (the "1969 Mainline Permit"). Rent was \$1,200 per year from 1969 to 1974 and \$12,000 per year for 1974 to 1979.
44. The 1969 Mainline Permit did not protect or advance the HFN's interests and did not include compensation for timber hauled across IR1.
45. From 1955 to 1979, Canada's actions again deprived HFN of fair market value in compensation for use of the Mainline Road.

THE BRANCH ROADS

No authority for Branch Roads prior to 1969

46. At least 22.2 acres of Branch Roads were constructed by the Company on IR 1 before 1969. However, to the extent that the Branch Roads were used for purposes beyond the

IR 1 timber, the Company had no legal authority to construct or use the Branch Roads until it finally sought and obtained permission in 1969.

47. An undated BCR approved an agreement relating to the Branch Roads that was entered into on May 14, 1969 (the “1969 Branch Roads Permit”) on the following terms:
- a) an annual rent of \$600;
 - b) a term of five years with three successive five-year renewal periods;
 - c) at each renewal period, the Company had the right to delete renewal for any Branch Roads not required; and
 - d) in the event of disagreement regarding rental renewal, the matter was to be referred to the Exchequer Court of Canada for arbitration.
48. The Company’s construction and use of the Branch Roads prior to the 1969 Branch Roads Permit was unlawful as there was no surrender, expropriation or permit for the lands on which the Branch Roads were built (the “Branch Roads lands” and, together with the Mainline Road Lands, the “Roads lands”) as required under the *Indian Act*.
49. The 1969 Branch Roads Permit was not in the best interests of the HFN, and was entered into in breach of Canada’s fiduciary obligations to HFN. 1969 Branch Roads Permit was renewed, with minor alterations, in 1974 and 1979.

1979 –Branch Road 640

50. In 1979, the Company indicated that it only needed to use Branch Road 640, which totalled 8.33 acres, and it asserted that although it was using this road to access its Tree Farm Licence to the north of IR 1, it would not haul timber from off-reserve over Branch Road 640.

51. During negotiations of the 1979 Branch Road Permit, HFN passed a BCR clearly stating that it wanted \$3,600 per year for Branch Road 640 plus \$10 per cunit of any logs hauled over the road.
52. The Company pushed for a rate of \$1,500/year with no penalty for hauling timber from off reserve.
53. Canada did not meaningfully consult HFN, and made no real attempt to negotiate with the Company on behalf of HFN. Canada also failed to rely upon or enforce the arbitration clause in the 1969 Branch Road Permit. Instead, Canada renewed the 1969 Branch Road Permit in 1979, on essentially the same terms. The HFN's requests, as expressed in the 1979 BCR were not addressed by Canada or incorporated into the Permit.
54. After having renewed the Permit, Canada forwarded HFN's BCR of 1979 to the Company in March 1980 and suggested that the Company contact HFN directly for future negotiations. In so doing, Canada abdicated its responsibility as a fiduciary to act in the best interests of and to negotiate fair compensation for HFN.

TERMINATION OF THE MAINLINE AND BRANCH ROADS AGREEMENTS

55. Despite the term of the 1969 Mainline Permit to 1990, the Company unilaterally decided to make no further payments under that permit after 1979.
56. In November 1980, Canada proposed that the Company pay \$11,500 for cancellation of the 1969 Mainline Permit and \$2,500 per year for rent under the renewed Branch Roads Permit.
57. Without consulting HFN, Canada reduced the demand to the Company to \$7,000 as compensation for terminating the 1969 Mainline Permit and agreed to recommend that HFN accept the Company's offer of \$1,500 per year for the Branch Roads Permit. The Company accepted Canada's offer in February 1981.

58. Following the 1981 agreement with the Company, Canada asked HFN for “a B.C.R. confirming the agreement, already reached with M & B, of \$7000.00 lump sum for the mainline and \$1500.00 per year for the branch roads”.
59. In July 1981, HFN expressed concern to Canada that the Company had installed gates in March 1981 that blocked access to the Mainline Road from off of IR 1 and prohibited use of that road by HFN members. Canada did not take any steps to admonish the Company for blocking the Band’s access to IR 1 even though no payments had been made since 1979.
60. In June 1983, the Company again offered \$7,000 for the cancellation of the Mainline Permit and \$1,500 per year for five years for the Branch Roads, back dated to 1979 and excluding interest charges.
61. In August 1983, HFN finally succumbed to pressure by the Company and Canada, and accepted the June 1983 offer. Canada did not require that the Company pay any interest on the amounts owing.
62. During this prolonged disagreement, Canada failed to refer matters to arbitration as required.
63. In March 1984, the Company indicated that it no longer required use of the Branch Roads and purported to terminate the Branch Roads Permit.

FAILURE TO ACT IN HFN’S BEST INTERESTS

Use in Trespass and Insufficient Compensation

64. Canada did not act in the best interests of HFN in the administration of the Roads on IR 1:
 - a) Canada purported to allow the Company to construct, use and occupy the Mainline Road in trespass for 8 years (1947-55), and the Branch Roads in trespass prior to 1969; and

- b) Canada obtained insufficient compensation for the Mainline Road and for the Branch Roads.

VI. Legal Basis

65. This claim is based upon the Crown's breaches of the *Indian Act*, the *Indian Timber Regulations* and of the Crown's fiduciary obligations at common law relating to the surrender and lease of reserve lands for the construction and use of the logging roads on IR 1, which were constructed and used between at least 1947 and 1983.
66. HFN alleges that Canada breached its fiduciary obligations in the administration of the lands upon which the Roads were built and used by the Company on IR 1. In particular, Canada:
- a) purported to allow the Company to construct and use the Roads in trespass without lawful authority;
 - b) thereafter purported to allow the Company to use the Roads in exchange for no compensation or compensation that fell significantly below market value, to the benefit of the Company and to the detriment of HFN;
 - c) applied undue and illegitimate pressure over HFN in negotiating the terms upon which the Roads would be used by the Company;
 - d) failed to lease the Roads lands upon terms that were in the best interests of HFN; and
 - e) failed to consult with the HFN at all, or in a manner consistent with a fiduciary's obligation of loyalty and good faith.
67. HFN seeks compensation from Canada for loss suffered by the HFN due to:
- a) Canada's failure to lease the Mainline and Branch Roads lands to the Company on terms that were in the best interests of HFN, including loss arising from the

failure to charge adequate compensation for the Company to construct and use the Mainline and Branch Roads to haul timber harvested outside IR 1 and hauled through IR 1;

- b) consequential damage resulting from Canada's breaches;
- c) interest; and
- d) such other damages or compensation as this Honourable Tribunal deems just.

Dated this 9th day of March, 2015.



Signature of Representative/Solicitor

Submitted by Kate M. Blomfield of Ratcliff & Company, Barristers and Solicitors, Suite 500 – 221 West Esplanade, North Vancouver, B.C. V7M 3J3

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