

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

'NAMGIS FIRST NATION

Claimant

v.

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

Respondent

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
August 7, 2012	
Amy Clark	
Ottawa, ON	7

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: 'NAMGIS FIRST NATION

As represented by Stan H. Ashcroft of Ashcroft & Company, Barristers and Solicitors, Suite #205 – 1544 Marine Drive, West Vancouver, BC V7V 1H8

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

1. The 'Namgis First Nation ("Namgis") submitted a claim to the Minister of Indian Affairs and Northern Development Canada ("Minister") on January 22, 1998 ("Specific Claim").
2. The Specific Claim concerned the taking of .499 of an acre of land from Nimpkish Indian Reserve No. 1 ("I.R. No. 1") in or about 1934 for the construction of a road ("Road").
3. By letter dated January 21, 2010, the Minister notified 'Namgis of the Minister's decision not to accept the Specific Claim for negotiation on the basis that the Specific Claim did not disclose an outstanding lawful obligation on behalf of the Queen in Right of Canada ("Crown") relating to the taking of .499 of an acre of I.R. No. 1 land.

II. (a) Validity (Rule 42(b))

4. The Crown denies the validity of the claims based on all the grounds in the Declaration of Claim dated May 7, 2012 ("Declaration"), paragraph 6.
5. The Crown denies the validity of the claims in the Declaration, paragraphs 40 and 41.
6. In the alternative, if there were any failure, acts or omissions related to maintaining and preserving the Road as alleged in the Declaration, paragraphs 40 (c) and (f), which the Crown denies, pursuant to the *Specific Claims Tribunal Act* ("Act"), section 20(1)(i), the Province of British Columbia ("Province") caused or contributed to such failure, acts or omissions or the loss arising from such failure, acts or omissions and the Crown is not at fault for any such loss.

7. The Crown denies the validity of the claim for damages in the Declaration, paragraph 42.
8. In the further alternative, if there was any failure related to maintaining and safeguarding the Road as alleged in the Declaration, paragraphs 42 (b) and (d), which the Crown denies, pursuant to the *Act*, section 20(1)(i), the Province caused or contributed to such failure or the loss arising from such failure and the Crown is not at fault for any such loss.

Jurisdiction

9. The Specific Claims Tribunal (“Tribunal”) does not have jurisdiction under the *Act*, section 14, to adjudicate the claim in the Declaration, paragraph 40(b), because this claim relates to losses alleged to have been incurred by individual band members.
10. The Tribunal does not have the jurisdiction under the *Act*, section 14, to adjudicate the claim for compensation in the Declaration, paragraph 42(e), because this claim relates to damages alleged to have been incurred by individual band members.
11. The Tribunal does not have the jurisdiction under the *Act*, section 20(1)(d)(ii), to adjudicate the claim for compensation in the Declaration, paragraphs 42(b) and (d), because these claims relate to harm or loss not pecuniary in nature.

III. Admissions, Denials or No Knowledge (Rule 42(d))

12. The Crown admits the facts in the Declaration, paragraphs 1, 2, 3, 7, 8, 9, 10, 11, 13, 14, 15, 16, 18, 22, 24, 27, 28, 30, 31, 32, 34, 37 and 39.
13. The Crown has no knowledge of the facts set out in the Declaration, paragraphs 5, 12, 25, 26, 35.

14. In reply to the Declaration, paragraph 4, the Crown admits that a letter was written on January 21, 2010. Beyond this fact, the details of the letter are irrelevant and privileged.
15. In reply to the Declaration, paragraph 17, the Crown says that the .499 acres of land was purportedly transferred from the Crown to the Province pursuant to section 48 of the *Indian Act*, R.S.C. 1927, c. 98. In 1934, the .499 acres of land was provincial Crown land to which the *Indian Act*, R.S.C. 1927, c. 98 did not apply. The Crown admits the remainder of the facts in paragraph 17.
16. In reply to the Declaration, paragraph 19, the Crown denies the facts in paragraph 19.
17. In reply to the Declaration, paragraph 20, the Crown admits that no compensation was paid for the loss of .499 of an acre of I.R. No. 1 land. If compensation was owed, which is not admitted, it was owed by the Province. The Crown denies the other facts in paragraph 20.
18. In reply to the Declaration, paragraph 21, the Crown denies the facts in the first sentence and admits the other facts in paragraph 21
19. In reply to the Declaration, paragraph 23, the Crown has no knowledge of the facts in the first sentence and admits the other facts in paragraph 23.
20. In reply to the Declaration, paragraph 29, the Crown has no knowledge of the facts in paragraph 29. By letter dated September 7, 1948, the Crown acknowledged receipt of the proposal of the Province to widen and improve the Road.
21. In reply to the Declaration, paragraph 33, the Crown admits the facts in paragraph 33. However, a June 1954 plan and field notes showed a sixteen-foot wide right of way through I.R. No. 1.

22. In reply to the Declaration, paragraph 36, the Crown admits the facts in the first sentence of paragraph 36 and has no knowledge of the other facts in paragraph 36.
23. In reply to the Declaration, paragraph 38, the Crown admits the facts in paragraph 38. The date of the correspondence between Nimpkish Chief James Sewid and the Minister of Labour was November 10, 1950.

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

24. On October 20, 1884, Reserve Commissioner Peter O'Reilly allotted 46.25 acres of land to I.R. No. 1.
25. In 1887, a survey confirmed I.R. No. 1 was comprised of 46.25 acres. The following year the survey was endorsed by the Crown and approved by the Province.
26. By letter dated January 9, 1931, Indian Agent W.M. Halliday advised Indian Commissioner W. E. Ditchburn that the 'Namgis passed a band council resolution granting the Province a right-of-way to construct a road across I.R. No. 1. Indian Agent Halliday also advised that compensation would be paid to band members for improvements damaged by the Road.
27. By Order in Council P.C. 217 dated February 5, 1934 ("O.I.C. 217"), the Crown transferred .499 of an acre of I.R. No. 1 to the Province. The .499 of an acre was composed of a right-of-way fourteen feet in width and recorded as plan number Rd. 2534 ("Plan 2534").
28. By Order in Council 1036 dated July 29, 1938 ("O.I.C. 1036"), the Province formally transferred to the Crown the administration and control of reserve lands in the Province, including I.R. No. 1.
29. The Road was rebuilt at some point during the summer of 1941.

30. By letter dated August 23, 1941, Indian Agent Todd informed S.D.H. Pope, District Engineer, that the 'Namgis agreed to give a portion of I.R. No. 1 land to the Province in order to straighten a six-foot bottleneck in the Road, which had been causing traffic to spill over onto the sidewalk.
31. By letter dated November 17, 1941, Indian Agent Todd informed Indian Commissioner D.M. MacKay that the bottleneck in the Road had been straightened and a new sidewalk had been built.
32. By letter dated May 6, 1947, Indian Agent Todd informed Minister of Public Works C.E. Carson that 'Namgis was agreeable to having the existing sidewalk taken by the Province in order to widen the Road subject to the Province building a new sidewalk on I.R. No. 1.
33. By letter dated November 10, 1950, Chief of Nimpkish Band Council James Sewid wrote to the Province requesting that the Road be widened and advising that the 'Namgis agreed to forego compensation for the land and a replacement sidewalk.
34. The Road was widened at some time before 1953.
35. On or about November 13, 1953, the Crown advised the Province that no application had been made for the additional right-of-way for the widening of the Road.
36. In 1974, a plan was registered in Canada Lands Survey Records showing the Road widened by .32 acres and no concrete sidewalk ("Plan 58937").
37. By Order in Council P.C 2001-904 dated May 17, 2001 ("O.I.C. 2001-904"), the Crown transferred to the Province administration and control of:

"All of the highway through Alert Bay Indian Reserve No. 1 comprised of Lots 124 and 125 as shown on plan 83726 deposited in the Canada Lands Surveys Records in Ottawa. Save and except the fourteen foot wide road shown on Plan

RD 2534 deposited in the Canada Lands Surveys Records in Ottawa. Comprising an area of 0.257 hectares more or less" ("Lands").

38. O.I.C. 2001-904 further provided that:

- a. for the above taking or transfer, the Province shall pay the Crown the amount of \$115,000; and
- b. Canada accepts the money as full and final satisfaction and compensation to Canada for the taking or transfer of the Lands.

V. Relief (Rule 42(f))

39. The Crown seeks a dismissal of all the claims set out in the Declaration.

VI. Communication (Rule 42(g))

Respondent's address for service: Department of Justice
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Attention: James M. Mackenzie

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Dated: August 7, 2012



Signature of
 Respondent lawyer for
Respondent

Myles Kirvan
Deputy Attorney General
Per: James M. Mackenzie
Department of Justice
British Columbia Regional Office