

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	October 12, 2016
David Burnside	
Ottawa, ON	1

B E T W E E N:

PASQUA FIRST NATION

Claimant

v.

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

Respondent

DECLARATION OF CLAIM

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*.

October 12, 2016

Date

David Burnside

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building, 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
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I. Claimant

1. The Claimant, the Pasqua First Nation (hereinafter also referred to as the “First Nation”) 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. 1-5 and within the meaning of Treaty No. 4 (hereafter “Treaty 4”). The First Nation is located in the southern part of the province of Saskatchewan.

II. Conditions Precedent

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 First Nation filed the claim with the Minister of Indian Affairs (Specific Claims Branch) on April 10, 2013, outlining the particulars of the Respondent’s breach of treaty, statutory and fiduciary duties in relation to the unlawful expropriation of land from the Pasqua Indian Reserve No. 79 (“IR 79”) by the Grand Trunk Pacific Branch Lines Company (“GTP”) for a railway right-of-way, station grounds and a road diversion (hereinafter referred to as the “Claim”).
4. The Specific Claims Branch notified the First Nation in writing on May 20, 2016, that the Claim was not accepted for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

III. Grounds of the Specific Claim

5. The following grounds are plead pursuant to s. 14(1) 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;

...
 (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; ...

IV. Statement of Facts

6. Pasqua Indian Reserve No. 79 was surveyed and set apart in 1876 pursuant to the terms of Treaty 4 for the Pasqua people. As originally constituted, IR 79 contained 38,496 acres of land and is situated approximately 35 miles north east of Regina, Saskatchewan.

(a) 1910 Railway Right of Way and Station Grounds

7. In May 1910, the GTP submitted an application for approval to the Board of Railway Commissioners for the location plans for the portion of the branch line running from Balcarres to Regina, which included the section of line through the Pasqua reserve. The application was approved by the Board on July 5, 1910.

8. In June 1910, the GTP submitted an application to the Department of Indian Affairs ("Department") requesting to take 26.56 acres of Pasqua reserve land for station grounds and the right of way (hereinafter the "right of way") that would pass through the southeast corner of the reserve.

9. On July 19, 1910, J.D. McLean, Assistant Deputy Minister and Secretary for the Department of Indian Affairs, instructed the Indian Agent, H. Nichol, to make a valuation in connection with the right of way.

10. In correspondence to the Department dated August 25, 1910, Indian Agent Nichol recommended \$116.50 as compensation to the Band member whose improvements would be affected and \$531.20 (based on a rate of \$20.00 per acre) for the land to be expropriated, totaling \$647.70.

11. On August 27, 1910, the GTP wired F. Pedley, Deputy Superintendent General of Indian Affairs, requesting that it be allowed access to the reserve to commence construction.
12. On August 29, 1910, having not received the Indian Agent's valuation, S. Bray, Chief Surveyor for the Department of Indian Affairs, recommended to the Department that the GTP be allowed to enter the reserve for construction and that an application be submitted for the necessary Order in Council.
13. On August 29, 1910, Deputy Minister McLean wired Indian Agent Nichol instructing him to permit the GTP to enter on Pasqua reserve land for construction.
14. On August 30, 1910, the Superintendent General of Indian Affairs made a formal submission to the Governor General in Council recommending approval of the GTP's application for the right of way through several reserves, including Pasqua reserve.
15. On September 8, 1910, the Department received the Agent's valuation of \$647.70 which was prepared without the requisite consultation with the Band. The Department then asked the GTP to consider payment of this amount.
16. On September 16, 1910, Order in Council P.C. 1740 granted the GTP formal authority to acquire 26.56 acres of Pasqua reserve land for the rail right of way pursuant to Section 46 of the *Indian Act*. The Order in Council recommended that the GTP be allowed to acquire the right of way "upon such terms as may be agreed upon".
17. On November 16, 1910 GTP solicitor, C.H. Mansur, forwarded a cheque in the amount of \$647.70 to the Department and a receipt was issued on November 26, 1910. This amount was credited to the trust account of the Pasqua Band on November 30, 1910, and \$116.50 was withdrawn on December 24, 1910, for payment to the Band member whose improvements were damaged.

(b) 1911 Road Allowance

18. In January 1911, the Department alerted the GTP to an error on the right of way plans. Although the plans showed a road allowance on the eastern boundary of the reserve, there was in fact no such road allowance. As a result, the Department notified the GTP that an additional 0.8 acres of Pasqua reserve land would be required in order to construct the rail line.
19. On January 27, 1911, Secretary McLean requested that the GTP pay \$16.00, using the earlier rate of \$20.00 per acre, as compensation for the 0.8 acre. The GTP sent this additional amount on November 17, 1911 and requested that a patent be issued for the land. The \$16.00 was credited to the Pasqua trust account on November 30, 1911.
20. On December 22, 1911, Secretary McLean forwarded a proposed description of patent to the GTP for the right of way for 27.36 acres, which included the 26.56 acres for the right of way and the additional 0.8 acres for the road allowance.
21. On January 18, 1912, the Department of Indian Affairs issued Letters Patent No. 16501 to the GTP covering the sale of 27.36 acres of Pasqua reserve land.
22. Order in Council P.C. 1740 was never amended or replaced formally granting the GTP the additional 0.8 acres despite that this acreage was included in the Letters Patent No. 16501.

(c) 1920 Road Diversion

23. On July 23, 1915 the GTP applied to the Department for two parcels of Pasqua reserve land comprising 1.6 acres for the purposes of a road diversion in connection with the right of way.
24. On August 4, 1915, the Department informed Indian Agent Nichol about the GTP's request and asked him to consult with the Band and recommend a sum for compensation. On September 16, 1915, Agent Nichol submitted a report noting

he had not yet consulted with the Band and recommended valuing the land at \$20.00 per acre, in keeping with the prior amount paid per acre.

25. On September 22, 1915, the Department advised the GTP of the amount assessed by Indian Agent Nichol and pointed out that the payment may be considered damages and would not represent a sale because the Department was opting to retain possession of these lands.
26. On June 30, 1920, the Department wrote to the GTP and confirmed the amount of Pasqua reserve land required for the road diversion to be 1.58 acres and that upon receipt of \$31.60 arrangements would be made to issue the Order in Council.
27. On September 15, 1920 Departmental correspondence indicate payment was received for Pasqua reserve land taken for the road diversion in the amount of \$31.60. However, there is no evidence of a deposit of the \$31.60 in the Pasqua Band's trust account regarding the land taken for the road diversion.
28. On October 9, 1920, Order in Council P.C. 2418 transferred 1.58 acres of Pasqua reserve land along the eastern boundary to the Province of Saskatchewan for road purposes.

V. The Basis in Law – Crown Breaches of Lawful Obligations

29. The Pasqua First Nation's Claim is brought on the grounds that the Respondent breached its statutory and fiduciary duties to the Pasqua First Nation in the context of this taking for the railway right-of-way and road diversion by:
 - a. failing to follow the expropriation procedures set out by the *Indian Act* and the *Railway Act* when it expropriated Pasqua Reserve land for the railway right-of-way and road purposes;
 - b. failing to advise the Pasqua First Nation regarding the valuation of the land to be taken and the its statutory right to seek arbitration if it was not satisfied with the compensation for the lands taken;

- c. failing to ensure that the Pasqua First Nation's use and enjoyment of its Reserve land was minimally impaired by purporting to grant fee simple title to the road and right-of-way lands to the GTP when it required only a limited interest in the nature of a statutory easement with a reversionary right in favour of the Pasqua First Nation when the lands were no longer required for railway and road purposes;
- d. failing to withhold its consent to the taking of Pasqua Reserve land as the transaction was foolish, improvident and exploitative; and
- e. in the alternative, if no statutory breach is found, breach of fiduciary duty to obtain adequate compensation for the taking of Pasqua Reserve lands.

VI. Relief Sought

- 30. The First Nation does not seek compensation in excess of \$150 million.
- 31. The Pasqua First Nation seeks the following relief:
 - a. compensation for the fair market value and loss of use of the Claim lands;
 - b. an Order that any interests conveyed to the GTP are limited to a statutory easement, and such interests revert to the Crown on behalf of the First Nation when the lands are no longer required for railway and road purposes, and that the underlying mineral rights remain vested in the Crown on behalf of the Pasqua First Nation;
 - c. an Order rescinding the January 18, 1912 Letters Patent and rectifying all Land Titles and other government records to reflect the interests in land described in paragraph 32(b) herein;
 - d. an award of solicitor-client costs pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119, section 110(2) in relation to the specific claim and this proceeding; and
 - e. such other relief as this Honourable Tribunal deems just.

Dated this 11th day of October, 2016 at the City of Calgary, in the Province of Alberta.

MAURICE LAW



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