

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	April 12, 2016	D É P O S É
David Burnside		
Ottawa, ON	1	

B E T W E E N:

Tseshah 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
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 12, 2016

David Burnside

(Registry Officer)

TO:

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I. Introduction

1. This claim is against Canada for its breach of its legal obligations to Tseshaht in the illegal surrender of Iwachis I.R. 3, Tseshaht First Nation's reserve and fishing village, to Canadian National Pacific Railway ("CNPR").

II. Claimant

1. The Claimant, Tseshaht First Nation ("Tseshaht") confirms that it is a First Nation in British Columbia within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*.

III. Conditions Precedent

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

(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. Tseshaht originally filed a claim respecting various alleged breaches of Canada's legal duties owed to Tseshaht on October 16, 2008.
4. This claim was rejected in a letter dated August 6, 2009, from Senior Assistant Deputy Minister of Treaties and Aboriginal Government Michel Roy.

IV. Claim Limit

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

V. Grounds

6. 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; and

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

VI. Allegations of Fact (R. 41(e))

7. On June 3, 1882, Commissioner Peter O'Reilly set aside Iwachis No. 3 ("IR 3"), a Reserve of twenty-five (25) acres situated on the Eastern bank of the Alberni Canal at the First Narrows at the mouth of the Franklin River. Prior to contact, Iwachis was a very important fishing village for Tseshah. Several families lived and had houses at Iwachis including the Gaelic family and the Clutesi family. O'Reilly noted the land was not of great value except as a fishing station.
8. The Reserve was surveyed in 1883, and was approved by BC's Chief Commissioner of Lands and Works on May 16, 1894. From that time forward, IR 3 was treated as an Indian Reserve, subject to the *Indian Act*.
9. IR 3 remained intact and occupied until 1913 when it was purportedly sold to the Canadian National Pacific Railway ("CNPR").
10. CNPR was established pursuant to the *Canadian Northern Pacific Railway Incorporation Act*, S.B.C. 1910, c. 4 ("*CNPR Act*") as a subsidiary of the Canadian National Railway ("CNR"). Pursuant to the *CNPR Act*, the Company had the power to purchase, hold, lease or sell land for the purposes of the Company.
11. The *British Columbia Railway Act*, R.S.B.C. 1911 c. 194 ("*BC Railway Act*"), also contained additional restrictions on the acquisitions and use of lands.

Railway companies were restricted to only acquiring land that was “unoccupied and unreserved.”

Purchase of Iwachis

12. On March 2, 1912, Mr. Green of Green & Burdeck Brothers Real Estate Agents wrote to West Coast Indian Agent, A. W. Agent Neill, asking to purchase IR 3 from the Government on behalf of CNPR. In the letter, Mr. Green stated: “the Company is prepared to pay the usual price to the Government, as well as to arrange for the purchase from the Indians themselves, at a reasonable rate per acre.”
13. Two days later, on March 4, 1912, Agent Neill wrote to the Secretary of the Department of Indian Affairs (“DIA”) in Ottawa seeking instructions with respect to CNPR’s request. He stated that he did not know how Tseshaht would react to the idea of selling their Reserve land. The letter seeks permission to inform, “the Indians that they will receive one half the amount the land sells for in cash and that the balance can be spent on improvement on some of their other reserves.”
14. A March 13, 1912, memorandum to the Minister by Chief Surveyor Sam Bray noted that if the land was required for railway purposes it could be dealt with as with a right-of-way; however, CNPR was seeking to purchase the entire Reserve without reference to whether it was necessary for railway construction and operation. In his memorandum, Bray sought instruction as to whether or not “any action [was] to be taken with a view to obtaining a surrender from the Indians.” A hand-written notation stated, “I think we should have more information.”
15. A week later, the DIA asked CNPR for clarification of the purpose for which CNPR required the land. Mr. Green of CNPR replied on March 29, 1912, that the requested data would be supplied by people in Toronto but expressing an interest in the transaction going forward as speedily as possible.
16. On April 12, 1912, CNPR’s lawyer G.F. MacDonnell wrote to Deputy Superintendent General (“DSGIA”) Frank Pedley setting out CNPR’s desire to purchase the land for terminal and station purposes. The letter set out that the

plans were not yet complete, but that CNPR was seeking to acquire the entirety of the Reserve and therefore presumed that no other plans were required.

MacDonnell asked that Pedley authorize negotiations to acquire the land as soon as possible.

17. On April 29, 1912, the DIA Assistant Deputy and Secretary McLean informed MacDonnell that the sale of IR 3 would not be allowed.
18. Despite this initial set back, CNPR did not give up on its plans to purchase Iwachis. On June 2, 1912, an internal correspondence from the Special Commissioner McKenna to Superintendent General of Indian Affairs set out that Executive Agent Holt of CNR had approached McKenna and the Attorney General W.J. Bower regarding the sale of the Reserve. The letter sets out that the Reserve might be alienated with the consent of the Dominion and Provincial Governments pending negotiations now in progress respecting Indian Lands. Contrary to the DIA's clear statement against the sale of IR 3, McKenna recommended the sale of the Reserve, concluding that the Reserve was of little use to the Indians and that it was no longer necessary as a fishing station. At this time there were still Tseshaht members living on Iwachis. McKenna reported that the Agent had assured him that Indians were willing to sell the Reserve for \$100/acre. Agent Neill apparently gave this assessment despite having been informed by the DIA on May 9, 1912, that they would not allow the sale.
19. On June 13, 1912, the British Columbia Minister of Lands wrote to Executive Agent Holt setting out that if it is arranged with the Indians to extinguish their rights in the Reserve, and there is a proper conveyance from the Dominion Government, the Department of Lands would dispose of its reversionary interest.
20. By November 12, 1912, the DIA appeared to change its position. Assistant DSDIA McLean informed Agent Neill that CNPR had applied to purchase Iwachis Reserve and was offering \$100/acre cash and \$100/acre credit to Tseshaht. McLean sought Agent Neill's opinion on this valuation. Agent Neill replied on November 22, 1912, stating:

At first the Indians were inclined to accept, but later on they said they expected at least \$200.00 an acre paid to them all in cash, and later still they spoke as if they would not sell at all. *I would consider \$300.00 an acre was a fair price for the land, the adjacent land was, I believe, sold for that sum, although the area being small, it would not hurt the Railway Company if they paid rather more per acre*, but so far as any value to the Indians goes, \$300.00 and acre is certainly very many times its value to them. [emphasis added]

21. On November 29, 1912, CNPR drafted plans for a station, terminal and lines on the Reserve. While these plans showed that CNPR was contemplating a major interference with parts of the Reserve, the plans did not appear to affect the entire Reserve, such that all of it was required.
22. Throughout December 1912, the DIA and CNPR exchanged various communications regarding the plans for the railway. Assistant DSDIA McLean requested more plans to ensure that the entire Reserve was required for railway purposes. MacDonnell set out that the entire Reserve was sought because “portions which would be left would not be of much value to anyone even with the present railway works constructed on them and would be required in the very near future for further railway works.” Tseshah was not privy to these communications and was under the impression that the land was being sought for military purpose.
23. On December 28, 1912, the DIA returned to its initial position that the Reserve could not be alienated until the Commission had addressed the “Indian Reserve Question” in British Columbia.
24. However, by January 14, 1913, the DIA again reversed its position and decided to allow the sale provided the “Reserve is duly surrendered by the Indians.” There is no explanation for this change in position set out in the historical record. There was no consultation with Tseshah on this change of position.
25. By January 16, 1913, the Reserve was surveyed in preparation for the surrender.
26. On February 18, 1913, 27 people allegedly signed the surrender. No records have been found describing the events of that day. Some of the people who signed the

surrender did not habitually reside on or near the Reserve nor did they have an interest in the Reserve. Indeed, some of the people who signed the surrender were from other First Nations. Mr. Gaelic and Mr. Clutesi resided on the Reserve. Neither of these men signed the surrender.

27. The majority of signatories to the surrender appear to have been illiterate and signed with their mark. Most of the signatories would not have spoken English and there is no evidence of a translator being present. Tseshahat had no legal representation regarding the surrender.
28. The land was sold for the initial asking price of \$200/acre and Mr. Gaelic's building was sold for \$100 for a total of \$5300. There is no explanation of the procedure for valuing the land or building on IR 3. No independent appraisal of the land was ever conducted. There is no record of the valuation of Mr. Gaelic's house. There was no valuation or compensation of Mr. Clutesi's house.
29. There is no evidence of any negotiations with CNPR. Agent Neill did, however, set out that Tseshahat were in financial difficulty and would accept a lower valuation of their lands.
30. Agent Cox forwarded the signed surrender documents together with a cheque for \$5,300 to DIA on February 25, 1913.
31. The initial documents were not executed properly and were returned to Agent Cox. Agent Cox enclosed a second Affidavit of Execution of Surrender on March 26, 1913; however the document again did not meet the *Indian Act* requirements. The Assistant DSDIA asked for further information. Agent Cox set out that there were 35 adult males eligible to vote but only 27 voted. Agent Cox did not specify whether the 35 adult males were members of Tseshahat, habitually resided on or near the interested reserve and were interested in the reserve.
32. The final version of the surrender documents submitted by Agent Cox is almost illegible. The reasons for the absence of the eligible voters are not decipherable in the document record. Agent Cox's belated and damaged letter is the only first-hand description of the Iwachis IR 3 surrender in the documentary record.

33. After receiving the requested information from Agent Cox, the DIA decided to submit the surrender to the Royal Commission on Indian Affairs before going to the Privy Council. However, the Royal Commission determined it did not have the authority to deal with the matter.
34. On July 17, 1913, the surrender was submitted to the Privy Council for approval. The DIA File Note of the same date described the details of the surrender, stating that: "The agent valued the land at \$200/acre, which is the same valuation as was placed on the land last year by the predecessor of the present agent. There is also a house belonging to an Indian on the Reserve which the Agent values at \$100.00." It will be recalled that, contrary to this assertion, Agent Neill had valued the land at a minimum of \$300/acre, not \$200/acre and valued the house at \$150. In this correspondence, the DIA introduced that the land was being sought for town purposes. This information was not shared with Tseshaht during or after these correspondences.
35. In the meantime, the Governor in Council turned to the Ministry of Justice for an opinion on various issues associated with the surrender including the Affidavit of Execution. The Ministry of Justice suggested rewording the affidavit to include the phrase "then present" in terms of who voted for the surrender, since the Ministry of Justice understood that there were 35 eligible male members in total but only 27 were present at the meeting. This correction was made to the affidavit.
36. The Governor in Council approved the surrender on September 12, 1913, stating that it was executed as required by s. 49 of the *Indian Act*, R.S., c. 43. Forty one (41) people were paid for the surrender
37. On May 11, 1914, the Royal Commission held a hearing with Tseshaht. Chief Shewish, a signatory to the Iwachis surrender, expressed that the community needed more land and access to fishing. Other interviewees similarly indicated that Tseshaht did not have enough access to fishing and that there was concern about intrusions upon their Reserves. Fishing was and continues to be of central

importance to Tseshahat. The loss of Iwachis as a fishing village at the mouth of the Franklin River is still felt today.

38. During the Royal Commission hearing, it was unclear whether or not the Royal Commission understood that the Reserve had been surrendered. For example, in questioning Chief Shewish, both the Commissioner and the Chief spoke as if Iwachis remained a Tseshahat Reserve.
39. Confusion over the surrender continued. The Royal Commission confirmed IR 3 as a reserve on July 9, 1914, with no mention of surrender. Then, on February 17, 1916, the Royal Commission rescinded its confirmation of Iwachis IR 3; setting out that IR 3 had been surrendered and sold to CNPR in October 1913.
40. On February 6, 1917, CNPR applied for a BC Crown Grant, which was granted on July 17, 1918, for the total amount of \$260 pursuant to the Order of the Lieutenant Governor in Council (approved on April 2, 1918). The document from the Minister of Lands recommending the BC Grant to the Executive Council specifically recognized the conveyance by the Dominion Crown and recommended the Quit Claim respecting Provincial reversionary rights be issued to CNPR at \$10/acre. The Province finally conveyed its revisionary interest in Iwachis to CNPR by Provincial Crown Grant 18/354 on July 17th, 1918.
41. On August 8, 1918, CNPR registered its fee simple interest in IR 3.
42. CNPR did not at any time build the railway line, install dockage facilities or erect railway buildings on IR 3, in fact CNPR never built anything on these lands. CNPR never used any of IR 3 for any Company purposes.
43. In 1949, CNPR sold the land to Bloedel Stewart and Welsh Limited along with four other properties. The land was sold again in 1980 to MacMillan Bloedel Limited.
44. Iwachis has never been used for railway purposes.

VII. The Basis in Law on which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

45. Iwachis IR 3, set aside by O'Reilly in 1882/1883, was an Indian Reserve under the *Indian Act* in 1913. Canada breached its statutory obligations under the *Indian Act* with respect to the illegal surrender of Iwachis as follows:

- a. The surrender was not for a purpose consistent with the *Indian Act*;
- b. The valuation was not properly conducted in accordance with the *Indian Act*;
- c. There was no meeting or council summoned for the purposes of a surrender in accordance with the rules of the band;
- d. If a meeting or council was properly summoned, persons not entitled to be in attendance were in attendance at the meeting;
- e. Persons entitled to vote in the surrender, did not vote in the surrender;
- f. Persons not entitled to vote in the surrender, were allowed to vote and their votes were counted;
- g. Persons not entitled to payment for the alleged surrender, were paid for the surrender;
- h. The consent of the Governor in Council was invalid.

46. Canada breached its fiduciary duty to Tseshahht with respect to the illegal surrender of Iwachis IR 3. Tseshahht has a cognizable interest in Iwachis IR 3 both as a Reserve and as a central fishing village occupied by Tseshahht. The fiduciary duty arises out of the Crown's power and control, and hence discretion over Iwachis. The Crown has an obligation to protect Tseshahht's interest in its Reserve lands and to deal with the Reserve lands in the best interests of Tseshahht. As a fiduciary, the Crown is obligated to prevent exploitative bargains of Tseshahht. Canada breached its fiduciary duty to Tseshahht in the alleged surrender of Iwachis IR 3.

47. Specifically, Canada breached its fiduciary obligations by the following:
- a. Failing to consider the best interest of Tseshahat in its negotiations for the surrender of Iwachis IR 3:
 - i. Failing to adequately consult with Tseshahat to properly ascertain their interests prior to negotiations leading to the surrender of IR 3;
 - ii. Failing to disclose information to Tseshahat during the negotiations with CNPR;
 - iii. Prioritizing CNPR's undisclosed interests over Tseshahat's interests in their lands and access to fishing;
 - iv. Failing to ensure Tseshahat had a clear understanding of the terms and implications of a surrender with special attention to the literacy and fluency levels in the community;
 - v. Failing to ensure Tseshahat had independent legal advice on the surrender of IR 3, and
 - vi. Failing to negotiate terms of surrender to the benefit of Tseshahat.
 - b. Failing to act bona fide in good faith in the discharge of its mandate in;
 - i. Allowing CNPR to acquire land, which was otherwise, occupied and reserved contrary to the *BC Railway Act*.
 - ii. Allowing the sale of Iwachis IR 3 to CNPR without ensuring the sale was necessary for the Company's purposes as required by the *CNPR Act*; and
 - iii. Failing to follow governing policy of the Department of Indian Affairs requiring a suspension of Reserve surrenders until the Reserve Commission could address the "Reserve Question".
 - c. Failing to protect and preserve from exploitation and ensure minimal impairment of Tseshahat's Reserve interest;

- i. Failing to investigate, inquire or ascertain whether the land requested by CNPR was in excess of what was required for railway purposes;
 - ii. Allowing the surrender of the entire Reserve rather than a right-of-way or other land interest;
 - iii. Failing to include a reversionary clause in the surrender in the event that the lands were not used for railway purposes;
 - iv. Failing to protect Tseshah't's right to fish at Iwachis;
 - v. Failing to seek return of lands when it became clear the lands were not being used for railway purposes; and
 - vi. Failing to obtain replacement lands for Tseshah't.
48. Canada allowed an illegal lease or disposition by the Crown of Reserve lands;
- a. Allowing the sale of Iwachis IR 3 to CNPR without ensuring the sale was necessary for the Company's purposes as required by the *CNPR Act*;
 - b. Allowing CNPR to acquire land which was otherwise occupied and reserved contrary to the *BC Railway Act*; and
 - c. Allowing the sale of Iwachis IR 3 to CNPR in breach of the *Indian Act* legislation procedure for surrenders.
49. Canada failed to provide adequate compensation for the Reserve lands taken by the Crown by:
- a. Failing to conduct independent appraisal of IR 3;
 - b. Failing to account for the value of the infringed fishing right;
 - c. Failing to properly consider Agent Neill's preliminary valuations;
 - d. Failing to disclose the policy or procedure behind the valuation;
 - e. Failing to properly value Mr. Gaelic's house;

- f. Failing to properly value or compensate Mr. Clutesi for his house;
- g. Failing to represent the best interests of Tseshaht in negotiation with CNPR; and
- h. Failing to insist upon adequate compensation as a condition for the taking.

VIII. Relief Requested

50. Tseshaht seeks:

- a. Compensation equal to the current, unimproved market value of the lands taken from Iwachis IR 3;
- b. Compensation equal to the value of the loss of use of the lands taken from Iwachis IR 3;
- c. Compensation equal to the value of the lost fishery at the mouth of the Franklin River;
- d. Compensation for losses suffered as a result of the Respondent's breach of its fiduciary or trust-like obligations;
- e. Compensation for the illegal disposition of Iwachis IR 3;
- f. Equitable compensation and/or interest;
- g. Costs in relation to these proceeding; and
- h. Such others damages, compensation or costs as this Honourable Tribunal may award.

Dated: April 11, 2016



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