

**SPECIFIC CLAIMS TRIBUNAL**

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TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	January 8, 2014	D É P O S É
Amy Clark		
Ottawa, ON	1	

B E T W E E N:

TOOSEY INDIAN BAND

Claimant

v.

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

Respondent

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**DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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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*.

January 8, 2014

\_\_\_\_ Amy Clark \_\_\_\_\_  
(Registry Officer)

TO:

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**I. Claimant (R. 41(a))**

1. The Claimant, the Toosey Indian Band (the “First Nation”), confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* in the Province of British Columbia (the “Province”).

**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

- (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 Forestry Access Road Claim (the “Claim”) with the Specific Claims Branch on June 18, 1998.
4. By letter dated June 30, 2011, Patrick Borbey, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, informed the First Nation that Canada had rejected the Claim.

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

5. For the purposes of the Claim, the First Nation does not seek compensation in excess of \$150 million.

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

6. The following are the grounds for the specific claim, as provided for in 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;
- (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.

**V. Allegations of Fact (R. 41(e))**

7. The First Nation is part of the Tsilhqot'in Nation.
8. The Tsilhqot'in Nation's Aboriginal title lands include areas in and around Riske Creek, British Columbia.
9. The First Nation's reserve lands include Toosey I.R. Nos. 1 and 1A.
10. The current main residential area and cattle grazing range for the First Nation is on Toosey I.R. No. 1.
11. Toosey I.R. Nos. 1 and 1A are used by the First Nation primarily as open range for horses and cattle.
12. On June 26, 1964, R.D. Greggor of the British Columbia Forest Service (the "Forest Service") advised the Indian Commissioner for British Columbia, J.V. Boys (the "Indian Commissioner"), of the Province's intention to construct an access road through Toosey I.R. No. 1 for forestry purposes.
13. On April 29, 1965, the Forest Service forwarded to the Indian Commissioner a print showing the proposed route of the access road through both Toosey I.R. Nos. 1 and 1A, and requested the Indian Commissioner's assistance in "obtaining tentative approval of the Band concerned so that we can request inspection of the area to calculate the compensation to be offered."

14. The Forest Service estimated that 30.4 acres would be required for the proposed access road.
15. On June 11, 1965, representatives from the Province and Canada met and discussed the placement of fences and cattle guards in relation to the proposed access road.
16. In a summary of the June 11, 1965 meeting between the Forest Service's R.L. MacDonald, Department of Lands Inspector J. Esler and Williams Lake Agency staff, MacDonald noted that the Assistant Indian Agent had indicated that, in relation to the construction of the access road, the First Nation would be satisfied with the construction of cattle guards where fences cut the access road.
17. Chief Engineer F.E. Johnson included a note in the margins of MacDonald's summary of the June 11, 1965 meeting suggesting that three cattle guards and additional fencing be used rather than the six cattle guards that would be required if cattle guards were placed across all existing fences cut by the access road.
18. On August 13, 1965, the Deputy Minister of Forests wrote to the Indian Commissioner with an offer of \$775 for the access road (30.5 acres at \$25 per acre), and indicated that the "requirements of fencing, cattle guards, and road junctions, have been discussed with the assistant Indian Agent at Williams Lake and will best be considered for positioning during road construction."
19. In the letter, the Deputy Minister of Forests further stated that "[i]t will be noted that the right-of-way outlined in red varies in width from 70 to 150 feet, due to the differences in the terrain."
20. The letter of August 13, 1965 was forwarded by the Indian Commissioner to the Williams Lake Agency Superintendent on August 19, 1965, along with instructions to "consult with the Band Council and obtain their consent to transfer Band land for right of way purposes at the amount shown."
21. On August 24, 1965, Chief Casirner Isnardy and Councillor Leonard Solomon signed a Band Council Resolution ("BCR") that purported to approve the expropriation of

the access road for the sum of \$25 per acre and the replacement of all existing fences and cattle guards.

22. The BCR provided that it was passed at “a meeting, held at Toosey I.R. #2.”
23. According to the affidavit of First Nation member Douglas Johnny, sworn on November 16, 1988 in support of discussions between the First Nation and Canada with regards to the access road, the BCR was presented separately to the two signatories, Chief Casimer Isnardy and Councillor Leonard Solomon, and was signed at different locations and times.
24. According to Mr. Johnny’s affidavit, no Band Council meeting occurred at the time when the purported approval by way of the BCR was provided.
25. On August 31, 1967, a survey of the “Chilcotin South Forest Road survey plan” was approved and deposited as Canada Lands Survey Records No. 53509.
26. The Chief Engineer for the B.C. Forest Service wrote to the Surveyor General on December 4, 1967 stating that the B.C. Ministry of Forests intended to establish the right of way lands as a “forest road” upon receipt of an Order-in-Council by the Privy Council (“OCPC”) transferring the jurisdiction and control of the lands to the Province.
27. The Minister of Indian Affairs and Northern Development sent a letter to the Governor in Council on January 18, 1968 with suggested text for an OCPC transferring jurisdiction of the lands comprising the access road to the Province. The suggested text stated that the “Minister of Highways...has applied for lands...for road purposes” and that the Governor in Council “is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and...should the lands cease to be used for public road purposes they shall revert to the Crown in right of Canada.”
28. The expropriation of the access road was approved by OCPC 1968-140 which was passed on January 25, 1968. The text of the OCPC was essentially the same as that

suggested by the Minister of Indian Affairs and Northern Development. There was no mention of the Minister of Forests or the Ministry of Forestry. The OCPC provided that:

- a) the application by the Minister of Highways of the Province of British Columbia for the access road had been approved by the Council of the Toosey Band of Indians by BCR dated August 24, 1965, in consideration of the payment of \$775; and
- b) the expropriation of 26.683 acres of land for the right-of-way through I.R. Nos. 1 and 1A was approved by the Governor in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, pursuant to s. 35 of the *Indian Act*.

29. A Gazette Notice dated March 13, 1968 announced the establishment of a “Forest Road” pursuant to s. 147 of the *Forest Act*, c. 153, RSBC 1960 (the “*Forest Act*”) across Toosey I.R. Nos. 1 and 1A.

30. The *Forest Act* stipulated at s. 53 that the maximum width which could be taken for a right of way without the owner’s consent was forty feet, except in places where the grade level of the right of way was proposed to be more than five feet above or below the surface of adjacent land, in which case additional width could be taken to accommodate the slopes and ditches.

31. At the time the access road was built, only the perimeter of the First Nation’s reserves was fenced. The area through which the access road passed, including the First Nation’s village and open cattle range, was not fenced.

32. On January 28, 1981 three horses owned by First Nation members were struck and killed by a logging truck traveling through the reserve on the access road. In a legal action initiated by First Nation members, the Court found the plaintiff First Nation members two-thirds responsible for the accident because they allowed their animals loose in an unfenced area.

33. On January 10, 1983 Dianne Dennis, Indian and Northern Affairs Canada (“INAC”) Lands and Resources Officer, Williams Lake District, wrote to the British Columbia Ministry of Forests in Williams Lake expressing the First Nation’s concerns regarding safety on the access road through I.R. Nos. 1 and 1A. Dennis reported that horses and cattle belonging to the First Nation had been killed by logging trucks and that the First Nation feared that a child might be struck crossing the access road to catch the school bus.
34. In the same letter, Dennis noted the First Nation’s wish to discuss installing additional fencing as well as other safety measures that would reduce the speed of the logging trucks on the access road through the reserves.
35. On September 20, 1985, Ernest W. Elliot, District Superintendent, Reserves and Trusts, Williams Lake, wrote to J. Paul Salembier, Legal Advisor, Reserves and Trusts, B.C. Region noting that the First Nation believed that Canada was “negligent in not making the Band members aware of their responsibilities as it relates to livestock being allowed to roam at large.” The District Superintendent suggested that a “fairly simple solution would be for the department to provide funding for the installation of cattle guards and the construction of fencing to keep livestock off the road.” Elliott estimated that the four cattle guards and 6.5 kilometers of fencing would cost \$34,000.
36. On April 29, 1987 Juliet Balfour, INAC Lands, Revenues and Trusts, wrote to W.E. Fry at the British Columbia Ministry of Forests and Lands and indicated that the Province had failed to meet its obligations to provide fencing and cattle guards on Toosey I.R. Nos. 1 and 1A, despite the First Nation’s attempts over the years to have these requirements fulfilled. Balfour requested the Province’s “cooperation in seeing that this long-standing obligation is fulfilled” given that the “building of fences, cattle guards and road junctions [was] a requirement of the transfer.”
37. Fry replied on June 25, 1987 by rejecting Balfour’s assertions. Fry stated that the Province had fully met its obligations in that “any fencing and cattle guards disturbed during road construction have been replaced” in accordance with the August 24, 1965

BCR, and that it had also fenced the access road where it passed through the village, as agreed in 1983.

38. On October 28, 1987, the First Nation's lawyer replied to Fry and Balfour by reminding Canada and the Province of the particulars of their respective lawful obligations to the First Nation and potential liabilities from their failure to meet these obligations. The letter included the particulars of the extent of fencing and cattle guards that the Province was obligated, but had failed, to provide.
39. On August 3, 1988, an official with the Department of Indian Affairs and Northern Development's Prince George District wrote to the Chief of the First Nation in response to the First Nation's query regarding the placement of a surcharge on timber passing through the reserve. The letter stated that the access road had been taken for public purposes pursuant to s. 35 of the *Indian Act*, and that the only negotiated term of the original expropriation agreement was \$775 in compensation which had already been paid to the First Nation.
40. Following negotiation with the First Nation, the Province decided to re-route the access road around the reserves in 1989.
41. On April 6, 1992, a B.C. Gazette Notice announced the discontinuance and closure of the access road.
42. On June 9, 1992, a Property Negotiator for the Ministry of Forests sent a memorandum to the B.C. Ministry of the Attorney General advising that the new access road was complete and that a provincial Order-in-Council should be prepared to transfer the access road back to Canada for return to Indian Reserve status. The memorandum stated that "[a]lthough the Privy Council Order mistakenly refers to the 'Minister of Highways' and 'public road purposes,' the negotiations were carried out by the Forest Service for the purpose of timber extraction."
43. Provincial Order-in-Council 411 dated April 3, 1997 authorized the Minister of Forests to convey the access road to Canada for the use and benefit of the First Nation.

44. The access road has not yet been transferred back to reserve status.
45. The Specific Claims Branch Review, completed in September 1998, stated that an official from the Ministry of Forests confirmed that a B.C. forest road cannot be a public highway under the provincial *Highway Act* c. 144, RSBC 1948 because the haulage of timber leads to potential liabilities, and as such the Ministry of Forests has the right to close such forest roads and/or restrict the flow of public traffic.

**VI. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation**

46. This claim is based on the Crown's breaches of its legal obligations, including statutory, fiduciary and other applicable legal obligations relating to the improper expropriation of the First Nation's reserve lands comprising the access road, and the operation of the access road from planning and construction to 1992.
47. Canada breached its statutory obligations to the First Nation by failing to strictly comply with the statutory requirements for the expropriation of the First Nation's reserve lands comprising the access road.
48. Canada breached its fiduciary obligations to the First Nation in relation to the planning and construction of the access road, and the operation of the access road by failing to:
- a) act with ordinary prudence with a view to the best interests of the First Nation;
  - b) preserve and protect the First Nation's interests in the reserve lands comprising the access road from exploitation; and
  - c) obtain adequate compensation for the taking of these reserve lands.
49. Canada breached its legal obligations to the First Nation by illegally disposing of the reserve lands comprising the access road to the Province.
50. In the alternative, Canada breached its legal obligations to the First Nation by failing to obtain adequate compensation for the reserve lands expropriated for the purposes of the access road.

51. The First Nation seeks the following relief:

- a) compensation and/or damages from Canada for losses and injurious affection as a result of Canada's breaches of its legal obligations in relation to the expropriation of the First Nation's reserve lands for the access road and in relation to the operation of the access road; and
- b) such other relief as this Honourable Tribunal deems appropriate.

Dated this 8<sup>th</sup> day of January, 2014.



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