

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	April 6, 2016
David Burnside	
Ottawa, ON	83

BETWEEN:

BIG GRASSY (MISHKOSIIMIINIIZIIBING) FIRST NATION (INDIAN BAND)

Claimant

v.

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

Respondent

AMENDED RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

The Amended Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

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1. This is the Crown's Response to the Declaration of Claim ("Claim") filed by the Big Grassy (Mishkosiimiiniiziibing) First Nation (Indian Band) with the Specific Claims Tribunal ("Tribunal") on October 25, 2011 pursuant to the *Specific Claims Tribunal Act* (the "Act").
2. The Claim relates to a road (the "Road") built on Big Grassy Indian Reserve No. 35G ("Reserve 35G" or the "Reserve") in or about 1933 and partially relocated in or about 1941.

Rule 42(a) - Status of the Claim

3. In 1988 the Big Grassy (Mishkosiimiiniiziibing) First Nation and certain individuals (collectively "the FN") filed a claim with the Minister (the "Original Claim").
4. The Original Claim alleged that the Crown had breached its fiduciary duty to protect Indian lands from improvident or unlawful taking in connection with the construction of the Road in or about 1933 and the relocation of the Road in or about 1941, which relocation included the construction of a bridge over the Big Grassy River. It also alleged that the Crown had been negligent in "permitting or acquiescing" in trespass to Indian lands in relation to buildings that were constructed on or near the Road.
5. On March 1, 1999, the Crown, the FN and the Province of Ontario entered into a settlement agreement in respect of that part of the Original Claim relating to whether the bed of the Big Grassy River formed part of the Reserve and concerning the lands used in connection with the construction of the bridge over the Big Grassy River.
6. By letter dated December 14, 1999, the Minister accepted the Original Claim for negotiation as it related to "Canada's failure to obtain proper compensation for the lands expropriated from the [FN's] Reserve for road purposes in 1933." The Minister did not accept the Original Claim for negotiation as it related to any other issues raised, including the issue of compensation for the taking of additional lands for the relocation of the Road and the issue of trespass.
7. On January 5, 2009, the Crown notified the FN in writing that the date of the Minister's decision to negotiate the Original Claim was deemed to be October 16, 2008.
8. The Original Claim has not been resolved.

Rules 42(b) - The Claim is Valid, in Part

9. For purposes of its Claim, the FN relies on the following ground:

"Failure of the [the Crown] to provide adequate compensation for reserve lands taken or damaged by the Crown. (s. 14, subsection (e))."

10. The Crown accepts the validity of the FN's Claim only insofar as it relates to the allegation that the Crown failed to meet its lawful obligation to obtain proper compensation for Reserve land taken for the construction of the Road in or about 1933.

11. Except as set out in paragraph 10 above, the Crown does not accept the validity of the FN's Claim; and, without limiting the generality of the foregoing, does not accept the validity of the Claim insofar as it is grounded in the allegation that:

- a. the Crown failed to meet its lawful obligation to obtain proper compensation for Reserve land taken for the relocation of the Road in or about 1941, including buildings, gardens and crops on the land and relocation costs, compensation having been paid to the FN in respect of such land;
- b. the Crown failed to meet its lawful obligation to obtain proper compensation for materials taken from Reserve land in connection with the construction and relocation of the Road, compensation having been paid to the FN in respect of such materials;
- c. the Crown failed to meet its lawful obligation to obtain proper compensation in the form of rent for such Reserve land as may have been used for garages or other structures along the Road, there being no lawful obligation on the part of the Crown to take steps, including proceedings at law, to evict alleged trespassers or claim compensation for any alleged trespass;
- d. the Crown is liable for the value of Reserve land, in its post-construction state as a road, when it was taken for the Road in or about 1933 and 1941;
- e. the Crown is liable for damage to and rehabilitation of the land taken for construction and relocation of the Road in or about 1933 and 1941, and land used as borrow pits for extracting gravel, rock and other fill material;

- f. the Crown is liable for the value of materials used in the construction of the wharves and rent for the wharves. To the extent that the wharves are located on "Bridge Lands" as that term is defined in the Big Grassy First Nation River Boundary Settlement Agreement dated March 1, 1999 between Mishkosiimiiniizibing First Nation, Canada and Ontario, the Crown says that the claim for rent for wharves is barred by the Release in favour of Canada located at Article 12.
12. In addition to the foregoing, the Crown does not accept the validity of the Claim insofar as it is grounded in the allegation that the Crown failed to meet its lawful obligation to obtain proper compensation for materials taken from Reserve land to *maintain* the Road to present day. ~~The "claim previously filed with the Minister" did not expressly or by implication include an alleged breach of a lawful obligation regarding compensation for maintenance materials extending from 1941 to present and therefore the Tribunal is without jurisdiction in respect of that aspect of the Claim.~~ Further and in the alternative, to the extent that the Claimant is in seeking compensation for maintenance materials to the present day, the claim is in part "based on events that occurred within the 15 years immediately preceding the date on which the claim was filed with the Minister" and, to that extent, is invalid pursuant to paragraph 15(1)(a) of the Act.
13. In addition to the foregoing, the Crown does not accept the validity of the Claim insofar as it is grounded in the allegation that the Crown failed to meet its lawful obligation to obtain proper compensation for the value of lost income and income equivalents to the present day from the loss of game and trapping animals, game birds and wild rice caused by the construction and location of the original Road and of the re-aligned Road. ~~The "claim previously filed with the Minister" did not expressly or by implication include an alleged breach of a lawful obligation regarding compensation for lost income and income equivalents and therefore the Tribunal is without jurisdiction in respect of that aspect of the Claim.~~ Further and in the alternative, to the extent that the Claimant is in seeking compensation for lost income and income equivalents to the present day, the claim is in part "based on events that occurred within the 15 years immediately preceding the date on which the claim was filed with the Minister" and, to that extent, is invalid pursuant to paragraph 15(1)(a) of the Act.

Rules 42(d) Basis of the Tribunal to Award Compensation

14. Paragraph 20(1)(e) of the *Act* may provide a basis for the Tribunal to award compensation in respect of the Claim.

Rule 42(d) - Admissions, Denials

15. The Crown admits the facts set out in paragraphs 5, 7, 13, 18, 21 and 23 of the Claim.

16. The Crown has no knowledge of the facts set out in paragraphs 14, 15, 16, 17 and 19 of the Claim.
17. The Crown admits the facts set out in the first two sentences of paragraph 6 of the Claim, but has no knowledge with respect to the facts set out in the third sentence.
18. In respect of paragraphs 8, 9 and 22 of the Claim, the Crown admits that materials, including gravel, rock and timber were taken from the Reserve for the construction and relocation of the Road, but denies that the FN was not paid for those materials.
19. In respect of paragraph 10 of the Claim, the Crown admits that prior to 1938, the Road did not include a bridge over the Big Grassy River. The Crown also admits that non-Indian individuals constructed garages and a parking area on Reserve lands where the Road met the river. The Crown denies that no rent was paid to the FN in respect of the use of such lands.
20. With respect to the first sentence of paragraph 11 of the Claim, the Crown has no knowledge of the construction and maintenance of a "road camp". With respect to the second sentence of paragraph 11, the Crown states that *if* such a camp existed, it is denied that no rent was paid to FN in respect the use of such lands as were used for the camp and that no compensation was paid to the FN in respect of such materials as were used to construct and maintain the camp and for camp purposes generally.
21. In respect of paragraph 12 of the Claim, the Crown admits that a wharf was wharves were built where the Road meets the South Bank of the Big Grassy River using materials taken from the Reserve, but denies that the FN was not paid for those material and denies that the FN was not paid rent for the land on which the wharves and its approaches were built.
22. The Crown admits the facts set out in the first two sentences paragraph 20 of the Claim, however the Crown has no knowledge regarding the provision (or lack thereof) made for the rehabilitation of lands no longer required for the Road.

Rule 42(e) - Statement of Facts

The Big Grassy Reserve is Established

23. On October 3, 1873, Chief Pay-ah-be-wash entered into the North-West Angle Treaty, No. 3, on behalf of the Assabaska Band (forerunner of the Big Grassy and Sabaskong Bands). In exchange for the surrender to Her Majesty the Queen in Right of Canada of a tract of land, Treaty 3 provided to the signatory Bands certain consideration, including setting aside land reserves for farming and other purposes.

24. The Treaty 3 reserve lands proposed to the Chiefs of Lake of the Woods and agreed upon in October 1875, included the Reserve No. 35G, which was described at the time as follows:

One large Reserve to include the Grassy river emptying into the South East shore of the Lake of the Woods and fronting thereon. This Reserve to contain four square miles on that side of the River towards the mouth of the Rainy River, and ten square miles to the East of the said Grassy River, all fronting on the Lake.

25. The survey plan of the Reserve prepared by the Dominion Land Surveyor is designated as number 98 of the Canada Lands Surveys Records and is deposited at the National Archives of Canada.
26. With the passage of the *Canada (Ontario Boundary) Act*, 1889, most of the Treaty 3 lands were confirmed as being included in the Province of Ontario.¹
27. On April 8, 1915, subject to certain exceptions, the Government of Ontario transferred all the Treaty 3 reserve lands to the Government of Canada.

The Construction of the Road

28. In June 1926, the Ontario Department of Northern Development requested from the Department of Indian Affairs ("Indian Affairs") information on what the latter required in order to give authority to Ontario to construct a road through the Reserve.
29. By letter dated July 5, 1926, Indian Affairs requested a plan showing the lands required for the road. Indian Affairs also indicated that once the land required was identified, a "valuation of the right of way will then be made and compensation requested".
30. On September 14, 1926, Ontario provided a survey plan of the lands required for the road from the south boundary of the Reserve to the Big Grassy River. The road north of the river was projected but not surveyed. The area required for the road in the original survey plan was 19.85 acres. The survey plan was recorded by Indian Affairs as RD 2151.
31. On September 18, 1926, Indian Affairs informed Indian Agent Frank Edwards ("Edwards") of Ontario's plan to construct a road through the Reserve and asked that Edwards report on what compensation, if any, Ontario should pay, if any improvements would be affected, and whether or not Ontario should be required to

¹ The Judicial Committee of the Privy Council's 1888 decision in *St. Catherine's Milling Co. v. R.*, had previously determined that Ontario had acquired the beneficial interest in the land within the Treaty 3 area upon its surrender in 1873.

fence any part of the road. In reference to compensation, it was suggested that "[i]t may be that the benefit of having this road is sufficient compensation for the land."

32. Edwards reported back to Indian Affairs on October 15, 1926 as follows:

As you doubtless remember, I wrote you in 1922 that the Indians would agree to the construction of this road without compensation,² but in view of your last letter I had a meeting of two councillors at this office to-day, the chief being absent on account of sickness. As you will observe from the enclosed letter, the band agree to the building of the road but consider that they should receive \$300.00 in return for the privilege accorded the Ontario Government.

33. By letter dated October 21, 1926, Indian Affairs advised the Ontario Department of Northern Development that it would transfer the land required for the road (19.85 acres) free of charge, provided that Ontario would agree to fence the road when requested. In an exchange of correspondence, Ontario requested reconsideration of the fencing requirement; Indian Affairs insisted on the fencing; and, Ontario finally agreed to fence the road.

34. On November 13, 1926, Indian Affairs acknowledged Ontario's acceptance of the fencing requirement and stated that, unless Ontario preferred otherwise, the lands would not be transferred until after the road was constructed since "the road when constructed may differ from the proposed location".

35. The road depicted on plan RD 2151 was not constructed. Ontario proposed a revised location for the road, which Indian Affairs agreed to, provided the fencing requirement remained. The new road plan, dated November 25, 1929 and recorded as Rd 2151A by Indian Affairs, showed the area of the proposed road as 22.148 acres.

36. On October 10, 1931, Indian Affairs learned of a proposal to construct a wharf at the point where the Road would meet the Big Grassy River.

37. By letter of October 29, 1931, Indian Affairs learned that one or two individuals had built garages on the Road in the Reserve, allegedly with permission from the Ontario Department of Northern Development. In response to an inquiry from Indian Affairs, Ontario maintained that no one from the Department of Northern Development had given such permission, nor would anyone have the authority to do so.

² Edwards' 1922 letter included the following statement: "You have explained to us the advantages of the road to the band, and the Department is legally entitled to expropriate the land without compensation." The letter is typed and one FN councillor signed his name, the other made his mark which was witnessed. The letter states that the councillors consulted with their Chief before coming to the meeting.

38. The Road was built. No compensation was paid to the FN in respect of the land used for the Road. In the period from 1931 through 1934, the Province of Ontario from time to time paid the FN for materials used in the construction of the Road.

The Relocation of the Road

39. On December 30, 1937, the Ontario Department of Highways informed Indian Affairs that Ontario wished to relocate the Road, which would necessitate the construction of a bridge over the Big Grassy River. A plan for the relocated Road was received by Indian Affairs in 1939 and designated as Rd 2151C. The plan showed that in some places the relocated Road would overlap the existing Road.
40. In July 1938, an official with the Department of Highways and Edwards met with the Chief of the Assabaska Band regarding the relocation of the Road. The Chief agreed that compensation for additional land required for the relocated Road would be based on \$10.00 per acre for bush land and \$50.00 per acre for cleared land. It was also agreed that additional compensation would be paid to individual Indians affected once the correct amounts had been ascertained. Edwards reported that the Chief, one Councillor and some of the affected Indians approved of this arrangement.
41. On August 25, 1938, Edwards provided Indian Affairs with copies of five agreements relating to compensation for the relocated Road: four with individual Indians (for land and improvements) and one with the Chief and Council of the Assabaska Band (for land). The terms of the agreements reflected the amounts agreed upon as set out above.
42. Ontario paid compensation to Indian Affairs for the additional 17.226 acres required to relocate the Road in accordance with the formulae set out above. Additional compensation was paid to individual Indians who had "location tickets" and who had made improvements to their land.
43. The Province of Ontario has at all times relevant to this matter owned and maintained the Road and, in that connection, the Province of Ontario caused or contributed to the Crown's failure to meet its lawful obligation to obtain proper compensation for Reserve land taken for the construction of the Road in 1933 and/or the losses, if any, arising from that failure.

Rule 42(f) - Relief

44. The Crown seeks the dismissal of the Claim as it relates to all matters other than the allegation that the Crown failed to meet its lawful obligation to obtain proper compensation for Reserve lands taken for the construction of the Road in or about 1933.
45. To the extent that the Crown is liable to pay compensation to the FN in respect of the Crown's breach of its lawful obligation to obtain proper compensation for

Reserve land taken for the construction of the Road in or about 1933, or in respect of any other breach found by this Tribunal, an order awarding compensation as against the Crown only to the extent that the Crown is at fault for any losses suffered by the FN as a result of the Crown's breach, as admitted and; for greater certainty, only to the extent that such losses were not caused by any third party, including the Province of Ontario.

46. To the extent that the Crown is liable to pay compensation to the FN in respect of the Road, the Crown pleads and relies upon s. 20(3) of the Act, and claims a deduction from the amount of any compensation calculated under subsection 20(1) of the Act in an amount equal to the value of benefits received by the FN in relation to the construction and use of the Road and wharf, in an amount to be determined at the hearing of this matter. The Crown says that such benefits include *inter alia*:
- a. Payments in an amount to be determined at the hearing of this matter provided as compensation for land and materials used in the building and relocation of the road;
 - b. Any increase to the value of Reserve land;
 - c. Employment benefits flowing from the building and relocation of the road itself; and
 - d. Economic benefits, including *inter alia*: benefits from the availability and provision of various goods and services to, from and upon the Reserve and an increase in the employment of FN members as a result of improved accessibility to and from the Reserve.
47. The Crown seeks its costs in the proceedings.
48. Such further relief as this Honourable Tribunal deems just.

Rule 42(g) - Communications

49. The Respondent's address for service is:

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Dated: November 25, 2011

Myles J. Kirvan
Deputy Attorney General of Canada
Per: John L. Syme
Solicitors for the Respondent

Dated: April 6, 2016



William F. Pentney Q.C.
Deputy Attorney General of Canada
Per: Lisa Cholosky
Department of Justice, Prairie Region
Solicitors for the Respondent

Syntak, Krista

From: Don Colborne <drcolborne@shaw.ca>
Sent: April-06-16 12:05 PM
To: Cholosky, Lisa
Cc: Syntak, Krista
Subject: RE: BGFN v HMTQ consent to filing amendments

Dear Ms. Cholosky,

On behalf of the Claimant I consent to Canada amending its Response, if such consent is necessary, and to filing an Amended Response, if such consent is necessary.

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From: Cholosky, Lisa [mailto:Lisa.Cholosky@justice.gc.ca]
Sent: Wednesday, April 06, 2016 9:43 AM
To: 'Don Colborne' <drcolborne@shaw.ca>
Cc: Syntak, Krista <Krista.Syntak@justice.gc.ca>
Subject: BGFN v HMTQ consent to filing amendments

Mr. Colborne,

In the matter of *Big Grassy First Nation v HMTQ*, SCT-3002-11, Canada consents to the filing of the Claimant's Amended Declaration of Claim, as filed with the Specific Claims Tribunal March 30, 2016, on the condition that the Claimant consent to the filing of the Respondent's Amended Response attached. For clarity, both parties are consenting to the act of amending the pleadings only, and not to the substance of the amendments.

Please indicate your consent by reply email and I will file the email and the Respondent's Response with the Tribunal forthwith.

Lisa Cholosky
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