

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

'NAMGIS FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES May 8, 2012 Guillaume Phaneuf	D É P O S É
Ottawa, ON	1	

Claimant

v.

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

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*.

May 8, 2012

Guillaume Phaneuf

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
As represented by the Minister of Aboriginal Affairs and Northern Development
Suite 600- 1138 Melville Street
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I. Claimant (R. 41(a))

1. The Claimant, 'NAMGIS FIRST NATION ("Namgis") confirms that it 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. I-5, as amended, in the Province of British Columbia.

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. 'Namgis initially filed this claim with the Minister on or about January, 1998 for breaches by Canada respecting the improper allowance of an expropriation of .499 acres of Nimpkish IR #1 ("IR #1") lands for a road right-of-way in 1934 ("ROW Claim").
 4. On January 21, 2010, Michel Roy, the Senior Assistant Deputy Minister of Indian Affairs and Northern Development wrote to 'Namgis stating that the ROW Claim had not been accepted for negotiation on the basis that "there is not an outstanding lawful obligation owed to the Namgis First Nation in respect of the subject matter of this claim".

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

5. 'Namgis does not seek compensation in excess of \$150 million for the purposes of the ROW Claim.

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

6. The following are the grounds for the Cormorant Island 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;
 - (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. Joint Reserve Commissioner O’Reilly set aside IR #1 for the “Nimkeesh” Indians, otherwise known as the Nimpkish Band and presently known as the ‘Namgis First Nation (“‘Namgis”).
8. In 1929, the Province’s Department of Public Works sought a right-of-way to construct and extend the Alert Bay Road through Reserves No. 1 and No. 2. A complicating factor was that a concrete sidewalk built by the ‘Namgis years earlier was situated in the centre of the right-of-way area on Reserve No. 1. This sidewalk was an important travel route for ‘Namgis members and constituted the only “comparatively safe place to walk in the village [of Alert Bay]”.
9. On January 9, 1931, Indian Agent Halliday reported to W.E. Ditchburn, Indian Commissioner for British Columbia, of a meeting held on January 8, 1931 at which a resolution in the following terms had been “unanimously adopted” by the voting members of the ‘Namgis:

“Resolved by the Nimpkish Band in council assembled, that they concede to the Provincial Government the right to put in a satisfactory road outside of the present sidewalk, which will be maintained at the expense of the Province of British Columbia, and that the speed limit shall be not over six miles an hour. It is understood that the province keeps the road continually in good condition, and a failure on their part lasting more than twelve months will nullify this concession. Resolved further that any buildings in the way of this road shall be moved at the expense of the Provincial Government and shall be put on proper foundation at a height above the water level not less than they are at the present time.”

10. Agent Halliday also reported the following:

The question of compensation was brought up at the meeting, and with Mr. Bice, who is acting for the Provincial Government, I went this morning and viewed the property with the express purpose of putting a fair assessment on the amount of work that had been done [sic] on the improvements of these places. The greater part of it we did not consider that any compensation whatever would be necessary, as it was only some places a foot wide outside of the sidewalk and in some places two or three feet, and in some places they were in a very bad state of repair. However, we found that the following were entitled in our opinion to certain compensation; this compensation to be based on the number of cubic yards of material that they themselves had placed in making the necessary fill, to keep the foreshore in good condition. The price or valuation thereon is taken from the average amount which is paid by the Provincial Government for similar work in road construction, namely sixty cents per cubic yards.

Those whom we decided were entitled to compensation are as follows:

Sam Scow	40	cu. yds.	@	\$ 24.00
Johnson Cook	30	“	“	18.00
Jerry May and Matthew King	88	“	“	52.00
Harry Brown	24	“	“	14.40
Moses Alfred	60	“	“	<u>36.00</u>
				\$ 145.00

In the conversation and discussion regarding the resolution just passed, the Indians were promised as far as possible that they would be given work in the construction of the road.

The Provincial Government would have liked to have taken in the sidewalk, and the offer was made that it would be maintained at the expense of the Provincial Government, but this was voted down by the Indians, the ground of the argument being that the sidewalk would form a

well-defined limit to the Indian reserve, and that if they gave over the sidewalk they would not have sufficient control over the undesirables going onto the reserve. It was [sic] tried to explain to them that it would make a difference of only about five feet, but they decided otherwise.

I may say that this road is needed, and will be of greater advantage to the Indians themselves. The only disadvantage will be that they are using a certain portion of what will be the road for storing their wood piles, and it will be necessary for them to put them either on platforms outside of the road or else pile them on the upper side of the side-walk, where it would be more or less unsightly.

11. On February 4, 1931, Assistant District Engineer Stevens wrote to the Chief Engineer of the Department of Public Works:

Following is the estimate of cost of construction of 14 ft. road through Indian Reserve No. 1. at Alert Bay; length of road 1560 ft:

Cribbing, 1450 lin. ft. 8 x 12 Cedar	
@ .37cts per ft. in place	\$1665.00
Fill, 500 cu. yds @ .80 cts	200.00
Grading	300.00
Culverts	50.00
Moving one building 77' x 24'	400.00
Moving 4 small buildings	120.00
Payment for filling done by Indians	145.00
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	\$3280.20
Contingencies	219.80
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	\$3500.00
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I am enclosing [sic] copy of letter from Indian Agent Halliday to Commissioner Ditchburn from which it appears that the Indians are willing to grant a right-of-way along the shore side of the concrete walk. The width of right-of-way obtainable is only 14ft. owing to a number of buildings along the shore which would be within the right-of-way if a greater width were obtained, however, this width will probably be sufficient to meet all demands for many years. The road will be used only by trucks, of which there are two at Alert Bay at present.

I would recommend that the road be constructed as soon as possible as there is a probability of the Indians having a change of heart if the work is not started in the near future.

12. It appears that by letter dated January 4, 1934, the Indian Commissioner recommended to the Department of Indian Affairs ("DIA") that the right-of-way be transferred to the Department of Public Works. It also appears that on January 19, 1934, the DIA advised the Indian Commissioner that "the Department agreed that the land could be transferred to the Provincial Government without further compensation in view of the work done, the payments already made and the benefit this road was to the Indians."
13. On February 5, 1934, Order in Council P.C. 217 was passed whereby .499 of an acre on Reserve No. 1 was transferred to the Department of Public Works pursuant to section 48 of the Indian Act.
14. On July 29th 1938, Order-in-Council 1036 was passed pursuant to which Alert Bay Indian Reserve No. 1 and Burial Ground Indian Reserve No. 2 were transferred to the Federal Crown with the following provisos, *inter alia*:

PROVIDED NEVERTHELESS that it shall at all times be lawful of Us, Our Heirs and successors, or for any person or persons acting in that behalf by Our or their authority, to resume any part of the said lands which it may be deemed necessary to resume for making roads ...; so, nevertheless that the lands so to be resumed shall not exceed one-twentieth part of the whole of the lands aforesaid, and that no such resumption shall be made of any lands on which any buildings may have been erected, or which may be in use as gardens or otherwise for the more convenient occupation of any such buildings;

...

PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes [sic] that plans of the location of such work shall be furnished for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work: ...

PROVIDED also that the Department of Indian Affairs shall through its proper officers be advised of any work contemplated under the preceding provisoes [sic] that plans of the location of such work shall be furnished

for the information of the Department of Indian Affairs, and that a reasonable time shall be allowed for consideration of the said plans and for any necessary adjustments or arrangements in connection with the proposed work: ...

PROVIDED also that all travelled streets, roads, trails, and other highways existing over or through said lands at the date hereof shall be excepted from this grant.

15. On June 21, 1939, the Province passed reciprocal Order in Council 821 which incorporated the terms of O.C. 1036.
16. It appears the various 'Namgis members whose improvements were removed to accommodate the right-of-way through Reserve No. 1 were compensated sometime in 1931. However, in 1941 it came to light that one 'Namgis member, Dan Cranmer, had not been compensated for his improvements. Mr. Cranmer was subsequently compensated in the amount of \$50.00.
17. The .499 of an acre at issue was transferred to the Department of Public Works pursuant to section 48 of the *Indian Act* R.S.C. 1927, c. 98. This section reads as follows:

Lands taken for Public Purposes:

48. No portion of any reserve shall be taken for the purposes of any ... road ... without the consent of the Governor in Council, but any ... for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

3. The Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation.

4. The amount awarded in any case shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held and for the benefit of any Indian who has improvements taken or injured.

Section 48 empowered the Governor in Council to authorize a provincial government which already had expropriation powers to extend that power to reserve land.

18. At the material time, the Province's Department of Public Works had alleged statutory authority to expropriate land for highway purposes under the *Highway Act*, R.S.B.C. 1924, c. 103, as amended by *An Act to consolidate and amend the Law relating to Highways and the Traffic thereon*, R.S.B.C. 1930 c. 24, and *An Act to amend the "Highway Act"*, R.S.B.C. 1931 c. 29. The relevant sections are as follows:

2. In this Act, unless the context otherwise requires: -

"Highway" includes all public streets, roads ... and any other public way;

"Land" includes all lands of every tenure and description whatsoever, including foreshore and lands covered with water, within the Province, and including lands granted by the Dominion to any person;

"Minister" means the Minister of Public Works.

PART I.

ESTABLISHMENT AND CONTROL OF HIGHWAYS

8. It shall be lawful for the Minister, in his absolute discretion, to make public highways of any width not exceeding one hundred feet, and to vary and alter any existing roads, and to take, either at the time the highway is first made or declared or at any subsequent time, at any point additional land beyond the width of one hundred feet where necessary to secure the efficient construction, maintenance, or use of the highway, and to declare the same by a notice in the Gazette, setting forth the direction

and extent of such highway; and for such purpose, by himself, his agents, servants, and workmen, without any notice to and without any consent on the part of any person owning or occupying the land, or having or claiming any estate, right, title, or interest therein, to enter upon, set out, ascertain, and take possession of any private roads and any lands in the Province, and any timber thereon; and also in the like discretion to enter upon any land for the purpose of cutting any drains that may be thought necessary, or for the purpose of taking therefrom any gravel, timber, stone, and other materials required for the construction or maintenance of any highway.

16. (1.) Compensation shall be paid in respect of lands entered upon and taken possession of under this Part for the following matters only:-

(a.) Improvements on the lands so taken, that is to say, everything constructed on or annexed to the soils by the hand of man, such as roads, buildings, structures, and fences, and improvements made by clearing, planting, grading, or cultivating the soil:

(b.) Lands which were originally granted to some person by the Crown, either in the right of the Province or the Dominion, and by taking of which the total area taken for the purpose of highways from the lands comprised in the original Crown grant is found to exceed one-twentieth of the total area of the lands comprised in the Crown grant, and then only for area in excess of one-twentieth of that total area; but where the lands comprised in the Crown grant have been subdivided into parcels by any registered conveyance or plan of subdivision, the area of land which may be so taken from any parcel without the payment of compensation shall not exceed one-twentieth of the area of that parcel, and where lands are being taken from two or more of the parcels at the same time the total area to be so taken without the payment of compensation shall be apportioned among those parcels on the basis of their respective areas.

(2.) If the amount of compensation payable in any case under subsection (1) is not agreed upon, the amount may be appraised and awarded by arbitration, and for that purpose the provisions of the "Public Works Act" relating to arbitration shall *mutatis mutandis* apply.

(3.) In determining the compensation payable to any owner in respect of any land entered upon and taken possession of under this Part, there shall be taken into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to the remaining lands of the owner through which the highway will pass, by

reason of the passage of the highway through the same or by reason of the construction of the highway or of works incidental thereto, and the increased value that will be so given shall be set off against the compensation otherwise payable to the owner under this section.

19. It is evident, then, that the Department of Public Works did have the alleged statutory power to expropriate land for road purposes and to invoke s. 48 of the *Indian Act*. The problem is that the Department of Public Works failed, with the concurrence of the DIA, to compensate 'Namgis for the .499 of an acre taken for the right-of-way on IR #1.
20. 'Namgis, as the beneficial owner of the .499 of an acre encompassed in the road right-of-way on Reserve No. 1 did not receive any compensation for the loss of same, it having been the opinion of "an officer of the DIA" that the "benefit" to Reserve No. 1 by having the road constructed was "sufficient compensation".
21. The documentary trail indicates that this opinion, which was incorporated in Order in Council 217, was questionable at best. As set out earlier, in his letter to the Chief Engineer, Assistant District Engineer Stevens ("Stevens") stated that the "road will be used only by trucks, of which there are two at Alert Bay at present". In the same letter, Stevens recommended that the "road be constructed as soon as possible as there is a probability of the Indians having a change of heart if the work is not started in the near future."
22. As late as 1948, some 14 years after Order in Council 217 was passed, there were "no cars owned by Indians" in Alert Bay and the Alert Bay Road was "used almost exclusively by the taxpayers" of Alert Bay. It appears that it was only in the four years between 1948 and 1952 that the number of vehicles on Alert Bay increased from "about four to sixty vehicles". It is not clear how many of those vehicles were owned by the 'Namgis members.

Failure to maintain and preserve 'Namgis use of its Sidewalk:

23. Far from benefitting the 'Namgis, the right-of-way proved to be of great inconvenience and hindrance to the 'Namgis. As noted by Indian Agent Halliday, the 'Namgis members had been storing their wood piles on a portion of the land needed for the road right-of-way which would have to be moved by the 'Namgis onto platforms on the side of the road or piled onto the sidewalk "where it would be more or less unsightly".

24. On September 4, 1941, Assistant District Engineer Pope wrote to District Engineer Bell regarding a "jog of approximately six feet" at the point where the Road passed into Reserve No. 1:

... Since the road was rebuilt this summer, the traffic has naturally swung over to its own side, and at the junction is now travelling over a portion of the cement walk built by the Indians. ...

Both the Indians and the [local] residents are anxious to have this bottleneck eliminated as under some circumstances this could be considered quite dangerous to foot traffic.

25. The right-of-way on IR #1 impeded the 'Namgis' use of the sidewalk by encroaching thereon and by increasing vehicular traffic through IR #1.

26. The sidewalk on IR #1 was built by the 'Namgis long before the right-of-way was constructed. The sidewalk was an important travel route for the 'Namgis members and constituted the only sidewalk in the Village of Alert Bay.

27. The 'Namgis were willing to relinquish a portion of IR #1 to fix the "bottleneck". Indian Agent Todd notified Public Works, BC of this fact and advised that in return 'Namgis requested that Dan Cranmer be compensated for his improvements from the original expropriation in 1934.

28. Indian Agent Todd notified the Indian Commissioner for BC on November 17, 1941 that the bottleneck had been straightened out and that a new sidewalk had been built.

Illegal widening of Road without Formal Expropriation and Compensation

29. In 1947 the Province wanted a further widening of the road right-of-way.
30. The 'Namgis agreed to permit the widening of the road in return for a new sidewalk adjacent to and parallel to the existing sidewalk, proper drains to protect the new road and a cement retaining wall to protect the foreshore side of the road.
31. Despite the District Engineer noting that "[t]he only comparatively safe place to walk in the Village is on the Indian Reserve sidewalk" the Province refused to consider building a new sidewalk or to pay any compensation to 'Namgis. Indian Agent Todd wrote to the Minister of Public Works for B.C. several times in 1948 setting forth the 'Namgis' right to compensation for improvements and having a new sidewalk built...

...You must also know that the law requires where such road is constructed through private property, compensation is obligatory.

It is not the intention of the Nimpkish Band or the Indian Affairs Branch to give the Department of Public Works anything free other than what you are legally entitled to.

I again wish to remind you there are no cars owned by Indians in this district and the road is used almost exclusively by the taxpayers of this community.

32. The road appears to have been widened and resurfaced sometime in 1952 or 1953. On November 13, 1953, W.S. Arneil, Indian Commissioner for B.C. communicated with the Provincial Department of Public Works that the road on IR #1 had been widened and hardsurfaced without the additional right-of-way having been applied for by B.C. Public Works to DIA.

33. On December 11, 1953 the Chief Engineer in Victoria confirmed that the road on Alert Bay IR #1 had been widened to 18 feet with a ditch outside.
34. On a "Plan and Field Notes of Survey of Highway Right-of-Way Through Indian Reserve No. 1, Alert Bay, Cormorant Island" prepared by P.D. Williams on October 1973, it shows an additional .32 acres of reserve land had been added to the original right-of-way since 1934.

Failure to hire 'Namgis members for Road Construction and Repairs

35. There is no evidence indicating that 'Namgis members were hired to work on the road contrary to the condition that predicated the passing of the Band Council Resolution approving the road right-of-way.

Failure to Maintain the Road on IR #1

36. The January 8, 1931 Band Council Resolution stated that 'Namgis "concede to the Provincial Government the right to put in a satisfactory road outside of the present sidewalk, which will be maintained at the expense of the Province of British Columbia" and "it is understood that the province keeps the road continually in good condition, and a failure on their part lasting more than twelve months will nullify this concession". There is evidence of continual issues with road safety and maintenance that concerned all involved.
37. In a letter from the Assistant District Engineer dated December 21, 1939, he reports "the old plank roadway has rotted out and must be removed or replaced by fill...I allowed Foreman Skinner \$500.00 but this will not complete the job and another report in yesterday says high tides, which lap against edge of road under the houses, stores and shacks which are built right to edge of road, have washed out sections of road and will have to be cribbed".
38. In a letter dated November, 1959 Chief James Sewid wrote to the Minister of Labour complaining about the condition of road, saying "requests for repairs to

this road have been made for many years but with no results". He further reported that the Province had "left about seventy-five or eighty drums of oil stored on the Indian Reserve by permission of the Indian Superintendent stating they would be back when the weather improved to finish the job. This was three years ago the oil is still here in storage but nobody returned and the road has gradually got worse until it now resembles a back wood trail instead of a progressive village street".

39. In 1952, the road was described by the District Engineer as "the over-used, partially-built road".

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

40. This claim is brought on the grounds that the Respondent breached its legal obligation and/or fiduciary obligations to 'Namgis or in the alternative, is negligent by:

- a. allowing the expropriation and subsequent transfer of .499 acres of IR #1 and by failing to obtain adequate compensation for the .499 acres;
- b. failing to hire 'Namgis members for road construction and repairs on IR #1;
- c. failing to maintain and preserve 'Namgis' sidewalk on IR #1;
- d. allowing additional widening of the road on IR #1 by .32 acres without formal expropriations by B.C. Public Works;
- e. not obtaining compensation for the additional widening of the road on IR #1; and
- f. not ensuring that the road on IR #1 was maintained in a manner satisfactory to 'Namgis.

41. This claim is based on the Crown's breach of the *Indian Act* and of the Crown's fiduciary obligations at common law relating to the improper taking of a right-

of-ways on IR #1 lands and the failure to obtain any compensation for those takings.

42. 'Namgis seeks compensation from Canada for damages for:
- a. the value of the .499 acres of Nimpkish IR #1 that were take, including injurious affection to adjacent lands;
 - b. failure to ensure that road maintenance was completed within twelve months or, failing this, to have the British Columbia Public Works' right to the road revoked;
 - c. failure to obtain compensation for the additional widening of the road by .32 acres on IR #1;
 - d. failure to safeguard the 'Namgis' use of the pre-existing sidewalk which marked the boundary of the right-of-way with IR #1;
 - e. failure to ensure that 'Namgis members were hired for road construction and repairs on the road right-of-way, which was a condition of the agreement allowing expropriation; and
 - f. such other damage or compensation as this Honourable Tribunal thinks just.

Dated this 7th day of May, 2012



Signature of Solicitor – Stan H. Ashcroft

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