

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

HUU-AY-AHT FIRST NATIONS

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	November 18, 2011	D É P O S É
Guillaume Phaneuf		
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

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*.

Date: November 18, 2011

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
Treaties and Aboriginal Government
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I. Claimant (R. 41(a))

1. The Claimant, HUU-AY-AHT FIRST NATIONS (“HFN”) confirms that it is a First Nation, within the meaning of s. 2(b) of the *Specific Claims Tribunal Act*, 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. HFN initially filed this claim with the Minister in 2005 in respect of breaches by Canada relating to logging on the Huu-ay-aht First Nations’ Numukamis Indian Reserve No. 1 (“Numukamis IR 1”) between approximately 1948 and 1969 (the “Numukamis IR 1 Timber Claim”).
4. HFN made further submissions to the Minister in 2007, expanding the scope of the claim and including claims regarding non-payment for spruce harvested in or about 1918 from Numukamis IR 1.
5. On December 17, 2008, Canada accepted negotiation of the claim in respect of the manner in which Canada sold surrendered timber from Numukamis IR 1 in 1942, but rejected part of the claim, including in respect of the following:
 - (a) The non-compliance of Timber Licence No. 269 with s.77 of the *Indian Act*;
 - (b) Canada’s renewal of the Timber Licence in and after 1948 without the consent and over the objection of the HFN; and
 - (c) The non-payment of timber royalties for Sitka Spruce harvested from IR 1 in or about 1918.

6. The notice to the HFN of Canada's decision not to negotiate part of the Numukamis IR 1 Timber Claim on December 17, 2008 brings this claim under s.16(1)(a) of the *Act*.
7. No part of the Numukamis IR 1 timber claim has been resolved.

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

8. HFN does not seek compensation in excess of \$150 million for the Numukamis IR 1 Timber Claim.

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

9. 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;

(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))

Numukamis IR 1

10. Numukamis IR 1, at the mouth of the Sarita River on the West Coast of Vancouver Island, was set aside as reserve land for HFN (then the "Ohiet Band of Indians") in 1882. In 1916 the Royal Commission on Indian Affairs reduced Numukamis IR 1 from approximately 1700 acres to 1100 acres.

11. Numukamis IR 1 was thickly timbered, covered in large spruce, fir and cedar, and a variety of other species, including balsam, hemlock, and white pine.

Surrender and Sale of Spruce Timber

12. During World War I, Canada passed legislation mandating the harvest of spruce for airplanes in the war effort. British Columbia was the primary Canadian source of aeroplane spruce for the Allies.
13. The HFN surrendered all of the “merchantable spruce timber” on Numukamis IR 1 in March 1918. The surrender included the general condition that the timber was surrendered to the Crown on such terms as the Crown deemed “most conducive” to the welfare of the HFN and its members, but also specified that:

...ten percent of all moneys received from the disposal thereof shall be divided equally amongst the members of our band and the remainder thereof shall be placed to our credit and interest thereupon paid to us in the usual way.
14. The surrender was formally accepted by the Crown on April 23, 1918.
15. In April 1918 W.E. Ditchburn, the Chief Inspector of Indian Agencies, confirmed that an agreement had been reached for the sale to the Imperial Munitions Board of 100,000 f.b.m. of rived (split) spruce from Numukamis IR 1 at \$30/Mf.b.m., (the “1918 Agreement”).
16. More than twice this amount of spruce, 206,402 f.b.m., was harvested from Numukamis IR 1 and sold to the Imperial Munitions Board pursuant to the 1918 surrender. As provided in the 1918 Agreement, the amount to be paid to the HFN was \$6,192.06
17. Pursuant to the Surrender of March 18, 1918, Canada was to distribute the proceeds of sale of the spruce by dividing 10% (\$619.21) among the band members, and depositing the remainder (\$5,572.85) to the credit of the HFN.

18. However, HFN has received less than 10% of the amount owed for spruce harvested pursuant to the surrender from IR 1 based upon the rate established in the 1918 Agreement, the exact amount being known to Canada.

Surrender of remaining merchantable timber on IR 1

19. In and around 1937, expressions of interest were made in the remaining merchantable timber on Numukamis IR 1.
20. In December 1937, HFN passed a resolution expressing interest in selling the Numukamis IR 1 timber “subject to this timber being advertised in the usual manner and that all the able members of the Band be given employment as far as possible on the logging operations.” In January 1938 HFN surrendered the merchantable timber on Numukamis IR 1 to the Crown.

“The usual manner” for advertising timber sales

21. The usual manner for advertising the sale of the merchantable timber at all relevant times included, *inter alia*, securing a reliable opinion as to:
- (a) the kinds of timber on the reserve,
 - (b) the quantities of timber on the reserve,
 - (c) the grade of timber on the reserve,
 - (d) the value of the timber to determine a minimum upset price.
22. The usual manner for advertising the sale of merchantable timber also included at all relevant times, *inter alia*, public advertisement of the opportunity for purchase of the timber such as to enable competitive market bidding on the timber.
23. The usual manner for advertising the sale of merchantable timber also included at all relevant times, *inter alia*, advertising conditions of sale or licence that were consistent with the *Indian Act* and the *Indian Timber Regulations*.

24. The usual manner for advertising the sale of merchantable timber also included at all relevant times, *inter alia*, that the value of timber sales were to be determined on the basis of stumpage royalty rather than bulk cash sale.
25. Canada did not advertise the Numukamis IR 1 timber in the usual manner or at all. Most significantly:
- (a) Canada did not publicly advertise the sale of Numukamis IR 1 timber before its sale.
 - (b) Canada did not secure a reliable opinion as set out at para. 22, above.
 - (c) Canada failed to obtain competitive market bidding for the Numukamis IR 1 timber.
 - (d) Canada did not advertise conditions of sale or license that were consistent with the *Indian Act* and the *Indian Timber Regulations*.
26. In any event, and moreover, the licence that Canada did issue for the harvest of IR 1 timber in 1942 was not consistent with the advertised conditions of sale or licence.

1938-1942 depressed timber rates and offers for purchase

27. In 1938 Canada knew that market conditions were depressed and that it was not a favourable time to carry out a sale of timber. Canada determined that the sale of Numukamis timber would be postponed.
28. In January 1939 Canada offered the Numukamis IR 1 timber for tender, specifying that there was 12,000 M f.b.m. of mixed species timber to be removed within five years, and that preferential employment be offered to HFN members.
29. At that time Canada knew or reasonably ought to have known:
- (a) That 12,000 M f.b.m. was not a reliable estimate of the merchantable timber on IR 1;
 - (b) That Canada had made no reliable assessment of the grade and value of timber on IR 1; and

- (c) That no right to harvest IR 1 timber exceeding 12 months could lawfully be granted.
- 30. In 1939 Bloedel, Stewart and Welch Limited (“BSW”) indicated that they sought at least a 20 year licence term for the IR 1 timber. However, Canada recognized and acknowledged that such a lengthy term was not in the best interest of the HFN and was not good forest practice. Canada again postponed the sale of the timber.
- 31. In 1942, after negotiations between BSW and Canada which were not known to the HFN, Canada issued Timber Licence 269 for the merchantable timber on Numukamis IR 1 to BSW.
- 32. The first annual Licence 269 was issued effective November 1, 1942 to April 30, 1943. However, Timber Licence 269 contained a “special condition” that purported to make it renewable for 21 years, and again for 21 years after that.
- 33. Timber Licence 269, including the “special condition”, was issued in 1942:
 - (a) despite the fact that Canada knew that by 1942 the timber market had not significantly improved from its depressed condition of 1938,
 - (b) despite the fact that Canada knew that a long term licence was not in the best interest of HFN and not good forest practice,
 - (c) despite the fact that the licence was not based upon the usual valuation of timber based on stumpage royalties capturing the current value of timber,
 - (d) despite the fact that Canada could not lawfully grant a right to harvest timber on IR 1 for a period longer than 12 months, and
 - (e) despite the fact that there was no term of licence requiring preferential employment for HFN members.

1948 HFN request cancellation of Licence 269

- 34. On January 19th 1948, before any timber had been harvested by BSW on IR 1, HFN made a formal petition to Canada requesting the cancellation of Timber Licence 269:
 - (a) Asking that the present licence be terminated and a new agreement of sale satisfactory to HFN be entered into;

- (b) Asking the Crown to protect the HFN's greater interest;
 - (c) Stating that HFN had not fully understood the terms and conditions of the sale of the IR 1 timber;
 - (d) Stating that the terms and conditions of the sale would not realize the full benefits for themselves and their heirs to which they were entitled;
 - (e) Stating that the price of logs in 1948 was far more than what it was in 1918 or 1942;
 - (f) Stating that under the present arrangement they would receive only half of what they should receive according to the present price of logs;
 - (g) Noting that under s. 77 of the *Indian Act* timber licenses may only be granted for up to 12 months, but may be renewed;
 - (h) Asking that any renewal be in compliance with adequate and proper present day rates of stumpage.
35. Timber Licence 269, which had been renewed annually since 1942, was set to expire on April 30, 1948. Upon expiry of the Licence in 1948, Canada had full discretion to determine whether the licence should be renewed on existing terms, or whether the timber should be advertised for sale to capture increased value and better conditions of sale in the best interest of HFN, as HFN had requested.
36. However, Canada did not accede to HFN's petition. Instead, Canada renewed Licence 269 in 1948 on the same terms as had been set in 1942, and every year after that until logging operations ceased in or about 1970.
37. Furthermore, Canada did not comply with or enforce the *Regulations* or the prevailing forestry practices at the time, which would have protected HFN's interests including, among other things, requiring the replanting of IR 1 after the harvest of merchantable timber.

The terms of Timber Licence 269

38. Timber Licence No. 269 was first issued effective November 1, 1942 to April 30, 1943. As required by the *Indian Act*, the licence was issued until April 30, 1943 “and no longer”, but purported to add the following “special condition”:

That the period of twenty-one years hereafter stated, within which the timber is to be removed, may be extended for a further period of twenty-one years should the timber not have been removed by April 30, 1963, and that on the expiration of the period of 42 years, should the timber thereon or any part thereof remain uncut the Licensee shall have the opportunity to arrange for a further [...] for 21 years on such terms as to royalties and stumpage as prevail at that time in the Province of BC with respect to timber similarly situated.

39. The licence also required that the dues paid annually be submitted with a report on the trees cut in that season:

[T]he dues to which the Timber cut under its authority are liable shall be paid as follows, namely –

Under a sworn return, furnished by a licensed scaler and on or before the 30th of November following the season in which the timber is cut.

40. Compliance with regulations was expressly required under the licence, which stated:

And further upon condition that the said Licensee, or their representatives, shall comply with all regulations that are or may be established by Order in Council and shall submit all the Timber cut under this Licence to be counted or measured and shall settle for the duties chargeable thereon when required by me or any officer thereupon authorized – otherwise the said timber will be forfeited to the Crown and the said Licence be subject to such other penalty or penalties as provided by law.

41. The licence also stated:

This licence No. 269 renewable yearly, under the provisions of section No. 13 of the Regulations governing the disposal of timber on Indian Reserves in the province of British Columbia, for a period of 21 years.

Timber Licence No. 269 from 1942-1970


42. From 1942 to 1969 Canada provided BSW with annual licences under Timber Licence No. 269, despite the objections of HFN and despite numerous breaches of requirements under the *Indian Act* and the *Indian Timber Regulations*.
43. Canada knew that Timber Licence No. 269 was a very questionable and unsatisfactory Timber Licence that was undervalued and far behind present day rates, and knew that timber harvest on IR 1 should have been consistent with existing market conditions.
44. In 1963, HFN renewed its objections to Timber Licence 269, and in 1965, hired lawyer Thomas Berger to seek on HFN's behalf to have the Licence terminated.
45. The Licence was terminated and logging operations ceased by 1970.
46. By the end of its logging operations on Numukamis IR 1, BSW had harvested significantly more timber than the 12,000 M f.b.m. included in the initial tender, the exact amount being known to Canada.

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


47. In particular, this claim is based upon the Crown's breaches of the *Indian Act*, the *Indian Timber Regulations* and of the Crown's fiduciary obligations at common law relating to a contract for the harvest and sale of rived spruce timber in approximately 1918, and to the surrender and sale of the remaining merchantable timber on IR 1 under Timber Licence No. 269, which was in effect from approximately 1942 to 1969.
48. HFN seeks compensation from Canada for:
 - (a) Damages for the failure to pay the full sum owed for the spruce harvested from IR 1 pursuant to the 1918 Agreement at the rates established by the 1918 Agreement;
 - (b) Damages for the difference between what HFN actually received for IR 1 timber between 1948 and 1970, and what HFN ought to have received had Canada acted in accordance with HFN's best interests and in accordance with the *Indian Act* and *Indian Timber Regulations* during that time;

- (c) Damages for the failure to enforce proper forestry practices on IR 1 and without limitation, for failure to replant upon harvest of IR 1 timber;
- (d) Interest; and
- (e) Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 17th day of November, 2011



Signature of Representative/Solicitor



Signature of Representative/Solicitor

Submitted by John R. Rich and Maegen M. Giltrow of Ratcliff & Company, Barristers and Solicitors, Suite 500 – 221 West Esplanade, North Vancouver, B.C. V7M 3J3
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