
Siska CPR Claim Update – Community Experiences at the Tribunal and the Importance of Oral Testimony

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Introduction

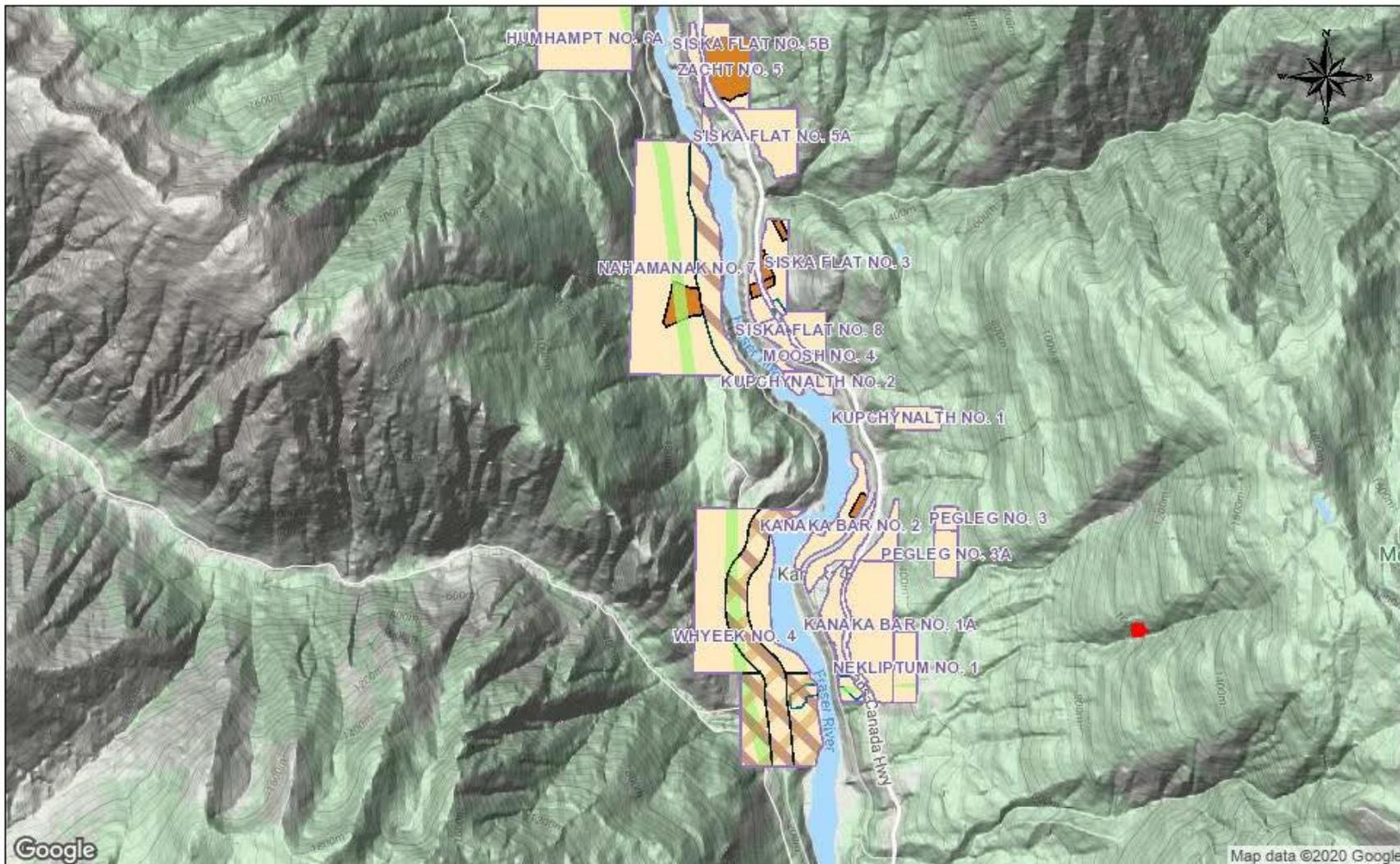
- Today's presentation will focus on my experience in the recent decisions of the Specific Claims Tribunal in *Siska Indian Band v. HMTQ*, 2021 SCTC 2, *Siska Indian Band v. HMTQ*, 2018 SCTC 2 with a particular focus on the use of oral knowledge and the emergence of new and novel Aboriginal law principles concerning:
 - Equitable Compensation Principles in Specific Claims;
 - The Tribunal's application of community testimony and oral evidence;
 - Fishery Losses; and
 - How the Tribunal considers compensation as it relates to land losses.

Historical Facts

- The Siska Reserves were allotted to the Band by Reserve Commissioner Sproat on June 18, 1878.
 - The Reserves are located within Siska traditional territory.
 - In 1883, the Province transferred the administration of lands in the Fraser Canyon to the Government of Canada to foster the construction of the CPR.
 - the Railway Belt – 20 miles either side of railway.
 - The right-of-way stretches the entire length of I.R. No. 7.
 - In 1911, the Reserves were administratively transferred to the DIA:
 - “Administration of the Railway Belt reserves was retransferred to the DIA by Order in Council dated December 29, 1911.” [para. 246]
 - In 1930, PC 208 “... provided that lands included within Indian reserves in the Railway Belt “shall continue to be vested in Canada in trust for the Indians”” [231].
 - From 1886 on, the CPR Company vigorously exercised exclusive possession of the land within the CPR right-of-way,
 - treating the members of the Siska collectivity as “trespassers”, effectively preventing the Band from access to lands and their fishing sites.
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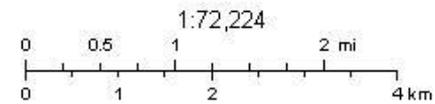
Siska Indian Band v HMTQ, 2018 SCTC 2

- In his Reasons for Decision released February 1, 2018, the Honourable Justice Slade validated the Siska Band's Specific Claim relating to the "presence" of the Canadian Pacific Railway through
 - Zacht Indian Reserve No. 5 and
 - Nahamanak Indian Reserve No. 7.
- The Tribunal found that the Crown had breached its fiduciary obligations owed to the Band, and that the Crown had utterly failed to act in conformity with its honourable obligations and duties to the Band.
- The Tribunal found the Band's Specific Claim valid under paragraphs 14(1)(b), (c), and (d) of the *Specific Claims Tribunal Act*.
- Canada admitted that it breached its fiduciary duty under paragraph 14(1)(e) by failing to provide Siska with proper compensation in 1885 when the railway was built.
 - Paid \$1 per acre



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|-------------------------|-----------------|-------------------|--------------|
| Indian Reserve Boundary | Surface Permits | Easement | AnnoEasement |
| Oil and Gas Activity | Lease | Lawful Possession | |
| BCR 18 (2) | Designated Land | Band Land | |



Validation

- Justice Slade of the Tribunal validated the Band's Claim, among other reasons, on the basis that:
 - Canada failed between 1885 and 1928 to meet its fiduciary duties to the Siska Band by:
 - authorizing an excessive right of way,
 - failing to consult and ascertain the needs of Siska; and
 - by failing take measures to protect the interests of Siska, including the failure to protect and provide access to their fishing stations; and
 - Canada illegally disposed of the right of way to CPR within I.R. 5 and I.R. 7 by authorizing the CPR right-of-way without statutory authority and in contravention of the surrender provisions of the *Indian Act*.

The Siska Reserves:

- Siska's Provisional Reserves:
 - The Tribunal found that the lands allotted in 1878 by Commissioner Sproat were “provisional reserves”.
 - That “in 1885 the fiduciary obligations of the Crown in relation to Siska's provisional Reserves in the Railway Belt were higher than those found in *Wewaykum*. The Reserves were within their traditional territory and could have been unilaterally “created” as *Indian Act* reserves” [para 278].
- The Reserve Creation Date:
 - The Tribunal distinguished the Reserve creation date in *Wewaykum* on the basis that “administration and control of the Railway Belt had been transferred to Canada on December 19, 1883. ...
 - The Dominion government had the power to unilaterally “create” reserves.” [para. 181]
- In 1911, the Reserves were administratively transferred to the DIA:
 - “Administration of the Railway Belt reserves was retransferred to the DIA by Order in Council dated December 29, 1911.” [para. 246]

Importance of Oral History Evidence

- The Tribunal made findings of fact based on the use of oral history evidence provided by community witnesses.
- The Tribunal accepted oral history evidence that the salmon fishery on the Fraser River sustained the Nlaka'pamux people for millennia:
 - [38] The salmon fishery on the Fraser River has sustained the people for millennia. Their language formed around terms used to describe their attachment to the salmon harvest, known in their language as Sc'uwen. Salmon was and to a lesser extent than in times past remains their primary source of sustenance. Ceremonial practices and spirituality are entwined with the seasonal migrations and harvesting of salmon.
- The oral history evidence documented the impact of the railway on the access to the fishery:
 - [48] Fisheries along the water boundary of IR 7 were preferred due to ready access to fishing sites. Access became difficult, as trails had been damaged by rocks, railway ties and rails which had been dumped down the steep embankment to the river. Access had been denied to them as if in trespass. This changed as the railway people are now "listening pretty good".

Cisco bridge on the C.P.R.



The Crown's Breach from 1885 to 1928

- Minimum Standards:
 - The Tribunal found that “the Crown failed throughout the events between 1885 and 1928 to meet its fiduciary duties to Siska” and had utterly failed to act in conformity with its honourable obligations and duties [para 302].

 - The Crown’s fiduciary obligation was at least one of “loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary”.

Fiduciary Duty – Consultation to Protect Provisional Reserve

- [279] Nevertheless, Crown actions in this matter have been measured against the performance of the “basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries” (*Wewaykum* at para 86).
- [280] Ordinary prudence in this context required that, at a minimum, the Crown elicit the concerns of Siska and consider their best interests.
- This called for consultation. Their obvious interest would include protection of their arable land and protection from damage and continued access to their fishing stations.
- There was no consultation.

Duty of Protection After Reserve Established

- “[301] Once the Reserves came under the *Indian Act*, the duty of the Crown was to enforce the protective provisions of the *Indian Act* and preserve the Siska Band’s interest in the reserves from exploitation (*Wewaykum* at para 86).
- To act in Siska’s interests need not have prevented the railway from moving forward, as it had long since been in operation.
- If expropriation was necessary to establish a proprietary interest in the CPR the Governor in Council could, under section 35 of the *Indian Act*, have exercised its authority to allow the taking of a form of non-exclusive tenure such as an easement.”

Canada's Position on Fishery Losses

- Canada took the position that Siska had not established any reduction in the Siska harvest of fish due to the railway as there was no direct evidence of actual losses that correspond with the construction period, 1882–1885, or for any period of time during the operation of the railway.
- Canada's expert Dr. Blewett did not acknowledge Siska sustained a loss due to a reduction in its annual harvest of fish and in his view, Siska's estimated losses on the fishery were hypothetical.
- The Tribunal rejected this argument referring to findings in the Validity Decision that the construction and operation of the railway disrupted Siska's access to the fishery but acknowledged the challenges raised by the fact that there was no data from which the impact on the Siska harvest of fish, could be measured.

Siska Indian Band v HMTQ, 2021 SCTC

Compensation decision based on illegal taking of reserve land for CPR railway & interference with fishery.

Compensation awarded to Siska by the Tribunal was assessed in the amount of **\$4,756,726**:

- a) Current Unimproved Market Value of the Claim Lands: \$161,118
 - b) Loss of Use of the Claim Lands: \$710,000
 - c) Harvest impacts of impaired access to the fishery: \$2,800,000
 - d) Damage to trails and labour to clear trails: \$700,000
 - e) Livestock losses: \$367,008
 - f) Timber removed: \$100,000
 - g) A deduction for payments received for IR 5 (\$1.60 in 1925) and IR 7 (\$89.60 in 1892 or +/- \$81,400 in present dollars).
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Compensation Adjustment

- Compensation adjusted to \$4,778,300 as the current unimproved market value, loss of use and livestock losses had to be adjusted
 - from the date of the validity Reasons for Decision at the Band Trust Account rate
 - to the Compensation Decision.
 - Post-judgment interest was subsequently added
 - Bill of Costs is being finalized for amounts not covered by federal funding.
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Trade of Fish

- [40] The core interest of the Siska in the 1878 allotment of the reserves was the fishery. The cognizable interest in the land included a proprietary interest in fishing sites.
 - [44] The significance of the access to the Fraser River was also borne out by the witness testimony given in this Claim.
 - [50] ...The evidence further reveals that the traditional economy of the Siska was centered on the harvest of salmon.
 - Salmon, including dried salmon, was a trade good.
 - This trade continued within the lifetime of living members of the Siska community.
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Indigenous Perspective

- [61]The evidence of Siska community members reveals their perspective that their material interest in the Claim Lands reflects their dependence on salmon for sustenance and the functioning of their historical economy.
 - But there is more; their identity as Nlaka'pamux peoples is connected to their lands as a place of harvest and spiritual connection to the salmon.
 - This cultural component is reflected in ceremonial practices associated with the return of the salmon.
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Fishery Losses

- The Tribunal found that pecuniary loss flowing from the impaired access to the Claimant's fishing stations was found to be compensable from 1882 to present.
 - The amount of the loss was assessed globally in the amount of \$2.8 Million + \$700,000 for damage to trails and labour to clear trails for a total of \$3.5M in fishery related losses.
 - This amount was based expert modeling of the cost of obtaining a volume of salmon sufficient to replace Siska's foregone annual harvest due to the construction of the CPR and its operation up to the present which was informed by oral testimony.
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Salmon Fishing Site



Testimony on the Significance of Access to Fisheries

- [45] Testimony was given by 7 witnesses over the course of several hearings in both the validity and compensation phase.
- [50] The basis for Sproat's understanding of the significance of places in the Indigenous perspective is borne out by the evidence in the present matter. The evidence further reveals that the traditional economy of the Siska was centered on the harvest of salmon. Salmon, including dried salmon, was a trade good. This trade continued within the lifetime of living members of the Siska community.

Chief Fred Sampson, Elder

- [46] Chief Sampson testified of his training and the technology employed. Reverence for natural materials and the salmon is expressed :
 - We are one and the same. We're a part of each other. I know that they did some testings on some of the archeological sites, and they dug up our people's remains, and they did testing on the bones. They were amazed at the high calcium content of those bones. And that calcium content was directly related to the fish. **So that's why I say, we are them and they are us.** Because we ate so much fish that we were made up of fish.
 - Most certainly the abundance of the salmon source was very key to a lot of the historic village sites that are throughout the canyon. **The fish resource was absolute paramount to the survival of the people as a whole. It was the most abundant source of protein that we had as river people and salmon people, along with all of the other traditional harvesting of foods and goods and materials. But the salmon were absolutely key.**

Maurice Michell, Elder

- Maurice Michell testified:

- We, the Nlaka'pamux people, our major food is salmon. When the Creator made us and put us on Mother Earth he made those for us so that we can survive on the land that he made for us.
- A lot of the times we were taught by our mom that when we started fishing, she said the first fish that you catch, you always return to the river. You thank the river and you thank – you thank the river for being there so that the fish could come up. When you catch your first fish, you thank the fish for showing itself so that we could sustain ourselves. You thank the fish and you offer it a gift and return it back to the water. And say be on your way, go to the spawning ground.

Fish Trail Losses

- The Tribunal found the labour expended over the period to be tangible and it was possible to value, awarding Siska \$700,000 in compensation:
 - [308] There are five runs of salmon annually, plus steelhead. There is some overlap of these runs.
 - Fishing “season” extends over 5-6 months annually. My estimate, or guess, of time expended up to 1884 is 60 days annually at 6 hours/day.
 - For 1885 to 2004, 36 days annually at 6 hours/day.
 - For 2004 to 2021, an average, taking into accounts a reduced effort to nil at present, of 10 days annually.
 - The total number of hours is $4,614 \times 6 = 27,684$.
 - Even if this estimate of hours is off by a sizable margin, the effort is obviously significant, having taken place every year for over a century.
 - This incalculable loss is assessed at \$700,000.
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Timber Losses

- Siska took the position that it should be compensated for timber losses as a result of the CPR clearing valuable timber from the Claim Lands, but in the absence of direct historic evidence, requested the Tribunal to exercise its discretion in awarding compensation.
- The Tribunal agreed with this approach concluding the construction of the railway would have resulted in the removal of trees from the entirety of the Claim Lands and estimated is this loss to Siska as \$100,000 in present value

Livestock Losses

- The Tribunal accepted Siska's position that the economic loss resulting from the loss of livestock through CPR train strikes should be compensated and agreed with Gordon Gislason's estimates of two animals lost every five years from 1885-1925 and one animal lost every five years from 1930 to 1965, which provided a present value of \$367,008.

Land Values and Appraisal Experts

- The Tribunal agreed with Siska's position that the full 89.51 acres through IR 7 should be valued, and concluded CUMV to be \$1800 per acre totaling \$161,118.
- Although the Tribunal favoured Canada's appraiser John Peebles loss of use methodology and concluded a present value loss of use value of the land in the amount of \$710,000, this was only a modest departure from the present value of the estimate of Siska's expert Rod Cook in the amount of \$723,357

BTA Compound Interest

- The Tribunal found that full compound interest at the Band Trust Account rate would apply to all of Siska's historic losses, including fishing losses on the basis of restitution:
 - [342] ... The **rationale for applying compound interest** is not that the lost revenue (or other pecuniary loss) would have been deposited in the Claimant's trust account.
 - The rationale derives from the **restitutionary aspect** of equitable compensation and the need to compensate for losses in a manner that **captures the lost utility and delay when restoring the Claimant for its pecuniary losses**.
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Significance of Decision

- This is a precedent setting decision as it is the first Specific Claim decision to:
 - I. Award compensation for fishing losses through equitable compensation; and
 - II. Apply full compound interest to bring forward historic losses to present in order to compensate for delay.