SCT File No.: SCT-7006-13

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

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

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

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

TO: TOOSEY INDIAN BAND
As represented by:
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I. Status of Claim (R. 42(a))

1. The Toosey Indian Band (the "First Nation") submitted a claim to the Minister of Indian Affairs and Northern Development (the "Minister") on June 18, 1998, with Supplementary Submissions dated May 25, 2009 (the "Specific Claim"). Pursuant to s. 42(1) of the *Specific Claims Tribunal Act* (the "Act"), the Specific Claim is deemed to have been filed with the Minister on October 16, 2008.

2. The Specific Claim concerns the taking of approximately 26.638 acres of land (the "Lands") from Toosey Indian Reserve No. 1 and Toosey Indian Reserve No. 1A (hereafter "I.R. 1" and "I.R. 1A", and collectively, the "Reserve") in 1968 for the construction of an access road (the "Road").

3. On June 30, 2011, Patrick Borbey, Senior Assistant Deputy Minister of Treaties and Aboriginal Government informed the First Nation of the Minister's decision not to accept the Specific Claim for negotiation on the basis that the claim did not disclose an outstanding lawful obligation on the part of the Government of Canada (the "Crown").

II. (a) Validity (R. 42(b) and (c))

4. The Crown denies the validity of the claims based on all the grounds in the Declaration of Claim dated January 8, 2014 (the "Declaration"), including those in paragraphs 6, 46, 47, 48, 49, and 50.

5. In the alternative, if there was a breach of a legal obligation including statutory, fiduciary and other applicable legal obligations relating to the expropriation, planning, construction, and operation of the Road as alleged in the Declaration, paragraphs 46, 47, 48, 49, and 50, which is not admitted but denied, pursuant to ss. 20(l)(i) of the Act, the Province of British Columbia (the "Province") caused or contributed to such breach, or the loss arising from such breach, and the Crown is not at fault for any such loss.

6. The Crown denies the validity of the claim that the First Nation has suffered damages, and further denies that it owes the First Nation compensation and/or damages as alleged at paragraph 51, or at all.

Jurisdiction

7. To the extent that any of the claims relate to losses and injurious affection alleged to have been incurred by individual band members, the Specific Claims Tribunal (the "Tribunal") does not have jurisdiction under s. 14 of the Act, to adjudicate such claims.

8. In reply to paragraph 8, the Crown states that the location of any "Aboriginal title lands" of the Tsilhqot'in Nation is not relevant to this claim and, to the extent that the Declaration is based on or alleges aboriginal rights and title, it is beyond the jurisdiction of the Tribunal under ss. 15(1)(f) of the Act, which states that a First Nation may not file a claim that is based on or alleges aboriginal rights or title. Paragraph 8 of the Declaration should be withdrawn, or it should be struck pursuant to ss. 15(1)(f) and 17(a) of the Act.

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

9. The Crown admits the facts as set out in the following paragraphs of the Declaration: 1-4, 9, 14, 18-20, 25, 34, 37, and 40.

10. The Crown has no knowledge of the facts as set out in the following paragraphs of the Declaration: 5, 10, 11, and 31.

11. In reply to paragraph 7 of the Declaration, the Crown does not know if all the members of the First Nation are, or consider themselves to be, members of the Tsilhqot'in Nation, nor does the Crown know what the First Nation means by the expression "the Tsilhqot'in Nation".

12. In reply to paragraph 12 of the Declaration, the Crown denies that the letter from R.D. Greggor advised of the Province's "intention to construct an access road through Toosey I.R. No. 1." The Crown says that the letter advised that the Province wished to consider the feasibility of a route through I.R. 1.

13. In reply to paragraph 13 of the Declaration, the Crown admits the facts in paragraph 13 but says that the actual quotation from the letter is "obtaining *the* tentative approval of the Band concerned so that we can request inspection of the area to calculate the compensation to be offered" (ital. added).

14. In reply to paragraph 15 of the Declaration, the Crown admits that the representatives from the Province and Canada met but denies that the meeting took place on June 11, 1965. In a "Memogram" dated June 11, 1965, R.L. MacDonald summarized the discussions that took place between himself, Land Inspector J. Esler and an Assistant Indian Agent. The Memogram does not state that the discussions took place on June 11, 1965, or that there was only one meeting.

15. In further reply to paragraphs 15 and 16 of the Declaration, the Crown denies the way in which the First Nation has summarized the contents of the Memogram.

16. The Crown denies the facts set out in paragraph 17 of the Declaration.

17. In reply to paragraph 21 of the Declaration, the Crown admits the existence of the August 24, 1965 Band Council Resolution (the "August 24, 1965 BCR") but denies the facts as set out by the First Nation. The Chief's name is incorrect and should read "Casimer". Further, the August 24, 1965 BCR copy has the name of "Casimer Isnardy" typed in above "Chief", and the name of "Leonard Solomon" typed in above "Councillor." The August 24, 1965 BCR copy is certified to be a true copy by W.J. Desmarais, Superintendent of the Williams Lake Indian Agency. The August 24, 1965 BCR approved the transfer of the land required for the Road to the Province. Moreover, the First Nation's use of the word "purported" is argument not fact.

18. In reply to paragraph 22 of the Declaration, the Crown admits that the August 24, 1965 BCR was passed at a meeting held at a Toosey I.R. but denies that the BCR states "#2".

19. The Crown denies the facts set out in paragraphs 23 and 24 of the Declaration. The Crown further says that the statements at paragraphs 23 and 24 are evidence, rather than facts, and therefore should not be included in the Declaration as they are contrary to Rule 39 of the *Specific Claims Tribunal Rules and Procedure*.

20. The Crown admits the facts set out in paragraphs 26 and 27 of the Declaration except that: (1) neither of the letters actually state that the Order-in-Council transfers "jurisdiction" of the lands to the Province and (2) the Crown has no knowledge of who inserted the handwritten text on the letter of January 18, 1968.

21. In reply to paragraph 28 of the Declaration, the Crown admits the existence of Order-in-Council PC 1968-140 dated January 25, 1968 (the "OCPC 1968-140") and that its recitals provide that the Ministry of Highways of the Province of British Columbia has applied for the Lands for road purposes and that the application was approved by the Council of the First Nation by the August 24, 1965 BCR in consideration for the payment of the sum of $775.00 which has been paid by the Province, but denies the remainder of the facts as summarized by the First Nation. OCPC 1968-140 states, *inter alia*, "THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Indian Affairs and Northern Development, pursuant to the provisions of section 35 of the Indian Act, is pleased hereby to consent to the taking of the said lands by the Province of British Columbia and that the control, management and administration thereof be transferred to Her Majesty in right of the Province of British Columbia subject to the proviso that should the lands cease to be used for public road purposes they shall revert to the Crown in right of Canada."

22. In reply to paragraph 29 of the Declaration, the Crown admits the facts set out in paragraph 29, except for the date of the Gazette Notice. The notice announcing the establishment of the road was signed by the Minister of Lands, Forests, and Water

Resources on March 13, 1968 and published in the March 21, 1968 issue of the British Columbia Gazette.

23. In reply to paragraph 30 of the Declaration, the Crown says that the interpretation of the *Forest Act* is a matter of law not fact.

24. In reply to paragraph 32 of the Declaration, the Crown admits that an action was brought by George Palmantier, Mary Jane Garland and Francis Johnny, as against Richard Merritt, Merritt Trucking Ltd. and the Province, but denies that the Court found that the plaintiffs are members of the First Nation.

25. In reply to paragraph 33 of the Declaration, the Crown denies that Dianne Dennis "reported that horses and cattle belonging to the First Nation had been killed". While Dennis advised that cattle and horses had been killed, she did not, contrary to paragraph 33, advise that the cattle and horses were those of the First Nation**.** The Crown admits the remainder of the facts in paragraph 33 and adds that Dennis reported in the same letter that the First Nation was "especially concerned with the area near their village because logging trucks go by at very high speeds."

26. In reply to paragraph 35 of the Declaration, the Crown denies that in a September 20, 1985 letter it was noted 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 letter actually states that it was a lawyer who acted for certain members of the First Nation who lost cattle as a result of a logging truck hitting the cattle that held the above belief.

27. In reply to paragraph 36 of the Declaration, the Crown admits the facts set out in paragraph 36 except for the name of the Administrator of Program Services in the Ministry of Forests and Lands, who was the recipient of the letter. The name is noted as W. Fry, and not W. E. Fry.

28. In reply to paragraph 38 of the Declaration, the Crown admits the existence of the letter of October 28, 1987, but as the letter is marked as being "without prejudice", it may not be appropriate to comment on the content of the letter until the status of the letter is clarified in these proceedings.

29. In reply to paragraph 39 of the Declaration, the Crown admits the existence of the letter of August 3, 1988, but denies the facts as summarized by the First Nation. The payment of $775.00 was not the only negotiated term of the original taking.

30. In reply to paragraph 41 of the Declaration, the Crown admits the facts set out in paragraph 41, except for the date of the B.C. Gazette Notice. The notice announcing the discontinuance and closure of the access road was signed by the Minister of Forests on April 6, 1992, and was published in the April 9, 1992 issue of the British Columbia Gazette.

31. In reply to paragraph 42 of the Declaration, the Crown admits the facts set out in that paragraph but says that the actual quotation from the letter uses the word "purposes of timber extraction" and not "purpose of timber extraction."

32. In reply to paragraph 43 of the Declaration, the Crown admits the existence of Provincial Order-in-Council 411 dated April 3, 1997 (the "OIC 411") but denies the facts as summarized by the First Nation. The OIC 411 authorizes the Minister of Forests to effect the conveyance of the Road shown on plan 53509 to Canada for the use and benefit of the First Nation.

33. In reply to paragraph 44 of the Declaration, the Crown says that the status of the Road is a matter of law not fact.

34. The statements in paragraph 45 of the Declaration are submissions, and not facts, and therefore should not be included in the Declaration. The statements also appear in the Specific Claims Branch Review which is a document that is marked as being "without prejudice" and the Crown has not consented to waive privilege over this document.

IV. Statements of Fact (R.42 (e))

The taking of the Lands for the Road

35. A public road had existed on or near the location of the Road prior to 1965. It had been a wagon trail or an old road that was not fenced.

36. By letter dated June 26, 1964, R.D. Greggor, Forester-in-charge, Engineering Services Division, B.C. Forest Service, Victoria, ('Greggor") wrote to J.V. Boys, Indian Commissioner for B.C., Department of Indian Affairs, Vancouver, ("Boys") advising that the Forest Service was planning to conduct "a survey along the route of an existing Public road" across Toosey IR 1 "in connection with its possible relocation and reconstruction as better access for the removal of the forest resources of Big Creek Drainage through Farwell Canyon". Greggor advised that the Forest Service would be carrying out "preliminary engineering investigations to permit selection of a route" and that when such a route is selected, they would contact the band through the Department of Indian Affairs and Northern Development ("DIAND") "for tentative approval of its position in the Reserve", and that they would, as usual, inform the band of their plans prior to road construction.

37. In a letter dated April 29, 1965, Greggor wrote to Boys advising that "[w]e would like to schedule entry to these lands for staking the route in August, with road construction to commence in September as a winter works program. It will be noted that this road will replace 'Public Road' #393 through the Reserve and will not conflict with the improved lands in Indian Reserve 1A. The acreage required for this project is about 30.4 acres.…The positioning of cattle guards and fences can also be covered at that time."

38. In a Band Council Resolution dated May 14, 1965 (the "May 14, 1965 BCR"), the First Nation advised that "after study of the Provincial Forest Services plan for the possible relocation of Public Road #383 [*sic*] we agree in principal [*sic*] and give our tentative approval". The May 14, 1965 BCR also provided that "the Forest Service

officers and their surveyors are granted free access to our lands for any purposes connected with this project" and that "we await the final offer before full acceptance of the plan."

39. By letter dated May 28, 1965, R.L. MacDonald, Field Supervisor, Engineering Services Division, Forest Service ("MacDonald") wrote to Messrs. J.A. Esler ("Esler") and W.C. Stewart ("Stewart"), Land Inspectors, B.C. Department of Lands, Foreshore and Water Resources, Williams Lake, advising that the Forest Service "is currently dealing with the Department of Indian Affairs to purchase right-of-way through I.R. 1 and 1A, 'Toosey', near Riske Creek." The letter further advised that the "band council has given approval for entry for location purpose, but have requested further negotiation on compensation to be offered". MacDonald then requested that he meet with either Esler or Stewart "in Williams Lake on Friday, June 11th, to discuss land values for unimproved land in the Riske Creek area?"

40. In a "Memogram" dated June 11, 1965 from MacDonald to F.E. Johnson, Chief Engineer, Forest Service, ('Johnson"), MacDonald summarized his meeting with Land Inspector Esler and the Assistant Indian Agent. MacDonald noted that while the appraised value of open range land in Alexis Creek – Riske Creek area around Williams Lake was $15 - $18 per acre, both B.C. Hydro and B.C. Highways had paid higher than the appraised value. The Land Inspector recommended and MacDonald concurred that $25 per acre be paid for the required Toosey reserve lands such that the total cost would be approximately $750 and thereby costly holdups or delays would be avoided.

41. In the same Memogram, MacDonald noted that the Assistant Indian Agent felt:

> "…that the band would be satisfied with the following intentions as expressed in our conversation:
>
> (a) R/W to be purchased at assessed values
>
> (b) Cattle guards when fences cut by road
>
> (c) Chance for employment of band members on Labour crew"

42. On the left margin of MacDonald's Memogram, someone in a different handwriting inserted the following note: "Three cattle guards – NBdy – SBdy Road to Village. I suggest fencing both sides of road near small I.R. 1A."

43. On July 22, 1965, in an internal Forest Service memo, MacDonald was asked to comment on the marginal note by someone in the Forest Service with the initials "C.P.H."

> "REMARKS 1. Please comment on marginal note made by F.E. Johnson on your memo dated 11 June/65. Three cattle guards and some fencing rather than six cattle guards. You would then have enough steel from Kamloops to complete a standard guard."

44. On the same July 22, 1965 Forest Service memo, following the above remark, someone in a different handwriting to that of C.P.H. responded "have steel – [illegible] of guards in Kamloops." The initials of the person who made this response are illegible.

45. On August 13, 1965, F.S. McKinnon, Deputy Minister, Forest Service, ('McKinnon") wrote to Indian Commissioner Boys, advising "that the location survey plans for the proposed Chilcotin-South Forest Road through Toosey Indian Reserve # 1 and Indian Reserve #1A based on air photo studies, have been completed" and that "[t]he Department is now prepared to offer $775.00 (being $25.00 per acre) for the approximate total of 30.5 acres of right-of-way required within the above mentioned lands."

46. In the same August 13, 1965 letter, McKinnon advised that "the right-of-way outlined in red varies in width from 70 to 150 feet, due to the differences in the terrain", and 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", and requested DIAND's assistance in obtaining final approval of the Forest Service's proposals from the Toosey Band Council.

47. By the August 24, 1965 BCR, the First Nation agreed to transfer the land required for the Road to the Province on the understanding that it would receive "$25.00 per acre and the replacement of all existing fences and cattle guards."

48. On September 28, 1965, Johnson, the Chief Engineer of the Forest Service, forwarded a cheque for $775.00 to Indian Commissioner Boys as payment in full for the Road. Johnson advised that "[l]egal survey of the route will be carried out after construction and a plan will be submitted to the Surveyor General of Canada for his approval, after which we presume the title to the road can be transferred to the Province."

49. The survey plan for the Road was approved by the Surveyor General of Canada on August 31, 1967. The survey had been conducted by J.E. Anderson B.C.L.S., between September and October 1966 and he recorded the right-of-way across Toosey I.R. Nos. 1 and 1A at 26.638 acres. The plan was recorded as C.L.S.R. #53509.

50. By OCPC 1968-140, the Governor General in Council consented to the transfer of 26.683 acres of land in the Indian Reserve Nos. 1 and 1A to the Province "subject to the proviso that should the lands cease to be used for public road purposes they shall revert to the Crown in right of Canada."

The Use of the Road

51. On January 28, 1981, an accident happened when a logging truck struck three horses on the Road. An action was brought by George Palmantier, Mary Jane Garland and Francis Johnny, as against Richard Merritt, Merritt Trucking Ltd. and the Province ("*Palmantier*"). The Plaintiffs in the action claimed damages for the negligence of the Defendants.

52. In a letter dated January 10, 1983, Diane Dennis, a Lands and Resources Officer, Indian and Northern Affairs, informed the Province of concerns regarding the safety of the Road that the First Nation had brought to her attention. Ms. Dennis advised that the First Nation was concerned "with the area near their village because logging trucks go by at very high speeds." She also mentioned that the "Band Council wants to discuss with your Ministry about building a fence along the road to protect their livestock, posting speed limit signs and building speed bumps to discourage logging trucks from speeding through the village area."

53. In response to Ms. Dennis's letter, the Province agreed in 1983 to fence both sides of the Road through the village.

54. In 1984, Justice Hamilton of the County Court of the Cariboo found that the driver of the truck in *Palmantier* was negligent in the operation of his vehicle. The Court also found that the Plaintiffs were contributorily negligent in allowing their horses to roam on the Road.

55. On June 29, 1989, R.B. McNaughton, District Manager, Williams Lake Forest District ("McNaughton"), notified the First Nation's Council (the "Council") of the Province's understanding of its obligations in relation to the Road, and how they have been met. In particular, he stated:

> "1. Where the road cut through fences existing at the time of construction, cattleguards and gates were installed.
>
> 2. A subsequent agreement was made in March of 1983 to fence the Right-of-way between the north boundary cattleguard and the next cattleguard. This fence was to be fencing and gates and was subsequently constructed.
>
> 3. An agreement was made in March 1993 [*sic*] to erect speed restriction signs, school bus warning signs and to advise the logging industry Licensees to use caution and obey speed restrictions. This has subsequently been followed up with several letters and warnings to the Licensees and truckers.
>
> In addition to the foregoing, the Forest Service has also carried out dust control treatments, and improved the cattleguards for light vehicle traffic."

56. In the same letter, McNaughton also advised that it was the Province's intention to re-route the Road around the Reserve, subject to the acquisition of a new right-of-way.

57. In a letter dated July 5, 1989, McNaughton advised the Council that, further to their meeting of June 29, 1989, the Ministry of Forests also "agreed to upgrade the right of way fences between the north Reserve boundary cattleguard and the point where the road crosses Riske Creek." The letter states that the Forest Service would supply fence

materials, three cattleguards and gates and the First Nation would submit a quote for labour and machine costs associated with the construction of the upgrade. It also states that "[u]pon completion of this work, we will consider all our obligations to your Band in regards to the right of way through the Reserve, as having been met."

58. On November 20, 1989, McNaughton advised the Council that the "fencing project and cattleguard installations were inspected on November 17, 1989 and the work was found to be satisfactory. We will therefore process your invoice in the amount of $1,335.00 as soon as possible."

59. In a letter dated November 27, 1989, Donna Kydd, counsel to the First Nation ("Kydd"), advised Ruth Montgomery, Director, Policy Development, BC Ministry of Native Affairs ("Montgomery"), that the First Nation was of the view that there were still several outstanding matters in relation to the Road. In the letter, Kydd also mentioned that the Road "is presently in use by logging trucks. These parties are continuing to speed through the Reserve without due care and attention. The truckers are not obeying the speed limit and the Toosey Indian Band has had little success in having the speed limit enforced."

60. On December 18, 1989, Montgomery informed Kydd that transfer of title to the Road from the Province to Canada, for the use and benefit of the Band, "should present no significant difficulties." In order for the transfer to "proceed promptly", Montgomery requested that Kydd submit the transfer request directly to Peter Downs, Manager, Property Services, Timber Harvesting Branch, Ministry of Forests ("Downs").

61. On July 30, 1990, Montgomery informed Kydd that the new road that was constructed around the Reserve at the First Nation's request was now complete and open. Montgomery again advised Kydd that in order to begin the transfer process of the Road back to Canada, a formal request should be submitted to Downs. Montgomery closed by stating "[t]he Ministry of Native Affairs is in contact with the ministries of Forests, and Transportation and Highways, on this issue and would be pleased to assist where possible in facilitating the transfer and bringing a final resolution to this longstanding issue."

The Closure of the Road

62. On August 28, 1990, Kydd advised Montgomery that "[w]e will be making our formal request for [transfer of title of the Road from the Province to Canada] to the appropriate officials in the near future." Kydd further advised of the First Nation's wish to conclude matters with the Province by the transfer of title as aforementioned and acceptance of the sum of $10,000.00 offered in settlement by the Province to the First Nation (the "Proposal").

63. On October 4, 1990, Eric Denhoff, Deputy Minister, Ministry of Native Affairs, outlined to Kydd the events leading to the collapse of the Proposal.

64. On April 6, 1992, a notice of discontinuance and closure of the Road was signed by the Minister of Forests and published in the British Columbia Gazette on April 9, 1992.

65. On April 8, 1992, Downs informed Kydd that the Road "is to be discontinued and closed by a notice to be published in the April 9, 1992 issue of the B.C. Gazette." Downs further stated that "[h]ighways have requested that a portion of the right-of-way [...] be transferred to their Ministry so that they can maintain the access to the bands settlement. The remainder would then be transferred to Canada." Downs closed by asking if Kydd was "in agreement with the transfer to Highways."

66. On April 23, 1992, Kydd informed Downs "(1) that certain matters are still unresolved as between the Band, your offices and those of the District Highways Manager; and (2) that until there is an agreement on such matters, the lands referred to in your said letter should not be transferred to the Ministry of Highways."

67. On March 3, 1997, Allyson Rowe, A/Senior Land Management & Leasing Officer, Lands and Trust Services North, Indian and Northern Affairs Canada ("Rowe") informed Peter Castley, Property Services Section, Resource Tenures and Engineering Branch ("Castley"), of the steps involved in the return of the Road to Canada. Rowe explained, "[t]he Ministry of Forests would obtain a provincial Order in Council

transferring administration and control of the road to the Federal Crown for the use and benefit of the Toosey First Nation." Pursuant to DIAND's Addition to Reserve process, Rowe informed Castley that DIAND would require an environmental audit and Certificate of Title evidencing free and clear title prior to the passing of the provincial Order in Council. Rowe advised that the transfer process is usually initiated by a band council resolution and therefore requested that Castley contact the Chief and Council of the First Nation for "their input in this process."

68. On March 5, 1997, Rowe informed Chief and Council of the First Nation that DIAND had been recently contacted by the Ministry of Forests regarding the return of the Road to the Federal Crown, and advised Chief and Council of the process involved in returning the Road to the Reserve. Rowe stated, "[w]e have asked that MoF contact you as soon as possible to include you in the process, as Addition to Reserves are usually initiated by the First Nation."

69. The Integrated Land and Resource Registry ("ILRR") search for Toosey Indian Reserves Nos 1 and 1A does not record a Provincial order-in-council transferring administration and control of the Road to the Crown.

V. Relief (R. 42(f))

70. The Crown denies the entitlement of relief sought and seeks to have the claim dismissed in its entirety.

71. If the Crown is liable, which is not admitted but denied, then the Crown asserts that the Province contributed to the acts or omissions and any losses arising therefrom as set out in subparagraph 20(1)(i) of the *Specific Claims Tribunal Act.*

72. If the Crown is liable, which is not admitted but denied, the Crown denies that the First Nation suffered a loss as a result, and further denies that it owes the First Nation compensation and/or damages as alleged at paragraph 51, or at all.

73. The Crown pleads and relies on section 20 of the *Specific Claims Tribunal Act*.

74. The Crown seeks its costs in the proceedings.

75. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: March 14th, 2014

Signature of
☐ Respondent ☒ lawyer for Respondent
William F. Pentney,
Deputy Attorney General of Canada
Per: Ji Won Yang
Department of Justice
British Columbia Regional Office