SCT File No.: SCT-7001-18

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KANAKA BAR INDIAN BAND

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
As represented by the Minister of Indian 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 provision of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

June 29, 2018

David Burnside
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(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
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I. Claimant

1. The Claimant, Kanaka Bar Indian Band (the "Band") confirms that it is a First Nation within the meaning of s. 2 of the *Specific Claim Tribunal Act* ("Act") by 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 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 Minster 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. In or about 1990, the Band filed a specific claim in respect to the improper 'taking' of reserve lands within Whyeek IR 4 for a right-of-way for the Canadian Pacific Railway (the "Claim") with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada ("Canada").

4. On or about 1996, the Band submitted additional materials to the Claim including supporting documents to Canada.

5. On or about May 25, 2009, the Band submitted the Claim refreshed to Canada including additional supporting documents and information.

6. By letter, dated May 17, 2011, Canada advised the Band of the partial acceptance of the Claim for negotiation.

7. By letter, dated January 11, 2012, the Band invited Canada “to come and meet with us…It is critical that Canada’s representative see what has been taken. We will then be ready to make you a reasonable and fair counter-offer”.

8. By letter, dated February 16, 2012, Canada advised Band that the status of the Claim within the Specific Claims Database has been updated to “closed”.

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

9. For the purposes of the claim, the Band does not seek compensation in excess of $150 million.

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

10. The following are the grounds for the specific claim, as provided for in s. 14 of the 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;
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> (d) an illegal lease or disposition by the Crown of reserve lands; or
>
> (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority.

IV. Allegations of Fact (R. 41(e))

Whyeek IR 4

11. The Band is a part of the Nlaka'pamux / Nlhakápmx Nation with traditional use and occupancy throughout its traditional territory that encompasses both sides of the Fraser River, south of Lytton, British Columbia, among other areas.

12. Whyeek IR 4 was allotted by Indian Reserve Commissioner Sproat in June 1878. The Reserve Commissioner also allotted the Band "their old right of fishing of both banks of the Fraser at this point".

13. Whyeek IR 4 had been a principal residence of the Kanaka Bar people and included a historic burial site and an important fishing camp. Whyeek IR 4 was central to the economy of the Kanaka Bar people. Sproat felt that Whyeek IR 4 could be the main settlement for the Band if it could be adequately irrigated. In 1914 the local Indian Agent had described it as "hilly and brushy, fishing camp and pasture on the right bank of the Fraser".

14. Whyeek IR 4 was surveyed by Dominion Land Surveyor Jemmett in 1885 at 351 acres.

15. The Canadian Pacific Railway ("CPR") was constructed through Whyeek IR 4 in the early 1880's. A survey plan, dated November 30, 1884, entitled *CPR Contract No. 61 Plan shewing land required for Right of Way 1884* signed by "Government Engineer" George Keefer (the "Keefer Plan") showed the location of the CPR right of way as a 600 foot wide right of way through the middle of Whyeek IR 4, comprising 110 acres, nearly one third of the reserve.

16. The contract between Canada and the CPR Company called for the conveyance of title to the railway constructed by the government within the right of way. The

Canadian Pacific Railway Act, SC 1881 (44 Vict), c 1 ("*CPR Act*") contained provisions relating to the granting of land to the CPR Company. *The Consolidated Railway Act*, SC 1879 (42 Vict), c 9 ("*Consolidated Railway Act*") forbade the alienation of interests in Crown land granted to railway companies.

17. The right of way cut the reserve in half, making it extremely difficult (if not impossible) to utilize the remaining lands as a settlement, or for agriculture. The pasture and cultivable lands in the reserve were severed as a result of the CPR right of way. This made irrigation extremely difficult or prohibitively expensive, and consequently much of the water available for irrigation was unused. The Whyeek Creek runs through a deeper ravine east of the railway tracks: water ditches would have to be diverted further west. At the northern end of the reserve the right of way includes all the land to the river's edge, and thus cuts off access to a portion of the fishery.

18. British Columbia joined Confederation pursuant to the *Terms of* Union*, 1871*, by which Canada assumed under Article 13 the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit".

19. The right of way through Whyeek IR 4 was not included in the first Order in Council (P.C. 58 of 15 January 1886) authorizing the transfer of the rights of way through 30 Indian reserves. However, by Order in Council of 25 August 1891, authority was given to transfer the right of way to the Department of Railways and Canals on payment of compensation. The acreage listed was 110 acres.

20. The CPR right of way was re-surveyed (as constructed) in 1904 by James F. Garden (Plan 11195/287/RR2006, the "Garden Plan"). This plan showed the acreage of right of way through Whyeek IR 4 as 107 acres.

21. By 1911 Letters Patent had still not been issued, and the CPR resumed efforts to obtain them. Order in Council P.C. 2983 of 29 December 1911 re-transferred the proposed CPR right of way through 30 Indian reserves back to the Department of Indian Affairs ("DIA") from the Department Railways and Canals, so that the DIA could issue Patents to CPR "for the correct areas, together with such areas as they may decide to grant". However, Whyeek was not a part of the original 30 reserves included in the 1886 Order, and consequently was not retransferred to the DIA by the 1911 Order.

22. An Order in Council dated 19 April 1912 authorized the conveyance of rights of way through Indian Reserves between Kanaka Bar and Lytton, and included a 107 acre way through Whyeek. Letters patent of 5 July 1912 purported to convey the 107 acres to the CPR. The Letters Patent of 1912 were signed by the Assistant Deputy and Secretary of DIA even though they were still under the administration and control of the Department of Railways.

23. On 25 January 1913, Whyeek IR 4 was removed from the operation of Dominion Lands Regulations for the Railway Belt as land reserved for Indians by Dominion Order in Council P.C. 205. The effect of this Order was to transfer the administration of Whyeek IR 4 from the Department of the Interior to the DIA. OIC P.C. 205 included an attached list of the reserves to be transferred to the DIA and provided the date of confirmation for Whyeek IR 4 as May 30, 1904.

24. In 1925 CPR requested that the 1912 Letters Patent be cancelled and replaced with new ones, due to an unacceptable reference in the patents to the provincial "reversionary interest".

25. New Letters Patent were issued in 1928, for 111 acres. The difference in acreage from that shown on the Garden Plan was apparently due to inaccuracies in

Garden's survey, which had only come to light after more accurate township plans had been completed.

Compensation

26. The compensation indicated for Whyeek IR 4 in 1891, and eventually paid to the benefit of the Band was $110.00 for 110 acres. No further compensation was paid to the Band even though the actual acreage purportedly patented to CPR in 1928 was 111 acres.

27. There is no information available regarding the exact methods of evaluation for the lands taken from Indian reserves in 1891. There was never any detailed analysis given with respect the calculations at Whyeek IR 4, but it would appear that compensation was based on the simple formula of one dollar per acre.

28. In December 1879 J.W. Trutch had been appointed as Dominion Land Agent in B.C., with broad powers to oversee the valuation of lands taken by the Dominion for the CPR. He hired valuators to appraise the lands and damages. The valuations for right of way lands through the Fraser and Thompson Canyons were submitted by Croasdaile and Ball on 4 November 1884 in the form of a very brief report for each. This was put into a Schedule that showed: value of cleared lands, value of fruit trees, value of fencing, cost of removing buildings, value of buildings, value of road, and value of clearing land.

29. An August 1885 report by Joseph Trutch, Dominion Land Agent in B.C., included a schedule of lands taken from thirty reserves along the railway from Port Moody to Savonas, stating the amount of acreage taken and the compensation which had been calculated by the "official valuators" as the value of the land and improvements taken from each reserve. Whyeek IR 4 was not included in this Schedule. In this memorandum Trutch pointed out that "there are other lands on which Indians reside along the line of the Railway, which although claimed by the

Indians resident thereon, do not appear to have been surveyed or authoritatively allotted for their use".

30. The Department of Railways and Canals duly sent information on the location of the reserves in question, including Whyeek IR 4. The Schedule of Compensation presented by the Department of Railways and Canals for this second group of conveyances in March 1890 (the "Schedule") was also only concerned with land acreage and unspecified improvements. There is no record of any investigation and valuation of these specific rights of way. The list shows only Kanaka Bar IR 4, acreage taken 110 ac., value of land at $110. While there were also categories for improvements, fences and buildings, these were blank.

31. Notable by their absence are other standard heads of damages, such as severance, smoke, noise and vibration, and other damages normally regarded as compensable "injurious affection". Also absent is any detailed calculation for loss of riparian lands.

32. The Schedule did not provide any detailed information concerning the calculation of value at Whyeek IR 4, although it is likely that a number of improvements were affected as the CPR went through good pasture lands and took riparian lands and agricultural ditches at the north end of the reserve.

33. This Schedule was sent to the Indian Superintendent on 3 June 1890, six years after construction. He then forwarded it to the local Indian Agent. Indian Agent Mackay responded on 11 September 1890 that "there does not appear to my mind any reason for amending the lists as regards the sums to be paid to individuals and those to be credited to Bands". He did not respond as to the valuation of these lands taken six or seven years previously. In 1891 Indian Superintendent Vowell formally accepted the Department of Railways and Canals valuations for right of way and requested that payment be made.

34. By Order in Council PC 2006, dated August 25, 1891, the Governor in Council approved the recommendation of the Minister of Railways and Canals that authority be given for the purchase of 110 acres of Whyeek IR 4, and that upon deposit of the purchase money of $110, the lands be transferred to Railways and Canals in order to transfer them to CPR. The sum of $110 was not credited to the Band's trust account managed by Canada until 1892, and did not include interest for the seven year interim.

35. The Band has no knowledge of whether the sum of $110 credited in 1892 was administered by Canada for the use and benefit of the Band.

Excessive Width

36. In 1910, residents of Boston Bar I.R. 2 and homesteaders between North Bend and Keefers began complaining to the Department of Interior about the excessive width of right of way through their lands. They had assumed that the CPR right of way through their lands was the regular 99 ft., and later learned the CPR was claiming an average of 400 ft. which usually included the only arable parcels on their lands. They protested vigorously. The Department of Interior investigated and began negotiations with the CPR on behalf of the settlers.

37. DIA was informed of the Department of Interior investigation because of the claim of an Indian homesteader on what is now Skuppah I.R. 2A. No action was taken by DIA to examine the CPR right of way through any other reserves in the area traversed by the CPR.

38. The Department of Interior’s investigation resulted in yet another survey of the CPR right of way. Representatives of the CPR and the Department of Interior visited the disputed lands and met with the interested homesteaders. The DIA did not take part in this inspection.

39. Ultimately, a new plan was prepared showing “portions of the right of way to be ceded to settlers, portions required for the CPR main line, and portions required for double tracking” between Boston Bar and Boothroyd (the “Doupe Plan”). It is clear that the CPR wished to retain the unusually wide right of way for the purpose of laying a second track at some future date. The Doupe Plan eventually superseded the Garden Plan for the portion of the line that it covered. The CPR solicitors sent a copy of this plan to the DIA Secretary in 1921.

40. The Doupe Plan did not affect the right of way through Whyeek IR 4, and the DIA did not seek to have a similar re-survey done through Whyeek IR 4, even though the right of way, at 600 feet, was greatly in excess of the normal 99 feet.

Appurtenant Water License

41. In 1955 one of the main water licenses appurtenant to Whyeek IR 4 was cancelled by the provincial government, due to non-beneficial use.

V. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation

Source of Fiduciary Duty

42. This claim is based on the Crown’s breach of its common law fiduciary duty and legal obligation under the *Indian Act* for authorizing an excessive right-of-way through Whyeek IR 4, and failing to ensure fair market compensation was paid by CPR and failing to ensure compensation was paid by CPR at the time of transfer to the Department of Railways.

43. Fiduciary duties originate with the *Royal Proclamation, 1763*, which establishes the Crown-Indigenous relationship as fiduciary in nature. The associated precept is the Honour of the Crown.

44. The honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal interest.

45. Canada's fiduciary duty with respect to the reserve creation for the Band was triggered by Article 13 of the *Terms of Union* and section 91(24) of the *British North America Act* because Canada had assumed unilateral discretionary control of the reserve creation process for the Band as the exclusive intermediary with the Province in relation to its aboriginal interests.

46. Canada's fiduciary obligation arose as an exclusive intermediary with the Province for the purpose of reserve creation in relation to the Band's interest in land habitually and historically used and occupied by the Band. Canada's position as an exclusive intermediary conferred a degree of control that left the Band's cognizable Aboriginal land interest in Whyeek IR 4 vulnerable to the adverse exercise of Canada's discretion. Canada's fiduciary duty arose at the outset of the reserve creation process and continued during the exercise of its discretionary control until the reserve creation process was concluded.

Fiduciary Duty during the Reserve Creation Process

47. The land allotted to the Band in 1878 by Commissioner Sproat was, at a minimum a provisional reserve.

48. Whyeek IR 4 became a reserve within the meaning of that term in the *Indian Act* on January 25, 1913, the date on which Whyeek IR 4 was removed from the operation of Dominion Lands Regulations for the Railway Belt as land reserved for Indians by Dominion Order in Council P.C. 205, and the administration and control of Whyeek IR 4 was transferred from the Department of the Interior to the DIA. Prior to that time, Canada owed to the Band at least the basic fiduciary 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.

49. As the right of way land was part of the traditional territory of the Band, the Crown owed a high standard of fiduciary duty and care in the present matter, including a duty to preserve and protect the Band's interest.

50. Ordinary prudence in this context required that, at a minimum, the Crown elicit the concerns of the Band and consider its best interests. This called for consultation. The Band's obvious interest would include protection of its arable land and protection from damage and continued access to its fishing stations. The Band was not consulted over the impact the occupation of the land within the right of way by the CPR would have on its use of the land and access to its fishing stations.

51. Irrespective of whether the Reserves came within the *Indian Act* at the dates of the grants to the CPR Company, the duties of the Crown to the Band included an assessment of how much land the CPR Company reasonably required for the operation and protection of the railway.

52. The land "granted" by the Crown exceeded that which was permissible under *the Consolidated Railway Act*. Section 9, limited the width of land that may be granted to a Railway Company to 99 feet.

53. The Crown had a legal obligation to safeguard and protect the Band's interest in its reserve lands and to deal with the lands in the best interests of the members of the Band. The Crown had a fiduciary duty to only grant to the CPR the minimum interest it required for the purposes of construction, maintenance and operation of the railway, and to ensure minimal impairment to the use and enjoyment of the reserve lands by the Band.

54. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. This included ensuring there was minimal impairment to the use and enjoyment of the reserve lands by the Band. The Crown did not act diligently to safeguard and protect the Band's interest in its reserve lands, did not deal with the lands in the best interests of the members of the Band, and did not meet the standard of conduct required of a fiduciary.

Cognizable Interest

55. As the Band was in occupation before and after the allotments, its interest was substantial and practical. The Band's interest in Whyeek 4 was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation. The Band's interest in Whyeek 4 was an interest in the land from which the Band had sustained itself, to which it had a tangible, practical, and cultural connection and that formed part of its traditional territory.

Fiduciary and Statutory Duty after Reserve Creation

56. On January 25, 1913, the date on which administration of Whyeek IR 4 passed to the DIA under the *Indian Act*, at the latest, Canada's obligations expanded to include the protection and preservation of the Band's interest in Whyeek IR 4. As a fiduciary, the Crown was also obligated to ensure that it did not let the public interest in the building of the railway supersede the Band's interest in its lands. The Crown breached its legal obligations under the *Indian Act*, RSC 1906, c 81 including, but not limited to section 48, when it allowed the CPR right-of-way through Whyeek 4.

57. Once Whyeek IR 4 came under the *Indian Act*, the duty of the Crown was to enforce the protective provisions of the *Indian Act* and preserve the Band's interest in the reserve from exploitation. 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.

58. As Whyeek IR 4 had become an *Indian Act* reserve on January 25, 1913, the purported grants to the CPR Company in 1925 and 1928 required surrender under the *Indian Act*. There was no surrender. As the grants purported to convey legal title to the CPR Company they were made without statutory authority within the meaning of the term in the Act, paragraph 14(1)(d).

59. The Crown had a fiduciary duty to protect the Band's cognizable interest in Whyeek IR 4 from alienation and the forsaking the interests of all others in favour of the Band's interest in Whyeek IR 4.

Restriction on Alienation

60. The *Consolidated Railway Act* forbade the alienation of interests in Crown land granted to railway companies. The CPR Company could receive no greater interest than an easement. As the *CPR Act* did not override the restriction on alienation in the *Consolidated Railway Act*, the purported grants to the CPR Company in 1912, 1925 and 1928 exceeded the statutory authority of the *Consolidated Railway Act* resulting in an illegal dispostion by the Crown of the Band's reserve lands. The grants were not authorized by statute. This applied irrespective of whether Whyeek IR 4 came within the *Indian Act* at the date of the grants.

61. The transfer was a transfer of administration of the land from one Ministry to another in anticipation of a grant to the CPR Company as required by the CPR Contract.

62. The lands were in the Railway Belt which were deemed transferred to the Dominion on December 19, 1883. Accordingly the lands were vested in Her

Majesty when the purported grants in 1912, 1925 and 1928 were made, and the restriction on alienation applied.

63. The dedication of Crown land for railway right of way purposes under the *Government Railways Act* was not a taking of the Band's interest in Whyeek IR 4. The *Government Railways Act* did not provide for taking land already vested in the federal Crown. No taking of the Band's interest in Whyeek IR 4 occurred. Instead, the effect of the *Government Railways Act* was to allow the construction of a railway that would, as constructed, be conveyed to the CPR Company as required by the CPR Contract. It did establish the ability of the government to construct the railway within an area known colloquially as a right of way.

64. Although the Band's possession of the right of way lands in Whyeek IR 4 was affected, its interest in the land was not.

65. The government of Canada accepted Whyeek IR 4 for purposes of the *Indian Act* on January 25, 1913. The grants were made in contravention of the surrender provisions of the *Indian Act*. The *Indian Act* would have permitted the taking of an interest less than title; hence Canada's obligation under Article 11 of the *Terms of Union, 1871*, could have been performed without contravening any statute or breach of duty.

Restriction on Width of Right of Way

66. The grants of 1912, 1925, and 1928 also purported to convey land in excess of that permitted by the *Consolidated Railway Act* and to that extent were not authorized by statute.

67. Whether or not the width restriction in the *Consolidated Railway Act* applied to grants made under the *CPR Act*, more land was granted than was necessary for railway purposes. In either case the Crown was in breach of its fiduciary duty to

act in the best interests of the Band by failing to consult and ascertain its needs and take measures to protect its interests. This included the failure to protect and provide access to the Band's fishing stations.

68. In addition to the usual noise, smoke and vibration damages, the lands of Whyeek IR 4 were severely damaged by severance, to the point where they were unfit for the original intended purpose. The difficulties in irrigating the remaining lands eventually resulted in the cancellation of a water licence. Such consequences could have been avoided if sufficient compensation had been awarded to offset the expense of irrigating the severed lands. These specific damages were not addressed by the valuators, or by the DIA.

69. Without limiting the foregoing, the Crown acted dishonorably and breached its fiduciary and/or legal obligations to the Band:

a. when it failed to exercise ordinary prudence, loyalty and good faith in the discharge of its constitutional obligation to set aside reserve land for the Band during the transfer of land for the CPR right of way through Whyeek IR 4;

b. when it failed to provide full disclosure to the Band during the reserve creation process relating to the transfer of land for the CPR right of way through Whyeek IR 4;

c. when it failed to act in the Band's best interest in exercising discretionary control over the specific Aboriginal interest of the Band in the lands transferred for the CPR right of way through Whyeek IR 4;

d. by failing to consult and ascertain the Band's needs and take measures to protect its interests;

e. by failing to protect and provide access to the Band's fishing stations;

f. when its officials failed to take steps to protect the Band's interest in the lands transferred for the CPR right of way through Whyeek IR 4;

g. when it granted more land was than was necessary for railway purposes;

h. by failing to investigate, inquire or ascertain whether the land requested by CPR was in excess of what was required for railway purposes;

i. by failing to minimally impair the Band's interest in the land transferred for the CPR right of way;

j. by failing to comply with the provisions of the *Consolidated Railways Act* by transferring more land than required from Whyeek IR 4;

k. by failing to properly value the land transferred for the CPR right of way;

l. by failing to ensure the Band received adequate compensation from CPR for the railway right of way;

m. by failing to consult with and obtain the consent of the Band regarding the amount of compensation paid by CPR;

n. by failing to ensure compensation was paid by CPR to the Band upon the existence of the CPR right of way through Whyeek IR 4 in 1884;

o. by failing to value the injurious affection to the remaining lands of Whyeek IR 4;

p. by failing to ensure the Band received payment from CPR in a timely manner;

q. by failing to distinguish between improved and unimproved land in carrying out the valuation;

r. by failing to ensure interest was paid by CPR on the payments received in 1891 in respect to the CPR right of way through Whyeek IR 4;

s. by failing to inquire into or obtain replacement lands for the Band;

t. by failing to obtain a surrender vote from the Band as required by the *Indian Act*; and

u. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to the Band.

VI. Relief Requested

70. The Band seeks:

a. An order from the Tribunal validating this specific claim of the Band in relation to Whyeek IR 4 under the *Specific Claims Tribunal Act*;

b. compensation from the Crown for failure to uphold its fiduciary and legal obligations to the Band arising from the Crown's administration of Whyeek IR 4 by the disposition of the CPR right-of-way through Whyeek IR 4;

c. damages and equitable compensation on current unimproved market value of the land transferred for the CPR right of way plus compensation for loss of use of the land transferred for the CPR right of way;

d. compensation for damages/injurious affection to the Band's adjacent reserve lands relative to Whyeek IR 4;

e. compensation for the Band's loss of water license appurtenant to Whyeek IR 4 in 1955;

f. interest on compensation;

g. costs of this claim; and

h. such other relief or compensation as this Honourable Tribunal deems just.

Dated this 29th day of June, 2018

Signature of Solicitor
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