SCT File No.: SCT-7002-18

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*.

October 19, 2018

Dragisa Adzic

(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* (the "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. On or about May 4, 2011, the Band filed a specific claim in respect to the illegal pre-emption in 1861 and subsequent alienation of a portion of the Band's settlement at T'aqt'agtn (the "Claim"), now designated Lot 4, G.1, Kamloops Division of Yale Land District ("Lot 4") with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada.

4. In a letter dated April 2, 2013, the Department of Indian Affairs and Northern Development stated:

> …it is the decision of the Minister of Aboriginal Affairs and Northern Development not to accept the Illegal Pre-emption of T'aqt'agtn specific claim for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

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

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

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

6. 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;
> …

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

The People of T'aqt'agtn

7. The Band is a part of the Nlha7kápmx (Nlaka'pamux) 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.

8. The people of T'aqt'agtn are part of the Band who live at the centre of the Fraser Canyon, about ten miles south of Klickumcheen (now known also as Lytton, B.C.) on the northern flanks of Teyih-en'l (Jackass Mountain). Closely banked by the Cascade Mountains on the east and Coast Mountains on the west, the land is very steep and very rocky.

9. The first known direct contact between Nlha7kápmx people and persons of European descent was the arrival of Simon Fraser at the confluence of the Thompson and Fraser Rivers in the present vicinity of Lytton in 1808 when

Simon Fraser travelled through the Band's traditional territory. Accounts from this time period estimate a considerable population. Fraser reported meeting by his estimate some 1,200 people at the confluence alone.

10. Early census records confirm that T'aqt'agtn was a large community of the Band when the land was pre-empted in 1861. The village was occupied all year round and included cultivated lands.

Fraser Canyon War

11. During the Fraser River gold rush of 1857-1858, over 30,000 gold seekers flocked to the Aboriginal lands of southern British Columbia, setting off conflict between the Nlha7kápmx and settlers, subsequently referred to as the Fraser Canyon War, Canyon War, or the Fraser River War.

12. On May 19, 1858, Governor Douglas wrote Lord Stanley that by his calculation at least 1,500, mostly American miners had reached the gold fields between Hope and Lytton, and he repeated a previously held concern that "the country will soon by overrun and occupied by a large white population whether it be agreeable to our wishes or not", and that there needed to be a more effective way to assert the "rights of the Crown."

13. On July 29, 1858, the Daily Victoria Gazette reported that over 200 armed Nlha7kápmx had arrived at a camp "…on their way to the Forks – most of them between the Upper and Lower Big Canons [*sic*], or within 25 miles of Fort Yale…" where they met some 80 better armed miners. The report stated "After a good deal of palaver, everything was amicably arranged…"

14. "Captain" H.M. Snyder of the New York Pike Guards, led an expedition into the Fraser Canyon on or about August 19, 1858 with the express purpose of making peace with the Nlha7kápmx. Snyder's account indicates that Snyder concluded

an unspecified number of ‘treaties’ with the Nlha7kápmx dealing with the co-existence in the Fraser Canyon and the working of the goldfields lining it, however none of these agreements have survived either in print or oral form, and the written contents of these 'treaties' is unknown.

Colonial Pre-Emption Law and Policy

15. Immediately after the Fraser Canyon War and partly in response to the events of the Fraser Canyon War, the Colony developed pre-emption law and policy.

16. On August 2, 1958, the *Act to Provide for the Government of British Columbia*, received royal assent in England, providing for the formal establishment of the new Crown Colony of British Columbia in the southern mainland of New Caledonia.

17. In September 1859 the Chief Commissioner of Lands and Works (“CCLW”), Richard Moody, wrote to Governor James Douglas about requests received that lands be opened for settlement in the Districts of British Columbia. On October 1, 1859 Douglas replied by sending a circular directly to the Gold Commissioners and Magistrates of British Columbia in which he instructed that they would “also cause to be reserved, the sites of all Indian Villages and the Land they have been accustomed to cultivate, to the extent of several hundred acres round each village for their especial use and benefit.”

18. Douglas's instructions to his magistrates and the CCLW were simultaneously reflected in legislation governing the disposition of Crown lands.

19. On January 4, 1860, *Proclamation No. 15* was issued. Under *Proclamation No. 15*, Indian settlements were exempt from the lands in the Colony of British Columbia (the “Colony”) that were available for pre-emption. “Indian settlements” were to be identified based on habitual and historic use and occupation.

Proclamation No. 15 stated that "British subjects and aliens…may acquire unoccupied and unreserved, and unsurveyed Crown land in British Columbia…not being the site of…an Indian Reserve or settlement."

20. T'aqt'agtn was an "Indian settlement" within the meaning *of Proclamation No. 15* and subsequent legislation prohibiting the acquisition of Indian settlements. This was to be ascertained, where necessary, by consulting with the Indigenous peoples themselves.

21. The colonial and later provincial legislation subsequently prohibited Indian settlements from being pre-empted through the enactment of *An Ordinance for regulating the acquisition of Land in British Columbia No. 27*, assented to April 11, 1865, and *An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia (1870) 33 Viet. No. 133*. On April 22, 1875, the federal crown approved the Province's post-confederation consolidation of the laws affecting Crown lands in the province through *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia 38 Viet. No. 5* (the "*Land Act, 1875*"). The *Land Act, 1875* stipulated that a declaration be sworn by the pre-emptor that the land being pre-empted "is not an Indian Settlement, or any portion thereof..." This prohibition continued in *An Act to amend and Consolidate the Laws affecting Crown Lands, c. 16, section 77* within Consolidated Statutes of B. C. 1888, Volume I, Chap. 66 (the "*Land Act, l884*"). Similar language continued in the *Land Act, 1888* and in the *Land Act, 1908* where a person pre-empting land had to swear a statutory declaration that the unoccupied and unreserved Crown land was not part of an Indian settlement.

22. The legal effect of pre-emption legislation was to exclude named categories of land (including Indian settlements) from the availability for pre-emption. The pre-emption legislation could not achieve its objectives if steps were not taken to identify Indian settlements in consultation with the Band.

23. All this was consistent with what Douglas had told the Nlha7kápmx in the field. In a October 9, 1860 dispatch, he advised the Duke of Newcastle about meetings at Cayoosh and Lytton. He reported that he had:

> …had an opportunity of communicating personally with the native Indian tribes, who assembled in great numbers at Cayoosh during my stay....I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support … The Indians mustered in great force during my stay at Lytton. My communications with them were to the same effect as to the native tribes who assembled at Cayoosh, and their gratitude, loyalty, and devotion were expressed in terms equally warm and earnest.

24. In May 1861, Royal Engineer Surveyor Sapper James Turnbull was instructed by Capt. R.M. Parsons to travel through the lower Fraser valley and up the Fraser Canyon to stake and mark:

> …all Indian villages, burial places, reserves, etc. as they may be pointed out to you by the Indians themselves, subject, however, to the decision of the District Magistrate as to the extent of the land so claimed by them. Make sketches of the locality and give dimensions of the claim, sending them to this office after acquainting the magistrate of what you have done. Be very careful to satisfy the Indians as long as their claims are reasonable, and do not mark out any disputed lands between whites and Indians before the matter is settled by the Magistrate.

25. On August 27, 1861, Douglas repealed *Proclamation No. 15*, replacing it with the *Pre-Emption Consolidation Act*. There was no change to the wording which prohibited the preemption of any Indian settlement, but it added the crucial rider that the "object of the measure is solely to encourage and induce the settlement of the country; occupation is, therefore, made the test of title, and no pre-emption title can be perfected without a compliance with that imperative condition."

Pre-Emption of Lot 4

26. From the time when gold was discovered in the Colony of British Columbia in 1858, the construction of road access to the interior of British Columbia, including the construction of the Cariboo Wagon Road through the Fraser Canyon to Lytton and beyond, was one of the main priorities of the colonial government of the day under Governor Sir James Douglas.

27. A detachment of some 300 Royal Engineers was brought from England to assist in the surveying and in the actual construction of roads leading from the Lower Mainland through the Fraser Canyon.

28. The construction of the Cariboo Wagon Road contributed to a further influx of settlers seeking to pre-empt land in the area nearby and including the T’aqt’agtn settlement.

29. The historic and early community of the Band was located on the land which would later be recorded as “Lot 4” since pre-contact times and continued post-contact.

30. On May 28, 1861, Magistrate H.M. Ball recorded Pre-Emption No. 14 Division of the Yale District (later known as Lot 4) next to the reserve at Kanaka Flat, for Eugene Combre (Combe) and Gustave Fontaine. He described it as "commencing on the northeast end of the Indian Reserve, thence [east etc.] returned to south east end of Indian Reserve ... partially cultivated and free from timber." A note after his signature shows that two pounds, one and eight pence, that is, the "full amount paid 28 May 1861".

31. Magistrate Ball did not consider that the partial cultivation and any clearing of timber which he considered ‘improvements’ were carried out previously by the

Band, and should not have been considered ‘improvements’ attributable to Combe and Fontaine.

32. The pre-emption of Lot 4 was recorded on the same day that Royal Engineer Surveyor Turnbull laid out an adjoining small reserve for the T’aqt’agtn community at “Kernaker Flat” including a graveyard located at the very boundary between Lot 4 and the reserve (now known as Kanaka Bar I.R. 2). At some point, water was also recorded for this pre-emption.

33. The T’aqt’agtn settlement comprised a larger area than the area surveyed as IR 2 by Turnbull and the T’aqt’agtn settlement which included the fishing camp sites and stations of the Band on the relatively wide bench below. Turnbull staked off only that portion supporting cultivated fields and a graveyard surrounding the pre-emption of Lot 4.

34. There is no evidence in Surveyor Turnbull’s survey notes that he made an effort to consult with members of the Band to ascertain the Band’s village sites, burial places, cultivated fields, or reserves.

35. In 1959 Magistrate William Cox reported staying at a food stop of Combe and Fontaine’s en route to Lytton to collect mining fees at that time. This area would have been near Lot 4, but higher in elevation than the land comprising Lot 4.

36. Settlement on lands in B.C. along the Fraser River was not sanctioned by any law at that time. If Combe and Fontaine were occupying Lot 4 at the time, it was without legal authority.

37. On May 26, 1862, Fontaine purported to convey his half interest in the 10 acre lot to Charles Sadoux.

38. On August 19, 1865, Combe and Fontaine filed an Application for Government Survey claiming 10 acres at Kanaka Bar by “right of purchase”. According to this Application, a Certificate of Improvement had been granted by local Magistrate Ball three days after the land was pre-empted, on June 1, 1861.

39. On May 1, 1868, Sadoux purported to sell his “one equal undivided half of eleven acres of Land, one house, one barn & sheds on Kanaka Bar” to John Combe for $400. The attached sketch map showed that the parcel had been extended northwards by 100 yards.

40. In 1868, Ball had recommended to the CCLW that lands be reserved for the Nlha7kápmx around Lytton as they were being crowded out. When the new Governor, Musgrave, visited the Interior early the following year, a delegation of Nlha7kápmx Chiefs met him in Lytton with the message that they would “greatly like to have village[s] and lands secured to us, so that no one can make us afraid, with as much water for our use as we need”. Musgrave had reassured the chiefs that “it will be my duty to protect you in the enjoyment of all rights conferred upon you by law”.

41. On May 17, 1870, Eugene Combe died, having devised all of his property, including the whole of his interest in the Lot 4 pre-emption claim at Kanaka Bar, to his friend Louis Hautier.

42. On May 23, 1879, a notice of payment was sent by William Teague of the Department of Lands and Works to “Combe and Fontaine” that they still owed $1.00 as the final installment on Pre-emption No. 14 ($10 having been paid at the time of recording), and that should they be in default on August 10, 1879 “any amount you have already paid and the land and improvements thereon will be liable under Section 2 of the said Act [i.e. the *1879 Land Amendment Act*] to forfeiture without further notice.”

43. Hautier continued to hold the Lot 4 pre-emption until his death in 1886, despite not having completed the legislative requirements to hold this land and having never received a Crown grant.

44. In or about 1886 Louis Hautier, who held the Lot 4 pre-emption, died, devising all his property to his children.

45. In 1895 Dominion Lands Agent at New Westminster, John McKenzie, contacted Louis Hautier's son, Alphonse Hautier, for particulars on Lot 4. Hautier explained that there had been some trouble surrounding the survey and that he had "a man on the place." McKenzie contacted the CCLW to find out why a Crown grant had not yet been issued. The Department of Lands replied that the heirs would have to submit all available documentation relating to the claim, the $1.00 of the purchase money, that the $5.00 of the Crown grant fee and the Certificate of Improvement were still outstanding.

46. On May 9, 1909, Alphonse Hautier forwarded the outstanding $1.00 purchase fee and the $5.00 Crown grant fee for Lot 4. The Deputy Commissioner of Lands and Works ("Deputy CCLW") wrote on May 28, 1909, that in addition to producing Combe's and Fontaine's original pre-emption record, he would either have to obtain a Certificate of Improvement or establish that one had been issued.

47. On June 1, 1909, Ashcroft solicitor Denis Murphy asked the Deputy CCLW if he was:

> To … understand, from what was stated in your letter to [Hautier] that if he now obtains a Certificate of Improvements the various transfers of this land from the original pre-emptor to his father will be recognized without proving that the original pre-emptor obtained a Certificate of Improvement. Under the law the recognition of these transfers could not be insisted upon without proving that the

> original pre-emptor had obtained a Certificate of Improvement before he transferred the property but as this matter has been long before the Department it may be possible that it is the intention to make an exception in this instance. I write, however, to make sure whether my understanding of the letter is correct.

48. On November 2, 1909, the Deputy CCLW wrote to inform Murphy that:

> …this matter has been laid before the Hon. the Chief Commissioner who is of the opinion that the Department has no authority to issue the Crown Grant to the Hautier Estate of the land in question. As no trace can be found of any Certificate of Improvement having been issued to the original pre-emptors any transfer of the preemption was illegal. The Commissioner suggests that the only course now that the Department can take in the matter would be to cancel the original Record and forfeit the purchase money paid thereon for failure to complete title and then to sell the land to Mr. Hautier under the provisions of the present Act.

49. On June 21, 1910, the Province accepted Hautier's application to have the unperfected original pre-emption record for Lot 4 cancelled and Crown grant at the then purchase price of $5.00 per acre and the now $10 Crown grant fee.

50. There is no evidence in the documentary record to indicate the federal government at this time considered intervening to have the land within the unperfected pre-emption of Lot 4 added to the Band's reserve.

51. On June 14, 1911, a Crown grant for 11 acres designated as Lot 4, G.1, Lytton District was issued to Alphonse Hautier.

52. In July 1911 Johnson surveyed Kanaka Flat I.R. No. 1A at 170.93 acres, the result being that Lot 4, G.1 was now completely surrounded by reserve land.

53. From December 19, 1883 to 1930, Lot 4 was within the Railway Belt, over which Canada had unilateral control. It was in the power of the federal Crown to deal with those lands for the benefit of the Band.

Terms of Union

54. When the colonial government made a final effort to allot reserves in the Fraser Canyon in 1870 before BC joined Confederation, although it was evident that an encroachment had taken place at T'aqt'agtn, no steps were taken to remedy the situation or to mark off, reserve or otherwise protect village lands for the Band.

55. In April of 1870 Surveyor John Trutch and Magistrate Peter O'Reilly were instructed by the Department of Lands and Works to survey reserves on the Fraser River where these had been neglected earlier. This was the first attempt to survey reserves in the canyon since Surveyor Turnbull, nine years earlier.

56. John Trutch recorded in his journal that on July 15, 1870, he had "arranged Reserves at Siska and Kanaka Flats". He returned to survey this on July 22, but "George not there…". He did not survey the reserve that day, nor did he return.

57. No Kanaka Bar reserves were included in the 1873 Schedule of Indian Reserves sent to Ottawa by the CCLW, B.W. Pearse.

58. In 1871, the Colony of British Columbia (the "Province") joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985, App II, No. 10 (the "*Terms of Union*"). By Article 13 of the *Terms of Union*, Canada and the Province agreed that Canada would assume the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit." Article 13 specifically provided for the creation of Indian reserves.

59. By Article 13, Canada and the Province also agreed on a mechanism for the creation of reserves in the future, which was to embody "a policy as liberal as that hitherto pursued by the British Columbia Government". On application by

Canada, the Province would convey to Canada, in trust for the use and benefit of the Indians, tracts of land "of such extent as it had hitherto been the practice of the British Columbia Government to appropriate for that purpose."

60. The reserve creation policy, "as liberal as that hitherto pursued", was in accordance with the *Royal Proclamation, 1763* which provided in part:

> …Nations or Tribes of Indians… should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them… as their Hunting Grounds.

61. When Superintendent of Indian Affairs I.W. Powell arrived in 1873, Nlha7kápmx Chiefs from the Fraser Canyon were among those who signed the petition sent to Powell detailing Indigenous peoples' concerns about land encroachments along the Fraser River clear from its mouth up as far as Lytton.

62. Powell noted in his journal documenting the visit that a total population of 74 Nlha7kápmx between the Kanaka Bar Indian Band and Skuppah Band. He also noted the complaint "…that Hautier had fenced in a burial ground and would not let them visit it. Old burial grounds are frequently ploughed up." A number of other Nlha7kápmx had informed Powell of specific examples of encroachments.

63. The Department of Indian Affairs was aware by 1874 that Nlha7kápmx settlements in the canyon had not been adequately protected by the colonial administration, and that such a specific problem existed at T'aqt'agtn.

64. Representatives from T'aqt'agtn were among those who met with Powell at Klickum-cheen [Lytton] in July 1874.

Establishment of Joint Indian Reserve Commission

65. In 1876, Canada and the Province established the Joint Indian Reserve Commission (the "JIRC") to implement their obligations under Article 13 of the Terms of the Union including the establishment of a process to set aside reserve lands for the use and benefit of Indians as contemplated by Article 13.

66. In early 1878, the Commission had been reduced to a sole Commissioner, G.M. Sproat, appointed jointly by the provincial and federal governments.

67. Sproat arrived at T'aqt'agtn on June 18, 1878. He noted that 'Kanaka Flat' was the principal residence of this group of Nlha7kápmx people, and a "very old settlement." In his Minute of Decision he confirmed:

> …the old reserve at Kanaka Flat on left bank of Fraser River...as per Royal Engineers sketch, but it has to be squared up in good survey shape and extended to include about 10 acres of woodland and any adjoining cultivable land if such can be found after the lines of Mr. L. Hautier's claim, at present unsurveyed, at Kanaka Flat have been defined…

68. In his Field Minute of June 18, 1878, Sproat elaborated on his Minute of Decision. He said he was allotting a new reserve for the 'Kanaka Flat Indians' at Whyeek (now I.R. No. 4) on the right bank of the Fraser (if there was sufficient water for irrigation) because the reserve at the old village site was gravelly and there was:

> …little if any water owing to Mr. Hautier's alleged prior claim....These Indians have not been very well treated at Kanaka Flat having been left for years without water for irrigation and if any bits of good land can be had at Why-eek it will be reasonable to give it to them….the land now in occupation of Mr. Hautier the only settler takes nearly all the best, but any adjoining cultivable land that proves to be outside of Hautier's and a piece of wood land may be added to the present reserve, when Mr. Hautier's boundary lines are defined. It being hardly possible to find any cultivable land at this place…

69. Sproat noted that the surveyor was to include the Indian graves within this latter, original, reserve. Sproat also noted that "[t]he water question, here as elsewhere, will require special attention and the surveyor will examine, advise and report".

70. Even when suggesting that some pre-emptions might be illegal, Sproat was still of the personal opinion that compromise was the best policy. At Kanaka, he wrote to Hautier that:

> …the place was an old Indian settlement and the Indians of Kanaka Flat were there I need not say, long before Mr. Comb or his predecessor Mr. Sartony, (sic) … It might be questioned if Mr. Sardony or Mr. Combe's title to the land was legal, considering the order which Governor Douglas sent about these Indian Lands to the Magistrate at Lytton, but that would be a question between the two Governments. I certainly do not wish to raise difficult questions about either land or water, but to compromise such questions.

71. Although Peter O'Reilly, Sproat's successor, did visit the canyon a second time in 1881, he made no alterations to the reserves at Kanaka Flat.

Memorial to Sir Wilfred Laurier

72. In the summer of 1910, Prime Minister Sir Wilfrid Laurier set out across the country on a pre-election campaign tour. On August 25th, 1910, he stopped in Kamloops where he was met by a delegation of Chiefs from the Nlha7kápmx Secwépemc, and Syilx Nations.

73. The delegation of Chiefs enlisted the help of their "secretary," a Scottish-born ethnologist and long-time ally, James Teit, who had put their words onto paper, and French priest Father LeJeune, who translated the verbal presentation and presented the written English document (the "Memorial"). The delegation asserted the persistence of their Aboriginal Nations' title and sovereignty over

their respective territories, vowing that they would continue to struggle for a just and reciprocal relationship with the government until it was achieved.

74. Laurier's brief visit came on the heels of interior peoples' escalating dispossession at the hands of settlers and the provincial and federal policies that sanctioned them.

75. The Memorial expressed the involvement of the interior nations in pressing for title, rights, and sovereignty and recounted story of the previous hundred years of relations with European newcomers from the Aboriginal point of view:

> We speak to you the more freely because you are a member of the white race with whom we first became acquainted, and which we call in our tongue "real whites."…
>
> When they first came among us there were only Indians here. They found the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all. The country of each tribe was just the same as a very large farm or ranch (belonging to all the people of the tribe) from which they gathered their food and clothing, etc., fish which they got in plenty for food, grass and vegetation on which their horses grazed and the game lived, and much of which furnished materials for manufactures…
>
> Just 52 years ago the other whites came to this country. They found us just the same as the first or "real whites" had found us, only we had larger bands of horses, had some cattle, and in many places we cultivated the land…
>
> They told us to have no fear, the queens laws would prevail in this country, and everything would be well for the Indians here. They said a very large reservation would be staked off for us (southern interior tribes) and the tribal lands outside of this reservation the government would buy from us for white settlement. They let us think this would be done soon, and meanwhile until this reserve was set apart, and our lands settled for, they assured us we would have perfect freedom of traveling and camping and the same liberties as from time immemorial to hunt, fish, graze and gather our food supplies where we desired; also that all trails, land, water, timber, etc., would be as free of access to us as formerly. Our chiefs were agreeable to these propositions, so we waited for these treaties to b

made, and everything settled. We had never known white chiefs to break their word so we trusted…

What have we received for our good faith, friendliness and patience? Gradually as the whites of this country became more and more powerful, and we less and less powerful, they little by little changed their policy towards us, and commenced to put restrictions on us. Their government or chiefs have taken every advantage of our friendliness, weakness and ignorance to impose on us in every way. They treat us as subjects without any agreement to that effect, and force their laws on us without our consent and irrespective of whether they are good for us or not…

After a time when they saw that our patience might get exhausted and that we might cause trouble if we thought all the land was to be occupied by whites they set aside many small reservations for us here and there over the country. This was their proposal not ours, and we never accepted these reservations as settlement for anything, nor did we sign any papers or make any treaties about same. They thought we would be satisfied with this, but we never have been satisfied and never will be until we get our rights. We thought the setting apart of these reservations was the commencement of some scheme they had evolved for our benefit, and that they would now continue until they had more than fulfilled their promises but although we have waited long we have been disappointed. We have always felt the injustice done us, but we did not know how to obtain redress…

Memorial to Minister Frank Oliver

76. On May 10, 1911, an expanded group of interior chiefs including Chief Charles Kowetellst of the Band, presented a letter addendum to the Federal Minister of the Interior and Superintendent-General of Indian Affairs , Frank Oliver, imploring the Minister, to address the question of title, rights, and jurisdiction which they viewed as fundamental to improving the living conditions of Aboriginal peoples (the “Oliver Memorial”).

77. In the Oliver Memorial interior chiefs wrote:

You already know most of those grievances we complain of, and the position we take regarding them. Some of our chiefs have written you from time to time, and several have visited the government in Ottawa within the last ten years. Your government has received petitions and

> complaints from the chiefs of the Thompson tribe in 1903 and 1909. The Declaration of the Shuswap, Thompson, and Okanagan tribes, July, 1910. The memorial of the same tribes presented to Sir Wilfred Laurier at Kamloops, August, 1910. Then Mr. McDougal, Special Commissioner, visited us twice, and no doubt sent in a report to your government as to our condition. Consequently we need not reiterate everything here. You know how the B.C. government has laid claim to all our tribal territories, and has practically taken possession of same without treaty and without payment. You know how they also claim the reservations, nominally set apart for us. We want to know if we own any land at all in this country…

McKenna-McBride Commission Visit

78. On November 14, 1914, the McKenna McBride Royal Commission (the "Royal Commission") arrived at T'aqt'agtn. In his opening address Chief "Charlie" told the Commissioners:

> "…you see the condition of our land around here - you can tell by that that we cannot do very much for ourselves - you see it is very poor where we live... this is the land that the Government has given us."

79. The final report of the Royal Commission shows official application by the Band for recently surveyed parcels at I.R. Nos. 1A and 3A, but which did not yet show on the official Schedule, and for additional lands at I.R. No. 4. In addition to I.R. No. 1 and the transfer of I.R. No. 1A, the Royal Commission confirmed the previously transferred land in I.R. No. 2.

80. The illegal pre-emption dispossessed the Band of the heart of its village lands. The result of the inaction of the colonial and federal governments to remedy the encroachment, an encroachment of which they were clearly aware, was the loss to the community of the centre of its settlement, including the most fertile land and traditional resources that could sustain a healthy community.

Lot 4 Encroachment

81. In the intervening period between when Lot 4 was illegally pre-empted and up until the present, successive owners of Lot 4 have increasingly encroached on the Band's reserve, interfering with the Band's use of its reserve lands.

VI. 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

82. This Specific Claim is based on the Crown's breach of its common law fiduciary duties and legal obligation to complete the reserve creation process relating to Lot 4, to ensure that Lot 4 was surveyed as an Indian reserve and protected for the exclusive use and benefit of the Band, and to prevent alienation of Lot 4.

83. *Recognition* as an Aboriginal interest in land under the law and policy governing reserve creation is the defining feature of a cognizable Aboriginal interest for the purpose of identifying the fiduciary duties of Crown officials carrying out their functions within that process. A cognizable interest in respect of which the Crown owes a *sui generis* fiduciary duty is an acknowledged Aboriginal interest in land whose protection was provided for in legislation and policy, whether or not Crown officials took the appropriate action to secure this protection.

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

85. The honour of the Crown was engaged during the reserve creation process, which imposed a heavy obligation on the Crown to:

    a. take a broad purposive approach to the interpretation of the promise; and
    b. act diligently to fulfill the promise.

86. A failure of the Crown to act diligently to fulfil the purpose of a constitutional promise will constitute a breach of the honour of the Crown.

Priority of Interests in the Colonial Period

87. Imperial colonial policy in relation to indigenous peoples and their lands was re-affirmed by the *Royal Proclamation, 1763*. In short, the "[n]ations or Tribes of Indians...should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them...as their Hunting Grounds".

88. The Proclamation forbade any Colonial Governor from issuing Patents "...upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians..." also forbidden was the "...taking Possession of any of the Lands above reserved, without our especial leave...".

Pre-Reserve Fiduciary Duty and Reserve Creation

89. Prior to the acquisition of a legal interest in land that is subject to the reserve creation process, the Crown's *sui generis* fiduciary duty is at least to act with respect to the interest of the Aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regards as the best interest of the beneficiaries.

90. As Lot 4 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 in Lot 4.

91. The Crown had a duty to diligently advance the interest of the Band in Lot 4. Diligence was called for in the identification of lands to be reserved – it had to be in the habitual places, and of sufficient quality and quantity to provide for the

needs of the Band. The Crown had a duty to set aside reserve lands for the Band on a timely and diligent basis in advance of pre-emption.

92. The honour of the Crown applies in the present circumstances. The fiduciary relationship is engaged as the outset of the reserve creation process. Article 13 of the *Terms of Union* obligated Canada to pursue a policy as liberal as that which existed in the Colony. Colonial policy was to protect Indian settlements. In the event of an unlawful pre-emption, measures were available to resume the land without compensation. Article 13 of the *Terms of Union* forms part of the historical circumstances of the fiduciary relationship between the Crown and the Band.

93. By allowing Lot 4 to be pre-empted, the Colony breached its lawful obligation to the Band under colonial law and policy, including *Proclamation No. 15* and subsequent colonial legislation, to protect Lot 4 from alienation as Lot 4 was the site of an Indian settlement. Canada inherited and remains responsible for this outstanding legal obligation of the Colony.

94. As a fiduciary, the Crown had obligations to preserve and protect the Band's interest in Lot 4. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. The Crown did not act diligently during the reserve creation process to secure the Band's interest in Lot 4, and did not meet the standard of conduct required of a fiduciary. The Band submits that the Crown breached its fiduciary duty to the Band by failing to include Lot 4 in its reserve allotment.

Discretionary Control

95. Canada's responsibility to protect the Band throughout its dealings were inherited from the *Royal Proclamation, 1763*, and further stem from the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3. (U.K.) (the "*Constitution*"). The *Constitution* divides

the power to make laws between the Province and Canada, and assigns to Canada jurisdiction over Indians and lands reserved for Indians.

96. The *Constitution* and its division of power came to apply to British Columbia in 1871. On July 20, 1871, by Order of Her Majesty in Council known as the *Terms of Union*, the Colony of British Columbia joined the Dominion of Canada. Under Article 13 of the *Terms of Union* Canada "assumed the charge of Indians" within British Columbia and "the trusteeship and management of the lands reserved for their use and benefit."

97. Canada had discretionary control over the Band under the *Constitution* and the *Terms of Union*.

98. 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.

99. During the reserve creation process, the Band was entirely dependent, vulnerable and at the mercy of the Crown's discretion to advance the Band's interests and see the reserve creation process through to completion. Canada had the power to see the reserve creation process through to completion in relation to Lot 4 diligently and in the best interest of the Band.

100. The discretion of the Colony was initially exercised by Surveyor Turnbull to stake and mark Lot 4 as an Indian settlement and reserve for the Band.

101. The discretion of Canada was initially exercised by Commissioner Sproat to fix and determine a reserve for the Band.

102. Canada's fiduciary obligation arose as an exclusive intermediary with the Province for the purpose of reserve creation in relation to the Band's Aboriginal interests 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 Lot 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.

103. Between 1883-1938 the Railway Belt had been transferred to Canada and the federal Crown had unilateral control over the lands at and around T'aqt'agtn. Canada did not require provincial approval to set aside reserve lands at T'aqt'agtn.

104. Canada did not take steps to challenge the unlawful pre-emption by seeking to have the pre-emption cancelled and having Lot 4 restored to the federal Crown as title-holder to Railway Belt lands. If it had, Canada would then have been able – unilaterally – to allot the full extent of T'aqt'agtn including Lot 4, or otherwise provide it legal protection for the use and benefit of the Band.

105. In the context of the earliest stages of the reserve creation process in British Columbia, the essential requirement of the discretion or power that will suffice to attract a fiduciary obligation is that the power wielded by officials acting on behalf of the Crown have scope for the exercise of some discretion or power to affect the beneficiary's interests. Colonial Surveyor Turnbull's, Superintendent Powell's, Commissioner Sproat's, and later Commissioner O'Reilly's scope of discretion to fix and determine a reserve for the Band which would affect its interest in Lot 4 attracted a fiduciary obligation on the Crown's part owed to the Band.

106. The Crown's discretion to affect the Band's interest in Lot 4 was also exercised by Magistrate Ball when he recorded the illegal pre-emption of Lot 4.

107. The evidence reveals the involvement of the federal Crown in every step taken in the process of the creation of reserves in British Columbia after confederation. Its involvement was in relation to the interest of the Indians being advanced by the creation of reserves. Prior usage of land was recognized as a factor in the exercise performed jointly with the Province to set apart land for reserves. The best interest of the Band, as a beneficiary, required the Crown to preserve the cognizable interest of the Band in Lot 4 as a reserve for the use and benefit of the Band.

Cognizable Interest

108. The Crown's fiduciary's obligation is owed in relation to the Band's cognizable interest. The Band's interest in Lot 4 satisfies the requirement of an independent legal interest capable of grounding a *sui generis* fiduciary duty.

109. Lot 4 was clearly delineated and identifiable, and the cognizable interest was its historic and contemporary use and occupation as an Indian settlement by the Band, a land interest specifically contemplated pre-confederation by Colonial law and policy, by the Crown instructions issued to Surveyor Turnbull - and post confederation by Article 13 of the *Terms of Union* and by the Crown instructions issued to Commissioner Sproat and later Commissioner O'Reilly to implement that Article.

110. The Band held an Aboriginal interest in the Lot 4 that would have qualified as an "Indian settlement" based on use and occupation.

111. Lot 4 ought to have been protected for the Band and, as a consequence of the Crown's failure to meet its responsibilities as a fiduciary, it was not.

112. The Band's interest in Lot 4 was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation.

113. The Band's interest in Lot 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.

114. The Band's use and occupation of Lot 4 had established a form of Aboriginal interest in land that would have been — and was — apparent as such to the officials charged with implementing reserve creation policy. This is evidenced by Sproat's letter to Hautier acknowledging "..the place was an old Indian settlement and the Indians of Kanaka Flat were there I need not say, long before Mr. Comb or his predecessor Mr. Sartony…". The Band's interest was therefore sufficient for the exercise of discretion by colonial and federal officials to be subject to the Crown's fiduciary duty.

115. The Band's interest was recognized in colonial policy, it was cognizable as it was land which they occupied and from which they, in close proximity to their dwelling places, sustained themselves. Their absence after confederation was due to ouster by settlers, contrary to colonial law. Although dispossessed, their interest remained cognizable.

116. If the Crown had diligently carried out the reserve creation process for the Band, then Lot 4 would have been included as part of Band's reserve lands. Ordinary prudence required colonial, and later federal Crown officials, to seek to have Lot 4 allotted as a reserve for the use and benefit of the Band, as otherwise the Band would be permanently deprived of its interest in Lot 4.

Fiduciary Duty and Competing Interests

117. When seeking compromise by failing to challenge the illegal pre-emption of Lot 4, Commissioner Sproat ought not to have given Hautier's illegal pre-emption interest the decisive weight that he did. Either the Band was going to be deprived of a form of interest in the land at issue, or Hautier was.

118. The only competing interest for which Commissioner Sproat had to account was the interest in the land that was the subject of the Crown's discretionary control and fiduciary duty, Lot 4. This interest was, on the one hand, the Band's tangible, practical and cultural interest in Lot 4, recognized under colonial and provincial law as protected, and, on the other, the Hautier's interest in his unlawful pre-emption. The Crown was required to deny the settlers of their pre-emption claims in favour of making a decision to allot Lot 4 as a reserve for the Band.

Duty to Correct Error

119. When a fiduciary makes a mistake, it has a duty to correct the error. Canada breached its fiduciary duty by failing to seek a correction of the mistake to permit the pre-emption of Lot 4.

Pre-Emption Legislation

120. Based on colonial law and policy, including *Proclamation No. 15* and subsequent colonial legislation, Lot 4 was land that should have been "lands reserved" for the Indians within the meaning of Article 13 of the *Terms of Union*. By Article 13 Canada assumed a fiduciary duty to the Band in regards to the protection and management of "lands reserved" for the Band, including Lot 4. Canada breached its fiduciary duty to the Band by failing to ensure that Lot 4 was protected and managed for the Band's benefit.

121. It had been the practice of the Colony to reserve Indian settlements out of the land available for pre-emption for the continued occupation of the Indians.

Because the federal Crown had unilateral control over the lands at and around T'aqt'agtn through the transfer of the Railway Belt, Canada had the power to act on the "policy as liberal" as that which existed in the Colony.

122. The duty of ordinary prudence required, at a minimum, that Colonial and later Federal Crown officials, including Surveyor Turnbull, Commissioner Sproat, and Commissioner O'Reilly, take steps to inquire into the extent of the Band's Indian settlement so that it could be protected as a reserve for the use and benefit of the Band. The fact that Crown officials did not take even these most basic steps put the Crown in breach of the *sui generis* fiduciary obligation it owed to the Band in relation to Lot 4.

123. 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 pre-emptions. There was no consultation.

124. Crown officials with knowledge of the Band's dissatisfaction in its reserve allotment refused to consult with the Band to ensure that Lot 4 was protected.

125. The Colony failed to fulfil its statutory and fiduciary duties to the Band when it failed to prevent Lot 4 from being pre-empted and failed to ensure that the error was rectified. Any pre-emption of an Indian settlement was illegal as it violated colonial law and policy, including *Proclamation No. 15* and subsequent colonial legislation, and after Confederation, it violated law governing pre-emptions with respect to Crown land within the Province of British Columbia, including the *Land Act, 1875*. The federal Crown failed to fulfil its statutory and fiduciary duties to the Band when it failed to challenge the pre-emption of Lot and failed to ensure that the error was rectified.

126. The Crown breached its statutory and fiduciary obligations to protect the Band's interests in allowing the alienation of the Band's settlement to private landholders and in failing to ensure that the lands in question were set aside as reserve lands for the use and benefit of the Band.

127. Crown officials knew or ought to have known, that the pre-emption contravened the applicable pre-emption law. Ordinary prudence required federal Crown officials to seek enforcement of provincial protection of Indian settlements of the Band and to challenge the pre-emption of settlers.

128. Crown officials, with knowledge of the circumstances surrounding the Lot 4 pre-emption and the Band's situation, did nothing to challenge the pre-emption.

129. The inaction of Crown officials during the pre-emption of Lot 4 and the judgment Surveyor Turnbull, Commissioner Sproat, and later Commissioner O'Reilly, displayed when they eventually made a decision to allot reserves to the Band fell short of fulfilling the Crown's fiduciary obligation.

130. The Crown breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to secure the Band's interest in Lot 4 and by improperly giving priority the settlers' wrongful pre-emption. The Crown's duty required good faith and ordinary prudence to uphold its fiduciary duty to the Band. Crown officials acted with neither, resulting in a breach of fiduciary duty to the Band, which is at issue under this Specific Claim.

Liability for Precolonial Breach

131. The Colony's fiduciary obligation owed to the Band in respect of Lot 4 was a fiduciary obligation that became an obligation of Canada on confederation, and for which Canada would, if in the place of the Colony, have been in breach.

132. The Colony's failure to take any measures to reserve Lot 4 from pre-emption was both a breach of a fiduciary obligation arising under *Proclamation No. 15* and a breach of its express provisions.

133. Treating the Crown as a continuous entity (defined by Canada's fiduciary obligations and, by necessary implication, the specific or cognizable Aboriginal interests in respect of which they were owed) is consistent with an Indigenous perspective on the ongoing fiduciary relationship between Indigenous peoples and the Crown. The legal obligation branch of s. 14(2) of *the Specific Claims Tribunal Act* can apply to fiduciary obligations.

134. The Imperial Crown satisfies the meaning of "Crown" in s. 14(2) of the S*pecific Claims Tribunal Act* in this claim because the fiduciary obligation it breached was a legal obligation that "became . . . the responsibility of the Crown in right of Canada".

135. Pre-Confederation and post-Confederation fiduciary obligations required the Crown to act with reference to the best interest of the same beneficiary in exercising a discretionary power to affect the same Aboriginal interest in the context of the same fiduciary relationship.

136. The Crown, Canada, was the exclusive intermediary with the Province in relation to the Band's interests, and thus exercised discretionary control over advancement of the Band's interests.

137. The Crown owed, at a minimum, fiduciary duties 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 Indian Band v Canada, 2002 SCC 79*).

138. Under Article 13 of the *Terms of Union* Canada had a duty to protect Indian settlements. Canada assumed the undertakings of the Colony in respect to the creation of an Indian reserve.

139. The Band submits that Article 13 of the *Terms of Union, 1871* defined federal powers with respect to Indians and Indian lands, and imposed an obligation on the federal government to continue to implement the elements of the Colony's reserve policy. While the federal government was not obligated to pursue the exact same policy, it was obliged to pursue a policy "as liberal." The Band submits that pursuing a policy "as liberal" as that pursued by the Colony required recognition by the federal government of the Indians' interest in their settlement lands and ensuring that such settlement lands were protected from non-Indian settlement, including pre-emptions.

140. The federal government's commitment to continuing the Colony's reserve policy, as captured in Article 13 of the *Terms of Union* was reflected in the mandates given to Commissioner Sproat and later Commissioner O'Reilly by the Deputy Superintendent General of Indian Affairs.

141. Federal Order in Council 170 appointing Sproat as sole Indian Reserve Commissioner, dated March 8, 1878, adopted the recommendations set out in a memorandum of D. Mills, Minister of the Interior, dated March 2, 1878, including the recommendation that Sproat be appointed as sole Indian Reserve Commissioner to ensure that "the continuity of the present Commission would be preserved and the Indians would have a guarantee that the same policy which has hitherto guided the Commission in dealing with their Reserves would be continued in the future."

142. O'Reilly was instructed to take guidance from the liberal policy embodied in the Terms of Union, and as set out in the 1876 agreement establishing the JIRC:

> In allotting Reserve Lands, you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a liberal policy being pursued toward the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).

143. O'Reilly was also directed to Sproat's 1878 progress report, which said, in part:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during the last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.

144. The Band had no power to obtain land in any other way and relied on Surveyor Turnbull, Commissioner Sproat, and later Commissioner O'Reilly, to protect its interests as they were the exclusive intermediary to deal with the governments on behalf of the Band. The Band was completely at Surveyor Turnbull's, Commissioner Sproat's, and later Commissioner O'Reilly's, mercy and vulnerable. Surveyor Turnbull, Commissioner Sproat, and later Commissioner O'Reilly clearly owed a fiduciary duty to the Band and all failed to challenge the pre-emption of Lot 4.

145. The Colony was aware of the "cognizable Indian interest" in Lot 4 at least as early as Governor Douglas' meetings with the Nlhakápmx Nation at Cayoosh and

Lytton, and by the latest from May 28, 1861, the day Turnbull came to Kanaka Bar, where he noted Indians were occupying and cultivating land “both summer and winter”, thus invoking a fiduciary relationship. Canada inherited the fiduciary obligations of the Colony towards the Band’s cognizable interest in Lot 4.

146. The Colony and Canada had a fiduciary duty to act in the best interest of the Band, with loyalty and good faith. As a fiduciary the Crown had obligations to preserve and protect the Band’s interest in Lot 4. The Band submits that the Colony and Canada breached its fiduciary duty to the Band by failing to include Lot 4 in the Band’s reserve allotment.

147. By not completing the reserve creation process relating to Lot 4 and challenging the illegal pre-emption of Lot 4, the Crown left the Band’s remaining reserve lands vulnerable to encroachment by the various owners of Lot 4.

148. The question before the Specific Claims Tribunal concerns the Crown’s common law fiduciary duties to the Band. Crown’s officials were obliged to ensure that their actions, decisions and judgments that would affect the Band’s interests met the ethical standards required of a fiduciary. Canada breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to complete the reserve creation process relating to Lot 4 and challenge the illegal pre-emption of Lot 4. The Crown’s duty required good faith and ordinary prudence to uphold its fiduciary duty to the Band. Colonial, and later, federal officials acted with neither, resulting in a breach of fiduciary duty to the Band, which is at issue under this Specific Claim.

149. 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 including Lot 4 for the Band on a timely basis;
b. by not consulting with the Band to ascertain the location of the Band's Indian settlements to be protected from pre-emption for the use and benefit of the Band;
c. when it failed to exercise ordinary prudence requiring that, at a minimum, Crown officials elicit the concerns of the Band and consider its best interests through consultation;
d. when it failed to protect the Band's tangible, practical and cultural interest in the Lot 4 from pre-emption;
e. when it failed to set aside reserve lands for the Band on a timely and diligent basis in advance of pre-emption;
f. when Crown officials with knowledge of the Band's dissatisfaction in its reserve allotment refused to consult with the Band to protect the Band's interest in Lot 4;
g. when it failed to challenge the pre-emption of Lot 4;
h. when it failed to consider intervening to have the land within the unperfected pre-emption of Lot 4 added to the Band's reserve at the time beginning June 21, 1910, when the Province accepted Alphonse Hautier's application to have the unperfected original pre-emption record for Lot 4 cancelled;
i. when it failed to protect the Band's cognizable interest in Lot 4 from pre-emption and the forsaking the interests of all others in favour of the Band's interest in Lot 4;
j. by failing to seek a correction of the Colony's error to permit the pre-emption of the Lot 4;

k. by failing to seek enforcement of provincial protection for Lot 4 as an Indian settlement;

l. when it failed to act in the Band's best interest in exercising discretionary control over the specific Aboriginal interest of the Band in Lot 4;

m. when it failed to secure the Band's interest in Lot 4 and by improperly giving priority to settlers' wrongful pre-emption;

n. when Crown officials failed to take steps to inquire into the extent of the Band's Indian settlements on Lot 4 so that it could be protected as a reserve for the use and benefit of the Band;

o. by failing to complete the reserve creation process relating to Lot 4;

p. when it failed to ensure that Lot 4 was surveyed as an Indian reserve and protected for the exclusive use and benefit of the Band;

q. when it failed to exercise its discretion to protect the Band's vulnerable interest in Lot 4, and prevent a grant of fee simple title overtaking the Band's independent legal entitlement to use and occupation of Lot 4;

r. by failing to advise the provincial government not to allow the pre-emption on lands habitually and historically used and occupied by the Band as an "Indian settlement";

s. by placing the interests of settlers ahead of the interest of the Band during the reserve creation process;

t. when it failed to reconcile fairly the Band's tangible, practical and cultural interest in Lot 4 with settlers interests in their unlawful pre-emption;

u. by the inaction of Crown officials during the pre-emption of Lot 4 and the judgment Surveyor Turnbull, Commissioner Sproat, and later Commissioner O'Reilly, displayed when they variously made decisions to allot reserves to the Band;

v. when its officials failed to take steps to protect Band's interest in Lot 4;

w. when crown officials refused to elicit the concerns of the Band and consider its best interests by reexamining the Band's reserve allotment

with the knowledge that the Band was dissatisfied with the lands allotted to it;

x. when the Crown left the Band's remaining reserve lands vulnerable to encroachment by the owners of Lot 4; and

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

VII. Relief Sought

150. The Band seeks:

a. An Order from the Tribunal validating the Specific Claim of the Band in relation to Lot 4 under 14(1)(b), and (c) of the *Specific Claims Tribunal Act*;

b. Compensation from Canada for the loss of Lot 4 as reserve land for the use and benefit of the Band;

c. Interest on compensation for the loss of Lot 4 as reserve lands for the use and benefit of the Band;

d. Compensation from Canada for the loss of the Band's remaining reserve land which has been encroached upon by Lot 4;

e. Costs of this claim; and

f. Such other damages or compensation as this Honourable Tribunal deems just.

Dated this 19th day of October, 2018

Signature of Solicitor
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