SCT File No.: SCT – 7002 – 18

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

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

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

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

TO: KANAKA BAR INDIAN BAND
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I. Status of Claim (R. 42(a))

1. The Kanaka Bar Indian Band ("Band") submitted a claim to the Specific Claims Branch, dated January 28, 2011. This claim was filed with the Minister of Indian Affairs and Northern Development Canada ("Minister") on May 4, 2011 ("Specific Claim").

2. The Specific Claim concerned the 19th century pre-emption and subsequent alienation of Lot 4, G.1, Kamloops Division of Yale Land District ("Lot 4"). The Band alleged breaches of legal and fiduciary duties on the part of the Queen in Right of Canada ("Crown") for failure to set aside Lot 4 as reserve lands for the Band and for failure to challenge the original, allegedly illegal pre-emption of Lot 4.

3. By letter dated April 2, 2013, the Minister notified the Band of the Minister's decision not to accept the Specific Claim for negotiation on the basis that the Specific Claim did not disclose an outstanding legal obligation on behalf of the Crown with respect to Lot 4.

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

4. The Crown denies the validity of the claims based on all grounds in the Declaration of Claim filed October 19, 2018 ("Declaration of Claim").

III. Admissions, Denials or No Knowledge (Rule 42(d))

5. Unless expressly admitted, the Crown denies each and every allegation of fact or law in the claim and puts the Band to strict proof thereof.

6. The Crown admits the facts in the Declaration of Claim, paragraphs 16, 24, 30, 38, 42, 46-49, 51-52, 68-69, and 78.

7. The Crown has no knowledge of the facts set out in the Declaration of Claim, paragraphs 7-9, 26-28, 31, 34, 50, 54, 57, 61, 63, 66 and 71-77.

8. The Crown denies the facts set out in the Declaration of Claim, paragraphs 29, 33, and 80-81.

9. In response to paragraph 10, the Crown admits that Lot 4 was pre-empted in 1861. The Crown has no knowledge as to whether the village was occupied all year round or whether the village included cultivated lands. The Crown has no knowledge whether early census records confirm that T'aqt'agtn was a "large community" of the Band in 1861.

10. In response to paragraph 11, the Crown admits there was a gold rush on the Fraser River in 1857-1858. The Crown has no knowledge with respect to the rest of the facts in this paragraph.

11. In response to paragraph 12, the Crown admits that Governor Douglas wrote to Lord Stanley to inform him that 1,500 "white miners" had arrived at the Couteau Gold Mines on May 19, 1858. The Crown has no knowledge whether Governor Douglas had previously held a concern regarding an influx of miners. The Crown admits the rest of the facts in paragraph 12.

12. In response to paragraph 13, the Crown admits that on July 29, 1858 the Daily Victoria Gazette reported that 200 Indians had met 80 or 90 white men and it was "feared a pitch battle would ensue", but that "[a]fter a good deal of palaver, everything was amicably arranged". The Crown has no knowledge as to whether the "200 Indians" referenced were Nlha7kápmx. The Crown has no knowledge as to whether the statement regarding the 200 or 300 men on their way to Forks are the same 200 Indians who met the 80 or 90 white men. The Crown has no knowledge as to whether the miners were better armed.

13. In response to paragraph 14, the Crown admits that Captain H.M. Snyder led an unauthorized expedition in the Fraser Canyon on or about August 19, 1858 with the express purpose of making peace with the Aboriginal inhabitants in the area of Fort Yale. The Crown also admits that accounts of Captain Snyder's expedition indicate that he concluded an unspecified number of treaties with the Aboriginal

people of the area. Canada has no knowledge regarding whether these Aboriginal people were the Nlha7kápmx, whether any treaties were in fact concluded and, if treaties were concluded, the content of these treaties.

14. In response to paragraph 15, the Crown admits that the Colony of British Columbia developed pre-emption law and policy shortly after the Fraser Canyon War. The Crown has no knowledge whether the development of pre-emption law and policy was partly in response to the events of the Fraser Canyon War.

15. In response to paragraph 17, the Crown has no knowledge as to whether Richard Moody wrote to Governor Douglas regarding requests that lands be opened up for settlement in British Columbia or whether the circular sent by Governor Douglas to the Gold Commissioners and Magistrates of British Columbia was in reply to the letter from Richard Moody. The Crown admits the rest of the facts as set out in paragraph 17.

16. In response to paragraph 18, whether Governor Douglas' instructions to the Magistrates of British Columbia and the Chief Commissioner of Lands and Works were "simultaneously reflected in legislation governing the disposition of Crown land" is legal argument, not fact.

17. In response to paragraph 19, the Crown has no knowledge as to whether the "Indian settlements" referred to in Proclamation No. 15 were to be identified based on "habitual and historic use and occupation". Proclamation No. 15 does not define an Indian settlement. The Crown admits the rest of the facts set out in paragraph 19.

18. In response to paragraph 20, the statements in this paragraph are legal argument, not fact.

19. In response to paragraph 21, the statements in this paragraph are legal argument, not fact.

20. In response to paragraph 22, the statements in this paragraph are legal argument, not fact.

21. In response to paragraph 23, the first sentence is legal argument, not fact. The Crown admits the rest of paragraph 23.

22. In response to paragraph 25, the Crown admits the first sentence. The Crown also admits that there was no change in the wording prohibiting the pre-emption of any Indian settlement. The Crown denies the rest of paragraph 25.

23. In response to paragraph 32, the Crown admits that Royal Engineer Surveyor Turnbull laid out a reserve at "Kernacker Flat" and that this reserve included a graveyard located at the boundary with Lot 4. The Crown denies that the pre-emption of Lot 4 was recorded on the same day as the reserve at "Kernacker Flat". The Crown admits that, at some point, water rights were also recorded for the pre-emption.

24. In response to paragraph 35, the date "1959" is a typographical error. The Crown admits that William Cox reported being near Lytton in 1859. The Crown has no knowledge as to whether the "French men" referenced in Mr. Cox's letter were Mr. Combe and Mr. Fontaine or whether the "preparations for vegetable gardens" were on Lot 4.

25. In response to paragraph 36, the statements in this paragraph are legal argument, not fact.

26. In response to paragraph 37, the Crown admits that Gustave Fontaine transferred his half interest in Lot 4 to Charles Sadoux.

27. In response to paragraph 39, the Crown admits that Charles Sadoux sold his half interest in Lot 4 to John (Eugene) Combe for $400. The Crown has no knowledge of "the attached sketch map" or whether the parcel had been extended northward by 100 yards.

28. In response to paragraph 40, the Crown admits that, in 1868, Magistrate H. M. Ball recommended to the Chief Commissioner of Lands and Works ("CCLW") that lands be reserved for the Nlha7kápmx around Lytton because the available land in the area was "eagerly taken up where water can be used for irrigation". The Crown admits the rest of paragraph 40.

29. In response to paragraph 41, the Crown admits that Eugene Combe's will was probated on June 30, 1870 and that he left all his property to Louis Hautier. The Crown has no knowledge with respect to Eugene Combe's date of death.

30. In response to paragraph 43, the Crown admits that Louis Hautier held the Lot 4 pre-emption until his death. The Crown also admits that as of 1886, a Crown Grant had not been issued for Lot 4. The phrase "despite not having completed the legislative requirements" is legal argument, not fact.

31. In response to paragraph 44, the Crown admits that Louis Hautier's will, dated February 21, 1882, bequeathed his estate, including all his personal and real property, to his children. The Crown has no knowledge as to when Louis Hautier died.

32. In response to paragraph 45, the Crown denies that the Certificate of Improvement was outstanding. The Crown admits the rest of the facts in paragraph 45.

33. In response to paragraph 53, the Crown admits that from December 19, 1883 to 1930, the land now known as Lot 4 was within the Railway Belt. The rest of the statements in this paragraph are legal argument, not fact.

34. In response to paragraph 55, the Crown admits that, in April of 1870, John Trutch and Magistrate Peter O'Reilly were instructed by the Department of Lands and Works to survey reserves on the Fraser River. The Crown has no knowledge as to the rest of the facts in this paragraph.

35. In response to paragraph 56, the Crown has no knowledge regarding the last sentence of this paragraph. The Crown admits the rest of the facts in paragraph 56.

36. In response to paragraph 58, the statements in this paragraph are legal argument, not fact.

37. In response to paragraph 59, the statements in this paragraph are legal argument, not fact.

38. In response to paragraph 60, the statements in this paragraph are legal argument, not fact.

39. In response to paragraph 62, the Crown admits I.W. Powell's journal notation of a complaint as set out in this paragraph. The Crown has no knowledge regarding the first and last sentences of this paragraph.

40. In response to paragraph 64, the Crown admits that I. W. Powell met with a representative of the Thompson or Nakal-kap-a-mouch band, Chief Spintlum, near Lytton in July 1874.

41. In response to paragraph 65, the Crown admits that in 1876, Canada and the Province established the Joint Indian Reserve Commission ("JIRC"). The rest of the statements in this paragraph are legal argument, not fact.

42. In response to paragraph 67, the Crown admits that "Kanaka Flat" was described by Commissioner Sproat as the Band's "headquarters for residence" and that the Kanaka Bar IR No. 2 ("Reserve") was listed as confirmed as per Royal Engineer's sketch on June 18, 1878. The Crown admits the rest of the facts in paragraph 67.

43. In response to paragraph 70, the Crown admits that Commissioner Sproat wrote to Louis Hautier regarding water rights at Kanaka Bar. The Crown has no knowledge regarding Commissioner Sproat's personal opinions with respect to the water rights at Kanaka Bar.

44. In response to paragraph 79, the Crown admits that the final report of the McKenna McBride Royal Commission (the "Commission") shows that IR Nos. 1A and 3A were not shown on the official schedule, were applied for by the Band and were confirmed by the Commission. The Crown further admits that the Band applied for, and was granted, additional lands at IR No. 4. Finally, Canada also admits that the Commission confirmed IR Nos. 1, 1A and 2.

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

Reserve Creation and Aboriginal Policy in Colonial British Columbia

45. On August 2, 1858, the Colony of Mainland British Columbia ("British Columbia") was established.

46. On September 2, 1858, James Douglas was appointed Governor and Commander-in-Chief of British Columbia. That same day, Governor Douglas was informed by Lord Lytton, Secretary of State for the Colonies, that the treatment of Aboriginal people in British Columbia was a subject that should demand the Governor's "prompt and careful consideration".

47. On October 1, 1859, Governor Douglas instructed British Columbia Gold Commissioners and Magistrates to "... 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 special use and benefit" ("Instructions").

48. Governor Douglas sent a copy of the Instructions to Colonel Richard Moody, CCLW for British Columbia. Governor Douglas informed CCLW Moody that "... the sites of all Indian Villages and the Land which they have been accustomed to cultivate, to the extent of several hundred acres round each village, have been reserved and are not to be subjected to the operation of the proposed pre-emption Law."

Colonial Pre-Emption Policy in British Columbia

49. On January 4, 1860, Governor Douglas issued *Proclamation No. 15*, allowing, subject to certain conditions, the pre-emption of unsurveyed land in British Columbia. Specifically exempted from such pre-emptions were any lands described as "an Indian reserve or settlement".

50. On March 5, 1861, Charles Good, Colonial Secretary, explained to CCLW Moody that he had been directed by Governor Douglas to request that the proposed towns and the Indian Reserves throughout British Columbia were to be marked out distinctly as soon as may be practicable, and the Indian reserves were to be defined as they were pointed out by the Indians themselves.

51. On March 5, 1861, Charles Good also informed William Cox that he would be receiving instructions from the CCLW to mark out the limits of the Indian reserves according to the boundaries of the inhabitants of each village and settlement may point out, that this was to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.

52. On March 4, 1862, William Young, Colonial Secretary, wrote to CCLW Moody reiterating that Indian settlements were not available for pre-emption, and if encroached upon may be retaken without any compensation.

53. On May 11, 1863, Colonial Secretary Young informed CCLW Moody that prior instructions regarding Indian reserve selection were still in effect, and "in all cases where the land pointed out by the Indians appears to the officer employed on the service to be inadequate for their support, a larger area is at once to be set apart."

Reserve Creation in the Yale District of British Columbia

54. On October 12, 1858 Governor Douglas informed Lord Lytton that, at Fort Yale, "[t]he Indians were assembled, and … [t]hey had many complaints of

maltreatment, and in all cases where redress was possible it was granted without delay."

55. On October 9, 1860 Governor Douglas informed the Duke of Newcastle that he had informed "great numbers" of Indians at both Cayoosh and Lytton 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".

Creation of Kanaka Bar IR No. 2 (the "Reserve") and Lot 4

56. In April 1861, the following instructions were sent from Royal Engineer R.M. Parsons to Royal Engineer Sapper James Turnbull:

> You will take an early opportunity of staking and marking out in the District you are now stationed, 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 land so claimed by them. Make sketches of the locality and give dimensions of claim, sending them to this officer after acquainting the Magistrate of what you have done. Be very careful to satisfy the Indians so 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, who is requested to give you every assistance...

57. Between May 28, 1861 and June 12, 1861, Royal Engineer Turnbull sketched both a settler claim and the "Kernacker Flat" Indian Reserve. The sketch indicates that the settler claim was located on the wagon road and directly east of the area sketched as an Indian Reserve.

58. On May 28, 1861, a pre-emption of land was registered ("Registration") by Magistrate H.M. Ball in the colonial registration book ("Pre-Emption"). The record describes the pre-empted land as No. 14, situated in "Canaka Flat" about 10 miles south of Lytton in favour of Eugene Combe and Gustave Fontaine. The

land is further described as "commencing from a post on the North E. end of the Indian Reserve turning thence 160 yards East thence running South 400 yards to the edge of the second bench thence 190 yards to a tree on the SE end of the Indian Reserve and thence 300 yards to the point of commencement partially cultivated and free from timber". Finally, Magistrate Ball records that the full amount for the pre-emption was paid on May 28, 1861. The Pre-Emption is the same land that would later become known as Lot 4.

59. A sketch attached to the Registration showed both an Aboriginal burial ground located immediately adjacent to Lot 4's western boundary. There is no specific mention of any signs of Aboriginal habitation on Lot 4 itself.

60. On June 1, 1861 the original certificate of improvement associated with the Pre-Emption was issued, but was subsequently lost.

The Status of the Reserve and Lot 4 Pre-Confederation

61. The pre-emption of Lot 4 was registered on May 28, 1861 to Eugene Combe and Gustave Fontaine. The certificate of improvement associated with this pre-emption was recorded as having been issued on June 1, 1861.

62. On May 26, 1862, Mr. Fontaine's interest in Lot 4 was conveyed to Charles Sadoux. There is no record of any complaint to officials made by the Band regarding the Pre-Emption at this time.

63. On August 19, 1865, Mr. Combe and Mr. Fontaine applied for a government survey of Lot 4. Although records indicate that Mr. Fontaine applied for the survey with Mr. Combe, these records are likely in error because by this time Mr. Fontaine had transferred his interest in Lot 4 to Mr. Sadoux.

64. On May 1, 1868 Mr. Sadoux conveyed his half-interest in Lot 4 to Mr. Combe for $400. As of this date, Mr. Combe had an undivided interest in Lot 4.

65. On March 15, 1869, local stipendiary magistrates were empowered to settle disputes between the Aboriginal inhabitants of British Columbia and settlers. No

complaint or dispute is recorded with respect to the Pre-Emption, Mr. Combe, or any other owners of Lot 4.

66. Mr. Combe died in 1870 and, on June 30, his will was probated. All his property, including Lot 4, was left to Louis Hautier.

Reserve Creation and Pre-Emption Policy Post-Confederation

67. On July 20, 1871 British Columbia joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985 App II, No. 10 ("*Terms of Union*").

68. Article 13 of the *Terms of Union* provided that: "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union". Article 13 further provided that: "To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quality of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

69. On June 21, 1873, I.W. Powell, the Superintendent of Indian Affairs, sent a letter to Lieutenant Governor Joseph Trutch, referring to the "urgent necessity" of dealing with Aboriginal lands, including setting aside reserves for Indian bands that had not yet been provided for.

70. In October 1874, ex-Governor Douglas informed Superintendent Powell that, during the colonial era, "the principle followed in all cases was to leave the extent and selection of land entirely optional with the Indians who were immediately interested in the Reserve".

71. In the summer of 1876, the Joint Indian Reserve Commission (the "JIRC") was created. By 1878, the JIRC consisted of only one Commissioner, G.M. Sproat.

The Status of the Reserve and Lot 4 Post-Confederation

72. When British Columbia joined Confederation, the Reserve had not been formally surveyed and had no recorded size.

73. In June 1878, Commissioner Sproat visited the Kanaka Bar area, acknowledging in a Field Minute that the Band had not had its colonial era reserves listed in the 1873 Schedule.

74. On July 10, 1878, Commissioner Sproat wrote to Louis Hautier regarding water use by the Band. Commissioner Sproat informed Mr. Hautier that it was the Government of Canada's position that a "reasonable supply of water necessarily attaches to the lands of the Indians in this arid part of the country" and that the Band's claims came first. Mr. Hautier and Commissioner Sproat agreed that the Band was entitled to 15 inches of water.

75. On July 24, 1878 Commissioner Sproat wrote in his Lytton Field minute that the "necessary water for household use, and other reasonable purposes, and for cultivation, must be provided for Indian settlements and for reserves in the arid parts of the Province".

76. Indian Affairs Survey Records No. BC 7, Plan of Kanaka Bar Indian Reserves, Yale District, British Columbia dated June 24, 1887 shows that the Reserve and Kanaka Bar IR Nos. 1, 1A, 3 and 4 were surveyed by W.S. Jemmett in 1885-1886.

77. In June 1895, B.H. John, a clerk in the British Columbia Lands and Works Department, informed Dominion Land Agent McKenzie that a $1.00 payment was still outstanding on the purchase price of Lot 4.

78. In or about 1886, Louis Hautier died and left Lot 4 to his children.

79. In 1901, Lot 4 was surveyed. There is no evidence that this survey had any impact on the Reserve.

80. On November 2, 1909, the Deputy Commissioner of Lands, after having conferred with the Commissioner of Lands, informed Alphonse Hautier's solicitor Denis Murphy that any subsequent transfer of Lot 4 following Louis Hautier's death was illegal in light of the absence of a pre-existing certificate of improvement. The Commissioner and Deputy Commissioner of Lands took the position that no certificate of improvement had been issued despite evidence that the original certificate of improvement was issued on June 1, 1861 but had subsequently been lost.

81. The Deputy Commissioner, on the basis of an incorrect understanding that no certificate of improvement had been issued, further informed Mr. Murphy that the only course for the Lands Department to take was to cancel the original record and forfeit the purchase money paid for failure to complete title. After the original record was cancelled, the Deputy Commissioner proposed to sell the land to Alphonse Hautier under the provisions of the legislation governing at that time.

82. On November 8, 1909, Mr. Murphy wrote to and inquired whether the government would agree to sell the land back to Louis Hautier's heirs, if the heirs agreed to cancel the record. The Deputy Commissioner responded on November 18, 1909 that the government would agree to sell the land to Alphonse Hautier for a price of $5 an acre, plus a $10 Crown Grant fee.

83. On June 21, 1910, Mr. Murphy purchased Lot 4 on behalf of Alphonse Hautier on the following terms: $55 for the land (11 acres at $5 an acre) plus $10 for the Crown Grant, minus the $6 already held by the Department.

84. On June 14, 1911, a Crown Grant was issued for Lot 4. The Crown Grant included a sketch depicting the wagon road on the east side of Lot 4 and the Reserve on the west side.

85. During July and August of 1911, Dominion Land Surveyor A.W. Johnson surveyed Kanaka Bar Indian Reserve No. 1A on the east side of, and adjacent to, Lot 4.

86. The Royal Commission on Indian Affairs Final Report, published in 1916, confirmed the addition of the Reserve as well as Kanaka Bar IR Nos. 1, 1A, 3, 3A and 4.

Recent Events

87. In 1984, archeological investigations were undertaken in a number of locations in and around the Reserve and Lot 4. A large prehistoric site was located, spanning both the Reserve and Lot 4. This prehistoric site contained cultural depressions, surface scatter, and subsurface deposits dated 1200-200 BP or "before present". In the context of dating for archeological sites, "present" is defined as the year 1950. This indicates last use of this prehistoric site circa 1750, over 100 years prior to the pre-emption of Lot 4 in 1861.

V. Relief (R. 42(f))

88. The Crown seeks a dismissal of all the claims set out in the Declaration of Claim.

89. If the Crown is liable for any compensation owed to the Band, which is not admitted, the Province of British Columbia caused or contributed to the alleged acts or omissions and any losses arising therefrom, pursuant to the *Specific Claims Tribunal Act* ("*Act*"), section 20(1)(i).

90. The Crown pleads and relies on the *Act*, section 20.

91. Such further and other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: December 19, 2018

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