SCT-7001-19

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*.

July 15, 2019

Guillaume Phaneuf
_____

(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 October 16 2008, the Band filed a Specific Claim in respect to the Canadian Northern Pacific Railway Right-of-Way through Kanaka Bar I.R. 2 (the "Claim"), with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada.

4. The Claim relates to the unlawful taking of rights of way through and damages to reserved lands on Kanaka Bar I.R. 2 ("IR 2") by the Canadian Northern Pacific Railway ("CNPR") and involves excessive width of right of way, inadequate compensation for right of way lands taken, and the use of lands on IR 2 by the CNPR for access to tracks without payment or agreement with the Band.

5. The area for a right of way through IR 2 initially used by the CNPR comprised 23.67 acres, later revised to 23.19 acres, (the "CNPR Right of Way") of the Band's reserve lands and encompasses the majority of the available foreshore, near to the Band's main village sites.

6. In a letter dated May 19, 2011, the Department of Indian Affairs and Northern Development Canada stated:

> …it is the decision of the Minister of Aboriginal Affairs and Northern Development not to accept for negotiation the Canadian Northern Pacific Railway Right-of-Way on IR 2 specific claim 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))

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

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

8. 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;
>
> (d) an illegal lease or disposition by the Crown of reserve lands;
>
> (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority
>
> …

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

9. 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.

10. The Nlha7kápmx Nation lands are traversed by the Fraser River from north to south. From the east it is joined by the Thompson River at Kumcheen, the ancient meeting place of the Nlha7kápmx Nation. These two rivers have been the lifeblood of the Nlha7kápmx Nation from earliest times.

11. The lower bench, below the Canadian National Railway ("CNR") and along the Fraser River bank, is an integral part of the Band's community and has always been one of the principal fishing places of the Band. Traditional fishing sites are still being used by community members at this location today.

12. CNR is the successor to the CNPR which was consolidated into the Canadian National system in 1919.

13. 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 Nlha7kápmx Nation lands and 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.

14. Gold was first "discovered" along the Fraser River within Nlha7kápmx Lands in 1856. Within two years gold seekers had prospected up and down the Fraser River and the Thompson River within the Nlha7kápmx Nation lands. The first

road to the interior was built, known as the Cariboo Wagon Road, to cater to the needs of the gold seekers and to encourage settlers in their wake. The Cariboo Wagon Road followed the banks of the Fraser River through Kanaka Bar to Lytton and continued along the banks of the Thompson River.

15. After the arrival of gold seekers in the mid-19th century, followed by settlers seeking land, the Fraser River and Thompson River also became the communication and transportation corridors to the Interior of the Province and then to the rest of Canada.

Terms of Union

16. 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.

17. 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."

18. 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…

Establishment of Joint Indian Reserve Commission

19. 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 Union* including the establishment of a process to set aside reserve lands for the use and benefit of Indians as contemplated by Article 13.

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

Allotment and Survey of IR 2

21. IR 2 was first known as the Kernacker Reserve and was surveyed on May 28, 1861 by James Turnbull of the Royal Engineers. He described it as being "situated about 8 ½ miles from Lytton, and about 140 ft [above] H.W.M." He added that the "Indians occupy this portion. Started out as reserve both summer and winter, and at the present time have the greater portion of it under cultivation…"

22. Commissioner Sproat visited the Kanaka Bar people on June 18, 1878. He noted 106 people lived there. Referring to what is now IR 2, he noted that the Kanaka Bar reserve was a very old settlement and marked off as a reserve "in early days" by Royal Engineers of the Colony. Commissioner Sproat confirmed the reserve set aside by Royal Engineer Turnbull as IR 2 along the Cariboo Wagon Road, extending it to include a 10 acre woodlot.

23. Commissioner Sproat's Minutes of Decision read as follows:

> No.2 The old reserve at Kanaka Flat on the left bank of Fraser river is confirmed as per Royal Engineer's 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.

24. Commissioner Sproat's reference to 'Hautier's claim' refers to an adjoining pre-emption claim by a settler on a village site of the Band which is the subject matter of a separate Specific Claim.

25. Accompanying Sproat's Minutes of Decision were his Field Minute, also known as Instructions to Surveyor. He allotted three other reserves at Kanaka Bar:

> Nekliptum I.R. 1
> Pegleg I.R. 3
> Whyeek I.R. 4

26. Sproat's accompanying sketch of Kanaka Bar shows the position of the Band's reserves, the old trails, the adjoining pre-emptions and fishing areas.

27. Sproat noted that the allotted reserves "are very poor for 106 Indians but the country affords not better, now that the two settlers have been allowed to take the best land and the water."

28. On July 24, 1878, Commissioner Sproat made a report in a Field Minute which indicated that he was unable to complete his work with regard to the "Lytton proper subgroup" which included the Band:

> I very deeply regret however to have to state that, though the "Lytton proper subgroup" of Indians have been as reasonable as the above mentioned groups further down the Fraser River. I have not been able to find a way of settling land questions for the "Lytton proper subgroup" that could be deemed satisfactory, or reasonably final. …

Survey of IR 2

29. Indian Reserve Commission surveyor, W.S. Jemmett reached the Band's reserves between 1882 and 1885. Jemmett surveyed IR 2 including its extension along the Fraser River at 113 acres.

Location of CNPR Line and Right of Way through Fraser Canyon

30. The Canadian Northern Pacific Railway Company (the "Company") was established as a corporation in 1910 by *An Act to Incorporate the Canadian Northern Pacific Railway*, 1910, S.B.C., c. 4 (the "*CNPR Act*"). The Company was to build 600 miles of line (100 miles on Vancouver Island) through the Yellowhead Pass to Vancouver via the Thompson/Fraser Valley. Construction was to begin July 1910 with completion by July 1, 1914.

31. The *CNPR Act* specified the lines of railway that could be constructed; as well as the business arrangements that could be made with other companies. The *B.C. Railway Act* was to apply, being deemed to be part of this act except where it might be inconsistent with the agreement dated January 17, 1910 between the Crown as represented by the Premier of British Columbia and the Canadian National Pacific Railway Company.

32. Part VII of the *B.C. Railway Act* deals with takings "reserving any property required for right of way etc. or other railway purposes shall from the date of the deposit of any map, plan or book of reference, in accordance with the provisions of the *B.C. Railway Act*, showing that such property is required, be reserved from location or alienation".

33. By the time the Company was established, early surveys in Vancouver, New Westminster and the Fraser Valley had alerted the Department of Indian Affairs

(“DIA”) that constructing a railway would involve expropriation of more Indian reserve lands and in particular, Indian reserve lands comprising foreshore areas.

34. On November 18, 1910, DIA Secretary McLean wrote to the DIA Superintendent General referring to the former Minister of Interior's ruling "made some years ago" that all railway applications for rights of way should be certified by the Chief Engineer of Department Railways and Canals as being actually required for railway purposes. He added that it now appeared that all plans of railways under Canadian Government Charter had to be also approved by the Board of Railway Commissioners. He suggested however, that it would be easier if just the Chief Engineer certified all plans.

35. There is no record of DIA investigating the necessity for the excessive widths of right of way taken by the CNPR through the Fraser Canyon in its initial taking, widths that enabled the whole length of the Fraser Canyon to be double tracked.

36. DIA was aware of the necessity of ensuring that governmental approvals were in place prior to construction of the CNPR occurring through reserves. In a November 25, 1910 letter Secretary McLean advised the Lytton Indian Agent that:

> I have to explain that the Department has long ago been obliged to make a ruling that no entry shall be made on an Indian Reserve for construction purposes until the right of way has been duly paid or arranged for. This ruling has to be adhered to strictly, as we have had great difficulty in the past to obtain settlement with Railway Companies after we have once allowed them to take possession of the land. You will please be careful to guide yourself accordingly in the future, and not allow entry on any Indian Reserve without the advice from this Department.

37. On December 15, 1910, McLean wrote to the CNPR Secretary, G. Ruel, stating that as it did not appear the CNPR was operating under a Dominion Charter, formal consent through Band surrenders were required for rights of way.

38. Location plans for a CNPR right of way through the Fraser Canyon were sent to the Lytton Indian Agent E.B. Drummond in January 1911. Construction was to begin shortly thereafter.

39. In March 1911, the Deputy Superintendent of Indian Affairs instructed the CNPR vice-president that if CNPR entered a reserve without the Band's consent, this would probably prevent DIA from securing a surrender.

40. The first Plan of Location of a CNPR right of way from Boston Bar to Skoonka Creek as surveyed and drawn by Fred J. Dawson, was deposited on August 22, 1911 (the “Dawson Plan”). The Dawson Plan does not show the CNPR Right of Way in the location as it was actually constructed by the Company.

41. The Dawson Plan indicates a particularly wide right of way through the area. At the south end of IR 2, the right of way as depicted is 366 ft. wide, and takes in the whole foreshore for at least 1000 ft. The right of way then narrows in part before widening considerably again at the north of IR 2, to take a 400 ft. width.

42. On January 2, 1911, the Company sent DIA Secretary McLean plans of a right of way required through Indian reserves between Boston Bar and Lytton, including IR 2.

43. On November 2, 1911, the Company right of way Agent D.J. McDonald sent an application and a location plan for the CNPR Right of Way through IR 2 to Indian Agent Drummond. Attached to the application was a cheque for $710.00 "being the amount agreed upon by the Indians, yourself and myself on the ground" for

23.67 acres and a description of the right of way which divided it into six parcels (A-F). There is no record of how the amount of $710.10 was arrived at. There is no documentation to show that the Chief and Council and interested Band members were alerted to any valuation session; there is no other record of who may have been present at any valuation session, and there is no record of any agreement on a valuation.

44. On November 13, 1911, the local Indian Agent duly forwarded a cheque for $2,216.30 to DIA headquarters and listed the amounts to be credited to each band, including the $710.10 for IR 2. He requested a telegram authorizing the Company to proceed with construction, “as in one or two places they are now waiting to commence work." DIA authorized the Company to enter the reserves for which compensation had been paid "for construction purposes", which included IR 2.

45. On July 19, 1912, Order in Council OC PC 1875 approved the Dawson Plan, recommending that the location indicated thereby "be approved for subsidy purposes".

Valuation

46. On July 26, 1911, the DIA surveyor wrote to the Minister of Interior stating there would be a delay while the CNPR plans were entered onto DIA plans and the Orders in Council were prepared. He suggested that where proper descriptions, plans, and payment had been made, Indian Agents should allow the Company to enter the several reserves for construction purposes.

47. By letter dated October 27, 1911, the solicitors for the Company, Mackenzie Mann & Co., wrote to the DIA regarding a cheque "in full settlement for right of way" through certain reserves between Boston Bar and Lytton. There is no documentation to show that the Band was notified of any valuation session, and

there is no other record of who was present, or as to any agreement on the valuation. The letter contained a list of amounts for rights of way through Indian reserves including $710.10 for the CNPR Right of Way through IR 2.

48. The Kanaka Bar dipnet fisheries are on the banks where the Fraser River follows the southern boundary of IR 2. This is where the whole foreshore was taken for the CNPR Right of Way. There is no evidence that loss of riparian rights, farm lands, fisheries or mining grounds were considered as part of the compensation due to the Band for the CNPR Right of Way.

Delay in Payment

49. On August 8, 1912, Lytton Indian Agent H. Graham sent a memo to DIA Secretary McLean to inform him that “the principal complaint of the Indians is that they have not received any money for the right of way from the Canadian Northern Railway Co. I would be obliged if you will inform me when the Indians can expect the money.”

50. DIA Secretary McLean responded in a letter dated August 19, 1912, to T.J. Cummiskey, Inspector of Indian Agencies, Lytton, B.C. McLean stated that payments had been received for rights of way, including through IR 2, and that the various sums had been credited to the Ottawa accounts of the interested First Nations. McLean also stated that “the former Indian Agent Mr. Drummond was requested to forward detailed valuations showing especially if any portions of these sums should be paid to the Indians for their improvements. He has not complied with this request” and so McLean asked that Indian Agent Graham submit the detailed valuation reports “in order that any sums due to the Indians may be paid to them”.

51. In December 1912, Agent Graham reported that, pursuant to instructions to revisit the valuation of all of the reserves in his Agency, he had found that the

Kanaka Bar IR 2 valuation should be increased by about $200, half of that accountable to higher values paid out to the holders of individual improvements.

52. Graham reported that he had gone over the various reserves listed "in company with the Indians interested and the Chiefs, and together we have readjusted the money allotted by the CNPR, which I think is satisfactory to all concerned". The values for IR 2 differed somewhat from earlier. The 23.67 acres was valued at $910 instead of $710, including:

i. Payments to Johnny Kanaka $25.00;
ii. Mrs. Hobby $100.00;
iii. Johnny Hanna $150.00;
iv. Johnny Spike $100.00; and
v. Thomas Dick $100.00.

CNPR Construction Camp on IR 2 and Uncompensated Timber Removal

53. During construction of the CNPR, a dispute arose between the Company and the Band relating to a CNPR construction camp operating on IR 2.

54. By letter, dated September 26, 1913, to Chief Charlie of the Band, a CNPR Engineer, J.V. Nimmo refers to the establishment of the CNPR construction camp as an agreement between the Company and Indian Agent Drummond:

> My understanding of the arrangements which were made between Mr. D. J. McDonald, the Company's Right of Way Agent and Mr. Drummond, the then Indian Agent as to the terms on which we were to construct our camp at Kanaka were that we were to have the use of the camping ground and such trees were necessary for the Construction of the camp and for fire wood free of charge so long as the camp was occupied by us in return for which you were to get the buildings when we had finished with them…

55. Chief Charlie of the Band wrote to the CNPR Engineer "I am very glad that you told me before you camped there". He then stated that he had not intended to charge the contractor for the use of the land and water, but CNPR had taken 230

trees. The Chief wrote "I will just charge you ninety dollars for them. They are 50 c. a stump you know, but I am charging you very little."

56. The CNPR's local Division Chief Engineer told Chief Charlie that it was his understanding that there would be no charge for the trees, that the Band would be compensated by having use of the camp buildings after the Company departed. He promised to investigate, and the local right of way agent for the Company then stated that the Band was being compensated for the rent of the camp grounds only; "I made no arrangements for firewood, neither did I make any arrangements for timber to build houses."

57. No payment for the 230 trees cut appears in the Auditor General's reports for DIA finances for the 1913-1914 fiscal year. It does not appear on the following year's finances either.

The Royal Commission on Indian Affairs in B.C.

58. On September 24, 1912, in an attempt to "settle all differences" regarding reserves, Canada and the Province established the Royal Commission on Indian Affairs in British Columbia (the "Royal Commission").

59. On April 9, 1914, Secretary McLean advised the Royal Commission that the Company was acting under a Provincial charter and a surrender was required for any right of way lands taken from Indian reserves.

60. On September 1, 1914, F.C. Gamble, the Chief Engineer of the BC Department of Railways, explained to the Royal Commission that the return of right of way plans submitted to him for certification had been delayed because they had been sent to the Company for revisions and corrections. The next day, T.H. White, the CNPR Chief Engineer, wrote to Secretary McLean to advise him that, after reviewing the right of way plans sent to him by the Chief Engineer of B.C.

Railways, and in comparing them with the CNPR's current plans, he found that the alignments and widths differed. White explained that the plans he had submitted to the Department with the applications were tentative until such time as they were adjusted for slopes, and he was having new plans prepared to represent the final alignment and right of way widths through the Indian reserves.

61. On September 4, 1914, Gamble advised the Royal Commission of the matter and that White intended to revise the right of way plans.

62. On September 10, 1914, Secretary McLean advised White that the issuance of patents for the rights of way was being held in abeyance until "final action has been taken by the Provincial Government", referring to certification of the plans. McLean also informed the Royal Commission on September 26, 1914 that no further action would be taken towards the applications until the CNPR had completed its revised plans.

63. Similarly, on September 28, 1914, the CNPR Chief Engineer informed the Royal Commission that the Company was postponing its request for title to the rights of way until the revised plans were completed. White had also instructed the Company right of way agent on September 19, 1914 to have the surveyors prepare new plans for the Indian reserves from Hope to Kamloops.

64. On July 24, 1915, the Royal Commission Secretary stated in a letter to White that he was "…having considerable difficulty in balancing areas of certain Indian Reserves of the Lytton Agency traversed by your Railway. Our acreages as shown by the Official Schedule of Reserves and by the Plans of Survey do not check in numerous instances with the acreages by the Agent for the district and upon which valuations are based by him". The Secretary stated that he and Graham went over the valuations in Victoria and requested that the CNPR

furnish him with right of way acreage acquisitions; he listed certain reserves, including IR 2.

65. The following summer, a Royal Commission corrected list of reserve lands taken for CNPR purposes indicated that 23.67 acres had been taken from the Reserve, but the CNPR's Chief Engineer warned soon thereafter that "final surveys" might show some discrepancies. Thus, despite correspondence which suggested that revisions of the right of way were required, at least to this point in time, the acreage remained the same as requested in the railway's initial application.

66. On March 15, 1915, the Royal Commission passed resolutions which officially confirmed IR 2 at an acreage that excluded the CNPR Right of Way.

67. In July 1916 the Royal Commission Report was published. Attached to the Royal Commission Report was a revision of right of way deductions. The CNPR Chief Engineer T.H. White had sent in a revised list of lands taken for right of way through Indian reserves; it did not include any changes on IR 2.

68. The CNPR became part of the CNR; it was declared to be for the general advantage of Canada and came under federal jurisdiction in 1917. The Canadian National Railway Company was incorporated on 6th June, 1919. The Federal Government had acquired control of the Company and of the various constituent and subsidiary companies comprising the Canadian Northern System. These included the CNPR. By this acquisition by the federal government, the CNPR became subject to the *Government Railway Act.*

Conveyance of CNPR Right of Way through IR 2

69. An Order in Council authorizing the taking of the CNPR Right of Way through IR 2 was requested by the Company on January 23, 1933. On January 26, 1933, the DIA Secretary wrote back to the CNR legal division noting that patents had

not been issued to the CNR for rights of way through 4 Nlha7kápmx reserves, including IR 2.

70. A description of the CNPR Right of Way for Letters Patent was prepared on February 15, 1933 for a right of way measuring 23.19 acres as shown on Plan RR 1125. An Order in Council was passed February 3, 1933. Letters Patent were issued on 27th February 1933, conveying 23.19 acres right of way through IR 2 to the CNR.

71. The Band has never surrendered its reserve lands within the CNPR Right of Way to the Crown.

Unauthorized and Unpaid Use of IR 2 for CNR Access Road

72. At the time of the construction of the CNPR in 1912, DIA instructed the Company that it was only permitted to negotiate the use of Indian reserve lands with DIA. However, there are no records indicating the negotiation over the building of a railway station or the road constructed to access the railway station on IR 2. There is no indication that the Band was informed, consulted, offered compensation, or even authorized the building of an access road to the CNR station.

IR 2 Located Within Railway Belt

73. From December 19, 1883 to 1930, IR 2 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.

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

74. This claim is based on the Crown's breach of its common law fiduciary duty and legal obligations under the *Indian Act*, and under applicable railway legislation, for allowing an excessive right of way through IR 2, failing to ensure fair market compensation was paid by CNPR at the time of the unlawful taking, and failing to obtain a surrender for sale or lease from the Band.

75. 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.

Discretionary Control

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

77. 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.

78. 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 interest in IR 2 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.

Fully Constituted Indian Reserve

79. IR 2 became a reserve within the meaning of that term in the *Indian Act* on December 19, 1883, the date deemed by Canada and the Province by agreement that the transfer of the Railway Belt occurred. At that time the land comprising IR 2 came under federal administration and control. Thereafter, the Crown exercised exclusive control over the interest of the Band in the reserve.

80. The federal Crown had already expressed its intention to create IR 2 as an *Indian Act* reserve as Commissioner Sproat by 1878 had confirmed and extended the allotment of IR 2 as previously set aside by Royal Engineer Turnbull.

81. Commissioner Sproat's confirmation and extension followed the steps to set aside IR 2 originally undertaken by Royal Engineer Turnbull. The federal Crown undertook a further step when IR 2 was surveyed by Crown surveyor Jemmett in 1885.

82. Determining a reserve creation date is fact sensitive and contextual. Regardless of the exact date of reserve creation of IR 2, it was a fully constituted *Indian Act* reserve well before the CNPR could have had any interest in lands located within the CNPR Right of Way.

83. Prior to IR 2 being established as an *Indian Act* reserve, 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 Band.

84. 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 CNPR Right of Way would have on its use of the land and access to its fishing stations.

Cognizable Interest

85. As the Band was in occupation of IR 2 before and after both the allotment by Sproat and the survey by Jemmett, its interest was substantial and practical. The Band's interest in IR 2 was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation. The Band's interest in IR 2 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

86. On December 19th, 1883, the date on which transfer of the Railway Belt occurred, Canada's obligations expanded to include the protection and preservation of the Band's interest in IR 2. As a fiduciary, the Crown was also obligated to ensure that it did not let the public interest in the building of the CNPR supersede the Band's interest in its lands. The Crown breached its legal obligations under the *Indian Act*, RSC 1906, c 81 (the "1906 *Indian Act*") including, but not limited to section 48, when it allowed the CNPR Right of Way through IR 2.

87. The duty of the Crown was to enforce the protective provisions of the *Indian Act* and preserve the Band's interest in IR 2 from exploitation. If expropriation was necessary to establish a proprietary interest in the CNPR, 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.

88. By 1911, the CNPR line through IR 2 was under construction without legal authorization through an Order in Council. Although Order in Council P.C. 1875 was passed on July 29, 1912 to approve the Dawson Plan, this was for subsidy purposes only, and was not passed pursuant to the *Indian Act*, nor did it purport to authorize the CNPR to exercise its powers of expropriation with respect to any particular reserve lands. The Dawson plan was inaccurate in any event.

89. There were no Orders in Council pursuant to section 46 of the *Indian Act* authorizing the CNPR's use of IR 2 until February 1933, some 20 years after the CNPR had occupied and used the Band's land in the first place.

90. Section 46 of the *Indian Act* clearly provided that an authorizing Order in Council must be passed prior to an expropriating body exercising its powers with respect to reserve lands

91. As IR 2 had become an *Indian Act* reserve on December 19th, 1883, and neither a surrender pursuant to the *Indian Act* was ever obtained, nor the provisions for the taking of land for public purposes for the CNPR Right of Way followed, the Crown's *de facto* alienation of the CNPR Right of Way was an illegal disposition within the meaning of the term in the Specific *Claims Tribunal Act*, paragraph 14(1)(d).

92. The Crown had a fiduciary duty to protect the Band's cognizable interest in IR 2 from alienation and a duty forsaking the interests of all others in favour of the Band's interest in IR 2.

Fiduciary Duty and Competing Interests

93. The Crown cannot shirk its fiduciary duty, where it exists, by invoking competing interests. Although the Crown may have had a competing public interest between constructing the railway and its fiduciary duty to the Band, the Crown still had an obligation to minimally impair the Band's cognizable interest in IR 2.

94. The CNPR Right of Way was in the Railway Belt which was deemed transferred to the Dominion on December 19, 1883. From December 19, 1883 to 1930, the CNPR Right of Way land 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.

Powers of the CNR

95. The CNPR was incorporated as a Provincial Railway Company in 1910 pursuant to *An Act to Incorporate the Canadian Northern Pacific Railway* 1910, S.B.C., c.4. That act incorporated the *British Columbia Railway Act* and provided the CPNR with the necessary power to carry on business within the Province.

96. Schedule 1 of *An Agreement between the Province and the Canadian Northern Railway*, 1910 S.B.C., c.3 set out an agreement entered into on January 7th 1910, by the Government of British Columbia and the Company. The Company agreed that it would truly and faithfully acquire lines of railway within the Province and that they would not alienate or sell the lines unless first receiving the Lieutenant Governor-in Council's consent.

97. The *British Columbia Railway Act*, S.B.C. 1911, c. 44 set out the general powers of a Provincial railway company. The powers included the right to acquire real and personal property under Section 33(1) and mandatory procedures for the expropriation of land for right of way and station purposes (part VII).

98. Pursuant to *An Act to Incorporate Canadian National Railway and respecting Canadian National Railways*, 1919 S.C. c. 13, the CNPR was consolidated with the Canadian Northern Railway system and, together with the Canadian Government Railways operations, became the National Railway System. This Act incorporated the provisions of the federal *Railway Act* S.C. 1906, c.37 (the "*Railway Act*") and the *Expropriation Act* (s.13).

99. Section 175 of the *Railway Act* reads as follows:

> 175. No company shall take possession of or occupy any portion of any Indian Reserve or lands without the consent of the Governor-in-Council.
>
> 2. When, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any railway company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor as in the case of lands taken without the consent of the owner.

100. The *Railway Act* S.C. 1919, c. 689, s. 192 and *the Railway Act* R.S.C. 1927, c. 170, s. 192 read identically.

101. Section 172(3) provided a restriction on alienation for lands taken by the CNR:

> The company may not alienate any such lands so taken, used or occupied.

102. Additionally Section 177 of the *Railway Act* placed limits on the width of a right of way which the CNR could take limiting the width to 100 feet wide except in extraordinary circumstances and which required an application to the Board of Railway Commissioners for Canada. Extra width for right of way purpose was only permitted when the track was set at a level 5 feet above or below the adjacent lands. In such cases the additional lands required for slope could be taken but required certification that such lands were required for valid railway purposes.

103. Section 46 of the 1906 *Indian Act*, provided:

> 46. No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve; and in any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

104. The 1906 *Indian Act* contained provisions for the taking of land for public purposes, including railways, and this continued to be the case when the act was amended in 1911 and 1927. Section 46 of the 1906 *Indian Act* and its 1911 and 1927 amendments provided reserve land could not be taken for railway purposes without the consent of the Governor in Council and compensation was mandatory. It added that “compensation shall be made therefore to the Indians of the band in the same manner as is provided with respect to the lands or rights of other persons”. When Section 46 was amended in 1911, there was an additional requirement that a company must have statutory power “for taking or using lands or any interest in lands without the consent of the owner” and “exercise such statutory power with respect to any reserve or portion of a reserve...”. In 1927, these requirements remained the same.

105. The *Indian Act* did not provide the power or authorization necessary for the expropriation of land by a railway company. It simply authorized a railway company to exercise its own statutory powers.

106. The Company was a corporation entirely distinct from the Crown, both as a Provincially incorporated company (prior to 1919), and as a Federally incorporated company (after 1919).

107. Section 48 of the *Indian Act* provided the Governor in Council with the authority to consent to the use of expropriation powers by the CNR with respect to reserve lands. It did not provide for the direct transfer of land to a railway company. Further, the Governor in Council had the authority to attach any conditions which were considered appropriate if a decision was made to authorize a particular taking of reserve lands.

108. Upon receiving the consent of the Governor in Council, the Company was required to take the steps for expropriation found in either the *British Columbia Railway Act* (prior to 1919) or in the *Railway Act* and *Expropriation Act* (after 1919). No such steps were taken with respect to the CNPR's Right of Way through IR 2. Accordingly, the CNPR's use of the Band's reserve lands is without lawful authority.

Excessive Width

109. The duties of the Crown to the Band in relation to IR 2 included an assessment of how much land the Company reasonably required for the operation and of the CNPR.

110. The DIA took no steps to require the Company to provide statutory justification for the excessive width. The DIA failed to take any steps to satisfy itself that the land taken was actually required.

111. The land "granted" by the Crown through Letters Patent in 1933 exceeded that which was permissible under the *Railway Act* which limited the width of land that may be granted to a railway company to 100 feet.

112. 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 Company the minimum interest it required for the purposes of construction, maintenance and operation of the CNPR, and to ensure minimal impairment to the use and enjoyment of the reserve lands by the Band.

Inadequate Compensation

113. Even had DIA complied with the statutory requirements of the *Indian Act* and obtained the necessary authorization under Section 46, this transaction still would have represented a breach of the Crown's lawful obligation to the Band. The DIA failed to meet the standard of care required of a fiduciary in dealing with reserve lands.

114. The Crown failed to ensure that the Band received adequate compensation for the value of the foreshore, and even dispensed with the requirements that there be independent certification that the lands requested were in fact required and that an independent person visit and value the lands as provided for in Section 53 of the *Railway Act*.

115. By authorizing the sale of lands within IR 2 at a flat rate, the Crown was in breach of its lawful obligations to the Band, and the statutory requirements of the *Indian Act* as Section 46 required that compensation for reserve lands be arrived at in the same manner as ordinary cases. Outside IR 2, there was no flat rate paid for lands taken for railway purposes. Ordinary cases outside IR 2 involved land being valued individually.

116. In addition to the statutory requirements, the Crown has a distinct lawful obligation as fiduciary of the Band to act in the best interests of the Band. As set

out above, this fiduciary obligation requires that in the management of reserve lands, the Crown maintain a standard of an ordinary prudence. Acting with ordinary prudence would not include disposing of lands at a flat rate having no regard to the quality of land taken, the impact on remaining lands, or for a price uniformly lower than that paid to others for similar land without any independent appraisal. In obtaining compensation for IR 2, the Crown had no regard for the value of the Band's fishing stations, mining grounds, severance, or any other impacts.

117. The *Indian Act* provided that, even after the issuance of a patent, the Crown maintained a right to correct errors in relation to the sale and disposal of Indian lands. This power is an independent fiduciary obligation on the Crown to continue to be vigilant with respect to Indian reserve lands and correct any errors even after the disposal of such lands. The Crown had on ongoing duty to correct an error relating to the sale or disposal of the Band's reserve lands within the CNPR Right of Way,

118. Minimally impairing the Band's interest in reserve lands required the Crown to take steps to ensure that the Band's reserve lands were not taken without authorization and were not taken without adequate compensation. A 'person of ordinary prudence' would not allow his or her own lands to be taken without a valuation. The Crown did not meet these obligations and breached its fiduciary duties to the Band.

Permitting Different Lands to be used

119. As set out above, the CNPR was never lawfully authorized to take and use the Band's reserve lands located within IR 2. Furthermore, any claim the CNPR may have had to the use of any land within IR 2 was based upon the Dawson Plan, and related to a particular parcel within IR 2.

120. As early as 1914 the Crown became aware that the CNPR line as constructed through IR 2 deviated from that which had earlier been discussed and dealt with in the Dawson Plan.

121. Permitting the CNPR to use more and different lands than purportedly authorized is a breach of a lawful obligation owed to the Band. The Crown was obligated to take steps to ensure that the CNPR did not trespass onto reserve land of the Band and that the CNPR use did not differ from the land which it had paid for.

122. Upon becoming aware that the CNPR line as constructed deviated from the Dawson Plan, the Crown had a fiduciary obligation to correct the error.

Unauthorized Use of Reserve lands as CNPR Camp and Unlawful and Uncompensated Removal of Trees from IR 2

123. Records indicate the CNPR made some arrangements with the Kamloops Indian Agent purportedly allowing the CNPR to use and occupy lands within IR 2 as a construction camp. CNPR also removed a number of trees from IR 2. There is no evidence of formal authorization for either the use of IR 2 reserve lands as a camp, or for the removal of timber from IR 2.

124. According to Section 33 of the 1906 *Indian Act*, no one could use or occupy any lands within a reserve without the authority of the Superintendent General. Any purported agreements consented to by any Indian which purported to authorize a person other than a Band member to use and occupy reserve lands otherwise than under authority of the Superintendent General were void.

125. The definition of 'reserve' contained in the 1906 *Indian Act* provided that "all the trees, wood, timber," were included within the definition of reserve.

126. DIA had undertaken to act on behalf of the Band in dealings with CNPR. Accordingly the DIA had an obligation to supervise the work of the CNPR and ensure that CNPR's use of the Band's reserve lands both complied with the terms of the *Indian Act* and was fair and equitable to the Band.

127. The Crown breached its lawful obligation to the Band by failing to prevent the CNPR from making an unlawful use of IR 2 reserve lands and resources, and by failing to ensure that the Band received adequate compensation for the Company's use of IR 2 lands and resources.

Unauthorized use of Reserve lands for Access Road

128. Since 1912 the CNPR (and later the CNR) had also been illegally using lands within IR 2 for the purpose of an access road. There has been no authorization for this use pursuant to *Indian Act* and the Band has not been properly compensated for the CNPR's use of its reserve lands.

129. By permitting CNPR's unlawful use of the lands Crown has breached its lawful obligations to the Band.

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

a. when it failed to obtain a surrender for the CNPR Right of Way and failing to comply with the surrender provisions of the *Indian Act*;

b. by failing to ensure that the Band received adequate compensation for the Company's use of IR 2 lands and resources;

c. by failing to prevent the CNPR from making an unlawful use of IR 2 lands for a camp and unjustifiably removing timber;

d. 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 unlawful taking of land for the CNPR Right of Way through IR 2;

e. when it failed to provide full disclosure to the Band during the reserve creation process relating to the unlawful taking of land for the CNPR Right of Way through IR 2;

f. 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 unlawfully taken for the CNPR Right of Way through IR 2;

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

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

i. when its officials failed to take steps to protect the Band's interest in the lands unlawfully taken for the CNPR Right of Way through IR 2;

j. when it purported to grant more land than was necessary for railway purposes;

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

l. by failing to minimally impair the Band's interest in the land unlawfully taken for the CNPR Right of Way;

m. by failing to comply with the provisions of the *Railway Act* by allowing more land than required to be unlawfully taken from IR 2;

n. by failing to properly value the land unlawfully taken for the CNPR Right of Way;

o. by failing to obtain adequate compensation for damages to IR 2 as a result of the railway's construction;

p. by failing to value the injurious affection to the remaining lands of IR 2;

q. by failing to value disturbance damages known or foreseeable to the Crown arising from the CNPR Right of Way through IR 2;

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

s. by failing to prevent the CNPR from using lands within IR 2 as an access road without lawful authorization and without compensation to the Band;

t. in its ongoing failure to correct errors in relation to the sale and disposal of the Band's reserve lands on IR 2 including lands which deviated from the Dawson Plan; and

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

VII. Relief Sought

131. The Band seeks:

a. an order from the Tribunal validating this specific claim of the Band in relation to IR 2 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 IR 2 by the illegal disposition of the CNPR Right of Way through IR 2;

c. damages and equitable compensation on current unimproved market value of the land transferred for the CNR Right of Way plus compensation for loss of use of the land unlawfully taken for the CNPR Right of Way;

d. compensation for damages/injurious affection to the Band's adjacent reserve lands relative to the CNPR Right of Way;

e. compensation for the Company's unlawful use of the Band's reserve lands for a camp and for an access road;

f. compensation for timber unlawfully removed from IR 2;

g. disturbance damages arising from the illegal disposition of the CNPR Right of Way through IR 2;

h. interest on compensation;

i. costs of this claim; and

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

Dated this 15th day of July, 2019

_____

Signature of Solicitor
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