SCT File No.: SCT – 7001 – 19

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. Context

1. The Claimant, the Kanaka Bar Indian Band ("Band"), alleges breaches of legal and fiduciary duties on the part of Her Majesty the Queen in Right of Canada ("Crown"), an illegal lease or disposition by the Crown of reserve lands and failure by the Crown to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority as a result of a right of way through the Band's reserve lands.

2. In 2011, the Respondent ("Canada") did not accept the above claim ("Specific Claim") for negotiation under the Specific Claims Policy on the basis that there was no outstanding lawful obligation on the part of Canada. Canada is presently re-assessing its position on this claim and is committed to work in light of principles of reconciliation and the Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples.

3. It is hoped that this Response will help to build bridges with the Band and will assist Canada and the Band ("Parties") to work collaboratively to resolve the Specific Claim by this proceeding or through alternative dispute resolution, including negotiation.

II. Status of Claim (R. 42(a))

4. The Band submitted a claim to the Specific Claims Branch ("SCB"), on December 4, 2000. This claim was filed with the Minister of Indian Affairs and Northern Development Canada ("Minister") on October 16, 2008 ("Specific Claim").

5. On November 24, 2008, the Band was invited to provide the SCB with additional documents, information and arguments that were not part of the original claim submission. The Band did not provide additional documents, information or argument to the SCB.

6. The Specific Claim concerned a right of way through Kanaka Bar Indian Reserve No. 2 ("IR 2") granted to the Canadian Northern Pacific Railway ("CNPR"), now known as the Canadian National Railway ("CNR") ("Right of Way"). The Band

alleged breaches of legal and fiduciary duties on the part of the Crown as a result of the Right of Way. The Band also alleged that the Right of Way constituted an illegal lease or disposition by the Crown of reserve lands and that the Crown failed to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority as a result of the Right of Way.

7. By letter dated May 19, 2011, 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 the Right of Way.

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

8. The Crown denies the validity of the claims based on all grounds in the Declaration of Claim filed July 15, 2019 ("Declaration of Claim").

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

9. The Crown admits the facts in the Declaration of Claim, paragraphs 20-23, 37, 49-50, 52, 54-55, 58, 61, 63 and 64.

10. In response to paragraph 9, the Crown admits that the Band is part of the Nlha7kápmx (Nlaka'pamux) Nation. The rest of the statements in this paragraph are legal argument, not fact.

11. In response to paragraphs 10-13, the statements in these paragraphs are legal argument, not fact.

12. In response to paragraph 14, the Crown has no knowledge as to when gold was first discovered along the Fraser River. The rest of the statements in this paragraph are legal argument, not fact.

13. In response to paragraph 15, the statements in this paragraph are legal argument, not fact.

14. In response to paragraph 16, the Crown admits that in 1871, the Colony of British Columbia ("Province") joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985, App II, No 10 ("Terms of Union"). The Crown further admits 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." The rest of the statements in this paragraph are legal argument, not fact.

15. In response to paragraph 17, the Crown admits that Article 13 required that the Dominion Government continue a "policy as liberal as that hitherto pursued by the British Columbia Government" with respect to the "charge of Indians, and the trusteeship and management of the lands reserved for their use and benefit". The Crown further admits that in order to carry out its policy towards Indigenous peoples, the Dominion Government and the Province agreed that "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate… 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." The rest of the statements in this paragraph are legal argument, not fact.

16. In response to paragraph 18, the Crown admits that the *Royal Proclamation of 1763*, RSC 1985, App. II, No. 1 states

> [a]nd whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominion and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

The rest of the statements in this paragraph are legal argument, not fact.

17. In response to paragraph 19, the Crown admits that Canada and the Province established the Joint Indian Reserve Commission ("JIRC") in 1876. The rest of the statements in this paragraph are legal argument, not fact.

18. In response to paragraph 24, the statements in this paragraph are legal argument, not fact.

19. In response to paragraph 25, the Crown admits that, in addition to confirming the old reserve at Kanaka Flat also known as the Colonial Reserve and now known as IR 2, Commissioner Sproat also confirmed three additional reserves for the Band, Nekliptum IR 1, Pegleg IR 3 and Whyeek IR 4. The Crown has no knowledge as to whether Commissioner Sproat's Field Minutes "accompanied" his Minute of Decision or whether Field Minutes were also known as "Instructions to Surveyor".

20. In response to paragraph 26, the Crown admits that Commissioner Sproat's sketch of Kanaka Bar shows the position of the Band's reserves, an old trail and a fishery below Mr. Palma's land.

21. In response to paragraph 27, the Crown admits that Commissioner Sproat's Field Minute dated June 18, 1878 notes that

> [t]he above completes the Kanaka Flat Reserves. They are very poor for 106 Indians, but the country affords no better, now that Hautier and Palma have been permitted to take the best of the land and water. Still if the railway comes that way, the location is good, and if the surveyor can find them good patches irrigable, at Whyeek they may make something by their hay and vegetables yet.

22. In response to paragraph 28, the Crown admits that Commissioner Sproat's Field Minute dated July 24, 1878, states:

> I very deeply regret however to have to state that, although the 'Lytton proper subgroup' of Indians have been as reasonable as the above mentioned group of Indians 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.
>
> The district around Lytton is more arid than lower down the Fraser.

The rest of the statements in this paragraph are legal argument, not fact.

23. In response to paragraph 29, the Crown admits that WS Jemmett's Field Book regarding "Kanaka Bar Indians Reserve No 2" is dated July 28, 1885 and that Jemmett surveyed this reserve as 118 acres in area, not 113 acres as set out in the Declaration of Claim. The Crown has no knowledge as to when WS Jemmett reached the Band's reserves.

24. In response to paragraph 30, the Crown has no knowledge whether construction of the Canadian Northern Pacific Railway ("CNPR") was to begin July 1910 and complete by July 1, 1914. The Crown admits that construction of the CNPR started in 1910 and completed in January 1915 and admits the rest of the statements in this paragraph.

25. In response to paragraph 31, the statements in this paragraph are legal argument, not fact.

26. In response to paragraphs 32 and 33, the statements in this paragraph are legal argument, not fact.

27. In response to paragraph 34, the Crown admits that a DIA Memorandum for the Minister, dated November 18, 1910 referred to a ruling made "some years ago by the Honourable Mister Sifton" that "all applications by Railway Companies for land for Right of Way purposes, etc. should be submitted to the Chief Engineer of Railways and Canals for his certificate, to the effect that the lands applied for were actually required for Railway purposes." The Crown further admits that the DIA Memorandum states that "[i]t now appears that all plans of Railways, acting under a Dominion Charter, require to be approved by the Board of Railway Commissioners…" and recommends that "… the certificate of the Chief Engineer of the Board of Railway Commissioners should be obtained instead of the certificate of the Chief Engineer of Railways and Canals …". The Crown has no knowledge as to whether the reference to "the Honourable Mister Sifton" is a reference to the former Minister of the Interior.

28. In response to paragraph 35, the statements in this paragraph are legal argument, not fact.

29. In response to paragraph 36, the Crown admits that in a letter dated November 25, 1910, the DIA advised the Lytton Indian Agent, EB Drummond ("Drummond"), 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.

The rest of the statements in this paragraph are legal argument, not fact.

30. In response to paragraph 38, the Crown admits that on January 2, 1911 the DIA wrote to Drummond to inform him that "blue prints of plans for the Canadian Northern Pacific Railway" through 14 reserves were forwarded to Drummond under separate cover that same day. The Crown has no knowledge as to whether construction was to start shortly thereafter.

31. In response to paragraph 39, the Crown admits that, on March 7, 1911, DIA Deputy Superintendent, Frank Pedley, sent a telegraph to Sir Donald Mann of the Canadian Northern Railway stating that

> … you will understand of course that if entrance upon Cheam Reserve with consent of Department, but without consent of Indians, which is necessary in this case, would in all probability operate to prevent us in assuring surrender.

The Crown has no knowledge whether Sir Donald Mann was the Vice-President of the CNPR on March 7, 1911.

32. In response to paragraph 40, the Crown admits that a Canadian Northern Pacific Railway Plan ("CNPR") of Location from Boston Bar to Skoonka Creek was

deposited on August 12, 1911. The Crown has no knowledge whether this was the first Plan of Location or if the Plan of Location was surveyed and drawn by Frank Dawson. The rest of the statements in this paragraph are legal argument, not fact.

33. In response to paragraph 41, the Crown admits that the plan of the CNPR's Right of Way shows that, at some points, the Right of Way is in excess of 100 feet as it traverses IR 2. The exact width of the CNPR's Right of Way at various points throughout IR 2 is outside the Crown's knowledge. The rest of the statements in this paragraph are legal argument, not fact.

34. In response to paragraph 42, the Crown admits that, on January 2, 1911, the DIA forwarded blue prints of CNPR plans through 14 reserves, including IR 2, to Drummond. The Crown also admits that, on December 15, 1911, the DIA received a letter from the CNPR forwarding a tracing and two blue prints of the CNPR's final right of way through 14 reserves, including IR 2. The Crown has no knowledge of any correspondence between DIA and the CNPR, dated January 2, 1911, forwarding plans of a Right of Way.

35. In response to paragraph 43, the Crown admits that the CNPR wrote to Drummond on November 2, 1911 enclosing a plan showing the CNPR Right of Way through IR 2 and a cheque for $710.00, "being the amount agreed upon by yourself, the Indians and myself on the ground." The Crown further admits that the Right of Way area is listed in the letter as 23.67 acres, more or less, and that the Right of Way was described with reference to parcels A through F. The rest of the statements in this paragraph are legal argument, not fact.

36. In response to paragraph 44, the Crown admits that, on November 3, 1911, Drummond forwarded to the DIA a CNPR cheque for $2,126.30 "in settlement of valuation of the following reserves which have been gone over by me, in company with the Indians" and the CNPR Right of Way Agent. He also enclosed blue prints. In the covering letter, Drummond listed the amounts to be credited to each band, including $710.00 for IR 2, and requested authority for permission to proceed with

construction on the subject reserves. The Crown further admits that on November 13, 1911, the DIA informed Drummond that: "

> You may permit Canadian Northern Pacific to enter on Kanaka Bar number two, Siska Flat number two, Boothroyd numbers eight and ten and Boston Bar number one, for construction purposes.

37. In response to paragraph 45, the Crown admits that Federal Order in Council ("OIC") PC 1875, dated June 29, 1912, states that the CNPR had:

> submitted plans and profiles showing the location of such railway between Yellowhead Pass and New Westminster Bridge, with the exception of 10 miles in the neighbourhood of Albreda Lake, between miles 417 and 427, which has not yet been located. The Minister submits the said plans and profiles and recommends that the location indicated thereby be approved for subsidy purposes. The Committee concur in the recommendation of the Minister of Railways and Canals and submit the same for approval.

The Crown has no knowledge whether the plans referred to in PC 1875 are the same as the "Dawson Plan".

38. In response to paragraph 46, the Crown at present has no knowledge of the contents of the July 26, 1911 memorandum, due to the illegibility of the copy of the document presently available to the Crown.

39. In response to paragraph 47, the Crown admits that a voucher from Mackenzie, Mann and Co. Ltd, dated October 27, 1911, states: "In full settlement for right of way, Canadian Northern Pacific Railway, across the undermentioned Indian Reserves" including $710.10 for IR 2. The Crown further admits that, at the bottom of the voucher, there is a notation "Received from Mackenzie, Mann & Co Limited, the sum of twenty-one hundred and twenty-six 30/100 …. In full settlement of the above account." The Crown has no knowledge of a letter dated October 27, 1911 to the DIA from Mackenzie, Mann & Co. The rest of the statements in this paragraph are legal argument, not fact.

40. In response to paragraph 48, the statements in this paragraph are legal argument, not fact.

41. In response to paragraph 51, the Crown admits that, on December 7, 1912 Indian Agent Graham ("Graham") wrote to the DIA stating, that he had:

> …gone over the Various Reserves mentioned in company with the Indians interested, and the chiefs, and together we have readjusted the money allotted by the Canadian Northern Railway Company, which I think is satisfactory to all concerned.

The Crown further admits that IR 2 was included in the list of the "various reserves", which Graham enclosed, and that the total payable with respect to the Right of Way through IR 2 was $910.00. The Crown has no knowledge as to whether half of the increased valuation was accountable to higher values paid out to the holders of individual improvements.

42. In response to paragraph 53, the statements in this paragraph are legal argument, not fact.

43. In response to paragraph 56, the Crown admits the facts in this paragraph and further admits that the CNPR ROW agent also stated:

> The arrangements I made were that as soon as the Company were through with their Camp's [*sic*] they were to be left with the Indians to compensate them for rent of the Camp grounds.

44. In response to paragraph 57, the Crown admits that the entries under "149 – Kanaka Indians, BC" in the Auditor General's Report 1912-13 do not include an entry that specifically refers to payment for 230 trees. The Crown has no knowledge as to whether payment was made with respect to the 230 trees in either the 1913-1914 or 1914-1915 fiscal years.

45. In response to paragraph 59, the Crown admits that, on April 9, 1914, the DIA informed the Royal Commission that:

> … as the Canadian Northern Pacific Railway Company is acting under a Provincial Charter a surrender was taken from the Cheam Indians for the right of way required through their reserve. This action was taken prior to the amendment to the Indian Act which rendered the taking of the surrender unnecessary ….

The Crown denies that the DIA stated that "a surrender was required for any right of way lands taken from Indian reserves" in this April 9, 1914 letter.

46. In response to paragraph 60, the Crown admits the first sentence in this paragraph. The Crown further admits that on September 2, 1914, the CNPR wrote to the Royal Commission to advise that, after reviewing the right of way plans sent to the CNPR by the BC Department of Railways, and in comparing them with the CNPR's current plans, the CNPR found that the alignments and widths differed. The Crown further admits that the CNPR stated that the plans submitted to the Royal Commission were tentative, "until such time as they were adjusted and the Right of Way required for slopes decided on", and CNPR was having new plans prepared, showing the final alignment and final Right of Way widths required through the Indian reserves in the Railway Belt.

47. In response to paragraph 62, the Crown admits that, on September 10, 1914, the DIA advised the CNPR that issuance of patents for the rights of way were being held in abeyance until "final action has been taken by the Provincial Government". The Crown has no knowledge whether the DIA was referring to the "certification of the plans". The Crown further admits that, on September 26, 1914, the DIA informed the Royal Commission that no further action would be taken by the DIA until the CNPR's final plans were received and the necessary action had been taken by the Royal Commission.

48. In response to paragraph 65, the Crown admits that, on August 2, 1916, the CNPR sent to the Royal Commission a "…list of acreages taken from the Indian Reserves in B.C., for rights-of-way for the Canadian Northern Pacific Railway" and stated that:

> [o]ur right-of-way agent, Mr. D.J. McDonald, says in his letter accompanying this list that "on the final surveys of the reserves mentioned therein it may be found, on account of revisions made after these areas were determined, that slight changes may occur in some instances."

The Crown further admits that IR 2 is included in the list, with CNPR Right of Way acreage of 23.67 acres. The rest of the statements in this paragraph are legal argument, not fact.

49. In response to paragraph 66, the Crown admits that the Royal Commission Minutes of Decision for the Lytton Agency - Kanaka Bar Tribe, dated March 15, 1915, confirmed IR 2 as fixed and determined with an acreage of 118 acres, "reduced to 94.25 by allowance of C.N.P.R. Co.'s right-of-way of 23.75 acres".

50. In response to paragraph 67, the Crown admits that, in July 1916, the Royal Commission published a report, and the description for the "Lytton Agency" notes the right of way allowances granted to the CNPR. The Crown has no knowledge as to whether CNPR Chief Engineer White had sent the Royal Commission a revised list of lands taken for right-of-way purposes. If this revised list was sent, the Crown has no knowledge as to whether or not it noted any changes on IR 2. The Crown further has no knowledge whether the table attached to the Royal Commission's report shows revisions of right of way deductions. The Crown further admits that, on August 2, 1916, the CNPR sent the Royal Commission a list of acreages taken from Indian Reserves for the CNPR Right of Way. Kanaka Bar IR 2 is listed with CNPR Right of Way acreage of 23.67 acres.

51. In response to paragraph 68, the Crown admits that *An Act to Incorporate Canadian National Railway Company and Respecting Canadian National Railways*, Ch. 13, 9-10 Geo V, was assented to June 6, 1919. The rest of the statements in this paragraph are legal argument, not fact.

52. In response to paragraph 69, the Crown admits that on January 23, 1933, the DIA requested an OIC authorizing the sale of 23.19 acres in IR 2 to the CNPR for a Right of Way. The Crown has no knowledge as to whether the CNPR requested this OIC. The Crown admits that on January 26, 1933, the DIA informed the CNR that patents had not been issued for the CNPR main line through five reserves in the Lytton Agency, including IR 2.

53. In response to paragraph 70, the Crown admits that the DIA prepared a description for patent, dated February 15, 1933, for the CNPR Right of Way, 23.19 acres in area, in IR 2, as shown on DIA Plan RR 1125A. The Crown admits that Letters Patent, dated February 27, 1933, conveyed 23.19 acres through IR 2 to the CNPR. The Crown admits the remaining statements in this paragraph.

54. In response to paragraph 71, the statement in this paragraph is legal argument, not fact.

55. In response to paragraph 72, the statements in this paragraph are legal argument, not fact.

56. In response to paragraph 73, the Crown admits that from December 19, 1883 to 1930, IR 2 was within the Railway Belt. The rest of the statements in this paragraph are legal argument, not fact.

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

The Creation of IR 2

57. A sketch and survey dated May 28, 1861 by Sapper James Turnbull set out a colonial reserve at "Kernacker Flat" ("Colonial Reserve").

58. Sapper Turnbull's sketch of the Colonial Reserve states that it is situated approximately 8.5 miles from Lytton and that the land set aside as the Colonial Reserve was occupied by the Band "both summer and winter".

59. Commissioner Sproat confirmed IR 2, including the Colonial Reserve, in a Field Minute, dated June 18, 1878, as follows:

> The old reserve at Kanaka Flat on the left bank of Fraser River is confirmed 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 ….

60. WS Jemmett surveyed the boundaries of IR 2 and the other Kanaka Bar reserves by survey, dated July 28, 1885.

61. The table "Confirmation of Reserves – Lytton Agency" from the Final Report of the Royal Commission, dated March 15, 1915, confirmed IR 2 with acreage of 118 acres "reduced to 94.25 by allowance of C.N.P.R. Co.'s right-of-way of 23.75 acres".

CNPR Construction on Indian Reserves

62. On March 31, 1910, the DIA requested the New Westminster Indian Agent to note in his valuation that a railway right of way on the foreshore in front of the Mission Reserve would cut off access from the Reserve to the water and to indicate what in his opinion may be necessary, "particularly for the convenience of the Indians". The DIA observed that the Indigenous peoples' interest in the foreshore is very great "in any case" and requested that

> [i]n this and similar valuations it is requested that you should confer with the Indians [*sic*] owners, with the view of getting their concurrence to such reasonable and proper valuations that you may arrive at.

63. The DIA wrote to Lytton Indian Agent Drummond on November 25, 1910, explaining the prohibition of entry on the Cheam Reserve for construction purposes and stating that the DIA had "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" and that this ruling must be "adhered to strictly". The DIA further informed Drummond that the Canadian Northern Railway [sic] was operating pursuant to a Provincial Charter and that

> [i]f the Railway is operating under a Dominion Charter, land in an Indian Reserve can be taken without the consent of the Indians, but with the necessary consent of His Excellency in Council. If a Railway is operating only under a Provincial Charter the consent and surrender of the necessary lands is required from the Indian band interested.

64. On December 2, 1910, with regard to Canadian Northern Railway right of way plan through the Squia-ala Indian Reserve, the DIA requested the New Westminster Indian Agent to

> remember that in all these valuations the Indian Council and the individual Indians interested are to be consulted and you should, if possible, obtain their concurrence with such reasonable valuations as you may arrive at ….

65. On December 14, 1910, the DIA informed the Inspector of Indian Agencies that railway companies did not require the DIA's "special permission" to enter Indian reserves for the purposes of surveying, but that it was to be understood that on no account was entry to be allowed on an Indian reserve for construction purposes without express advice from the DIA.

66. On December 15, 1910, the DIA informed the CNPR that it did not appear that the CNPR was operating under a Dominion Charter and, if that was the case, the land required could not be taken without formal consent of the respective Indian bands, and the consent required to be given under formal surrender.

67. On March 2, 1911, the DIA wrote to CNPR with respect to the Cheam Indian Reserve, stating that surrender forms had been sent to the Lytton Indian Agent with instructions and that

> [w]hen the surrender has been duly executed and on your acceptance and payment of the terms arranged and also on payment of the costs that the Indian Agent had incurred, entry on the said reserve will be allowed for construction purposes and until the said action as above indicated is taken trespass on the reserve will not be allowed.

68. On October 4, 1912, the DIA informed J.A.J. McKenna regarding right-of-way applications across Indian reserves, referring to the Kamloops Indian Reserve, that:

> [w]hen the plan and application is received the usual instructions will be sent to the Indian Agent …. [T]hese instructions are to the effect that he shall consult the Indian Council and each Indian occupant interested, and endeavor to arrive with them and the Railway Company's Agent at value that shall be mutually satisfactory.

69. On May 15, 1913, the DIA informed the CNPR Right of Way Agent that, regarding land in Kamloops IR 1 required for railway purposes,

> …if lands are required for legitimate Railway purposes they may be taken under the authority of an Order in Council, that is to say, without a formal

> surrender from the Indians although it is the policy of the Department to consult the Indians as to compensation for lands to be taken for any purpose.

The DIA further stated that it was not permissible to deal with Indians in connection with the sale of any portion of their lands.

> You should forward to the Department a plan showing the lands desired together with your offer of the sum you are willing to pay for the same; the matter will then be dealt with by the Department.

70. On April 9, 1914, the DIA informed the Royal Commission, referring to the "Cheam Indians", that

> … as the Canadian Northern Pacific Railway Company is acting under a Provincial Charter a surrender was taken from the Cheam Indians for the right of way required through their reserve. This action was taken prior to the amendment to the Indian Act which rendered the taking of the surrender unnecessary ….

CNPR Right of Way Through IR 2

71. On November 2, 1911, the CNPR Right of Way Agent applied to Drummond for a 23.67-acre Right of Way through IR 2 and enclosed plans, describing and showing the Right of Way through IR 2, as well as a cheque for $710.00, "being the amount agreed upon by yourself, the Indians and myself on the ground."

72. On November 3, 1911, Drummond sent to the DIA a cheque for $2,126.30 for the CNPR Right of Way through five Indian reserves, including $710.00 for IR 2. Drummond also requested authority for permission to proceed with construction on these reserves as the CNPR were waiting to commence work.

73. On August 8, 1912, Graham informed the DIA 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.

74. On August 19, 1912, in reply to a letter from the Inspector of Indian Agencies, dated July 8, 1912, regarding the complaint of the Indians from Cheam to Siska that they had not received money for the CNPR Right of Way, the DIA informed the

Inspector that payments had been received for the Right of Way, including for IR 2, and that the various sums had been credited to the Ottawa accounts of the interested Bands. The DIA requested that the Inspector place the matter of revaluation of the Right of Way with the new Indian Agent Graham to submit detailed valuation reports showing if any portions of these sums should be paid to the Indians [*sic*] for their improvements "in order that any sums due to the Indians may be paid to them".

75. On December 20, 1912, a DIA memorandum to the Deputy Minister confirmed receipt of Graham's revaluation of the CNPR Right of Way through Lytton Agency Reserves. Graham increased the value of the IR 2 Right of Way, 23.67 acres in area, from $710.00 to $910.00, including allocations to five Kanaka Bar members.

76. In September 1913, Chief Charlie wrote to the CNPR, stating that the Band would not charge the CNPR for the camp and use of the water and the wagon road, but that the Band would charge the CNPR $90.00 for 230 trees that had been cut down.

77. On September 26, 1913, the CNPR replied to Chief Charlie that it was the CNPR's understanding of the arrangements made between the CNPR Right of Way Agent and Drummond that the CNPR were to have use of the camping ground and such trees as necessary for the construction of the camp and for firewood free of charge and, in return, the Band were to receive the camp buildings when the CNPR had finished with them.

78. On September 29, 1913, in response to the CNPR letter dated September 26, 1913, the Right of Way Agent responded that he had made no arrangements for firewood or for timber to build houses. The arrangements he had made were that as soon as the CNPR were finished with their camp, they were to leave the camp with the Indians [*sic*] in order to compensate them for rent of the camp grounds.

79. On September 1, 1914, the B.C. Department of Railways ("B.C. DOR") explained to the Royal Commission that the delay in returning the plans of the Indian reserve [*sic*], submitted for the certificate of the B.C. Minister of Railways, had been due

to the fact that those plans, sent to CNPR for revision and correction, had not been returned to the B.C. DOR. As soon as they were received, the B.C. DOR would send them, with the necessary certificate attached, to the Royal Commission.

80. On September 2, 1914, the CNPR informed the Royal Commission that the 23 plans of the CNPR Right of Way through Indian Reserves between Hope and Kamloops, sent to the CNPR by the BC DOR, were quite different from the current CNPR Right of Way plan. The plans, which the CNPR had sent to the Royal Commission, had been merely tentative plans until such time as the CNPR had the line adjusted and Right of Way required for slopes decided on. The CNPR was having new plans prepared showing final alignment and final Right of Way widths required through the Indian reserves in the Railway Belt and would send them to the Royal Commission to replace the plans previously deposited.

81. On September 4, 1914, the BC DOR, as explanation to the Royal Commission for the delay in returning the CNPR Right of Way plans, referred to the CNPR's letter dated September 2, 1914, which stated that the CNPR Right of Way plans submitted to the DIA had been merely tentative until the final line was decided and the required widths settled and the CNPR was having new Right of Way plans prepared for submission to the DIA.

82. On September 10, 1914, the DIA informed the CNPR that the issue of Patents for B.C. Indian Reserves lands, required for the CNPR Right of Way, were being held in abeyance until final action had been taken by the Provincial Government and the DIA noted that the final plans "may vary from the preliminary ones". The final adjustment of compensation was to be made on the receipt of the CNPR final plans and the Patents issued in accordance with the final plans."

83. On September 19, 1914, the CNPR requested Right of Way Agent McDonald to have the land surveyors prepare new plans of the CNPR Right of Way through each Indian reserve, as the ones on file with the DIA were now out of date.

84. On September 26, 1914, the DIA informed the Royal Commission that it was the intention of the CNPR to file final plans showing the Right of Way through the Indian Reserves between Hope and Lytton and that the DIA would take no further action until the final plans had been received and after the necessary action had been taken by the Royal Commission.

85. On September 28, 1914, the CNPR informed the Royal Commission that the CNPR had decided to postpone the sending to the DIA revised plans of Right of Way through the Railway Belt and had requested that the DIA not issue any more deeds until such time as the DIA have received revised plans and descriptions of the CNPR final line.

86. On July 24, 1916, the Royal Commission informed the CNPR that it was very difficult to balance "areas of certain Indian Reserves of the Lytton Agency traversed by your Railway". The acreages as shown by the Official Schedule of Reserves and by the Plans of Survey did not check in numerous instances with the acreages by the Agent for the district and upon which valuations are based by him. The Royal Commission further noted that the Secretary and Indian Agent Graham had gone over the valuations in Victoria and requested that the CNPR furnish right-of-way acreage acquisitions, including for IR 2.

87. On August 2, 1916, in reply to the above July 24, 1916 letter from the Royal Commission, the CNPR provided the Royal Commission with a "list of acreages taken from the Indian Reserves in BC for right-of-way purposes for Canadian Northern Pacific Railway". The CNPR further stated that:

> [o]ur right-of-way Agent, Mr. DJ McDonald, says in his letter accompanying this list that 'on the final surveys of the reserves mentioned therein it may be found, on account of revisions made after these areas were determined, that slight changes may occur in some instances.'

88. On April 14, 1924, the CNR sent to the DOI, Indian Lands Branch, RR 1125A Plan No. A-501, showing the CNR's Right of Way across IR 2. The total acreage of the Right of Way was 23.19 acres, slightly less than the 23.67 acres that had been previously noted as required for the Right of Way.

89. On February 3, 1933, the transfer of the 23.19 acre Right of Way on IR 2 was confirmed in favour of the CNPR by Federal OIC. On February 27, 1933, Letters Patent were issued to the CNPR for the 23.19 acre Right of Way on IR 2.

VI. Relief (R. 42(f))

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

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

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

VII. Communication (R. 42(g))

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Dated: September 13, 2019

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