

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL

KANAKA BAR INDIAN BAND

SPECIFIC CLAIMS TRIBUNAL	
F I L E D	TRIBUNAL DES REVENDICATIONS PARTICULIÈRES July 15, 2019 Guillaume Phaneuf
Ottawa, ON	1

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
Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
Fax number: (613) 954-1920

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 Minister 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 14, 1998 the Band filed a Specific Claim in respect to the Unauthorized and Unpaid Taking of right of way for C.N.P.R. through Kanaka Bar I.R.1A (the “Claim”), with the Specific Claims Branch of the Department of Indian Affairs and Northern Development Canada.
4. The Claim relates to the unlawful use of the current Canadian National Railway Right of Way (the “CNR Right of Way”) within the Band’s Indian Reserve 1A (“IR 1A”) consisting originally of 30.41 acres and subsequently an extra 0.126 acres taken in 1957, which has operated without lawful authorization, and for which the Band has not received any compensation.
5. By letter dated November 24, 2008, the Band was asked to provide the Specific Claims Branch with additional documents, information and arguments in support of the Claim.

6. On or about May 25, 2009 the Band provided additional legal argument to the Specific Claims Branch.

7. In a letter dated July 25, 2011, the Department of Indian Affairs and Northern Development stated:

...it is the decision of the Minister of Aboriginal Affairs and Northern Development not to accept for negotiation the Canadian Northern Pacific Railway (CNPR) Right-of-Way on IR 1A 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))

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

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

9. 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))

10. 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.
11. 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.
12. The lower benches, 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. At least two separate fishing stations, each with circular cultural depressions scatters of prehistoric basalt flake tools and manufacturing debris, have been recorded. Traditional fishing sites are still being used by community members at this location today.
13. The CNR is the successor to the Canadian National Pacific Railway ("CNPR") which was consolidated into the Canadian National system in 1919.
14. 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.

15. Gold was first "discovered" along the Fraser River in the 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. It was to cater to the needs of the gold seekers and to encourage settlers in their wake that the first road to the Interior was built, known as the Cariboo Wagon Road. The Cariboo Wagon Road followed the banks of the Fraser through Kanaka Bar to Lytton and continued along the banks of the Thompson River.
16. 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

17. 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.
18. 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."
19. 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

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

Allotment of Reserve Lands

22. Commissioner Sproat visited the Kanaka Bar people on June 18, 1878. 106 people lived there. 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. Accompanying Sproat's Minutes of Decision were his Field Minute or Instructions to Surveyor.
23. Sproat confirmed and extended the original reserve on the Cariboo Wagon Road as far as the boundary of an adjoining preemption, and allotted three other reserves. In total he set aside four reserves at Kanaka Bar:

Nekliptum I.R. 1

Kanaka Bar I.R. 2

Pegleg I.R. 3

Whyeek I.R. 4

24. Sproat's accompanying sketch of Kanaka Bar shows the position of the reserves, the old trails, the adjoining pre-emptions and fishing areas.
25. On June 18, 1878, Sproat allotted lands to the Band described along the shoreline of the Fraser (the "Reserve Lands") when he was also careful to assign to the Band "their old right of fishing".
26. The Reserve Lands included the lands which are now contained within the CNR Right of Way.
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 24th 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" of which the Band is part of:

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. ...
29. By 1910 the Niha7kápmx had sent numerous petitions to Ottawa about the small amount of cultivable land that had been reserved for their use and the lack of water recorded for them on these arid lands which would yield nothing without irrigation.
30. The amount of arable land allotted by the JIRC to Indian Bands including the Band, along the Fraser and Thompson Rivers, was inadequate. As a result,

members of these Bands continued to use and improve parts of their traditional territories which were adjacent to their reserves.

Survey of IR 1A

31. In 1909 Reverend John McDougall was commissioned by the Department of Indian Affairs ("DIA") to visit and report on the Indians and reserves within and to the south of the Railway Belt.
32. In his 1910 report, McDougall reported that a number of these Indians had met with him at Lytton and were supported by the resident Anglican missionary, Archdeacon Pugh, in their request that they be given title to the lands which they had improved.
33. At McDougall's request, Archdeacon Pugh compiled a list of "Lands squatted on by the Thompson Indians in the vicinity of their Reservations". Included in this list is the following entry:

Paul Wallace and Jimmy Spike

Unsurveyed District, 160 acres near 47 Mile Post old Cariboo Road. Adjoining Kanaka. Bar I.R. No. 2, Sec. 24, T. 15, R. 27, W.6M.
34. In response to McDougall's recommendations, on February 3, 1910, the Secretary of the DIA requested the Department of the Interior to "reserve from sale or settlement" the parcels of land listed by Archdeacon Pugh until they had been surveyed. In April 1910 Dominion Land Surveyor A.W. Johnson was given instructions by Indian Affairs to "survey as Indian Reserves" the twenty-six parcels in question.
35. Indian Agents were also notified of Johnson's proposed surveys and instructed to assist as much as possible.

36. By April 5, 1910, the Department of the Interior had issued instructions to dominion land agents in reference to the lands Johnson was instructed to survey as Indian reserves, "...not to grant entries on, or otherwise dispose of [the] lands..."
37. Despite these instructions, CNPR survey and construction teams were not prevented from entering the Band's occupied lands within IR 1A.
38. On April 16, 1911, the DIA Secretary wrote to the Department of the Interior confirming that Surveyor Johnson had been asked to survey the plots on McDougall's recommendation. He stated that it was intended to have all the parcels surveyed by Johnson "set apart as Indian Reserves" (hereafter referred to as the "New Reserves").
39. In July 1911, IR 1A was surveyed by Surveyor Johnson at 170.93 acres ("Johnson's Plan"). Johnson reported that this land was irrigated by ditch from Momeylun Creek, but that the Indians intended to build a ditch from Nekliptum Creek. He recommended that a water record be granted from Nekliptum and Siwash Bar Creeks.
40. The acreage of IR 1A remained constant and did not change between Johnson's Plan in 1911 and a later confirming Minute of Decision of the McKenna-McBride Commission in 1914.
41. At all times, IR 1A contained the Reserve Lands allotted by Commissioner Sproat in 1878.

Location of CNPR Line and Right of Way through Fraser Canyon

42. *The Act to Incorporate the Canadian Northern Pacific Railway Company* was passed by the BC Legislature on March 10, 1910. This legislation 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 17th January, 1910 between the Crown as represented by B.C. Premier and the Company.

43. 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".
44. 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.
45. On February 2, 1911, CNPR Right of Way agent F.J. Coulthard wrote to Drummond to arrange a meeting. He understood that the surveys of Indian Reserves in the Lytton Agency were complete and wanted to have the right of way "fixed up". He telegraphed to the same effect on February 11, 1911.
46. About this time, W.C. Cowell took over the position of Dominion Land Agent at Kamloops. He reported on May 8, 1911, on his first visit to the Lytton office where he found that the previous agent, McKenzie, had left "an unsatisfactory record" and especially in regard to the Nlha7kápmx "who have either been encouraged to or deliberately squatted on vacant and unsurveyed Dominion Land". Cowell wrote two long memorandums in these first days of his new job to S. Maber, Superintendent B.C. Lands, Department of the Interior, claiming the New Reserves taking huge tracts of the best lands in the Railway Belt and "good land in the Railway Belt is scarce enough without giving it all away to Indians".

He stated that he had heard of individual Niha7kápmx having areas of 720 acres surveyed for them. He suggested "the Indian Agent should have some instructions to order them back to the reserve."

47. On May 9, 1911, Cowell wrote that he had just found the letter of April 5, 1910 reserving these lands, referring to the New Reserves, from preemption which, he felt should have been sent to the Dominion Land Agent of New Westminster because most of the land was there. He stated that the lands had therefore "not been reserved as far as this district was concerned as we had no registers dealing with the said land and it was presumed similar instructions were sent to Mr. McKenzie ... [but] when the records were transferred, no mention was made of Maber's instructions...no harm was done because no entries have been granted". However, Cowell went on to falsely repeat a rumor that one settler had been deprived of lands that he had entered in 1906 - and the land instead given to the Niha7kápmx.
48. CNPR surveyors, Dawson and Christie, had apparently contacted the Surveyor General's office with regard to the what would later be known as the CNR Right of Way through the New Reserves. In August 1911, the Surveyor General responded to their telegrams that DIA surveys of New Reserves "are not complete and no decision has been reached as to whether the parcels are to be set apart as Indian reserves or not". In fact the surveys were complete, but through Cowell's misinformed memos of May 8 and 9, 1911, and Cowell's inaction on the request for further investigation and report, there was a delay in any confirmation or action by the Department of the Interior of the New Reserves including IR 1A.
49. 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 plan does not show the CNR Right of Way as it was actually constructed by the CNPR.

50. Surveyor Johnson's remaining plans of the New Reserves were sent in on December 19, 1911. He stated in his covering letter that the CNPR "are constructing through several of those reserves, but there is no certainty about their right of way at present, so I did not tie to their work". He offered to complete the reserve surveys by adding plans and descriptions of the various parcels taken by the CNPR as he expected to have them soon, given that he was doing work for the CNPR.
51. The Canadian National Railway Company was incorporated on 6th June, 1919. The Federal Government had acquired control of the Canadian Northern Railway 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*.

Free Rights of Way

52. On December 2, 1911, Order in Council PC 2743 was passed. It referred to 10 submissions from the Minister of Interior regarding "several colonization Railway Companies" applying for free rights of way through unoccupied Crown Land in the B.C. Railway Belt. The recommendation was that "in accordance with the practice in similar cases, the land occupied by the right of way and station grounds of the said railway over such unoccupied lands, which are at the disposal of the Crown, may be reserved for and granted, ... free of charge and the letters patent therefor be issued in the ordinary way".
53. On April 15, 1912 the Assistant Secretary of the Department of the Interior wrote to the CNPR right of way agent, D.J. McDonald, referring to various

communications sent to Department of the Interior from the Dominion Lands Agent at Kamloops regarding lands desired by CNPR for purchase. He referred to Order in Council PC 2743 and enclosed a list of lands across which the CNPR "will be granted free right of way in accordance with the above O/C". He referred to his letter of April 13th setting out the procedures for such a grant. He wanted plans of the located line and the constructed line as deposited with the registrar. The list of land "against which free right of way has been noted" included the area surveyed as IR 1A. It was another ten years before they received the plan of the "constructed line" requested.

54. At the time Order in Council PC 2743 was passed, IR 1A including the Reserve Lands through which the CNR Right of Way traverse were occupied by the Band.
55. Order in Council 1875 dated June 29th, 1912 was passed approving Dawson's location Plan 5641 showing the CNPR through Boston Bar and Skoonka Creek in order to pay new subsidies to the CNPR.
56. N. Cote of the Lands Patent Branch then wrote to the CNPR right of way agent. He wanted a plan of the whole line. In the meantime, however "reservation for the [C.N.P.R.] right of way has been noted against all the lands in the enclosed list".
57. On September 2, 1914, the Chief Engineer for CNPR, T.H. White, wrote to the Secretary of the McKenna McBride Royal Commission (the "Royal Commission") that Gamble had forwarded 23 plans of CNPR right of ways through Indian reserves between Hope and Kamloops but "comparing these plans with our present right of way plan, I find that they are quite different as far as alignment and right of way widths are concerned". He stated that "these plans which were sent to you were merely tentative plans until such time as we had the line adjusted and right of way required for slope decided on". He stated that new

plans were being prepared “showing final alignment and final right of way width required through the Indian Reserves in the Railway Belt”, which should be forwarded when complete.

McKenna-McBride Commission Visit

58. The Royal Commission began to consider the New Reserves in December of 1913. The DIA surveyor drew up a list of reserves that been acquired by the Dominion, by purchase, exchange or otherwise since the JIRC surveys. This list included "reserves (which) have been selected in the Railway Belt", but not yet confirmed, including IR 1A.

59. Around this time, the Indian Agent at Lytton, H. Graham, wrote to his superior, the Assistant Deputy and Secretary of DIA altering him to the fact the unsatisfactory state of affairs for the Band by informing that that the CNPR had “taken a right of way through some of these and the Indians have been unable to obtain any compensation on account of his having or not having been gazetted as an Indian Reserve.”

60. On November 14, 1914, the Royal Commission met with Chief Charlie and other members of the Band. In his opening address Chief “Charlie” told the Commissioners:

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

61. Hans Wallace testified regarding IR 1A. He had been cultivating there for 18 years. Although the surveyor had described the land as densely timbered, it was

with second growth, said Wallace, which had almost all been used up for firewood. He “borrowed” water from Kanaka Bar IR 2 “but there was only enough to irrigate 10 ac. on IR 1A”.

62. Jimmy Spike testified about the land that he cultivated on IR 1A. He had worked on it for about four years before the surveyor came around. He grew timothy and hay, and had put in 40 apple trees, which he also irrigated with water from Kanaka Bar IR 2. He did not consider that any more land could be farmed on IR 1A even if there were enough water.
63. The DIA Secretary wrote to the Royal Commission Secretary, forwarding Johnson's plans and requesting the Royal Commission to investigate whether the parcels should be set aside as Indian reserves. He added that the Commissioner for Lands in B.C. had recommended that the Royal Commission investigate them in order to have the benefit of their advice and information before getting the Orders in Council to set them aside as reserves. He urged haste as the lands were useless without water, but the residents could not apply for water until the land had been granted.
64. On December 1st, 1914 the Royal Commissioners met with the Lytton Indian Agent to go over applications for the lands surveyed by Johnson in 1910/1911. Graham recommended that confirmation of IR 1A even though “the majority of the land was either taken by the C.N.P.R. or destroyed by it”. He stated that the residents were not compensated at all. The Commissioners noted that they would write to the DIA for compensation for the Nlha7kápmx for the CNPR right of way through their reserve.
65. IR 1A as surveyed by A.W. Johnson at 170.93 acres was recommended as a reserve, being cleared and used for grazing, with an area cultivated. There was no mention of the large area taken for right of way along the banks of the Fraser.

66. The Royal Commission Interim Reports confirming the New Reserves were dated December 3, 1914. Interim Report No. 62 confirmed IR 1A as shown on Johnson's Plan. Plan BC 874 was stamped with the Commission's Confirmation Certificate. Minutes of Decision by the Royal Commission confirming the New Reserves was dated December 3, 1913.

67. Order in Council P.C. 2544 was passed on October 17, 1918. It referred to Order in Council PC 2169 of September 17, 1889, allowing lands to be withdrawn from the Railway Belt and set aside as government reserves. It ordered that the lands described below be so withdrawn and "set aside as Indian Reserves". The lands described include IR 1A, containing 170.93 acres as surveyed by Johnson in 1911 and recorded in the Department of the Interior under Plan No. 18101. Five of the twenty-two reserves mentioned were traversed by the CNPR. However, the above Order in Council makes no reference to the route of the CNPR or to any alienation of any right of way for the CNPR through these reserves.

68. The Canadian National Railway Company was incorporated on June 6, 1919. The Dominion Government had acquired control of the Canadian Northern Railway Company and of the various constituent and subsidiary companies comprising the Canadian Northern System. These included the CNPR which became known as the CNR. By this Act, the *Government Railway Act* was to be applicable to the CNR.

69. The Minutes of Decision of the Royal Commission on Indian Affairs in B.C., which included confirmation of Kanaka Bar IR 1A at 170.93 acres, were approved by the Province of B.C. on July 26, 1923, by Order in Council # 911. They were approved and confirmed by the Federal Government on 19th July, 1924, by Order in Council P.C. 1265.

70. The first definitive plan showing the CNR Right of Way through the Fraser Canyon was Plan 350991 A520 (“Plan 350991”), dated January 5, 1924, six years after the final confirmation of IR 1A.

Excessive Width

71. Plan 35099 discloses land taken by the CNPR/CNR in excess of the width required for railway purposes. There is no evidence that DIA took any precaution of requiring independent certification for whether the excessive width was necessary. There is no explanation given by the DIA as to why the CNPR/CNR was able to obtain a right of way in excess of that permitted by statute.

Conveyance of Railway right of way through Kanaka Bar IR 1A to CNR with no authority or compensation

72. On March 22, 1929, DIA's Scott and Ditchburn met with Provincial representatives Cathcart and Bass to discuss issues arising from the proposed transfer to the Province of the Railway Belt land in so far as they affected Indian reserves. The resulting agreement was to except the Railway Belt reserves from the transfer.
73. For the next two years correspondence focused on these issues. The Scott/Cathcart Agreement of 1929 was passed as Order in Council PC 208 on February 3, 1930. The attached Schedule of Indian reserves to be excepted from the transfer included IR 1A at 170.93 acres, as confirmed by Order in Council 2544 on October 17th, 1918.
74. On March 5, 1930 Letters Patent were issued to the CNR for possession of lands comprising the CNR Right of Way through lands described according to the Township Plans, but in fact these lands comprise part of IR 1A. The Letters Patent were signed by officers of the Department of the Interior in Ottawa. Lands described as issued to the CNR through IR 1A amount to 30.41 acres.

75. According to the Reserve General Register of DIA, the acreage of IR 1A has been reduced only by the TransCanada Highway and an extra 0.126 acres taken for extra CNR right of way in 1957. There is no mention of any alienation of 30.41 acres from the original 170.93 acres and according to DIA records; there has been no such taking.
76. The Band has never surrendered the Reserve Lands to the Crown. The Band has never received compensation for the CNR Right of Way though IR 1A.

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

77. This claim is based on the Crown's breach of its common law fiduciary duty and legal obligation under the *Indian Act* for allowing an excessive right of way through IR 1A, failing to ensure fair market compensation was paid by CNR at the time it began to use the Reserve Lands as a right of way, and failing to obtain a surrender for sale or lease from the Band.
78. 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

79. The Honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal interest.
80. 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.

81. 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 1A vulnerable to the adverse exercise of Canada's discretion. Canada's fiduciary duty arose at the outset of the reserve creation process and continued during the exercise of its discretionary control until the reserve creation process was concluded.

Fiduciary Duty during the Reserve Creation Process

82. Prior to the acquisition of a legal interest in land that is subject to the reserve creation process, the Crown's *sui generis* fiduciary duty is to act with respect to the interest of Aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regards as the best interest of the beneficiaries.
83. During the reserve creation process, the Crown had fiduciary obligations of loyalty, good faith, full disclosure and ordinary prudence in the discharge of its mandate to act in the best interest of the Band.
84. The Crown had a fiduciary duty to diligently advance the interest of the Band in IR 1A during the reserve creation process.
85. Diligence called for care in the identification of land to be reserved by the Crown for the use and benefit of the Band. It was accepted by the Crown that land would be set apart for the Band at its habitual and historic places, and would be sufficient in quantity and quality to provide for the reasonable needs of the Band.

86. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. The Crown did not act diligently during the reserve creation process to secure the Band's interest in IR 1A and the Reserve Lands, and did not meet the standard of conduct required of a fiduciary. As a result of interdepartmental wrangling between the Department of the Interior and DIA, the Band's interest in the Reserve Lands was *de facto* unlawfully alienated.

Provisional Reserve

87. On June 18, 1878 Sproat had allotted the Reserve Lands to the Band when he described the shoreline of the Fraser at the place which is now included as IR 1A. At this time the land allotted to the Band in 1878 by Commissioner Sproat was, at a minimum a provisional reserve.
88. Alternatively, IR 1A became a provisional reserve in July of 1911 when it was surveyed by A.W. Johnson at 170.93 acres. In either case, IR 1A was a provisional reserve before the first Plan of Location of the CNR Right of Way was deposited on August 22, 1911, and well before the first definitive plan showing the CNR Right of Way, Plan 350991, dated January 5, 1924.

Fully Constituted Indian Reserve

89. IR 1A became a reserve within the meaning of that term in the *Indian Act* on October 17, 1918, the date on which IR 1A was removed from the operation of Dominion Lands Regulations for the Railway Belt as land reserved for Indians by Order in Council P.C. 2544, and the administration and control of IR 1A was transferred from the Department of the Interior to the DIA. Prior to that time, Canada owed to the Band at least the basic fiduciary obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the

subject matter, and acting with ordinary prudence with a view to the best interest of the Band.

90. As the Reserve Lands were part of the traditional territory of the Band, the Crown owed a high standard of fiduciary duty and care in the present matter, including a duty to preserve and protect the Band's interest.
91. 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 Reserve Lands within the CNR Right of Way by the CNR would have on its use of the land and access to its fishing stations.

Cognizable Interest

92. As the Band was in occupation of IR 1A and the Reserve Lands before and after both the allotment by Sproat and the survey by Johnson, its interest was substantial and practical. The Band's interest in IR 1A and the Reserve Lands was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation. The Band's interest in IR 1A and the Reserve Lands 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

93. On October 17th, 1918, the date on which administration of IR 1A passed to the DIA under the *Indian Act*, at the latest, Canada's obligations expanded to include the protection and preservation of the Band's interest in IR 1A and the Reserve Lands. As a fiduciary, the Crown was also obligated to ensure that it did not let

the public interest in the building of the CNR supersede the Band's interest in its lands. The Crown breached its legal obligations under the *Indian Act*, RSC 1906, c 81 including, but not limited to section 48, when it allowed the CNR Right of Way through IR 1A and the Reserve Lands.

94. Once IR 1A and the Reserve Lands came under the *Indian Act*, the duty of the Crown was to enforce the protective provisions of the *Indian Act* and preserve the Band's interest in the reserve from exploitation. If expropriation was necessary to establish a proprietary interest in the CNR, 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.
95. As IR 1A had become an *Indian Act* reserve on October 17th, 1918, and no Order in Council was ever issued authorizing the sale or lease to or any form of occupation by the CNPR/CNR over the Reserve Lands, the Crown's *de facto* alienation of the Reserve Lands to the CNR was made without statutory authority within the meaning of the term in the *Specific Claims Tribunal Act*, paragraph 14(1)(d).
96. The Crown had a fiduciary duty to protect the Band's cognizable interest in IR 1A from alienation and the forsaking the interests of all others in favour of the Band's interest in IR 1A and the Reserve Lands.

Fiduciary Duty and Competing Interests

97. 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 cognizable interest of the Band to its provisional reserve.

98. The Reserve Lands were in the Railway Belt which were deemed transferred to the Dominion on December 19, 1883. From December 19, 1883 to 1930, the Reserve Lands were 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.
99. From 1883 until 1930, the federal government had both the legislative and proprietary jurisdiction necessary to make decisions about the lands within the Railway Belt, including the lands within IR 1A. Canada had the power to create IR 1A as a reserve without reference to the provincial government's consent or co-operation. The Railway Belt provided a unique opportunity for the federal government to fulfill the constitutional obligations found in clause 13 of the *Terms of Union, 1871*, and assume without any hindrance the trusteeship and management of lands reserved for the Indians.

Powers of the CNR

100. The Canadian National Pacific Railway Company 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 CNPR with the necessary power to carry on business within the Province.
101. 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 Canadian Northern Railway. The Canadian Northern Railway 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. The Provincial Government in return agreed to convey, by free grant, rights of

way insofar as they extend through vacant Crown lands and are necessary for railway lines and stations.

102. 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 (Section 33(1) and mandatory procedures for the expropriation of land for right of way and station purposes (part VII).
103. 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).
104. 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.
105. The *Railway Act*, S.C. 1919, c. 689, s. 192 and the *Railway Act*, R.S.C. 1927, c. 170, s. 192 read identically.
106. 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.

107. 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 five 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.
108. Provisions of the applicable *Indian Act* provided that prior to 1911, reserve land could not be taken for railway purposes without the consent of the Governor-in-Council and compensation was mandatory. Between 1911 and 1951 the Governor in Council still had to consent to any taking; however, during those years the Governor in Council could only authorize a railway company to exercise the statutory power which that company had pursuant to its own governing legislation. 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.
109. The CNR 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).
110. 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. Upon receiving the consent of the Governor in Council, the CNR 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 CNR's Right of Way through IR 1A. Accordingly the CNR's use of the Reserve Lands is without lawful authority.

Excessive Width

111. The duties of the Crown to the Band in relation to IR 1A included an assessment of how much land the CNPR Company reasonably required for the operation and protection of the railway.
112. The land "granted" by the Crown through Letters Patent in 1930 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.
113. 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 CNR the minimum interest it required for the purposes of construction, maintenance and operation of the railway, and to ensure minimal impairment to the use and enjoyment of the reserve lands by the Band.
114. Minimally impairing the Band's interest in the Reserve Lands required the Crown to take steps to ensure that the Reserve Lands were not taken without authorization and were not taken without compensation. A 'person of ordinary prudence' would not allow his or her own lands to be taken without a valuation and compensation. The Crown did not meet these obligations and breached its fiduciary duties to the Band.
115. Without limiting the foregoing, the Crown acted dishonorably and breached its fiduciary and/or legal obligations to the Band:

- a. when it failed to exercise ordinary prudence, loyalty and good faith in the discharge of its constitutional obligation to set aside reserve land for the Band during the unlawful taking of land for the CNR Right of Way through IR 1A and the Reserve Lands;
- b. when it failed to provide full disclosure to the Band during the reserve creation process relating to the unlawful use of land for the CNR Right of Way through IR 1A and the Reserve Lands;
- c. when it failed to act in the Band's best interest in exercising discretionary control over the specific Aboriginal interest of the Band in the lands unlawfully used for the CNR Right of Way through IR 1A and the Reserve Lands;
- d. by failing to consult and ascertain the Band's needs and take measures to protect its interests;
- e. when it failed to obtain a surrender for the CNR Right of Way and failing to comply with the surrender provisions of the *Indian Act*;
- f. by failing to protect and provide access to the Band's fishing stations;
- g. when its officials failed to take steps to protect the Band's interest in the lands unlawfully used for the CNR Right of Way through IR 1A and the Reserve Lands;
- h. when it purported to grant more land than was necessary for railway purposes;

- i. by failing to investigate, inquire or ascertain whether the land requested by CNR was in excess of what was required for railway purposes;
- j. by failing to minimally impair the Band's interest in the land unlawfully used for the CNR Right of Way;
- k. by failing to comply with the provisions of the *Railway Act* by allowing more land than required to be unlawfully used from IR 1A and the Reserve Lands;
- l. by failing to properly value the land unlawfully used for the CNR Right of Way;
- m. by failing to ensure the Band received compensation from CNR for the CNR Right of Way;
- n. by failing to obtain compensation for damages to IR 1A and the Reserve Lands as a result of the railway's construction;
- o. by failing to value the injurious affection to the remaining lands of IR 1A and the Reserve Lands;
- p. by failing to value disturbance damages known or foreseeable to the Crown arising from the CNR Right of Way through IR 1A and the Reserve Lands;
- q. by failing to inquire into or obtain replacement lands for the Band; and
- r. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to the Band.

VII. Relief Sought

116. The Band seeks:

- a. An order from the Tribunal validating this specific claim of the Band in relation to IR 1A 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 1A by the illegal disposition of the CNR Right of Way through IR 1A;
- c. damages and equitable compensation on current unimproved market value of the land used for the CNR Right of Way plus compensation for loss of use of the land unlawfully taken for the CNR Right of Way;
- d. compensation for damages/injurious affection to the Band's adjacent reserve lands relative to the CNR Right of Way;
- e. disturbance damages arising from the Crown's breach of fiduciary duty in regards to IR 1A;
- f. interest on compensation;
- g. costs of this claim; and

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

Dated this 15th day of July, 2019

A handwritten signature in cursive script that reads "Darwin Hanna".

Signature of Solicitor
Darwin Hanna
Callison & Hanna
Barristers & Solicitors
2784 Alamein Avenue
Vancouver, BC V6L 1S2
Tel: (604) 222-2374
Fax: (604) 222-2974
darwin@chlaw.ca