

|                       |  |                            |
|-----------------------|--|----------------------------|
| F<br>I<br>L<br>E<br>D | SPECIFIC CLAIMS TRIBUNAL<br>TRIBUNAL DES REVENdicATIONS<br>PARTICULIÈRES | D<br>É<br>P<br>O<br>S<br>É |
|                       | September 16, 2019   |                            |
|                       | Isabelle Bourassa  |                            |
| Ottawa, ON            | 5  |                            |

**SCT File No.:** SCT – 7002 – 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  
 As represented by Darwin Hanna  
 Callison & Hanna, Barristers & Solicitors  
 2784 Alamein Avenue  
 Vancouver, BC V6L 1S2  
 Email: darwin@chlaw.ca

## **I. Overview**

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 the Specific Claim to the Specific Claims Branch (“SCB”), on October 14, 1998. This claim was filed with the Minister of Indian Affairs and Northern Development Canada (“Minister”) on October 16, 2008.
5. On November 24, 2008, the SCB invited the Band to provide additional documents, information and arguments that were not part of the original Specific Claim submission. The Band provided this additional information to the SCB on May 25, 2009.
6. The Specific Claim concerns the allegedly unauthorized and unpaid taking of a right of way (“Right of Way”) through Kanaka Bar Indian Reserve No. 1A (“IR

1A”) by the Canadian Northern Pacific Railway (“CNPR”), now known as the Canadian National Railway (“CNR”). The Band alleges breaches of legal and fiduciary duties on the part of the Crown as a result of the Right of Way. The Band also alleges that the Right of Way constitutes 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 July 25, 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 Government of Canada 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 21, 23, 31, 39, 57 and 60.
10. The Crown has no knowledge of the facts set out in the Declaration of Claim, paragraphs 10-12 and 14.
11. In response to paragraph 13, the statements in this paragraph are legal argument, not fact.
12. In response to paragraph 15, the Crown admits that gold was discovered along the Fraser River in or about 1856 and that the Cariboo Wagon Road followed the banks of the Fraser River through Kanaka Bar to Lytton. The Crown has no knowledge with respect to the rest of the facts in this paragraph.
13. In response to paragraphs 16-19, the statements in these paragraphs are legal argument, not fact.

14. In response to paragraph 20, the Crown admits that Canada and British Columbia (“Province”) established the JIRC in 1876. The rest of the statements in this paragraph are legal argument, not fact.
15. In response to paragraph 22, the Crown admits the facts in the first sentence of this paragraph. The Crown has no knowledge as to whether Commissioner Sproat’s Field Minute or Instructions to Surveyor accompanied Commissioner Sproat’s Minutes of Decision.
16. In response to paragraph 24, the Crown admits that Commissioner Sproat’s sketch accompanying the allotment of the reserves shows the position of the reserves and the adjoining pre-emption and that the sketch shows an old trail and a fishery.
17. In response to paragraph 25, the Crown denies that Commissioner Sproat allotted lands to the Band within IR 1A and admits that Commissioner Sproat’s Minute of Decision, dated June 18, 1878 states: “These Indians are to have their old right of fishing along the whole of the frontage of Mr. Palma’s land on the left bank of the Fraser... and also at a fishing place on the right bank of the Fraser River opposite to Mr. Palma’s land...”.
18. In response to paragraph 26, the Crown denies that the lands which Commissioner Sproat allotted to the Band are now contained within the Right of Way along the Fraser River adjoining IR 1A.
19. In response to paragraph 27, the Crown admits that Commissioner Sproat’s Field Minute, dated June 18, 1878, states:

The 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.

20. 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, though 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.

21. In response to paragraph 29, the statements in this paragraph are legal argument, not fact.
22. In response to paragraph 30, the statements in this paragraph are legal argument, not fact.
23. In response to paragraph 32, the Crown admits that, in his 1910 report, Reverend J. McDougall ("McDougall") reports ("McDougall Report") meeting with a "large delegation of...Indians" at Lytton, and that these "Indians" were supported by the resident Anglican Missionary, Archdeacon Pugh. The Crown further admits that the McDougall Report notes applications with respect to "Kanaka Bar IR Nos 1a and 3a" and "Paul Wallace and Jimmy Spike land adjoins Kanaka Bar I.R. No. 3". The Crown denies that the McDougall Report refers to a request by these "Indians" for title to the lands that they had improved.
24. In response to paragraph 33, the Crown has no knowledge whether Archdeacon Pugh's list was compiled "at McDougall's request". The Crown admits the rest of the facts in this paragraph.
25. In response to paragraph 34, the Crown admits that on February 3, 1910, the Secretary of the Department of Indian Affairs ("DIA") wrote to the Department of the Interior ("DOI") asking that the DOI "reserve from sale or settlement" the parcels of land listed by Archdeacon Pugh. Whether this recommendation was

in response to McDougall's recommendation is legal argument, not fact. The Crown further admits that on April 20, 1910, the DIA sent instructions to Dominion Land Surveyor A.W. Johnson ("Johnson") to "make some surveys required by this Department of certain lands situated within the Railway Belt, occupied by Indians". The Crown denies that Johnson was "given instructions by Indian Affairs to 'survey as Indian Reserves' the twenty-six parcels in question".

26. In response to paragraph 35, the Crown admits that, on May 10, 1910, the DIA notified A. Irwin, Indian Agent for Kamloops, BC that instructions had been sent to Johnson to make the necessary surveys. The Crown has no knowledge as to whether other Indian Agents were also so notified.
27. In response to paragraph 36, the Crown admits that, on April 5, 1910, the DOI instructed the Dominion Land Agent at New Westminster regarding lands in the Railway Belt occupied by Indians, being surveyed as arranged by the DIA, not to "grant entry for the lands in question, unless it is definitely determined that the entry does not affect the Indian occupants, or their improvements". The Crown denies that Johnson was instructed to survey these lands as Indian reserves.
28. In response to paragraph 37, the statements in this paragraph are legal argument, not facts.
29. In response to paragraph 38, the Crown admits that, by letter dated April 26, 1911, not April 16, 1911, the DIA informed Indian Agent E.B. Drummond ("Drummond") that "in accordance with representations made" by McDougall, instructions were sent to Johnson to survey 26 plots of land on the Fraser River around Lytton. The Crown further admits that the DIA's letter states that "[i]t is intended to have all the said plots set apart as Indian reserves".
30. In response to paragraphs 40 and 41, the statements in these paragraphs are legal argument, not fact.

31. In response to paragraph 42, the Crown admits that the *Canadian Northern Pacific Railway Company (Incorporation) Act*, SCB 1910, c 4 was passed by the BC Legislature on March 10, 1910. The rest of the statements in this paragraph are legal argument, not fact.
32. In response to paragraph 43, the statements in this paragraph are legal argument, not fact.
33. In response to paragraph 44, the Crown admits that, on January 2, 1911, the DIA wrote to Drummond informing him that “blue prints of plans of the Canadian Northern Pacific Railway” through 14 Indian reserves had been sent to him under separate cover. The list of reserves included Kanaka Bar IR No. 2 and did not include the lands which became IR 1A. The rest of the statements in this paragraph are legal argument, not fact.
34. In response to paragraph 45, the Crown admits the first sentence of this paragraph. The Crown further admits that the CNPR understood that surveys of the reserves in Drummond’s district had been completed and the CNPR was very anxious to get the Right of Way fixed up. The Crown further admits the final sentence of this paragraph.
35. In response to paragraph 46, the Crown admits that, on May 8, 1911, Dominion Land Agent W.C. Cowell (“Cowell”) wrote to the DOI, stating:

Now the most important question I have to refer to is with regard to Indians who have either been encouraged to or deliberately squatted upon vacant and surveyed Dominion Lands .... Besides holding this Dominion Land by somewhat improving it, they retain their interest in the Reserve, where their plot is under excellent cultivation, and I think the Indian Agent should have instructions to order them back to the Reserve, because if some of them are permitted to do this, it may eventually cause dissatisfaction to the rest of them....

In further response to paragraph 46, the Crown admits that Cowell stated in his above letter that he had heard of one squatter who had 720 acres of land surveyed for them. The Crown denies that Cowell specifically referred to the record left

by the previous agent, McKenzie, as an “unsatisfactory record” or the Indigenous squatters or 720-acre squatter as Nlha7káp̄mx people. The Crown also admits that Cowell sent a second letter to the DOI on May 9, 1911, in which he stated:

Good land in the Railway Belt is scarce enough without giving it all away to Indians. If the Indian leaves the Reserve and wants to take up Dominion Land well and good, but he should then be classed as a homesteader and be governed in the same manner and come under the same regulations as the white man.

The rest of the statements in paragraph 46 are legal argument, not fact.

36. In response to paragraph 47, the Crown admits that on May 9, 1911, Cowell wrote to the DOI, stating:

Since writing you yesterday a personal letter re the “Indians” throughout the Railway Belt but more particularly around Lytton, I came across a letter from the Department dated the 5<sup>th</sup> April, 1910, file 2044461 which deals with this matter. The letter referred to should have been sent to the New Westminster Agency, because the bulk of the land referred to was at that time included in that Agency. The lands were not reserved therefore as far as this district was concerned, as we had no registers dealing with the said lands and it was presumed similar instructions were sent to Mr. McKenzie.

When the records were transferred no mention of your instructions was given, neither were the lands marked “RESERVED”. However no harm has been done because no entries have been granted.

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

37. In response to paragraph 48, the Crown admits that, on August 4, 1911, the DOI informed CNP surveyors Messrs Christie and Dawson that:

[t]he surveys by the Department of Indian Affairs to which you refer are not yet completed and no decision has been reached as to whether the parcels are to be set apart as Indian reserves or not. ... Under the circumstances it would be best to tie to a monument on each newly surveyed line intersected by your right of way. These lines may then be identified when the returns of surveys of the parcels in question are received.

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

38. In response to paragraph 49, the Crown admits that an official CNPR Plan of Location (“Plan”) for the Right of Way lands from Boston Bar to Skoonka Lake was deposited on August 12, 1911. The Crown has no knowledge as to whether the Plan was surveyed and drawn by Fred J. Dawson. The rest of the statements in this paragraph are legal argument, not fact.

39. In response to paragraph 50, the Crown admits that, in December 1911, Johnson sent field notes and plans of Indian reserves near Lytton to the DIA with a covering letter in which he advised that:

...The C.N.P. Railway Co. are constructing through several of these Reserves, but there is no certainty about their Right of Way at present, so I did not tie to their work.

When the Right of Way surveys are completed I shall be able to have access to them as soon as anybody, as I am now surveying for them in this district, and if you desire it I can complete these surveys of the Reserves by giving you plans and descriptions of the various parcels taken by the C.N.P.R.

40. In response to paragraph 51, the statements in this paragraph are legal argument, not fact.

41. In response to paragraph 52, the Crown admits the facts stated in this paragraph, except that the Crown has no knowledge whether the Minister’s submissions numbered more than one. The Crown further admits that in Order in Council (“OIC”) PC 2743, the Minister further recommended that

...consent of the Governor in Council be granted to all Colonization Railways to construct their lines over such unoccupied lands in the Railway Belt ... as may be at the disposal of the Crown, through which portions of their lines will run, provided plans of the lines of the said railways, signed by a Dominion Land Surveyor, approved by the Surveyor General and confirmed by the Board of Railway Commissioners for Canada, are filed in the Department of the Interior.

42. In response to paragraph 53, the Crown admits that, on April 15, 1912, the DOI advised CNPR that OIC PC 2743 authorized a free grant to the CNPR of unoccupied lands in the Railway Belt and provided a list of the lands which DOI

believed were covered by PC 2743. The Crown denies that the list included the legal description of the lands which later became IR 1A. The Crown further admits that DOI requested that plans of the located line and of the constructed line be forwarded to the DOI. The final sentence in paragraph 53 is legal argument, not fact.

43. In response to paragraph 54, the statements in this paragraph are legal argument, not fact.
44. In response to paragraph 55, the Crown admits that OIC PC 1875 was signed on June 29, 1912. The rest of the statements in this paragraph are legal argument, not fact.
45. In response to paragraph 56, the Crown admits the facts stated and that, on March 6, 1913, the DOI requested a plan of the whole CNPR line and advised that, in the meantime, a reservation for the CNPR right of way had been noted against “all the lands in the enclosed list pending the receipt in this Department of the required plan”. The Crown further admits that the enclosed list included the legal description of the lands which later became IR 1A.
46. In response to paragraph 58, the Crown admits the facts stated in this paragraph, except the Crown denies that the DIA surveyor’s list of reserves, “which have been selected in the Railway Belt” and “which have not yet been confirmed”, included the lands which later became IR 1A.
47. In response to paragraph 59, the Crown admits that on May 18, 1914, H. Graham (“Graham”), the Lytton Indian Agent informed the DIA that:

... the Canadian Northern Railway Company have taken a right of way through some of these [extra Reserves] and the Indian has been unable to obtain any compensation on account of him having no title, or it not having been gazetted as an Indian reserve.

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

48. In response to paragraph 61, the Crown admits the facts stated in this paragraph regarding Hans Wallace's testimony that he had been cultivating lands that later became IR 1A for approximately 18 years, that he noted that he borrowed water from the "Indians of Kanaka Bar", and that there was only enough water to cultivate 10 acres. The Crown admits that, in response to the question "Is there good timber there?" Hans Wallace responded "Fairly big trees, but we have been using them for firewood, and there is not very much left". The Crown also admits that Hans Wallace responded "yes" to the question "When this was surveyed three years ago, the surveyor said it was densely timbered – Is it second growth?"
49. In response to paragraph 62, the Crown admits the facts stated in this paragraph regarding Jimmie Spike's (also known as Jimmie Spice) testimony about the 2 ½ acres of land he cultivated on lands that later became IR 1A and further admits that Chief Charlie testified that Jimmie Spike also grew hay on that cultivated land.
50. In response to paragraph 63, the Crown admits the facts stated and further that, on November 17, 1914, the DIA forwarded to the Royal Commission plans for the additional reserves in the Lytton Agency, including the plan for the lands which later became IR 1A, and requested that the Royal Commission "look into the matter as to whether these several parcels of land should be set aside as Indian reserves".
51. In response to paragraph 64, the Crown admits that, on December 1, 1914, the Royal Commission met with Graham "in regard to the extra reserves shown in the official schedule, but which had not yet been officially gazetted". The Crown further admits that, with respect to "Kanaka Bar adjoining No. 1, containing 170.93 acres", that later became IR 1A, Graham stated:

There are two Indians have [*sic*] their houses and live there continuously. They have made improvements there but there is not a great deal of land that can be improved.

and, in response to a question about the balance of the land in the area that later became IR 1A, apart from the locations of the two Indigenous house and improvements, Graham stated that:

[i]t might be good for rough pasturage. The majority of this land was either taken by the C.N.R. or destroyed by it.

The Crown further admits that, after discussing various reserves, the Commission asked: “[o]n any of these reserves where the C.N.R. went through, were the Indians compensated for their improvements?” and Graham answered:

[t]here was nothing done at all, but there were a few improvements – very few improvements, on any of these reserves. The C.N.R. took quite a bit of the area but not very much of the good land.

The Crown further admits that the transcript of the meeting includes the following note: “Write a letter to the Department re: compensation for these Indians on account of right-of-way going through their reserve”. The Crown denies that the transcript of the meeting includes any recommendation from Graham with respect to confirmation of what is now IR 1A. The rest of the statements in paragraph 64 are legal argument, not fact.

52. In response to paragraph 65, the Crown has no knowledge whether the lands, which later became IR 1A, were “recommended as a reserve, being cleared and used for grazing, with an area cultivated”. The Crown admits that, on December 1, 1914, Graham wrote to the Royal Commission to suggest that the Commission have “the additional Reserves added to the original Reserves which they are adjoining” and that “Kanaka Bar 1A” is included in the list of “Additional Reserves” with “Water” of “25 [inches] from Nekliptum Creek”. The rest of the statements in this paragraph are legal argument, not fact.

53. In response to paragraph 66, the Crown admits that Royal Commission Interim Report No. 62, dated December 3, 1914, resolved:

That Indian Reserve No. 1A of the Kanaka Bar Tribe, Lytton Agency, not appearing in the official Schedule of Indian Reserves 1913, but containing,

according to the plans of survey, one hundred and seventy and ninety three one hundredths (170.93) acres, be confirmed as shown on the Official Plans.

The Crown further admits that Plan BC 874 of IR 1A was stamped with the Commission's Confirmation Certificate and that the Plan depicts the locations of the lands cultivated by Jimmie Spike and Paul Wallace on the east side of the Yale-Cariboo Wagon Road. The Crown further admits that the Royal Commission Minutes of Decision for the Lytton Agency, dated December 3, 1914, ordered the confirmation of IR 1A.

54. In response to paragraph 67, the Crown admits the statements of fact in the first three sentences of this paragraph. The statements in the final two sentences of this paragraph are legal argument, not fact.
55. In response to paragraph 68, the statements in this paragraph are legal argument, not fact.
56. In response to paragraph 69, the Crown admits the statements of facts in this paragraph.
57. In response to paragraph 70, the Crown admits that Plan 35099 A526 [not A520], dated January 5, 1924, is a Canadian National Railway Plan showing the Right of Way required for the CNPR through part of the Fraser Canyon, with the location of IR 1A identified by handwritten notation. The rest of the statements in this paragraph are legal argument, not fact.
58. In response to paragraph 71, the statements in this paragraph are legal argument, not fact.
59. In response to paragraph 72, the Crown admits the statements of fact in this paragraph.
60. In response to paragraph 73, the Crown admits the first two sentences of this paragraph. The Crown further admits that Schedule 3 to PC 208, entitled "Indian Reserves in the Railway Belt and Peace River Block in the Province of British

Columbia”, included IR 1A with acreage of 170.93 acres and date of confirmation as “O.C. 18<sup>th</sup> October, 1918”.

61. In response to paragraph 74, the Crown admits that, on March 5, 1930, Letters Patent were issued to the CNPR regarding the CNPR’s right of way through lands in the Fraser Canyon. The Crown has no knowledge of the identity of the Letters Patent signatory. The rest of the statements in this paragraph are legal argument, not fact.
62. In response to paragraph 75, the Crown admits that an undated copy of the Reserve General Register for Indian and Northern Affairs with respect to IR 1A does not specifically note the alienation of 30.41 acres from the original 170.93 acres and that the Register includes a notation, “Right of Way CNP Ry. Excluded by title”. The Crown further admits that the only specific acreage reductions listed are an 18.187 acre reduction, dated June 21, 1954, for a right of way for a road through IR 1A, and a 0.126 acre reduction, dated April 4, 1957, in favour of the CNR. The rest of the statements in this paragraph are legal argument, not fact.
63. In response to paragraph 76, the statements in this paragraph are legal argument, not fact.

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

***Reserve Creation Policy and the Royal Commission***

64. The Royal Commission was established to “settle all differences between the Governments of the Dominion and the Province respecting Indian Lands and Indian Affairs generally...” within the Province. The Commission was empowered to set aside reserve lands:

At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added

for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

### *Creation of IR 1A*

65. On January 9, 1909, the DIA, requested that McDougall examine carefully “the reserves situated within the railway belt and also the reserves south of the railway belt ... [and] also enquire as to the demand for Indian reserves in the province ....”.
66. On January 27, 1910, McDougall reported (“McDougall Report”) that a number of Indians were living off reserve and squatting on Crown Lands, including in the Lytton area. A schedule attached to the McDougall Report entitled “Alexander, additional land applications” included the following entries: “Kanaka Bar IR Nos 1a and 3a”.
67. On February 3, 1910, the DIA requested that the DOI reserve the parcels noted in the McDougall Report from sale or settlement until the DOI could arrange to have the parcels properly surveyed.
68. On April 5, 1910, the DOI instructed the Dominion Land Agent at New Westminster not to grant entries on, or otherwise dispose of the lands noted in the McDougall Report.
69. In July 1911, Johnson surveyed the lands which later became IR 1A. In December 1911, Johnson informed the DIA that he would send his field notes and survey plans. He further advised that the CNPR were constructing through several of the reserves in the area and that there was no certainty about the CNPR’s right of way. His survey therefore did not “tie to their work”. Johnson further stated that, when the right of way surveys were complete, he could complete the surveys of the reserves by providing the DIA with plans and descriptions of the various parcels taken by the CNPR.

70. The DIA responded that it was the CNPR's duty to make surveys and furnish plans of their rights of way through all lands, including Indian reserves, and, since the CNPR would be sending in their plans, it would not be necessary to make any alterations or additions to the plans filed by Johnson.
71. On March 28, 1911, Drummond wrote to the DIA to inquire whether the land parcels surveyed by Johnson were to be made Indian reserves.
72. On April 26, 1911, the DIA informed Drummond it was intended to have the Johnson-surveyed 26 plots of land set aside as Indian reserves.
73. On May 15, 1911, the DOI informed the DIA that:

... This Department understands that pursuant to this letter [April 5, 1910] your Department has proceeded with the surveying of locations affected by Indian squatters for the purpose of creating reservations. It was not exactly the intention of this Department to authorize the formation of reserves at this point .... Before deciding this question, it is our desire that an inspection should be made by an officer of this Department on the merits of each individual Indian occupant .... The Department is therefore instructing their Agent to have an inspection made by a Homestead Inspector of each case. It will then be decided whether it is more appropriate to deal with these occupants by making the reserves or by permitting them to secure their locations in some other way. It is understood that these Indians already possess reserves in other locations.

74. On May 19, 1911, the DIA wrote to the DOI about the Indians' claims to certain small parcels of land in the Railway Belt, stating:

[i]t is understood that this Department is to continue until finished the survey of the small plots of land authorized by the Minister, and that your Department will then decide whether all or any of them are to be constituted Indian reserves, or if the Indians will be allowed to homestead or be otherwise compensated for their rights and improvements and that in any case the Indians will be fairly dealt with.

If the foregoing is the correct view of the matter, action will be taken to have the surveys completed and copies of the plans, etc. will then be forwarded to your Department for action.

75. The DIA advised the DOI on March 4, 1912 that 12 plans of parcels in the Railway Belt, surveyed by Johnson, had been sent to the DOI, including the plan

of the parcel designated as “Kanaka Bar IR 1A”, containing 170.93 acres. The DIA requested that the DOI take such action as might appear advisable in connection with the lands, with the object of either granting them to “the Indians” or having them reserved as “Indian Reserves”.

76. On February 14, 1912, the DIA corresponded with Drummond that:

... It has been represented to the Department that you have given the Indians to understand that all the unallotted lands within the railway belt rightfully belong to the Indians.

In this connection I have to state that no such instructions were sent from this Department, and the only action at present being taken by the Department is to survey a few small plots of land which a few Indians claimed as rightfully belonging to them from long occupation or improvement. Of course it will devolve upon the Department of the Interior either to grant these plots to the Indians or to have them set apart as Indian reserves...

77. On March 4, 1912, the DIA informed Drummond that the Johnson survey plans of 24 plots of land in the Railway Belt had been sent to him for his information and for use and reference and it was “to be distinctly understood that they are not yet constituted Indian Reserves nor otherwise granted to the Indians ....”.

78. In June 1912, Inspector of Indian Agencies, T.J. Cumminsky (“Cumminsky”), reported to the DIA that:

... at a meeting of the Lytton Band of Indians held here, on the 14<sup>th</sup> inst., the Indians put this question to me, and specifically asked what would be done with Indians who had squatted on lands outside the Reserves. They inform me that Mr. Drummond promised to have this land given to them, but never did so. I asked the Indians not to be deceived, that Mr. Cowell, of the Dominion Lands Department at Kamloops, has been appointed to investigate all such cases. He will visit the points, personally, and his information and evidence will be submitted to the Department of the Interior for a final decision.

79. On June 28, 1912, the DIA informed Cumminsky that:

“... the Indians undoubtedly misunderstood the late Indian Agent, Mr. Drummond, as it is not credible that he would have made them a promise to secure for them all the unallotted land in the Railway Belt.”

80. The 1913 Dominion Schedule of Indian Reserves does not list IR 1A. The only reserve associated with the Band is Kanaka Bar IR No. 2.

81. On May 26, 1914, the DIA wrote to the DOI inquiring about the Railway Belt lands near Lytton that had been surveyed in 1911, stating that “[w]e have not received any communication from your Department to the effect that the said plots are confirmed as Indian Reserves.”

82. On July 20, 1914, the DOI informed Cowell that:

The lands as surveyed by the Indian Department Surveyor, however, were reserved pending decision. During the consideration of this case a special Indian Commission was appointed ... and as these Indian claimants have an interest in Reserves elsewhere and as it is doubtful whether the Indians should be recognized both in regard to the lands on which they are squatted and the Reserves in which they already have their interests it was considered that the Indian Commission should have an opportunity of passing on their cases if it desired to do so. As, however, the question of what area of land in each case should be reserved in the interest of the Indian squatter for the purpose of being dealt with by the Indian Commission is a matter to be dealt with by this Department please proceed with the necessary instructions to determine whether this Department will approve of the areas already surveyed for the Indians or whether there should be modifications in respect to the same or refusal in certain cases of no merit to recognize the claims.

83. On August 21, 1914, the DOI requested that the Surveyor General, regarding “Indian Squatters near Lytton”:

Please do not show on any new township plans which may be issued the surveys of certain plots of land surveyed by A.W. Johnston, D.L.S., for Indian squatters, as it is probable the claims as surveyed will not be recognized without modification. I think it was already arranged not to show these surveys on your plans but I again draw the subject to your attention in order to make sure as further investigations are now being made into these claims.

84. On August 22, 1914, the DIA requested that the DOI inform the Lytton Dominion Lands Agent that no encroachments were to be made on Railway Belt lands near Lytton on which Indians were settled and had made improvements and stated that the surveys of these lands had been “... done with the intention

of the said plots of land, after investigation, being either granted in fee simple to the Indians or constituted Indian Reserves.”

85. On August 28, 1914, the DIA asked the Royal Commission whether the Commissioners would be looking into the plots of land settled upon and improved by Indians in the Railway Belt near Lytton.
86. On September 3, 1914, the Royal Commission informed the DIA that these plots of land had not yet been investigated by the Commission and asked be kept up to date on their status.
87. On November 14, 1914, the Royal Commission heard testimony from Hans Wallace (aka Paul Wallace) and Jimmie Spike (aka Jimmie Spice) regarding their use of the portions of the lands which would later become IR 1A. Mr. Wallace testified that he had been cultivating about four acres of land for approximately 18 years and Mr. Spike stated that he had been cultivating the land, shown on the plan as 2 ½ acres in area, for four years.
88. On November 17, 1914, the DOI informed the DIA that the DOI had assumed that the question of the claims of Indian squatters on Dominion Lands along the Fraser River in the vicinity of Yale and Lytton BC was to be included in the Royal Commission enquiry. For this reason, DOI had held off dealing with the question of the confirmation of the reserves. The DOI recommended that the question be referred to the Royal Commission.
89. On November 17, 1914, the DIA requested that the Royal Commission look into whether the surveyed parcels, including “Kanaka Bar IR 1A” should be set aside as Indian Reserves. The DIA advised that:

[t]he Commissioner of Lands for British Columbia has signified his desire to have your Commission deal with these reserves, in order to have the benefit of the opinion and information of your Commission before submitting the Orders in Council necessary for setting aside these reserves, as they are all situate within the Railway Belt.

90. On November 26, 1914, the Royal Commission informed the DIA the Royal Commission would take action as requested at the very earliest opportunity.

91. On December 1, 1914, the Royal Commission examined Graham with respect to “extra reserves shown in the official schedule, but which had not yet been officially gazetted”, including the lands which later became IR 1A. Graham stated:

There are two Indian have [sic] their houses and live there continuously. They have made improvements there but there is not a great deal of land that can be improved.

92. In response to a question about the balance of the land in the area that later became IR 1A, apart from the locations of the two Indigenous house and improvements, Graham stated that:

[i]t might be good for rough pasturage. The majority of this land was either taken by the C.N.R. or destroyed by it.

93. After discussing various reserves, the Royal Commission asked: “[o]n any of these reserves where the C.N.R. went through, were the Indians compensated for their improvements?” and Graham answered:

[t]here was nothing done at all, but there were few improvements – very few improvements, on any of these reserves. The C.N.R. took quite a bit of the area but not very much of the good land.

94. The transcript of the meeting includes the following note: “Write a letter to the Department re: compensation for these Indians on account of right-of-way going through their reserve”.

95. On December 1, 1914, Graham recommended that the Royal Commission add Kanaka Bar IR 1A with Water of 25 inches from Nekliptum Creek to the adjoining original reserve, “Kanaka Bar 1”.

96. On December 3, 1914, by Interim Report No 62, the Royal Commission resolved

[t]hat Indian reserve No. 1A of the Kanaka Bar Tribe, Lytton Agency, not appearing in the official Schedule of Indian Reserves 1913, but containing, according to the plans of survey, one hundred and seventy and ninety three one hundredths (170.93) acres, be confirmed as shown on the Official Plans.

97. Plan BC 874 of IR 1A was stamped with the Commission's Confirmation Certificate. The Plan depicts the locations of the lands cultivated by Jimmie Spike and Paul Wallace on the east side of the Yale-Cariboo Waggon Road on a high bench of land, separated by steep rock bluffs from a lower bench along the Fraser River, the location of the CNPR Right of Way. There is no notation on the Plan as to any occupation or cultivation of the lower bench. The Royal Commission Minutes of Decision for the Lytton Agency, dated December 3, 1914, ordered the confirmation of IR 1A.

98. On April 6, 1915, the DOI informed the DIA that, although the DOI had been asked to have the remaining reserves confirmed by Order-in-Council ("OIC"), in the DOI's opinion:

...[t]he enquiry which has been made into the merits of these claims is not sufficient to justify this Department in recommending confirmation of the reserves according to the boundaries at present proposed.

...

The particulars furnished this Department by the Surveyor's returns give no information as to what the name of the Indian squatter is, how long he has been resident there, whether his occupation is bona fide or made only for the purpose of holding claims, nor the value of the improvements.

...

This Department does not necessarily take the position that these claims, even as now surveyed, should not be recognized and that there may not be important reasons for the recognition of the claims as surveyed, but the position taken is that up to the present there has been no competent investigation into the nature of these claims and no adjudication on the question of merit pertaining to them.

99. On April 20, 1915, the DIA responded that the Royal Commission had been investigating the Indian land claims in the Railway Belt and suggested that both

DOI's April 6 Letter and the DIA April 20 reply should be sent to the Royal Commission for comment.

100. On May 4, 1915, after review of the DOI and DIA correspondence, the Royal Commission concluded that

...after full and very careful consideration the Commission has to say that its action with respect to lands in the Railway Belt which are the subject of Mr. Maber's letter was taken only after the most full and careful inquiry, adequate examination as to the Reserves and lands affected, and exhaustive inquiries not merely to the requirements of the applicant Indians but as to the interests and claims of white settlers as well.

After full and most careful consideration, the Commission can therefore see no justification for varying in any way its decisions as embodied in Interim Reports Nos 59 to 68 inclusive...

101. On October 18, 1915, the DOI recommended to the Deputy Minister that "the lands occupied and improved by the Indians should be set apart for them in the usual way" and referred to the "very careful investigation into each case by the two Inspectors of the Kamloops Agency and detail joint reports submitted, showing residence and improvements done".

102. On December 1, 1915, the DIA recommended to the Deputy Minister that an Order in Council be passed confirming the reserves as suggested by the DOI on October 18, 1915.

103. On October 17, 1918, by Federal OIC PC 2544, the Governor in Council withdrew

...from the operation of the Regulations the survey, administration, disposal and management of Dominion Lands within the Forty-Mile Railway Belt of the Province of British Columbia, subject to existing rights as defined and created under the same, such lands as have been or may be reserved for Indians...

including IR 1A.

104. The Province approved Royal Commission Interim Report No. 62 on July 25, 1923 by way of BC OIC 911 and, on July 19, 1924, the Federal Government approved the Interim Report by way of Federal OIC PC 1265.
105. On February 3, 1930, by Federal OIC PC 208, the land in the Railway Belt was transferred back to the Province, with the exception of the Indian Reserves set apart by the Dominion Government and shown on the attached Schedule 3 to PC 208. IR 1A is listed in Schedule 3 with a description of “Yale District, in Secs. 24 and 25, Tp. 13, R. 27, W. 6<sup>th</sup> M, between Reserves Nos. 1 and 2.”, an acreage of 170.93 acres and a date of confirmation as “OC 18<sup>th</sup> October, 1918”.
106. On August 5, 1930, Federal OIC PC 1771 withdrew Indian reserve lands, including Kanaka Bar IR 3A, from the operation of the *Dominion Lands Act*, RSC 1927, c 113 and OIC PC 1512, dated October 5, 1926, transferred these lands to the DIA. IR 1A is not included in the list of reserves in Appendix A to PC 1771.

***The CNPR Right of Way Through IR 1A***

107. On January 2, 1911, the DIA informed Drummond that blue prints had been sent under separate cover showing the CNPR plans through 14 Indian Reserves, including Kanaka Bar IR No. 2. IR 1A is not listed as one of the 14 Indian Reserves.
108. On February 2, 1911, CNPR Right of Way Agent Coulthard informed Drummond that he understood the surveys of the reserves in Drummond’s district were complete and that he was “very anxious to get the Right of Way fixed up....”.
109. On August 2, 1911, CNPR surveyors Christie and Dawson stated to the DOI that they were making right of way surveys for the CNPR and inquired whether the “new Indian reserves” had been confirmed and, if they had been, to send the plans. On August 4, 1911, the DOI informed Christie and Dawson that the

surveys were not yet completed and no decision had been reached as to whether the parcels were to be set apart as Indian reserves or not.

110. On August 12, 1911, the official CNPR Plan of Location for the Right of Way lands from Boston Bar to Skoonka Lake was deposited. The Plan shows the Right of Way passing through allotted reserves in the Fraser Canyon, including the lands which later became IR 1A.

111. On December 2, 1911, Federal OIC PC 2743 stated that the Minister of the Interior recommended that:

consent of the Governor in Council be granted to all Colonization Railways to construct their lines over such unoccupied lands in the Railway Belt ... as may be at the disposal of the Crown, through which portions of their lines will run, provided plans of the lines of the said railways, signed by a Dominion Land Surveyor, approved by the Surveyor General and confirmed by the Board of Railway Commissioners for Canada, are filed in the Department of the Interior.

112. On December 9, 1911, CNPR provided to the DIA tracings and blue prints of the final Right of Way through 14 Indian reserves, including Kanaka Bar IR No. 2 and not including the lands which later became IR 1A.

113. On April 15, 1912, the DOI sent to the CNPR a list of the lands across which the Company would be granted free right of way in accordance with OIC PC 2743 and advised that the Dominion Lands Agent had been instructed that any new entries granted for these lands must be subject to reservation for the CNPR Right of Way. The lands which later became IR 1A with the legal description, Section 24 and 25, Tp 13, Rge 27, W 6<sup>th</sup> Meridian, were not included in the DOI list.

114. On June 29, 1912, Federal OIC PC 1875 allowed a grant of subsidy of \$12,000 per mile, to a maximum of 525 miles, and also authorized the CNPR to contract under this subsidy. PC 1875 further stated that the CNPR had submitted plans and profiles showing the location of the CNPR from Yellowhead Pass to the New Westminster Bridge, with the exception of ten miles near Albretha Lake.

115. On July 29, 1912, the DIA informed Cumminsky that a map showing the CNPR Right of Way in the Railway Belt, British Columbia would be prepared and forwarded to him. The DIA further noted that the DIA had always made valuations and payments for rights of way, as finally arranged by the Agent. In the event of any dispute or question arising as to payment to individual Indians for right of way, the matter was to be brought to the attention of the DIA for immediate investigation.
116. On March 6, 1913, the DOI informed the CNPR that the CNPR Right of Way reservation had been noted against all the lands in an enclosed list pending the DOI's receipt of the survey plans. The lands which later became IR 1A were included in the enclosed list.
117. On September 2, 1914, the CNPR informed the Royal Commission that CNPR were making new plans showing the final alignment and final Right of Way widths required through the Indian Reserves in the Railway Belt on the CNPR line and would send the plans when complete to replace the plans previously deposited with the Royal Commission.
118. On January 5, 1924, Plan 35099 of the Canadian National Railway was deposited. Plan 35099 showed the Right of Way surveyed by GM Christie on August 2, 1921 and sworn by him on January 5, 1924. The Department of the Interior approved Plan 35099 on May 11, 1927. The location of IR 1A is noted on the Plan in handwriting.
119. On February 3, 1930, Federal OIC PC 208 transferred lands within the Railway Belt to the Province, excluding the Indian Reserves set apart by the Dominion Government. The scheduled attached to PC 208 includes IR 1A at 170.93 acres.
120. On March 5, 1930, Letters Patent were issued to the CNPR with respect to the Right of Way.
121. On January 21, 1931, the CNR recommended that the District Right of Way Agent make application to the DIA to secure grants of the lands required for the

CNPR right of way, for which CNPR had expected grants, but which had been transferred to the DIA without reservation. The CNR referred to the DOI's intention to issue a patent to the CNPR prior to the transfer of the lands to the Province and through oversight, the Right of Way had not been reserved when transfer had been made.

122. In October 1931, the DIA advised the Deputy Minister, referring to two specific reserves in the Fraser Canyon, not IR 1A, that:

... the Department of the Interior did not obligate itself to give us the lands included within this right of way but it did assure the railway company a free grant, and in my opinion it was owing to oversight by that Department that the description of these reserves in the confirming Order in Council in 1918 did not contain an exception of this right of way. I would, therefore recommend that the Department of the Interior be requested, on account of error in description, to have this Order in Council amended so as to exclude the Canadian Northern Pacific right of way through these two reserves.

123. On February 22, 1932, the DOI recommended to the Dominion Lands Board that, as lands comprising a railway Right of Way, not the Right of Way on IR 1A, had been included erroneously in the subject Indian reserve by 1918 OIC PC 2544, a patent should be issued to the CNPR for the Right of Way as reserved, assuming that the lands at issue remained vested in the Dominion. A marginal note on this document recommends that the Dominion issue a patent to the CNPR after the 1918 OIC PC 2544 is amended.

### ***Width of the Right of Way***

124. An Energy Mines and Resources Canada plan and Canada Lands Survey Record 64975, dated November 20, 1978, for a Resurvey of part of the boundaries of IR 1A show the Right of Way, referencing Plan 35099 CLSR, Plan A526 LRO. The Right of Way appears to be of a uniform width throughout IR 1A, although the width of the Right of Way is not marked on this document. The section noted as "IR 1A Kanaka Bar" on Plan 35099 notes a right of way width of 100 feet, with the right of way widening to 350 feet as it moves from the FR NE ¼ Sec.

24, Tp. 13, Rg. 27 section to the FR SE ¼ Sec. 24, Tp. 13, Rg. 27. The Right of Way then narrows to 100 feet from 350.

**VI. Relief (R. 42(f))**

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

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

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

**VII. Communication (R. 42(g))**

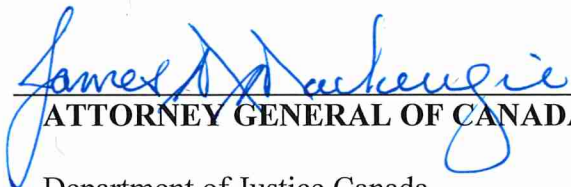
Respondent's address for the service:

Department of Justice Canada  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Attention: James M. Mackenzie

Fax number address for service: (604) 666-2710

Email address for service: james.mackenzie@justice.gc.ca

Dated: September 13, 2019

  
**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
British Columbia Regional Office  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Fax: 604-666-2710

**Per: James Mackenzie**

Brett Love

Tel: 604-666-5963

Email: [James.Mackenzie@justice.gc.ca](mailto:James.Mackenzie@justice.gc.ca)

Solicitor/counsel for the Respondent