

SPECIFIC CLAIMS TRIBUNAL	
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES  Dragisa Adzic  Dragisa Adzic
Ottawa, ON	1

SCT File No.: SCT - 4001 - 24

**SPECIFIC CLAIMS TRIBUNAL**

**BETWEEN:**

**BIRDTAIL SIOUX FIRST NATION**

Claimant

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA**  
as represented by the Minister of Crown-Indigenous Relations

Respondent

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**DECLARATION OF CLAIM**

Pursuant to Rule 41 of the  
*Specific Claims Tribunal Rules of Practice and Procedure*

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This Declaration of Claim is filed under the provisions of the *Specific Claims Tribunal Act*, SC 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

July 11, 2024

\_\_\_\_\_  
Date

Dragisa Adzic

\_\_\_\_\_  
Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
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**I. Claimant (R.41(a))**

1. The Claimant, Birdtail Sioux First Nation (“**Birdtail**” or the “**First Nation**”), confirms that it is a First Nation within the meaning of section 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 and a “band” within the meaning of the *Indian Act*, RSC 1985, c. I-5, as amended. The First Nation is located in Manitoba.

**II. Conditions Precedent (R. 41(c))**

2. The following conditions precedent as set out in section 16(1) of the *Specific Claims Tribunal 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 November 12, 2009, Birdtail filed the Railway Right of Way 1905, Birdtail Sioux IR #57 Specific Claim (the “**Claim**”) with Indian and Northern Affairs Canada, Specific Claims Branch. The Claim relates to breaches of Canada’s statutory and fiduciary obligations to the First Nation that resulted in the unlawful taking of approximately 88.72 acres of Birdtail Creek Indian Reserve #57 (“**Birdtail IR 57**”) for a railway without a surrender.
4. By a letter from the Acting Senior Assistant Deputy Minister dated February 6, 2012, the First Nation was informed of the Minister of Aboriginal Affairs and Northern Development’s decision to reject the Claim for negotiations on the basis that it failed to reveal an outstanding lawful obligation on the part of the Government of Canada.

**III. Claim Limit (Act, s. 20(1)(b))**

5. The First Nation does not seek compensation in excess of \$150 million for the Claim.

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

6. The following are the grounds for the Specific Claim, as provided for in section 14 of the *Specific Claims Tribunal Act*:

**14(1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal based on any of the following grounds, for compensation for its losses arising from those grounds:

...

**(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))**

*i Setting Aside Reserve Land for Birdtail Sioux*

7. In 1889, Canada set aside Birdtail IR 57, consisting of approximately 6,760 acres for the use and benefit of Birdtail.
8. The Dakota Sioux First Nations, including Birdtail, were occupants of what is now Canada since time immemorial and long before Confederation. However, the Government of Canada did not permit Birdtail and other Dakota Sioux Nations to participate in the post-Confederation Numbered Treaties because the Government viewed them as “refugees” from the United States who entered what is now Canada after the Minnesota War of 1862-63.

9. During 1872, representatives of various Dakota Sioux Nations residing within Canada petitioned for lands of their own. The Government of Canada eventually entered into arrangements with the Dakota Sioux Nations to provide them with reserve lands.
10. Based on the location of Birdtail IR 57, Birdtail likely would have been a signatory to Treaty No. 1, Treaty No. 2, or Treaty No. 4 if they had been permitted to enter Treaty.
11. An Order-in-Council dated January 4, 1873 authorized a single reserve of 12,000 acres be set aside for all of the Dakota Sioux Nations, based on a formula of 80 acres of land per family of five. This was half the allocation (160 acres per family) under Treaty Nos. 1 and 2 and one eighth the allocation under later Numbered Treaties such as neighbouring Treaty No. 4 (640 acres per family).
12. A second Order-in-Council dated April 24, 1873 authorized the Lieutenant Governor to select the site of the reserve for the Dakota Sioux Nations in the vicinity of Lake Manitoba. However, the Dakota Sioux Nations refused to accept that site as the location for their reserve, as it was considered to be Ojibwa territory.
13. A second site was proposed for the Dakota Sioux Nations' reserve at the junction of the Assiniboine River and the Little Saskatchewan River, as described in an Order-in-Council dated April 27, 1874.
14. However, the different communities of Dakota Sioux Nations wanted reserves at different locations. During an interview between the Indian Commissioners and certain Sioux living at Fort Ellice on September 21, 1874, a Chief named Mahpiyahdinape (known in English as Enoch), a recognized headman of a group of Dakota People that would later become known as Birdtail, noted lack of wood at the proposed reserve located at the junction of the Little Saskatchewan and Assiniboine Rivers, and instead requested a reserve at Birdtail Creek.
15. By October 1874, Birdtail had rejected the proposed reserve at the junction of the Assiniboine and Saskatchewan Rivers due to the scarcity of wood.

16. A new Order-in-Council dated November 12, 1874 authorized the selection of two or three reserves for the Dakota Sioux Nations based on the same formula of 80 acres per family of five.
17. In May and June of 1875, surveyor William Wagner laid out the reserve at Birdtail Creek for Chief Mahpiyahdinape's Band. Wagner's August 1875 survey report described the reserve as follows:

Birdtail Creek - Enoch's Band. The Reserve for this band is taken out of Township 15 Range 27 West and is bounded on the South by the Assiniboine River - the Birdtail Creek divides the Reserve in nearly two equal parts - and in surveying it as will be seen the plan I was guided by the legal division of the Townships as laid down in the Manual. This Reserve contains about from 7 to 800 acres of wood of which some is very good for building purposes.

The amount of acres wanted were 6400 acres.

Surveyed as per plan ----- 6880 do

therefore a surplus of only ----- 480 acres, which may be counted in for the broken surface on the western limit. Enoch and two of the Sioux were with me for a few days and

expressed themselves [sic] satisfied. The Birdtail Creek gave them in four nights over 2,500 fish amongst them 3 Sturgeon.

18. In a memorandum dated July 22, 1878, L. Vankoughnet, Deputy Superintendent General of Indian Affairs, informed David Mills, Superintendent General of Indian Affairs, that Enoch's Band (Birdtail) consisted of 430 "souls" or about 86 families.
19. The reserve for Birdtail was confirmed in a Privy Council Memorandum dated May 17, 1889:

On a Memorandum dated 15<sup>th</sup> May, 1889, from the Superintendent General of Indian Affairs, submitting here with lithographed plans of the various Reserves of Land, as well as descriptions of the same, which have from time to time been allotted (sic) to, and have been set apart for, the benefit of the hereinafter mentioned Bands of Indians who were interested in those portions of Manitoba and the North West Territories covered by Treaties 4, 6, and 7, and part of Treaty 2, the boundaries of said Reserve having been defined by survey, as shown on the said lithographed plans, and recommending that the Reserves thus defined and described hereafter under the names of the Chiefs of various Bands or otherwise be confirmed by Your Excellency in Council.

20. The description of the reserve for Birdtail is as follows:

This Reserve is situated in township fifteen, range twenty-seven, west of the principal meridian, on the eastern side of the Assiniboine River.

It is bounded by a line beginning at the north-east corner of section twenty-one, township fifteen, range twenty-seven, west of the principle meridian, and running west two hundred and forty-three chains more or less, to the north-west corner of section nineteen, in said township; thence south fifteen chains and seventy-five links, more or less, along the western boundary of said section nineteen to its intersection with the left bank of the Assiniboine River; thence south-easterly along the said bank of the said river to its intersection with the southern boundary of section four, in said township; thence east sixty-nine chains and forty-two links, more or less, to the southeast corner of section four; and thence north three hundred and twenty-four chains, more or less, to the point of beginning; containing an area of ten and three quarters square miles, more of less.

*ii Grand Trunk Pacific Railway*

21. In the late 1800s and early 1900s, the Grand Trunk Pacific Railway (“**Grand Trunk**”), now part of the Canadian National Railway, began expanding into western Canada.
22. A formal agreement was made between the Laurier government and Grand Trunk dated July 29, 1903 (“**Grand Trunk Agreement**”). The Grand Trunk Agreement was attached as a schedule to *The National Transcontinental Railway Act*, 1903, 3 Edward VII, c 71, which received Royal Assent on October 24, 1903. The stated purpose of *The National Transcontinental Railway Act* was to expedite the construction of a new “common railway highway across the Dominion of Canada, from ocean to ocean and wholly within Canadian territory.”
23. Paragraph 46 of the Grand Trunk Agreement provided that Canada would make any lands vested in the Crown available to Grand Trunk for its Western Division right-of-way, stations, yards, and other necessary purposes.
24. The Grand Trunk Agreement took effect as of the passing on October 24, 1903 of *An Act to incorporate the Grand Trunk Pacific Railway Company*, 1903, 3 Edward VII, c 122 (“**Grand Trunk Act**”).

25. Section 12 of the Grand Trunk Act provided an overview of the new railway's intended route across Canada. Section 12 also provided that Grand Trunk could establish branch lines from various points on the main line, and divided the main line, for construction purposes, into five sections: Eastern, Quebec, Woodland, Prairie, and Mountain. These five sections, plus all branch lines and subsequent acquisitions, would constitute the Grand Trunk Pacific Railway system.
26. Unlike the other sections, the route of the Prairie section was made subject to Cabinet approval:

Provided always that before the construction of any portion of the "Prairie Section" in the North-west Territories is commenced, the location thereof shall be subject to the approval of the Governor in Council, having regard to the principle that, except for the purpose of reaching proposed common points, or for other satisfactory reasons, such location shall, as far as practicable, be so made that such main line of railway shall be constructed at such distance, generally not less than thirty miles, from any other main line of railway running in the same direction, already constructed, or located by plans sanctioned by the Minister of Railways and Canals prior to the passing of this Act, as the Governor in Council may deem reasonable.

*iii                      Birdtail IR 57 Right of Way*

27. In or around December 1904, Grand Trunk's surveyors ran two trial lines across Birdtail IR 57. Indian Agent G.E. Wheatley advised the Department of Indian Affairs of this on December 16, 1904. Secretary J.D. McLean responded on December 28, 1904, directing Agent Wheatley to ensure that no construction commenced until the right of way had been duly arranged for.
28. Secretary McLean's direction was in keeping with the Department of Indian Affairs' new policy on railway surveys. The Department wanted advance payment because it had been difficult to collect from the railway companies once construction was over.
29. At a special meeting in Ottawa on August 4, 1905, Cabinet approved plans for the construction of a 275-mile portion of the Grand Trunk route extending westward from Portage la Prairie to approximately Indian Head in eastern Saskatchewan.

30. On August 10, 1905, Governor General Earl Grey formally approved the enabling Order-in-Council, in accordance with section 122 of the *Railway Act*, 1903, 3 Edward VII, c 58 (“**1903 Railway Act**”), and section 12 of the Grand Trunk Act.

On a Memorandum dated 28th July 1905, from the Minister of Railways and Canals, representing that under date 20th July instant, there has been submitted for approval a route map, shewing the general location of that portion of the proposed line of The Grand Trunk Pacific Railway between Portage la Prairie and Township 26 North, Range 13, West 2nd Meridian, a distance of about 275 miles, the approval asked for being that of the Minister of Railways and Canals under Section 122 of The Railway Act....

31. The Memorandum noted that the Towns of Birtle and Brandon were against the proposed route because it would not pass through those towns, but stated that local interests should not “be allowed for a moment to interfere to the detriment of this great national road in the selection of the route to be followed...”
32. On August 14, 1905, the Privy Council office sent a copy of the August 10 Order-in-Council to the Department of Railways and Canals, who forwarded it to the Board of Railway Commissioners along with the map of the 275-mile section.
33. On September 30, 1905, the Board of Railway Commissioners approved the route plan, which included the projected line through Birdtail IR 57.
34. Work was already underway on the approved section by September 1, 1905, in contravention of the Department of Indian Affairs’ policy on advance right of way approvals.
35. On October 4, 1905, Indian Commissioner Laird’s office informed Headquarters that contractors had started clearing the line through Birdtail IR 57. The following day, Secretary McLean warned Grand Trunk General Manager Frank W. Morse that the contractors would be treated as trespassers unless proper certified plans were immediately filed with the Department of Indian Affairs and a payment was made.
36. On October 6, 1905, Grand Trunk prepared a map of the line through Birdtail IR 57, excerpted from the route plan approved by the Board of Railway Commissioners. The map

contained a note stating that the amount of land required for the right of way was 79.17 acres, more or less. The map also contained a signed statement, dated October 9, 1905, from M.J. Butler, Deputy Minister & Chief Engineer, Department of Railways and Canals:

I hereby certify that the Land shewn herein on the Sioux Indian Reserve Enoc[h] No 57 is actually required for Railway purposes and is such as the Company should be allowed to acquire under Section 35 of the Indian Act as amended.

37. On October 9, 1905, Grand Trunk Vice President Wainwright forwarded the plan of the proposed route through Birdtail IR 57 to the Department of Indian Affairs with an offer of \$79.17 for the right of way and seeking authorization to proceed with construction.
38. On October 10, 1905, the Deputy Superintendent General, Frank Pedley, acknowledged Grand Trunk's correspondence and indicated that the Department of Indian Affairs was prepared to grant Grand Trunk permission to build the line across Birdtail IR 57 following receipt of the payment of \$79.17 as a deposit, which would be subject to further adjustment.
39. Grand Trunk responded enclosing a cheque for \$79.17 and stated that it represented "payment in full". On October 17, 1905, L. Stewart, Assistant Secretary for the Department of Indian Affairs, returned the cheque to Grand Trunk, writing that the Department had granted permission for Grand Trunk "to commence necessary work of construction of the railway through the said reserve upon 'the understanding that the price to be paid will be adjusted later.' The document which you have forwarded specifies that payment is made in full,...Payment cannot be accepted under such condition and the voucher is returned herewith."
40. Grand Trunk remitted a second cheque on October 20, 1905 but it still specified payment in full and was therefore returned.
41. On October 27, 1905, General Manager Morse forwarded a cheque to Assistant Secretary Stewart in the amount of \$79.17 "covering payment on purchase of right-of-way through Indian Reserve No. 57, Manitoba" and requested that the railway contractors be permitted to proceed without any further delay. However, prior to that, on October 12, 1905, Assistant

Secretary Stewart telegraphed Agent Wheatley in Birtle, telling him to allow work to proceed on the right of way.

42. On November 10, 1905, Agent Wheatley provided Headquarters with his valuation report for the 79.17 acres of Birdtail IR 57 that was requested for the right of way. The valuation report stated that Grand Trunk's route would largely not touch upon land suitable for farming, with the exception of about 20 acres in the southeast, and that the route ran all the way through Birdtail IR 57. The valuation of the reserve lands was stated to be as follows:

Improved land farmed by Charlie Hanska, No. 29.	
3.25, A, @ \$10.00, per acre	\$ 32.50
Improved land farmed by Moses Bun, No. 25.	
2.25, a, @ \$10.00, per acre	22.50
Land suitable for cultivation	
14.50, a, @ 6.00, per acre	87.00
Land partly suitable for cultivation	
59.17, a, @ \$4.00, per acre	<u>236.68</u>
Total 79.17, acres	\$378.68

43. On November 15, 1905, Secretary McLean replied to Agent Wheatley criticizing the way he had valued the individual improvements, and directing him to provide a new estimate.
44. On November 22, 1905, Agent Wheatley forwarded an amended valuation of the lands to Secretary McLean. The amended valuation was stated to be as follows:

Improved interests of Charlie Hanska No. 29.	
3.25, a @ \$7.00, per acre	\$ 22.75
Improved interests of Moses Bun, No. 25,	
2.25, a @ \$7.00, per acre.	15.75
Land suitable for cultivation, Band.	
20, a, @ \$6.00, per acre	120.00
Land partly suitable for grazing, Band	
59.17, a, @ \$4.00. per acre	<u>236.68</u>
Total 79.17 acres	\$395.68

45. On November 29, 1905, the Privy Council of Canada recommended that Grand Trunk's application for a right of way through Birdtail IR 57 comprising 79.17 acres or 4.92 miles

long be approved (the “**1905 Taking**”). In an Order-in-Council dated November 29, 1905, the authority cited for the 1905 Taking was section 35 of the *Indian Act*:

...the railway company being allowed to acquire the said right of way, - that under the provision of Section 35 of the Indian Act as amended by Section 5 of Chapter 33, 50-51 Victoria, authority is given for the sale of the land to the railway company upon such terms as may be agreed upon between the Department of Indian Affairs and the railway company....

46. Section 35 of the 1886 *Indian Act*, as amended in 1887 by Section 5, of Chapter 33, 50-51 Victoria, contained an expropriation provision which provided as follows:

35. No portion of any reserve shall be taken for the purposes of any railway, road, or public works without the consent of the Governor in Council, and if any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve is done under the authority of an Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons; and the Superintendent General shall, in any case in which an arbitration is had, name the arbitrator on behalf of the Indians, and shall act for them in any matter relating to the settlement of such compensation; and the amount awarded in any case shall be paid to the Minister of Finance and Receiver General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements thereon.

47. A similar provision was added as a new section of the *Railway Act*, 1888, 51 Victoria, c 29 (“**1888 Railway Act**”), which was given Royal Assent in May of 1888:

101. No company shall take possession of or occupy any portion of any Indian reserve or lands without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken possession of, used or occupied by any company, or when the same is injuriously affected by the construction of any railway, compensation shall be made therefor, as in other cases.

48. Section 101 of the 1888 Railway Act was slightly amended in section 136 of the 1903 Railway Act as follows:

136. No company shall take possession of, or occupy, any portion of any Indian reserve or lands, without the consent of the Governor in Council; and when, with such consent, any portion of any such reserve or lands is taken

possession of, used or occupied by any 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.

*iv Fencing*

49. On December 6, 1905, Secretary McLean forwarded the amended land valuation to General Manager Morse and stated that once the balance of \$316.01 was received (\$395.18 minus the advance of \$79.17), the Department of Indian Affairs would issue the patent. Secretary McLean also advised of a departmental rule requiring all railway rights of way to be properly fenced:

I have, however to draw your attention to a provision that this Department has found necessary to make in the case of rights of way through Indian reserves to the effect that the right of way shall be properly fenced on both sides, and it is requested that, in addition to such level crossings as may be required, at least one under crossing suitable for horse and cattle shall be constructed, if there is a point in the railway at all convenient for the purpose, or if a culvert or a bridge can be used, the fences shall be built accordingly.

Kindly note that the provision relating to fencing is to be carried out on all Indian reserve through which the railway passes.

50. On December 13, 1905, Frank Morse responded to the directive about proper fencing, stating that “the Grand Trunk Railway Company is quite prepared to comply with the requirements of Section 199 of the [1903] Railway Act, and Section 35 of the Indian Act, in the matter of fencing”.
51. Section 199 of the 1903 Railway Act contains several obligations on railway companies with respect to fencing:

199. The company shall erect and maintain upon the railway fences, gates and cattleguards, as follows: -

- (a) Fences of a minimum height of four feet six inches on each side of the railway.
- (b) Swing gates in such fences, of the minimum height aforesaid, with proper hinges and fastenings, at farm crossings; provided that sliding or hurdle gates, already constructed, may be maintained.

(c) Cattle-guards, on each side of the highway, at every highway crossing at raillevel by the railway. The railway fences at every such crossing shall be turned into the respective cattle-guards on each side of the highway.

2. Such fences, gates and cattle-guards shall be suitable and sufficient to prevent cattle and other animals from getting on the railway.

3. Whenever the railway passes through any locality in which the lands on either side of the railway are not improved or settled, and inclosed, the Company shall not be required to erect and maintain such fences, gates and cattle-guards unless the Board [of Railway Commissioners] otherwise orders or directs.

52. On December 21, 1905, Secretary McLean informed Frank Morse that the Department of Indian Affairs would not approve the sale of any right of way unless Grand Trunk agreed to proper fencing and other reasonable conditions.

53. On January 12, 1906, Frank Morse forwarded the balance of \$316.01 required for the right of way through Birdtail IR 57 to the Department of Indian Affairs.

54. The right of way was never fenced.

*v Additional Takings*

55. The official Crown patent to Grand Trunk covering the right of way through Birdtail IR 57 is dated January 13, 1906.

56. When building the right of way through Birdtail IR 57, Grand Trunk ended up taking additional acreage on the northern side of the line. Grand Trunk's Assistant Solicitor, D'Arcy Tate, advised Secretary McLean of this on November 22, 1906. Secretary McLean advised that the matter would be dealt with once the Indian Agent submitted a revised land valuation.

57. An amended map of the right of way dated November 12, 1906 indicates that it was excerpted from a plan approved by the Board of Railway Commissioners on July 25, 1906, with the total amount of land required from Birdtail IR 57 now amounting to 84.58 acres, more or less.

58. Secretary McLean wrote to Agent Wheatley on November 26, 1906 and asked him to provide a valuation of the extra parcel and any improvements. Agent Wheatley reported on December 12, 1906 that he valued the extra land taken at \$4.00 per acre and there were “no Indian improvements affected.”
59. On January 12, 1907, Assistant Solicitor Tate submitted a voucher for \$20.00, representing 5 acres at \$4 per acre, to Deputy Superintendent General Frank Pedley and asked for an amended patent. The amended patent was issued on January 29, 1907, but was corrected a year later because of a description error.
60. On February 22, 1907, the Privy Council formally approved Grand Trunk’s acquisition of an additional 5.41 acres of reserve land from Birdtail IR 57 for railway purposes, finding that the area required for the right of way was 84.58 acres instead of 79.17 (the “**1907 Taking**”).
61. On March 6, 1907, Secretary McLean wrote to Grand Trunk requesting another 1.64, since only 5 of the 5.41 acres had been paid for.
62. On April 2, 1907, Assistant Solicitor Tate submitted a cheque of \$1.64 to the Department of Indian Affairs for the outstanding balance.
63. On March 27, 1908, the Deputy Superintendent General of Indian Affairs issued a memorandum to cancel a wrong description in Indian Land Patent office and directed that a correct Letters Patent be issued to reflect the updated right of way:

Whereas a wrong description has been found to exist in the body of the Indian Lands Patent dated the 29<sup>th</sup> day January, 1907, issued to the Grand Trunk Pacific Railway company, owing to the description furnished not including all the land required for Right of Way,

Now therefore, by and in virtue of the powers and duties vested in the Superintendent General of Indian Affairs, by the Indian Act, Chap. 81, Revised Statutes of Canada, 1906, I hereby direct the said Letters Patent to be cancelled, and a note of such cancellation to be made in the margin of the Registry thereof, and correct Letters Patent to be issued in their stead.

64. Letters Patent were initially issued on March 31, 1908 and later on December 15, 1938 conveying 88.72 acres of Birdtail IR 57 to Grand Trunk for railway purposes (collectively, the “**Railway Parcel**”) and recognizing Canadian National Railway as successor in title to Grand Trunk.
65. On August 21, 1958, pursuant to Order-in-Council P.C. 1958-1165, the right of way granted to Grand Trunk was reconveyed to Canada due to errors and discrepancies found in the original surveys. Order-in-Council P.C. 1958-1165 refers to 88.72 acres that were conveyed to Grand Trunk.
66. The completed Railway line cuts through Birdtail IR 57, splitting a significant portion of the southern reserve area from the main portion of the reserve and reducing the usefulness of the remaining portions of Birdtail IR 57.

*vi No Surrenders Were Obtained for the Railway Parcel*

67. No surrenders were ever obtained by Canada in respect of the Railway Parcel or any portion of the same.
68. Section 38 of the 1886 *Indian Act*, as amended in 1894, 1895, and 1898, contained a general surrender provision which read:

38. No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act: provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage; in the interests of the Indians, of wild grass and dead or fallen timber.

69. By 1906, the *Indian Act* was revised and the sections relating to lands taken for public purposes and surrenders were amended. Section 35 of the *Indian Act* became section 46, as follows:

46. No portion of any reserve shall be taken for the purposes of any railway, road, or public work without the consent of the Governor in Council and if any railway and road, or public work passes though or causes injury to any reserve, or, if any act occasioning damage to any reserve is done under the

authority of an Act of Parliament, or of the legislature of any province, compensation shall be made therefor to the Indians of the band in the same manner as in provided with respect to the lands or rights of other persons.

70. Section 38 of the *Indian Act* became section 48, as follows:

48. Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered, to the Crown for the purposes of this Part: Provided that the Superintendent General may lease for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

**VI. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation**

71. This Claim is based on the Crown's breach of its statutory and fiduciary duties to the First Nation in the context of unlawful taking of land for a railway right of way, i.e., the Railway Parcel.

72. At all times material to this Claim, Birdtail IR 57, including the Railway Parcel, was:

- (a) "lands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*;
- (b) a reserve legally established and subject to the *Indian Act*; and
- (c) a cognizable and specific Aboriginal interest of the First Nation, over which the Canada had assumed discretionary control.

*i Breach of Statutory Obligations under the Indian Act*

73. The 1905 Taking constituted a "sale" or "alienation". The 1905 Taking did not comply with sections 35 and 38 of the *Indian Act* in force at the time, which called for compensation to the Indians in exchange for any taking of land for the purpose of a railway, and that no such taking be permitted without a surrender to the Crown.

74. Canada breached its statutory obligations to Birdtail under the *Indian Act* with respect to the 1905 Taking, giving rise to claims under subsection 14(1)(b)-(e) of the *Specific Claims Tribunal Act*, as follows:

- (a) failing to follow the expropriation and the surrender procedures set out by the *Indian Act*;
- (b) failing to conduct the valuation of the lands in accordance with the *Indian Act*;
- (c) failing to provide meaningful information to Birdtail regarding the purported taking of reserve lands, the Indian interests therein, the valuation of the lands, or other conditions that might apply to the 1905 Taking;
- (d) failing to advise Birdtail of the valuation of the land to be taken and its statutory right to seek arbitration if it was not satisfied with the compensation for the lands taken;
- (e) failing to obtain adequate compensation for the 1905 Taking;
- (f) failing to ensure minimal impairment of Birdtail's use and enjoyment of its reserve land by purporting to grant fee simple title to the right of way lands to Grand Trunk when it only required a limited interest in the nature of a statutory easement with a reversionary right in favour of Birdtail when the lands were no longer required for railway purposes; and
- (g) failing to withhold its consent to the 1905 Taking as the transaction was foolish, improvident and exploitative.

**ii Breach of Statutory Obligations under the 1903 Railway Act**

75. Canada breached its statutory obligations to Birdtail under the 1903 Railway Act with respect to the 1905 Taking, giving rise to claims under subsection 14(1)(b), (c), and (e) of the *Specific Claims Tribunal Act*, as follows:

- (a) failing to obtain adequate compensation for the 1905 Taking; and

- (b) failing to withhold its consent to the 1905 Taking as the transaction was foolish, improvident and exploitative.

***iii Breach of Canada's Fiduciary Duty***

- 76. Canada breached its fiduciary obligations to the First Nation with respect to both the 1905 Taking and the 1907 Taking, and the taking of the Railway Parcel generally.
- 77. The taking of reserve lands for public purposes invokes a fiduciary duty upon the Crown in its interactions with First Nations peoples.
- 78. Birdtail has a cognizable interest in Birdtail IR 57 as a reserve, including the Railway Parcel. The fiduciary duty arises out of the Crown's power and control and discretion over Birdtail IR 57. The Crown has an obligation to protect Birdtail's interest in its reserve lands, including Birdtail IR 57, and to deal with reserve lands in the best interests of Birdtail. As a fiduciary, the Crown is obligated to prevent exploitative bargains of Birdtail.
- 79. Canada breached its fiduciary duty to Birdtail with respect to the 1905 Taking, the 1907 Taking, and the taking of the entirety of Railway Parcel, giving rise to claims under subsection 14(1)(c)-(e) of the *Specific Claims Tribunal Act*, as follows:
  - (a) failing to obtain Birdtail's informed consent to the 1905 Taking, the 1907 Taking, and the taking of the entirety of the Railway Parcel;
  - (b) failing to obtain adequate compensation for the taking of the Railway Parcel;
  - (c) failing to provide meaningful information to Birdtail regarding the takings in respect of the Railway Parcel, the Indian interests therein, the valuation of the lands, or other conditions that might apply to the takings;
  - (d) failing to advise Birdtail of the valuation of the land to be taken and its statutory right to seek arbitration if it was not satisfied with the compensation for the lands taken;
  - (e) failing to ensure minimal impairment of Birdtail's use and enjoyment of its reserve land by purporting to grant fee simple title to the Railway Parcel to Grand Trunk

when it only required a limited interest in the nature of a statutory easement with a reversionary right in favour of Birdtail when the lands were no longer required for railway purposes;

- (f) failing to explore options to take a lesser interest in Birdtail IR 57, including by failing to explore alternative routes for the railway that would not impair Birdtail's interest in Birdtail IR 57;
- (g) failing to follow the expropriation and the surrender procedures set out by the *Indian Act*;
- (h) failing to negotiate the terms of a surrender of the Railway Parcel to the benefit of Birdtail;
- (i) failing to act in the best interests of Birdtail and favouring the interests of Grand Trunk over those of Birdtail; and
- (j) failing to withhold its consent to the taking of the Railway Parcel as the transaction was foolish, improvident and exploitative.


## **VII. Relief Sought**

80. Based on the foregoing, the First Nation seeks the following relief:

- (a) compensation for the fair market value and loss of use of the Railway Parcel and loss of use and usefulness of the remainder of Birdtail IR 57;
- (b) equitable compensation for Canada's failure to uphold its fiduciary and legal obligations to the First Nation arising from the Crown's administration of Birdtail IR 57 and the illegal disposition of the Railway Parcel right of way through Birdtail IR 57;
- (c) equitable interest or restitution on historical losses suffered by Birdtail;
- (d) such other damages or compensation as this Honourable Tribunal deems appropriate; and

- (e) costs in relation to the specific claims process.

Dated this 10<sup>th</sup> day of July, 2024 at the City of Saskatoon in the Province of Saskatchewan.



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