Tribunal File No.: SCT - **7001** - **25**

SPECIFIC CLAIMS TRIBUNAL

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FILED / TRIBUNAL DES REVENDICATIONS PARTICULIÈRES / DÉPOSÉ
May 14, 2025
Katherine Richard
Ottawa, ON | 1

BETWEEN:

KITSELAS FIRST NATION

Claimant

and

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

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 provisions of the *Specific Claims Tribunal Act*, SC 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

May 14, 2025

Date

Katherine Richard

Registry Officer

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building, 234 Wellington Street East Tower
Ottawa, Ontario KIA 0H8
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I. Claimant(s) (Subrule 41(a) of the *Rules*)

1. The Claimant, Kitselas First Nation ("Kitselas"), confirms that it is a First Nation (within the meaning of section 2 (a) of the *Specific Claims Tribunal Act*, SC 2008, c 22, in the Province of British Columbia.

II. Conditions Precedent (Subrule 41(c) of the *Rules*)

2. The following conditions precedent as set out in subsection 16(1) (d) of the *Specific Claims Tribunal Act*, SC 2008, c 22, have been fulfilled:

> (d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. On March 6, 2017 Kitselas filed the Kitselas Railway Specific Claim (the "Claim") with the Specific Claims Branch. On June 17, 2020, the Minister notified Kitselas in writing that the Claim was accepted for negotiation.

4. While efforts by Kitselas to reach a negotiated settlement in the four (4) years since Canada accepted the Claim for negotiation, including the provision of expert appraisal and forestry experts from Kitselas to Canada, the Claim has yet to be resolved and the parties are at an impasse.

III. Claim Limit (Paragraph 20(1)(b) of the *Act*)

5. The Claimant does not seek compensation in excess of $150 million.

IV. Grounds (Subsection 14(1) of the *Act*)

6. The following are the grounds for the Claim, as provided for in section 14 of the *Specific Claims Tribunal Act*, SC 2008, c 22:

> (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; and

(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 (Subrule 41(e) of the *Rules*)

7. This Claim is in respect of reserve lands taken by the Grand Trunk Pacific Railway Company ("GTPR") for a railway right-of way ("ROW") over Kitselas Indian Reserve #1 ("IR 1"), Chimdimash Indian Reserve #2 ("IR 2") and Kshish Indian Reserve #4 ("IR 4") ("Kitselas Reserves"). Canada failed to ensure Kitselas was adequately compensated for the land, timber, disturbance of the gravesites and injurious affection caused by the construction of the GTPR ROWs across the Kitselas Reserves.

8. Pursuant to Article 13 of the Terms of Union by which British Columbia entered Confederation in 1871, the Kitselas Reserves, among others, were allotted by Commissioner Peter O'Reilly ("O'Reilly") by Minutes of Decision dated October 6, 1891 and were approved by the Chief Commissioner of Lands and Works ("CCLW").

9. O'Reilly revisited the Kitselas territory and made some amendments to the Kitselas Reserves on September 18, 1894 which were also approved by the CCLW resulting in the following acreages:

- No. 1 Kitselas 1470 acres
- No. 2 Chimdimash 240 acres
- No 4 Kshish 130 acres.

10. The Indian reserves in British Columbia, including the Kitselas Reserves, were not conveyed to Canada until 1938 however they were administered by the federal Crown as if they were *Indian Act* reserves.

Kitselas Indian Reserve 1

11. In May of 1908 the GTPR supplied surveys to the Department of Indian Affairs ("DIA") indicating the path of the intended right-of-way ("ROW") across IR 1. However, prior to obtaining approval, in July 1908, the GTPR commenced clearing the ROW.

12. In October 1909, Kitselas Chiefs and its members requested that the railway line not interfere with their graveyards. In July 1910, the Indian Agent ("IA") reported valuations of the Kitselas Reserves at $2.50 per acre x 29.41 acres; $140.00 for improvements and $110.00 per grave.

13. In October 1910 the DIA received the tracings and plans for the ROW through IR 1. Privy Council ("P.C.") 2200 was issued November 9, 1910 for the 29.42 acres of the Kitselas Reserves to be transferred to the GTPR. On August 29, 1912 the DIA issued the grant to the GTPR.

14. A decade later the IA admitted that the compensation was low but accepted it because there had been "some white men" who had accepted at that rate.

15. In 1922 the Canadian National Railway, (the "CNR"), successor to the GTPR, advised the DIA that the ROW was in fact only 27.71 acres. The error was corrected by P.C. 1006 of June 20, 1928.

Chimdimash Indian Reserve 2

16. The GTPR sought a ROW through IR 2 and, in a situation similar to that which occurred in relation to IR 1, commenced construction prior to obtaining the DIA's consent.

17. In 1910 the land required for the ROW over IR 2 was valued by the DIA at $10 per acre. The plans were provided to the DIA on January 29, 1913. By PC 98/1308 the DIA recommended that authority be given to the CNR to take 8.46 acres of IR 2 for railway purposes pursuant to section 46 of the Indian Act. Sometime before June, 1923 the GTPR paid the DIA $84.60 for 8.46 acres.

18. In August of 1923, the CNR advised the DIA that only 5.71 acres were required and as a result, the documents were amended and monies returned.

Kshish Indian Reserve 4

19. On January 21,1909, the GTPR applied under section 175 of the Indian Act for 65.95 acres of IR 4. In April, 1909 the DIA granted permission for the ROW.

20. In or about July, 1910 the IA valued the land required at $15 per acre plus the value of the improvements. By letter dated November 9, 1922 GTPR confirmed that its ROW was only 65.70 acres and not the original area of 65.95 acres.

21. On June 20, 1928, by PC 1006, 65.70 acres of IR 4 were transferred to the GTPR pursuant to section 48 of the Indian Act, 1927.

Inadequate Compensation for Land Taken

22. As a result of the foregoing, Kitselas received inadequate compensation for the land taken from IR 1, IR 2 and IR 4.

Timber Issue

23. Timber was removed from the Kitselas Reserves by the subcontracting firm of Foley Welch & Stewart without any compensation being paid to Kitselas.

24. The 1910 lease agreement between the GTPR and Kitselas contained the provision that Kitselas was to accede to the disposal of timber cut in the construction of the railway track.

25. In 1912 the Inspector of Indian Agencies Tyson acknowledged that that "remuneration given to the Indians was in most cases exceedingly small".

26. The Inspector requested an investigation of the "cutting and destroying of large quantities of timber outside of the line of the Railroad Right of Way" but the request was refused.

27. In 1920 there were still complaints from Kitselas regarding the dealings of Foley Welch & Stewart. There is no evidence that Kitselas obtained any compensation for the timber removed by the firm of Foley Welch & Stewart in connection with the GTPR's ROW.

Injurious Affection

28. The construction of the GTPR caused significant damage to two of Kitselas' historical villages located on IR 1:

    (a) Gitlaxdzawk or git'laxdzo.ks, known as the Kitselas Fortress Village; and

    (b) Tsunyow.

29. There was at least a 15% reduction in the reserve land value of the remainder of IR 1 as a result of the GTPR ROW taking and there was at least a 10% reduction in the reserve land value of the remainder of IR 4 as a result of the GTPR ROW taking.

30. A significant amount of timber was isolated on IR 1 and IR 4 as a result of the construction of the railway and could no longer be harvested, resulting in the claim for injurious affection.

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

31. Kitselas submits that Canada breached the fiduciary duty owed to it by:

(a) failing to obtain fair and adequate compensations for the lands that were taken from IR 1, IR 2 and IR 4 and for the destructions of the gravesites and removal of the graves from IR.1;

(b) failing to obtain any compensation for the timber removed from IR 1, IR 2 and IR 4 and the timber that was incapable of being harvested from IR 1 and IR 4 due to the construction of the railway (injurious affection); and

(c) failing to obtain any compensation for lands on IR 1, IR 2 and IR 4 that were subject to injurious affection as a result of the construction of the railway.

32. In addition, Canada breached its statutory duties owed to Kitselas in failing to adhere to the statutory provisions set forth in sections 46 and 48 of the Indian Act and section 175 and 192 of the Railway Act in force at the time.

Applicable Legislation

33. At the time that Dominion Orders in Council PCOC 2026 (October 1, 1909) and PC 2200 (November 9, 1910) were passed recommending that the GTPR acquire 55.95 acres of land on IR 4 and 29.42 acres of land on IR 1 pursuant to section 46 of the Indian Act, R.S.C. 1906, c. 81, it read 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, road, or public work passes through 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 is provided with respect to the lands or rights of other persons.

34. When Dominion Order in Council PCOC 98/1308 was passed on July 7, 1923 permitting the GTPR to take lands on IR 2 section 46 had been amended by S.C. 1911, c. 14, s. 1 and it read as follows:

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

35. Section 175 of the Railway Act of 1906 c. 37 which was in force at the time of the taking reads as follows:

> No company shall take possession of or occupy any portion of any Indian reserve or lands, without the consent of the Governor in Council. When, with such consent, any portion of any 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.

36. The applicable legislation at the time that Dominion Order PCOC 1006 was passed on June 20, 1928 which transferred 27.71 acres of IR 1, 5.71 acres of IR 2 and 65.70 acres of IR 4, was section 48 of the Indian Act R.S.C. 1927, c. 98 ("1927 Indian Act") which reads as follows:

> 48. No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility without the consent of the Governor in Council, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the of owner may, with the consent of the Governor in Council as aforesaid, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.

2. In any such case compensation shall be made therefor to the Indians of the band, and the exercise of such power, and the taking of the lands or interest therein and the determination and payment of the compensation shall, unless otherwise provided by the order in council evidencing the consent of the Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

37. Also relevant is section 192 of the Railway Act, 1927 R.S.1927, c. 170 which states ("1927 Railway Act"):

> 192. 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.

38. Both sections 46 of the Indian Act of 1906 and section 48 of the 1927 Indian Act, dictated that, in cases of the taking of reserve lands for railway purposes, the consent of the Governor in Council be obtained and that compensation be paid. The Railway Act, 1906 c. 37 and the 1927 Railway Act, were applicable at the time of the takings which both contained a number of requirements, including the requirement that the company not take possession of occupy the lands before obtaining the consent of the Governor in Council and pay compensation for the land and any injurious affection.

Breach of Fiduciary Duty

39. The existence of a fiduciary relationship and concurrent obligations will be found when the following elements exist as stated in Wewaykum Indian Band v. Canada, [2002] 4 SCR 245 at paragraph 85 ("Wewaykum"):

There are two basic elements in the test for the existence of fiduciary obligations in the Crown-Aboriginal context:

(a) the identification of a cognizable Indian interest; and

(b) an undertaking of discretionary control by the Crown in relation to that interest in a manner that invokes reasonability "in the nature of a private law duty".

40. In this particular Claim the fiduciary obligations that will be of significance are those that arise in administering and disposing of provisional reserve land. The Supreme Court of Canada has recognized the existence of fiduciary obligations in relation to provisional reserves in several cases: Wewaykum, Canada v. Kitselas First Nation 2014 FCA 150 ("Kitselas") and Osoyoos Indian Band v. Her Majesty the Queen in the Right of Canada, SCT-7002-11 ("Osoyoos").

41. The case of Wewaykum involved a dispute between the Cape Mudge and Campbell River First Nations. While the Court dismissed the appeals of those First Nations, it made some important comments with respect to the fiduciary duty owed to aboriginal peoples.

42. The existence of fiduciary obligations will be "imposed on the Crown …in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures" (Wewaykum at paragraph 81) and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" (Wewaykum at paragraph 85).

43. The judgment of Mr. Justice Binnie, speaking for the Court in Wewaykum, in the following paragraphs are important:

> [51] …While the Department of Indian Affairs treated the "reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the Constitution Act, 1867. It was not until the Judicial Committee of the Privy Council decision in St. Catherine's Milling and Lumber Co. v. The Queen (1988), 14 App. Cas. 46, that it was made clear that under s. 91(24) all the "Dominion had [was] a

right to exercise legislative and administrative jurisdiction – while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province…"

…

[79] … All members of the Court accepted in Ross River that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (Sparrow) or existing reserves (Guerin). The fiduciary duty where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.

(B. Slattery, "Understanding Aboriginal Rights" (1987), 88 Can. Bar Rev. 727, at p. 753)

…

[89] In the present case the reserve-creation process dragged on from about 1878 to 1928, a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.

…

[94] Insofar as the appellant bands contend for a broad application of a fiduciary duty at the stage of reserve creation in non-s. 35(1) lands (as distinguished from their other arguments concerning existing reserves and reserve disposition), it is necessary to determine what the imposition of a fiduciary duty adds at that stage to the remedies already available at public law. The answer, I think, is twofold. In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In Blueberry River McLachlin J. (as she

then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs". See also D.W.M. Waters, Law of Trusts in Canada (2nd ed. 1984), at pp. 32-33; Fales v. Canada Permanent Trust Co., [1077] 2 S.C.R. 302, at p. 315. Secondly, and perhaps more importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies, about which more will be said below.

...

[96] When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: Samson Indian Nation and Band v. Canada, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the governments discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in Guerin, supra, at p. 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.

[97] Here, as in Ross River, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.

...

It is clear that the authority for GTPR for the taking of land in the Kitselas Reserves was the applicable Railway Acts. In Canada (Attorney General) v. Canadian Pacific Ltd. (2000), 79 B.C.L.R. (3d) 62 (S.C.) at paragraph 24, Saunders J. stated:

> Historically, federally incorporated railways in Canada have been subject to various forms of the Railway Act...

As stated in Osoyoos, at paragraphs 48-51:

> [48] A central issue in Canadian Pacific was whether the Railway Act, 1927 was the authority for the taking of land within a reserve. As in the present matter, the case was concerned with a taking of land allotted as reserve while title remained with the Province of British Columbia. Canadian Pacific ceased using the land for railway purposes after the transfer of title to Canada.
>
> [49] Saunders J. rejected Canadian Pacific's claim that it acquired the land under the CPR Act or the Canadian Pacific Contract, and found that "any entitlement to CPR to the land must come from the Railway Act". (para. 150)
>
> [50] At paras. 145-146, Saunders J. considered s. 189 of the Railway Act, 1927:
>
> > No company shall take possession of, use or occupy any lands vested in the Crown, without the consent of the governor in Council.
>
> And found that:
>
> ...The term "the Crown" has been interpreted to include the Provincial Crown: British Columbia (Attorney General) v. Canadian Pacific Railway, [1906] A.C. 204 (Canada P.C.); Mitchell v. Sandy Bay Indian Band, supra, at 105. Likewise, Her Majesty refers to both the federal and provincial Crown (para. 146)

[51] Canadian Pacific is authority for the application of the Railway Act, 1927, s. 189, to land vested in a Province. The Railway Act, 1919, was in force when the KVR acquired an interest in Okanagan I.R. 1, then a provisional reserve.

44. The applicable Railway Act for the takings of the Kitselas Reserves was the Railway Act, 1927, s. 192 which states:

> 192. 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.

45. At the time that GTPR acquired its interest in the Kitselas Reserves the title to the (provisional reserve) was held by the Province.

Cognizable Indian Interest

46. There can be no issue in these circumstances of this Claim that there was clearly a cognizable Indian interest in the Kitselas Reserves which was clearly recognized as such by Canada's agents.

Discretionary Control

47. The takings of the Kitselas Reserves by the GTPR were pursuant to section 48 of the 1927 Indian Act wherein consent was required by the Governor in Council and compensation was to be paid. Clearly, Canada had complete control over this process and Kitselas had no opportunity to negotiate the amount of compensation it was to receive for its interests.

48. Kitselas relied completely on Canada's agent, the IA, to protect its interests.

Injurious Affection

49. The provisions in the Railway Acts in force at the time of the GTPR takings required compensation for injurious affection which was described in the case of Semiahmoo Indian Band v. Canada (C.A.) [1998] 1 F.C. 3 at paras 114-115:

> 114. In order to ensure full restitution, the referee will also have to determine whether the Band suffered any damage to the remainder of the reserve during the period from 1969 to the date of this Court's judgment and, if yes, the referee will have to quantify that amount. For example, did the loss of the surrendered land impede development on the remainder of the reserve? In expropriation law, damage to the value of the remainder of a property as a result of a partial taking may be compensable under the principle of injurious affection. Damage by injurious affection, also known as "consequential damage", recognizes inter alia that, "[w]here part of an owner's land is expropriated, the piece or pieces of land remaining may be rendered less valuable as a result of their severance from the expropriated portion. Here a claim may be made for 'injurious affection by severance'."
>
> 115. The principle of injurious affection flows from the overriding objective of compensation in expropriation cases, which is to make the expropriated owner "economically whole". Injurious affection is a statutory remedy for partial takings by the Crown. It is therefore, not strictly applicable in this case. However, given that compensation in expropriation cases has the same objective as restitutionary relief in an action for breach of fiduciary duty committed by the Crown in the context of a land surrender, this issue should be taken into consideration in the calculation of equitable damages.

Pre-Reserve Creation Fiduciary Duties:

50. As set out Wewaykum at paragraph 97 and Kitselas at paragraph 49, the pre-reserve creation fiduciary duties are, to act in accordance with the standards of loyalty and good faith. When it arises it "is limited to the basic 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 aboriginal beneficiaries" (Wewaykum at para. 86).

51. It is submitted that ordinary prudence with a view to act in the best interests of Kitselas at a minimum would require obtaining fair and adequate compensation for

Kitselas' interests in the Kitselas Reserves. There is no evidence of Canada's agents obtaining proper appraisals for the land or timber taken for the GTPR ROW, no proper valuation was made for the disturbance of gravesites nor the removal of bodies to another location, nor is there any evidence of compensation being paid for injurious affection.

IR 1 Failure to obtain any or adequate compensation for the Land, Timber and Injurious Affection

52. Pursuant to the legislation, Kitselas was to be properly compensated for the reserve lands taken by the GTPR for the ROW. There is evidence that even the IA thought the valuation of $2.50 per acre for the IR 1 land was too low. Canada also failed to obtain any compensation for the timber removed by the subcontracting firm of Foley Welch & Stewart.

53. There was no independent evaluation undertaken in relation to the value of the lands or timber taken from IR 1.

54. Expert evidence tendered by Kitselas supports it position that significant compensation is owed to Kitselas by Canada.

55. Kitselas was also not paid any compensation of injurious affection. In addition, two historical villages that had cultural and archaeological significance for Kitselas were destroyed and Kitselas received no compensation for this. As well, there was an estimated 15% reduction in the value of the reserve land remaining in IR 1 for the following reasons:

    (a) The GTPR taking in 1912 removed useful riverfront area destroying access to the river which was important to act as a service area for events occurring at the Skeena River, such as steam ship navigation, fishing, band security, housing, day to day activities and recreation; and

(b) The construction of the railway changed the topography of the river bank area.

Failure to obtain adequate compensation for the Graveyards

56. It is Kitselas' position that the Canada failed to obtain sufficient compensation for the GTPR's interference with the graveyard sites, which the IA had recognized as archaeologically significant. It should be noted that while compensation was initially set at $110.00 per grave, the Kitselas members who could substantiate their claims to 8 of the 15 graves were paid only $95 per grave, with the balance of the funds being applied toward a monument and enclosure for a new cemetery. Accordingly, the Kitselas members who were directly compensated for interference with family graves received only $95 per grave and not $110 as originally stipulated. Moreover, Kitselas alleges that, at any rate, the sum of $110 per grave was inadequate compensation.

57. The inadequacy of the compensation is evidenced by the following:

$1,650.00 was paid to Kitselas for the interference with the graveyard however, the sum of $1,895.00 was debited from the Kitselas account for purposes and expenses relating to the removing the bodies and relocating the graveyard as follows:

$225	for removal of graves
$475	to Simon Wallace for graves he "owned"
$ 95	to Old Richard for graves he "owned"
$ 95	to Daniel Star for graves he "owned
$95	to Mrs. Blake for graves she "Owned
$750	to clear the graveyard
$ 15	to David Seymour for boarding labourers
$ 30	to Richard Cecil for boarding labourers
$115	for a monument
$1,895	TOTAL

58. In other words, Kitselas had less money in their trust fund account after the GTPR interfered with the graveyard than before it did so. Moreover, the fact that all of the compensation paid to Kitselas was disbursed for expenses incurred in relocating the graveyard confirms that Kitselas did not receive any compensation for other heads of damages, such as damages relating to the desecration of a culturally significant cemetery, which the DIA had recognized as having great archaeological significance.

59. Lastly, the foregoing takes on added significance when at the time in October 1909, the Chiefs and Kitselas members petitioned the DIA asking that the "railroad lines be moved outside the three graveyards".

IR 2 Failure to obtain any or adequate compensation for the Land and Timber

60. The DIA valued the 5.71 acres of reserve land on IR 2 at $10.00 per acre for a total of $57.10. The DIA did not conduct an independent land evaluation. The estimated value of the IR2 reserve land at the time of the taking was valued in the Land Appraisal at $171.00.

IR 4 Failure to obtain any or adequate compensation for the Land (including timber)

61. The DIA valued the 65.70 acres of reserve land on IR 4 at $15.00 per acre for a total of $985.50. There is no explanation for the substantial difference between the price per acre between IR 2 and IR 4 when they were taken at a similar time. The estimated value of the IR4 reserve land at the time of the taking was valued in the Land Appraisal at $1,281.00.

62. The Timber Appraisal values the timber that was taken for the GTPR ROW on IR 4 at $21,041.74 in 1911. In addition to the timber that was harvested by Foley Welch & Stewart on IR 4, in a 1910 lease agreement between the GTPR and Kitselas there was a provision that Kitselas was to accede to the disposal of the timber cut in the making of the railroad track. It is Kitselas' position that the Crown

was under a fiduciary obligation to obtain adequate compensation from the GTPR for Kitselas' timber and made an unnecessary and unjustified concession to Kitselas' detriment in allowing the GTPR to cut the timber without proper compensation.

63. Only an independent evaluation would have satisfied the duty imposed upon the Crown to ensure that Kitselas was being fully compensated. There is no evidence that the DIA sought advice from an appraiser for any of the GTPR takings.

64. It is submitted that Canada breached its statutory and fiduciary duties of "loyalty, good faith in the discharge of its mandate" and "acting with ordinary prudence with a view to the best interest" of Kitselas by failing to get adequate compensation for the land, and no compensation for the timber, injurious affection of both land and timber and desecration of the graveyard on the Kitselas Reserves.

Honour of the Crown

65. At all times the honour of the Crown is at stake as is set forth Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73 at para. 16 ("Haida"). This is an overreaching obligation that "gives rise to different duties in different circumstances" (Haida at para. 18).

> [18] The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: Wewaykum... The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in Wewaykum, at par. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:...Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is

sufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

66. This was further considered in Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14 ("Metis") at para. 73:

73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": Haida Nation, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (Wewaykum, paras. 79 and 81; Haida Nation, at para. 18);

67. The Metis case was further discussed in the Specific Claims Tribunal Decision of Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada SCT-7004-11 at paragraph 178:

> [178] In Manitoba Metis Federation v. Canada, 2013 SCC 14, [2013] 1 SCR 623 [Manitoba Metis Federation], the Supreme Court of Canada expanded on the relationship between the honour of the Crown and fiduciary duty:
>
> > The honour of the Crown arises "from the Crown' assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people": Haida Nation, supra, at para. 32. In Aboriginal law, the honour of the Crown goes back to the Royal Proclamation of 1763, which made reference to "the several Nations or Tribes of Indian, with whom We are connected, and who live under our Protection:" see Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate her:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> ...
>
> [180] The honour of the Crown is a practical and concrete concept. It gives rise to a fiduciary duty where the Crown assumes discretionary control over specific Aboriginal interests...

68. Canada did not uphold the honour of the Crown when it failed to secure proper and adequate compensation for the Kitselas Reserve lands, timber, and graveyards and injurious affection caused to the Kitselas Reserves.

VII. RELIEF SOUGHT

69. Kitselas seeks the following relief:

a. A determination that Canada breached it statutory and fiduciary obligations to Kitselas;

b. In the alternative, a determination that Canada was negligent in not obtaining adequate compensation;

c. Equitable compensation for Canada's breach of its statutory, honourable, and fiduciary duties including:

   i. Compensation for the land;

   ii. Compensation for the timber

   iii. Compensation for the graveyards; and

   iv. Compensation for the injurious affection caused to the Kitselas Reserves and the timber on IR 1 and IR 4 as a result of Canada's breach of statutory and fiduciary duties and/or negligence.

d. Costs to be awarded on a solicitor-client or substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure,* SOR/2011-119 section 110(2) in relation to the Specific Claim and this proceeding; and

e. Such other relief as this Honourable Tribunal deems just.

Dated this 14TH day of May, 2025

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