SCT File No.: SCT-7001-25

SPECIFIC CLAIMS TRIBUNAL

BETWEEN

KITSELAS FIRST NATION

Claimant

-and-

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

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: Kitselas First Nation
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Overview

1. The Respondent, His Majesty the King in right of Canada as represented by the Minister of Crown-Indigenous Relations ("**Canada**"), is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada acknowledges these principles as it attempts to assist the Specific Claims Tribunal ("**Tribunal**") in adjudicating matters brought before it.

2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. Canada is open to using the processes of the Tribunal to facilitate the resolution of issues and to narrow the matters for determination and will continue to pursue all appropriate forms of resolution as this claim proceeds through the Tribunal process.

3. The Declaration of Claim (the "**Claim**") concerns takings of portions of provisional reserve lands of the Kitselas First Nation for a right-of-way for the construction of a railway by the Grand Trunk Pacific Railway Company (the "**Grand Trunk Pacific Rw. Co**."), and the adequacy of compensation paid to the Kitselas First Nation.

4. Regarding Kitselas First Nation's Claim as a whole, Canada does not admit that:

    (a) it breached any fiduciary or statutory duties owed to the Kitselas First Nation under section 14(1)(b) or (c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 ("***SCTA***");

    (b) there was any illegal lease or disposition by the Crown of reserve lands under section 14(1)(d) of the *SCTA*;

    (c) there was a failure to provide adequate compensation for lands taken or damaged under section 14(1)(e) of the *SCTA*; or

(d) that Canada otherwise did not conduct itself in accordance with the honour of the Crown.

5. Canada says that it obtained proper and fair compensation for the Kitselas First Nation for the lands and improvements that were either taken or destroyed by the Grand Trunk Pacific Rw. Co., and exercised its discretion honestly, prudently, and for the benefit of the Kitselas First Nation and did not breach a duty.

6. Canada says that it acted with lawful authority, met its obligations relating to the Kitselas First Nation's interests in lands in taking lands for railway construction and ensured the Kitselas First Nation received compensation. The interest in land acquired by the Grand Trunk Pacific Rw. Co. and any successors remains subject to the provisions of the applicable *Indian Act* and *Railway Act* (including the restraint against alienation). The interest in land acquired by the Grand Trunk Pacific Rw. Co. or its successors was something less than a fee simple absolute.

7. Canada admits that in or about 1915 or thereabouts, the Kitselas First Nation informed Canada that timber had been removed from its provisional reserves. Canada says that there were one or more agreements between the Kitselas First Nation and the Grand Trunk Pacific Rw. Co. and/or its agents that permitted the use of timber in connection with the construction of the railroad's right-of-way, but does not know how much, if any, timber was removed without Kitselas First Nation's approval. Further, Canada does not know the value of any timber removed, who removed the timber, or whether the Kitselas First Nation received compensation for the timber.

8. In response to the whole of the Declaration of Claim, Canada requires further historical research and expert historical and accounting evidence, and in the spirit of reconciliation, Canada will re-assess its position and, if appropriate, will amend this Response as new documentary and expert evidence is received.

9. Kitselas First Nation previously received compensation in respect of the non-inclusion of a 10.5-acre parcel of land in Kitselas Indian Reserve No. 1 that was initially set apart for the Kitselas First Nation in 1891 by the Joint Indian Reserve Commission ("JIRC"). Canada understands the Claim does not seek compensation in respect of the same lands or for any matters that were released as part of the settlement of *Kitselas First Nation v. Her Majesty the Queen in Right of Canada* (SCT-7003-11), 2013 SCTC 1, or in the settlement of any other claims.

10. This Response periodically uses terminology now recognized as antiquated. This is only when required for legal accuracy or when referring to or quoting from historical sources.

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

11. Canada admits that Kitselas First Nation is a First Nation within the meaning of section 2 of the *SCTA*, as pled in paragraph 1 of the Claim. Canada further admits that Kitselas First Nation is located in the Province of British Columbia.

12. Canada admits, in response to paragraph 2 of the Claim, that this claim meets the condition precedent as set out in paragraph 16(1)(d) of the *SCTA*, except for the assertion at paragraph 30 asserting that the railway construction resulted in timber on Kitselas Indian Reserve #1 ("**Kitselas I.R. No. 1**") and Kshish Indian Reserve #4 ("**Kshish I.R. No. 4**") becoming "isolated" and un-harvestable. Canada says that the Kitselas First Nation's claim for injurious affection based on "isolated timber" at paragraph 30 was not previously filed with the Minister as required by s. 16(1) of the *SCTA*, and Canada does not know if it is based on the same or substantially the same facts as the claim filed with the Minister.

13. Canada admits, in response to paragraph 3 of the Claim, that this claim meets the condition precedent as set out in paragraph 16(1)(d) of the *SCTA* except that the Kitselas Railway Specific Claim that was submitted and accepted for negotiation did

not say the construction of the railway resulted in timber on Kitselas I.R. No. 1 and Kshish I.R. No. 4 becoming "isolated" and un-harvestable as asserted in paragraph 30.

14. In response to paragraph 4 of the Claim, Canada acknowledges that the claim has not been resolved by a final settlement agreement.

15. Canada acknowledges the Kitselas First Nation is not seeking compensation in excess of $150 million for the purposes of this claim, as outlined in paragraph 5 of the Claim.

16. Canada acknowledges, in response to paragraph 6 of the Claim, the Kitselas First Nation has brought this claim pursuant to paragraphs 14(1)(b), (c), (d) and (e) of the *SCTA*. Canada says that to the extent the Claim asserts negligence or seeks damages in tort that such issues are outside of the Tribunal's jurisdiction.

II. Canada's position with respect to Validity of the Claim (R.42(b) and (c))

17. Canada does not agree that the facts establish any valid claims under the *SCTA*. If Canada owed the duties asserted by the Kitselas First Nation in the Claim, Canada says that it met its duties and conducted itself with good faith, loyalty and honour throughout, and in accordance with applicable legislation of the time. Canada also says that it acted with diligence and a view to the best interest of the Kitselas First Nation. With the benefit of further documentary and expert historical and accounting evidence, Canada may re-examine its position on this Claim and may amend this Response accordingly.

18. In further response to the whole of the Declaration of Claim, and to paragraph 7 in particular, Canada states that the Grand Trunk Pacific Rw. Co. obtained less than a fee simple absolute in the portions of the Kitselas Reserves taken for the railway and that Canada met its obligations relating to Kitselas' interests in the lands.

19. If the Tribunal should find that the claim of the Kitselas First Nation is valid, Canada states that:

(a) Paragraphs 20(1)(a) to (c) of the *SCTA* may provide the basis for the Tribunal to award compensation.

(b) This is subject, however, to any apportionment with third parties under subsection 20(1)(i) and applicable deduction or set off from such compensation calculated in accordance with subsection 20(3) of the *SCTA*.

III. Canada's position with respect to Assertions of Fact

20. In response to paragraph 7 of the Claim, the Grand Trunk Pacific Rw. Co. was incorporated in 1903 to build a rail line running from Winnipeg through Prince George to Prince Rupert. The Grand Trunk Pacific Rw. Co. construction of the rail line crossed Kitselas I.R. No. 1, Chimdimash Indian Reserve #2 ("Chimdimash I.R. No. 2"), and Kshish I.R. No. 4 (collectively the "**Kitselas Reserves**").

21. In further response to paragraph 7 of the Claim, Kitselas received compensation arising from the Grand Trunk Pacific Rw. Co. construction of the railway. The Tribunal will need to determine whether Kitselas was entitled to the types of compensation it claims, and whether the compensation Kitselas received was adequate.

22. In response to paragraph 8 of the Claim:

(a) After British Columbia entered confederation in 1871 pursuant to Article 13 of the Terms of Union, between 1871 and 1875, Canada and British Columbia negotiated the terms under which additional reserve lands would be set apart. This negotiation led to the establishment of an Indian Reserve Commission charged and instructed to meet with First Nations within British Columbia and set apart reserves for their use and benefit.

(b) On July 19, 1880, Peter O'Reilly was appointed as Indian Reserve Commissioner in British Columbia, pursuant to Dominion OCPC 1880-1334. O'Reilly was instructed to set aside Indian reserves subject to the

approval of the Chief Commissioner of Lands and Works for British Columbia and the British Columbia Indian Superintendent.

(c) Deputy Superintendent General of Indian Affairs Lawrence Vankoughnet, issued instructions to O'Reilly, dated August 9, 1880.

(d) On October 6, 1891, O'Reilly allotted six provisional reserves for the Kitselas First Nation, observed an abundance of timber on Kitselas I.R. No. 1 and Chimdimash I.R. No. 2, and allotted Kshish I.R. No. 4 to relocate the village from Kitselas I.R. No. 1.

23. In response to paragraph 9 of the Claim:

(a) O'Reilly visited the Kitselas First Nation a second time and on September 18, 1893, he issued a second set of Minutes of Decision which altered the Kitselas First Nation's provisional reserves.

(b) In 1901, the Kitselas First Nation's lands were surveyed.

(c) The Commissioner of Lands and Works approved the provisional reserves on September 9, 1902, and the 1902 Schedule of Indian Reserves in the Dominion of Canada recorded the Kitselas Reserves as follows:

i. Kitselas I.R. No. 1 totaling 1470 acres,

ii. Chimdimash I.R. No. 2 totaling 240 acres, and

iii. Kshish I.R. No. 4 totaling 130 acres.

(d) On September 24, 1912, Canada and the Province of British Columbia jointly appointed the Royal Commission on Indian Affairs for the Province of British Columbia (the "McKenna-McBride Commission") to resolve an impasse concerning reserve creation. The McKenna-McBride Commission was afforded authority to deal with reserve lands required for right-of-way or

other railway purposes under section 8 of the agreement creating the McKenna-McBride Commission (the "McKenna-McBride Agreement").

(e) In or about April, 1916, by Minutes of Decision, the McKenna-McBride Commission confirmed the Kitselas First Nation held Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4, with acreages annotated as being "less allowed right-of-way of the G.T.P.R. Co."

(f) Canada and British Columbia appointed W.E. Ditchburn and Major J.C. Clark, respectively, to review and amend the McKenna-McBride Commission work. The report by Ditchburn and Clark was ratified by the British Columbia Provincial Government in July of 1923 through BC Order-in-Council 1923-911 and by Canada in July of 1924 through OCPC 1924-1265.

24. In response to paragraph 10 of the Claim, Kitselas I.R. No. 1, Chimdimash I.R. No. 2, and Kshish I.R. No. 4 were provisional reserves at the time of the taking by the Grand Trunk Pacific Rw. Co. They became reserve lands within the meaning of s 91(24) of the *Constitution Act, 1867*, when British Colombia transferred administration and control of the subject lands to the federal Crown on July 29, 1938, by Order-in-Council 1036.

Kitselas Indian Reserve 1 (Kitselas I.R. No. 1)

25. In response to paragraph 11 of the Claim:

(a) In or about the spring of 1908, the Grand Trunk Pacific Rw. Co. began entering and clearing railway rights-of-way across multiple Skeena River Indian Reserves, including Kitselas I.R. No. 1, and Canada advised the Grand Trunk Pacific Rw. Co. it needed permission to obtain rights-of-way prior to commencing work and informed it of the need to compensate First Nations for their interest in land affected by the right-of-way.

(b) In July 1908, Canada advised the Grand Trunk Pacific Rw. Co. its railway contractors were reportedly entering and clearing land in the Kitselas First Nation Kitselas I.R. No. 1 and Chimdimash I.R. No. 2, that they did not have permission to do so, and requested certified right-of-way plans and a deposit covering the reasonable valuation of lands that would be affected.

(c) In 1908, section 175 of the *Railway Act*, 3 E. VII. c 58, s.1 stated that:

> 1. 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 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

26. In response to paragraph 12 of the Claim:

(a) On October 20, 1909, Chief Samuel Wise and Chief Simon Wallace of the Kitselas First Nation and its members met to "talk over our old village up at Kitselas" and petitioned Canada to have the railroad right-of-way avoid "three graveyards in one place" where their families were buried.

(b) In or about July 1910, Canada's Indian Agent visited the Kitselas First Nation with an agent of the Grand Trunk Pacific Rw. Co. to assess the value of the Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4 lands that would be affected by the right-of-way. The Grand Trunk Pacific Rw. Co. agreed to pay the Kitselas First Nation $110.00 for each grave site affected by the right-of-way, including the costs of reinterment, which was a higher rate than had been paid to one or more other First Nations. The Kitselas First

Nation received $1,650.00 for the 15 graves that were situated upon the Kitselas I.R. No. 1 right-of-way lands.

(c) Canada's Indian Agent valued 29.42 acres of right-of-way land situated on Kitselas I.R. No. 1 at $2.50 per acre, or $73.55 total. Only two improvements were noted in respect of the right-of-way lands on Kitselas I.R. No. 1, individually valued at $40.00 and $100.00 respectively.

(d) In 1908, the Provincial Government under the *Lands Act* priced pre-emption lands at $1.00 per acre and second-class Crown lands at $2.50 per acre, whereas wild hay meadows and lands "suitable for agricultural purposes or which [were] capable of being brought under cultivation profitably" were rated as first class and priced at $5.00 per acre.

(e) In or about the fall of 1915, one of the Chiefs of the Kitselas First Nation told the McKenna-McBride Commission the right-of-way on Kitselas I.R. No. 1 has been "sold by the Government to the Grand Trunk Pacific Railway... without saying a word about it to us for $2.50 an acre". The Commissioners noted the amount to be paid was being negotiated and that "there was some difficulty about the appraisement, and I think the Indian Agent has been able to get a larger sum of money than was at first agreed upon for the land that was taken away from the Indians, and a large proportion of this money will be paid over to the Indians."

(f) In or about November 1915, a valuation was requested by the McKenna-McBride Commission and in or about February 1916, Canada's Indian Agent valued Kitselas I.R. No. 1 lands at $1.00 per acre due to expected costs of clearing the lands relative to those the Province valued at a higher rate, the extent of cultivable areas, and "unmerchantable timber."

27. In response to paragraph 13 of the Claim:

(a) Canada admits it received the location tracing of the Grand Trunk Pacific Rw. Co. right-of-way through Kitselas I.R. No. 1 in or about October 1910.

(b) In or about October 1910, Canada calculated the Grand Trunk Pacific Rw. Co. owed $1,863.55 to the Kitselas First Nation for the right-of-way over Kitselas I.R. No. 1, comprising of $1,650.00 for the removal of graves, $140 for the improvements located on the right-of-way, and $73.55 for the 29.42 acres for the right-of-way valued at $2.50 per acre.

(c) Order-in-Council PC 2200 dated November 9, 1910, recommended that the Grand Trunk Pacific Rw. Co. be allowed to acquire the Kitselas First Nation's interest in Kitselas I.R. No. 1, pursuant to section 46 of the *Indian Act*, in part on the grounds that the Chief Engineer of the Western Division of the National Transcontinental Railway certified that it was "required and is necessary for the proper and efficient maintenance and operation of the Grand Trunk Pacific Railway" and that "the location of the railway through the said reserve has been approved by the Board of Railway Commissioners for Canada."

(d) In 1910, Section 46 of the *Indian Act* read as follows:

> 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.

(e) In or around December 1910, the Grand Trunk Pacific Rw. Co. right-of-way through Kitselas I.R. No. 1 had been paid for in full to Canada to hold in trust for the Kitselas First Nation, including compensation paid for the grave sites and improvements that had been located on the affected lands, totalling $1,863.55.

(f) Between December 1911 and March 1915, Canada distributed some or all of the $1,650.00 in compensation for the removal and reinterment of the graves on Kitselas I.R. No. 1 and any undistributed funds were left in the Kitselas First Nation's trust account.

(g) In or around June 1912, Canada approved the Chief Engineer of the Grand Trunk Pacific Rw. Co.'s finalized location plan of the Kitselas I.R. No. 1 right-of-way.

(h) In or about August 1912, Land Patent 16699 was issued, granting the Grand Trunk Pacific Rw. Co. 29.42 acres of Kitselas I.R. No. 1.

28. In response to paragraph 14 of the Claim, Canada admits that on July 26, 1920, the Indian Agent who provided the February 1916 valuation to the McKenna-McBride Commission explained the apparently low value of $2.50 per acre for the right-of-way through Kitselas I.R. No. 1 as follows:

> "This arrangement may appear rather low in estimate, but upon the [Grand Trunk Pacific Rw. Co] right of way Agent, Mr. Wm. H. Dempster having given me proof, at the time, that some of the pre-empted land, in instances partly improved and partly fenced, had been accepted by some white men at that rate, and the Kshish land there having practically been wild land; I found myself impelled to consent to the arrangement."

29. In response to paragraph 15 of the Claim:

(a) Canada admits it was discovered that the right-of-way being used over Kitselas I.R. No. 1 totalled 27.71 acres only as opposed to the 29.42 acres of land that had been conveyed to the Grand Trunk Pacific Rw. Co. There was a discrepancy of 1.71 acres between the Registered Plan, which established the right-of-way at 27.71 acres, and the location plan, which had indicated that 29.42 acres of land were required for the right-of-way.

(b) Canada admits that on June 20, 1928, Order-in-Council PC 1006 was passed, pursuant to section 48 of the *Indian Act*, RSC 1927, c 98 ("***Indian Act*, RSC 1927**"), to correct the actual right-of-way acreages, such that the Grand Trunk Pacific Rw. Co. was granted 27.71 acres of Kitselas I.R. No. 1, 5.71 acres of Chimdimash I.R. No. 2, and 65.70 acres of Kshish I.R. No. 4.

(c) Section 48 of the *Indian Act*, RSC 1927 read 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 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."

(d) Section 192 of the *Railway Act*, RSC 1927, c 170 read as follows:

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

ii. 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.

(e) The land used by the Grand Trunk Pacific Rw. Co. did not at any time exceed the land for which it had been granted a right-of-way.

Chimdimash Indian Reserve 2 (Chimdimash I.R. No. 2)

30. In response to paragraph 16 of the Claim:

(a) As set out above in response to paragraph 11 of the Claim, in or about the spring of 1908, the Grand Trunk Pacific Rw. Co. began clearing railway rights-of-way across Chimdimash I.R. No. 2 without permission or prior approvals of the right-of-way, and Canada informed the Grand Trunk Pacific Rw. Co. of the need for such permissions, approvals, and compensation to affected First Nations.

(b) As set out at paragraph 25 above in response to paragraph 11 of the Claim, in July 1908, Canada advised the Grand Trunk Pacific Rw. Co. its railway contractors did not have permission to enter and clear land in the Kitselas First Nation Kitselas I.R. No. 1 and Chimdimash I.R. No. 2, and requested

certified right-of-way plans and a deposit covering the reasonable valuation of lands that would be affected.

31. In response to paragraph 17 of the Claim:

(a) As set out above in response to paragraph 12 of the Claim, in or about July 1910, Canada's Indian Agent met with the Kitselas First Nation and an agent of the Grand Trunk Pacific Rw. Co. and assessed the value of Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4 lands that would be affected by the Grand Trunk Pacific Rw. Co. right-of-way.

(b) In or about July 1910, the 8.46 acres of right-of-way land situated on Chimdimash I.R. No. 2 was valued at $10.00 per acre, or $84.60. There were no improvements or grave sites noted that would be affected by this right-of-way.

(c) In or about September 1911, while the plan showing the Chimdimash I.R. No. 2 right-of-way had not yet been furnished by the Grand Trunk Pacific Rw. Co., Canada requested the Grand Trunk Pacific Rw. Co. make a further deposit towards the purchase of rights-of-way through nine provisional reserves, including Chimdimash I.R. No. 2.

(d) On December 30, 1911, an amount of $493.57 was credited to the Kitselas First Nation's Chimdimash I.R. No. 2 trust account in payment of the Grand Trunk Pacific Rw. Co. right-of-way through that provisional reserve, $408.97 of which was an overpayment and was recovered and conveyed to trust accounts of other First Nations to correct shortfalls in those accounts.

(e) In or about January 1913, the Grand Trunk Pacific Rw. Co. Right-of-Way Agent sent Canada revised location plans for an 8.46-acre right-of-way through Chimdimash I.R. No. 2.

(f) As set out above in response to paragraph 12 of the Claim, in November 1915, a valuation was requested by the McKenna-McBride Commission and in or about February 1916, Canada's Indian Agent valued Chimdimash I.R. No. 2 lands at $1.00 per acre due to expected costs of clearing the lands relative to those the Province valued at a higher rate, the extent of cultivable areas, and "unmerchantable timber."

(g) In July of 1916, the McKenna-McBride Commission released its report. Tables included in the report listed the Chimdimash I.R. No. 2 lands as having a value of $1.00 per acre.

(h) The Grand Trunk Pacific Rw. Co. was taken over by the Canadian National Railway ("**CNR**") in or about the 1920s.

(i) On July 7, 1923, Order-in-Council PC 98/1308 was passed recommending that CNR be permitted to purchase the Kitselas First Nation's interest in the 8.46-acre right-of-way through Chimdimash I.R. No. 2 in accordance with section 46 of the *Indian Act*, as amended.

(j) In 1923, section 46 of the *Indian Act* read as follows:

> 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 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 Governor in Council, be governed by the requirements applicable to the like proceedings by such company, municipal or local authority in ordinary cases.

32. In response to paragraph 18 of the Claim:

(a) In 1923, CNR informed Canada that the Chimdimash I.R. No. 2 right-of-way only totalled 5.71 acres, not the 8.46 acres of land conveyed to the Grand Trunk Pacific Rw. Co.

(b) The Grand Trunk Pacific Rw. Co. had paid for an 8.46-acre right-of-way at $10.00 per acre, and CNR requested that the overpayment of $27.50 be applied towards shortfalls that existed with respect to rights-of-ways purchased on other provisional reserves.

(c) As noted above in response to paragraph 15 of the Claim, Order-in-Council PC 1006, dated June 20, 1928, was passed pursuant to the provisions of section 48 of the *Indian Act*, RSC 1927 to correct the actual acreages such that the Grand Trunk Pacific Rw. Co. was granted a 5.71-acre right-of-way over Chimdimash I.R. No. 2, as well as 27.71 acres of Kitselas I.R. No. 1 and 65.70 acres of Kshish I.R. No. 4.

Kshish Indian Reserve 4 (Kshish I.R. No. 4)

33. In response to paragraph 19 of the Claim:

(a) In December of 1908, Grand Trunk Pacific Rw. Co. prepared a sketch of the proposed right-of-way through Kshish I.R. No. 4, including grounds for a station.

(b) On January 21, 1909, the Grand Trunk Pacific Rw. Co. formally applied for an Order-in-Council to acquire a 65.95-acre right-of-way through Kshish I.R. No. 4 accompanied by a plan certified by the Deputy Minister and Chief Engineer of Railways and Canals, under Section 46 of the *Indian Act*.

(c) In correspondence in or about January and February 1909, Canada informed the Grand Trunk Pacific Rw. Co. that no alienation of any part of an Indian Reserve was to be made until the question of title or reversionary interest to Indian reserve lands had been resolved as between Canada and British Columbia.

(d) In or about April to May 1909, Canada requested the Grand Trunk Pacific Rw. Co. to pay a deposit of $10.00 per acre for lands requested for railway purposes before being permitted to enter provisional reserves including Kshish I.R. No. 4. The Grand Trunk Pacific Rw. Co. paid the deposit and was allowed to resume clearing the right-of-way through reserves.

(e) In or about May 1909, Canada investigated the value of improvements located upon provisional reserve lands affected by the right-of-way including Kshish I.R. No. 4.

(f) In or about July 1910, the Grand Trunk Pacific Rw. Co. deposited money towards rights-of-way on nine Skeena River provisional reserves, including Kshish I.R. No. 4, for permission to enter and construct upon these provisional reserves.

34. In response to paragraph 20 of the Claim:

(a) As set out above in response to paragraphs 12 and 17 of the Claim, in or about July 1910, Canada's Indian Agent met with the Kitselas First Nation and an agent of the Grand Trunk Pacific Rw. Co. and assessed the value of

Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4 lands that would be affected by the Grand Trunk Pacific Rw. Co. right-of-way.

(b) Canada admits that in or about July 1910, the 65.95 acres of right-of-way land situated on Kshish I.R. No. 4 was valued at $15.00 per acre, or $989.25. The only improvement noted on the right-of-way lands on Kshish I.R. No. 4 was a 50 by 60 foot piece of cleared and improved land with good soil that was valued at $50.00.

(c) In or about December 1911, $989.25, the balance owing for the right-of-way through Kshish I.R. No. 4, was credited to the Kitselas First Nation's Kshish I.R. No. 4 trust account.

(d) Canada admits that in 1922, the Grand Trunk Pacific Rw. Co. confirmed the right-of-way over Kshish I.R. No. 4 totalled 65.70 acres, not the 65.95 acres of land that had been conveyed to the Grand Trunk Pacific Rw. Co.

35. In response to paragraph 21 of the Claim, as noted above in response to paragraphs 15 and 18 of the Claim, Order-in-Council PC 1006, dated June 20, 1928, was passed pursuant to the provisions of section 48 of the *Indian Act*, RSC 1927 to correct the actual acreages such that the Grand Trunk Pacific Rw. Co. was granted a 65.70-acre right-of-way over Kshish I.R. No. 4, as well as 27.71 acres of Kitselas I.R. No. 1 and 5.71 acres of Chimdimash I.R. No. 2. On October 30, 1928, Land Patent 21444 was issued granting the Grand Trunk Pacific Rw. Co. 65.70 acres of Kshish I.R. No. 4.

Canada Ensured Kitselas First Nation was Compensated for Railway Lands

36. In response to the Claim as a whole, and specifically paragraph 22, Canada acted prudently and in accordance with its statutory and lawful obligations to stop the unauthorized clearing commenced by railway contractors of the Grand Trunk Pacific Rw. Co. in 1908. In doing so, Canada met its obligations relating to the Kitselas First Nation's interests in lands and later corrected errors to reflect right-of-way actually

taken by the railway and secured deposits for anticipated compensation for the rights-of-way. Canada consulted the Kitselas First Nation in valuing the provisional reserve lands affected by the right-of-way to ensure proper and fair compensation was received. Canada exercised its discretion with good faith, loyalty, and honour by providing full disclosure appropriate to the matter at hand and with a view to the best interests of the Kitselas First Nation.

Timber Issue

37. In response to paragraph 23 of the Claim, Canada admits that in or about 1915 or thereabouts, the Kitselas First Nation informed it that timber had been removed from its provisional reserves. Canada says that there were one or more agreements between the Kitselas First Nation and the Grand Trunk Pacific Rw. Co. and/or its agents that permitted the use of timber in connection with the construction of the railroad's right-of-way but does not know what timber, if any, was removed without Kitselas First Nation's approval, the value of the timber removed, who removed the timber, or whether the Kitselas First Nation received compensation for the timber. Canada understands that the Grand Trunk Pacific Rw. Co. paid royalties to the Province of British Columbia for timber.

38. In response to paragraph 24 of the Claim, during the railway construction, the Kitselas First Nation entered into one or more agreements with Grand Trunk Pacific Rw. Co., its railway subcontractor Foley, Welch & Stewart, and/or one or more of Foley, Welch & Stewart's sub-subcontractors that may have permitted the removal of timber, including:

    (a) Agreements for camping and firewood privileges; and

    (b) Rental of lands outside the right-of-way on Kitselas I.R. No. 1 and Kshish I.R. No. 4 to permit Grand Trunk Pacific Rw. Co. to construct temporary tramways, tracks and buildings to support railway construction.

39. In response to paragraphs 25 and 26 of the Claim, Canada admits that on June 6, 1912, A.M. Tyson, Inspector of Indian Agencies, said the Kitselas First Nation and Grand Trunk Pacific Rw. Co. subcontractors had entered agreements for camping and firewood, that the remuneration paid to the members of the Kitselas First Nation at the camps he had visited was in most cases exceedingly small, and asked that an officer investigate the removal and destruction of timber outside the right-of-way and the agreements between the Kitselas First Nation and railway sub-contractors. Canada presently has no knowledge of any refusal to this request.

40. In response to paragraph 27 of the Claim, Canada admits that in or about 1920 the Kitselas First Nation raised the issue of the removal of timber by railway subcontractor Foley, Welch & Stewart, and/or one or more of Foley, Welch & Stewart's sub-subcontractors, and compensation for such timber removed. Canada does not presently have any information on compensation for the harvesting of timber being credited to the Kitselas First Nation's trust accounts.

Injurious Affection

41. In response to paragraph 28 of the Claim, Indian Reserve Commissioner O'Reilly noted in 1894 that the Kitselas First Nation intended to abandon its old village at Kitselas I.R. No. 1. Canada has no information on any damage to historical villages by the construction of the railway as asserted. With the benefit of further documentary and expert historical and accounting evidence, Canada may amend this Response accordingly.

42. In response to paragraph 29 of the Claim, Canada denies there was a reduction in provisional reserve land value as asserted. With the benefit of further documentary and expert historical and accounting evidence, Canada may amend this Response accordingly.

43. In response to paragraph 30 of the Claim, as noted at paragraph 12 above, Canada says that the Kitselas First Nation's claim filed with the Minister was not for injurious affection based on "a significant amount of timber [being] isolated" and Canada does not know if it is based on the same or substantially the same facts.

44. In further response to paragraph 30 of the Claim, Canada denies that it is impossible to harvest the timber remaining on Kitselas I.R. No. 1 and Kshish I.R. No. 4. The Kitselas First Nation has not established that Canada had, or was in breach of an obligation to obtain compensation for allowing railway construction which created "isolated" timber. The Kitselas First Nation has also not established:

    (a) an entitlement to compensation for "isolated" timber;

    (b) that compensation received did not include the value of timber on lands; or

    (c) that compensation was otherwise inadequate as the Claim asserts.

    With the benefit of further documentary and expert evidence, Canada may amend this Response accordingly.

IV. Canada's Statements of Fact

45. Canada says that it had legal authority to take the lands for the right-of-way, that it met its obligations relating to the Kitselas First Nation's interests in lands and did not breach any statutory or fiduciary obligation and did not cause any losses in respect of the Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4 reserves for which the Kitselas First Nation was not compensated.

46. At the time of the railway construction, the Kitselas First Nation was represented by multiple Chiefs and there were initially three separate trust accounts maintained for each of the Kitselas I.R. No. 1, Chimdimash I.R. No. 2 and Kshish I.R. No. 4 reserves. The Kshish and Kitselas trust accounts were amalgamated into the Kitselas trust

account on March 31, 1924, while the Chimdimash trust account was blended into the Kitselas trust account on February 28, 1928.

Compensation for Railway Takings

47. Canada does not admit to any breaches of statutory or fiduciary duties regarding the taking of Kitselas First Nation's provisional reserve lands for a right-of-way for the Grand Trunk Pacific Rw. Co. or the adequacy of compensation. With the benefit of further documentary and expert historical and accounting evidence, Canada may amend this Response accordingly.

Quantification of losses arising from any identified breaches of statutory or fiduciary duties

48. If further historical research and expert historical and accounting evidence demonstrates a loss arising from any breaches of statutory or fiduciary duties, Canada states that the compensation for takings for the railway should be calculated as the value that Kitselas First Nation would have received had the breach not occurred, brought forward to the present-day.

49. In accordance with paragraph 20(1)(i) and subsection 20(3) of the *SCTA*, Canada states that it is not liable for any losses caused by third parties and that any value received by Kitselas First Nation for the taking should be brought forward to a present-day value and deducted from the amount of compensation.

V. Relief

50. Canada seeks the following relief:

(a) Dismissal of the claim;

(b) In the alternative, Canada relies upon s. 20(3) of the SCTA and seeks to set off the value of the benefit received by Kitselas First Nation in relation to the subject matter of this claim brought forward to its current value from any compensation deemed owing;

(c) An apportionment of any losses caused by third parties under section 20(1)(i), if appropriate;

(d) Canada may decide not to seek costs upon the final determination of the proceedings; however, it reserves the right to seek such costs; and

(e) Such further relief as counsel may request and this Honourable Tribunal deems just.

VI. Communication

51. The Respondent's address for the service of documents is:

Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Attention: Shane Hopkins-Utter & Scott Hanson

Facsimile number for service is: (604) 666-2710

Email address for service is: Shane.Hopkins-Utter@justice.gc.ca
Scott.Hanson@justice.gc.ca

Dated: July 11, 2025

Signature of
☐ defendant ☒ lawyer for defendant

ATTORNEY GENERAL OF CANADA
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