

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

COOK'S FERRY INDIAN BAND

v.

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

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	September 14, 2020
Susie Thorsley	
Ottawa, ON	5
D E P O S É	

Claimant

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: COOK FERRY'S INDIAN BAND
As represented by Darwin Hanna
Callison & Hanna, Barristers & Solicitors
2784 Alamein Avenue
Vancouver, BC V6L 1S2
Email: darwin@chlaw.ca

I. Context

1. The Claimant, the Cooks Ferry Indian Band (the “Band”), asserts breaches of legal and fiduciary duties on the part of Her Majesty the Queen in Right of Canada (“Crown”), an illegal lease or disposition by the Crown of reserve lands and failure by the Crown to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority as a result of a right of way through the Band’s reserve lands.
2. In May 2011, the Respondent (“Canada”) partially accepted the above claim (“Specific Claim”) for negotiation under the Specific Claims Policy on the basis that there was an outstanding lawful obligation on the part of Canada. Canada is committed to work in light of principles of reconciliation and the Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples.
3. It is hoped that this Response will help to build bridges with the Band and will assist Canada and the Band (“Parties”) to work collaboratively to resolve the Specific Claim by this proceeding or through alternative dispute resolution, including negotiation.

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

4. The Band submitted a claim to the Specific Claims Branch (“SCB”), received on February 11, 1992.
5. The Band submitted additional legal arguments dated March 1, 2001 to SCB. This claim was filed with the Minister of Indian Affairs and Northern Development Canada on October 16, 2008 (“Specific Claim”).
6. By letter dated November 24, 2008, the Band was invited to provide the SCB with additional documents, information and arguments that were not in the original claim submission. On June 2, 2009, SCB received additional documents, information and argument from the Band.

7. The Specific Claim concerned a right of way through Pokheitsk Indian Reserve No. 10 (“IR10”) granted to the Canadian Pacific Railway Company (“CPR”) (“Right of Way”) for a railway. The Band asserted breaches of legal and fiduciary duties on the part of Crown as a result of the Right of Way. The Band also asserted that the Right of Way constituted an illegal lease or disposition by the Crown of reserve lands and that the Crown failed to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority as a result of the Right of Way.
8. By letter dated May 13, 2011, Canada notified the Band of the decision to partially accept the Specific Claim for negotiation on the basis that the Specific Claim disclosed an outstanding lawful obligation on behalf of the Crown with respect to the Right of Way.
9. By letter dated September 18, 2018, Canada notified the Band that the claim had been reviewed in light of developments in case law, and provided an amendment to Canada’s position regarding the basis of the May 13, 2011 acceptance.

III. Validity (R. 42(b) and (c))

10. The Crown does not admit the validity of the claims based on all grounds in the Declaration of Claim filed July 14, 2020 (“Declaration of Claim”).

IV. Admissions, Denials or No Knowledge (Rule 42(d))

11. In response to the Declaration of Claim paragraph 9, the Crown admits that the Band is part of the Nlha7kápmx (Nlaka’pamux) Nation. The rest of the statements in paragraph 9 are legal argument, not fact.
12. In response to paragraph 10, the Crown admits that Indian Reserve Commissioner Sproat (“Sproat”) allotted land for Pokheitsk IR10 by Minute of Decision, and that the Minute of Decision stated that “a reserve near the left bank of the Thompson river about opposite the 89 mile post from Yale on the Yale-Cariboo

wagon road consisting of 30 acres or thereabouts, to include in good survey shape the land formerly cultivated by the Indians and shown by the remains of their old fences.” The Crown has no knowledge as to the date of Sproat’s allotment; however, it was likely dated between July 1878 and June 1880. The Crown admits that Sproat’s Minute of Decision for IR10 included a note that a settler “has intruded upon this Indian settlement and seeks to include it within his preemption”. The statement in paragraph 10 that “Sproat also recognized the importance of the fishery at Cook’s Ferry”, is legal argument, not fact. The Crown admits that, in 1878, Sproat recorded Minutes of Decision allocating reserves for the “Upper Nicola Indians”, “Lower Nicola Indians”, “Lytton Indians”, “Nicomin Indians”, and allocating a reserve for “Cooks Ferry Indians” on the Nicola River “about seven miles from Spences Bridge”, and these allocations were followed by Sproat’s statement that “The Indians are to have access to and to be at liberty to carry on, as formerly, their fisheries for the various kinds of fish, at their accustomed fishery places, and more particularly ...”

13. In response to paragraph 11, the Crown does not have specific knowledge of whether “[h]istorically, the river bank of the Thompson River for the length of IR 10 was a major fishing ground for the Band”. The Crown does not have specific knowledge of whether the “north and south ends of IR 10 are old gill net and dipping spots”, or whether “[p]latforms used to be built out from the shore for dip netting”. The Crown does not have specific knowledge of whether the “riparian lands along IR 10 were important for landing canoes in conjunction with the pitch lamp fishing process”.

14. In response to paragraph 12, the Crown admits that E.M. Skinner (“Skinner”) surveyed IR10 for the Indian Reserve Commission, and that his Field Book notes that he began such survey on September 2, 1885. The Crown admits that in a letter dated January 14, 1886, Skinner enclosed a sketch indicating IR10 at 79.9 acres. The Crown admits that in the same January 14, 1886 letter, Skinner

- observed that a portion of Sproat's allotment for IR10 had been pre-empted, and that this pre-empted portion was "an arable flat of good quality."
15. In response to paragraph 13, the Crown admits that IR10 was surveyed by F.C. Swannell ("Swannell") in 1907, and that his survey was calculated as containing 22 acres. The rest of the statements in paragraph 13 are legal argument, not fact.
 16. In response to paragraph 14, the Crown admits that the steel for the CPR railway was laid through IR10 by the end of December 1884. The Crown admits that a survey plan marked "585", and dated May 7, 1890, shows the course of the railway as running through the length of IR10, and bears the notation: "Cooks Ferry Indian Reserve No 10 'Pokheitsk' $7^{55}/_{100}$ Acres"; and indicates the distance from the centre of the railway to the edge of the right of way on the inland side as "150' "; and indicates that the right of way on the other side lies from the centre of the railway to the edge of the Thompson river. The Crown has no knowledge as to whether the "right of way cut off access to the river and the fishery entirely." The rest of the statements in paragraph 14 are legal argument, not fact.
 17. In response to paragraph 15, which contains a description of a contract; a construction of provisions of *An Act Respecting the Canadian Pacific Railway*, 44 Vic, ch. 1; and a construction of provisions of *An Act to amend and consolidate "The Railway Act, 1868"*, and *the Acts amending it*, S.C. 1879, 42 Vic c.9, the statements in this paragraph are legal argument, not fact.
 18. In response to paragraph 16, the Crown admits that in 1871, the Colony of British Columbia ("Province") joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985, App II, No 10 ("Terms of Union"). The Crown further admits by Article 13 of the Terms of Union, Canada and the Province agreed that Canada would assume the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit."

19. In response to paragraph 17, the Crown admits that Order in Council PC 1886-53, dated January 18, 1886, authorized the Department of Railways and Canals to purchase from the Department of Indian Affairs (“DIA”) certain lands set out in a schedule, and that IR10 was not listed on the schedule. The Crown has no knowledge of an Order in Council 58, dated January 15, 1886. The Crown admits that Order in Council PC 1891-2006, dated August 25, 1891 authorized the Department of Railways and Canals to purchase from DIA “certain Indian Reserve lands in British Columbia, traversed by the main line of the Canadian Pacific Railway as per schedule herewith”, and that the schedule included IR10 with its “Acreage” listed as 7.55.
20. In response to paragraph 18, the Crown admits that the right of way of the constructed main line of the CPR railway from mile 28.5 to mile 66 was surveyed by James F. Garden (“Garden”), and that his survey plan was sworn by him July 13, 1904 at Vancouver. The Crown admits that Garden’s survey of the Right of Way through IR10 was calculated as containing 8.8 acres. The rest of the statements in paragraph 18 are legal argument, not fact.
21. In response to paragraph 19, the Crown admits that Order in Council PC 1911-2983, dated December 29, 1911, consented to the recommendation of the Minister of Railways and Canals that 30 parcels of Indian Reserve lands as set out in a schedule attached to the Order-in-Council dated March 15, 1886, be retransferred to the DIA so that it could issue Letters Patent to the CPR Company “of the correct areas, together with such other areas as they may decide to grant.” The Crown admits that IR10 was not set out in the schedule attached to Order in Council PC 1886-379, dated March 15, 1886. The rest of the statements in paragraph 19 are legal argument, not fact.
22. In response to paragraph 20, the Crown admits that Letters Patent dated April 5, 1928 (“1928 Letters Patent”), by the terms and conditions of the contract and agreement embodied in *An Act Respecting the Canadian Pacific Railway*, 44 Vic, ch. 1, granted the CPR that parcel of land in IR10 “[c]ontaining by

admeasurement Eight Acres and Eight-tenths of an Acre, more or less”. The rest of the statements in paragraph 20 are legal argument, not fact.

23. In response to paragraph 21, the Crown admits that Order in Council PC 1913-205, dated January 25, 1913, withdrew IR10 from the operation of the Regulations for the administration and disposal of lands within the Forty Mile Railway Belt, in the Province of British Columbia, and that such Regulations were established by Order-in-Council dated September 17, 1899, subject to existing rights as defined or created under the said regulations. The Crown admits that Order in Council PC 1913-205 referenced “the reserves on the attached list, marked “A”, have been surveyed and are shown on the official plans of the respective townships”, and that this list indicates in respect of IR10 that the “Official Plan on which Shown” is Township 18, Range 24, West 6 Meridian, and for IR10 that the “Date of Confirmation” is February 15, 1907. The rest of the statements in paragraph 21 are legal argument, not fact.
24. In response to paragraph 22, which contains statements regarding compensation, this paragraph is legal argument, not fact.
25. In response to paragraph 23, which contains statements regarding valuation of lands, including the valuation of IR10, this paragraph is legal argument, not fact.
26. In response to paragraph 24, the Crown admits that Order in Council PC 1879-1686, dated December 9, 1879, approved the appointment of Joseph W. Trutch (“Trutch”) as Resident Agent to the Dominion in British Columbia. The Crown admits that Order in Council PC 1882-29192, dated June 30, 1882, recorded that it was necessary to arrange the legal transfer to the Government of all rights of way between Emory’s Bar and Port Moody to be traversed by the line of the CPR and the settlement of all claims for damages arising therefrom, and authorized Trutch to receive all appraisements which may be submitted by the valuers appointed by him. The Crown admits that in November 1884, Trutch conveyed

to the Department of Railways and Canals a schedule of valuations for land required for railway purposes between Port Moody and Savonas. Some pages of this schedule contained column headings entitled: “Compensation for land taken”, “Compensation for trees fencing &c x roads”, “Compensation for trees fencing &c”, “Compensation for Fruit Trees fencing”, “Compensation for Buildings”, and “Total Amount”. The rest of the statements in paragraph 24 are legal argument, not fact.

27. In response to paragraph 25, the Crown admits that in August 1885, Trutch conveyed to the Department of Railways and Canals, 29 tracings from right of way plans “showing the land taken in each case from the several Indian Reserves between Port Moody and Savonas...together with a Schedule thereof stating the amount reported by the Official Valutors as the value of the land taken from each several Reserve and for the improvements thereon...”. Trutch also conveyed his observation that the 29 Reserves comprised “all the lands actually allotted for Indian Reserves through which the Canadian Pacific Railway passes, between Port Moody and Savonas, as far as I had been able to ascertain after having applied to the Agent of the Indian Department in British Columbia for information on this point...”. Trutch also conveyed his observation that “...there are other lands on which Indians reside along the line of the Railway, which although claimed by the Indians resident thereon, do not appear to have been surveyed or authoritatively allotted for their use”. The rest of the statements in paragraph 25 are legal argument, not fact.

28. In response to paragraph 26, the Crown admits that in March 1890, the Department of Railways and Canals conveyed to the Deputy Superintendent General of Indian Affairs, a valuation of lands taken for the Canadian Pacific Railway, from Indian Reserves in British Columbia that were not included in the previous valuation sent in September 1885 from the Department of Railways and Canals to the DIA. This March 1890 valuation contained column headings entitled: “Acreage”, “Land”, “Improvements”, “Total”. This March 1890

valuation listed IR10 with its “Acreage” listed as 7.55, “Land” listed as \$7.55, “Improvements” listed as blank, and “Total” listed as \$7.55. The rest of the statements in paragraph 26 are legal argument, not fact.

29. In response to paragraph 27, which contains statements regarding heads of damages, and statements regarding loss of riparian lands, the statements in this paragraph are legal argument, not fact.
30. In response to paragraph 28, the Crown has no knowledge as to whether a valuation schedule was sent to the Indian Superintendent on June 3, 1890. The Crown admits that, by letter dated September 11, 1890, Indian Agent Mackay acknowledged that the Indian Superintendent had previously sent him “two lists of Reserves shewing values awarded to certain bands of Indians for lands taken from their Reserves for C P Railway right of way”. The Crown admits that, in his September 11, 1890 letter, Indian Agent Mackay stated that “there does not appear to my mind any reason for amending the lists as regards the sums to be paid to individuals and those to be credited to Bands”. The Crown admits that in July 1891, the DIA drafted a letter saying it accepted the Department of Railway and Canals’ valuation of lands taken for the Canadian Pacific Railway from Indian Reserves in British Columbia, noting that such valuation had been previously transmitted by the Department of Railways and Canals’ letter of March 11, 1890, and requesting that the Department of Railways and Canals cause the amount of \$597.65 to be deposited to the credit of the Receiver General on account of Indian lands and the certificates of deposit and draft sent to the Department. The Crown has no knowledge as to whether this letter was sent. The rest of the statements in paragraph 28 are legal argument, not fact.
31. In response to paragraph 29, the Crown admits that Order in Council PC 1891-2006, dated August 25, 1891 authorized the Department of Railways and Canals to purchase from the DIA for the total amount of \$640.65, “certain Indian Reserve lands in British Columbia, traversed by the main line of the Canadian Pacific

Railway as per schedule herewith”, and that “a valuation has been arrived at based on valuations of similar lands, and that such valuations have now been accepted by the” DIA. The Crown admits that the schedule forming part of Order in Council PC 1891-2006 included IR10 with its “Acreage” listed as 7.55, “Land” listed as \$7.55, “Improvements” listed as blank, and “Total” listed as \$7.55. The Crown admits that the 1928 Letters Patent, by the terms and conditions of the contract and agreement embodied in *An Act Respecting the Canadian Pacific Railway*, 44 Vic, ch. 1, granted the CPR that parcel of land in IR10 “[c]ontaining by admeasurement Eight Acres and Eight-tenths of an Acre, more or less”. The Crown admits that the 1928 Letters Patent stated that such land in IR10 “are lands to a conveyance of which the Company is entitled under the provisions of the said Act and contract” and stated that the Department of Railways and Canals “ has paid “the sum of Eight Dollars and Eighty Cents” and stated that this sum was “agreed upon for the taking of said lands for the purpose of the construction, operation and maintenance of the said Railway”. The Crown has no knowledge of whether “in 1892, \$7.55 had been paid”. The rest of the statements in paragraph 29 are legal argument, not fact.

32. In response to paragraph 30, the Crown has no knowledge of whether the sum of \$7.75 was not credited to the Band’s trust account until 1892. The rest of the statements in paragraph 30 are legal argument, not fact.

33. In response to paragraph 31, the Crown admits that in August 1913, homesteader William Champion of North Bend, B.C., wrote to the Board of Railway Commissioners for Canada, stating that he had been informed that the CPR “claim 200 feet on each side of the track”. The Crown admits that in February 1914, the Department of the Interior wrote to the Board of Railway Commissioners regarding Champion’s claim and stated that the homesteader had assumed that the CPR Company claimed the ordinary width of right of way. The rest of the statements in paragraph 31 are legal argument, not fact.

34. In response to paragraph 32, the Crown admits that by letter dated October 10, 1919, the Department of the Interior wrote to the DIA, regarding the claim of Charles “Cisco, an Indian squatter who has improvements on the lands” that CPR applied for north of “Chuppah Indian reserve No. 2” for right of way, and invited DIA’s view of the matter. The rest of the statements in paragraph 32 are legal argument, not fact.
35. In response to paragraph 33, the Crown admits that by letter dated April 13, 1918, the CPR Company wrote to the Department of the Interior, to inform them that the Company was sending out a party in the charge of Mr. Doupe “to define on the ground the limits of the land actually required for railway purposes through the disputed properties.” The rest of the statements in paragraph 33 are legal argument, not fact.
36. In response to paragraph 34, the Crown admits that a survey plan by J.L. Doupe, dated July 1918, was entitled “Plan of Right of Way through Townships 10, 11 & 12, Range 26 West 6 Meridian ...” and included the notation that it was “showing portions thereof proposed to be ceded to settlers and portions to be retained by the Company and showing also additional right of way required for double track.” The Crown admits that by letter dated July 12, 1921, the CPR Company wrote to the Department of the Interior, to transmit a tracing of Doupe’s plan and stated the CPR Company’s view that the Doupe plan would supersede the Garden plans for the portion of right of way that it covered. The Crown has no knowledge as to whether “CPR solicitors sent a copy of this plan to the DIA Secretary in 1921”. The rest of the statements in paragraph 34 are legal argument, not fact.
37. In response to paragraph 35, the Crown admits that the July 1918 survey plan by Doupe concerned the “Plan of Right of Way through Townships 10, 11 & 12, Range 26 West 6 Meridian”, and that this portion of the CPR railway did not include IR10. The rest of the statements in paragraph 35 are legal argument, not fact.

38. In response to paragraph 36, the Crown admits that by letter dated December 21, 1966, Marathon Realty advised the DIA that Marathon had been asked by the CPR Company to purchase for them a strip of land 1,800 feet long and 60 feet wide, and that approximately 1,500 feet of the 1,800 foot strip would lie within Indian Reserve No. 10. The Crown admits that 1,500 feet by 60 feet is 90,000 square feet and that 90,000 square feet is equal to 2.066 acres. The rest of the statements in paragraph 36 are legal argument, not fact.
39. In response to paragraph 37, the Crown admits that in a letter dated December 21, 1966 from Superintendent Henson, Nicola Agency to the Indian Commissioner for B.C., he reported receiving a complaint from the Cook's Ferry Council that the CPR Company "had encroached on their Pokheitsk I.R. No. 10 in constructing a new siding". The Crown admits that in a letter dated March 13, 1967, from Superintendent Henson to Marathon Realty, he referred to Marathon's offer of \$50.00 per acre, reports that "[y]our offer was referred to a meeting of the Cook's Ferry Council, and found quite unacceptable. They claim that this land was irrigated in the past, and productive, and could have been rendered so again. They request payment of \$500.00 per acre, with the Railway Company paying all costs of survey, registration, etc." The Crown has no knowledge of whether the "Band wanted... a land exchange". The rest of the statements in paragraph 37 are legal argument, not fact.
40. In response to paragraph 38, the Crown has no knowledge as to whether the "concept of the land exchange was not taken up by the DIA". The Crown has no knowledge as to whether the "Band Council had been advised by DIA officials that the CPR had the power to expropriate the Additional Lands". The Crown admits that by letter dated December 21, 1966 from Superintendent Henson, to the Indian Commissioner for B.C., he reported that the CPR Company wished to purchase a strip of land adjacent to their existing right-of-way, and wrote "Please advise also whether a surrender will be required; I imagine that the C.P.R. has the

right to expropriate at a just valuation, and in this case, I imagine no surrender would be necessary. I will refer the matter to the Cook's Ferry Council as soon as I hear from you." The Crown admits that by letter dated February 19, 1968 from Superintendent Henson to the Indian Commissioner for BC, it was stated that "After considerable discussion last year, the Cook's Ferry Council decided that they would be willing to accept \$250.00 an acre as compensation for the land taken from them...Area involved will be 2.62 acres" on IR9 and IR10, and "Cost of the survey, registration, etc., will be borne by the Railway Company." The Crown admits that Order in Council PC 1968-1669, dated August 28, 1968 grant authority for the conveyance of "2.48 acres, more or less" for a railway widening according to plan 53921. The Crown admits that Letters Patent, dated December 9, 1968 stated that "whereas the said lands are not required for public purposes, and under and by virtue of the statutes in that behalf and pursuant to authority duly granted by the Indian Act, the said lands or the interest therein...have been disposed of to The Canadian Pacific Railway Company...for the price of Six Hundred and Fifty-five Dollars" and "...do...grant...in Pemynoos Indian Reserve Number Nine and Pokheitsk Indian Reserve Number Ten, a railway widening according to plan 53921...containing 2.48 acres, more or less." The Crown admits that plan 53921 noted the acreage for the railway widening at 2.07 acres in IR10 and .41 acres in IR9, and together these total 2.48 acres. The rest of the statements in paragraph 38 are legal argument, not fact.

41. In response to paragraph 39, the Crown has no knowledge as to whether the "CPR Company has used existing Band farm roads and tracks to access the CPR track with no permission from or compensation to the Band". The rest of the statements in paragraph 39 are legal argument, not fact.

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

Establishment of the Railway Belt

42. When British Columbia ("BC") joined Confederation in 1871, Article 11 of the Terms of Union stipulated that Canada would arrange for the construction of a railway joining the new province with the rest of the country within ten years. The construction of this railway was considered at the time a matter of profound national importance.
43. The Government of BC agreed to support the construction of the railway and granted the Railway Belt to Canada: a 40-mile wide strip of land along the route of the main line of the CPR from Port Moody on the coast to the BC-Alberta border.
44. The transfer of the Railway Belt happened in two steps. First, in 1880, the Legislative Assembly of British Columbia enacted *An Act to Grant Public Lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway*, SBC 1880, c 11. However, the route originally conceived was not ultimately followed for the entire line. As a result, the second step was that the 1880 Act was amended in 1883 to grant Canada twenty miles on each side of the line, wherever it was finally located.

Creation of IR 10

45. Sproat allotted land for IR10 by Minute of Decision, dated likely between July 1878 and June 1880.

“a reserve near the left bank of the Thompson river about opposite the 89 mile post from Yale on the Yale-Cariboo wagon road consisting of 30 acres or thereabouts, to include in good survey shape the land formerly cultivated by the Indians and shown by the remains of their old fences. [] 50 inches of water for irrigation & other purposes are assigned prior to all other claims from all sources of water supply which can be used for this land. GMS [] Note A [settler] has intruded upon this Indian settlement and seeks to include it within his preemption.”

46. Another of Sproat's Minutes of Decision for the Band, dated July 10, 1878 also referred to access to accustomed places for fishing:

“The old grave yard in Mr. John Murray's lower farm is to be marked off so that the Indians may enclose it, and they are to have access to their old fishery on the right bank of the Thompson river at said farm for the purpose of fishing in their accustomed way, but said access must be in the manner that shall be least inconvenient to the land owner.

Their old rights of fishing at their accustomed places on both banks of the Thompson with the same condition of access as above stated, and particularly on a flat called Tsin-tahk-tl on right bank of Thompson river immediately past the 87 mile post from Yale on the Yale-Carbioo wagon road, are confirmed to them.”

47. In July 1880, Indian Superintendent Powell sent the Minutes of Decision for the Cook's Ferry Band to the Province's Chief Commissioner of Lands & Works (“CCLW”) for his approval.
48. The land set aside by Sproat for IR10 was transferred from the Government of BC to Canada in 1883, as part of the transfer of the Railway Belt lands.
49. On September 2, 1885, Skinner began the survey of IR10 for the Indian Reserve Commission.
50. In January 1886, Skinner observed that a portion of Sproat's allotment for IR10 had been pre-empted by Mr. Chung, and that the preemption had been surveyed by Mr. Jane. The Band told Skinner that they were willing to give up their claim to Mr. Chung's preemption, provided they were given meadow land.

“Mr. Jane made two surveys for...Ah Chung, which are shown on the accompanying sketch in red, and yellow lines. [] I found that the land in question was a little North of the 89 mile post, and was an arable flat of good quality. [] The Indians claim that they used this land, is disputed by Ah Chung, who says that no attempt have been made on their part, until he succeeded in conveying water upon it from Pokheitsk creek, and from information given me while in that vicinity, I think he was correct this statement. [] In both cases the Indians were willing to give up their claim

provided land was given them. [...] At Pokheitsk, they are very anxious to have some meadows – in the valley of Pokheitsk creek, about fourteen (14) miles from the Thompson river.”

51. By letter dated January 21, 1889, Reserve Commissioner O’Reilly (“O’Reilly”) responded to a request from the Superintendent General of Indian Affairs for the plans of survey for the Cook’s Ferry Band. O’Reilly noted that Skinner’s survey plan of the reserves had not yet been approved by BC. He anticipated that it would be difficult to get BC’s sanction for IR10, because 42 acres of Sproat’s allotment had been previously preempted by Mr. Chung in 1876.

“...I am of [sic] opinion that inasmuch as the claims were legally held, and improved prior to Mr. Sproat’s visit, the Provincial Government will decline to recognize them. [...] ...I agree with Mr. Skinner in thinking that as the land promised them by Mr. Sproat is of [comparably?] little value, there will be no difficulty in making a satisfactory arrangement with them.”

52. In December 1889, O’Reilly observed that, the Province’s CCLW “refused to sanction” IR 10 and IR 11 as surveyed by Skinner, and as a result, both IR10 and IR11 had to be reduced in size:

“...on the grounds that at the time of their allotment by...Sproat, the latter encroached on the pre-emption claims of Ah Chung and Ah Yep, to the extent of 42 and 21 acres respectively. [] Certificates of improvement had, in both cases, been obtained on the land, long before the allotments were made by Mr. Sproat.”

53. Because the CCLW required IR10 and IR11 to be reduced in size, and also because “of the representations of the Indian Agents, to the effect that these Indians had no meadow lands from which to obtain winter feed”, O’Reilly visited the Cook’s Ferry Indians in October 1888. As a result of that visit, O’Reilly allotted six additional reserves.

54. In December 1889, O’Reilly sent his minutes of decision for the six additional reserves as well as three pages of reserve sketches to the Deputy Superintendent General of Indian Affairs. O’Reilly noted that he presumed that it would “be necessary to obtain the approval of the...Minister of the Interior to these allotments, before instructions are given for their survey.”

55. By letter dated January 10, 1890, the Deputy Superintendent of Indian Affairs wrote to the Minister of the Interior to seek his approval of O'Reilly's additional reserves for the Cook Ferry Band, attaching O'Reilly's letter of December 1889, his minutes of decision and three pages of reserve sketches. One of the sketches indicates with a dotted line the overlap of IR10 with the land previously preempted by Mr. Chung.
56. By Order in Council PC 1890-2410, dated October 31, 1890, the Governor in Council authorized the six additional reserves allotted by O'Reilly, and acknowledged that these additional allotments of 2, 233 acres were made, in part, because the CCLW had directed that the size of IR10 and IR11 be reduced:
- “...necessary in consequence of the action of the Chief Commissioner of Lands and Works in refusing to sanction certain reserves outside the Railway Belt on the ground that at the time of their allotment a part of the lands were affected by pre-emption entry, and also in consequence of representations made by the Indian Agent to the effect that these Indians have no meadow land from which to obtain Winter feed for their stock.”
57. The OIC recorded that the authority was given “under sub clause A of clause 38 of its Regulations affecting Dominion Lands in the Railway Belt in British Columbia...for the setting apart as Indian Reserves ...”
58. In 1891, the alteration to IR10 to eliminate the overlap with Mr. Chung's preemption was surveyed by O. Fletcher, Dominion Land Surveyor, along with the six additional reserves allotted by O'Reilly.
59. In February 1894, O'Reilly observed that Mr. Fletcher's 1891 surveys contained “numerous omissions and qualifications” such that his plans could not be “accepted or presented for approval by the Provincial Government.”

60. In 1903, Dominion Land Surveyor P. Burnet was retained to resurvey the alteration to IR10 to eliminate the overlap with Mr. Chung's preemption, along with the six additional reserves allotted by O'Reilly.
61. By letter dated June 10, 1907 Indian Reserve Commissioner Vowell, retained T. Gore, Dominion Land Surveyor, to resurvey the six additional reserves allotted by O'Reilly, and "the rectification of the boundaries of Nos. 10 and 11 where they encroach on the claims of Ah Chung and Ah Yep." Vowell noted that the work was to be in accordance with the Manual of Dominion Land Surveys, and that the work was to be connected with existing surveys of the Department of the Interior." Vowell instructed that "[m]ost of these reserves have been previously surveyed by Messrs. Fletcher and Burnett whose work was found to be so inaccurate that it could not be accepted. You will therefore obliterate their lines as much as possible ..."
62. In 1907, Swannell, Dominion Land Surveyor, under the direction of Gore, resurveyed the six additional reserves allotted by O'Reilly for Cook's Ferry Band, as well as the rectification of the boundaries of IR10.
63. Order in Council PC 1911-2983, dated December 29, 1911, consented to the recommendation of the Minister of Railways and Canals that 30 parcels of Indian Reserve lands as set out in a schedule attached to Order-in-Council dated March 15, 1886, be retransferred to the DIA so that it could issue Letters Patent to the CPR Company "of the correct areas, together with such other areas as they may decide to grant." IR10 was not set out in the Schedule.
64. By Order in Council PC 1913-205, dated January 25, 1913, the Governor in Council withdrew IR10 and other reserves from the operation of the Regulations for the administration and disposal of lands within the Forty Mile Railway Belt, in the Province of British Columbia:

“...whereas the reserves on the attached list, marked “A”, have been surveyed and are shown on the official plans of the respective townships [] Therefore...the Governor General in Council is pleased to withdraw from the operation of the above mentioned regulations, the lands...which are comprised within the said reserves respectively...”

65. In 1924, Order in Council PC 1924 -1265 recorded that the lands in the Railway Belt were under the sole jurisdiction of the Dominion and that the findings of the Royal Commission on Indian Affairs for the Province of BC (the "McKenna-McBride Commission") with reference to reserves in the Railway Belt were confirmed without any reductions or cut-offs to any reserves in the Railway Belt.
66. By Order in Council PC 1930- 208, Canada returned the Railway Belt lands to the Province of BC, but retained all the Indian reserves within the Railway Belt, including IR10.

The Construction of the CPR

67. To further advance its constitutional obligation to construct a national railway, Canada entered into contracts with Andrew Onderdonk to build the western segment of the CPR from Savona's Ferry to Port Moody. Contract 63 dealt with the line from Junction Flat to Savona's Ferry, which included the lands at issue in this claim.
68. In 1881, pursuant to the *Canadian Pacific Railway Act*, SC 1881 (44 Viet), c 1 ("CPR Act"), Parliament granted a charter to the CPR Company and approved the CPR Company's contract with Canada dated October 21, 1880 (the "CPR Contract"). Under the CPR Act and CPR Contract, Canada agreed to construct the western section of the CPR mainline from Kamloops to Port Moody, and to convey the railway and right of way to the CPR Company. In exchange, the CPR Company agreed to maintain, work, and run the CPR railway.

69. The railway was subsequently constructed and operated under the authority of the *Government Railways Act, SC 1881, c 25*.
70. A survey plan showing land required for the Right of Way along the Thompson River was deposited in the provincial Land Registry in New Westminster on July 15, 1885 on behalf of the Minister of Railways and Canals pursuant to the *Government Railways Act* (the “1885 Location Plan”).
71. The July 1885 Location Plan was plotted, before Skinner surveyed IR10 in September 1885. As such, it is apparent that a later hand has drawn in IR10 on the July 1885 Location Plan.
72. The steel for the CPR railway was laid through IR10 by the end of December 1884.
73. The construction of the western section of the CPR was completed in 1885 and the railway was in operation starting June 1886.

Transfer of the right of way to the CPR Company

74. A year after the railway was completed, by Order in Council PC 1886-1935, dated November 2, 1886, the Governor in Council authorized the conveyance to the CPR Company of “the portions of the road which have been constructed by the Government and to which under the Contract the Company are entitled,” pursuant to the CPR Contract and CPR Act.
75. By letter dated October 5, 1888, the DIA notified the Department of Railways and Canals that it hadn’t received notice or compensation regarding the right of way through all of the reserves in BC:
- “...the railway in question passes through a number of Indian Reserves in British Columbia, of which this Dept. has not received any notice from said

Railway Co., nor has there been any compensation paid to the Dept. of the right of way through these Reserves.”

76. Attached to the letter, was a “Schedule of Indian Reserves in B.C. through which the Can. Pacific Railway probably passes and of which Plans of Right of Way have not yet been received by the Dept.”. The Schedule listed the “Cooks Ferry Indians”.
77. The Schedule also noted that “The Dept. has not yet received the Plans of Survey of these Reserves for these Indians...”
78. By letter dated February 13, 1889, the DIA wrote to the Department of Railways and Canals to forward correspondence from O’Reilly regarding the position of Cook’s Ferry reserves “with regard to established points upon [the] railway”. O’Reilly’s correspondence enclosed a January 1889 letter from Skinner that indicated the positions:
- “Reserve No. 9
Centre of Railway at north end of bridge over Pesmynooos [sic] Creek is S, 47.09 E distant 83 links from south-west corner of Reserve.
- Reserve No. 10
Adjoins Reserve No. 9
Centre of railway is 1.35 links east of southwest corner of Reserve”.
79. By letter dated March 11, 1890, the Department of Railways and Canals sent the DIA a valuation schedule of lands taken from Indian Reserves in British Columbia for the CPR that had not been included in the previous valuation sent with the letter of the 5th September 1885. The schedule lists Cook’s Ferry IR10, with the right of way listed as 7.55 acres, and valued at \$7.55.
80. By letter dated May 4, 1890, the Department of Railways and Canals sent the DIA “Plan 585”, titled “Canadian Pacific Railway Plan of Lands taken from Indian Reserves”, and which indicated the Right of Way through IR10 as 7.55 acres.

81. Order in Council PC 1891-2006, dated August 25, 1891, authorized the Department of Railways and Canals to purchase from the DIA certain Indian Reserve lands and, after payment, DIA was to transfer the lands to the Department of Railways and Canals, and the Department of Railways and Canals, was then to transfer the lands to the CPR Company “under the contract with the Government.” The schedule forming part of Order in Council PC 1891-2006 included IR10 with its acreage listed as 7.55.
82. By memorandum dated August 19, 1903, the Surveyor General wrote to the Deputy Minister of the Department of the Interior to observe that, with respect to the portions of the railway built in British Columbia by the Dominion, the existing survey had been made for building the railway and not for defining the right of way. As such, the Surveyor General recommended a new survey of these portions in order to “issue a patent to the Company” and so that the Department of the Interior could correctly define lands adjoining the right of way when disposing of them.
83. On July 13, 1904, Surveyor James F. Garden (“Garden”) signed a copy of his survey plan entitled “Canadian Pacific Railway Right of Way Plan Main Line (as Constructed) From 3 miles West of Savonas Mile 28.5 to 5 miles West of Spatum Mile 66 Registration District of Kamloops BC”.
84. Garden’s plan indicated that the Right of Way through IR10 was 8.80 acres. On November 14, 1904, the Chief Engineer of the Department of Railways and Canals also signed this copy of the Garden survey plan and recorded thereon his notice “that the lands shown on this plan of survey are the lands of the Government to be conveyed to the Canadian Pacific Railway Company, as by section seven of the contract and agreement (...Victoria chapter...) provided for.”
85. On April 12, 1923, the DIA noted that “The Garden plans have never been supplied to this department.”

86. By letter dated, April 26, 1923, the Department of the Interior sent the DIA copies of the Garden survey plans.
87. The 1928 Letters Patent, by the terms and conditions of the contract and agreement embodied in *An Act Respecting the Canadian Pacific Railway*, 44 Vic, ch. 1, granted the CPR that parcel of land in IR10 “[c]ontaining by admeasurement Eight Acres and Eight-tenths of an Acre, more or less”.
88. The 1928 Letters Patent stated that such lands in IR10 “are lands to a conveyance of which the Company is entitled under the provisions of the said Act and contract”.
89. The 1928 Letters Patent stated that the Department of Railways and Canals “in accordance with orders in Council of the 18th January, 1886, and of the 15th March, 1886” had paid the Superintendent General of Indian Affairs “the sum of Eight Dollars and Eighty Cents of lawful money of Canada” and stated that this sum was “agreed upon for the taking of said lands for the purpose of the construction, operation and maintenance of the said Railway”.
90. The 1928 Letters Patent stated that the Department of Railways and Canals “in accordance with orders in Council of the 18th January, 1886, and of the 15th March, 1886” had paid the Superintendent General of Indian Affairs “the sum of Eight Dollars and Eighty Cents”, although, in fact, the Department of Railways and Canals had paid the Superintendent General of Indian Affairs in accordance with Order in Council PC 1891-2006, dated August 25, 1891.
91. On December 7, 1931, the Registrar at Kamloops issued the CRP Company a certificate of Indefeasible Title in fee-simple for “8.8...acres more or less of Pokheitsk Indian Reserve No.10...shown...on...a plan...made by...Garden, dated 13th July, 1904, and of record in the Surveys Branch of the Department of Indian Affairs under No. R.R. 2005...”

92. Around 1913, a dispute arose between the Company and the Departments of Interior and Justice over whether preemptors along the section of the railway from below Boston Bar to Lytton on the Fraser River, were entitled to land claimed by the Company as right of way under the *Government Railways Act* that was in excess of 99 feet. According to correspondence between 1914 and 1916, the Company and the Departments of the Interior and Justice agreed that the CPR Company was entitled to at least a 99 foot right of way, but disagreed as to where the Company was entitled to more than that. The matter was settled when the CPR Company accepted a narrower right of way in some areas of this section of the railway in accordance with the findings of the Company's engineer and the government. The dispute did not involve the section of the railway through IR10.
93. In 1918, the CRP Company sent out a party in the charge of Mr. Doupe to “define on the ground the limits of the land actually required for railway purposes through the disputed properties” from below Boston Bar up to past Keefers on the Fraser River, and his resulting survey plan for that section was dated July 1918, and titled “Plan of Right of Way Through Townships 10, 11 & 12, Range 26 West 6 Meridian”.

Valuation of land taken for the CPR and payment of compensation for IR10

94. In December 1879, the Governor in Council appointed Joseph Trutch as Canada's "Resident Agent for British Columbia." Trutch's functions were to assist the Department of Interior in the administration of railway lands, and to oversee the construction of the CPR under the instructions of the Department of Railways and Canals. One of his duties included advising the government on the valuations of and compensation for lands to be taken for the railway.
95. Order in Council PC 1882-29192 observed that, with a view to arranging for the “legal transfer to the Government of all rights of way ... and for the settlement of

all claims for damages arising therefrom”, Trutch had been instructed to engage the services of land valuers for the “appraisal of such lands and damages”.

96. On August 3, 1885, Trutch provided valuations of those segments of the railway right of way that traversed Indian reserves between Savona's Ferry and Port Moody, excluding lands which had not yet been surveyed or authoritatively allotted for the use of Indians. IR10 was not included as it had only been surveyed in September 1885, too late to be included in Trutch's valuation.
97. In 1888, the DIA became aware that the CPR railway passed through other reserves in addition to those for which valuations had been provided in 1885. The DIA submitted a list of these reserves, which included the “Cooks Ferry Indians”, to the Department of Railways and Canals for an assessment of the compensation payable for these lands.
98. In March 1890, following an exchange of correspondence between the DIA and the Department of Railways and Canals to clarify the boundaries of the reserves, the Department of Railways and Canals provided valuations to the DIA for the CPR right of way through the reserves in question.
99. The Department of Railways and Canals' valuation in March 1890 indicated that 7.55 acres was taken from IR10 and the value of the land was \$7.55.
100. The DIA reviewed the valuations provided and then recommended that Vowell, Indian Superintendent for BC, and the Indian Agents in whose agencies the reserves were situated, review the valuations and provide a statement setting out the sums to be paid to individuals for improvements and the sums to be credited to each Band as the values of the lands taken. With respect to the valuations of eleven reserves, including IR10, the DIA also asked Vowell to submit these to the Agents, and state if the valuations may be considered a fair compensation.

101. J.W. MacKay (“MacKay”), Indian Agent for the Lytton Agency, made a tour of the reserves in his agency, which agency included the Cooks Ferry reserves, in the summer of 1890 in order to obtain the information requested by DIA.
102. By letter dated September 11, 1890, Indian Agent MacKay wrote to Indian Superintendent Vowell, with reference to Vowell’s letter enclosing two lists of “values awarded to certain bands of Indians for lands taken” for CPR right of way. Agent MacKay reported that regarding the two lists “... there does not appear to my mind any reason for amending the lists as regards the sums to be paid to individuals, and those to be credited to the bands.” MacKay enclosed two statements marked “A” and “B” setting out the sums to be credited to individuals and the sums to be credited to bands. Statement “B” listed the valuations of eleven reserves, including IR10.
103. In October 1890, DIA wrote that it inferred from MacKay’s statement regarding no “reason to amend” the payment of sums to individuals and to Bands regarding the 11 reserves on MacKay’s Schedule “B”, that MacKay considered the awards just.
104. Order in Council PC 1891-2006, dated August 25, 1891, recommended the payment of \$640.65 by the Department of Railways and Canals to the DIA for lands within certain Indian reserves traversed by the CPR railway, and the Order added that the “...valuation has been arrived at based on valuations of similar lands and that such valuations have now been accepted by the Department of Indian Affairs”.
105. Order in Council PC 1891-2006 authorized, upon deposit of the purchase money, transfer of the land “... to the Department of Railways and Canals in order to [sic] their transfer to the Canadian Pacific Railway under the contract with the Government.” The schedule forming part of Order in Council PC 1891-

2006 included IR10 with its “Acreage” listed as 7.55, “Land” listed as \$7.55, “Improvements” listed as blank, and “Total” listed as \$7.55.

McKenna- McBride Commission's consultation with the Band

106. In 1912, the McKenna-McBride Commission was created to settle the disagreements between Canada and British Columbia "respecting Indian Lands and Indian affairs generally".
107. In November 1913, a Commissioner met with the Band at Spence’s Bridge.
108. Chief Johnny Titlanetza testified about the use of IRs 8, 8A, and 9. He told the Commission that, at that time, IR9 and IR10 had about 7 families living there. The Chief stated that he had told Indian Agent Irwin “that he should build us a road, because we were still packing on horse back, the same as we did over 100 years ago, and now we have trains going by almost every minute, and we are still packing our good to market on horse back. [...] Mr. Irwin said...I will give you 400 dollars to build five miles of road width. [...] They have not done anything since. The Government should give me some money, what the Government received for right-of-way from the C.P.R.”

1968 right-of-way widening

109. In 1966, Marathon Realty on behalf of CPR advised the DIA that they had been asked by the CPR Company to purchase for them a strip of land 1,800 feet long with a width of 60 feet...” and that “the parcel of land is immediately adjacent to the Railway Company’s existing right-of-way and that approximately 1,500 feet of the 1,800 foot strip lay within IR10, with the balancing laying within IR9.

110. By letter dated March 13, 1967, Superintendent Henson conveyed to Marathon Realty that the offer of \$50 an acre was unacceptable to the Band, and that they sought \$500 an acre “with the Railway Company paying all costs of survey, registration, etc.”
111. By letter dated April 10, 1967, Superintendent Henson sent Chief Walkem a copy of Marathon’s letter of April 6, 1967 which observed that “raw land similar to this parcel is available at less than \$50.00 per acre in certain areas...however, I would be prepared to recommend purchase of the property at a price of \$150.00 per acre...”
112. By letter dated, February 19, 1968, Superintendent Hansen wrote to the Indian Commissioner for BC, to report that the Band Council had decided they would be willing to accept \$250 an acre, and that Marathon had agreed, and that the area involved would be 2.62 acres. Superintendent Hansen also attached a Band Council Resolution dated January 27, 1968, authorizing the CPR to enter upon IR9 and IR10 to carry out a survey “for the widening of the right-of-way by approximately 60 feet, and for a distance of approximately 1800 feet.”
113. On March 1, 1968, the amount of \$655 was received from Marathon. The “funds were forwarded to the Branch to be held in suspense account pending formal acceptance by the Cook’s Ferry Band by means of Band Council Resolution.”
114. By Band Council Resolution dated March 9, 1968, the Band accepted \$655 for 2.62 acres.
115. By letter dated April 1, 1968, the office of the Indian Commissioner for BC, recorded its view that \$250 an acre was acceptable, based on their inspection of the property, and on provincial land assessment values. The office of the

Indian Commission observed that the “area involved is located along the railroad right-of-way and lies at the foot of a steep grade”.

116. Order in Council PC 1968-1669, dated August 28, 1968, authorized the conveyance of “2.48 acres, more or less” of land from IR 9 and IR10 to the CPR, in consideration of \$655, with reference to survey plan 53921.
117. Survey Plan 53921 noted the acreage for the railway widening as 2.07 acres in IR10 and .41 acres in IR9.
118. \$655 divided by 2.48 acres equals \$264.11 per acre. \$264.11 per acre multiplied by 2.07 acres in IR10 equals \$538.44 received for the land in IR10.
119. Letters Patent dated December 9, 1968 were issued to the CPR for “2.48 acres, more or less”.

Recent events

120. On June 25, 1999, in an appeal by several Indian bands including the Cook’s Ferry Band, the Federal Court of Appeal (*Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325) held that the CPR rights of way through various reserves are "in the reserve" for the purposes of section 83 of the *Indian Act*, 1985 and that the appellant bands have jurisdiction to levy property taxes.
121. On June 22, 2001, the electors of the Band successfully voted to designate the railway right of way lands through IR10 pursuant to section 38(2) of the *Indian Act*, 1985.
122. On July 7, 2001, the Band, via an Instrument of Designation, designated the right of way area through IR10 so that a right of way could be granted to the CPR Company.

123. On October 18, 2001, the Governor in Council accepted the Band's designation of the railway right of way lands by Order in Council PC 2001-1905, passed pursuant to section 40 of the *Indian Act*, 1985.

VI. Relief (R. 42(f))

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

125. If the Crown is liable, which is not admitted, the Province of British Columbia caused or contributed to the alleged acts or omissions and any losses arising therefrom, pursuant to the *Specific Claims Tribunal Act* ("Act"), section 20(1)(i).

126. If the Crown is liable, which is not admitted, the compensation received by the Band from the DIA for the land should be deducted from the amount of compensation, pursuant to the Act, section 20(3).

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

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

I. Communication (R. 42(g))

Respondent's address for the service:

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

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

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

Dated: September 14, 2020

"James M. Mackenzie"

ATTORNEY GENERAL OF CANADA

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

Per: James Mackenzie

Peri Smith

Tel: 604-666-5963

Email: James.Mackenzie@justice.gc.ca

Solicitor/counsel for the Respondent