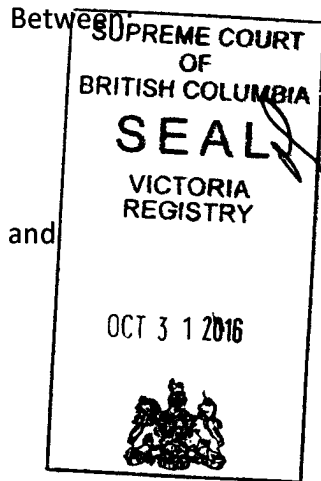


IN THE SUPREME COURT OF BRITISH COLUMBIA  
CIVIL DIVISION



COWICHAN TRIBES

PLAINTIFF

THE ATTORNEY GENERAL OF CANADA and  
ISLAND CORRIDOR FOUNDATION

DEFENDANTS

**NOTICE OF CIVIL CLAIM**

**This action has been started by the Plaintiff for the relief set out in Part 2 below.**

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff(s).

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff(s) and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service,
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## CLAIM OF THE PLAINTIFFS

### I. STATEMENT OF FACTS

#### A. The Parties

1. The Plaintiff Cowichan Tribes is a "band" as defined in the *Indian Act*, R.S.C. 1985, c. I-5 ("Cowichan Tribes").
2. The Defendant Attorney General of Canada is the representative of Her Majesty the Queen in Right of Canada ("**Canada**"), pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50. Her Majesty the Queen in Right of Canada:
  - a. has exclusive legislative jurisdiction in Canada with respect to Indians and lands reserved for Indians pursuant to section 91(24) of the *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in RSC 1985, Appendix II, No. 5;
  - b. holds reserve lands for the use and benefit of Indian Bands pursuant to s. 18(1) of the *Indian Act*; and
  - c. has a fiduciary relationship with the Cowichan Tribes with respect to Cowichan Indian Reserve #1.
3. The Defendant Island Corridor Foundation (the "**ICF**") is a federally registered society with a registered office in Duncan, British Columbia. The Objects of the ICF require it to respect and support First Nations' interests and traditional lands and uses within the Island Corridor.

#### B. Creation of the ROW

4. The British Columbia Terms of Union, May 16, 1871 ("**Terms of Union**") required Canada to complete a rail line across British Columbia within ten years of British Columbia's entry into Confederation.
5. To facilitate the rail line, British Columbia agreed to convey to Canada public lands along the entire length of the railway in British Columbia amounting to no more than 20 miles on each side of the line.
6. Due to politics and financing challenges, Canada was unable to complete the rail line within ten years of Terms of Union.

7. After many years, Canada and British Columbia reached an agreement on the rail line for Vancouver Island. On December 19, 1883, British Columbia passed *An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province*, SBC 1884 c. 14 (the "**Settlement Act**").
8. The *Settlement Act* granted the lands necessary for the railway on Vancouver Island to Canada—but specifically exempted any Indian reserves or settlements, and naval or military reserves, from the lands granted to Canada.
9. On April 19, 1884, Canada passed An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion, RSC 1884, c. 6 (the "**Dominion Act**").
10. The *Dominion Act* authorized the Governor in Council to grant to the Esquimalt & Nanaimo ("**E & N**") Railway Company those lands granted to Canada by British Columbia in the *Settlement Act* upon completion of the railway.
11. The *Indian Act, 1880*, SC 1880, c. 28, s. 31, provided for railways passing through or causing injury to reserve lands, requiring payment of compensation if a railway was constructed through any reserve belonging to or in possession of any band of Indians.
12. Subsections 7(3) and 9(37) of the *Consolidated Railway Act 1879*, 42 Victoria, c. 9 ("**Consolidated Railway Act**"), permitted a railway company to take and appropriate Crown lands (including Indian reserves and settlements) for the use of its railway and works, with compensation and with the consent of the Governor in Council, but prohibited the railway company from alienating those lands.
13. In or around 1885, the E & N Railway Company constructed a rail line and works within and through Cowichan Indian Reserve #1, which was at all material times an Indian reserve or settlement ("**Reserve #1**").
14. The land taken up by E & N Railway Company through Cowichan Indian Reserve #1 is referred to as the right-of-way, or the "**ROW**", in this Notice of Civil Claim. The ROW is in the nature of an easement and was and is subject to the condition that the land continues to be used for railway operations.
15. The E & N Railway Company completed the rail line from Victoria to Nanaimo on August 13, 1886.

16. Canada formally conveyed the land, as it was described in the *Settlement Act*, to the E & N Railway Company in or around 1887. This conveyance to E & N Railway Company did not include lands within an Indian reserve or settlement.
17. At the time of the construction of the railway there is no record of the Governor in Council consenting to the taking of the ROW through Cowichan Indian Reserve #1 or that title was transferred to the E & N Railway Company.
18. The E & N Railway Company operated the rail line and works through Reserve #1. On February 2, 1905, the Canadian Pacific Railway ("CPR") acquired the E & N Railway Company. CPR retained certain assets as E & N assets for tax purposes until 1913.
19. Through Order in Council 1036/1938, the Province of British Columbia conveyed the administration and control of certain lands to Her Majesty the Queen in right of Canada for the use and benefit of the Indians of British Columbia, including Cowichan Indian Reserve #1 lands (except for travelled streets, roads, trails, and other highways existing over or through said lands). Her Majesty the Queen in right of Canada holds said Cowichan Indian Reserve #1 lands for the use and benefit of Cowichan Tribes.
20. By Dominion Order in Council PC 1963-1411, the Governor in Council provided consent to the E & N Railway Company to exercise its statutory powers in relation to the ROW, and issued letters patent to the Company conveying the ROW. Any grant to the E & N Railway Company that purports to convey more than a right-of-way conditional upon use of the lands for railway operations is of no force and effect.

**C. End of Railway Operations**

21. In 1999, RailAmerica purchased a portion of the E & N Railway lands from CPR. However, just two years later, RailAmerica announced its intention to shut down rail service due to a lack of freight traffic.
22. The ICF was formed in 2003 as a not-for-profit charitable society. CPR and RailAmerica donated the sections of the railway lands they each owned to the ICF, which now owns the entire E & N Railway Corridor and branch lines.
23. In 2006, Southern Railway of Vancouver Island Limited ("SVI") began operating freight services on the E & N Railway Corridor. SVI also began operating passenger services on behalf of VIA Rail.
24. Between 2006 and 2011 freight and passenger traffic on the E & N Railway declined steadily. The railway infrastructure also required significant upgrades and restoration.

25. In 2010, the British Columbia Ministry of Transportation released two studies evaluating the economic potential of the E & N Railway. It estimated the cost of rehabilitating the rail corridor from Victoria to Courtenay for freight and VIA Rail passenger services to be between \$70 million and \$130 million.
26. On April 5, 2011, SVI and VIA Rail decommissioned passenger rail service indefinitely due to safety concerns about the railway infrastructure. Freight service between Parksville and Duncan continued at a slow speed.
27. In November 2014, SVI and the ICF announced the discontinuance of the remaining freight service.
28. ICF does not have the funds, or the possibility of funding, sufficient to rehabilitate the rail corridor and re-start rail service.

**D. Cowichan Tribes Taxation Authority**

29. The Cowichan Tribes has enacted laws governing property assessment and taxation of lands within Cowichan Indian Reserve #1, which apply to the lands subject to the ROW.

**II. RELIEF SOUGHT**

1. Cowichan Tribes claims as follows:
  - a. A declaration that the lands subject to the ROW are "reserve" lands for the purposes of the *Cowichan Tribes First Nation Property Assessment Law, 2013* and the *Cowichan Tribes First Nation Property Taxation Law, 2013*;
  - b. A declaration that the lands subject to the ROW revert to the administration and control of Canada for the use and benefit of Cowichan Tribes as a part of Cowichan Indian Reserve #1 upon the cessation of railway operations;
  - c. In the alternative, a declaration that the lands subject to the ROW revert to the administration and control of Canada in trust for Cowichan Tribes upon the cessation of railway operations.
  - d. A declaration that the lands subject to the ROW are no longer being used for railway operations, and as such are no longer being used for railway purposes;
  - e. A declaration that the lands subject to the ROW have reverted to the administration and control of Canada for the use and benefit of Cowichan Tribes as part of Cowichan Indian Reserve #1;

- f. In the alternative, that the lands subject to the ROW have reverted to the administration and control of Canada in trust for Cowichan Tribes;
- g. Costs in this action; and
- h. Such other relief as this Honourable Court may deem just and appropriate.

### III. LEGAL BASIS

1. The Plaintiff proceeds in reliance upon:
  - a. *Consolidated Railway Act, 1879, 42 Victoria, c. 9;*
  - b. *Indian Act, 1880, SC 1880, c. 28;*
  - c. *The Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province, SBC 1884 c. 14;*
  - d. *An Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion, RSC 1884, c. 6;*
  - e. *The Constitution Act, 1867 (UK), 30 & 31, c 3, reprinted in R.S.C. 1985, Appendix II, No. 5; and*
  - f. *Section 35 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c. 11;*
  - g. *Indian Act, RSC 1985, c. I-5;*
  - h. *Cowichan Tribes First Nation Property Assessment Law, 2013;*
  - i. *Cowichan Tribes First Nation Property Taxation Law, 2013; and*
  - j. such further enactment(s) as counsel may advise.
2. The lands subject to the ROW were and are reserve lands within Cowichan Indian Reserve #1.
3. The Cowichan Indian Reserve #1 is Crown land within the meaning of subsection 7(3) of the *Consolidated Railway Act*.

4. As a result of the prohibition on alienation of Crown lands taken for railway purposes contained in the *Consolidated Railway Act*, administration and control of the lands must revert to the Crown for the use and benefit of the Cowichan Tribes when the lands are no longer used for the railway company's railway and works.
5. The facts set out above establish that:
  - a. the ROW is no longer being used for railway operations; and
  - b. there is no reasonable prospect that the infrastructure for the railway will be restored to a condition sufficient for the operation of a railway.
  - c. As a result of the restraint on alienation of Crown lands taken for railway purposes, the lands subject to the ROW revert to Cowichan Tribes or, in the alternative, to the Crown in trust for Cowichan Tribes.

Plaintiffs address for service:


Woodward & Company Lawyers LLP  
Barristers & Solicitors  
1022 Government Street, Suite 200  
Victoria, BC V8W 1X7  
Attention: Gary Campo and Sonya Morgan

Fax number address for service: (250) 380-6560 Woodward & Company Lawyers LLP

Place of trial: Victoria

The address of the registry is: Victoria Law Courts  
850 Burdett Ave  
PO Box 9248  
Stn Prov Govt  
Victoria, BC V8W 9J2

Dated: October 31, 2016

  
\_\_\_\_\_  
Gary Campo / Sonya Morgan  
Woodward & Company Lawyers LLP  
Counsel for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.



## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

### **Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

Right to administration and control of land within Cowichan Indian Reserve #1.

### **Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

*[Check one box below for the case type that best describes this case.]*

- a motor vehicle accident
- personal injury, other than one arising from a motor vehicle accident
- a dispute about real property (real estate)
- a dispute about personal property
- the lending of money
- the provision of goods or services or other general commercial matters
- an employment relationship
- a dispute about a will or other issues concerning the probate of an estate
- a matter not listed here

### **Part 3:**

*[If an enactment is being relied on, specify. Do not list more than 3 enactments.]*

- a. *Consolidated Railway Act, 1879, 42 Victoria, c. 9*
- b. *Indian Act, 1880, SC c. 28*