

No. 15 4903
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

SNAW-NAW-AS FIRST NATION

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.

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) send a copy of the filed Response to Civil Claim on the Plaintiff.

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 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:

- a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed Notice of Civil Claim was served on you;

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- b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed Notice of Civil Claim was served on you;
- c) if you reside elsewhere, within 49 days after the date on which a copy of the filed Notice of Civil Claim was served on you; or
- d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

PART 1: STATEMENT OF FACTS

The Parties

1. Snaw-Naw-As (Nanoose) First Nation is an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 (“Snaw-Naw-As”).
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*, R.S.C. 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, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11;
 - 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 aboriginal peoples of Canada, including the Plaintiffs.
3. The Defendant Island Corridor Foundation (the “Foundation”) is a federally registered society with a registered office at 921 – H Canada Avenue, Duncan BC, V9L 1V2.

Snaw-Naw-As First Nation Reserve

4. The ancestors of Snaw-Naw-As, or Nanoose, First Nation occupied lands in the vicinity of the present reserve of the Snaw-Naw-As at and before the time of contact with Europeans on Vancouver Island, before the assertion of British sovereignty on Vancouver Island, and at the time that the predecessor of the Snaw-Naw-As, the Saalequun Tribe, entered into a treaty with the Crown (the “Douglas Treaty”).
5. Pursuant to the Douglas Treaty the village site or sites of the signatories of the treaty were to be reserved for them and their descendants. The establishment of this reserve became a matter of ongoing controversy between the Snaw-Naw-As and the Crown.

6. On January 4, 1877, the Joint Indian Reserve Commission, acting on behalf of the governments of Canada and British Columbia, set aside an estimated 140 acres on the south shore of Nanoose Bay for the use and benefit of the Snaw-Naw-As Indians (the "Reserve"). From this date forward, both Canada and British Columbia acted on the basis that the Reserve was controlled and administered by Canada for the use and benefit of Snaw-Naw-As.
7. The administration and control of the land set aside for the Reserve was not transferred to Canada at that time. British Columbia transferred the administration and control and all beneficial interest in the land subject to the *Settlement Act* (described below), including the lands comprising the Reserve, in or about 1883. From that date forward, the Reserve was unquestionably a reserve within the meaning of the *Indian Act*.
8. To the extent that British Columbia retained administration and control of any remaining Crown interest in the Reserve after the transfer to Canada effected by the *Settlement Act*, these interests were fully transferred to the administration and control of Canada by Order in Council 1036/1939 (British Columbia).
9. Since Order in Council 1036/1939 (British Columbia), all Crown interests, whether legal or equitable, in the Reserve have been under the administration and control of Canada to be held for the use and benefit of Snaw-Naw-As.

Establishment of the Esquimalt and Nanaimo Railway Right of Way

10. The British Columbia Terms of Union, May 16, 1871, ("Terms of Union") required Canada (or the "Dominion Government") to complete a rail line across British Columbia within ten years of British Columbia's entry into Confederation.
11. 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.
12. Due to politics and financing challenges, Canada was unable to complete the rail line within ten years of Terms of Union.
13. 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*"). Section 3 of the *Settlement Act*

grants the lands necessary for the railway on Vancouver Island to Canada, which are described as follows:

Bounded On the South by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca;

On the West, by a straight line drawn from Muir Cree, aforesaid to Crown Mountain;

On the North by a straight line drawn from Crown Mountain towards Seymour Narrows; and

On the East, by the coast line of Vancouver Island to the point of commencement; and including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon, therein and thereunder.

14. The *Settlement Act* exempts any Indian reserves, settlements or naval or military reserves from the land grant to Canada. It also incorporated the Esquimalt & Nanaimo ("E & N") Railway Company and enabled it to construct the railway line north of Nanaimo to Comox.
15. Canada formally conveyed the land as it was described in the *Settlement Act* to the Esquimalt & Nanaimo ("E & N") Railway Company by a Dominion Land Grant in 1887. The E & N Railway Company completed the railway line to Nanaimo on August 13, 1886.
16. 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.
17. In order to facilitate extensions to the E & N Railway line, CPR sought a right of way ("ROW") across the Snaw-Naw-As Reserve. On October 16, 1907, CPR requested permission from the Department of Indian Affairs for a ROW of a strip of land about 50 feet wide on either side of the centre line of the E & N Railway containing approximately 10.79 acres.
18. Negotiations between CPR and the Department of Indian Affairs over the appropriate price for the ROW lasted until October of the following year, when the parties settled on the price of \$650.50 for the land and improvements. In the meantime, the Department of Indian Affairs authorized CPR to begin constructing the ROW on January 21, 1908.

19. On November 20, 1908, the ROW plans were certified by the Department of Railways and Canals as land being set aside for railway purposes. Due to concerns about the possibility that British Columbia had a reversionary interest in the reserve lands, which issue the Province had taken into court at that time, the Department of Indian Affairs delayed seeking approval of the ROW from the Governor in Council.
20. On July 4, 1912, the Department of Indian Affairs recommended that authority for the sale of the ROW lands be granted under section 46 of the *Indian Act*, which provided for taking of such lands by railway companies with the Governor in Council's consent.
21. On July 30, 1912, Order-in-Council PC 2017 was issued, granting authority for the sale as recommended by the Department of Indian Affairs.
22. Subsequently, CPR completed the extension to Courtenay. The total length of the E & N Railway line from Victoria to Courtenay was then approximately 225 km.

Esquimalt & Nanaimo Railway Ceases Operations

23. In 1979, VIA Rail began operating the passenger service on the E & N Railway, but CPR retained ownership.
24. 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.
25. The Island Corridor Foundation 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 Island Corridor Foundation, which now owns the entire E & N Railway Corridor and branch lines.
26. Southern Railway of Vancouver Island Limited ("SVI") is a British Columbia registered company with a registered office at Suite 1800-541 West Georgia St. Vancouver BC, V6B 0M3.
27. In 2006, SVI began operating freight services on the E & N Railway. SVI also began operating passenger services on behalf of VIA Rail.

28. Between 2006 and 2011 freight and passenger traffic on the E & N Railway declined steadily. The railway infrastructure also required significant upgrades and restoration.
29. 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.
30. 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 continue at a slow speed.
31. On November 2014, SVI and the Island Corridor Foundation announced the discontinuance of the remaining freight service between Duncan and Parksville.
32. As of October 30, 2015, the Island Corridor Foundation has confirmed investment commitments from various stakeholders and governments totalling just \$13.4 million.
33. Island Corridor Foundation has asked the federal government to confirm an additional \$7.5 million contribution. The federal government has not approved this request.

PART 2: RELIEF SOUGHT

1. Snaw-Naw-As claims as follows:
 - a. A declaration that the lands subject to the ROW revert to the administration and control of Canada for the use and benefit of Snaw-Naw-As as a part of the Snaw-Naw-As reserve upon the cessation of railway operations;
 - b. In the alternative, a declaration that the lands subject to the ROW revert to the administration and control of Canada in trust for Snaw-Naw-As upon the cessation of railway operations.

- c. 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;
- d. A declaration that the lands subject to the ROW have reverted to the administration and control of Canada for the use and benefit of Snaw-Naw-As as part of the Snaw-Naw-As reserve;
- e. In the alternative, that the lands subject to the ROW have reverted to the administration and control of Canada in trust for Snaw-Naw-As.
- f. Costs in this action; and
- g. Such other relief as this Honourable Court may deem just and appropriate.

PART 3: LEGAL BASIS

1. The E & N Railway Company's authority to take Crown lands is set out in the *Consolidated Railway Act*, 1879, 42 Victoria, c. 9.
2. Subsection 7(3) of the *Consolidated Railway Act*, permits a railway company to take and appropriate Crown lands for the use of their railway and works but prohibits the railway company from alienating those lands.
3. As a result of the prohibition on alienation of Crown lands taken for railway purposes, the lands must revert to the Crown when the lands are no longer used for the railway company's railway and works.
4. The Snaw-Naw-As Reserve is Crown land within the meaning of subsection 7(3) of the *Consolidated Railway Act*.
5. The ROW through the Reserve was obtained pursuant to a taking authorized by the Governor in Council pursuant to s.46 of the *Indian Act*, R.S.C. 1906, c. 81.
6. The facts set out above establish that:

- a. the ROW is no longer being used for the railway; 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.
7. As a result of the restraint on alienation of Crown lands taken for railway purposes, the lands subject to the ROW revert to Snaw-Naw-As or, in the alternative, to the Crown in trust for Snaw-Naw-As.
8. The Plaintiffs rely on the following enactments:
- a. The *Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province*, S.B.C. 1884 c. 14;
 - b. The *Indian Act*, R.S.C. 1906, c. 81;
 - c. The *Consolidated Railway Act*, 1879, 42 Victoria, c. 9;
 - d. The *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in R.S.C. 1985, Appendix II, No. 5; and
 - e. Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11.

Plaintiff's address for service:

JFK Law Corporation
Suite 816 - 1175 Douglas Street
Victoria, BC V8W 2E1

Fax number for service (if any):

250.381.8567

Email address for service (if any):

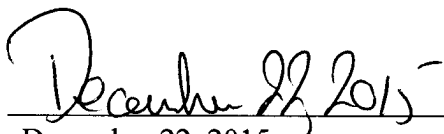
rjanes@jfkllaw.ca

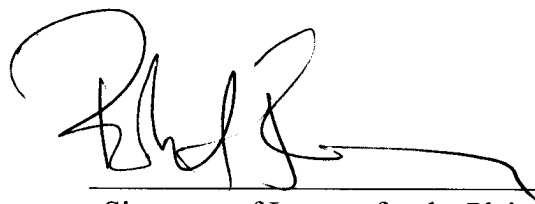
Place of trial:

Victoria, British Columbia

The address of the registry is:

850 Burdett Avenue
Victoria, BC V8W 1B4


December 22, 2015


Signature of Lawyer for the Plaintiff
Robert Janes Q.C.

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

PART 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Claim for reversion to the Crown of lands taken for railway purposes.

PART 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Put an "x" in **one** box below for the case type that best describes this case.]

A personal injury arising out of:

a motor vehicle accident

medical malpractice

another cause

A dispute concerning:

contaminated sites

construction defects

real property (real estate)

personal property

the provision of goods or services or other general commercial matters

investment losses

the lending of money

an employment relationship

a will or other issues concerning the probate of an estate

a matter not listed here

PART 3: THIS CLAIM INVOLVES:

[Put an "x" in all boxes below that apply to this case.]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

PART 4:

The Plaintiffs rely on the following enactments:

- (a) The *Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province*, S.B.C. 1884 c. 14;
- (b) The *Indian Act*, R.S.C. 1906, c. 81;
- (c) The *Consolidated Railway Act*, 1879, 42 Victoria, c. 9.
- (d) The *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in R.S.C. 1985, Appendix II, No. 5; and
- (e) Section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c. 11.