

**NATIONAL RESEARCH DIRECTORS CONFERENCE  
VANCOUVER, BRITISH COLUMBIA  
FEBRUARY 23 - 25, 1994**

**INFORMATION PACKAGE  
ON  
MANITOBA RAILWAY RIGHT OF WAY CLAIM**

**Opaskwayak Cree Nation  
Railway Right of Way Claim  
Indian Reserve No. 21A  
(Submitted May 1993)**

- o Statement of Fact (including maps)**
- o Statement of Claim**
- o Legal Questions**
- o Federal Statement of Claim**

Ralph Abramson  
Director  
T.A.R.R. Centre of Manitoba

OPASKWAYAK CREE NATION  
RAILWAY RIGHT OF WAY CLAIM  
INDIAN RESERVE NO. 21A

STATEMENT OF FACT

Prepared for the Opaskwayak Cree Nation  
by the T.A.R.R. Centre of Manitoba  
May 1993

#### Establishment of I.R. # 21 A

1. Treaty Number 5 was negotiated in 1875. The Treaty provided for reserve land on the basis of 160 acres per family of five or in that proportion.

Document No. 1

2. The Indians of The Pas Band adhered to Treaty Number 5 on September 7, 1876, with Chief John Constant signing for the Indians.

Document No. 2

3. They received land in reserves on both sides of the Saskatchewan River at The Pas. Included in this land was Reserve 21A, located at the junction of the Pasqua and Saskatchewan Rivers. It was surveyed by Dominion Land Surveyor W.A. Austin in 1883 and contained 1,599.19 acres.

Document No. 3

4. Order in Council 1003, dated May 13, 1930, confirmed the reserve and withdrew it from the operation of the Dominion Lands Act.

Document No. 4

#### Canadian Northern Railway Right of Way

5. Section 35 of the Indian Act(1886) required that compensation should be paid to any band of Indians for damages caused by the passing of any railway, road, or public work through their reserve.

Document No. 5

6. The amendment to the Indian Act of the following year added the requirement that "... 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...".

Document No. 6

7. In a letter of June 22, 1905, the Winnipeg solicitors for the Canadian Northern Railway Company advised David Laird, the Indian Commissioner at Winnipeg, that the Company was about to begin construction of a railway line for which they required a right of way across The Pas Indian Reserve. On the Company's behalf they applied for "permission to enter and take possession of the land required."

Document No. 7

8. On June 26, 1905, Laird wrote to J.D. McLean, the Secretary of the Department of Indian Affairs, informing him of the application of the Canadian Northern Railway Company for a right of way in The Pas Reserve. He recommended that "the usual consent by Order in Council be given the Company to enter upon the reserve."

Document No. 8

9. In his reply, dated June 30, 1905, McLean noted the difficulty which the Department had experienced in arranging with railway companies for payment after they had taken possession of a right of way through Indian reserves. He asked Laird to obtain a deposit from the Canadian Northern Railway Company consisting of "a sum of money which you consider should be sufficient to cover the value of the right of way through the Pas Indian reserve, including the individual improvements and damages."

Document No. 9

10. In a letter to McLean dated July 4, 1905, J.A. McKenna, Assistant Indian Commissioner in Winnipeg, reported that he had notified the solicitors of the Canadian Northern Railway Company of the terms mentioned in McLean's letter of June 30 and had asked them to provide him with a plan of the required

land as soon as possible. McKenna expressed his opinion that it was impracticable to insist upon a deposit in advance. He pointed out that a deposit was not necessary because compensation was required under the law [Indian Act], which provided that "no portion of any reserve shall be taken for the purpose of any railway, road, or public work without the consent of the Governor in Council".

Document No. 10

11. On July 4, 1905, G.G. Ruel, Assistant Solicitor for the Canadian Northern Railway Company in Toronto, sent McLean two blueprints showing the proposed location of the right of way. He wrote that the area required for the right of way would be approximately 53 acres. Requesting the approval of the Department for the work to proceed, Ruel explained that the Company wanted to begin grading the land before the official plans were filed with the Railway Department in order to advance the work as far as possible that season.

Document No. 11

12. The Chief Engineer of the Railway Company wrote to the Winnipeg solicitors on July 5, 1905, stating that 53 acres for the right of way and 18.5 acres for station grounds were required on The Pas Reserve.

Document No. 12

13. In a letter of July 5, 1905, the solicitors for the Canadian Northern Railway Company in Winnipeg referred McKenna to the enclosed statement of the required acreage from the Company's Chief Engineer (Document No. 12). They asked McKenna to give them a figure for the deposit, "subject to subsequent arrangement as to the actual amount to be paid per acre", and said that they would forward him a cheque for the requested amount.

Document No. 13

14. On July 5, 1905, McKenna sent McLean a copy of the above correspondence of the same date from the Railway Company's solicitors in Winnipeg. He requested two copies of the plan submitted by the Railway Company, so that he could forward one to the Indian Agent at The Pas to enable him to make an exact valuation of the land. On the basis of the total acreage of 71.5 applied for by the Company, consisting of 53 acres for a right of way and 18.5 for station grounds, McKenna suggested a deposit of \$300.

Document No. 14

15. The same day, McKenna wrote to Joseph Courtney, Indian Agent at The Pas, asking him to provide a valuation of the land required by the Railway.

Document No. 15

16. In a letter to Ruel dated July 6, 1905, McLean stated that an Order in Council was required to authorize the sale of the right of way, for which the Department would immediately apply. If a deposit of \$200 was made, McLean informed Ruel that the Railway Company could enter the reserve and take possession of the right of way as soon as an Order in Council was passed.

Document No. 16

17. On July 7, 1905, Ruel sent a telegram notifying McLean that he had applied for a cheque for the \$200 deposit.

Document No. 17

18. McKenna acknowledged receipt of a cheque for \$200 in a letter of July 7, 1905 to the Winnipeg solicitors of the Canadian Northern Railway Company.

Document No. 18

19. In a letter to McLean dated July 7, 1905, McKenna reported that he had received a cheque for \$200 from the Winnipeg solicitors.

Document No. 19

20. A receipt from the Merchant's Bank of Canada records a credit of \$200 paid by the Indian Commissioner to the account of The Pas Band on July 8, 1905.

Document No. 20

21. In a memo to the Deputy Superintendent General dated July 10, 1905, Samuel Bray, Chief Surveyor, recommended that application be made immediately for an Order in Council authorizing the sale to the Canadian Northern Railway of the land required for a right of way and station grounds in the south part of Block A in The Pas Reserve.

Document No. 21

22. The draft of a letter dated July 10, 1905 from the Secretary to Laird acknowledged the letter of July 5 from the Assistant Indian Commissioner (Document No. 14). It informed Laird that Ruel had been told that if he made a deposit of \$200, "...the Company might take possession as soon as an Order in Council giving authority for sale could be obtained..."

Document No. 22

23. In a second memo to the Deputy Superintendent General on July 10, 1905, Bray referred him to the draft of a letter of the same date from the Secretary to David Laird (Document 22). He observed that the Department had handled the application for the right of way in accordance with an understanding that railway companies should not be allowed to enter a reserve without authorization by Order in Council. Although noting that the Department had no power to sell or alienate any portion of an Indian reserve without an Order in Council, Bray

suggested that if the Railway made a reasonable deposit when it wished to begin work, the Superintendent General could then give his consent to allow the Railway to occupy the land until the necessary Order in Council had passed.

Document No. 23

24. McLean requested Laird, in a letter of July 25, 1906, to ask the Company for a plan of the right of way and station grounds certified by the Chief Engineer of Railways and Canals.

Document No. 24

25. Courtney sent Laird, on August 3, 1905, the valuation that McKenna had requested (Document No. 15). He estimated the total area of dry land on the south side of the river at 50 to 70 acres and placed a valuation on it of \$50 per acre "at the lowest calculation". He said that the remaining 1400-1500 acres consisted of muskeg and would be worth from 25 cents to \$5 per acre.

Document No. 25

26. On August 14, 1905, McKenna forwarded McLean a copy of the report by Courtney on the valuation of the land applied for by the Railway. He wrote that he was asking Marlatt for a report on the same subject.

Document No. 26

27. Marlatt reported his valuation of the land to McKenna on September 26, 1905. Stating that there was 50 to 70 acres of dry land on the south side of the river, he expressed his opinion that it would cause serious damage to have the Railway running through this area, which was quite thickly populated and "the most valuable portion of the Reserve". If the Railway Company still found it necessary to run their line through this portion of the reserve, he suggested that they

should be confined to the actual right of way and locate their station grounds on the north side of the river. He gave his valuation for the land on the south side of the river at \$75 per acre exclusive of improvements for the dry and habitable portion, and \$2 per acre for the low muskeg lands. For the land on the north side of the river which he recommended as the location for the station grounds, he estimated the value at \$20 per acre "for all the dry land they require" and \$2 per acre for the muskeg land.

Document No. 27

28. On September 27, 1905, McKenna forwarded to McLean a copy of Marlatt's report. He noted that his office had not yet received a copy of the plan of the right of way.

Document No. 28

29. On October 3, 1905, McLean replied that to date the Department had received only a sketch showing the centre line of the proposed right of way. He asked Laird to urge the Company to forward without delay a complete plan.

Document No. 29

30. S. Stewart, Assistant Secretary of the Department of Indian Affairs, asked Ruel in a letter of October 4, 1905 to file a right of way plan "in order that the necessary authority to dispose of the land may be obtained from His Excellency in Council."

Document No. 30

31. In a letter dated October 6, 1905, McKenna acknowledged McLean's communication of October 3 (Document No. 29). Before the request for a plan was put to the Company, he suggested, the Department should first consider the question raised in Marlatt's report as to whether "the interest of the Indians of the Pas Reserve demands non-compliance with the application".

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McKenna outlined several corollaries of this question, including Marlatt's suggestion that only a right of way should be allowed on the land applied for.

Document No. 31

32. On November 3, 1905, Stewart wrote to Ruel with reference to his previous letter of October 4 (Document No. 30) and stated that the necessary Order in Council could not be obtained until a plan of the right of way certified by the Chief Engineer of Railways and Canals had been received by the Department. Before allowing the Railway to proceed with its work, a deposit of \$5,000 would be required as a result of increased valuations that had been received.

Document No. 32

33. Replying on November 4, 1905 to Stewart's letter of November 3, Ruel told McLean that the Company would probably not commence construction that fall.

Document No. 33

34. On May 5, 1906, McLean wrote to A.D. Davidson, General Agent of the Canadian Northern Railway Company, acknowledging the receipt of his letter of May 1 and the enclosed blueprint. He observed that Davidson's letter stated that the blueprint showed the lands required by the Railway in The Pas Reserve, but that the blueprint itself stated that the land was required for a mill site. If this land was not in fact required for railway purposes, McLean stressed that it could not be alienated without a surrender:

Lands situated within an Indian reserve which are actually required for railway purposes may be taken under the provisions of Section 35, as amended, of the Indian Act. Lands in an Indian reserve required for other purposes cannot be taken without a formal surrender of the same by the

Indians.

Document No. 34

35. Marlatt recommended to Laird in his letter of May 31, 1906 that The Pas Band be asked to surrender 500 acres from the north end of Block A, "... exclusive of the land occupied by the Hudson's Bay Company, by the Church Missionary Society, and by the Right of way and station grounds of the Railway."

Document No. 35

36. On June 1, 1906, Laird forwarded to McLean a copy of Marlatt's letter (Document No. 35), together with some comments of his own. Laird noted that a survey plan of the right of way and station grounds at The Pas had not been furnished to his office: "If such a plan exists, this office and Mr. Marlatt should be furnished with copies, before the surrender is taken, as I suppose if such ground is expropriated it will not require to be surrendered by the Indians."

Document No. 36

37. In his reply of June 6, 1906, McLean told Laird that the Company had not yet filed a plan of the right of way, nor had they made a sufficient deposit to warrant allowing them to proceed with their work.

Document No. 37

38. In a letter to McLean dated June 13, 1906, Laird said that he understood that the Company was taking a large quantity of railway construction supplies to The Pas Reserve and that it planned to proceed with the work from that end. He inquired whether McLean wished him to take up the matter with the Company, what additional amount of deposit should be requested, and whether the Company should be ordered to stop its work if the deposit was not paid.

Document No. 38

39. McLean replied to Laird on June 19, 1906, informing him that the Department had requested the Railway on November 3, 1905 to file a plan of the right of way and to make a deposit of \$5,000 if immediate possession was required. As neither the plan nor the deposit had been received, McLean asked Laird to instruct the Indian Agent at The Pas not to allow any work on the right of way.

Document No. 39

40. In a covering letter sent to Laird on September 25, 1906 with the surrender of 500 acres in The Pas Reserve, Marlatt stated that the surrender excluded the right of way:

The 500 Acres [sic] surrendered is exclusive of the Right of Way of the Canadian Northern Ry. through the surrendered portion, unless it is necessary to include it in order to make the Companies' title clear.

Document No. 40

41. George Macdonnell, Assistant Solicitor for the Canadian Northern Railway in Toronto, notified McLean in a letter of September 28, 1906 that he was sending him three copies of the plan showing the right of way through The Pas Reserve. He asked that the Order in Council be passed as soon as possible.

Document No. 41

42. McLean forwarded the plan of the right of way to the Department of Railways and Canals on October 3, 1906, requesting that they be certified by the Chief Engineer.

Document No. 42

43. On October 3, 1906, McLean acknowledged receipt of Macdonnell's letter of September 28 and three copies of the plan. He wrote that the Department would apply for an Order in Council authorizing the sale of the land as soon as the plan was certified by the Chief Engineer of Railway and Canals. McLean stated that the sum of \$5,044.74 was due on the right of way alone, calculated on the basis of the valuation of \$75 an acre for the area of 69.93 acres taken. He added that the Indian Agent at The Pas would be immediately requested to send the final valuation including the value of damages to Indian improvements.

Document No. 43

44. McLean sent a copy of the plan of the right of way to Fred

Fischer, Indian Agent at The Pas, on October 3, 1906, asking him to provide a final valuation of the land required and of any damages to improvements.

Document No. 44

45. The Canadian Northern Railway plan of the right of way through The Pas Reserve was certified on October 11, 1906 by the Deputy Minister and the Chief Engineer of the Department of Railways and Canals.

Document No. 45

46. The Acting Secretary of the Department of Railways and Canals returned two copies of the certified plan to McLean on October 17, 1905 and noted that the other copy remained on file.

Document No. 46

47. On October 30, 1906, Frank Oliver, the Superintendent General of Indian Affairs, applied for an Order in Council allowing the sale of the land required for a right of way and station grounds in The Pas Reserve.

Document No. 47

48. Mackenzie, Mann & Co. Ltd. of Toronto wrote to Ruel on October 31, 1906, stating that they were enclosing a cheque for \$5,044.75 to the Secretary of the Department of Indian Affairs for the purchase of the right of way in The Pas.

Document No. 48

49. In a letter to Ruel dated November 2, 1906, S. Stewart, the Assistant Secretary, acknowledged receipt of the cheque for \$5,044.75 and said that the Indian Agent at The Pas had been wired to permit the Company to proceed with construction of the right of way.

Document No. 49

50. On November 2, 1906, Stewart sent a telegram to Fischer apprising him of the payment of \$5,044.74 and instructing him to permit the Railway Company to go on with its work.

Document No. 50

51. Stewart wrote a letter to Fischer on November 2, 1906 confirming the message relayed in the telegram of the same date. He also asked the Indian Agent to make a detailed final valuation of the right of way and the Indian improvements on the required land.

Document No. 51

52. A receipt from the Bank of Montreal stamped November 6, 1906 records a payment of \$5,044.75 made by Mackenzie, Mann & Co. to the account of the Receiver General.

Document No. 52

53. An Order in Council of November 8, 1906 authorized the sale of 69.93 acres in the southern portion of Block A in The Pas Reserve for a right of way and station grounds:

The Chief engineer of the Department of Railways and Canals has certified that the land is actually required for railway purposes and is such as the Company should be allowed to acquire under the provisions of section 35 of the Indian Act as amended.

Document No. 53

54. In his reply on November 12, 1906 to McLean's letter of October 3 (Document 44) requesting a final valuation, Fischer estimated the value of the land required for the right of way as \$3 per acre. Referring to Courtney's letter of August 3, 1905 (Document No. 25), he misquoted the former Indian Agent's valuation of the land in question at 25 cents to \$1 per acre (in fact, Courtney estimated the value of the muskeg land at from 25 cents to \$5 per acre). Fischer added that the land required for the station grounds was of greater value because it was cleared, but he presumed that it would be treated as a separate matter because he thought it was part of the surrendered area.

Document No. 54

55. On December 4, 1906, Fischer wrote again to the Secretary acknowledging the telegram and letter from Stewart on November 2 (Document Nos. 50 and 51). stating that the Railway Company had deposited \$5,044 for the right of way. Fischer said that

he still thought his valuation of \$3 per acre to be a fair average as the right of way only ran through about one acre of dry and cleared land, with the balance of the acreage being mostly muskeg. Repeating his assumption that the land for the station grounds was in the surrendered portion of the Reserve, he estimated the value of this land at \$50 per acre.

Document No. 55

56. McLean told Fischer in a letter of December 6, 1906 that the Department had accepted Marlatt's valuation of \$75 per acre for the dry land and \$2 per acre for the low muskeg land. He asked Fischer to determine the acreage of the dry and habitable land and of the muskeg. He directed him to include in his assessment the land required for station grounds, adding that "The lands surrendered by the band is an entirely distinct matter."

Document No. 56

57. Fischer replied on December 31, 1906 that the required land included about 37 acres of muskeg and about 32.93 acres of comparatively dry land which was covered with spruce and tamarack, excepting one acre of cleared and dry land.

Document No. 57

58. In a letter to Marlatt dated January 21, 1907, McLean drew the Inspector's attention to the difference between his valuation

and Fischer's. He asked Marlatt to provide a final appraisal of the land, with the information given by the Indian Agent and his knowledge of the area, detailing the amount which he considered the Department should demand from the Railway in the sale.

Document No. 58

59. Marlatt responded on February 8, 1907 that he had not received a copy of the plan of the station grounds, but that presuming Fischer's division of the lands to be correct, he would place a value of \$75 per acre on the 32.93 acres of comparatively high land and \$2 per acre on the 37 acres of muskeg land, making a total of \$2,543.75 for the land required.

Document No. 59

60. In a memorandum to the Deputy Minister dated February, 25, 1907, Bray said that the Department had already approved Marlatt's initial valuation of \$75 per acre for the dry land and \$2 per acre for muskeg land in the area required by the Railway. He noted that the acreage of dry land and muskeg had been ascertained and that the total amount based on Marlatt's valuation was \$2543.75, leaving a balance of \$2701 to be refunded to the Railway Company from the total of \$5,244.75 which it had paid.

Document No. 60

61. In a further memo to the Deputy Minister dated April 12, 1907, Bray referred to his memo of February 25 (Document No. 60) and recommended that Marlatt's valuation of \$2,543.75 be accepted and that a refund of \$2701 be paid to the Railway Company.

Document No. 61

62. The records of the Indian Lands Registry, Department of Indian Affairs and Northern Development, show that land in The Pas Reserve comprising 69.93 acres was sold to the Canadian Northern Railway on April 12, 1907. The land is described in the Sales Book entry as a right of way. (The entry gives two patent numbers. They must have been added after the patents were issued in 1932, dividing the right of way between the portions south of Seventh Street and north to the Saskatchewan River.)

Document No. 62

63. On April 26, 1907, McLean wrote to the Railway Company stating that the Department had accepted Marlatt's valuation of \$2,543.75 for the right of way and station grounds and that a refund of \$2,701 was therefore due to the Company, for which a cheque was enclosed. He further stated that a patent would issue when the Company had fenced its line and constructed road crossings.

Document No. 63

64. In a telegram to McLean on January 17, 1908, Laird inquired whether the Railway Company had settled in full with the Department as it had applied for immediate permission to begin work on the right of way.

Document No. 64

65. McLean replied in a telegram of January 18, [1908] that the Railway Company had paid in full for the right of way and "may occupy same for railway purposes." (The year was not legible on this document. See Document No. 66.)

Document No. 65

66. The Department's copy of Document No. 65 indicates the year as 1908.

Document No. 66

67. A description for the patent dated January 30, 1911 was signed by Dominion Lands Surveyor J.K. McLean. Handwritten at the bottom of the second page is the unsigned notation: "No - must except more street crossings".

Document No. 67

68. On January 30, 1911, McLean forwarded to A.D. Davidson a copy of the description for the patent of the same date (Document No. 66), requesting him to examine it. He noted the places where no crossings had been provided for.

Document No. 68

69. Over twenty years later, on March 14, 1931, a plan showing the Canadian Northern Railway right of way north of Seventh Street in The Pas townsite was registered at the Land Titles Office in Neepawa, Manitoba as Plan 587.

Document No. 69

70. G.M. Hair, Regional Counsel for Canadian National Railways, wrote on December 19, 1932 to J.C. Caldwell, Director of Indian Lands and Timber, Department of Indian Affairs, requesting a patent for Block 21, Block 23, Lot 9 in Block 33, Lot 9 in Block 42, and Lot 12 in Block D in The Pas townsite as shown on Plan 587.

Document No. 70

71. A description for patent dated December 23, 1932 designated the land to be patented as those parcels in The Pas townplot

comprising the right of way of the Canadian Northern Railway in the said townplot, North of Seventh Street and being composed of Lot Twelve in Block D, Lot Nine in Block Thirty-three, Lot Nine in Block Forty-two and Blocks Twenty-one and Twenty-three, all as shown on Plan of Special Survey of Part of Block A of The Pas Indian reserve, entered and registered in the Neepawa Land Titles Office under plan No.587.

Document No. 71

72. Letters Patent were issued to the Canadian Northern Railway on December 29, 1932 for the right of way in the Pas townplot

north of Seventh Street as described in Document No. 71.

Document No. 72

73. On January 12, 1933, Hair wrote to Caldwell asking for a reply to his letter of December 19, 1932 (Document No. 70).

Document No. 73

74. The Registrar of Indian Lands Patents sent the patent for the right of way north of Seventh Street (Document No. 72) to the Registrar of Titles in Neepawa on January 21, 1933.

Document No. 74

75. In a letter of January 21, 1933, the Director of the Department of Indian Affairs informed Hair that the patent for the right of way north of Seventh Street in The Pas townplot had been issued and forwarded for registration to the Registrar of Titles, Neepawa.

Document No. 75

Use of the Right of Way North of 7th Street - The Pas Townsite

77. Beginning in 1920, the portion of land at the extreme northern end of the right of way which had been secured for railway purposes was used by Western Grocers as the location for its first store in The Pas area. As was reported in The Pas

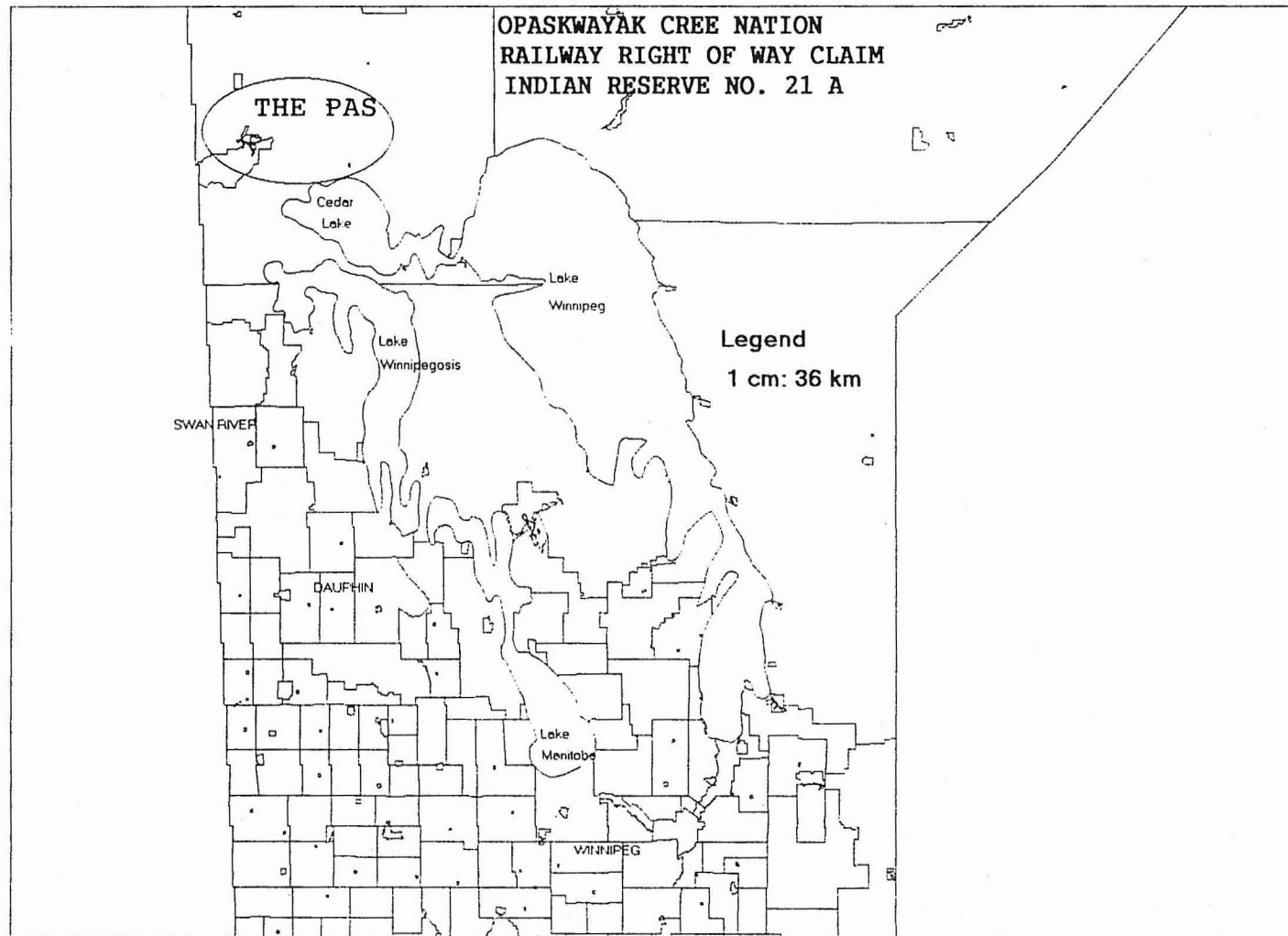
Gateway to Northern Manitoba, a local history of The Pas produced by The Pas Historical Society in 1983, in addition to the use of the H.B.Co. building, two warehouses were also established "on a railway spur, one on the north side of the track and one on the south side of the track". In 1926 a three story warehouse was built at the location, with two additional stories being added in 1928. This is the building which is currently being used by Western Grocers.

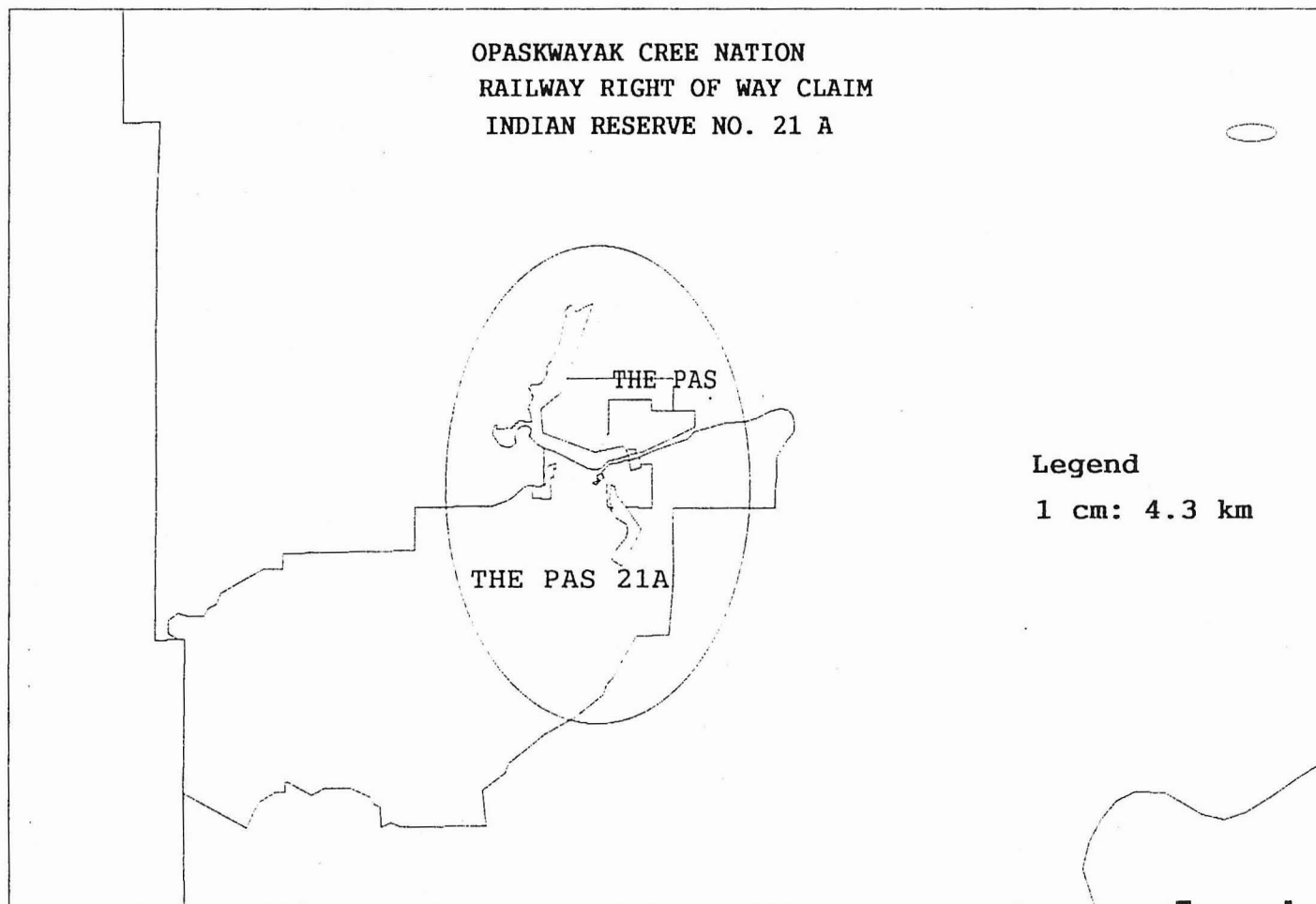
Document 76

77. On September 24, 1990 the Attorney General of Canada, acting on upon instruction from the Department of Indian Affairs and Northern Development, issued a Statement of Claim against the Canadian Northern Railway Company (the successor company of the Canadian National Railway Company) in the Manitoba Court of Queen's Bench. It was claimed that, since the portion of the original railway right of way through IR# 21A laying north of Seventh Street was no longer being used for railway purposes, the subject area should be returned to the Crown in the Right of Canada, as the original conveyance to the Canadian Northern was conditional on the area being used for railway purposes. Evidence was offered that two of the portions of the subject land had been alienated by the Canadian Northern ie. a portion to MacLeod Stedman Limited, and another portion to a numbered company (62547 Manitoba Ltd.). The balance of the subject area remains in the control

of the Canadian Northern Railway Company, although the lands are not being used for railway purposes. It was likewise argued that, since the conveyance to the CN was conditional, the Crown in the Right of Canada should receive damages for the amount of time the subject area was not being used for railway purposes by the CN. The case has as yet to be heard.

Document 77





# PLAN OF SPECIAL SURVEY

OF PART OF

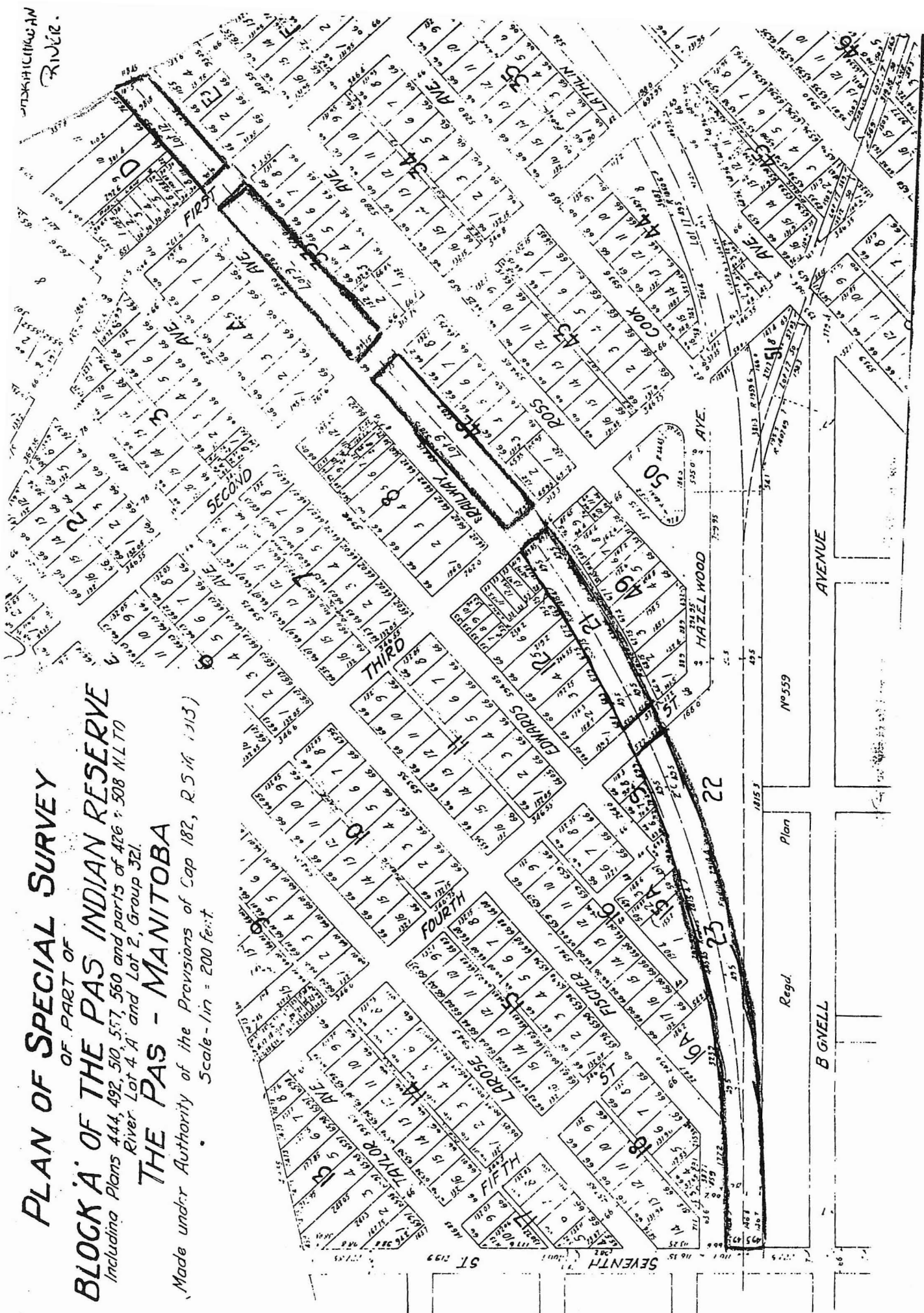
## BLOCK 'A' OF THE PAS INDIAN RESERVE

Including Plans 444, 492, 510, 557, 560 and parts of 426 & 508 N.L.T.O.  
River Lot 4 'A' and Lot 2, Group 321.

## THE PAS - MANITOBA

Made under Authority of the Provisions of Cap 182, R.S.M. 1913.)

Scale - 1 in = 200 feet



OPASKWAYAK CREE NATION  
RAILWAY RIGHT OF WAY CLAIM  
INDIAN RESERVE NO. 21A

STATEMENT OF CLAIM

Prepared for the Opaskwayak Cree Nation  
by the T.A.R.R. Centre of Manitoba  
May 1993

1. In relation to the situation outlined in the Statement of Fact, included as part of this submission package, the Opaskwayak Cree Nation (OCN) would submit the following interpretation and analysis of the events surrounding the alienation of the reserve land at IR# 21A for railway right of way purposes:

- the reserve parcel known as IR# 21A was established for the OCN (formerly The Pas Indian Band) under the provisions of Treaty No. 5, signed at The Pas in 1876. (see paragraphs 1 - 4 of the Statement of Fact)

- between the years 1905 and 1907, when the Canadian Northern Railway (CNR) actively pursued the acquisition of the reserve land required at IR# 21A for railway right of way purposes, it was apparent that the parties involved in the discussions ie. the CNR and the Department of Indian Affairs (there is no evidence that the OCN was involved in the discussions), acknowledged that the area in question was reserve land and, further, that the provisions of the Indian Act would apply. (see paragraphs 5 - 53 of the statement of fact)

- when the required right of way was transferred to the CNR, it was done so under the provisions of section 35 of the Indian Act (1887), and it was specified that the area was required for railway purposes - the acquisition being conditional on the area actually being used for railway purposes.

- it is apparent that for the majority of the time since the area was acquired by the CNR, a significant portion of the right of way has not been used for the purpose for which was acquired. (see paragraphs 77 & 78 of the statement of fact).

- the federal government, through the court action initiated by the Department of Indian and Northern Affairs, has acknowledged

that it is the federal position that, as the area in question in this issue (and portions thereof) has not been and is not being used for the purpose for which it was originally acquired, the area should be transferred back to the control and administration of the federal government and appropriate compensation should be paid in light of the unauthorized use of the land acquired for railway right of way purposes.

- the OCN would go one step beyond the federal government position as set out in the previous section one step further and argue that the area in question, ie. that portion of the railway right of way that is no longer being used for railway purposes, should be reconstituted as reserve land for the use and benefit of the OCN.

- the OCN would likewise put forward the position that it is due compensation based on the amount of revenue that was generated by the CNR from its unauthorized use and control of the area in question.

.....

Therefore, the Opaskwayak Cree Nation would submit that the above fact situation would give rise to a claim for which redress is required. It is further suggested that the components of a settlement package developed to redress this matter would include:

1. The re-conversion to reserve status of any portion of the reserve land originally acquired for railway purposes and which is no longer required and/or being used for that purpose.
2. The payment of compensation to the Opaskwayak Cree Nation based on the loss of use of the area from the time the land was

not used for railway right of way purposes, at which time the area should have been reconverted to full reserve land status.

3. The payment of compensation to the Opaskwayak Cree Nation based on the amount of revenue which has been generated by the unauthorized use of the right of way other than the purpose for which the subject land was acquired.

OPASKWAYAK CREE NATION  
RAILWAY RIGHT OF WAY CLAIM  
INDIAN RESERVE NO. 21A

Legal Questions

Prepared for the Opaskwayak Cree Nation  
by Paul Forsyth, Legal Counsel for the  
T.A.R.R. Centre of Mantioba, April 1993

**OPASKWAYAK CREE NATION (formerly THE PAS INDIAN BAND)  
SPECIFIC CLAIM: I.R. NO. 21 A  
CANADIAN NORTHERN RAILWAY - RIGHT OF WAY  
PLAN NO. 587, LTO NEEPAWA**

**DRAFT LEGAL AND FACTUAL QUESTIONS**

1. In 1906, were the lands which subsequently came to be legally described as follows:

"Comprising the right of way of the Canadian Northern Railway in the said townplot. North of seventh street and being comprised of Lot No. 12 in Block D, Lot No. 9 in Block 33, Lot No. 9 in Block 42, and Blocks 21 and 23, all as shown on Plan of Special Survey of part of Block A of The Pas Indian Reserve, entered and registered in the Neepawa Land Titles Office under plan No. 587"

(hereinafter referred to as "the lands")

part of The Pas Indian Reserve No. 21A as established pursuant to the terms of Treaty No. 5 the Indian Act?

2. Were the lands validly transferred to the Canadian Northern Railway/Canadian National Railway ("CNR") by the consent and agreement of Canada pursuant to the provisions of Section 35 of the Indian Act and in accordance with the provisions of the Railway Act, i.e., did CNR have the capacity or right to take the lands pursuant to those provisions?
3. If the transfer was valid, were the lands transferred subject to a condition, expressly, impliedly or by operation of law, that CNR's right to and interest in the lands would end upon its ceasing to use the lands for the purpose of a railway right of way?
4. When, and to what extent, have the lands ceased to be used by CNR for the purpose of a railway right of way?
5. If the transfer was not valid, or if the transfer was valid but subject to the said condition, is the Band entitled to require that Canada:
  - a) restore the lands, or alternatively, the portions of the lands no longer used for railway purposes, to reserve status by regaining title to the lands for the use and benefit of Opaskwayak Cree Nation ("OCN"); and
  - b) provide compensation to OCN in respect of the unauthorized taking, holding or usage of the lands.

6. To the extent that Canada is unable to restore the lands to reserve status, is Canada, by reason of its relationship with the Band and the duties arising therefrom, obliged to compensate the Band for loss or damage arising from the taking and usage of the reserve lands by CNR?
  - a) what duties and obligations, fiduciary or otherwise, if any, did Canada owe to the Band in respect of the taking of the reserve lands by CNR?
  - b) did Canada fail to fulfill any such duties in permitting the taking and usage of the reserve lands by CNR?
  - c) did Canada exceed its jurisdiction and authority in permitting the taking and usage of the reserve lands by CNR?
  - d) did Canada act with less than reasonable care and honour in protecting the interests of the Band, existing and residual, in respect of the taking of the reserve lands, and in properly informing the Band of its rights in relation to such interests?
  - e) did Canada act with less than reasonable care in failing to more properly record and protect the residual interest in the land arising from the taking of reserve land pursuant to Section 35 of the Indian Act?
  - f) if Canada did so fail, to what compensation is the Band entitled in relation to the taking of reserve land and its continued usage thereafter?

OPASKWAYAK CREE NATION  
RAILWAY RIGHT OF WAY CLAIM  
INDIAN RESERVE NO. 21A

Federal Statement of Claim

Filed in the Court of Queens Bench  
by the Attorney General of Canada  
September 24, 1990

File No.

THE QUEEN'S BENCH  
WINNIPEG Centre

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

plaintiff

- and -

CANADIAN NORTHERN RAILWAY COMPANY,  
CANADIAN NATIONAL RAILWAY COMPANY, and  
CANADIAN NATIONAL RAILWAY COMPANY t/a  
CANADIAN NORTHERN RAILWAY COMPANY

defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a Manitoba lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Queen's Bench Rules, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Manitoba.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Where the claim made is  
for a stated amount of  
money only, including  
following)

~~IF YOU PAY THE PLAINTIFF'S CLAIM, and \$100 for costs, within the time for serving and filing  
statement of defence, you may move to have this proceeding dismissed by the court. If you believe the  
amount claimed for costs is excessive, you may pay the plaintiff's claim and \$100 for costs and have the  
costs assessed by the court.~~

(Date) September 24, 1990

Issued by

Deputy Registrar

(Name & address of  
each defendant)

TO:

CANADIAN NORTHERN RAILWAY CO.  
123 Main Street  
Winnipeg, Manitoba  
R3C 1A3

Address of court office:

2nd Floor - 408 York Ave.  
Winnipeg, Manitoba  
R3C 0P9

CANADIAN NATIONAL RAILWAY CO.  
123 Main Street  
Winnipeg, Manitoba  
R3C 1A3

- 2 -

CLAIM

1. The Plaintiff claims as against the Defendants:
  - a) Specific performance by the Defendants of an agreement between Her Majesty the Queen in right of Canada and Canadian Northern Railway Company whereunder Canadian Northern Railway Company acquired the lands more specifically hereinafter set forth as a railway right-of-way on condition, inter alia, that the lands would be re-transferred once no longer required for such purpose; the Plaintiff requiring such specific performance only with respect to those portions of the lands title to which remains in the name of Canadian Northern Railway Company and more particularly described in Certificates of Title Nos. C1927 and C3037; or
  - b) in the alternative:
    - i) a declaration that the lands described in Certificates of Title Nos. C1927 and C3037 are no longer required by the Defendants for railway right-of-way purposes; and
    - ii) an order directing the Defendants to transfer the lands described in Certificates of Title Nos. C1927 and C3037 to Her Majesty the Queen in right of Canada or, alternatively, an order vesting the said lands in Her Majesty the Queen in right of Canada; and

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- c) general damages:
  - i) for the use and occupation by the Defendants of the lands from the date same were no longer required for railway purposes; and
  - ii) for the wrongful alienation and deprivation of the Crown's right to continued use and enjoyment of those portions of the said lands (more particularly described hereafter) which were alienated by the Defendants from the date of such alienation; or
  - iii) in the alternative, for use and occupation by the Defendants of the said lands from the date same were conveyed to the Defendants; and
- d) an order of pending litigation against the lands described in Certificates of Title Nos. C1927 and C3037; and
- e) costs; and
- f) such further or other relief as to this Honourable Court may seem meet.

2. This action is brought on behalf of HER MAJESTY THE QUEEN IN RIGHT OF CANADA (hereinafter referred to as "the Crown") who has suffered the loss or damages hereinafter claimed or is otherwise entitled to the relief sought.

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3. The Defendant CANADIAN NORTHERN RAILWAY COMPANY (hereinafter referred to as "Northern") was declared to be a company pursuant to the provisions of An Act respecting the Canadian Northern Railway Company, S.C. 1899, c. 57 (hereinafter referred to as "the Northern Act") and carries on its business and undertaking in the Province of Manitoba.
4. The Defendant CANADIAN NATIONAL RAILWAY COMPANY (hereinafter referred to as "National") was incorporated pursuant to the provisions of An Act to incorporate the Canadian National Railway Company and respecting Canadian National Railways, S.C. 1919, c. 13, (hereinafter referred to as "the National Act") and carries on its business and undertaking in the Province of Manitoba..
5. Pursuant to the provisions of the National Act, it was provided that the operations of Northern might be amalgamated with those of National on consent of the Governor-in-Council. By issuance of an Order-in-Council dated May 17, 1956, Northern was amalgamated with National.
6. Notwithstanding the aforesaid amalgamation, National has continued to carry on business for limited purposes under the name of Northern or, in the alternative, Northern has continued to carry on business for limited purposes under its own name.
7. In or around the year 1906, Northern approached the Crown to acquire certain lands forming a portion of The Pas Indian Reserve No. 21A, legally described as:

Comprising the right of way of the Canadian Northern Railway in the said townplot. North of seventh street and being comprised of Lot

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No. 12 in Block D, Lot No. 9 in Block 33, Lot No. 9 in Block 42, and Blocks 21 and 23, all as shown on Plan of Special Survey of Part of Block A of The Pas Indian Reserve, entered and registered in the Neepawa Land Titles Office under plan No. 587.

(hereinafter referred to as "the lands").

8. Subsequently, an agreement was reached with the Crown whereby Northern would acquire the lands for the purpose of a railway right of way.
9. The Plaintiff says the aforesaid agreement expressly or by necessary implication provided, inter alia, that Northern would acquire and hold the lands for so long only as it continued to use same for the purpose of constructing and operating a railway upon them and that upon ceasing to use the lands as aforesaid all interest of Northern in the lands would cease and determine and the lands would be re-conveyed to or become re-vested in the Crown.
10. By Order-in-Council dated November 6, 1906, consent issued for the disposition of the lands to Northern for the purpose of a railway right of way.
11. By Letters Patent, dated December 29, 1932, the Crown transferred the lands to Northern for so long as same were used for the purposes of a railway right of way.
12. Following the issuance of the Letters Patent aforesaid, Northern made application to bring the lands under The Real Property Act, (presently RSM 1988, c. R30), resulting in the issuance of Certificate of Title No. 45590 by the District Registrar of the Neepawa Land Titles Office in the name of Northern.

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13. Northern has since ceased to use the lands for railway purposes and has caused or permitted to be alienated portions thereof on two separate occasions, particulars of which are as follows:

- a) on or about December 22, 1970, National (as the successor by amalgamation to Northern) transferred to MacLeod Stedman Limited that portion of the lands legally described as:

In the town of The Pas, in Manitoba, and being all those portions of Block 21, which Block is shown on a plan of Special Survey registered in the Neepawa Land Titles Office as No. 587 and designated as "Parcel A" and "Parcel B" on a plan registered in the said Office as No. 5525; and

- b) on or about June 13, 1985, National (as the successor by amalgamation to Northern) transferred to 62547 Manitoba Ltd. that portion of the lands legally described as:

In the town of The Pas and being Lot 1, Plan 2311 P.L.T.O. in Block A The Pas Indian Reserve.

14. As of the date this Statement of Claim was issued, Northern remains the registered owner of the balance of the lands, particularly described as follows:

- a) under Certificate of Title No. C1927:

In the Town of The Pas and being:

Pcl. 1

Lot 12 Block D, Lot 9 Block 33, Lot 9 Block 42 and all of Blocks 21 and 23, S.S. Plan 587 P.L.T.O. (N. Div.) in Block A The Pas Indian Reserve, excepting

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1stly: out of Block 21, Plan 5525  
P.L.T.O. (N. Div.),  
2ndly: out of Lot 9 Block 42, Plan  
2311 P.L.T.O.

Pcl. 2

All mines, minerals, gravel, and  
valuable stone in Parcels A and B,  
Plan 5525 P.L.T.O. (N. Div.) as set  
forth in Transfer 170557 P.L.T.O.  
(N. Div.); and

b) under Certificate of Title No. 3037:

All mines, minerals, gravel, and  
valuable stone in Lot 1, Plan 2311  
P.L.T.O. in Block A The Pas Indian  
Reserve as set forth in transfer 85-  
5101 P.L.T.O.

15. The Plaintiff says that the interest conveyed in the lands to Northern was a determinable fee simple, that is to say, the lands were subject to a possibility of reverter in the Crown whereby the estate conveyed to Northern automatically determined upon the subject lands ceasing to be used for the purpose of a railway right-of-way.
16. The Plaintiff says further, or in the alternative, that, by operation of law, Northern's right to and interest in the lands ceased and determined upon Northern ceasing to use the lands for the purpose of a railway right-of-way. The Plaintiff pleads and relies upon, inter alia, sections 134 and 136 of the Railway Act, S.C. 1903, c. 58., sections 189 and 192 of the Railway Act, R.S.C. 1927, c. 170, section 35 of the Indian Act, S.C. 1886, c. 43 (amended S.C. 1887, c. 33, s. 5), and section 48 of the Indian Act, R.S.C. 1927, c. 98.

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17. In the further alternative, the Plaintiff says that the consent of the Governor-in-Council to the transfer of the lands to Northern was conditional upon Northern continuing to use the lands for the purpose of a railway right-of-way.
18. The Plaintiff says that Northern's continued use, occupation, and possession of the lands and the continuance of title in the name of Northern once the lands were no longer required for railway purposes and the transfers of those portions of the lands as set out in paragraph 13 herein are contrary:
- a) to the terms of the agreement between Northern and the Crown previously referred to; and, or in the alternative,
  - b) to ~~the provisions of the~~ Railway Act and the Indian Act previously referred to; and, or in the alternative,
  - c) to the terms of the consent of the Governor-in-Council under which the lands were transferred to Northern as aforesaid.
19. The Plaintiff says that, with regard to those portions of the lands which have been transferred by National, as set out in paragraph 13 herein, the Crown is entitled, as against the Defendants, to damages:
- a) for the use and occupation by Northern and, or in the alternative, National of such lands from the date same were no longer required for railway purposes; and
  - b) for such wrongful alienation and deprivation of the Crown's right to continued use and enjoyment of same.

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20. The Plaintiff further says that, with regard to the balance of the lands now remaining in the name of Northern (and as described in Certificates of Title Nos. C1927 and C3037), the Crown is entitled, as against the Defendants:
- a) to the return of same, as being no longer required for railway purposes; and
  - b) to damages for the use and occupation by Northern and, or in the alternative, National of such lands from the date same were no longer required for railway purposes to the date same are transferred back to the Crown.
21. By way of alternative to the allegations contained in paragraphs 9, 15, 16, and 17 herein, the Plaintiff says that, pursuant to section 3 of the Northern Act, in the event Northern did not complete construction of its railway lines south of the Saskatchewan River within five years from the proclamation of that Act (that is to say, by July 9, 1904), the powers granted to it by Parliament, including, without limitation its ability to take, possess, use, or occupy Crown lands, ceased and became null and void insofar as concerned such uncompleted lines.
22. The Plaintiff further says that the lines of Northern south of the Saskatchewan River were to include a line over the lands and that same had not been constructed by July 9, 1904.
23. The Plaintiff therefore says that, in the result, Northern had neither the capacity nor the right to take or otherwise acquire from the Crown the lands and the Crown is entitled from the Defendants:

- 8 -

17. In the further alternative, the Plaintiff says that the consent of the Governor-in-Council to the transfer of the lands to Northern was conditional upon Northern continuing to use the lands for the purpose of a railway right-of-way.
18. The Plaintiff says that Northern's continued use, occupation, and possession of the lands and the continuance of title in the name of Northern once the lands were no longer required for railway purposes and the transfers of those portions of the lands as set out in paragraph 13 herein are contrary:
- a) to the terms of the agreement between Northern and the Crown previously referred to; and, or in the alternative,
  - b) to the ~~provisions of the~~ Railway Act and the Indian Act previously referred to; and, or in the alternative,
  - c) to the terms of the consent of the Governor-in-Council under which the lands were transferred to Northern as aforesaid.
19. The Plaintiff says that, with regard to those portions of the lands which have been transferred by National, as set out in paragraph 13 herein, the Crown is entitled, as against the Defendants, to damages:
- a) for the use and occupation by Northern and, or in the alternative, National of such lands from the date same were no longer required for railway purposes; and
  - b) for such wrongful alienation and deprivation of the Crown's right to continued use and enjoyment of same.

- 9 -

20. The Plaintiff further says that, with regard to the balance of the lands now remaining in the name of Northern (and as described in Certificates of Title Nos. C1927 and C3037), the Crown is entitled, as against the Defendants:
- a) to the return of same, as being no longer required for railway purposes; and
  - b) to damages for the use and occupation by Northern and, or in the alternative, National of such lands from the date same were no longer required for railway purposes to the date same are transferred back to the Crown.
21. By way of alternative to the allegations contained in paragraphs 9, 15, 16, and 17 herein, the Plaintiff says that, pursuant to section 3 of the Northern Act, in the event Northern did not complete construction of its railway lines south of the Saskatchewan River within five years from the proclamation of that Act (that is to say, by July 9, 1904), the powers granted to it by Parliament, including, without limitation its ability to take, possess, use, or occupy Crown lands, ceased and became null and void insofar as concerned such uncompleted lines.
22. The Plaintiff further says that the lines of Northern south of the Saskatchewan River were to include a line over the lands and that same had not been constructed by July 9, 1904.
23. The Plaintiff therefore says that, in the result, Northern had neither the capacity nor the right to take or otherwise acquire from the Crown the lands and the Crown is entitled from the Defendants:

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- a) to the return of the balance of the lands remaining in the possession of Northern (and as described in Certificates of Title Nos. C1927 and C3037);
  - b) to damages for use and occupation by Northern and, or in the alternative, National of the lands from the date Northern first took possession of same;
  - c) to damages arising from the sale of those portions of the lands as more particularly set out in paragraph 13 aforesaid.
24. By way of further alternative to the allegations contained in paragraphs 9, 15, 16, and 17 herein, the Plaintiff says that, insofar as concerns the balance of the lands now remaining in Northern's possession (and as described in Certificates of Title Nos. C1927 and C3037), the Crown has, at all times, retained an equitable estate or interest therein and is therefore entitled:
- a) to the return of same, as being no longer required for railway purposes; and
  - b) to damages for the use and occupation by Northern and, or in the alternative National of such lands from the date same were no longer required for railway purposes to the date same are transferred back to the Crown.
25. As to all of the allegations made herein, the Plaintiff says that National, as the successor to Northern or, in the alternative, by virtue of carrying on business for limited purposes under the firm name and style of "Canadian Northern Railway Company", is liable jointly and severally for all relief to which the Crown may be entitled as against Northern.

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26. The Plaintiff therefore claims as against the Defendants as hereinbefore set forth.

September 24, 1990

DEPARTMENT OF JUSTICE  
301-310 Broadway Ave.  
Winnipeg, Manitoba  
R3C OS6  
ph. 983-2391

Colin S. Morrison  
Thomas A. Saunders

Solicitors for the  
Plaintiff