SCT-1001-12

SPECIFIC CLAIMS TRIBUNAL

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February 10, 2017

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SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

MADAWASKA MALISEET FIRST NATION

Claimant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

FURTHER AMENDED RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Further Amended Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

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1. This is the Crown's Response to the Declaration of Claim ("Claim") filed by the Madawaska Maliseet First Nation ("Claimant") with the Specific Claim Tribunal ("Tribunal") on August 13, 2012 pursuant to the *Specific Claims Tribunal Act* (the "Act").

2. The Claim for compensation relates to three parcels of land totaling approximately 1,169 acres adjoining to or near the present St. Basile Indian Reserve No. 10 ("present reserve") in New Brunswick. Parcel A is a 350 acre parcel lying west of and contiguous to the present reserve. Parcel B contains approximately 19 acres and lies on the western side of the Madawaska River where it joins with the St. John River. Parcel C consists of approximately 800 acres and lies contiguous to the present reserve on its northern side, all as shown on the map, Appendix "A" hereto – provided by the Claimant. The Claimant has amended its claim to include the remaining land that falls within the red lines of a map created by General George Sproule in 1787 ("Sproule Map"), in addition to Parcels A, B and C.

3. It is the Crown's position that the ~~three parcels of~~ land for which compensation is claimed was~~were~~ never part of an Indian reserve.

Status of the Claim – Rule 42(a)

4. The Claimant formally submitted its claim to the Minister of Indian Affairs and Northern Development ("Minister") on April 16, 1998 ("original claim"). Upon the coming into force of the Act on October 16, 2008, the Claimant was advised that the original claim met the requisite criteria and was deemed to have been filed with the Minister pursuant to section 42 of the Act.

5. The original claim alleged that the Crown illegally disposed of three parcels of reserve lands. Specifically, that the land was *de facto* Indian reserve land as of 1792 or before, and that the Crown had a legal obligation to protect the existing land base of the Maliseets at Madawaska, based on Dummer's Treaty and Mascarene's Treaty, which includes the so-called Mascarene's Promises, as well as Belcher's Proclamation and the *Royal Proclamation of 1763*. These obligations were allegedly breached by the alienation of parcels A, B, and C.

6. On January 13, 2009, the Claimant was advised, in writing, that the original claim had not been accepted for negotiation.

7. Subsequently, on August 13, 2012, the Claimant filed its Declaration of Claim, on the following grounds (at paragraph 6 of the Declaration of Claim):

   a) a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

b) a breach of a legal obligation of the Crown under the Indian Act or any other legislation - pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

d) an illegal lease or disposition by the Crown of reserve lands;

e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority.

8. At paragraph 398 of the Declaration of Claim the Claimant states that the claim "is based in the Crown's breach of its common law fiduciary duty with respect to the alienation of parcels A, B, and C, as well as the remaining tract of land as outlined in paragraph 38, and additionally, with respect to its failure to meet its obligations under *The Royal Proclamation* and *An Act to regulate the management and disposal of [the] Indian Reserves in this Province* when it alienated parcels A, B, and C, as well as the remaining tract of land as outlined in paragraph 38."

9. The Crown accepts that the criteria contained in section 16(1)(a) of the Act are met and that the Claim is properly before the Specific Claims Tribunal.

Validity of the Claim – Rule 42(1)(b) and (c)

10. The Crown does not accept the validity of the Claim, or that the Claimant has suffered any damages.

Allegations of Fact - Declaration of Claim (Rule 41(e)): Acceptance, denial or no knowledge (Rule 42(d))

11. Denials: The Crown, denies each and every fact alleged in the Declaration of Claim other than expressly admitted herein.

12. No Knowledge: The Crown has no knowledge of the allegations in paragraphs 26, 30 and 31 in the Declaration of Claim.

13. Admissions: The Crown admits the facts as set out in paragraph 1, 2, 3, 4, 5, 6, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 27, 29, 37 of the Declaration of Claim.

14. Admissions/Denials Qualified

a) With respect to paragraph 7, the Crown admits that parcels A, B and C are situated at or near the confluence of the Madawaska and St. John Rivers, but denies that the Crown set aside these three parcels of land for the benefit of the Madawaska Maliseet, or that they were part of an Indian reserve.

b) With respect to paragraph 10, the Crown agrees that the Sproule Mmap ~~of 1787~~ shows the existence of an Indian village at the confluence of the Madawaska and St. John Rivers, on the east side of the St. John River.

c) With respect to paragraph 11, the Crown admits that there was a land grant in 1790 but says that it was made to Joseph Mazerolle ("Joseph Muzerall" in the Declaration of Claim) and forty-one others as opposed to "forty-eight others".

d) With respect to paragraph 25, the acreage shown on the 1860 Beckwith Plan of Survey does show 8 lots, but the total acreage is 822 acres; lot No. 1 is stated to be 100 acres, and granted to John Hartt.

e) With respect to paragraphs 22 and 36, the Crown admits the existence of the sketch of a survey by H. M. Garden, at the direction of John Dibblee, of eight lots at the mouth of the little Madawaska (including the 800 acres making up parcel C), but denies that the eight lots form part of a recognized reserve. The sketch is not evidence of the existence of an Indian reserve. The sketch does not make reference to 1600 acres. The sketch contains a note that lots No. 3 and 4 are intended for Indian locations, and are supposed to contain upwards of 200 acres each.

f) With respect to paragraph 28, the Crown admits that the Maliseet Indians of New Brunswick, including those at Madawaska/St. John Rivers, fall within the categories of Indians to which the *Royal Proclamation of 1763* applies. However, the Crown denies that the Maliseet Indians of the Madawaska/St. John Rivers were signatories to *Dummer's Treaty* or *Mascarene's Treaties* in 1725-26.

g) These Treaties, as well as the *Royal Proclamation of 1763*, did not create reserve lands in Nova Scotia which then included what is now the Province of New Brunswick. If, and in so far as, these instruments speak to reserve lands in New Brunswick, they are irrelevant because parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map were not lands reserved by the Crown for Indians.

h) With respect to paragraph 32, the Crown denies that the 250 acre portion of parcel A was ever set aside as reserve land. Accordingly, the *Royal Proclamation of 1763* has no application with respect to the grant of land to Simon Hebert in 1825.

i) With respect to paragraph 33, as the Crown denies that the 100 acre portion of parcel A was ever set aside as reserve land, The *Royal Proclamation of 1763,* as well as the 1844 New Brunswick legislation: *An Act to Regulate the Management and Disposal of Indian Reserves in this Province,* have no application to the grant of this land to John Hartt in 1860. In the alternative, the grant to John Hartt was in keeping with the 1844 New Brunswick legislation.

j) With respect to paragraph 34, the Crown denies that parcel B was ever set aside as reserve land. Accordingly, the *Royal Proclamation of 1763* has no application to the grant of this land to Simon Hebert in 1829.

k) With respect to paragraph 35, the Crown agrees that the Sproule Mmap ~~dated 1787~~ notes the existence of an Indian village in the area of the present-day Saint Basile reserve. However, the Crown denies that this map demonstrates the existence of a "*de facto* reserve", and moreover does not document an intention on the part of the Crown to set aside the land that comprises the village as an Indian reserve.

l) The Crown denies the allegation at paragraph 398 and says that parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map were never set aside as reserve lands. Accordingly, there are no legal obligations, and no fiduciary duty is owed to the Claimant in respect of the disposition of the parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map.

m) Moreover, the Crown denies the allegation that there was either an equitable or a common law fiduciary obligation on the Crown to set apart the said parcels, and the remaining land within the red lines of the Sproule Map, as part of the lands reserved for the Madawaska Maliseet. This allegation lacks both a legal and factual foundation.

n) In response to paragraph 410, since parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map were not reserve lands, the disposition of that land ~~parcels A, B, and C~~ does not give rise to any legal obligations or a fiduciary duty on the part of the Crown within the meaning of the Act, and no compensation is payable.

Statement of Facts (R.42(e))

No Record of the Creation of a Reserve for the Madawaska Maliseet First Nation at the Confluence of the Madawaska and St. John Rivers

15. There is historical evidence of the presence of a small group of Maliseet Indians residing, on a non-permanent basis, at the confluence of the Madawaska and St. John Rivers ("Madawaska Maliseets"), in the approximate location of the

present reserve, east of the St. John and below the Madawaska Rivers, dating back to the late eighteenth century.

16. An Indian reserve at the Madawaska is mentioned in the 1842 *Schedule of Indian Reserves in the Province of New Brunswick.* But, it is not until the mid-1840's that there is any evidence of an intention on the part of the Crown to set aside a parcel of land as a reserve for the Madawaska Maliseets.

17. The 1838 *Schedule of Indian Reserves in New Brunswick* does not mention a reserve at the Madawaska/St. John Rivers. There is also a report dated August 30, 1841 prepared by John Saunders regarding the Moses Perley report of that same year. In his report, Saunders states that in the several schedules or lists of Indian reserves that had been prepared at different times, there is no mention of a reserve at the mouth of the Madawaska River. He went on to record that "The site of the Indian Village or Encampment & about seven hundred acres of land are still vacant".

18. The 1842 *Schedule of Indian Reserves in New Brunswick* reflects 17 people living in the area, at the mouth of the Madawaska River, and the area is defined as being 700 acres.

19. In 1844, an *Act to Regulate the Management and Disposal of the Indian Reserves in this Province,* S.N.B. 1844, 7 Vict., c.47 ("1844 Act") was passed by the Province of New Brunswick, which became effective following Royal Assent on September 3, 1844. The implementation of this legislation included efforts to survey the land where the Madawaska Maliseets had been residing so as to define the territory and set aside a tract of land for their use. The 1854 Revised Statute *Of Indian Reserves*, R.S.N.B. 1854, Chapter 85 (which replaced the 1844 Act) speaks to the Indian reserves to be surveyed, and sold to the highest bidder, at public auction, with the proceeds of sale to be applied for the benefit of Indians.

20. In his July 1845 report, John Dibblee confirms that there were 17 people and only 10 males young and old in the Madawaska Maliseet settlement. It was his view that allowing the males 50 acres each, or 500 acres in total, the residue of the land in the area could be disposed for their benefit. Since he was unable to state the total number of acres available for disposal in that area, he engaged Deputy Surveyor Garden to survey the land.

21. In August 1845, Deputy Surveyor Garden prepared a survey map of the "reserve lands" at Madawaska. The survey is identified as a "Sketch of a survey of eight lots on the Indian Reserve near the mouth of the Little Madawaska River as per direction of John Dibblee Esqr.". This survey shows eight lots, numbered 1 through 8, comprising approximately 1500 acres.

22. There is no indication that the eight lots set out in Deputy Surveyor Garden's sketch were meant to define the boundaries of the reserve intended for the

Madawaska Maliseet. In fact, the sketch indicates that only two of the lots were being considered as possible reserve lands. Marginalia on the survey states "No. 3 & 4 intended for the Indian Locations supposed to contain upwards of 200 acres each".

23. In 1860 Deputy Surveyor Charles (Chas. E.) Beckwith is instructed to survey the "Indian Reserve at Little Falls, Madawaska to be made and laid off into lots for sale". This (November 1860) survey is titled "Plan of a Survey of the Indian Reserve, St-Basil, Victoria County now Madawaska County N.B..."

24. As with the survey prepared by Garden in 1845, the Beckwith survey shows eight numbered lots. However, the lots did not extend nearly as far back from the St. John River as they did in the Garden survey. The Beckwith survey shows 8 lots, lot No. 1 having been granted to John Hartt, leaving 7 lots with a total acreage of 722 acres.

25. The Beckwith survey bears the signature of Chief Surveyor Department of Indian Affairs Bray, and that of the Deputy Superintendent General of Indian Affairs Frank Pedley (Pedley was Deputy Superintendent General in the early 1900s). While no instrument was adopted to formally confirm the creation of a reserve at Madawaska, the elements required for establishing a reserve for the Madawaska Maliseet at the mouth of the Madawaska River were met, arguably, by the end of 1860. The 7 lots of land set out in the 1860 survey correspond to the present reserve at the St. John/Madawaska Rivers.

Parcels A, B and C Not Set Aside as a Reserve

26. Parcels A, B, or C did not form part of the lands set aside, or intended to be reserved for the Madawaska Maliseets. This is confirmed by the Beckwith survey of 1860.

27. Parcel A is a 350 acre parcel which is comprised of two lots located next to one another along the eastern boundary of the current Saint Basile reserve: a 250 acre lot granted to Simon Hebert in 1825 and a 100 acre lot granted to John Hartt in April of 1860.

28. Parcel B is approximately 19 acres located on the western side of the Madawaska River where it joins with the St. John River. In 1829, a licence of occupation was granted for that land to Simon Hebert, for a period of 21 years.

29. The grant of the 250 acre part of parcel A and the issuance of the licence of occupation covering parcel B, both to Simon Hebert, took place well before the creation of the Madawaska Maliseet reserve.

30. With respect to the 100 acre part of parcel A that was granted to John Hartt, there is evidence that he began living on the land in the early 1840's with the Band's consent. He received a grant for this land in April 1860, prior to what is arguably the earliest recognition of the Madawaska Maliseet reserve.

31. Marginalia at the bottom of one copy of the 1860 survey lists the Madawaska reserve's total acreage of the reserve boundaries surveyed by~~at~~ Beckwith as 822 acres, but notes that with the subtraction of the 100 acres granted to John Hartt that the reserve's total acreage was 722 acres.

32. Parcel C consists of approximately 800 acres and lies contiguous to the present reserve on its northern side. This parcel of land appears on the Garden sketch of 1845 as the northern portion of the eight lots.

33. The 800 acre parcel does not appear on the Beckwith survey of 1860, which reflects smaller lots, leading to a total acreage of 722 for the reserve. This 800 acre parcel was never set aside or intended to be part of the reserve.

34. While there is no single procedure for the creation of a reserve, the key component is the Crown's intention to create a reserve. This intention must also have been expressed by an official having the requisite authority to bind the Crown. There is no documented intention to create a reserve with respect to parcel A, B, or C.

The Red Lines of the Sproule Map do not Define Reserve Land

35. The red lines of the Sproule Map do not define, and were not intended to define, the boundaries of the Indian reserve. The map does note the existence of an Indian village at the confluence of the Madawaska and St. John Rivers that falls within the red lined area. There is also a notation on the map that reads: "The Indians require the tract of land within the red Lines to be reserved for their use: Except Kelly's lot."

~~34.~~36. A large part of the land that falls within the red lines became part of the United States upon the settlement of the border between the two countries. Further, part of parcel A falls outside the red lines of the Sproule Map, as does parcel C.

No Obligations Arise Under the Royal Proclamation 1763, and the New Brunswick Legislation Regarding the Management and Disposal of Reserve Lands

~~35.~~37. Neither the *Royal Proclamation of 1763*, nor the *Act to Regulate the Management and disposal of the Indian Reserves in this Province* –and its successor legislation *Of Indian Reserves*, creates a legal obligation or a fiduciary duty on the Crown with respect to the disposition of parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map.

The Royal Proclamation of 1763

~~36.~~38. One of the purposes of the *Royal Proclamation of 1763* ("*Proclamation*") was to govern relations between the British North American colonists and the Indians in dealing with the lands occupied by the latter.

~~37.~~39. The Supreme Court of Canada in *R. v. Marshall; R.* v. *Bernard*, [2005] 2 R.C.S. 220, held that the *Proclamation* applied to the ancient colony of Nova Scotia, which (until 1784) included the Province of New Brunswick. However, the Court expressly rejected the argument that it reserved to the Mi'kmaq (in that case) title in all unceded, and/or unpurchased land in the former colony of Nova Scotia. The Court held that the *Proclamation* did not grant Nova Scotia to the Indians, nor did it grant a right to reserve lands in Nova Scotia (which then included what is now New Brunswick) to any particular Indian Band. The *Proclamation* sought instead to protect existing reserve land to minimize conflict between settlers and Indians.

~~38.~~40. Since parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map were not part of an Indian reserve, they do not fall under the protection of the *Proclamation.* Accordingly, the *Proclamation* does not create a legal obligation or a fiduciary duty on the Crown with respect to the disposition of any of these parcels.

~~39.~~41. The *Proclamation* applies only in the context of unceded/unpurchased land. The Declaration of Claim recites the fact that the traditional territory of the Madawaska Maliseet along the St. John River was part of the territory that was ceded to the British under the Treaty of Utrecht (1713).

An Act to Regulate the Management and disposal of the Indian Reserves in this Province ("1844 Act")

~~40.~~42. In 1844, New Brunswick enacted legislation to authorize the leasing and sale of New Brunswick reserves for the best interest of Indians and the settlement of the country. The monies raised were to be used for the exclusive benefit of Indians. The pre-confederation 1844 Act, and its successor, *Of Indian Reserves,* also set out the procedure for the disposition of reserve lands.

~~41.~~43. Since parcels A, B, ~~and~~ C and the remaining land within the red lines of the Sproule Map were not part of the reserve, the manner in which they were disposed of is not governed by the 1844 Act. In the alternative, if it is determined that land was set aside as a reserve at the confluence of the Madawaska and St. John Rivers prior to 1860, and the reserve included parcels A, B ~~, and~~ C and the remaining land within the red lines of the Sproule Map, the 1860 grant to John Hartt was made pursuant to, and in accordance with, valid colonial legislation (the 1844 Act), and the proceeds of the sale were to the benefit of the Indians.

Relief (Rule 42(f))

~~42.~~44. The Crown seeks dismissal of the Claim in its entirety, and the costs of responding in this proceeding.

~~43.~~45. The Crown pleads and relies on the *Specific Claims Tribunal Act*, and the *Rules of Practice and Procedure* made pursuant thereto.

~~44.~~46. If the Claimant is successful in establishing a compensable loss in relation to the disposition of the three parcels of land in issue, the loss was caused by the Province of New Brunswick, given that the three parcels of land were conveyed prior to Confederation: section 20(1)(i) of the *Specific Claims Tribunal Act*.

Communication (Rule 42(g))

~~45.~~47. Respondent's address for service of documents:

Department of Justice Canada
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DATED at Halifax, Province of Nova Scotia, this 10th day of February, 2017.

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