

**SPECIFIC CLAIMS TRIBUNAL**

B E T W E E N:

LAKE BABINE NATION

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	February 25, 2013	D É P O S É
Amy Clark		
Ottawa, ON	16	

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA  
as represented by the Minister of ~~Aboriginal~~ Indian Affairs and Northern Development  
Canada

Respondent

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**AMENDED DECLARATION OF CLAIM**  
**Pursuant to Rule 41 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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

Date: February 22, 2013

\_\_\_\_\_  
(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada  
Bank of Canada Building  
234 Wellington Street East Tower  
Ottawa, Ontario K1A 0H8  
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**I. Claimant (R. 41(a))**

1. The Claimant, the Lake Babine Nation (the “Nation”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act* (“Act”), in the Province British Columbia.

**II. Conditions Precedent (R. 41(c))**

2. The following conditions precedent, as set out in s. 16(1) of the Act, have been fulfilled:

**16.** (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part.

3. On June 26, 1997, the First Nation filed the Tachet Topley Landing Specific Claim (the “Claim”) with Indian and Northern Affairs Canada (“INAC”).
4. The Specific Claims Branch conducted research and prepared a historical review, dated August 29, 1997.
5. The Nation filed a response to the Specific Claims Branch’s historical review on August 17, 1998.
6. On May 25, 2011, INAC advised the Nation that it rejected the majority of the allegations in the Claim. In particular, INAC rejected the allegations relating to Canada’s breach of its fiduciary duties in failing to reserve and protect the following lots for the use and benefit of the Nation: Lot 1610A, Lot 1353, and the east half of Lot 1354.

**III. Claim Limit (Act, s. 20(1)(b))**

7. For the purposes of the Claim, the Nation does not seek compensation in excess of \$150 million.

**IV. Grounds (Act, s. 14(1))**

8. The following are the grounds for the Claim, as provided for in s. 14 of the Act:

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...

**V. Allegations of Fact (R. 41(e))**

9. The Nation traditionally used and occupied ~~the lands around~~ on both sides of the Fulton River, where it meets ~~Lake Babine. In particular, the Nation had at least two settlements in this area; one north of the Fulton River (Tachet), and one south of the Fulton River (Topley Landing)~~ Babine Lake.
10. An October 1909 survey conducted by J.H. Brownlee of the provincial Department of Lands Surveyor General's Branch showed "Indian shacks" north of the Fulton River, on the eastern portion, close to Babine Lake.
11. A 1913 pre-emptor's map from the provincial Department of Lands showed that a portion of land south of the Fulton River, on the shores of ~~Lake Babine~~ Lake was an "Ind. Res."
12. In or around 1915, the Nation applied to the Royal Commission on Indian Affairs for B.C. ("McKenna McBride Commission") under what became known as Application No. 84 for reserve land around the Fulton River where it meets ~~Lake Babine, including:~~ Babine Lake. In particular, a witness before the McKenna McBride Commission requested a reserve south of the Fulton River for timber purposes, and also testified that members of the Nation occupied and/or used the land north of the Fulton River and that he believed this land was already his.

a. ~~The eastern portion of Lot 1610A, north of the Fulton River~~

b. ~~Lot 1353, south of the Fulton River; and~~

e. ~~The eastern portion of Lot 1354, south of the Fulton River.~~

13. On November 16, 1915, Commission Secretary C. H. Gibbons wrote to the provincial Deputy Minister of Lands, R. A. Renwick ([“Renwick”](#)), requesting that certain lands [north and south of the Fulton River](#) be withheld from alienation pending the final decision of the McKenna McBride Commission. ~~The~~[In particular, the](#) land to be set aside under this application was described as “Item No. 84, Babine - E. 1/2 Lot No. 1354 and the Lot directly N. thereof; also the projection of land on the E. end of Lot 1610a, said protection to be subtracted from the land of Lot 1610a, covered by A.P.” [Notes in the margin of the Province’s copy of the letter noted that while Lots 1353 and 1354 were available, Lot 1610A was covered by Application to Purchase No. 9700.](#)
14. [The McKenna McBride Commission’s 1916 List of Additional Land Applications for the Babine Agency listed for Application No. 84 only ungazetted Lot 1353. No explanation was given for removing the land north of the Fulton River from Application No. 84. There is no record that the Department of Indian Affairs \(“DIA”\) took any steps to investigate or challenge the McKenna McBride Commission’s reduction of Application No. 84 so that land north of the Fulton River which comprised an Indian village was not set aside.](#)
15. [On May 22, 1916 Renwick received the List of Additional Land Applications. On May 29, 1916 he advised the McKenna McBride Commission that Lot 1353 was “apparently vacant.”](#)
16. ~~14.~~ On May 30, 1916, the McKenna McBride Commission issued a Minute of Decision relating to ~~the Nation’s~~ Application No. 84, allotting to the Nation an Indian Reserve comprising about 128 acres south of the Fulton River described as ungazetted Lot 1353.

17. ~~15.~~ An undated map prepared by the McKenna McBride Commission's Surveyor, Ashdown Green, and associated with Application No. 84, situates Indian Reserve No. 25 ("I.R. 25"), comprising 128 acres, south of the Fulton River on Lot 1353.
18. ~~16.~~ I.R. No. 25 was confirmed as an Indian reserve of the Band Nation by B.C. Order in Council No. 911 on July 25, 1923 and by Order in Council PC 1265 on July 19, 1924.
- ~~17. — Members of the Nation who had lived south of the Fulton River for generations were encouraged by Indian Agent Edgar Hyde ("Hyde") to expand their settlement south of the Fulton River because it was reserved.~~
- ~~18. — An undated blue print ("blue print") that the Indian Agent G. C. Mortimer ("Mortimer") received from the Indian Commissioner in 1926 shows seven "Indian houses" on the lot south of the Fulton River, on the shore of Lake Babine.~~
19. On April 13, 1927, Indian Affairs Assistant Deputy and Secretary J. D. McLean ("McLean") instructed British Columbia Land Surveyor V. Schjelderup ("Schjelderup") to survey ungazetted Lot 1353, containing 128 acres, as I.R. No. 25. ~~McLean instructed Schjelderup that "should occasion arise where the information you obtain from Victoria is not sufficiently definite to properly identify the parcels you are inspected to survey, the Indian Agent should be consulted."~~
20. In his April 13, 1927 instructions, McLean directed Schjelderup to communicate with Indian Commissioner W. E. Ditchburn ("Ditchburn") and provincial Surveyor General J. W. Umbach ("Umbach") in Victoria. He was to obtain from Ditchburn "information concerning the exact location of the parcels to be surveyed, copies of sketches and also original field notes of adjoining reserves etc" and from Umbach, "information as you will require concerning British Columbia Land surveys." McLean further instructed that "should occasion arise where the information you obtain from Victoria is not sufficiently definite to

properly identify the parcels you are expected to survey, the Indian Agent should be consulted.”

21. On May 16, 1927, Schjelderup obtained from the Indian Commissioner’s office, “blue prints, etc. in connection with his work during the summer.” There is no record of his receiving any further direction from Ditchburn relating to Application No. 84. Schjelderup also met with Umbach on an undisclosed day in May 1927.
22. Despite McLean’s April 13, 1927 instructions that Schjelderup should be guided by Ditchburn as to the “exact location” of the reserves to be surveyed, on May 21, 1927, Umbach purported to instruct Schjelderup to survey IR No. 25 **north** of the Fulton River as Lot 1353.
23. ~~20.~~ On May 21, 1927, the provincial Surveyor General, J. E. Umbauch (“Umbauch”) instructed Schjelderup to survey an area north of the Fulton River as Lot 1353. UmbauchUmbach stated that “it has been decided to cancel the survey of Lot 1610-A” and that “it is understood that the area desired for the Indian Reserve is the easterly portion of said Lot 1610-A, lying **north** of the river, and that you intend to survey the reserve as Lot 1353.” With regard to the lots **south** of the Fulton River, provincial Surveyor General directed Schjelderup to survey these into “one or more district lots.”
24. There is no record that Umbach’s May 21, 1927 letter was sent to Ditchburn, McLean or any other federal official, nor is there any record that these revised instructions were ever discussed with any federal official. There is no record that Schjelderup consulted with any federal official as to the instructions or information received.
25. On October 29 and November 1, 1927 Schjelderup surveyed Lots 2173, 2174 and 2175 south of the Fulton River, which together had formerly comprised ungazetted Lot 1353. His field notes stated that these surveys were conducted

under “instructions dated May 21st, 1927.”

26. ~~21. In~~ On November 3 and 4, 1927, Schjelderup surveyed I.R. 25, No. 25. His field notes stated that this survey was conducted “under instructions dated April 13, 1927.” He surveyed IR No. 25 comprising 116.2 acres, north of the Fulton River, and called this Lot 1353. He surveyed the lot south of the Fulton River, containing 126 acres, as Lot 2173. He surveyed two other lots located within Lot 2173, at the shore of Lake Babine, on either side of the road. The small lot north of the road is recorded as Lot 2175, and it contains “A. Sidaris General Store.” The small lot south of the road is recorded as Lot 2174 and it contains an “old log bldg” close to the road, and “H.B. Co Warehouse and stable” on the shore of Lake Babine.
22. ~~Unlike the blue print, Schjelderup’s 1927 survey plan of Lot 2173 does not show any Indian houses.~~
23. ~~On September 4, 1931, Daniel J. Leon, a member of the Nation, contacted the Department of Indian Affairs (“DIA”) for help as the B.C. Forest Department had told him to move his house from the area south of the Fulton River—the reserve allotted by the McKenna McBride Commission Mortimer recommended that DIA purchase the land south of the Fulton River occupied by the Indians “so as to eliminate any hardships occasioned by the Indians at that point.”~~
24. ~~On May 30, 1940, Mortimer’s replacement, S. Mallinson (“Mallinson”), inquired of DIA whether it would be possible to obtain the land south of the Fulton River occupied by the Indians as an Indian reserve.~~
25. ~~On November 13, 1940 provincial Deputy Minister H. Cathcart, following up on complaints made by District Forester R. C. St. Clair regarding the “Indians squatting” on the land south of the Fulton River, requested to DIA that the Indians living south of the Fulton River be removed. He renewed this request in 1944.~~
26. ~~DIA initially took the position that it would do nothing, and that it would not remove the Indians living south of the Fulton River until compelled to do so by~~

the Province.

27. On November 16, 1927, Schjelderup reported to McLean that he had completed the season's surveys. He advised that he did not expect to file the field notes and plans with the provincial Surveyor General until February 1, 1928.
28. On April 30, 1928, Umbach advised the Assistant Deputy & Secretary DIA that field notes covering Schjelderup's 1927 work for DIA had been received, examined and found to be in order, and that duplicate copies would now be sent to DIA. There is no record that Schjelderup or Umbach advised Ditchburn, McLean or any other DIA official of Umbach's revision of McLean's April 13, 1927 instructions relating to IR No. 25. There is no record of any questions or challenge from DIA of Schjelderup's survey of IR No. 25 north of the Fulton River.
29. At some point prior to 1929, members of the Nation were encouraged by Indian Agent Edgar Hyde ("Hyde") to expand their settlement south of the Fulton River because it was reserved. They did so.
30. Around this same time, the B.C. Forest Department was planning to develop Lots 2173, 2174 and 2175 (south of the Fulton River on the shore of Babine Lake) for tourism purposes, as a campground.
31. On September 4, 1931, Daniel J. Leon, a member of the Nation, contacted DIA for help as the B.C. Forest Department had told him to move his house from south of the Fulton River, an area at that time referred to as Topley Landing. Leon described how difficult building his house had been and said that the Indian Agent had told them that this was an Indian reserve.
32. Indian Agent G. C. Mortimer ("Mortimer") was instructed by DIA in Ottawa to report on this dispute between the members of the Nation and the B.C. Forest Department.
33. On September 24, 1931, Mortimer wrote to Ditchburn. He noted that a blueprint

(that he believed had been received from the Indian Commissioner in 1926) showed old reserves coloured in red and new reserves coloured in green and that “to the North at the mouth of the Fulton River and adjoining the Babine Lake is red and the one to the South at the mouth, also adjoining the lake, is green.” An undated blueprint matching this description shows IR No. 25 north of the Fulton River, and seven “Indian houses” on the lot south of the Fulton River, on the shore of Babine Lake.

34. Mortimer also drew Ditchburn’s attention to a map of IR No. 25 (No. B.C. 581) dated December 3, 1927, which showed the Reserve north of the Fulton River, but nothing south of the River. He reported that in 1928 the previous Indian Agent, Hyde, had “instructed a few Indian families from Old Fort and Fort Babine to build their homes and clear the land on the lot immediately South of the mouth of the Fulton River which, he said, was Indian Reservation. This led to the building of good homes by three Indian families and also a small store.”
35. On September 30, 1931, Ditchburn replied that “there was no old reserve at Fulton River” and that he did not know why a map showing such a reserve colored in red (to represent old reserves) should have been issued. Ditchburn noted that the McKenna McBride Commission had set aside a reserve at Fulton River generally thought to be **south** of the River, but that when Schjelderup arrived he found Indian families settled **north** of the Fulton River and surveyed that land (116 acres) as a reserve. Ditchburn apparently had no knowledge of Umbach’s May 21, 1927 letter, which revised McLean’s April 13, 1927 instructions to Schjelderup.
36. On October 22, 1931, Mortimer forwarded his report and Ditchburn’s response to the Secretary, DIA. Mortimer recommended to the Secretary that DIA purchase the land south of the Fulton River occupied by the Indians “so as to eliminate any hardships occasioned by the Indians at that point.”
37. DIA took no steps, following Mortimer’s 1931 recommendation, to secure the land

south of the Fulton River for the Nation.

38. On January 11, 1940, provincial District Forester R. C. St. Clair (“St. Clair”) wrote to the provincial Chief Forester reporting on a complaint received the previous year from B. McCrea of “Indians who are squatting on vacant Crown land” at Topley Landing and of the “unsanitary” conditions of this “Indian village.”
39. On February 6, 1940, the provincial Deputy Minister H. Cathcart (“Cathcart”) wrote to Indian Commissioner for B.C., D. M. MacKay (“MacKay”), passing on the complaint of the “Indian squatters” at Topley Landing. Cathcart noted that it appeared that at one time the Indian Agent had been under the impression that the lands south of the Fulton River had been set aside as a Reserve, and that this may have led to the current misunderstanding.
40. On March 28, 1940, Father Godfrey, OMI, who had been a missionary in the Babine Lake area for a number of years, reported to then Indian Agent S. Mallinson (“Mallinson”) giving information in support of the existence of a reserve south of the Fulton River at Topley Landing.
41. MacKay forwarded Father Godfrey’s letter to DIA in Ottawa, noting that during his own visits to Topley Landing he had always found it to be a clean and well ordered community.
42. On April 30, 1940, MacKay asked Mallinson for a full report, including a report of the area occupied by the members of the Nation and any recommendations regarding the purchase of the lands, although he thought “it is extremely unlikely that funds can be provided for this purpose.”
43. On May 30, 1940 Mallinson submitted to MacKay an extensive report regarding Topley Landing. Mallinson described in detail the Nation’s community there as having “an exceptionally neat appearance” and described the many buildings including houses, a community hall and boat houses. Mallinson again recommended that the land be reserved for the Nation.

44. In his June 6, 1940 report to DIA in Ottawa MacKay reviewed the history of the McKenna McBride Commission's allotment of Topley Landing, and noted that the reserve had not been surveyed there, as Schjelderup "finding a few Indian houses on the present Reserve surveyed it as Indian Reserve No. 25." He noted that Schjelderup appeared not to have consulted DIA in this decision, "as I am unable to find any correspondence showing why this change should have been made." MacKay recommended again that the land should be set aside and surveyed for the Nation.
45. DIA did not act on the recommendations of Mortimer, Mallinson, Father Godfrey or MacKay, or otherwise pursue setting aside the land south of the Fulton River as an Indian Reserve, despite the existence of an Indian settlement on this land.
46. On November 13, 1940 Cathcart requested that DIA remove the members of the Nation living south of the Fulton River. Cathcart appeared unaware of Umbach's role in revising McLean's April 13, 1927 instructions provided to the surveyor, and instead blamed DIA, since the surveyor was "acting on behalf of your Department, and so far as I am aware, under your instructions."
47. Protests from the Province about the occupation of Topley Landing continued into 1944. MacKay continued to recommend that DIA purchase the lands occupied by members of the Nation at Topley Landing.
48. On July 4, 1944 Mallinson recommended that DIA apply to lease the land from the Province. He noted that the members of the Nation had "built their homes here approximately 20 years ago and have used the site for almost 100 years."
49. On August 9, 1944, Cathcart rejected Mallinson's suggestion that the Province grant a lease for the members of the Nation at Topley Landing.
50. DIA did not take any steps to challenge Schjelderup's failure to survey Topley Landing and took no steps to survey and reserve Topley Landing for the benefit of the Nation when this mistake became known. Instead, DIA took the position that

the members of the Nation should not build any new improvements at Topley Landing, but that they should be permitted to remain there so long as they were not compelled by the Province to move.

51. On September 30, 1944, MacKay recommended to DIA in Ottawa that evidence be obtained to strengthen DIA's position in the event the Province moved to evict the members of the Nation residing at Topley Landing. On the same day, Indian Commissioner W. S. Arneil ("Arneil") wrote to Mallinson that in order to prevent the Province from removing the members of the Nation from Topley Landing, "we could, as a last resort, attempt stay of action under Section 48 of the B.C. Statute of Limitations... if we can show continuous possession by the present occupants and their ancestors for a period of sixty years."

52. ~~27. In 1948 DIA secured statutory declarations from the Indians residing at Topley Landing, including~~ On February 3, 1948, Indian Agent J. V. Boys wrote to the Indian Commissioner enclosing Statutory Declarations from the members of the Nation living at Topley Landing, noting "these Affidavits support the Indians' claims of continuous residence on this spot for more than 60 years as required by Section 48 of the B.C. Statute of Limitations." Arneil, referencing his letter of September 30, 1944, forwarded the Statutory Declarations to DIA in Ottawa. The enclosed Statutory Declarations of Daniel Leon, Rosie Leon, John Baptiste (Paddy) Leon, and Jim Charley ~~to the effect~~ stated that each of them had been born at Topley Landing and had lived there all or most of their lives. DIA took no further steps to protect or reserve the lands for the Nation.

## VI. **The Basis in Law on which the Crown is Said to Have Failed to Fulfil or Otherwise Breached a Lawful Obligation**

53. ~~28.~~ This claim is based on the Crown's breach of its common law fiduciary obligations to complete the reserve creation process relating to the lands south of the Fulton River, and in particular to ensure that these lands were set apart and

surveyed as an Indian Reserve in addition to the lands that were reserved north of the Fulton River, and protected for the exclusive use and benefit of the Nation. In doing so, the Crown's actions were not consistent with the honour of the Crown.

54. ~~29.~~ Furthermore, Canada failed to follow through on promises made to the Nation to protect the lands south of the Fulton River and failed, when the opportunity arose, to remedy previous breaches of its fiduciary obligations by taking steps to reserve the lands for their benefit. In doing so, the Crown's actions were not consistent with the honour of the Crown.

~~30. — The Nation seeks compensation from Canada for:~~

~~a. — The loss of the reserve comprising approximately 128 acres south of the Fulton River allotted to the Nation by the McKenna McBride Commission in 1916;~~

~~b. — Interest;~~

~~c. — Such other damages or compensation as this Honourable Tribunal deems just.~~

Dated this 22 day of February 2013.



Signature of Solicitor

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