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SPECIFIC CLAIMS TRIBUNAL		
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SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

AKISQ'NUK FIRST NATION

CLAIMANT

v.

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

RESPONDENT

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

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

TO: AKISQ'NUK FIRST NATION
As represented by Darwin Hanna, of
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I. Status of Claim (R. 42(a))

1. The Akisq'nuk First Nation (the "First Nation") submitted a claim to the Minister in March 1999 alleging, among other things, that the federal Crown breached fiduciary obligations owed to the First Nation in connection with an area of land which was allotted by the Indian Reserve Commissioner in 1884 as part of what later became Indian Reserve No. 3 ("I.R. 3") but was excluded from the Crown's survey of the allotted lands in 1886, as well as additional land which the Royal Commission on Indian Affairs for the Province of British Columbia (the "McKenna-McBride Commission") recommended be added to I.R. 3 but which was never added to the reserve.

2. The Minister notified the First Nation in writing on February 21, 2011 of his decision not to accept the claim for negotiation.

II. (a) Validity (R. 42(b) and (c))

3. The Crown does not accept the validity of any of the claims set out in the Declaration of Claim, and in particular denies:

(a) the alleged 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;

(b) the alleged 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.

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

4. In reply to paragraph 7 of the Declaration of Claim, the Crown does not know the location or size of the lands referred to as the "Madias Tatley Lands" in the Declaration of

Claim or which, if any, portion of those lands were included in Indian Reserve Commissioner O'Reilly's allotment of the lands which subsequently became known as I.R. 3.

5. In reply to paragraph 8 of the Declaration of Claim, the Crown admits that P.C. 1344 appointed Commissioner O'Reilly as reserve commissioner but denies that the facts in paragraph 8 of the Declaration of Claim fully represent Commissioner O'Reilly's terms of appointment or his duties as reserve commissioner.

6. In reply to paragraph 9 of the Declaration of Claim, the Crown admits that Commissioner O'Reilly's allotment of the lands which subsequently became known as I.R. 3 included 8,320 acres.

7. In reply to paragraph 10 of the Declaration of Claim, the Crown admits that Surveyor Skinner surveyed the lands which subsequently became known as I.R. 3 in September 1886 and that the lands as surveyed by Surveyor Skinner totaled 8,456 acres.

8. In reply to paragraph 11 of the Declaration of Claim, the Crown admits that Surveyor Skinner departed from the boundaries described in Commissioner O'Reilly's Minute of Decision but states that Commissioner O'Reilly was informed of Surveyor Skinner's justification for his departure and approved of Surveyor Skinner's changes to the boundaries of the I.R. 3 lands by signing Surveyor Skinner's survey sketch.

9. The Crown admits the facts in paragraph 12 of the Declaration of Claim but denies that they fully represent all of the evidence reviewed and considered by the McKenna-McBride Commission in relation to the First Nation's reserve lands.

10. In reply to paragraphs 13 and 14 of the Declaration of Claim, the Crown admits that the McKenna-McBride Commission recommended the addition of a 3,040 acre parcel to I.R. 3 on March 25, 1915 and then amended this recommendation on March 29, 1915 to refer instead to a 2,960 acre parcel. The Crown does not know which, if any, portion of the lands referred to as the Madias Tatley Lands in the Declaration of Claim were included in the 2,960 acre parcel. The Crown denies that the Commission had the power to order any addition to reserve land,

since the McKenna-McBride Commission's recommendations were subject to approval by both the provincial and federal Crown. The Crown further denies that the remaining facts set out in paragraph 14 of the Declaration of Claim fully represent the considerations and decisions of the federal Crown with respect to the First Nation's reserve lands during the Ditchburn-Clark review.

IV. Statements of Fact (R. 42 (a))

The allotment of reserves generally in British Columbia

11. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the *Terms of Union*, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission. It was established in 1876 and was comprised of three commissioners, one of whom was Gilbert Sproat. The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.

12. Following Commissioner Sproat's resignation, in 1880 the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner, having been found suitable and recommended by senior federal and provincial Crown officials.

13. The order in council appointing Commissioner O'Reilly, P.C. 1334, stated that the duties of the commissioner "consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes". Commissioner O'Reilly's terms of appointment included that he was to act in his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works and the federal Indian Superintendent for British Columbia "as to the particular places to be visited and the reserves to be established". Commissioner O'Reilly's reserve allotments would be subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, should be referred to the Lieutenant Governor.

14. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate. Those instructions provided that, in allotting reserve lands, he should have "special regard" not just to the interests of the bands, but to the claims of "white settlers" as well. The instructions further provided, among other things, that Commissioner O'Reilly was to be careful not to disturb the Indians in the possession of any "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached".

15. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely (he was originally appointed for only twelve months). Commissioner O'Reilly remained reserve commissioner until his retirement in 1898.

16. The federal Crown lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the provincial Crown because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

The allotment of I.R. 3

17. On August 6, 1884, Commissioner O'Reilly met with Chief Moyes and others for the purpose of identifying an appropriate reserve allotment for the First Nation. They discussed summer and winter grazing requirements, population, and numbers of livestock. Commissioner O'Reilly asked the Chief and others to show him the best places in the area because he was unfamiliar with the territory.

18. On August 9, 1884, Commissioner O'Reilly completed his Minute of Decision for the allotment of the lands which subsequently became I.R. 3 which included a metes and bounds description of the allotted reserve lands as well as his sketch of its boundaries.

19. The lands which subsequently became I.R. 3 were surveyed by E.M. Skinner in September 1886. Surveyor Skinner submitted his report and survey sketch on May 12, 1887 to Commissioner O'Reilly noting changes he had made to the original boundaries described in

O'Reilly's Minute of Decision. Commissioner O'Reilly signed Surveyor Skinner's survey sketch.

20. On July 10, 1887 both Commissioner O'Reilly and the Chief Commissioner of Lands and Works signed the official *Plan of Kootenay Indian Reserve No. 3, Lower Columbia Lake, Kootenay District, British Columbia* which incorporated Surveyor Skinner's boundary changes. Another copy of this plan was signed by the Superintendent General of Indian Affairs.

The McKenna-McBride Commission and the First Nation

21. On September 24, 1912, the federal and provincial Crown signed an agreement referred to as the McKenna-McBride Agreement. The agreement established a Royal Commission on Indian Affairs for British Columbia, "to settle all differences between the Governments of the Dominion and the Province respecting Indian Lands and Indian Affairs generally [...]". The Commission's powers included the ability to recommend reserve allotments. This agreement was approved by reciprocal federal and provincial orders in council which included the following provision:

> [...] notwithstanding anything in the said [McKenna-McBride] Agreement contained, the acts and proceeding of the Commission *shall be subject to the approval of the two Governments* [emphasis added].

22. On September 21, 1914, the First Nation met with the McKenna-McBride Commission. Chief Arbel described his concerns about land pre-emptions in the area and the First Nation's grazing land requirements. He requested more land for the First Nation. The McKenna-McBride Commission also heard from Ignatius Eaglehead about the First Nation's land use and requirements.

23. On October 28, 1914, the McKenna-McBride Commission also examined Indian Agent Galbraith who testified about the survey of I.R. 3 and his opinion that its boundaries should have been extended into the mountains so that those lands could be used as a forest reserve. Indian Agent Galbraith advised the McKenna-McBride Commission that the First Nation had asked for more land at the time of Commissioner O'Reilly's allotment.

24. On December 14, 1914 Indian Agent Galbraith submitted a map to the McKenna-McBride Commission on which he had marked out an area he thought could possibly be provided to the First Nation as additional reserve land for their cattle and horses.

25. On February 12, 1915, Indian Agent Galbraith further reported to the McKenna-McBride Commission:

> [...] The only available land I find near [I.R. 3] is north of Lots 122, 115 & 124 and is partially covered with small timber and is not fit for cultivation. If 3000 acres can be found near there, I would recommend it be added to the reserve.

26. The McKenna-McBride Commission confirmed I.R. 3 as "now fixed and determined" on March 24, 1915. On March 25, 1915, it recommended the addition of 3,040 acres to I.R. 3. On March 29, 1915, it rescinded its first recommendation and instead recommended that a 2,960 acre parcel be added to I.R. 3.

27. On June 30, 1916, the McKenna-McBride Commission released its final report, including the recommendation that a 2,960 acre parcel should be added to I.R. 3.

28. At all material times the 2,960 acre parcel referred to in the McKenna-McBride Commission's recommendation was provincial Crown land.

The Ditchburn-Clark Review

29. By the terms of its establishment, the recommendations of the McKenna-McBride Commission were not binding on either the provincial or federal Crown. The cooperation of both the federal and provincial Crown was also required in order to implement the Commission's recommendations. Shortly after the release of the Commission's final report, the federal Crown supported its implementation but the provincial Crown objected.

30. In 1920 British Columbia proposed that a joint federal-provincial review of the Commission's report be carried out (the "Ditchburn-Clark review'). W.E. Ditchburn, Chief Inspector of Indian Agencies in British Columbia, was appointed as the federal representative and Major J.W. Clark was appointed as the provincial representative to this review.

31. The provincial representative, Major Clark, concluded that the 2,960 acre addition to I.R. 3 was not required. Instead, Major Clark and various other provincial Crown officials supported the creation of a grazing commonage in the area that could be used by the First Nation to accommodate their need for grazing land.

32. Chief Inspector Ditchburn, for the federal Crown, reported to the federal Deputy Superintendent General of Indian Affairs that it was his view that the additional lands were required for the First Nation but that the provincial grazing policy was a considerable "drawback" to what he had "hoped would have been a satisfactory settlement of the Indian reserve question". On March 27, 1923, Chief Inspector Ditchburn submitted his final report to the Deputy Superintendent General of Indian Affairs on the results of his negotiations with Major Clark. He noted his disagreement with Major Clark's, and the provincial Crown's, disallowance of additional reserve lands in the Kootenay Agency, including I.R. 3.

33. Major Clark submitted his own report to the provincial Minister of Lands noting that Ditchburn was not in agreement regarding the provincial Crown's refusal of additional lands for the First Nation.

34. On July 19, 1924, the Prime Minister approved the amended McKenna-McBride Commission report. The additional acreage of 2,960 in the McKenna-McBride Commission's report was crossed out and described as "Disallowed." On July 25, 1923, the Government of British Columbia approved the same.

V. Relief (R. 42(f))

35. The Crown denies the entitlement of the relief sought and seeks to have the claim dismissed in its entirety.

36. The Crown seeks its costs in the proceedings.

37. If the Crown is liable, which is not admitted, then the Crown asserts that the Province of British Columbia contributed to the acts or omissions and any losses arising therefrom, as set out in paragraph 20(1)(i) of the *Specific Claims Tribunal Act*.

38. If the Crown is liable, which is not admitted, then the Crown asserts that the Tribunal shall deduct the value of the lands in I.R. 3 which Surveyor Skinner included in the reserve boundaries, as set out in paragraph 20(3) of the *Specific Claims Tribunal Act*.

39. The Crown pleads and relies on section 20 of the *Specific Claims Tribunal Act*.

40. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: June 6, 2013

Signature of
☐ Respondent ☒ lawyer for Respondent
William F. Pentney,
Deputy Attorney General
Per: Brett Nash
Department of Justice
British Columbia Regional Office