SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES
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SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

ʔAKISQ̓NUK FIRST NATION

CLAIMANT

v.

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

TO: ʔAKISQ̓NUK FIRST NATION
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I. Overview

1. The ʔAkisq̓nuk First Nation, formerly known as the "Akisq'nuk First Nation" and before that the Columbia Lake Indian Band (the "First Nation"), alleges that the Respondent breached fiduciary obligations in connection with an area of land allotted in 1884 by an Indian Reserve Commissioner as part of what later became the Columbia Lake Indian Reserve No. 3 ("IR 3"), but which was subsequently excluded from the 1886 survey of the reserve. The First Nation further asserts a breach in connection with land recommended for addition to IR 3 by the Royal Commission on Indian Affairs for the Province of British Columbia (the "McKenna-McBride Commission"), which was not ultimately added to the reserve due to a disagreement between the Respondent and the Province of British Columbia ("British Columbia"). Finally, the First Nation alleges that the Respondent breached a fiduciary obligation by failing to ensure the setting aside of a grazing commonage contemplated by British Columbia at the conclusion of a joint federal-provincial review (the "Ditchburn Clark review") of the recommendations of the McKenna-McBride Commission.

2. The Respondent takes the position that neither the lands excluded from IR 3 by the 1886 survey, nor those recommended for addition to the reserve by the McKenna-McBride Commission, were reserve lands. The Respondent maintains that at all material times it acted with loyalty and good faith, and in the First Nation's best interests, in relation to these lands, thereby meeting any fiduciary obligations ~~it owed in relation to both parcels of land~~. Finally, the Respondent takes the position that the First Nation's claim respecting the contemplated grazing commonage lies outside the jurisdiction of the Specific Claims Tribunal, or alternatively that it had no fiduciary obligation in relation to the grazing commonage, provision of which lay in the sole discretion of British Columbia.

3. The Respondent is mandated to respond to this claim by the terms of the *Specific Claims Tribunal Rules of Practice and Procedure* (SOR/2011 – 119), and consistent with the duties and functions of the Crown in right of Canada in the conduct of litigation. The Respondent affirms the relationship between resolution of specific

claims and the broader goal of reconciliation between First Nations and the Crown, and adopts the commitment to resolution of specific claims in a "just and timely manner" as set out in the preamble to the *Specific Claims Tribunal Act* (the "Act").

II. Status of Claim (R. 42(a))

4. The First Nation submitted a claim to the Minister of Indian Affairs and Northern Development ("the Minister") in 1999.

5. The Minister notified the First Nation in writing on February 21, 2011 of his decision not to accept the claim for negotiation. The Respondent takes the position that the contents of this letter are subject to settlement privilege, and does not waive that privilege.

6. The First Nation initiated this claim before the Specific Claims Tribunal (the "Tribunal") on March 14, 2013. On February 4 and 5, 2016, respectively, the Tribunal handed down a ruling on an interlocutory issue arising in the claim, as well as a final ruling on the claim's validity.

7. An application for judicial review brought by the Respondent in respect of both rulings was heard by the Federal Court of Appeal on May 16, 2017. The Court handed down its ruling on September 1, 2017, setting aside the Tribunal's interlocutory and final rulings and directing that the claim be returned to the Tribunal to be re-determined by a differently constituted panel.

III. Validity (R. 42(b) and (c))

8. The Respondent~~Crown~~ does not accept the validity of the claims set out in the Further Amended Declaration of Claim, in particular the following:

(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; and

(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.

9. The Respondent takes the position that the breach alleged in paragraph 107(o) of the Further Amended Declaration of Claim lies outside the jurisdiction of the Specific Claims Tribunal.

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

~~9.~~10. The Respondent admits the facts as set out in the following paragraphs of Part V of the Further Amended Declaration of Claim: 9, 11, 12, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 31, 32, ~~35~~36, ~~36~~37, ~~37~~39, 40, ~~38~~41, ~~39~~42, ~~40~~43, ~~41~~44, ~~43~~46, ~~44~~47, ~~45~~48, ~~46~~ 49, ~~and~~ ~~49~~52, 54 and 55.

~~10.~~11. In reply to paragraph 8 of the Further Amended Declaration of Claim, the Respondent admits that approximately 960 acres allotted as reserve by Reserve Commissioner O'Reilly in 1884 were not subsequently included in the 1886 survey of the reserve carried out by Crown Surveyor Skinner (the "Survey Land"). The Respondent further admits that the recommendation of the McKenna-McBride Commission for the addition of 2,960 acres of land to the First Nation's reserve (the "Additional Land") was never implemented by the Respondent and British Columbia. The Respondent says the remainder of the statements in this paragraph are legal argument, not fact.

~~11.~~12. In reply to paragraph 10 of the Further Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes legal argument~~interpretation~~, not fact.

~~12. In reply to paragraph 12 of the Amended Declaration of Claim, the Respondent admits the paragraph, except that the reference to the word "had" in the quotation of Article 13 should be "has".~~

13. In reply to paragraph 13 of the Further Amended Declaration of Claim, the Respondent says that this ~~statement in this~~ paragraph constitutes ~~is a matter of~~ legal argument~~interpretation~~, not fact.

14. In reply to paragraph 15 of the Further Amended Declaration of Claim, the Respondent admits the paragraph, but notes that British Columbia did not accept the Respondent's recommendation for the creation of a Joint Indian Reserve Commission until 1876.

15. In reply to paragraph 22 of the Further Amended Declaration of Claim, the Respondent:

a. admits the first sentence, except that the Respondent denies that Commissioner O'Reilly found "500 cattle and 800 horses" to have been owned by the First Nation; and
b. admits the second sentence.~~; and~~
~~c. admits the third sentence, but says that Commissioner O'Reilly was writing in this passage about the Kootenay Indians as a larger group, and not specifically about the First Nation.~~

16. In reply to paragraph 23 of the Further Amended Declaration of Claim, the Respondent:

a. admits that Commissioner O'Reilly rendered an August 9, 1884 Minute of Decision allotting proposed reserve lands, but denies that all these lands subsequently became part of IR 3;
b. admits that the area allotted was described in Commissioner O'Reilly's Minute of Decision as comprising 8,320 acres;

c. admits that Commissioner O'Reilly was guided in his allotment of proposed reserve lands by the "habits, wants and pursuits" of the First Nation; and
d. has no knowledge as to whether Commissioner O'Reilly's allotment of proposed reserve lands was based on the First Nation's traditional use or occupation of those lands.

~~17. In reply to paragraph 27 of the Amended 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.~~

~~18. In reply to paragraph 28 of the Amended 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.~~

~~19.~~ 17. In reply to paragraph 30 of the Further Amended Declaration of Claim, the Respondent admits the 1898 pre-emption of Lot No. 9245, E. Kootenay District, but has no knowledge of the dates of the remaining pre-emptions referenced in this paragraph, nor of their impact on the recommendations of the McKenna-McBride Commission.

~~20. In reply to paragraph 31 of the Amended Declaration of Claim, the Respondent admits that the McKenna-McBride Commission was established by the Respondent and British Columbia in an attempt to "settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province". The Respondent further admits the content of the excerpt from the memorandum of agreement establishing the McKenna-McBride Commission, with the exception that the words "and that the Commission's proposals" have been erroneously added to this excerpt.~~

~~21.~~ 18. In reply to paragraph ~~32~~ 33 of the Further Amended Declaration of Claim, the Respondent:

a. admits the first sentence;
b. denies that British Columbia "was required" to "take all steps required to legally reserve any additional lands granted"; and
c. admits the excerpt from Article 7 of the memorandum of agreement establishing the McKenna-McBride Commission.

~~22.~~ 19. In reply to paragraph ~~33~~ 34 of the Further Amended Declaration of Claim, the Respondent says that this paragraph constitutes legal argument~~interpretation~~, not fact.

~~23.~~ 20. In reply to paragraph ~~34~~ 35 of the Further Amended Declaration of Claim, the Respondent:

a. admits the first sentence;
b. admits that Chief Arbel told the McKenna-McBride Commission that the reserve "was given to me by Mr. O'Reilly"; but
c. denies the remainder of the paragraph.

21. In reply to paragraph 38 of the Further Amended Declaration of Claim, the Respondent:

a. admits the first three sentences;
b. admits the 2,960 acre parcel was clearly delineated by the McKenna-McBride Commission, but has no knowledge of it being shown on maps as a "new reserve".

~~24.~~ 22. In reply to paragraph ~~42~~ 45 of the Further Amended Declaration of Claim, the Respondent admits that the federal representative to the Ditchburn-Clark review, Chief Commissioner Ditchburn, expressed that the addition of 2960 acres to IR 3, as recommended by the McKenna-McBride Commission, was "necessary for the

reasonable requirements of [the] Indians", and that this recommendation had the further support of Deputy Superintendent-General of Indian Affairs Duncan Campbell Scott.

~~25.~~ 23. In reply to paragraph ~~47~~ 50 of the Further Amended Declaration of Claim, the Respondent denies that Chief Commissioner Ditchburn was prepared to accept the disallowance of the 2960 acre addition to IR 3 by British Columbia's representative on the Ditchburn-Clark review, Major Clark, "on condition that a grazing commonage would be established".

~~26.~~ 24. In reply to paragraph ~~48~~ 51 of the Further Amended Declaration of Claim, the Respondent has no knowledge as to whether a grazing commonage was created for the First Nation by British Columbia. ~~Because the breach alleged in subparagraph 83 (m) of the Amended Declaration of Claim did not form part of the claim submitted to the Minister in 1999, nor that initiated before the Tribunal in 2013, the evidence adduced to date does not disclose what steps – if any – were taken by the Respondent to press British Columbia to do so.~~

~~27.~~ 25. In reply to paragraph ~~50~~ 53 of the Further Amended Declaration of Claim, the Respondent has no knowledge as to whe~~n~~ther the First Nation was informed that the addition of 2960 acres to IR 3 had been disallowed.

26. In reply to paragraph 56 of the Further Amended Declaration of Claim, the Respondent:

a. admits that the Additional Land was partially adjacent to IR 3;

b. admits the second and third sentences; and

c. says that the fourth sentence constitutes legal argument, not fact.

V. Statements of Fact (R. 42 (e))

The allotment of reserves generally in British Columbia

~~28.~~27. 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, at which time Peter O'Reilly was appointed as Indian Reserve Commissioner.

~~29.~~28. 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.

~~30.~~29. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate. The instructions 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".

~~31.~~30. 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.

~~32.~~31. The Respondent 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

~~33.~~32. On August 5 and 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.

~~34.~~33. On August 9, 1884, Commissioner O'Reilly completed his Minute of Decision for the allotment of the lands proposed to become IR 3 which included a metes and bounds description of the allotted reserve lands as well as his sketch of its boundaries.

~~35.~~34. The lands which subsequently became IR 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.~~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 IR 3 lands by signing surveyor Skinner's survey sketch.

~~36.~~35. Surveyor Skinner excluded lands from O'Reilly's eastern boundary that "would run up the mountains and include some worthless land" for lands to the south, because the southern line depicted in O'Reilly's Minute of Decision would have cut across an Indian field. He noted that the "Indians on this reserve seemed on the whole satisfied that these changes were made".

~~37.~~36. 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

~~38.~~37. On September 24, 1912, the federal and provincial Crown signed an agreement establishing 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.

~~39.~~38. 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.

~~40.~~39. On October 28, 1914, the McKenna-McBride Commission ~~also~~ examined Indian Agent Galbraith who testified about the survey of I.R. 3. 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. Galbraith also opined:

> ... a mistake was made when the reserve was first laid out in that the boundary lines should then have been extended to the mountains and that land could then have been kept for all time as a forest reserve. But it is not likely that anyone will go behind them. I think there is only one settler that I know of who has a place

> there. [...] They would have liked to have got some more of the bottom lands, but that would be impossible.

~~41.~~40. Indian Agent Galbraith did not explain the basis on which he had concluded that the layout of the reserve was "a mistake".

~~42.~~41. On December 9, 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.

~~43.~~42. 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.

~~44.~~43. 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:

> Commencing on the North-east corner of Lot One Hundred and Twenty-Two (122), East Kootenay District, and running North therefrom Three Hundred and Eighty (380) chains; thence West One Hundred and Sixty (160) chains to the North-east corner of Kootenay Indian Reserve No. Three (3); thence South Two Hundred and Eighty (280) chains; thence East One Hundred and Twenty (120) chains; thence South One Hundred and Twenty (120) chains to the North-west corner of the aforementioned Lot One Hundred and Twenty-two (122); and thence East Forty (40) chains to the place of commencement, containing an area of Three Thousand and Forty (3040) acres, more or less ....

~~45.~~44. On March 29, 1915 the McKenna-McBride Commission rescinded its first recommendation and instead recommended that a 2,960 acre parcel be added to I.R. 3 as follows:

> Commencing at the North-east corner of Lot One Hundred and Twenty-two (122), East Kootenay District, and running north therefrom Three Hundred and

> Eighty (380) chains; thence West One Hundred and Sixty (160) chains to the North-east corner of Kootenay Indian Reserve No. Three (3); thence South Eighty (80) chains; thence East Eighty (80) chains; thence South One Hundred and Twenty (120) chains; thence East Forty (40) chains; thence South One Hundred and Eighty (180) chains; and thence East Forty (40) chains to the place of commencement, containing and area of Two Thousand Nine Hundred and Sixty (2960) acres more or less ....

~~46.~~45. On April 10, 1915, the provincial Deputy Minister of Lands advised the McKenna-McBride Commission that the recommended parcel of land:

> ... was reconveyed from the Canadian Northern Pacific Railway Company to the Crown and reserved from any alienation in September 1912.
>
> A notation of the application has been made on the records of this Department and no disposition of the lands in question will be made until finally dealt with by the Royal Commission on Indian Affairs.

~~47.~~46. On June 30, 1916, the McKenna-McBride Commission released its final report, which recommended the creation of four hundred eighty-four new reserves in British Columbia. Included among these was the recommendation that a 2,960 acre parcel should be added to I.R. 3.

~~48.~~47. The Respondent made a series of attempts after 1916 to secure British Columbia's approval for the McKenna-McBride Commission's report, however at all material times the 2,960 acre parcel referred to in the McKenna-McBride Commission's recommendation remained provincial Crown land.

~~49.~~48. Between 1916 and 1919, Deputy Superintendent General of Indian Affairs Duncan Campbell Scott ("Scott") wrote to and met with British Columbia politicians and senior provincial officials, advising them of the Respondent's willingness to accept the McKenna-McBride Commission's report "as it stood", and urging quick action on the Commission's recommendations.

~~50.~~49. British Columbia insisted it needed more time to consider the matter.

~~51.~~50. Throughout 1919, federal Superintendent General of Indian Affairs Arthur Meighen ("Meighen") also became involved in lobbying for provincial support of the McKenna-McBride Commission's recommendations. Meighen met with British Columbia Premier John Oliver to discuss the two government's responses to the report, and wrote follow-up letters reiterating the Respondent's desire to have the report's recommendations accepted. Each communication was met with the response that British Columbia needed more time to consider the matter.

~~52.~~51. On December 19, 1919, British Columbia Minister of Lands, T.D. Patullo ("Patullo") wrote to Meighen, expressing the view that the McKenna-McBride Commission's recommendations had gone "much further than ... the two Governments contemplated in the original agreement...."

The Ditchburn-Clark Review

~~53.~~52. By the terms of its establishment, the recommendations of the McKenna-McBride Commission were not binding on either the Respondent or British Columbia. The cooperation of both governments was ~~also~~ required in order to implement the Commission's recommendations. By December 1, 1919 the Respondent had signaled its support for the implementation of the McKenna-McBride Commission's recommendations but British Columbia objected.

~~54.~~53. Thus, in 1920 British Columbia proposed that a joint federal-provincial review of the Commission's report be carried out within the Dominion (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.

~~55.~~54. The Respondent and British Columbia's attempts to resolve their differences regarding reserve creation through the Ditchburn-Clark review reflected the growing political independence of the Dominion from Great Britain in the years following World War I, and was in part a response to British unwillingness to become involved in the

question of indigenous land rights in British Columbia. (Six years later, the Dominion's independence was more formally recognized in the *Balfour Declaration* of 1926, subsequently incorporated in the 1931 *Statute of Westminster*, by which the British parliament renounced any legislative authority over Dominion affairs, except as specifically provided in law.)

~~56.~~55. The provincial representative, Major Clark, believed that the recommended addition to IR 3 was not required. Instead, Major Clark, on the recommendation of provincial Grazing Commissioner Thomas P. Mackenzie, supported the creation of a grazing commonage in the area that could be used by the First Nation, along with the St. Mary's and Shuswap Indian Bands, to accommodate their need for grazing land.

~~57.~~56. Chief Inspector Ditchburn, for the Respondent, advised that the additional lands were required for the First Nation. However he noted that provincial grazing policy was "a considerable drawback" to what he had "hoped would have been a satisfactory settlement of the Indian reserve question".

~~58.~~57. Before the Ditchburn-Clark review drew to a close in 1923, Chief Commissioner Ditchburn escalated the issue of the 2,960 acres recommended for addition to the First Nation's IR 3 to Scott. Ditchburn expressed frustration with Clark's intransigence:

> now that we have got into that section of the country where large areas are concerned it is a matter of fighting every inch of the way ....

~~59.~~58. Ditchburn also identified provincial Grazing Commissioner Thomas P. MacKenzie (the "Grazing Commissioner") as a particular obstacle to securing British Columbia's approval for an additions to reserves in the Kootenay Agency:

> [t]he Grazing Commissioner, while realizing that it is necessary that the Indians should have grazing areas for themselves, is using his influence to have some of the new reserves recommended by the Royal Commission in the Kootenay Agency eliminated but I shall protest very strongly against this.

~~60.~~59. Ultimately, however, Ditchburn was unable to persuade Major Clark to change his mind regarding the proposed new IR 3 lands.

~~61.~~60. On March 27, 1923, Chief Inspector Ditchburn submitted his final report to Scott on the results of his negotiations with Major Clark. He noted his disagreement with Major Clark's and British Columbia's disallowance of additional reserve lands in the Kootenay Agency, including IR 3.

~~62.~~61. Major Clark submitted his own report to the provincial Minister of Lands noting that Ditchburn was not in agreement regarding British Columbia's refusal of additional lands for the First Nation.

~~63.~~62. Once in receipt of final reports from both Ditchburn and Clark, final communications on the matter of British Columbia reserve creation took place in the spring of 1923 between Scott and Patullo. Patullo noted that the one issue on which the two appointees had been unable to agree was with respect to "extra grazing areas for the St. Mary's Band, the Lower Columbia Lake Band and the Shuswap Tribe". Nonetheless, Scott's view, endorsed by Meighen, was that any further delay in reaching agreement with British Columbia on the recommendations of the McKenna-McBride Commission would be inadvisable.

~~64.~~63. In October 1923 Scott briefed Meighen's successor, Superintendent General of Indian Affairs Charles Stewart, on the status of reserve creation in British Columbia. Alluding to a series of meetings with the Allied Tribes of British Columbia concerning the outcome of the McKenna-McBride Commission and Ditchburn-Clark review, Scott observed:

> In spite of this vigorous protest from the Indians as to the acceptance of the report ... I cannot, with a due sense of responsibility and having the best interests of these people at heart, recommend any other action but the adoption of the report. The Indians will receive in aggregate a large acreage of reserve lands free from any vexatious claim of the Province, such as the so-called 'reversionary interest' has been in the past. While it is true that in some districts it would have been more satisfactory if larger reserves could have been set aside

> for them, conditions peculiar to British Columbia rendered that almost impossible …

~~65.~~64. In the same briefing, Scott noted the need for compromise with British Columbia following what he characterized as "long negotiations" in order to protect the "future welfare of the British Columbia Indians".

~~66.~~65. The Respondent's approval of the report of the McKenna-McBride Commission, as modified by the Ditchburn-Clark review (with the additional acreage of 2,960 in the McKenna-McBride Commission's report ~~was~~ crossed out and described as "Disallowed") was formalized on July 19, 1924 by OIC PC 1265-1924.

Grazing Commonage

~~67.~~66. In his March 27, 1923 final report to Duncan Campbell Scott Ditchburn noted that:

> Major Clark … has recommended that a grazing commonage (not a reserve) for the joint use of the Shuswap and Lower Columbia Lake tribes be allowed by the Grazing Commissioner for the use of Indian stock only and free from all grazing fees.

~~68.~~67. Two weeks previously, on March 15, 1923, provincial Grazing Commissioner Thomas P. MacKenzie (the "Grazing Commissioner") had penned a memo to the "Indian Department" proposing "grazing allotments of Crown lands" to be set aside as "commons for the Indians". Included in the allotments proposed by the Grazing Commissioner were "[t]wo areas of 3000 and 2000 acres respectively" for the "Indians of Reservation No. 3 and Shuswap Indian Reservation", to be located "near reservations". The Grazing Commissioner noted in his memo that these allotments were being suggested "in lieu of areas proposed as new Reservations by Royal Indian Commission [sic]".

~~69.~~68. Ditchburn had anticipated that problems might arise with British Columbia's proposal to establish a grazing commonage. In February 1923 he had written to Scott:

> With regard to the additional grazing areas which I expect to get, I cannot say at the moment just what the Government of British Columbia will do though some hints already dropped lead me to believe that they will not be inclined to constitute the lands as Indian reserves. I will use the utmost [illegible] to have these so constituted and point out that it will be impossible to have any control over the same unless this is done.

~~70.~~69. Four years later, on June 7, 1927, the Grazing Commissioner wrote to Ditchburn in the latter's role as Indian Commissioner for British Columbia. In his letter, the Grazing Commissioner reiterated his intention to consider allotting grazing lands for the Shuswap Indian Band, as well as a range "along the east side of Upper Columbia Lake" as a grazing commonage for the "Indians of Reserve No. 3 east of Windermere Lake".

~~71.~~70. Ditchburn, as Indian Commissioner, responded promptly on June 30, 1927:

> … I beg to say that at the time of the settlement of the report of the Royal Commission of Indian Affairs it was fully understood from your Deputy Minister and yourself that in lieu of the reserve which had been recommended by the Royal Commission you would set aside a large grazing area for the use of the Indians, and I trust that you will not overlook this, as it is important that the Indians should feel assured that they will have plenty of room for the grazing of their stock.

~~72.~~71. The evidence adduced to date does not disclose what further steps – if any – were taken by the Respondent to press British Columbia to create the grazing commonage. ~~This is a new aspect of the First Nation's claim which was not included in the claim submitted to the Minister in 1999 nor that initiated before the Tribunal in 2013. For this reason, the Respondent may seek the Tribunal's consent to augment its pleading on the grazing commonage as additional facts become known.~~

VI. Relief (R. 42(f))

~~69.~~72. The Respondent ~~(~~denies ~~the~~ entitlement to~~of~~ the relief sought and seeks to have the claim dismissed in its entirety.

~~70.~~ 73. If the Respondent is liable, which is not admitted, then the Respondent asserts that British Columbia contributed to the acts or omissions and any losses arising therefrom, as set out in paragraph 20(1)(i) of the Act.

~~71.~~ 74. If the Respondent is liable, which is not admitted, then the Respondent asserts that the Tribunal shall deduct the value of the lands in IR 3 which Surveyor Skinner included in the reserve boundaries, as set out in paragraph 20(3) of the Act.

~~72.~~ 75. The Respondent pleads and relies on section 20 of the Act.

~~73.~~ 76. Such further relief as this Honourable Tribunal deems just.

VII. Communication (R. 42(g))

Respondent's address for service: Department of Justice
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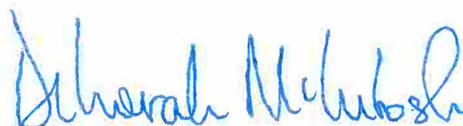

Signature of
☐ Respondent ☒ lawyer for Respondent
William F. Pentney,
Deputy Attorney General
Per: Deborah McIntosh
Department of Justice
British Columbia Regional Office