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SPECIFIC CLAIMS TRIBUNAL

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November 19, 2018

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Ottawa, ON | 106

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ʔAKISQ̓NUK FIRST NATION

Claimant

v.

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

Respondent

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

This 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 Originally Filed: March 14, 2013

Amended Version Filed: November 14, 2017

Further Amended Version Filed: June 5, 2018

Third Amended Version Filed: November 19, 2018

Guillaume Phaneuf

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(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, ʔAkisq̓nuk First Nation (the "First Nation"), previously known as the Columbia Lake Indian Band, confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, in the Province of British Columbia.

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

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal 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. The First Nation filed the Madias Tatley Pre-emption Land Alienation Specific Claim with the Department of Indian Affairs, Specific Claims Branch on or about April 19, 1999. The claim related to the breach of duty by Canada that resulted in the First Nation's loss of reserve land entitlement to a 3,040 acre parcel within the boundaries of Block 4596, Group 1, Kootenay District, (the "Madias Tatley Land").

4. In a letter dated February 21, 2011, the Department of Indian Affairs and Northern Development stated:

> …it is the decision of the Minister of the Department of Indian Affairs and Northern Development not to accept for negotiation the Madias Tatley Pre-emption Land Alienation Specific Claim on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

5. The provisions of paragraph 16(1)(a) of the *Specific Claims Tribunal Act* have been met as Canada informed the First Nation in writing of their refusal to accept

any obligation regarding the Madias Tatley Pre-emption Land Alienation Specific Claim.

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

6. For the purposes of the claim, the First Nation does not seek compensation in excess of $150 million.

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

7. The following are the grounds for the claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

> 14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> (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;
>
> …

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

8. This specific claim relates to the Crown breaching its fiduciary duty to the First Nation arising from two distinct transactions relating to the reserve creation of Kootenay Indian Reserve No. 3 set aside by the Crown for the use and benefit of the First Nation. The first breach of fiduciary duty by the Crown to the First Nation involved land allotted by Reserve Commissioner Peter O'Reilly in 1884, but not included in the Reserve due to a change in survey points by Crown Surveyor Skinner in 1886 from those originally intended by O'Reilly, resulting in the loss of 960 acres from the Reserve, described herein as the "Survey Land". The second

breach of fiduciary duty of the Crown to the First Nation involved the failure to enforce an order of the McKenna-McBride Commission that resulted in the exclusion of the 2,960 acres of land ordered by the McKenna-McBride Commission in 1915 to be added to the Reserve, described herein as the "Additional Land".

9. All of the subject lands of this Specific Claim have been plotted on a map prepared by Natural Resources Canada, dated June 3, 2014 (the "2014 Map").

10. Responsibility for "Indians, and Lands reserved for Indians" fell under federal jurisdiction, pursuant to s.91 (24) of the then *British North America Act,* 1867, 30 & 31 Vict, c 3. (the "*British North America Act*"). However, British Columbia assumed administrative control over most Crown lands from which reserve lands were to be created.

Terms of Union

11. In 1871, the Colony of British Columbia (the "Province") joined Confederation pursuant to the *British Columbia Terms of Union*, 1871, RSC 1985, App II, No. 10 (the "*Terms of Union*"). By Article 13 of the *Terms of Union,* Canada and the Province agreed that Canada would assume the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit." Article 13 specifically provided for the creation of Indian reserves.

12. By Article 13, Canada and the Province also agreed on a mechanism for the creation of reserves in the future, which was to embody "a policy as liberal as that hitherto pursued by the British Columbia Government", and British Columbia agreed to convey land to Canada for that purpose. On application by Canada, the Province would convey to Canada, in trust for the use and benefit of the Indians, tracts of land "of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose."

13. The reserve creation policy, "as liberal as that hitherto pursued", was in accordance with the *Royal Proclamation*, 1763, which provided in part:

> …. Nations or Tribes of Indians… should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them… as their Hunting Grounds.

14. Article 13 of the *Terms of Union* required that in the case of any "disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

Establishment of Joint Indian Reserve Commission

15. In 1875, Canada and the Province established the Joint Indian Reserve Commission (the "JIRC") to implement their obligations under Article 13 of the *Terms of the Union* including the establishment of a process to set aside reserve lands for the use and benefit of Indians as contemplated by Article 13.

16. The Memorandum attached to the Governor in Council's approval of the JIRC on November 10, 1875 provided in part:

> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly.
>
> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian Tribes speaking the same language) in British Columbia, and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.

> 3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia, no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. …

17. In 1877, Canada and the Province agreed that the JIRC should be dissolved and replaced by a sole Indian Reserve Commissioner.

18. In 1880, the Governor in Council approved the appointment of Peter O'Reilly as an Indian Reserve Commissioner.

Reserve Allotment

19. The Governor in Council passed Order in Council PC 1334 approving the appointment of Commissioner O'Reilly and described his duties as follows:

> … the responsible duties connected with which 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.

20. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate in a letter that included the following:

> In allotting Reserve Lands to each Band you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued [sic] towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the country frequented by it, as well as to the claims of the white settlers (if any)…

21. A.S. Farwell (Stipendiary Judge in Kootenay region), in his "Report on the Kootenay Indians" dated December 31, 1883 acknowledged the increase in the number of land pre-emptions in the Kootenay District:

> The Upper Kootenays have entirely abandoned their old custom of crossing the mountains in pursuit of game, the buffalo having left their former haunts on the eastern slope of the mountains. The Indians now depend for their sustenance chiefly on their cattle and the game, and fish they can secure on the Upper Kootenay and Upper Columbia Rivers. These Indians at present own about 400 head of cattle, and some 500 horses. The major part of their cattle have been wintered heretofore on the east side of the Columbia Lakes. This is a favourite grazing place of the Indians and they felt very sore at its being pre-empted, occupied and fenced in by white settlers. Up to last April, the only person claiming land in the neighbourhood of these lakes is a Mr. Baptiste Morigeau, who has built a house and trading store on Morigeau Creek. This creek runs in on the east side of the Lower Columbia Lake, about 3½ miles from its outlet. […]
>
> […] On the 19th April last, E.J. Johnston recorded 80 acres, adjoining Morigeau's claim. On the 2nd June, F.W. Aylmer recorded 320 acres on the right of the Columbia River, a few miles below the Columbia Lakes. On the 9th July last, F. P. Armstrong and D. Bellhouse recorded 320 acres and 80 acres respectively along the eastern shore of the Upper Lake. These last two records the Indians took on with particular disfavour, as they are located directly on their long-used and favorite cattle run.[…]These Indians have been anxiously awaiting, year after year, the arrival of the "Commissioner," and are particularly angry and disappointed at no action having been taken during the past season towards defining their reserves.

22. On August 6, 1884, Commissioner O'Reilly met with Chief Moyes and eight other members of the First Nation for the purpose of identifying an appropriate reserve allotment for the First Nation including grazing requirements, as they owned "500 cattle and 800 horses". Commissioner O'Reilly asked the Chief and others to show him the "best places" in the area because he was unfamiliar with the territory.

23. On August 9, 1884, after meeting with the First Nation, Commissioner O'Reilly rendered his Minute of Decision (the "Minute of Decision") for the allotment of lands which subsequently became Kootenay Indian Reserve No. 3, including a metes and bounds description of the allotted reserve lands as well as his sketch of his boundaries (the "Reserve"). The area of the Reserve was described as 8,320 acres. O'Reilly allotted the Reserve based on the habits, wants, and pursuits of the First Nation and to the land the First Nation traditionally used and occupied.

24. Commissioner O'Reilly noted, in 1884, that:

> … the habits of the Kootenay Indians have in the past been migratory, moving from place to place, at different seasons of the year as suited their pursuits and requirements… the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their cattle and horses in the most favoured spots.

25. By letter, dated December 10, 1884, Commissioner O'Reilly stated to the Chief Commissioner of Lands and Works ("CCLW"):

> That I have not overestimated the requirements of the Indians will be admitted by any disinterested person acquainted with the character of the country; and with the number of cattle owned by the Kootenays upon which they must in future depend in a large measure for food, the buffalo east of the mountains being now almost extinct…

26. In September 1885, the CCLW approved Commissioner O'Reilly's allotment of the Reserve for the First Nation.

Survey Deviation

27. In August 1886, Crown Surveyor Skinner surveyed the Reserve totaling 8,456 acres. Skinner's survey departed from the survey instructions contained in the Minute of Decision of Commissioner O'Reilly.

28. In a letter dated May 12, 1887, Crown Surveyor Skinner acknowledged his departure from the Minute of Decision:

> I have the honor to furnish you with the following report, and sketch of the two changes made by me in surveying the Kootenay Indian Reserve No.3 finding that the line between Stations 5 and 6 would run up the mountains and include some worthless land, I turned south at two hundred chains instead of turning at two hundred and twenty as directed in your instructions. From Station 8 to station 9 was given by you as two hundred chains, but finding that the distance would on running the south line across an Indian field, I extended the line twenty chains further south.

29. The land lost from the Reserve allotted by O'Reilly as a result of Surveyor Skinner's deviation from the Minute of Decision was from two parcels, totaling 960 acres, along the eastern boundary of the Reserve (the "Survey Land"). The Survey Land is defined in the 2014 Map, and is comprised of Area (a) of the 2014 Map depicting a 560 acre change in the eastern boundary of the 1884 O'Reilly allotment and Area (b) of the 2014 Map depicting a 400 acre change in the eastern boundary of the 1884 O'Reilly allotment.

30. In or about 1898, 1909 and 1910, six lots east of the Reserve were pre-empted by settlers, including lot no. 9245, sub-lot no. 123 of lot 4596, sub-lot no. 131A of lot 4596, sub-lot no. 131 of 4596, sub-lot no. 115 of lot 4596, and sub-lot no. 124 of lot 4596. As a result of these pre-emptions, certain lands in the Survey Lands, and to the east of the Survey Lands, were not available when the McKenna-McBride Commission was adjusting the acreage of the Reserve.

Establishment of the McKenna-McBride Commission

31. On September 24, 1912, in an attempt to "settle all differences" regarding reserves, Canada and the Province established the Royal Commission on Indian Affairs in British Columbia (the "McKenna-McBride Commission"). The preamble noted in part that:

> …it is desirable to settle all differences between the Government of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia: ...

32. The McKenna-McBride Commission was to review the previous allotments to determine whether the allotments exceeded or were insufficient to satisfy that "...reasonably required for the use of the Indians of that tribe or locality..." and make adjustments it considered necessary.

33. The McKenna-McBride Commission had the power to adjust the acreages of any reserve, including increasing the quantity of land where it was found to be insufficient (Articles 2(a) and 3). The Province was required to take all steps required to legally reserve any additional lands granted. Article 7 provided that:

> …the lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians.

34. The adjustments and additions ordered by the McKenna-McBride Commission would be executed in accordance with the "true purpose and intent" of the agreement to establish the McKenna-McBride Commission.

35. The McKenna-McBride Commission met with the First Nation in September 1914. Chief Arbel told the Commission that the "reserve was given to me by Mr. O'Reilly", and that the area provided for grazing was insufficient, and, as a result, the First Nation's animal stocks were decreasing.

36. On October 28, 1914, Indian Agent R.L.T. Galbraith for the Kootenay Agency provided evidence to the McKenna-McBride Commission that the federal

government made a mistake when surveying the Reserve and that “the boundary lines should have then been extended to the mountains…”.

37. On December 9, 1914, Galbraith submitted a map to the McKenna-McBride Commission as requested on which he marked out an area for additional reserve land for the First Nation.

38. In 1915 the Commissioners consulted with the First Nation. They were told of the need for more land, and that they grazed their stock on land outside of the reserve allotted by Commissioner O’Reilly in 1885. An addition of 2,960 acres was ordered. The additional land was described sufficiently to be shown on maps as a “new reserve”.

39. On March 25, 1915, the McKenna-McBride Commission ordered that an additional 3,040 acre parcel be added to the Reserve pursuant to the Minute of Decision. Four days later on March 29, 1915, the McKenna-McBride Commission rescinded that order, and replaced it with an order that 2,960 acres be added to the Reserve (the “Additional Land”). The boundaries of the Additional Land were precisely described by the McKenna-McBride Commission. The Additional Land is defined in the 2014 Map and is comprised of the March 29, 1915 recommendation of the McKenna-McBride Commission comprising 2,960 acres to the east of the Reserve, of which 160 acres overlaps Area (a) and 200 acres overlaps Area (b) of the Survey Land.

40. Commissioner O’Reilly, Judge Farwell, Father Leon Fouquet and Chief Arbel attested to the long time presence of the Kootenay Indians in the territory in which the Reserve, and the addition, were allotted.

41. On December 7, 1915, the Deputy Minister of Lands reported that the lands identified by Galbraith were vacant and available and that the request of the McKenna-McBride Commission for them had been noted on the “Maps of the

Department". The Deputy Minister said that a survey of the lands was required before they could be set aside for Indian reserve purposes. The final McKenna-McBride Report ordered the Additional Lands be added to the Reserve.

42. In a letter, dated February 7, 1917, Deputy Superintendent General of Indian Affairs Duncan Campbell Scott had written to Senator Hewitt Bostock urging the two governments to accept the McKenna-McBride Commission Report before its public release in order to avert the referral of a dispute to the Secretary of State for the Colonies:

> I think it is advisable that the Province and the Dominion should come to a reasonably speedy and harmonious decision on the Commission's report, otherwise the question would have to be referred to the Secretary of State for the Colonies under the provisions of Clause 13 of the Terms of Union.

43. By December 1, 1919, Canada signaled its support for the implementation of the McKenna-McBride Commission Report. However, the Province objected.

Ditchburn-Clark Review

44. In 1920, the federal and provincial governments established a joint federal-provincial review of the McKenna-McBride Commission's Report (the "Ditchburn-Clark Review") pursuant to the *Indian Affairs Settlement Act*, S.B.C. 1919, c. 32 and British Columbia *Indian Lands Settlement Act*, S.C. 1920, c. 51. The provincial representative, Major J. W. Clark, was the Provincial Superintendent of Soldier Settlements. Ditchburn, the federal representative, was the Federal Chief Inspector of Indian Affairs.

45. Through the Ditchburn-Clark Review of the McKenna-McBride Commission Report, the federal government confirmed that the First Nation reasonably required the 2,960 acres of the Additional Land to be added to the Reserve.

46. Major Clark had refused reserve additions in the Kootenay region. Ditchburn objected to the disallowance of the 2,960 acres of the Additional Land. Ditchburn

did not agree with Major Clark on the disallowance of the Additional Land and they subsequently filed separate reports.

47. Ditchburn reported the disagreement to his superior, Duncan C. Scott, Deputy Superintendent General of Indian Affairs.

48. On March 11, 1923, Ditchburn informed Scott that the additions in the Kootenays and Shuswap were refused by Major Clark. He considered this unjust. Estimates of the number of horses ranged up to 255, and cattle, 359. More grazing land was needed for the First Nation. He told Scott:

> …
> Personally I feel that the attitude taken by the Grazing Commissioner is putting the Government of British Columbia in a position of breaking faith with regard to the agreement of 1912.
> …
> In the grazing country this is important both in the interests of whites and Indians for it is needless for me to say that the Indians will not take kindly to having taken away from them meadow lands which they have always been using and see these given to white stock-raisers.
> …

49. On March 27, 1923, Ditchburn provided a final report to Scott noting his disagreement with Major Clark:

> Kootenay Agency
> …
> New Reserve No. 3A of 2960 acres for the Lower Columbia Lake Indians was disallowed as not reasonably required by the Indians and seriously militating against the white development. The proposed new reserve completely encircled Crown-granted lands.
> …
> The decisions with regard to these new reserves were taken by Major Clark on the recommendation of the Grazing Commissioner. Objection was taken by myself on the grounds that the additions were necessary for the reasonable requirements of the Indians and statistics were brought forward to bear out my argument. Major Clark, however, 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.
> …

Grazing Commonage

50. Ditchburn was prepared to accept Clark's disallowance of the allotment of the Additional Land on condition that a grazing commonage would be established for the Kootenay and Shuswap Indians, including the First Nation, as promised by Major Clark.

51. The grazing commonage was never created for the First Nation. The Crown did not press the Province to fulfil this promise of a grazing commonage for the First Nation.

Disallowance of the Additional Land

52. On July 19, 1924, the Governor in Council approved the amended McKenna-McBride Commission Report generally, which disallowed the additional 2,960 acreage for the First Nation.

53. The First Nation was not informed by the Crown that the Additional Land was disallowed.

54. In 1927, Duncan Campbell Scott testified before the House of Commons' Joint Special Committee inquiry into the claims of the Allied Indian Tribes of British Columbia. He tabled his "Report on the British Columbia Indian Question". When asked by a committee member whether reserve land had been selected for the Indians he testified, "They were selected with great care by them, as lands being occupied and used by the Indians to which they had aboriginal title".

55. The acreage added to the Reserve by the McKenna-McBride Commission was, like the land allotted by Commissioner O'Reilly, being used by the First Nation at the time of allotment.

56. The Additional Land was adjacent to the Reserve as previously allotted. The Kootenay Indians used and occupied the territory when the Commission allotted the addition to the Reserve. The description clearly defined a parcel of land within the territory in actual use by them. The interest of the First Nation in the additional land was cognizable.

VI. The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation

Source of Fiduciary Duty

57. This Specific Claim is based on the Crown's breach of its common law fiduciary duties and legal obligations to complete the reserve creation process relating to the Survey Land and Additional Land, to ensure that these lands were surveyed and set aside as an Indian reserve and protected as a reserve for the exclusive use and benefit of the First Nation. Article 13 of the *Terms of Union* obligated Canada to pursue a policy as liberal as that which existed in the Colony. Article 13 of the *Terms of Union* forms part of the historical circumstances of the fiduciary relationship between the Crown and the First Nation.

58. *Recognition* as an Aboriginal interest in land under the law and policy governing reserve creation is the defining feature of a cognizable Aboriginal interest for the purpose of identifying the fiduciary duties of Crown officials carrying out their functions within that process. A cognizable interest in respect of which the Crown owes *a sui generis* fiduciary duty is an acknowledged Aboriginal interest in land whose protection was provided for in legislation and policy, whether or not Crown officials took the appropriate action to secure this protection.

59. The honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal interest.

60. The honour of the Crown was engaged during the reserve creation process, which imposed a heavy obligation on the Crown to:

a. take a broad purposive approach to the interpretation of the promise; and
b. act diligently to fulfill the promise.

Fiduciary Duty during the Reserve Creation Process

61. Prior to the acquisition of a legal interest in land that is subject to the reserve creation process, the Crown's *sui generis* fiduciary duty is to act with respect to the interest of the Aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regards as the best interest of the beneficiaries.

62. During the reserve creation process, the Crown had fiduciary obligations of loyalty, good faith, full disclosure and ordinary prudence in the discharge of its mandate to act in the best interest of the First Nation.

63. The Crown had a fiduciary duty to diligently advance the interest of the First Nation in the Survey Land and Additional Land during the reserve creation process.

64. Diligence called for care in the identification of land to be reserved by the Crown for the use and benefit of the First Nation. It was accepted by the Crown that land would be set apart for the First Nation at its habitual and historic places, and would be sufficient in quantity and quality to provide for the reasonable needs of the First Nation.

65. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. The Crown did not act diligently during the reserve creation process between 1871 and 1925 to secure the First Nation's interest in the Additional Land or the Survey Land, and did not meet the standard of conduct required of a fiduciary.

Discretionary Control

66. Canada's fiduciary duty with respect to the reserve creation for the First Nation was triggered by Article 13 of the *Terms of Union* and section 91(24) of the *British North America Act* because Canada had assumed unilateral discretionary control of the reserve creation process for the First Nation as the exclusive intermediary with the Province in relation to its aboriginal interests.

67. During the reserve creation process, the First Nation was entirely dependent, vulnerable, and at the mercy of the Crown's discretion to advance the First Nation's interest and see the reserve creation process through to completion. Canada had the power to see the reserve creation process through to completion in relation to the Survey Land and Additional Land diligently and in the best interest of the First Nation.

68. The discretion of Canada was initially exercised by Commissioner O'Reilly to fix and determine a reserve for the First Nation.

69. Canada's fiduciary obligation arose as an exclusive intermediary with the Province for the purpose of reserve creation in relation to the First Nation's Aboriginal interests in land habitually and historically used and occupied by the First Nation. Canada's position as an exclusive intermediary conferred a degree of control that left the First Nation's cognizable Aboriginal land interest in the Survey Land and Additional Land vulnerable to the adverse exercise of Canada's discretion. Canada's fiduciary duty arose at the outset of the reserve creation process and continued during the exercise of its discretionary control until the reserve creation process was concluded.

70. The fact that the federal government could not unilaterally set aside reserve land without provincial cooperation does not diminish the standard of conduct required of the federal Crown.

71. In the context of the earliest stages of the reserve creation process in British Columbia, the essential requirement of the discretion or power that will suffice to attract a fiduciary obligation is that the power wielded by officials acting on behalf of the federal Crown have scope for the exercise of some discretion or power to affect the beneficiary's interests. Commissioner O'Reilly's scope of discretion to fix and determine a reserve for the First Nation which would affect its interest in the Survey Land and Additional Land attracted a fiduciary obligation on the Crown's part owed to the First Nation.

72. The evidence reveals the involvement of the Crown in every step taken in the process of the creation of reserves in British Columbia after confederation. Its involvement was in relation to the interest of the Indians being advanced by the creation of reserves. Prior usage of land was recognized as a factor in the exercise performed jointly with the Province to set apart land for reserves. Once land was set apart the Crown exercised discretion throughout the steps taken to achieve the object of Article 13. The best interest of First Nation, as a beneficiary, required the Crown to preserve the cognizable interest of the First Nation in the Survey Land and Additional Land as a reserve for the use and benefit of the First Nation.

Cognizable Interest

73. Regardless, in the present matter there is ample evidence of long time use and occupation of the region by the Ktunaxa Nation, referenced as the Kootenay Indians.

74. On August 9, 1884, once the Reserve was allotted by Commissioner O'Reilly, the First Nation's cognizable interest in the reserve lands crystallized, including the Survey Land, as a result of O'Reilly meeting with members of the First Nation. O'Reilly had identified the Reserve as land the First Nation had habitually and historically used for various purposes including stock raising and access to timber and had precisely described it by metes and bounds.

75. In September 1885, once the CCLW had accepted the allotment of the Reserve, the Reserve became a reserve within the meaning of the *Indian Act* or alternatively a provisional reserve administered in accordance with the *Indian Act.*

76. The Crown's fiduciary's obligation is owed in relation to the First Nation's cognizable interest. The First Nation's interests in the Survey Land and Additional Land satisfy the requirement of an independent legal interest capable of grounding a *sui generis* fiduciary duty.

77. Where the First Nation's interest is in land subject to the reserve creation process, the process need not have been finalized for the interest to be cognizable.

78. Constitutional obligations and statutes relating to the First Nation should be liberally construed and doubtful expressions resolved in the favour of the First Nation. If there was any doubt as to whether the Survey Land and Additional Land were reserve lands set aside for the use and benefit of the First Nation, the doubt should be resolved in favor of the First Nation.

79. The First Nation's interest in the Survey Land and Additional Land was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation.

80. The First Nation had an interest the Survey Land and Additional Land that was vulnerable to the exercise of federal discretion that resulted in pre-emptions and grants of fee simple title east of the Reserve.

81. The Survey Land and Additional Land ought to have been protected for the First Nation and, as a consequence of the Crown's failure to meet its responsibilities as a fiduciary, they were not.

82. The First Nation's collective Aboriginal interest in the land it had habitually and historically used and occupied at the time decisions about reserve creation were being made, though recognized in legislation and policy, was not created by executive or legislative action.

83. The First Nation's interest in the Survey Land and Additional Land was an interest in the land from which the First Nation had sustained itself, to which it had a tangible, practical and cultural connection and that formed part of its traditional territory.

84. The First Nation's use and occupation of the Survey Land and Additional Land had established a form of Aboriginal interest in land that would have been — and was — apparent as such to the officials charged with implementing reserve creation policy. The First Nation's interest was therefore sufficient for the exercise of discretion by federal officials to be subject to the Crown's fiduciary duty.

85. Although Canada's discretionary power was limited by the need for provincial cooperation in that Canada could not unilaterally create a reserve, a fiduciary obligation owed by Canada to the First Nation arose in the absence of complete or exclusive control, based on Canada's position as exclusive intermediary conferring a degree of control that left a cognizable Aboriginal land interest "vulnerable" to the adverse exercise of its discretion.

86. If the Crown had diligently carried out the reserve creation process for the First Nation, the Survey Land and Additional Land would have been included as part of the Reserve. Ordinary prudence required federal Crown officials to seek to have the Survey Land and Additional Land allotted as a reserve for the use and benefit of the First Nation, as otherwise the First Nation would be permanently deprived of its interest in the Survey Land and Additional Land.

Fiduciary and Statutory Duty after Reserve Creation

87. In 1884, once the Reserve was created, the content of the Crown's fiduciary duty expanded to include the protection and preservation of the First Nation's legal interest in the Survey Land from alienation.

88. The *Indian Act* provided that no reserve land shall be alienated until it has been surrendered to the Crown pursuant to the provisions of the *Indian Act*. The *Indian Act* provided which conditions would certify a valid surrender, and required the assenting of a majority of the members of the First Nation. The Crown was required to hold a surrender vote of the members of the First Nation in order to alienate the Survey Land and Additional Land. By not complying with the surrender requirements of the Indian Act, the Crown breached a legal obligation and its fiduciary duty to the First Nation.

The Survey Land and the Crown's Obligation to Correct the Error

89. The error in the survey of Crown Surveyor Skinner was known to the Crown.

90. The Crown had knowledge of the Survey Land error but at no time did it consider, let alone attempt, to fulfill its fiduciary and constitutional obligations to correct the obvious errors and to protect an order of the McKenna-McBride Commission made in favour of the First Nation. The Crown failed in this regard through among other things, its failure to refer the dispute to the Secretary of State for the Colonies, as mandated by Article 13 of the *Terms of Union.*

91. The survey deviation of Skinner relating to the Survey Land in 1886 grounds this specific claim as it was an error.

92. The survey error in 1886 was readily identifiable and could have been corrected by the Crown.

93. When a fiduciary makes a mistake, it has a duty to correct the error. Canada breached its fiduciary duty by failing to seek a correction of the survey error in relation to the Survey Land.

94. The Crown cannot have met its duty of ordinary diligence by doing nothing to protect the First Nation's interest in the Survey Land or Additional Land. No consideration was given to pursuing the remedy of referring the disagreement between Ditchburn and Clark over the Additional Land to the Secretary of State for the Colonies as provided for in Article 13 of the *Terms of Union.* Instead, the Crown abdicated its duty to the First Nation in favour of what may well have been an unnecessary political compromise with the Province.

Duty to Protect the Additional Land

95. The First Nation's cognizable interest in the Additional Land was crystalized on March 29, 1915 when the McKenna-McBride Commission issued its order to allot the Additional Land as a reserve for the use and benefit of the First Nation. The Additional Land became a provisional reserve on that date as the land was precisely described, the land was available, and the Province was consulted.

96. Canada had a fiduciary duty to protect the First Nation's cognizable interest in the Additional Land from alienation and the forsaking the interests of all others in favour of the First Nation's interest in the Additional Land.

97. The Crown's fiduciary duty was owed to the First Nation independently, and was not a fiduciary duty of a collective nature owed to all First Nations. The Crown could not, merely by invoking competing interests, shirk its fiduciary duty owed to the First Nation. The Crown was obliged to preserve and protect the legal interest of the First Nation in the Survey Land and the Additional Land. There was no need to balance the interests of other First Nations or non-Indigenous people. Canada should have referred the disagreement over the Additional Land to the

Secretary of State of the Colonies while proceeding to finalize the transfer of the reserves for other First Nations over which there was no disagreement.

98. The McKenna-McBride Commission took full account of all interests. The Crown had a private law duty to act on behalf of the First Nation to protect its legal interests in the Survey Land and Additional Land.

Duty to Refer Disagreement to the Secretary of State for the Colonies

99. The Province's refusal to accept the recommendations of the McKenna-McBride Commission constituted a disagreement between the new Province and Canada over the size of land to be set aside as reserve, within the meaning of Article 13 of the *Terms of Union*.

100. In the course of negotiations with the Province in determining the amount of Additional Land, despite continuous disagreement with the Province, Canada did not avail itself of the mandatory dispute resolution mechanism provided for in Article 13 of the *Terms of Union*.

101. Canada had a fiduciary duty to take steps to protect the First Nation's interest in the Additional Land and was bound by the provisions of Article 13 of the *Terms of Union* which required "in case of disagreement between the two Governments respecting the quantity of such tracts of lands to be granted, the matter shall be referred for the decision of the Secretary of State for the Colonies."

102. The Crown's conduct in capitulating to the Province's desire to disallow the Additional Land was not in the First Nation's best interests and was instead in favour of a political compromise. Canada had a fiduciary obligation to advocate on behalf of the First Nation to ensure their interests were protected, including referring the disagreement to the Secretary of State for the Colonies, as mandated by Article 13 of the *Terms of Union.*

103. Canada failed to disclose and consult with the First Nation with respect to the Survey Land error or the disallowance of the Additional Land.

104. Canada breached its fiduciary duty to the First Nation by failing to ensure that the Survey Land and Additional Land were protected and set aside as a reserve for the use and benefit of the First Nation.

105. The question before the Specific Claims Tribunal concerns the Crown's common law fiduciary duties to the First Nation. The Crown's officials were obliged to ensure that their actions, decisions and judgments that would affect the First Nation's interests met the ethical standards required of a fiduciary. Canada breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to complete the reserve creation process relating to the Survey Land and Additional Land. The Crown's duty required good faith and ordinary prudence to uphold its fiduciary duty to the First Nation. Federal officials acted with neither, resulting in a breach of fiduciary duty to the First Nation, which is at issue under this Specific Claim.

106. Failure to seek a correction constituted a breach of a legal obligation, defined in s. 14(1)(c) of the *Specific Claims Tribunal Act*.

Summary of Breaches

107. Without limiting the foregoing, the Crown acted dishonorably and breached its fiduciary and/or legal obligations to the First Nation:

a. when it failed to exercise ordinary prudence, loyalty and good faith in the discharge of its constitutional obligation to set aside reserve land for the First Nation;

b. when it failed to provide full disclosure to the First Nation during the reserve creation process;

c. when it failed to exercise ordinary diligence to protect the First Nation's cognizable interest in the Survey Land as allotted by Commissioner O'Reilly;

d. when it failed to correct an error or omission made by Crown Surveyor Skinner through his deviation from the Minutes of Decision to include the Survey Land as part of the Reserve;

e. when it failed to consult with the First Nation with respect to the Survey Land error;

f. when it failed to provide disclosure to the First Nation of the Survey Land error;

g. when it failed to complete the reserve creation process relating to the Survey Land and Additional Land;

h. when it failed to exercise ordinary diligence to protect the First Nation's cognizable interest in the Additional Land, ordered to be set aside as reserve lands by the McKenna-McBride Commission;

i. when it failed to protect the First Nation's tangible, practical and cultural interest in the Survey Land and Additional Land;

j. *simplicter*, when it failed to implement the recommendations and order of the McKenna-McBride Commission to include the Additional Land as part of the Reserve;

k. by failing to fully consult with or obtain the consent of the First Nation to ascertain the lands the First Nation wanted set aside as a reserve;

l. by failing to obtain a surrender vote from the First Nation as required by the *Indian Act*, before alienating the Survey Land and Additional Land;

m. when it failed to consult with the First Nation with respect to the disallowance of the Additional Land;

n. when it failed to take the constitutionally required step under Article 13 of the *Terms of the Union* of referring the Additional Land dispute to the Secretary of State for the Colonies;

~~o. when it failed to make arrangements to ensure a grazing commonage would be allotted for the First Nation;~~

p. ~~p.~~ o. when its officials failed to take steps to protect the First Nation's interest in the Survey Land and Additional land;

q. ~~q.~~ p. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to the First Nation; and

r. ~~r.~~ q. when it failed to act in the First Nation's best interest in exercising discretionary control over the specific Aboriginal interest of the First Nation in the Survey Land and the Additional Land.

VII. Relief Requested

108. The First Nation seeks:

a. An order from the Tribunal validating this specific claim of the First Nation in relation to the Survey Land and Additional Land under 14(1)(b) and (c) of the *Specific Claims Tribunal Act*;

b. Compensation for the loss of the Survey Land and Additional Land as reserve lands for the use and benefit of the First Nation;

c. Interest on compensation for loss of the Survey Land and Additional Land as reserve lands;

d. Costs of this specific claim; and

e. Such other relief or compensation as this Honourable Tribunal deems just.

Originally Dated the 13th day of March, 2013.

Amended Version Dated the 14th day of November, 2017.

Further Amended Version Dated this 5th day of June, 2018.

Third Amended Version Dated this 19th day of November, 2018.

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