SCT File No.: SCT- 7003 -13

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

ʔAKISQ̓NUK FIRST NATION

Claimant

v.

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

Respondent

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: September 18, 2013
Amended Version Filed: November 17, 2017
Further Amended Version Filed: March 2, 2018

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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 Elkhorn Ranch Specific Claim with the Department of Indian Affairs, Specific Claims Branch on or about February 3, 1994. The claim related to the breach of duty by Canada that resulted in the First Nation's loss of entitlement to Lot 108, a 320 acre parcel, otherwise known as the Elkhorn Ranch ("Elkhorn Ranch").

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

> …it is the decision of the Minister of the Department of Indian Affairs and Northern Development not to accept for negotiation the Elkhorn Ranch (Lot 108) 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 Elkhorn Ranch 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 specific 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;
>
> (d) an illegal lease or disposition by the Crown of reserve lands;
>
> …

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

8. This specific claim relates to the Crown breaching its fiduciary duty to the First Nation pertaining to Lot 108, otherwise known as Elkhorn Ranch, comprising 320 acres, which lies within the First Nation's traditional territory to the north of Columbia Lake Indian Reserve No. 3, otherwise known as Kootenay Indian Reserve No. 3, with a legal description of District Lot 108, Kootenay District (~~T~~the "Reserve").

9. 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.

Proclamation No. 15

10. On January 4, 1860 *Proclamation No. 15* was issued. Under *Proclamation No. 15*, Indian settlements were exempt from the lands in the Colony of British Columbia that were available for pre-emption. "Indian settlements" were to be identified based on habitual and historic use and occupation.

11. Elkhorn Ranch was an "Indian settlement" within the meaning of *Proclamation No. 15* and subsequent legislation prohibiting the acquisition of an Indian settlement.

12. The provincial legislation subsequently prohibited Indian settlements from being pre-empted through the enactment of *An Ordinance for regulating the acquisition of Land in British Columbia No. 27* assented to April 11, 1865, *An Ordinance to amend and consolidate the Laws affecting Crown Lands in British Columbia* (1870) 33 Viet. No. 133. On April 22, 1875, the federal crown approved the Province's post-confederation consolidation of the laws affecting Crown lands in the province through *An Act to amend and consolidate the Laws affecting Crown Lands in British Columbia* 38 Viet. No. 5 (the "*Land Act, 1875*"). The *Land Act, 1875* stipulated that a declaration be sworn by the pre-emptor that the land being pre-empted "is not an Indian Settlement, or any portion thereof..." This prohibition continued in *An Act to amend and Consolidate the Laws affecting Crown Lands*, c. 16, section 77 within Consolidated Statutes of B. C. 1888, Volume I, Chap. 66 (the "*Land Act, l884*"). Similar language continued in *the Land Act, 1888* and in the *Land Act,* 1908 where a person pre-empting land had to swear a statutory declaration that the unoccupied and unreserved Crown land was not part of an Indian settlement.

13. The legal effect of pre-emption legislation was to exclude named categories of land (including Indian settlements) from the availability for pre-emption. The pre-emption legislation could not achieve its objectives if steps were not taken to identify Indian settlements in consultation with the First Nation.

Terms of Union

14. 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.

15. 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". 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 had hitherto been the practice of the British Columbia Government to appropriate for that purpose."

16. 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.

Establishment of Joint Indian Reserve Commission

17. In 1876, 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.

18. 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…

19. On January 6, 1876, the Province passed an Order in Council that provided terms of reference for the Reserve Commissioners to assign reserves.

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

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

22. Commissioner O'Reilly remained Indian Reserve Commissioner from 1880 until his retirement in 1898, but took a leave of absence from his duties for at least seven months between April and October of 1883 due to poor health.

Reserve Allotment

23. 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.

24. 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).
> …
> The government considers if of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specifically careful not to disturb the Indians in possession of any villages, fur trading posts, settlements, clearing burial places and fishing stations occupied by them and to which they may be specially attached.
> …
> The claims to water privileges of the Bands whose Reserves require irrigation should be fully recognized by you and ample provision of water should be made to them.

25. On April 17, 1883, I.W. Powell, Indian Superintendent, wrote to the Superintendent of Indian Affairs emphasizing the urgency of establishing

reserves for the Ktunaxa people, including the First Nation. Powell's letter expressed concern about delaying reserve creation in these areas until the spring of 1884, since a Indian Reserve Commissioner would require a full season to complete the reserve allotment process in one or other area, effectively delaying reserve creation in the other area for "two or three years": Despite the urgency, reserve allotment did not occur. No alternative arrangements were made by the federal and provincial governments for reserve allotment during Commissioner O'Reilly's 1883 illness and absence.

26. The delay in establishing reserves for the First Nation effectively enabled the pre-emption of Elkhorn Ranch.

27. On December 31, 1883 A.S. Farwell (Stipendiary Judge in Kootenay region), provided a "Report on the Kootenay Indians" to the Chief Commissioner of Lands and Works ("CCLW") detailing the issue of white settlers pre-empting lands in the Columbia Lakes region and the land usage of the First Nation:

> …every white man I conversed with, without exception, forcibly impressed on me the fact that the Kootenay Indians, as a whole, were extremely dissatisfied with the unsettled state of their land affairs.
> …
> 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…

Elkhorn Ranch Pre-emption

28. On October 27, 1883, G. H. Johnston pre-empted 320 acres of land located south of Windermere Creek and east of Windermere Lake, which was historically

referred to as Upper Columbia Lake. This pre-emption occurred while Commissioner O'Reilly was on a leave of absence.

29. G.H. Johnston served as a justice of the peace in 1883 and was later appointed as Minister of Railways and Canals in 1885.

30. There is no record of G.H. Johnston swearing a declaration for the pre-emption of Elkhorn Ranch that the land being pre-empted was "not an Indian Settlement."

31. Johnston paid $320 for the pre-emption of Elkhorn Ranch in three installments – on November 8, 1884, November 8, 1885 and lastly on July 5, 1889.

32. On April 10, 1884, Commissioner O'Reilly wrote to the CCLW to suggest that no applications to pre-empt or purchase land in Ktunaxa territory should be granted, except subject to what was deemed necessary for the Indians.

33. Between 1885-1887, A.W. Vowell was an Indian Agent in the Kootenay District for the Department of Indian Affairs and had responsibilities to the First Nation.

34. On November 8, 1884, Vowell signed a Declaration evidencing that G.H. Johnston made his first installment of $80 for the pre-emption of Elkhorn Ranch.

35. On November 10, 1885, Vowell witnessed a Certificate of Improvement by G.H. Johnston for Elkhorn Ranch.

36. The Crown grant for Elkhorn Ranch was issued to Johnston on December 18, 1889.

37. The First Nation's interest in Elkhorn Ranch would have been protected from pre-emption had it not been for the significant delay on behalf of the Crown in establishing reserves for the First Nation and other Ktunaxa peoples.

Allotment of IR 3

38. On August 5, 1884, Commissioner O'Reilly noted the circumstances of the First Nation, as well as their preferences regarding land allotment.

39. 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. O'Reilly noted 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.

40. At all times material to the claim, Elkhorn Ranch was an important area for the First Nation. The First Nation occupied Elkhorn Ranch for residential, domestic, and agricultural purposes.

41. On August 7, 1884, Elkhorn Ranch was surveyed by F. W. Aylmer. The field notes and attached plan clearly show an "Indian Cabin" within the 320 acre parcel pre-empted by Johnston, as well as another "Indian Cabin" just south of Elkhorn Ranch. The survey, plan, and field notes reveal that in 1884, the area identified as Elkhorn Ranch was being used by the First Nation. The plan further shows the other "Indian Cabin" outside Elkhorn Ranch with a trail that leads to a fence located within Elkhorn Ranch. The presence of Indian cabins is clear evidence that there were Indian settlements on Elkhorn Ranch.

42. 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 area of the Reserve was described as 8,320 acres.

43. By letter, dated December 10, 1884, Commissioner O'Reilly stated to the 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…

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

45. In 1886, the Reserve was surveyed by Crown Surveyor Skinner. Both the survey and field notes of Skinner provide evidence that Elkhorn Ranch was used and occupied by the First Nation.

Establishment of the McKenna-McBride Commission

46. 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 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… and that the Commission's proposals "as a final adjustment of all matters relating to Indian Affairs in British Columbia."

47. The Commission met with the First Nation in September 1914. Chief Abell 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.

48. A member of the First Nation, Ignatius Eaglehead, testified before the Commission in reference to Elkhorn Ranch when asked about the cultivability of the Reserve:

> From the Windermere side right on the reserve line there is a good piece of land there that the Indians cultivate…. That is where I think it is good land…

49. Chief Abell of the First Nation referenced Elkhorn Ranch before the Commission in regards to water issues. His testimony is as follows:

> A. There are three places where we get our water from – two right here and the third is Windermere creek.
>
> Q. How do your take that water from Windermere Creek?
>
> A. From a ditch.
>
> Q. And do you get sufficient water, including the water you get from Windermere Creek or are you short of water?
>
> A. The water that runs from Windermere Creek there are two Indians farming there and when they come to divide the water they get a little of it, hardly enough to irrigate the place they want to irrigate. …

Access to Windermere Creek

50. On September 23, 1896, two Water Licenses to use water from Windermere Creek for domestic and irrigation purposes were granted to the First Nation.

51. The First Nation utilized water from Windermere Creek by means of a ditch through a number of fee simple properties, including Elkhorn Ranch, to provide water for use on the Reserve for domestic and agricultural purposes.

52. In 1950 the First Nation was denied access to Elkhorn Ranch for the purpose of maintaining the irrigation ditch from Windermere Creek to the Reserve.

53. The First Nation continues to be denied access to Elkhorn Ranch for the purpose of maintaining the irrigation ditch from Windermere Creek to the Reserve.

Experimental Farm

54. From 1924 to 1936, Elkhorn Ranch was owned by the Department of Agriculture that operated an "Experimental Farm" on Elkhorn Ranch. Canada held legal title to Elkhorn Ranch from 1924-1936 and Elkhorn Ranch was used for agricultural purposes.

Expectations of First Nation

55. On December 28, 1939, Chief Louie Abell of the First Nation wrote a letter to Indian Affairs Branch, Department of Mines and Resources, requesting a map of the Reserve and stating that the settlers were taking up the First Nation's land.

56. On March 8, 1943, Chief Michel wrote to Major Donald McKay, Indian Commissioner for the Province, asserting the First Nation's understanding that Elkhorn Ranch was part of the First Nation's reserve.

57. Oral history of the First Nation confirms that the First Nation habitually and historically used and occupied Elkhorn Ranch and the resources that it held. Oral history of the First Nation confirms that the First Nation always understood that based on its habitual and historical use and occupation of Elkhorn Ranch, that Elkhorn Ranch was to be included in the Reserve.

Reserve Commissioner O'Reilly

58. The First Nation's habitual and historical use and occupation of Elkhorn Ranch would have been evident to O'Reilly during the reserve creation process and would have been capable of being known or recognized by O'Reilly.

Taylor Plan

59. Aylmer's Field Notes, Skinner's Field Notes, and Commissioner O'Reilly's Sketch Plan of the Minutes of Decision for the Reserve, were plotted on a plan by D. B. Taylor C.L.S. at Energy Mines and Resources on September 24, 1991 (the "Taylor Plan").The Taylor Plan clearly indicates that the First Nation was using and occupying Elkhorn Ranch.

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

60. This Specific Claim is based on the Crown's breach of its common law fiduciary duties and legal obligation to complete the reserve creation process relating to Elkhorn Ranch, to ensure that Elkhorn Ranch was surveyed as an Indian reserve and protected for the exclusive use and benefit of the First Nation and to prevent alienation of Elkhorn Ranch except in accordance with statutory surrender provisions of the *Indian Act*. Article 13 of the *Terms of Union* obligated Canada to pursue a policy as liberal as that which existed in the Colony.

61. *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.

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

63. ~~62.~~ 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.

64. ~~63.~~ A failure of the Crown to act diligently to fulfil the purpose of a constitutional promise will constitute a breach of the honour of the Crown.

Pre-Reserve Fiduciary Duty and Reserve Creation

65. ~~64. Prior to the reserve creation, 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.~~ The circumstances in which a fiduciary obligation arises shape its content. The content of the Crown's *sui generis* fiduciary duty varies to take into account its broader public obligations. 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.

66. ~~65.~~ The Crown had a duty to diligently advance the interest of the First Nation in Elkhorn Ranch. Diligence was called for in the identification of lands to be reserved – it had to be in the habitual places, and of sufficient quality and quantity to provide for the needs of the First Nation.

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

68. ~~67.~~ As a fiduciary the Crown had obligations to preserve and protect the First Nation's interest in Elkhorn Ranch. The First Nation submits that Canada breached its fiduciary duty to the First Nation by failing to include Elkhorn Ranch in its reserve allotment.

69. ~~68.~~ The honour of the Crown was applicable in these circumstances. The fiduciary relationship is engaged as the outset of the reserve creation process. Article 13 of the *Terms of Union* obligated Canada to pursue a policy as liberal as that which existed in the Colony. Colonial policy was to protect Indian settlements.

70. ~~69.~~ The Crown had a duty to set aside reserve lands for the First Nation on a timely and diligent basis in advance of pre-emptions. Even though the First Nation complained of settlers pre-empting land, it took the JIRC a delay of 8 years to allot the Reserve.

71. ~~70.~~ The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. The Crown did not act diligently during the reserve creation process, and did not meet the standard of conduct required of a fiduciary between 1871 and 1925 to secure the First Nation's interest in Elkhorn Ranch.

Discretionary Control

72. ~~71.~~ 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.

73. ~~72.~~ 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 interests 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 Elkhorn Ranch diligently and in the best interest of the First Nation.

74. ~~73.~~ The discretion of Canada was initially exercised by Commissioner O'Reilly to fix and determine a reserve for the First Nation. Canada's fiduciary obligation arose as an exclusive intermediary with the Province in relation to the First Nation's Aboriginal interests in land habitually and historically used and occupied by the First Nation. Canada's position conferred a degree of control that left the First Nation's cognizable Aboriginal land interest in Elkhorn Ranch vulnerable to the adverse exercise of Canada's discretion.

75. 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.

76. 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 Elkhorn Ranch attracted a fiduciary obligation on the Crown's part owed to the First Nation.

Cognizable Interest

77. ~~74.~~ Canada was aware of the First Nation's cognizable interest in Elkhorn Ranch as early as August 6, 1884, when Commissioner O'Reilly met members of the First Nation for the purpose of identifying an appropriate reserve allotment, or at least as early as August 7, 1884, when Elkhorn Ranch was surveyed by Aylmer, and Aylmer recorded field notes and attached a plan clearly showing an "Indian

Cabin" within the 320 acre parcel pre-empted by G.H. Johnston which demonstrates that the First Nation had a cognizable interest in Elkhorn Ranch.

78. The Crown's fiduciary's obligation is owed in relation to the First Nation's cognizable interest. Interests in reserve land satisfy the requirement of an independent legal interest capable of grounding a *sui generis* fiduciary duty.

79. ~~75.~~ 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 Elkhorn Ranch was reserve land, which should have been set aside for the use and benefit of the First Nation, the doubt should be resolved in favor of the First Nation.

80. ~~76.~~ Elkhorn Ranch was clearly delineated and identifiable, and the cognizable interest was its historic and contemporary use and occupation as an Indian settlement by the First Nation, a land interest specifically contemplated by Article 13 of the *Terms of Union* and by the Crown instructions issued to Commissioner O'Reilly to implement that Article.

81. The First Nation had an interest in Elkhorn Ranch that was vulnerable to the exercise of federal discretion that improperly resulted in a grant of fee simple title overtaking the First Nation's independent legal entitlement to use and occupation of that land.

82. The First Nation's interest in Elkhorn Ranch was *recognized* by enactments and policies as an independent interest in land anchored in collective use and occupation.

83. The First Nation's interest in Elkhorn Ranch 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 Elkhorn Ranch 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. ~~77.~~ If the Crown had diligently carried out the reserve creation process for the First Nation, Elkhorn Ranch would have been included as part of the Reserve. Ordinary prudence required federal Crown officials to seek to have Elkhorn Ranch 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 Elkhorn Ranch.

Fiduciary Duty and Competing Interests

86. Commissioner O'Reilly ought not to have given Johnston's pre-emption interest the decisive weight he did. Either the First Nation was going to be deprived of a form of interest in the land at issue, or Johnston was.

87. The only competing interests for which Commissioner O'Reilly had to account were interests in the land that was the subject of the Crown's discretionary control and fiduciary duty, Elkhorn Ranch. These interests were, on the one hand, the First Nation's tangible, practical and cultural interest in Elkhorn Ranch, recognized under colonial and provincial law as protected, and, on the other, Johnston's interest in his unlawful pre-emption. The Crown was required to deny Johnston of his pre-emption claim in favour of making a decision to allot Elkhorn Ranch as a reserve for the First Nation.

Duty to Correct Error

88. ~~78.~~ 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 illegal pre-

emption of Elkhorn Ranch when it failed to add Elkhorn Ranch as a reserve once the Department of Agriculture owned Elkhorn Ranch between 1924-1936.

89. ~~79.~~ The failure to add Elkhorn Ranch as a reserve once the Department of Agriculture owned Elkhorn Ranch grounds the claim as it was an error.

90. ~~80.~~ The error or omission to add Elkhorn Ranch between 1924-1936 was readily identifiable and could have been corrected by the Crown.

91. ~~81.~~ The Crown cannot have met its duty of ordinary diligence by doing nothing to protect the First Nation's interest in Elkhorn Ranch. No consideration was given to add Elkhorn Ranch as reserve land once the Department of Agriculture owned Elkhorn Ranch in 1924.

Fiduciary Duty and Conflicts of Interest

92. ~~82.~~ In situations where a fiduciary faces a conflict of interest, the Crown bears the burden to prove that it did not benefit from its fiduciary powers.

93. ~~83.~~ The Crown was in a conflict of interest situation as it owed fiduciary duties to the First Nation while providing for the pre-emption of Crown lands by settlers.

94. ~~84.~~ While at the same time acting as Indian Agent for the Department of Indian Affairs with responsibilities to the First Nation, Indian Agent Vowell executed Declarations for the pre-emption of Elkhorn Ranch, facilitating the pre-emption of Elkhorn Ranch.

95. ~~85.~~ Vowell as an agent of the Crown, while in a conflict of interest, nevertheless facilitated the pre-emption of Elkhorn Ranch at a time when he was supposed to be representing the First Nation.

96. ~~86.~~ G.H. Johnston as a justice of the peace, was a representative of the Crown at the time he pre-empted Elkhorn Ranch, which placed him in a conflict of interest.

Duty to Preserve Riparian Rights

97. ~~87.~~ The Crown was aware of the First Nation's use of Elkhorn Ranch for water purposes as early as the testimony of Chief Abell to the McKenna-McBride Commission in September 1914.

98. ~~88.~~ The Crown's duty of diligence required it to preserve the riparian rights of the First Nation, protecting the First Nation's access to Windermere Creek for domestic and agricultural water uses. The Crown breached its duty by allowing Elkhorn Ranch to be pre-empted.

99. ~~89.~~ The Crown has continued to act dishonorably by denying the First Nation access to Elkhorn Ranch for the purpose of maintaining the irrigation ditch from Windermere Creek to the Reserve.

Pre-emption Legislation

100. ~~90.~~ By allowing Elkhorn Ranch to be pre-empted, the Crown breached its lawful obligation to the First Nation under colonial law and policy, including *Proclamation No. 15* and subsequent legislation including the *Land Act*, *1875*, to protect Elkhorn Ranch from alienation as Elkhorn Ranch was an Indian settlement.

101. ~~91.~~ The provincial legislation was clear that lands on which there were Indian settlements were not available for pre-emption. A person pre-empting land had to swear a statutory declaration that the unoccupied and unreserved Crown land was not part of an Indian settlement. In failing to consult with the First Nation and failing to obtain a ~~Form 5~~ declaration that Elkhorn Ranch was not part of an Indian settlement, the Crown contravened the provisions of the pre-emption legislation.

102. The duty of ordinary prudence required, at a minimum, that Crown officials, including Commissioner O'Reilly and Indian Agent Vowell, take steps to inquire into the extent of the First Nation's Indian settlement so that it could be protected as a reserve for the use and benefit of the First Nation. That Crown officials did not take even these most basic steps put the Crown in breach of the *sui generis* fiduciary obligation it owed to the First Nation in relation to Elkhorn Ranch.

103. Crown officials were obliged to ensure that their actions, decisions and judgments that would affect the First Nation's interest met the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples.

104. ~~92.~~ Canada failed to fulfil its statutory and fiduciary duties to the First Nation when it failed to prevent Elkhorn Ranch from being pre-empted and failed to notify the Province of the error and ensure that it was rectified. Any pre-emption of an Indian settlement was illegal as it violated the *Land Act, 1875*.

105. ~~93.~~ The Crown breached its statutory and fiduciary obligations to protect the First Nation's interests in allowing the alienation of the First Nation's settlements to private landholders and the Department of Agriculture and in failing to ensure that the lands in question were set aside as reserve lands for the First Nation.

106. ~~94.~~ The Crown had a duty to ensure that G.H. Johnston provided a ~~Form 5~~ declaration that the land in question "is not an Indian settlement or any portion thereof" as required by ~~section 24 of~~ the *Land Act, 1875*.

107. Crown officials, including Johnston himself, knew or ought to have known, that the pre-emption contravened the *Land Act*, *1875*. Ordinary prudence required federal Crown officials to seek enforcement of provincial protection of Indian settlements of the First Nation and to challenge the pre-emption of Johnston. The First Nation, as beneficiary, was entitled to expect the Crown to act with a

view to its best interest when exercising discretionary power to take steps to preserve its interest in Elkhorn Ranch.

108. Crown officials, such as Indian Agent Vowell with knowledge of the circumstances surrounding the Elkhorn Ranch pre-emption and the First Nation's situation, did nothing to challenge the pre-emption.

109. The inaction of Crown officials during the pre-emption of Elkhorn Ranch and the judgment Commissioner O'Reilly displayed when he eventually made a decision to allot a reserve to the First Nation fell short of fulfilling the Crown's fiduciary obligation.

110. The Crown breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to secure the First Nation's interest in Elkhorn Ranch and by improperly giving priority to Johnston's wrongful pre-emption. 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 at issue under this Specific Claim.

Summary of Breaches

111. ~~95.~~ 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 prudence, loyalty and good faith in the discharge of its mandate, and provide full disclosure to the First Nation during the reserve creation process;

b. when it failed to protect the First Nation's cognizable interest in Elkhorn Ranch from pre-emption and the forsaking the interests of all others in favour of the First Nation's interest in Lot 108;

c. by failing to seek enforcement of provincial protection for Elkhorn Ranch as an Indian Settlement;

d. when Crown officials, including Commissioner O'Reilly and Indian Agent Vowell, failed to take steps to inquire into the extent of the First Nation's Indian settlement on Elkhorn Ranch so that it could be protected as a reserve for the use and benefit of the First Nation;

e. ~~c.~~ when it failed to challenge the pre-emption of Elkhorn Ranch;

f. ~~d.~~ when it failed to complete the reserve creation process relating to Elkhorn Ranch;

g. ~~e.~~ when it failed to set aside reserve lands for the First Nation on a timely and diligent basis in advance of pre-emptions;

h. ~~f.~~ by failing to advise the provincial government not to allow pre-emptions on lands habitually and historically used and occupied by the First Nation as an "Indian settlement";

i. ~~g.~~ when it failed to ensure that G.H. Johnston provided a ~~Form 5~~ declaration that the land in question "is not an Indian settlement or any portion thereof" as required by section 24 of the *Land Act 1875*;

j. ~~h.~~ by placing the interests of settlers ahead of the interest of the First Nation during the reserve creation process;

k. ~~i.~~ by acting in a conflict of interest as Indian Agent Vowell was facilitating pre-emptions;

l. ~~j.~~ by failing to protect the First Nation's access to Windermere Creek for domestic and agricultural water uses;

m. ~~k.~~ when it failed to ensure that Elkhorn Ranch was protected as a reserve for the exclusive use and benefit of the First Nation;

n. when it failed to exercise its discretion to protect the First Nation's vulnerable interest in Elkhorn Ranch and prevent a grant of fee simple title overtaking the First Nation's independent legal entitlement to use and occupation of Elkhorn Ranch;

o. when it failed to protect the First Nation's tangible, practical and cultural interest in Elkhorn Ranch;

p. when it failed to reconcile fairly the First Nation's tangible, practical and cultural interest in Elkhorn Ranch with Johnston's interest in his unlawful pre-emption;

q. by the inaction of Crown officials during the pre-emption of Elkhorn Ranch and the judgment O'Reilly displayed when he eventually made a decision to allot a reserve to the First Nation;

r. when it failed to secure the First Nation's interest in Elkhorn Ranch and by improperly giving priority to Johnston's wrongful pre-emption;

s. ~~l.~~ 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; ~~and~~

t. ~~m.~~ by failing to correct its error or omission of not setting aside Elkhorn Ranch once it learned of its error or omission, particularly between 1924 and 1936 when it owned Elkhorn Ranch; and

u. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to the First Nation.

VII. Relief Requested

112. ~~96.~~ The First Nation seeks:

a. An order from the Tribunal validating the Specific claim of the First Nation in relation to 320 acre parcel known as Lot 108 or Elkhorn Ranch under 14(1)(b),(c) and (d) of the *Specific Claims Tribunal Act*;

b. Compensation for the loss of the 320 acre parcel, known as Lot 108 or Elkhorn Ranch, as reserve lands;

c. Interest on compensation for the loss of the 320 acre parcel, known as Lot 108 or Elkhorn Ranch, as reserve lands;

d. Compensation for loss of riparian rights to Windermere Creek;

e. Interest on compensation for loss of riparian rights to Windermere Creek;

f. Costs of this claim; and

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

Originally Dated the 18th day of September, 2013.

Amended Version Dated ~~this~~ the 17th day of November, 2017.

Further Amended Version Dated this 2nd day of March, 2018.

Signature of Solicitor

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