Tribunal File No.: SCT - 7002-25

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

June 30, 2025

Susie Thorsley

Ottawa, ON | 1

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

'NAMGIS FIRST NATION

Claimant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

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*, SC 2008, c 22, and the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119.

June 30, 2025

Date

Susie Thorsley

Registry Officer

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I. Claimant(s) (Subrule 41(a) of the *Rules*)

1. The Claimant, 'Namgis First Nation ("'Namgis"), confirms that it is a First Nation within the meaning of section 2 (a) of the *Specific Claims Tribunal Act*, SC 2008, c 22, in the Province of British Columbia.

II. Conditions Precedent (Subrule 41(c) of the *Rules*)

2. The following conditions precedent as set out in subsection 16(1) (d) of the *Specific Claims Tribunal Act*, SC 2008, c 22, have been fulfilled:

> (d) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

3. On September 17, 2014 'Namgis sent the 'Namgis McKenna-McBride Specific Claim (the "Claim") to the Specific Claims Branch. It was officially filed on March 18, 2015. On March 25, 2019, Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, notified 'Namgis in writing that the Claim was accepted for negotiation.

4. The Claim involved three applications for reserve land made by 'Namgis before the McKenna-McBride Commission – one described as Application No. 73 involving land surrounding the Nimpkish River and Nimpkish Lake ("Nimpkish Lake"), the second described as Application No. 76 for Ksuiladas, also known as the Plumper Island group ("Plumper"), and the third described as Application No. 77 for Kuldekduma, also known as the Pearse Islands ("Pearse").

5. On May 21, 2025 the Claim was officially split into two Specific Claims, one for Nimpkish Lake and the other for Pearse and Plumper.

6. Despite efforts by 'Namgis to reach a negotiated settlement in the six (6) years since Canada accepted the Claim for negotiation, including the provision of expert

appraisal and forestry reports from 'Namgis to Canada, the Nimpkish Lake Specific Claim has yet to be resolved and the parties are at an impasse. 'Namgis and Canada are continuing negotiations on the Pearse and Plumper Specific Claim.

III. Claim Limit (Paragraph 20(1)(b) of the *Act*)

7. The Claimant does not seek compensation in excess of $150 million.

IV. Grounds (Subsection 14(1) of the *Act*)

8. The following are the grounds for the Claim, as provided for in section 14 of the *Specific Claims Tribunal Act*, SC 2008, c 22:

> (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; and
>
> (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 (Subrule 41(e) of the *Rules*)

9. The McKenna McBride Commission on Indian Affairs for British Columbia (the "Commission") was established by Agreement dated September 24, 1912, between the Dominion and British Columbia governments. The purpose of the Agreement was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands…in the Province of British Columbia".

10. On October 25, 1913 Deputy Superintendent General of Indian Affairs Duncan C. Scott gave instructions to Indian Agents as follows:

> TO INDIAN AGENTS, -

These instructions are issued in brief and practical form as an aid to the efficient management of the agencies under the care of Indian Agents in Canada. For detailed instructions on particular points and for further information, application should be made to headquarters.

The officers of the Department are reminded of their responsibilities as guardians of the Indians entrusted to their immediate care. It is felt that the very nature of this relation should have the effect of calling forth an Agent's most conscientious endeavours.

While the duty of an Agent is first of all to protect the interests of the Indians under this charge, the rights of citizens should be respected and the courtesy which is due to the public should always be observed.

NA, RG-10, Vol. 11023, File 604

11. In a letter from Indian Agent Halliday of the Kwawkewith Agency ("Halliday") to J.G.H. Bergeron, Secretary of the Commission for British Columbia, Halliday stated, in relation to the 'Namgis reserves:

> "...It will be noticed that many of the reserves are very small and that the whole acreage of the Agency is very unevenly divided between the different tribes.."

1. Alert Bay — This reserve is situated on Cormorant Island on Alert Bay. There are three wharves here. The reserve compromises 46.25 acres and the village of the Nimkeesh Indian is here. It is also the headquarters of the Indian Agent. The land is fair but mostly heavily timbered.

2. Graveyard — On the waterfront at Alert Bay.

3. Cheslakee — This reserve is situated at the mouth of the Nimpkish River and distant about two miles from Alert Bay. It can be reached by launch. The area is 302.87 acres. It is useful as a fishing station but the soil is fair.

4. Arcewyee — This reserve of 41.3 acres is situated in a sharp bend of the Nimpkish River about 2.5 miles from its mouth and could be reached by canoe. It is heavily timbered excepting a narrow strip close to the river. Very little of it is of any use for agricultural purposes.

5. Otsawlas — This reserve of 53.25 acres is on another bend of the Nimpkish River near its source in Nimpkish Lake. There is a fishing village located on it where the winter fish are caught and cured. It is more useful for fishing purposes than agricultural land.

12. On June 2, 1914, the Commission met with 'Namgis at Alert Bay. At that time, 'Namgis presented seven applications for additional reserves to the Commissioners.

13. Of those seven, four were rejected on the grounds that the lands were already alienated. Of the remaining three, on the recommendation of the Indian Agent, William Halliday ("Agent Halliday") the Nimpkish Lake lands were not made reserve lands for the use and benefit of 'Namgis.

14. Chief Laguese's evidence before the Commission regarding the application for the Nimpkish River lands can be summarized as follows:

(a) There was an old Indian house there.

(b) It takes two days' poling up the river that empties into the lake to reach this area.

(c) It is an old village site of the Band which had not been permanently occupied for approximately fifty years.

(d) The land had been cleared by the Band.

(e) The Band wished to obtain the land for purposes of timber harvesting, hunting, farming, and gardening.

15. On June 14, 1916 the Commission issued its decision regarding the Nimpkish River lands stating:

> 73. A half mile on each side of Nimpkish river from Kla-anck to Wilkiamayi, 100 acres, two days poling up the river (Kla-anck River apparently same as Nimpkish)…
>
> DECISION OF COMMISSION: Not entertained as not reasonably required…

Report of the Royal Commission on Indian Affairs for the Province of British Columbia (Victoria: Acme Press, 1916)

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

16. 'Namgis submits that Canada, through Halliday, breached its fiduciary duty owed to it by:

(a) failing to recommend that the Nimpkish Lake lands be added to the 'Namgis reserve lands;

(b) failing to assist and prepare 'Namgis for the Commission hearings; and

(c) failing to accurately put forth 'Namgis position before the Commission.

Breach of Fiduciary Duty

17. The existence of a fiduciary relationship and concurrent obligations will be found when the following elements exist as stated in Wewaykum Indian Band v. Canada, [2002] 4 SCR 245 at paragraph 85 ("Wewaykum"):

There are two basic elements in the test for the existence of fiduciary obligations in the Crown-Aboriginal context:

(a) the identification of a cognizable Indian interest; and

(b) an undertaking of discretionary control by the Crown in relation to that interest in a manner that invokes reasonability "in the nature of a private law duty".

18. The existence of fiduciary obligations will be "imposed on the Crown …in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures" (Wewaykum at paragraph 81) and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" (Wewaykum at paragraph 85).

19. The judgment of Mr. Justice Binnie, speaking for the Court in Wewaykum, in the following paragraphs are important:

> [51] …While the Department of Indian Affairs treated the "reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the Constitution Act, 1867. It was not until the Judicial Committee of the Privy Council decision in St. Catherine's Milling and Lumber Co. v. The Queen (1988), 14 App. Cas. 46, that it was made clear that under s. 91(24) all the "Dominion had [was] a right to exercise legislative and administrative jurisdiction – while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province…"
>
> …
>
> [79] … All members of the Court accepted in Ross River that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (Sparrow) or existing reserves (Guerin). The fiduciary duty where it exists,

is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.

(B. Slattery, "Understanding Aboriginal Rights" (1987), 88 Can. Bar Rev. 727, at p. 753)

...

[89] In the present case the reserve-creation process dragged on from about 1878 to 1928, a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion.

...

[94] Insofar as the appellant bands contend for a broad application of a fiduciary duty at the stage of reserve creation in non-s. 35(1) lands (as distinguished from their other arguments concerning existing reserves and reserve disposition), it is necessary to determine what the imposition of a fiduciary duty adds at that stage to the remedies already available at public law. The answer, I think, is twofold. In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In Blueberry River McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs". See also D.W.M. Waters, Law of Trusts in Canada (2nd ed. 1984), at pp. 32-33; Fales v. Canada Permanent Trust Co., [1077] 2 S.C.R. 302, at p. 315. Secondly, and perhaps more importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies, about which more will be said below.

...

[96] When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting: Samson Indian Nation and Band v. Canada, [1995] 2 F.C. 762 (C.A.). As the Campbell River Band acknowledged in its factum, "[t]he Crown's position as fiduciary is necessarily unique" (para. 96). In resolving the dispute between Campbell River Band members and the non-Indian settlers named Nunns, for example, the Crown was not solely concerned with the band interest, nor should it have been. The Indians were "vulnerable" to the adverse exercise of the governments discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. As Dickson J. said in Guerin, supra, at p. 385:

It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship.

[97] Here, as in Ross River, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty 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 regarded as the best interest of the beneficiaries.

...

20. The following passages from the Federal Court of Appeal decision in the case of Her Majesty the Queen in right of Canada v. Kitselas First Nation et. al, 2014 FCA 150, are also applicable here:

> [43] Though a judicially enforceable fiduciary duty does not arise in every facet of the relationship between the Crown and aboriginal peoples, the courts have found a fiduciary duty in varied circumstances. Of particular

pertinence to these proceedings, in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 (*Ross River*) at para. 68, LeBel J. recognized that the reserve creation process presumptively engages the Crown's fiduciary duty:

> It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration that *sui generis* nature of native land rights.

...

[48] This is precisely the approach followed by the Judge in this case. Relying principally on the teachings of the Supreme Court of Canada in *Wewaykum*, the Judge found, at para. 111 of his Reasons, that the high degree of discretionary control assumed by the Crown over the lives of aboriginal peoples expressed in Article 13 of the *British Columbia Terms of Union* could, in appropriate circumstances, give rise to a fiduciary duty with respect to the provision or non-provision of reserve lands.

...

[51] In this case, the Judge appropriately had regard to the unique context of reserve creation history in British Columbia. Contrary to Ontario and most of Western Canada, reserve creation in British Columbia did not result from a treaty process, but rather from a unilateral undertaking of the Crown, notably set out in Article 13 of the *British Columbia Terms of Union* and in the various Crown instructions issued to implement that Article. As a result, there were no negotiations with aboriginal peoples to determine the parameters of the reserve allotment policy, and the actual allocation of land for reserve creation purposes was largely left to the discretion of Crown officials acting pursuant to the instructions they received.

[52] As the Judge found in this case, the instructions that governed the implementation of the unilateral Crown policy of reserve allocation in

> British Columbia clearly required the Crown officials responsible for the implementation of the policy to take into account and to have regard to the actual land uses of the various aboriginal nations for which the reserves were being created. This is notably reflected in the instructions given by the Department of Indian Affairs to Commissioner O'Reilly in 1880: "In allotting Reserve Lands [...] [y]ou 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 claims of the White settlers (if any)": Reasons at para 15. In essence, as noted in Commissioner Sproat's report of 1878, "[t]he first requirement is to leave the Indians in the old places to which they are attached": Reasons at para. 16.

Cognizable Indian Interest

21. There can be no issue in these circumstances of this Claim that there was clearly a cognizable Indian interest in the Nimpkish Lake lands given the testimony of Chief Laguese before the Commission.

Discretionary Control

22. 'Namgis relied completely on Halliday to protect and pursue its interests before the Commission. In recommending to the Commission that the Nimpkish Lake lands not be added to the 'Namgis reserve lands Agent Halliday failed in his duty to 'Namgis.

Honour of the Crown

23. At all times the honour of the Crown is at stake as is set forth Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73 at para. 16 ("Haida"). This is an overreaching obligation that "gives rise to different duties in different circumstances" (Haida at para. 18).

> [18] The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over

specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: Wewaykum... The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in Wewaykum, at par. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:...Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is sufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

24. This was further considered in Manitoba Métis Federation Inc. v. Canada (Attorney General), 2013 SCC 14 ("Metis") at para. 73:

73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": Haida Nation, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (Wewaykum, paras. 79 and 81; Haida Nation, at para. 18);

25. The Metis case was further discussed in the Specific Claims Tribunal Decision of Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada SCT-7004-11 at paragraph 178:

> [178] In Manitoba Metis Federation v. Canada, 2013 SCC 14, [2013] 1 SCR 623 [Manitoba Metis Federation], the Supreme Court of Canada expanded on the relationship between the honour of the Crown and fiduciary duty:
>
> > The honour of the Crown arises "from the Crown' assertion of sovereignty over an Aboriginal people and de facto control of land and resources that were formerly in the control of that people": Haida

Nation, supra, at para. 32. In Aboriginal law, the honour of the Crown goes back to the Royal Proclamation of 1763, which made reference to "the several Nations or Tribes of Indian, with whom We are connected, and who live under our Protection:" see Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate her:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> ...
>
> [180] The honour of the Crown is a practical and concrete concept. It gives rise to a fiduciary duty where the Crown assumes discretionary control over specific Aboriginal interests...

26. Canada did not uphold the honour of the Crown when it failed to support 'Namgis in its request to have the Nimpkish Lake lands be added to its reserves.

VII. RELIEF SOUGHT

27. 'Namgis seeks the following relief:

a. A determination that Canada breached its fiduciary and other legal obligations to 'Namgis;

b. Equitable compensation for Canada's breach of its honourable and fiduciary duties and legal obligations to 'Namgis including:

   i. Compensation for the land; and

   ii. Compensation for the timber

c. Costs to be awarded on a solicitor-client or substantial indemnity basis pursuant to the *Specific Claims Tribunal Rules of Practice and Procedure,* SOR/2011-119 section 110(2) in relation to the Specific Claim and this proceeding; and

d. Such other relief as this Honourable Tribunal deems just.

Dated this 27 TH day of June, 2025

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