

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

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SPECIFIC CLAIMS TRIBUNAL		
F I L E D	TRIBUNAL DES REVENdicATIONS PARTICULIÈRES	
	May 19, 2017	
	Guillaume Phaneuf	
Ottawa, ON		59

Claimant

v.

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

Respondent

FURTHER 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: January 29, 2014
Amended Filed: August 28, 2014
Further Amended Filed: September 29, 2014
Further Further Amended Filed: May 19, 2017

(Registry Officer)

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I. Claimant (R. 41(a))

1. The Claimant, ʔačqam, formerly known as the St. Mary's Indian (the "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 Band filed the Alienation of St. Eugene Mission Residential School Farm Lands with the Department of Indian Affairs, Specific Claims Branch. The claim related to breach of duty by Canada that resulted in the Band's loss of entitlement to Lots 1, 2, 3, and 1063, consisting of 627.75 acres, otherwise known as the St. Eugene Mission Residential School Farm Lands, ("Mission Farm Lands").
4. After the school closed in 1970 the federal government failed to purchase the "Mission Farm Lands for the benefit of the Band (note the Mission Farm Lands do not contain the lands taken for a provincial road, which lands originally formed part of the Mission Farm Lands). In 1976, the Order of the Oblates of Mary Immaculate sold the Mission Farm Lands to Ernest Pighin. The Mission Farm Lands were part of the school operations. The Band asserts that the federal government breached its legal obligation and fiduciary duty to them by not taking steps to set aside the Mission Farm Lands as a reserve and by allowing the Mission Farm Lands to be alienated to a third party upon the closure of the

school.

5. In a letter dated October 28, 2013, the Department of Indian and Northern Affairs stated:
...it is the decision of the Minister of the Aboriginal Affairs and Northern Development not to accept for negotiation the Alienation of St. Eugene Mission Residential School Farm Lands specific claim on the basis that there is no outstanding lawful obligation on the part of the Government of Canada.

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

6. For the purposes of the claim, the Band 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 ...

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

8. The Band is one of the First Nations of the Ktunaxa Nation. The Ktunaxa aboriginal people are also referred to in historic documents as the “Kootenay”. The Ktunaxa Nation have used and occupied lands adjacent to the Kootenay and Columbia Rivers, and the Arrow Lakes in British Columbia prior to European contact.
9. The Band had a large pre-contact camp at the confluence of Joseph Creek and the St. Mary’s River. The Band utilized horses for traditional activities and kept their horses in fields close to their camp. The Ktunaxa name for this area is “?Aqam”. The Mission Farm Lands and Lot 11558 are located within the area of ?Aqam. The Band habitually used and occupied ?Aqam.
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 (the “Colony”) that were available for pre-emption.
11. ?Aqam was an “Indian settlement” within the meaning of *Proclamation No. 15* and subsequent legislation prohibiting the acquisition of Indian settlements.
12. Lots 1, 2, 3, and 1063 otherwise known as the Mission Farm Lands, comprising 627.75 acres, lies adjacent to the Kootenay Indian Reserve No.1 and St. Mary’s Indian Reserve No. 1A.
13. On December 4, 1868, John Shaw pre-empted Lot 1, which consisted of 160 acres. The pre-emption was transferred to Leon Foquet, Roman Catholic Missionary on May 19, 1875. A Crown Grant for Lot 1 was issued to Leon Foquet on May 11, 1881.
14. The Colony joined Confederation pursuant to the *Terms of Union*, 1871, under which Canada assumed by Article 13 the “charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit.” Prior to 1871, the Mission Farm Lands were under the discretionary control of the Colony. Canada assumed

discretionary control over the Band's interest in the Mission Farm Lands by the Terms of Union as the exclusive intermediary with the Province in relation to their interests, and thus exercised discretionary control over the advancement of the Band's interests. Canada had the power to challenge any pre-emptions of the Mission Farm Lands and a duty to act diligently in the interest of the Band.

15. In the autumn of 1874, Reverend Father Léon Fouquet and Brother John Burns traveled to the Kootenays to set up a mission to educate Aboriginal people in the Kootenay area about the beliefs of the Catholic religion and to provide education and training. By October of that year, they had raised a two-storey log house on Lot 1, Kootenay District which Reverend Father Fouquet had acquired by transfer in 1875 from John Shaw, the local Justice of the Peace. Lot 1 was pre-empted by John Shaw in 1868.
16. For the recently deceased C.J.E. de Mazenod, Reverend Father Léon Fouquet and Brother John Burns named their endeavor "Mission de St. Eugene", which became known as the St. Eugene Mission. In June of 1875, Father Napoléon Grégoire arrived to help Father Léon M. Fouquet and Brother John Burns. The Mission was expanded through pre-emptions of lots 2, 3, 1063, and 11558 by Mission officials.
17. On January 6, 1876, the provincial government passed an Order in Council that provided terms of reference the Reserve Commissioners to assign reserves.
18. On March 24, 1877, Napoléon Grégoire pre-empted Lot 2, which consisted of 280 acres. A Crown Grant for Lot 2 was issued to Napoléon Grégoire on November 2, 1880.
19. On January 29, 1878, Brother John Burns homesteaded Lot 3, which consisted of 72 acres.
20. A Crown Grant for Lot 3 was issued to Brother John Burns on November 2, 1880.
21. On January 29, 1878, Brother John Burns homesteaded Lot 1063 which consisted of 208

acres. A Crown Grant for Lot 1063 was issued to Brother John Burns on April 22, 1896.

22. On August 9, 1880, O'Reilly was appointed Reserve Commissioner. Commissioner O'Reilly's mandate was, as indicated in Federal Order in Council 1344, to allot reserve lands after ascertaining "accurately the requirements of the Indian Bands" and he was instructed by the Deputy Superintendent General of Indian Affairs to "interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached"
23. Commissioner O'Reilly was the sole federal representative during the reserve creation process for the Band and was aware of the Band's cognizable interest in the Mission Farm Lands during the process to establish Kootenay Indian Reserve No. 1 in 1884 through the Mission's provision of service to members of the Band on the Mission Farm Lands.
24. On April 17, 1883, Powell, the Dominion Inspector of Indian Agents, wrote to the Superintendent of Indian Affairs emphasizing the urgency of establishing reserves for the Ktunaxa people, including the Band. Despite the urgency, reserve allotment did not occur until 1884.
25. On April 10, 1884, Powell wrote to William Smithe (the Chief Commissioner of Lands and Works) 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.
26. In 1884, Commissioner O'Reilly noted the factual circumstances of the Band, as well as their expectations regarding the allotment.
27. By a Minute of Decision, dated August 20, 1884, Commissioner O'Reilly allotted Kootenay Indian Reserve No. 1 to the Band, which did not include the Mission Farm Lands due to competing pre-emption claims of church officials.

28. In 1886, Vankoughnet, Deputy Superintended of Indian Affairs, provided a report to Prime Minister Sir John A. McDonald, in respect to Dr. Powell's report which indicated that there was a large Indian village on the Mission Farm Lands.
29. Lots 1, 2, 3, and 1063, totaling 760 acres, were transferred to the Oblates and title registered in the Land Registry in 1897. West of the Mission were Lots 494 and 1758 which were owned by the Sisters of Providence. Together, Lots 1, 2, 3, 1063, 494, and 1758 formed the St. Eugene Mission Property, which was later expanded with the addition of Lot 11558 in 1922.
30. In 1890, the Hon. E. Dewdney, Supt. General of Indian Affairs visited the St. Eugene Mission and recommended that an effort be made to scatter the Indians from the Indian village on the Mission Farm Lands to the reserves.
31. In 1887, Reverend Father Fouquet was replaced by another Oblate priest named Father Coccola. The "Indian Industrial School" was opened at the St. Eugene Mission (the "School") in 1890.
32. In 1898, the federal government, as represented by the Superintendent of Indian Affairs, acquired 33 1/3 acres of Lot 1. On or about 1910, the federal government funded and constructed an Indian residential school that formed part of the St. Eugene Mission, situated within the 33 1/3 acre parcel. The School was operated by the Oblates until 1970, when it was closed. Students from the Ktunaxa Nation, including the Band and from other aboriginal groups attended the School.
- 32.1 On May 22, 1914, Father Ernest Lambot of the St. Eugene Mission received a certificate of pre-emption for Lot 11558 (Pre-emption Record 1451), which consisted of 140 acres. On February 16, 1915, the Land Commissioner for the Cranbrook District cancelled Father Lambot's pre-emption for Lot 11558 for lack of occupation. On March 2, 1915, Father Lambot received a new pre-emption for Lot 11558 (Pre-emption Record 1536).

On February 27, 1919, Father Lambot received a Crown Grant for Lot 11558. On January 3, 1922, Father Lambot transferred Lot 11558 in fee simple to the Order of the Oblates of Mary Immaculate.

33. The area surrounding the St. Eugene's Church and the residential school became known as the St. Eugene's Mission and it became the area in which much activity took place. The Mission Farm Lands and Lot 11558 were utilized for farming purposes in support of the operations of the school, which was done by students of the school, Ktunaxa members who resided at the Mission and church officials. Members of the Ktunaxa Nation regularly attended both the Church and the School. Many families of the Band resided in tipi's and cabins on the grounds of the St. Eugene Mission on a year-round basis.
34. In the 1920's the Oblate Fathers had discussions with the federal government for the sale of lands that were occupied by the members of the Band and the Ktunaxa Nation.
35. Canada had discretionary control in respect to the Mission Farm Lands and Lot 11558 during operation of the School and closure of the School. Canada provided funding to the Oblates for the operation of the School and leasing of the Mission Farm Lands and Lot 11558. Canada worked closely with the Oblates for the closure of the School.
36. In 1925, the federal government purchased two parcels of land (25.05 acres and 1.91 acres) that were excepted out of Lot 1 from the Oblate Fathers for \$2,000. The federal government purchased these lands in order to ensure that the lands upon which "Indian houses" were not disposed of to a third party.
37. A memorandum, dated February 23, 1925, to the Superintendent General, Indian Affairs confirmed that the federal government was concerned about the potential alienation of lands that were occupied by the Band.
38. In 1951, the federal government set aside the 26.96 acres purchased in 1925 as reserve land for the following Bands: St. Mary's; Columbia Lake; Shuswap; Tobacco Plains;

Lower Kootenay; and the Arrow Lakes.

39. In anticipation of the closure of the School, the Order of Oblates of Mary Immaculate commissioned in 1969 an appraisal of District Lots 1 (except those lands excepted) 2, 3, 1063, and 11558. During this time, the, Order of Oblates of Mary Immaculate were making plans to lease the lots for agricultural purposes.
40. On November 20, 1969, the Regional Superintendent of Education, Indian Affairs, stated, “As far as the land is concerned, if it is on reserve land and came originally from the Indian people, in all probability it will be returned to them”. On December 2, 1969, the District Superintendent of Education, Indian Affairs, stated, “I should like to recommend that the land and buildings at St. Eugene’s be transferred to the St. Mary’s Band”.
41. On December 23, 1970, an official of the Department of Indian Affairs and Northern Development suggested that the Order of Oblates of Mary Immaculate “keep in mind” a Mr. Victor Pighin for the purchase of the lots as the “Pighin family ... are long associates of the Mission and Victor [Pighin] would very much like to buy the Mission property for one of his family”.
42. The School was closed in 1970 when government policy changed to encourage public education for Indian children.
43. In 1971, after the School closed the St. Mary’s, Columbia Lake, Shuswap and Lower Kootenay Bands, by separate Band Council Resolutions, requested that the Department of Indian Affairs “turn ... over” Lot 494, Lot 1758 and a portion of Lot 1. In 1974, the federal government added 320.71 acres, from parcels, described as L1758, L494 and Parcel A, Assigned A and Assigned B of Lot 1, to the St. Mary’s Indian Reserve No. 5A for the benefit of five Bands: St. Mary’s; Columbia Lake; Shuswap; Tobacco Plains; and Lower Kootenay.
44. In 1976, the Order of the Oblates of Mary Immaculate sold the remaining Mission Farm

lands and Lot 11558 totaling of 767.75 acres to Ernest Pighin. The lands sold are identified as District Lots 1 (except those lands excepted) 2, 3, 1063, and 11558.

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

45. By allowing the Mission Farm Lands to be pre-empted, the Colony breached its lawful obligation to the Band under colonial law and policy, including *Proclamation No. 15* and subsequent colonial legislation, to protect the Mission Farm Lands from alienation as the Mission Farm Lands were an Indian settlement. Canada inherited and remains responsible for this outstanding legal obligation of the Colony.
46. Canada's responsibility to protect the Band throughout its dealings stems from the structure of the *Canadian Constitution, the Constitution Act, 1867*. The Constitution divides the power to make laws between the Province and Canada, and assigns to Canada jurisdiction over Indians and lands reserved for Indians.
47. The *Constitution* and its division of power came to apply to British Columbia in 1871. On July 20, 1871, by Order of Her Majesty in Council known as the *Terms of Union*, the Colony of British Columbia joined the Dominion of Canada. Under Article 13 of the *Terms of Union* “assumed the charge of Indians” within British Columbia and “the trusteeship and management of the lands reserved for their use and benefit.”
48. Canada had discretionary control over the Band under the *Constitution* and the *Terms of Union*.
49. Based on colonial law and policy, including Proclamation No. 15 and subsequent colonial legislation, the Mission Farm Lands were lands that should have been “lands reserved” for the Indians within the meaning of Article 13 of the *Terms of Union*. By Article 13 Canada assumed a fiduciary duty to the Band in regards to the protection and management of

"lands reserved" for the Band, including the Mission Farm Lands. Canada breached its fiduciary duty to the Band by failing to ensure that the Mission Farm Lands were protected and managed for the Band's benefit.

50. As Crown title remained with the Province, Canada could not act on the "policy as liberal" unless there was a concomitant obligation on the Province to appropriate tracts of land as had been its practice. It had been the practice of the Colony to reserve Indian settlements out of the land available for pre-emption for the continued occupation of the Indians.
51. The honour of the Crown applies in the present 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. In the event of an unlawful pre-emption, measures were available to resume the land without compensation.
52. The Band interest was recognized in colonial policy, it was cognizable as it was land which they occupied and from which they, in close proximity to their dwelling places, sustained themselves. Their absence after confederation was due to ouster by settlers, contrary to colonial law. Their occupation and unlawful displacement was acknowledged by the federal officials assigned the responsibility of addressing the matter of reserve allotment under Article 13 of the *Terms of Union*. Although dispossessed, their interest remained cognizable.
53. The Crown, Canada, was the exclusive intermediary with the Province in relation to their interests, and thus exercised discretionary control over advancement of their interests.
54. The Crown owed, at a minimum, fiduciary duties of "...loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (*Wewaykum Indian Band v Canada*, 2002 SCC 79).

55. In *Williams Lake Indian Band v. HMTQ*, 2014 SCTC 3, the Tribunal found, at paragraph 314, that under Article 13 of the *Terms of Union* Canada had a duty to protect Indian settlements:

The honour of the Crown applies in the present circumstances. The fiduciary relationship is engaged at the outset of the reserve creation process (*Ross River, supra; Wewaykum, supra*). 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.

...

56. Further at paragraph 320 the Tribunal stated that Canada assumed the undertakings of the Colony in respect to the creation of an Indian reserve:

Canada had, by the terms of Article 13 of the *Terms of Union*, undertaken, on the Indians behalf to adopt a policy in relation to reserves as liberal as that of the former colony. In doing so it assumed, with limits, the unilateral undertaking previously made by the colony. This had constitutional effect (*R v Jack*, [1980] 1 SCR 294, 100 DLR (3d) 193), and thus falls squarely within the category of obligations found in *Manitoba Metis Federation* to invoke the honour of the Crown and establish fiduciary obligations. Unlike the former colony, Canada lacked the power to unilaterally allot a reserve. It did, however, have the ability to make the policy effective by challenging the pre-emptions, and a duty to act diligently in the interest of the Williams Lake Indians.

57. The Band submits that Article 13 of the *Terms of Union*, 1871 defined federal powers with respect to Indians and Indian lands, and imposed an obligation on the federal government to continue to implement the elements of the Colony's reserve policy. While the federal government was not obligated to pursue the exact same policy, it was obliged to pursue a policy "as liberal." The Band submits that pursuing a policy "as liberal" as that pursued by the Colony required recognition by the federal government of the Indians' interest in their settlement lands and ensuring that such settlement lands were protected from non-Indian settlement, including pre-emptions.

58. The federal government's commitment to continuing the Colony's reserve policy, as

captured in article 13 of the Terms of Union was reflected in the mandate given to Commissioner O'Reilly by the Deputy Superintendent General of Indian Affairs.

59. O'Reilly was instructed to take guidance from the liberal policy embodied in the *Terms of Union*, and as set out in the 1876 agreement establishing the JIRC (the "1876 Agreement"):

In allotting Reserve Lands, 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 toward 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).

60. O'Reilly was also directed to Sproat's 1878 progress report, which said, in part:

The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during the last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.

61. In *Canada v. Kitselas First Nation*, 2014 FCA 150 at paragraph 52 the Court confirms Commissioner O'Reilly's instructions:

"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.

62. In *Kitselas*, at paragraph 17, the Court found that Commissioner O'Reilly had discretion and power to allot reserve lands:

... In the Judge's view, "Commissioner O'Reilly was the vehicle by which federal discretion would be exercised over the establishment of reserves": Reasons at para. 200.


63. The Band had no power to obtain land in any other way and relied on Commissioner O'Reilly to protect its interests as he was the exclusive intermediary to deal with the governments on behalf of the Band. The Band was completely at Commissioner O'Reilly's mercy and vulnerable. Commissioner O'Reilly clearly owed a fiduciary duty to the Band Nation and failed to challenge the pre-emptions of the Mission Farm Lands.
64. Canada was aware of the "cognizable Indian interest" in the Mission Farm Lands and Lot 11558 from O'Reilly's meeting with the Band in 1884, during the operation of the Mission School and process to close the Mission School, thus invoking a fiduciary relationship similar to the *Canada v. Kitselas First Nation*, 2014 FCA 150, case. The case will be relied upon for the appeal before the Tribunal.
65. Canada had knowledge of the Band's cognizable interest and use of the Mission Farm Lands and Lot 11558.
66. Canada had a fiduciary duty to act in the best interest of the Band, with loyalty and good faith. As a fiduciary the Crown had obligations to preserve and protect the Band's interest in the Mission Farm Lands and Lot 11558. The First Nation submits that Canada breached its fiduciary duty to the Band by failing to include the Mission Farm Lands and Lot 11558 in their reserve allotment.
67. The Crown breached its common law fiduciary duty and legal obligation by failing to:

- a. challenge the pre-emptions of the Mission Farm Lands;
- b. complete the reserve creation process relating to the Mission Farm Lands and Lot 11558;
- c. ensure that the Mission Farm Lands and Lot 11558 were surveyed as an Indian reserve and protected for the exclusive use and benefit of the Band; and
- d. acquire the Mission Farm Lands and Lot 11558 as a reserve for the Band during the operations of the school and when the school closed in 1970.

VII. Relief Sought

68. The Band seeks compensation from Canada for:
 - a. The loss of the Mission Farm Lands and Lot 11558;
 - b. Interest; and
 - c. Such other damages or compensation as this Honourable Tribunal deems just.

Dated: May 19, 2017



Signature of Solicitor

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