Further Amended Response filed June 19, 2017
Amended Response filed September 29, 2014
Original Response filed March 20, 2014

SCT File No.: SCT – 7007 – 13

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

?AQ'AM~~St. Mary's Indian Band~~

Claimant

v.

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

Respondent

FURTHER AMENDED RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

TO: ?aq'am~~St. Mary's Indian Band~~
As represented by Darwin Hanna of
Callison & Hanna, Barristers & Solicitors
2784 Alamein Avenue
Vancouver, BC V6L 1S2
Email: darwin@chlaw.ca

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

1. The ?aq'am ("Band"), formerly known as the St. Mary's Indian Band ~~("Band")~~, submitted a claim to the Minister of Indian Affairs and Northern Development Canada ("Minister") dated November 12, 2009 ("Specific Claim").

2. The Specific Claim concerned 19th century pre-emptions and the 1976 sale of 627.75 acres of land (portions of Kootenay District Lots 1, 2, 3 and 1063), used at times for farming to support the St. Eugene Mission and Residential School ("Mission Farm Lands"). The Band alleged breaches of legal and fiduciary duty on the part of the Queen in Right of Canada ("Crown") to set aside the Mission Farm Lands as reserve lands for the Band.

3. By letter dated October 28, 2013, the Minister notified the Band of the Minister's decision not to accept the Specific Claim for negotiation on the basis that the Specific Claim did not disclose an outstanding legal obligation on behalf of the Crown in relation to the Mission Farm Lands.

II. Validity (R. 42(b))

4. The Crown denies the validity of the claims based on all grounds in the Further Further Amended Declaration of Claim filed May 19, 2017 ("Further Further Amended Declaration") and, in particular, denies the validity of the claims in paragraphs 7, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68(a).

III. Admissions, Denials or No Knowledge (Rule 42(d))

5. The Crown admits the facts in the Further Further Amended Declaration, paragraphs 1, 2, 3, 5, 13, 31, 40.

6. The Crown has no knowledge of the facts set out in the Further Further Amended Declaration, paragraphs 8, 9, 11, 26, 29, 30, 33.

7. The Crown denies the facts set out in the Further Further Amended Declaration, paragraphs 4 and 41.

8. In reply to the Further Further Amended Declaration, paragraph 10, the Crown admits that on January 4, 1860, James Douglas, Governor of the Colony of British Columbia, issued *Proclamation No. 15,* excluding "the site of an existent or proposed town, auriferous land … or an Indian reserve or settlement" from the lands available for pre-emption.

9. In reply to the Further Further Amended Declaration, paragraph 12, the Crown admits that the Mission Farm Lands are comprised of portions of Lots 1, 2, 3 and 1063, totaling 627.75 acres in area. The Crown denies that the Mission Farm Lands are adjacent to Kootenay Indian Reserve No. 1 and admits that a portion of Lot 1 is adjacent to St. Mary's Indian Reserve No. 1A.

10. In reply to the Further Further Amended Declaration, paragraph 14, the Crown admits that British Columbia joined Confederation in 1871 and the Dominion Government assumed "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit" pursuant to Article 13 of the *Terms of Union*, and denies the other facts in paragraph 14.

11. In reply to the Further Further Amended Declaration, paragraph 15, the Crown has no knowledge of whether John Shaw was a local Justice of the Peace and admits the other facts in paragraph 15.

12. In reply to the Further Further Amended Declaration, paragraph 16, the Crown has no knowledge of when Father Napoleon Gregoire arrived at the St. Eugene Mission or whether he helped Father Leon M. Fouquet and Father John Burns and admits the other facts in paragraph 16.

13. In reply to the Further Further Amended Declaration, paragraph 17, the Crown admits that, following British Columbia's entry into Confederation in 1871, pursuant to Article 13 of the *Terms of Union,* Indian reserve commissions were established to allot reserves in British Columbia. The first Joint Indian Reserve Commission was established in 1876.

14. In reply to the Further Further Amended Declaration, paragraph 18, the Crown admits that the Province of British Columbia ("Province") issued a Certificate of Record of Unsurveyed Land to Father Napoleon Gregoire on March 24, 1877 for Lot 2, 320 acres in area, and that Lot 2 was surveyed July 19, 1877, 280 acres in area. The Crown has no knowledge of when Father Gregoire "pre-empted" Lot 2 and if the Province issued a Crown Grant to Father Gregoire for Lot 2.

15. In reply to the Further Further Amended Declaration, paragraphs 19 and 20, the Crown admits that the Province issued a Certificate of Record of Unsurveyed Land to Father John Burns on January 29, 1878 for Lot 3, 72 acres in area. The Crown has no knowledge of when Father Burns "homesteaded" Lot 3 and if the Province issued a Crown Grant to Father John Burns for Lot 3.

16. In reply to the Further Further Amended Declaration, paragraph 21, the Crown admits that the Province issued a Certificate of Pre-emption Record to Father John Burns on September 13, 1890 for Lot 1063, 208 acres in area, and that the Province issued a Crown Grant for Lot 1063 to Father John Burns on April 22, 1896. The Crown has no knowledge of when Father Burns "homesteaded" Lot 1063.

17. In reply to the Further Further Amended Declaration, paragraph 22, the Crown denies that Commissioner O'Reilly was appointed August 9, 1880. The Crown admits that Peter O'Reilly was appointed Indian Reserve Commissioner on July 19, 1880 by Dominion OIC 1334, which described the duties of the Commissioner as "consist[ing] 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". The Crown further

admits that on August 9, 1880 an unnamed official of the Department of Indian Affairs drafted instructions to Commissioner O'Reilly on the process for allotting reserves.~~,~~ Those instructions provided that, in allotting reserve lands, Commissioner O'Reilly should have "special regard" not just to the interests of the bands, but to the claims of "white settlers" as well. The instructions further provided, among other things, that Commissioner O'Reilly was to be careful not to disturb the Indians in the possession of any "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached".

18. In reply to the Further Further Amended Declaration, paragraph 23, the Crown admits that Commissioner O'Reilly was appointed Indian Reserve Commissioner on July 19, 1880 and remained reserve commissioner until his retirement in 1898. The Crown denies the other facts in paragraph 23.

19. In reply to the Further Further Amended Declaration, paragraph 24, the Crown admits that on April 17, 1883, I.W. Powell, Indian Superintendent for British Columbia, wrote to the Superintendent General of Indian Affairs regarding the urgency of setting aside lands in Kootenay. The Crown further admits that Indian Reserves 1, 2 and 3 were allotted for the Upper Kootenay Indians on August 20, 1884. The Crown has no knowledge of the relationship, if any, between "the Ktunaxa people" and the Upper Kootenay Indians and denies the other facts in paragraph 24.

20. In reply to the Further Further Amended Declaration, paragraph 25, the Crown admits that on April 10, 1884, a representative of the Indian Reserve Commission wrote to the Chief Commissioner of Lands and Works to suggest that no further applications to pre-empt or purchase land in the Kootenay District be granted, except subject to what was deemed necessary for the Indians. The Crown has no knowledge of the identity of the author of the letter and no knowledge of the relationship, if any, between "Ktunaxa territory" and the Kootenay District.

21. In reply to the Further Further Amended Declaration, paragraph 27, the Crown admits that Commissioner O'Reilly allotted Kootenay Indian Reserve No. 1 to the Band.

The Crown denies that Kootenay Indian Reserve No. 1 did not include the Mission Farm Lands due to competing pre-emption claims of church officials.

22. In reply to the Further Further Amended Declaration, paragraph 28, the Crown admits that in 1886, Vankoughnet, Deputy Superintendent General Indian Affairs reported to the Right Honorable Sir John Macdonald, Superintendent General Indian Affairs regarding a report received from Superintendent Powell. Powell reported "At the Mission Ranch and in the land belonging to it is the Indian village consisting of forty or fifty log huts. The population of the village is about 200."

23. In reply to the Further Further Amended Declaration, paragraph 32, the Crown has no knowledge of the relationship, if any, between Mission School students and the "Ktunaxa Nation". The Crown admits the other facts in paragraph 32.

23.1 In reply to the Further Further Amended Declaration of Claim, paragraph 32.1, the Crown denies that on January 3, 1922, Father Lambot transferred Lot 11558 in fee simple to the Order of the Oblates of Mary Immaculate. The Crown admits that on January 5, 1922, the Certificate of Indefeasible Title No. 11628 transferred land described as Lot 11558 to Certificate of Indefeasible Title No. 11629. The Crown admits the remainder of the facts in this paragraph. The February 16, 1915 letter from Land Commissioner Wallinger to H. Cathcart, Superintendent of Inspections Branch, confirmed that Wallinger had given Father Lambot the privilege of re-pre-empting Lot 11558 as per Superintendent Cathcart's instructions in a letter dated February 5, 1915.

24. In reply to the Further Further Amended Declaration, paragraph 34, the Crown admits that on January 26, 1925, W.E. Ditchburn wrote to Duncan C. Scott, Deputy Superintendent General of Indian Affairs ("DGSIA"), regarding the acquisition of three small parcels of land adjacent to the Kootenay Residential School from the Order of the Oblates of Mary Immaculate ("Oblate Fathers"). The Crown has no knowledge of any 1920's discussions between the Oblate Fathers and the federal

government for the sale of lands, if the lands were occupied by the Band and the relationship, if any, between occupiers of the land and the Ktunaxa Nation.

25. In reply to the Further Further Amended Declaration, paragraph 35, the Crown denies that it had discretionary control over the Mission Farm Lands and Lot 11558 during the operation of the School and closure of the School. The Crown admits that it provided funding to the Oblates for the operation of the School and worked closely with the Oblates for the closure of the School and denies that the Crown provided funding to the Oblates for the leasing of the Mission Farm Lands and Lot 11558.

26. In reply to the Further Further Amended Declaration, paragraph 36, the Crown denies the facts in the first sentence and has no knowledge of the facts in the second sentence in paragraph 27. The Crown admits that the federal government purchased 25.05 acres of land from the Oblate Fathers.

27. In reply to the Further Further Amended Declaration, paragraph 37, the Crown denies the facts in paragraph 37. The Crown admits the existence of a memorandum dated February 23, 1925 from the Deputy Superintendent General of Indian Affairs to the Honourable Charles Stewart, reiterating concerns first expressed by W.E. Ditchburn, Indian Commissioner for British Columbia, about disposition of 25 acres upon which a number of "Indian houses" were located.

28. In reply to the Further Further Amended Declaration, paragraph 38, the Crown denies that 26.96 acres were set aside and admits that, by Dominion OIC PC 1951-4886, 25.05 acres of land were set aside on September 18, 1951 as St. Mary's Indian Reserve No. 1A for the benefit of the Lower Kootenay, Kinbasket, St. Mary's, Tobacco Plains, Lower Columbia Lake and Arrow Lake Bands.

29. In reply to the Further Further Amended Declaration, paragraph 39, the Crown admits the first sentence and has no knowledge of the last sentence in paragraph 39.

30. In reply to the Further Further Amended Declaration, paragraph 42, the Crown admits that the School closed in 1970 and has no knowledge of the other facts in paragraph 42.

31. In reply to the Further Further Amended Declaration, paragraph 43, the Crown denies that the addition of 320.7 acres was to St. Mary's Indian Reserve No. 5A; admits that the addition of 320.7 acres was to St. Mary's Indian Reserve No. 1A; and admits the other facts in paragraph 43.

32. In reply to the Further Further Amended Declaration, paragraph 44, the Crown admits ~~the facts in the first sentence and admits~~ that in 1976 Lot 11558 was conveyed to Ernest Pighin along with portions of Lots 1, 2, 3 and 1063. The Crown has no knowledge of the remaining facts in paragraph 44.

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

The allotment of reserves generally in British Columbia

33. Dominion Order in Council 1334, which appointed Commissioner O'Reilly as Indian Reserve Commissioner, described the duties of the Commissioner as "consist[ing] 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".

34. Commissioner O'Reilly's 1880 terms of appointment included that he was to act at his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works and the federal Indian Superintendent for British Columbia "as to the particular places to be visited and the reserves to be established". Commissioner O'Reilly's reserve allotments would be subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, were to be referred to the Lieutenant Governor.

35. In August 1880, at the time of his appointment, an unnamed official of the Department of Indian Affairs in Ottawa instructed Commissioner O'Reilly regarding

the discharge of his mandate. Those instructions provided that, in allotting reserve lands, Commissioner O'Reilly should have "special regard" not just to the interests of the bands, but to the claims of "white settlers" as well. The instructions further provided, among other things, that Commissioner O'Reilly was to be careful not to disturb the Indians in the possession of any "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached".

36. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely, as he had originally been appointed for only twelve months. Commissioner O'Reilly remained reserve commissioner until his retirement in 1898.

37. The federal Crown lacked the sole authority to allot, set aside, or create reserves for the Band. The allotment and creation of reserves required the cooperation of the provincial Crown because the lands upon which reserves for the Kootenay Indians were to be established were provincial Crown lands.

The allotment of Indian Reserves to the Upper Kootenay Indians

38. On several days in July 1884, Commissioner O'Reilly met with Chief Isadore of the Kootenay Indians for the purpose of identifying an appropriate reserve allotment for these Indians.

39. On July 9, 1884, Father Fouquet, an Oblate missionary from the St. Eugene Mission, wrote to Commissioner O'Reilly advising that, in his view, the Indians with whom the Commissioner was to meet, "seem to understand what was a reservation and the necessity of pointing out to you the lands they wish to be reserved for themselves."

40. On August 20, 1884, Commissioner O'Reilly completed his Minutes of Decision for the allotment of the lands which subsequently became Kootenay IRs 1, 2 and 3.

41. On December 10, 1884, Commissioner O'Reilly wrote to the provincial Chief Commissioner of Lands and Works regarding his work in the Kootenay region. He

indicated that very little land had been occupied by white settlers. He noted his duty to "to define what land was necessary for [the Indians] ..., having regard to their habits, wants and pursuits, and to deal liberally with them".

42. On December 16, 1884, Commissioner O'Reilly reported to the Superintendent General of Indian Affairs ("SGIA") regarding the process of reserving lands for the Upper Kootenay Indians. He stated that:

> The principal village of the Kootenays, consisting of 47 houses, is situated on the south bank of the St. Mary's river, on the property of the Rev'd Father Fouget; the "St. Eugene Mission" has been established by the Roman Catholics at this place; and here the Indians congregate during the winter months ....

43. On September 1, 1887, Commissioner O'Reilly sent a letter to the SGIA, commenting on the enlargement of reserves for the Kootenay Indians. He noted that the reserves were "the largest in the area, and the most valuable" that he had allotted since he had assumed the duties of Reserve Commissioner. He repeated that, "according to the basis upon which reserves have in the past, been defined in British Columbia, the Kootenay Indians were liberally dealt with, and at the time of the allotment of their reserves were perfectly satisfied".

44. On September 27, 1887 Commissioner O'Reilly completed his Minutes of Decision for the allotment of the lands which subsequently became Kootenay IRs 4, 5 and 6.

45. In a letter dated October 15, 1887, Commissioner O'Reilly advised the SGIA of his additional allotments for the Upper Kootenay Indians. He reported that the Commission, after a thorough examination of the Indian lands, concluded that, "with a view to allaying all feelings of dissatisfaction on the part of the Indians, three small allotments [of 1038 acres] should be added to those already assigned".

46. A letter written in or about 1887, to "Chief Isadore and the Kootenay Indians at St. Mary's Reserve" from the Chief Commissioner of Land & Works, the SGIA and Commissioner O'Reilly, outlined the history of the reserve creation process for the

"Upper Kootenay" and stated that, when Commissioner O'Reilly allotted the reserves in 1884, Chief Isadore acknowledged that "he was satisfied that the Indians had been given more land than they expected, and that there was no occasion to reserve any more land."

47. In a letter dated February 10, 1890, L. Vankoughnet, Deputy Superintendent General of Indian Affairs ("DGSIA"), advised E. Dewdney, SGIA, of his previous visit to the Indian reserves of the Kootenay District, including his visit to the St. Eugene Mission and his inspection of "the site which had been transferred to the Department to be used by the Authorities of the Roman Catholic Church, part of it to be leased for erecting buildings thereon for the purposes of said Industrial School, but the greater portion of it to be cultivated as a farm and the products consumed in the school".

48. By Indenture dated December 23, 1925, the Oblate Fathers granted 25.05 acres of land adjacent to the St. Eugene Residential School to the Crown. On September 18, 1951, Dominion Order in Council PC 1951-4886 created St. Mary's Indian Reserve No. 1A on these lands for the benefit of the Lower Kootenay, Kinbasket, St. Mary's, Tobacco Plains, Lower Columbia Lake and Arrow Lake Bands.

49. On December 23, 1970, Father G.F. Kelly, an employee of the Department of Indian Affairs and Northern Development ("DIAND"), wrote a letter to Father Hub stating that, when making arrangement for "next year's or longer lease of the Cranbrook property", Victor Pighin requested that "you keep him in mind". Mr. Kelly further stated that Mr. Pighin would "like to buy the Mission property" and, in a recent letter, Mr. Pighin asked him "to let the person in charge of the disposal of the property know of his interest".

50. On July 23, 1971, G.H. Perret, DIAND Superintendent-in-Charge, Kootenay-Okanagan District, advised F.J. Walchli, DIAND Regional Superintendent of Economic Development, that, "The St. Mary's Band does not have any historic claim to the land. The land and buildings were purchased several years ago from the Catholic Church.".

51. By Band Council Resolutions in August 1971, the Band and other Kootenay area Bands requested that DIAND "turn the lands and buildings known as St. Eugene's Residence", covering the whole of lots 494, 1758 and a portion of lot 1, over to the Kootenay Bands to be held in common by the St. Mary's, Tobacco Plains, Columbia Lake, Shuswap, and Lower Kootenay Bands as an Indian Reserve.

52. Order in Council 1974-1370, dated June 13, 1974, added Lots 1758 and 494 and Parcel A of Lot 1, totaling 1320.71 acres, to St. Mary's Indian Reserve 1A for the benefit of the Saint Mary's, Tobacco Plains, Columbia Lake, Shuswap and Lower Kootenay Bands.

53. On March 29, 1976, the Oblate Fathers conveyed Lot 11558 and the remaining Mission Farm Lands, namely, portions of Lots 1, 2, 3 and 1063, totaling 627.75 acres, to Ernest Pighin.

V. Relief (R. 42(f))

54. The Crown seeks a dismissal of all the claims set out in the Further Further Amended Declaration.

55. If the Crown is liable, which is not admitted, the Province of British Columbia caused or contributed to the alleged acts or omissions and any losses arising therefrom, pursuant to the *Specific Claims Tribunal Act* ("*Act*"), section 20(1)(i).

56. If the Crown is liable, which is not admitted, the value of any portion of the Mission Farm Lands, if any, which may have been included in the Band's reserves or in reserves the Band holds jointly with any other First Nation, should be deducted from the amount of compensation pursuant to the *Act*, section 20(3).

57. The Crown pleads and relies on the *Act*, section 20.

58. Such further and other relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

Respondent's address for the service:

Department of Justice
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Attention: James M. Mackenzie

Fax number address for service: (604) 666-2710

Email address for service: james.mackenzie@justice.gc.ca

Dated: June 19, 2017

ATTORNEY GENERAL OF CANADA

Department of Justice
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, British Columbia
V6Z 2S9
Fax: 604-666-2710

per: **Per: James Mackenzie**
Whitney Watson
Richelle Rae

Tel: 604-666-5963
Email: James.Mackenzie@justice.gc.ca

Solicitor/counsel for the Respondent