

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
F I L E D	April 27, 2018
Guillaume Phaneuf	
Ottawa, ON	71

?AQ'AM

Claimant

v.

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

Respondent

FOURTH 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

Fourth Amended Declaration of Claim: April 27, 2018

Guillaume Phaneuf

 (Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
Fax number: (613) 954-1920

I. Claimant (R. 41(a))

1. The Claimant, ʔaąam, 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, (the "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 and historically 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. "Indian settlements" were to be identified based on habitual and historic use and occupation.
11. Aqam was an "Indian settlement" within the meaning of *Proclamation No. 15* and subsequent legislation prohibiting the acquisition of Indian settlements. This was to be ascertained, where necessary, by consulting with the Indigenous peoples themselves.

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 Léon Fouquet, Roman Catholic Missionary on May 19, 1875. A Crown Grant for Lot 1 was issued to Léon Fouquet on May 11, 1881. Shaw's pre-emption application was signed by future Reserve Commissioner Peter O'Reilly while he was a Justice of the Peace.
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~~ 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 for 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 Superintendent 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. At the time Indian Reserves were allotted to the Upper Kootenay in the 1880s, Chief Isadore was the Chief of the "Upper Kootenay", which included the Band. Chief Isadore was the intermediary between the Upper Kootenay and government officials – including Commissioner O'Reilly.

30. On March 9, 1887, Constable H. Anderson reported to A. W. Vowell, Stipendiary Magistrate, that Chief Isadore and other Ktunaxa members released an imprisoned Band Member, Kapla, from the 'gaol' at Wild Horse Creek, which has been described by government officials as the "Kootenai Uprising":

The fact of them having rescued the prisoner will now justify severe measures for the punishment of the Chief and his principal subordinates and who have been, instrumental in causing the dissatisfaction which now exists among them respecting the settlement of the Indian reserve question.

31. Prime Minister John A. MacDonald agreed to send the Mounted Police Force to the Kootenay region to protect the white settlers.

32. Chief Isadore was so dissatisfied with the pre-emptions and reserve surveys that he asked that Justice of the Peace F.W. Alymer and Constable Anderson leave the region, which was supported by a petition of settlers, dated March 14, 1887. Chief Isadore claimed lands that had been pre-empted by the settlers, including Aylmer. Chief Isadore was also dissatisfied with the area of land set apart at St. Mary's Mission. Knowing that there was dissatisfaction with the reserve allotments as the reserve lands were insufficient for winter grazing requirements for stock, Crown officials considered re-adjustment of the reserve boundaries to enlarge the reserve boundaries. The Crown officials were seeking an agreement with the Band about the extent and locality of the reserve, including enlargement. In 1887 there was no agreement reached between the Crown and the Band regarding any reserve land adjustments.

33. On July 13, 1887, Indian Superintendent Powell recorded that he met with Chief Isadore, noting that the "reserve at St. Mary's is inadequate for the requirement of the Band". Powell reported that the reserve at St. Mary's was inadequate for the requirements of the Band and that he had instructed Indian

Agent Michael Phillips to obtain a census of the Indians and their stock:

With regard to Isadore's speech upon his land difficulties, there cannot be the least doubt that they should be promptly adjoined. My view and the impression of those with me was that the reserve at St. Mary's is inadequate for the requirements of the Band, on account of the great quantity of useless and stoney ground, of which it is largely composed.

This opinion appears to be shared by all the settlers in the vicinity, with whom I conversed, and this evidence is further confirmed by the Indian Department Surveyor, who last summer surveyed the land...

...I instructed M. Phillips to obtain a census of the Indians and their stock, and personally to seek out and report upon any difficulties existing there and the best solutions of these.

34. In a July 28, 1887 report from Indian Superintendent J.W. Powell to the Provincial Attorney General enclosing a Letter from Michael Phillips with the results of his census, it was reported by Indian Agent Phillips that:

...there can be no doubt that the present reservation is too small... Also that a considerable addition of land be made to the present reservation on the St. Mary's River. From the St Mary's River to Skookum Creek is not at all too large for them and their Stock.

I need hardly add that they cannot live on the present small reservation the greater part of which is simply waste land...

35. In a letter dated September 24, 1887, from Crown officials Vernon, Powell, and O'Reilly addressed to 'To Chief Isadore And His Kootenay Indians At St. Mary's Reserve', Crown officials acknowledged the Band's dissatisfaction with its reserve allotment, yet emphasized they would not be consulting with the Band on changes to the land set aside for the Band, and that the decision would be final:

The Government of Canada and British Columbia have been told you are dissatisfied with the Reserves laid out for you in 1884 by the Indian Reserve Commissioner Mr. O Reilly, and they have authorized us to come here and inquire into the matter. We have not been able to meet

you so many having left for Sand Point, and we cannot wait until your return. We have seen all your Lands, and have increased your Reserves to what we consider ample for all your requirements...

...

You cannot expect the Government to give you more land to raise useless horses. The Government are desirous you should take all the land you can utilize, but they will not give you more than your wants justify. We have now decided to allow you a piece of land on what is known as Isidore's Lower Farm, so as to cover all the improvements and all the hay land in the immediate vicinity. We have also reserved a valuable meadow some distance away where some of you have been in the habit of cutting hay, as well as a piece on Bummers Flat, When you have been accustomed to camp during some portion of the Summer. These reserves are all that will be made, and will with those previously laid off contain all the land you can possibly want for [sic] and your stock and much more than has been allotted to Indians in some other places. **This is a final decision and will not be altered...**

[Emphasis Added]

...

36. ~~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.
37. ~~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.
38. ~~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.

39. ~~30.~~ In 1890, the Hon. E. Dewdney, Superintendent 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.
40. ~~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.
41. ~~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.
42. ~~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.

43. ~~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.
44. ~~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.
45. ~~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.
46. ~~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.
47. Effective April 1, 1969 all personal at residential schools, including the School, became federal civil servants.
48. By a Memorandum of Agreement for the Operation of the School made September 25, 1962 between the Indian Affairs Branch of the Department of Citizenship and Immigration and the Oblates, it was agreed that the principal or officer-in-charge of the School had to receive prior approval of appointment from the Minister of Citizenship and Immigration. The principal of the School had an independent reporting obligation to the DIA with respect to the care and education of the resident children and the use of DIA funds in the maintenance and operations of the School and residence.

49. ~~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.
50. ~~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".
51. ~~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".
52. ~~42.~~ The School was closed in 1970 when government policy changed to encourage public education for Indian children.
53. ~~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.

54. ~~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

Source of Fiduciary Duty

55. 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 the Mission Farm Lands and Lot 11558 to 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 to prevent alienation of the Mission Farm Lands and Lot 11558.
56. 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.
57. The honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal interest.
58. 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.
59. 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

60. 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.
61. The Crown had a duty to diligently advance the interest of the Band in the Mission Farm Lands and Lot 11558. 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 Band. The Crown had a duty to set aside reserve lands for the Band on a timely and diligent basis in advance of pre-emptions.
62. ~~54.~~ 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. Article 13 of the *Terms of Union* forms part of the historical circumstances of the fiduciary relationship between the Crown and the Band.

63. ~~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.
64. As a fiduciary the Crown had obligations to preserve and protect the Band's interest in the Mission Farm Lands and Lot 11558. The Crown fulfils its fiduciary obligation by meeting the prescribed standard of conduct. The Crown did not act diligently during the reserve creation process to secure the Band's interest in the Mission Farm Lands and Lot 11558, and did not meet the standard of conduct required of a fiduciary. The Band submits that Canada breached its fiduciary duty to the Band by failing to include the Mission Farm Lands and Lot 11558 in its reserve allotment.

Discretionary Control

65. ~~46.~~ Canada's responsibility to protect the Band throughout its dealings stem from the structure of the ~~*Canadian Constitution, the Constitution Act, 1867, 30 & 31 Victoria, c. 3. (U.K.)*~~ (the "Constitution"). 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.
66. ~~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* Canada "assumed the charge of Indians" within British Columbia and "the trusteeship and management of the lands reserved for their use and benefit."
67. ~~48.~~ Canada had discretionary control over the Band under the *Constitution* and

the *Terms of Union*.

68. Canada's fiduciary duty with respect to the reserve creation for the Band 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 Band as the exclusive intermediary with the Province in relation to its aboriginal interests.
69. During the reserve creation process, the Band was entirely dependent, vulnerable and at the mercy of the Crown's discretion to advance the Band'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 the Mission Farm Lands and Lot 11558 diligently and in the best interest of the Band.
70. The discretion of Canada was initially exercised by Commissioner O'Reilly to fix and determine a reserve for the Band.
71. Canada's fiduciary obligation arose as an exclusive intermediary with the Province for the purpose of reserve creation in relation to the Band's Aboriginal interests in land habitually and historically used and occupied by the Band. Canada's position as an exclusive intermediary conferred a degree of control that left the Band's cognizable Aboriginal land interest in the Mission Farm Lands and Lot 11558 vulnerable to the adverse exercise of Canada's discretion. Canada's fiduciary duty arose at the outset of the reserve creation process and continued during the exercise of its discretionary control until the reserve creation process was concluded.
72. 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.

73. 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 Band which would affect its interest in the Mission Farm Lands and Lot 11558 attracted a fiduciary obligation on the Crown's part owed to the Band.
74. The evidence reveals the involvement of the Crown in every step taken in the process of the creation of reserves in British Columbia after confederation. Its involvement was in relation to the interest of the Indians being advanced by the creation of reserves. Prior usage of land was recognized as a factor in the exercise performed jointly with the Province to set apart land for reserves. The best interest of the Band, as a beneficiary, required the Crown to preserve the cognizable interest of the Band in the Mission Farm Lands and Lot 11558 as a reserve for the use and benefit of the Band.
75. The Crown's fiduciary's obligation is owed in relation to the Band's cognizable interest. The Band's Interests in the Mission Farm Lands and Lot 11558 satisfy the requirement of an independent legal interest capable of grounding a *sui generis* fiduciary duty.
76. The Mission Farm Lands and Lot 11558 were clearly delineated and identifiable, and the cognizable interest were their historic and contemporary use and occupation as an Indian settlement by the Band, 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.
77. The Band held an Aboriginal interest in the Mission Farm Lands and Lot 11558 that would have qualified as an "Indian settlement" based on use and

occupation.

78. The Mission Farm Lands and Lot 11558 ought to have been protected for the Band and, as a consequence of the Crown's failure to meet its responsibilities as a fiduciary, they were not.
79. The Band's interest in the Mission Farm Lands and Lot 11558 was recognized by enactments and policies as an independent interest in land anchored in collective use and occupation.
80. The Band's interest in the Mission Farm Lands and Lot 11558 was an interest in the land from which the Band had sustained itself, to which it had a tangible, practical, and cultural connection and that formed part of its traditional territory.
81. The Band's use and occupation of the Mission Farm Lands and Lot 11558 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 Band's interest was therefore sufficient for the exercise of discretion by federal officials to be subject to the Crown's fiduciary duty.
82. ~~52.~~ The Band's 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.
83. From 1910, once the federal government funded and constructed the School, and funded annually the operations of the School, or in the alternative, from April 1, 1969, once all personal at residential schools became federal civil

servants, the Crown was in a position, as a fiduciary, to act with ordinary prudence to protect the Band's cognizable interest in the Mission Farm Lands and Lot 11558 by taking steps to acquire the Mission Farm Lands and Lot 11558, but failed to do so.

84. If the Crown had diligently carried out the reserve creation process for the Band, then the Mission Farm Lands and Lot 11558 would have been included as part of the Reserve. Ordinary prudence required federal Crown officials to seek to have the Mission Farm Lands and Lot 11558 allotted as a reserve for the use and benefit of the Band, as otherwise the Band would be permanently deprived of its interest in the Mission Farm Lands and Lot 11558.

Fiduciary Duty and Competing Interests

85. Commissioner O'Reilly ought not to have given the settlers pre-emption interests the decisive weight that he did. Either the Band was going to be deprived of a form of interest in the land at issue, or the settlers were.
86. 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, the Mission Farm Lands and Lot 11558. These interests were, on the one hand, the Band's tangible, practical and cultural interest in the Mission Farm Lands and Lot 11558, recognized under colonial and provincial law as protected, and, on the other, the settlers interests in their unlawful pre-emptions. The Crown was required to deny the settlers of their pre-emption claims in favour of making a decision to allot the Mission Farm Lands and Lot 11558 as a reserve for the Band.

Fiduciary Duty and Conflicts of Interest

87. 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.

88. The Crown was in a conflict of interest situation as it owed fiduciary duties to the Band while providing for the pre-emption of Crown lands by the Oblates.
89. John Shaw as a Justice of the Peace was a representative of the Crown at the time he pre-empted Lot 1, which placed him in a conflict of interest.
90. Future Indian Reserve Commissioner O'Reilly, acting as a Justice of the Peace, was in a conflict of interest when he facilitated the pre-emption of Lot 1.

Duty to Correct Error

91. 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 mistake to permit the pre-emptions of the Mission Farm Lands and Lot 11558.

Pre-Emption Legislation

92. ~~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.
93. ~~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.
94. The duty of ordinary prudence required, at a minimum, that Crown officials,

including Commissioner O'Reilly 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 Band. The fact 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 Band in relation to the Mission Farm Lands and Lot 11558.

95. Ordinary prudence in this context required that, at a minimum, the Crown elicit the concerns of the Band and consider its best interests. This called for consultation. The Band's obvious interest would include protection of its arable land and protection from pre-emptions. There was no consultation.
96. Crown officials with knowledge of the Band's dissatisfaction in its reserve allotment refused to consult with the Band to ensure that the Mission Farm Lands and Lot 11558 were protected.
97. On September 24, 1887 when crown officials Vernon, Powell, and O'Reilly notified the Band they would not be consulting with the Band further on changes to the land set aside for the Band, and that the decision "...is a final decision and will not be altered", the Crown breached its duty of ordinary prudence as crown officials refused to elicit the concerns of the Band and consider its best interests by reexamining the Band's reserve allotment with the knowledge that the Band was dissatisfied with the lands allotted to it.
98. Canada failed to fulfil its statutory and fiduciary duties to the Band when it failed to prevent the Mission Farm Lands and Lot 11558 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 colonial law and policy, including *Proclamation No. 15* and subsequent colonial legislation, and after Confederation, it violated law governing pre-emptions with respect to Crown land within the Province of British Columbia, including the *Land Act, 1875*.

99. The Crown breached its statutory and fiduciary obligations to protect the Band's interests in allowing the alienation of the Band's settlements to private landholders and in failing to ensure that the lands in question were set aside as reserve lands for the use and benefit of the Band.
100. Crown officials knew or ought to have known, that the pre-emptions contravened the applicable pre-emption law. Ordinary prudence required federal Crown officials to seek enforcement of provincial protection of Indian settlements of the Band and to challenge the pre-emption of settlers.
101. Crown officials, with knowledge of the circumstances surrounding the Mission Farm Lands and Lot 11558 pre-emptions and the Band's situation, did nothing to challenge the pre-emptions.
102. The inaction of Crown officials during the pre-emptions of the Mission Farm Lands and Lot 11558 and the judgment Commissioner O'Reilly displayed when he eventually made a decision to allot a reserve to the Band fell short of fulfilling the Crown's fiduciary obligation.
103. 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 Band's interest in the Mission Farm Lands and by improperly giving priority to settlers' wrongful pre-emptions. The Crown's duty required good faith and ordinary prudence to uphold its fiduciary duty to the Band. Crown officials acted with neither, resulting in a breach of fiduciary duty to the Band, which is at issue under this Specific Claim.

Liability for Precolonial Breach

104. The Colony's fiduciary obligation owed to the Band in respect of the Mission Farm Lands and Lot 11558 was a fiduciary obligation that became an obligation of Canada on confederation, and for which Canada would, if in the place of the

Colony, have been in breach.

105. The Colony's failure to take any measures to reserve Lot 1 from pre-emption was both a breach of a fiduciary obligation arising under *Proclamation No. 15* and a breach of its express provisions.
106. Treating the Crown as a continuous entity (defined by Canada's fiduciary obligations and, by necessary implication, the specific or cognizable Aboriginal interests in respect of which they were owed) is consistent with an Indigenous perspective on the ongoing fiduciary relationship between Indigenous peoples and the Crown. The legal obligation branch of s. 14(2) of the Specific Claims Tribunal Act (the "SCTA") can apply to fiduciary obligations.
107. The Imperial Crown satisfies the meaning of "Crown" in s. 14(2) of the SCTA in this claim because the fiduciary obligation it breached was a legal obligation that "became . . . the responsibility of the Crown in right of Canada".
108. Pre- and post-Confederation fiduciary obligations required the Crown to act with reference to the best interest of the same beneficiary in exercising a discretionary power to affect the same Aboriginal interest in the context of the same fiduciary relationship.
109. ~~53.~~ The Crown, Canada, was the exclusive intermediary with the Province in relation to ~~their~~ the Band's interests, and thus exercised discretionary control over advancement of ~~their~~ the Band's interests.
110. ~~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).

111. ~~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.

...

112. ~~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~~ *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.

113. ~~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.

114. ~~58.~~ The federal government's commitment to continuing the Colony's reserve policy, as captured in ~~A~~article 13 of the ~~Terms of Union~~ Terms of Union was reflected in the mandate given to Commissioner O'Reilly by the Deputy Superintendent General of Indian Affairs.
115. ~~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).

116. ~~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.

117. ~~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.

118. ~~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.

119. ~~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.

120. ~~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.

121. ~~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~~ Band 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.
122. The question before the Specific Claims Tribunal concerns the Crown's common law fiduciary duties to the Band. Crown's officials were obliged to ensure that their actions, decisions and judgments that would affect the Band's interests met the ethical standards required of a fiduciary. Canada breached its fiduciary duty because of the manner in which its officials conducted themselves by failing to take any available measures to complete the reserve creation process relating to the Mission Farm Lands and Lot 11558. The Crown's duty required good faith and ordinary prudence to uphold its fiduciary duty to the Band. Federal officials acted with neither, resulting in a breach of fiduciary duty to the Band, which is at issue under this Specific Claim.
123. ~~67.~~ Without limiting the foregoing, ¶the Crown acted dishonorably and breached its fiduciary duty and/or legal obligations by failing to the Band:
- a. when it failed to exercise ordinary prudence, loyalty and good faith in the discharge of its constitutional obligation to set aside reserve land for the Band on a timely basis;
 - b. by not consulting with the Band to ascertain the location of the Band's Indian settlements to be protected from pre-emption for the use and benefit of the Band;
 - c. when it failed to exercise ordinary prudence requiring that, at a minimum, Crown officials elicit the concerns of the Band and consider its best interests through consultation;
 - d. when it failed to protect the Band's tangible, practical and cultural

- interest in the Mission Farm Lands and Lot 11558 from pre-emption;
- e. when it failed to set aside reserve lands for the Band on a timely and diligent basis in advance of pre-emptions;
 - f. when Crown officials with knowledge of the Band's dissatisfaction in its reserve allotment refused to consult with the Band to protect the Band's interest in the Mission Farm Lands and Lot 11558;
 - g. ~~a-~~ when it failed to challenge the pre-emptions of the Mission Farm Lands;
 - h. when it failed to protect the Band's cognizable interest in the Mission Farm Lands and Lot 11558 from pre-emption and the forsaking the interests of all others in favour of the Band's interest in the Mission Farm Lands and Lot 11558;
 - i. by failing to seek a correction of its error to permit the pre-emptions of the Mission Farm Lands and Lot 11558;
 - j. by failing to seek enforcement of provincial protection for the Mission Farm Lands and Lot 11558 as Indian settlements;
 - k. when it failed to act in the Band's best interest in exercising discretionary control over the specific Aboriginal interest of the Band in the Mission Farm Lands and Lot 11558;
 - l. when it failed to secure the Band's interest in the Mission Farm Lands and Lot 11558 and by improperly giving priority to settlers' wrongful pre-emptions;
 - m. when Crown officials failed to take steps to inquire into the extent of the Band's Indian settlements on the Mission Farm Lands and Lot 11558 so that they could be protected as a reserve for the use and benefit of the Band;
 - n. ~~b-~~ by failing to complete the reserve creation process relating to the Mission Farm Lands and Lot 11558;
 - o. ~~e-~~ when it failed to 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~~

- p. when it failed to exercise its discretion to protect the Band's vulnerable interest in the Mission Farm Lands and Lot 11558, and prevent grants of fee simple title overtaking the Band's independent legal entitlement to use and occupation of the Mission Farm Lands and Lot 11558;
- q. by failing to advise the provincial government not to allow pre-emptions on lands habitually and historically used and occupied by the Band as an "Indian settlement";
- r. by placing the interests of settlers ahead of the interest of the Band during the reserve creation process;
- s. when it failed to reconcile fairly the Band's tangible, practical and cultural interest in the Mission Farm Lands and Lot 11558 with settlers interests in their unlawful pre-emptions;
- t. by the inaction of Crown officials during the pre-emption of the Mission Farm Lands and the judgment O'Reilly displayed when he eventually made a decision to allot a reserve to the Band;
- u. when its officials failed to take steps to protect Band's interest in the Mission Farm Lands and Lot 11558;
- v. when crown officials refused to elicit the concerns of the Band and consider its best interests by reexamining the Band's reserve allotment with the knowledge that the Band was dissatisfied with the lands allotted to it;
- w. ~~d.~~ when it failed to acquire the Mission Farm Lands and Lot 11558 as a reserve for the Band during the operations of the Sschool and when the Sschool closed in 1970; and
- x. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to the Band.

VII. Relief Sought

124. ~~68.~~ The Band seeks ~~compensation from Canada for:~~
- a. An Order from the Tribunal validating the Specific claim of the Band in relation to the Mission Farm Lands and Lot 11558 under 14(1)(b), and (c) of the SCTA;
 - b. ~~a.~~ Compensation from Canada for ~~t~~he loss of the Mission Farm Lands and Lot 11558 as reserve lands for the use and benefit of the Band;
 - c. ~~b.~~ Interest on compensation for the loss of the Mission Farm Lands and Lot 11558 as reserve lands for the use and benefit of the Band; ~~and~~
 - d. Costs of this claim; and
 - e. ~~e.~~ Such other damages or compensation as this Honourable Tribunal deems just.

Dated: ~~May 19, 2017~~ April 27, 2018



Signature of Solicitor

Darwin Hanna
Callison & Hanna, Barristers &
Solicitors
2784 Alamein Avenue
Vancouver, B.C. V6L 1S2
Tel: (604) 222-2374
Fax: (604) 222-2974
darwin@chlaw.ca