

SPECIFIC CLAIMS TRIBUNAL		
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	May 11, 2015	
	Guillaume Phaneuf	
	Ottawa, ON	
	39	

SCT File No.:SCT-1001-12

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

**MADAWASKA MALISEET FIRST NATION**

and

Claimant

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

Respondent

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**AMENDED RESPONSE**

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

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

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1. This is the Crown's Response to the Declaration of Claim ("Claim") filed by the Madawaska Maliseet First Nation ("Claimant") with the Specific Claim Tribunal ("Tribunal") on August 13, 2012 pursuant to the Specific Claims Tribunal Act (the "Act").
2. The Claim relates to three parcels of land totaling approximately 1,169 acres adjoining or near the present St. Basile Indian Reserve No. 10 (the "Reserve") in New Brunswick. Parcel A is a 350 acre parcel lying west of and contiguous to the current Reserve. Parcel B contains approximately 19 acres and lies on the western side of the Madawaska River where it joins with the St. John River. Parcel C consists of approximately 800 acres and lies contiguous to the Reserve on its northern side.

#### **Status of the Claim - Rule 42(a)**

3. In April 1998, the Claimant filed a claim with the Minister (the "Original Claim").
4. The Original Claim alleged that the Crown illegally disposed of three parcels of reserve lands. The Band claims that the land was *de facto* reserve land as of 1792 or before and that the Crown had a legal obligation to protect the existing land base of the Maliseets at Madawaska, which included the three parcels of land, based on Dummer's Treaty and Mascarene's Treaty, which includes the so-called Mascarene's Promises, as well as Belcher's Proclamation and the Royal Proclamation. This legal obligation was allegedly breached in the alienation of parcels A, B, and C.
5. On January 13, 2009, the Crown advised the FN that the Original Claim had not been accepted for negotiation by the Minister of Indian Affairs and Northern Development on the basis that there was no lawful obligation on the Crown because the special parcels of land at issue did not constitute a "reserve" within the meaning of the *Indian Act* at the time they were alienated.
6. The Crown states that the criteria contained in section 16(1)(a) of the *Act* are met and this claim is validly before the Specific Claims Tribunal.

#### **Validity of the Claim – Rule 42(1)(b) and (c)**

7. The Crown does not accept the validity of the Claim, or that the Claimant has suffered any damages.

**Allegations of Fact - Declaration of Claim (R.41(e)): Acceptance, denial or no knowledge (R. 42(d))**

8. The Crown, denies each and every fact alleged in the Claim unless hereinafter expressly admitted herein.
9. The Crown has no knowledge of the allegations at paragraphs 26, 30 and 31 of the Claim.
10. The Crown admits the facts as set out in paragraph 1, 2, 3, 4, 5, 6 [I moved this out of the "argumentative section"] 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27 [moved this one out too], 29 [moved this too] 37 of the Claim. [note with respect to paragraphs 10 and 37 – I can't find this sketch and reference. That said, it seems the Research people had no issue admitting it].
11. With respect to paragraph 7, the Crown admits that parcels A, B and C are situated at the confluence of the Madawaska River and the St. John River but denies that the Crown set aside these three parcels of land for the benefit of the Madawaska Maliseets.
12. With respect to paragraph 11, the Crown admits that there was a land grant in 1790 but says that it was made to Joseph Mazerolle and forty-one others as opposed to the forty-eight others.
13. With respect to paragraph 22 and 36, the Crown admits the existence of the sketch of a survey of eight lots at the mouth of the little Madawaska, which includes the 800 acres making up parcel C, but denies that the eight lots form part of an existing reserve. The Crown also denies that this sketch is evidence of an intention on the part of the Crown to set aside this land as a reserve. The Crown also says that the sketch does not make reference to 1600 acres but instead states that lots No. 3 and 4 contain approximately 200 acres each.
14. In response to paragraph 28, the Crown admits that the Maliseet people of New Brunswick, including those at Madawaska, fall within the categories of Indians described within the *Royal Proclamation of 1763*. However, the Crown denies that the Maliseet people at Madawaska were signatories to *Dummer's Treaty* or *Mascarene's Treaties* in 1725-26.
15. In any event, the Crown says that as neither these Treaties nor the *Royal Proclamation* created reserve lands, their application is irrelevant since parcels A, B, and C were not lands reserve by the Crown for aboriginal people.
16. With respect to paragraph 35, the Crown admits the existence of the Sproule map dated 1787 which reflects the existence of an Indian village in the area of

the present day St-Basile reserve. However, the Crown denies that this map demonstrates the existence of a “*de facto* reserve” or any intention on the part of the Crown to set aside the land as a reserve.

17. In response to paragraph 32, as the Crown denies that the 250 acre portion of parcel A was ever set aside as reserve land, it is irrelevant whether the grant of this land to Simon Hebert in 1825 followed the procedure for the alienation of reserve lands provided for in the *Royal Proclamation of 1763*.
18. In answer to paragraph 33, as the Crown denies the claim that the 100 acre portion of parcel A was ever set aside as a reserve, it is irrelevant whether the procedures set out in either the Royal Proclamation or in the 1844 legislation *An Act to Regulate the Management and disposal of Indian Reserves in this Province* were followed in the grant of this land to John Hart in 1860.
19. In reply to paragraph 34, since the Crown denies that the 19 acres comprising parcel B was ever set aside as a reserve, it is also irrelevant whether the procedure for the alienation of reserve lands set out in the *Royal Proclamation* was followed when the land was granted to Simon Hebert in 1829.
20. The Crown denies the allegation at paragraph 38 and says that as parcels A, B, and C were never reserve lands, there were no legal obligation or fiduciary duty owed to the Claimant in respect of the alienation of those lands.
21. Moreover, the Crown denies the allegation that there was either an equitable or a common law fiduciary obligation on the Crown to set apart the said parcels as part of the lands reserved for the Madawaska Maliseet. This allegation lacks both a legal and factual foundation.
22. In response to paragraph ~~40~~ 39, since parcels A, B and C were not reserve lands at the time of alienation, these transactions do not give rise to any legal obligation or fiduciary duty on the part of the Crown within the meaning of the Specific Claims Policy and no compensation or damages are payable.

#### **Statement of Fact (R.42(e))**

##### *Legal Requirements for the Creation of a Reserve*

23. The Supreme Court of Canada set out the legal requirements for the creation of reserve lands in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816, and *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245. In *Ross River*, the Supreme Court held that while there is no single procedure for creating a reserve, the key component is the Crown’s intention to create a reserve. This intention must also have been expressed by an official having the authority to bind the Crown.

*Creation of a Reserve for the Madawaska Maliseets*

24. There is evidence of the presence of a small group of Maliseet people residing at the confluence of the Madawaska and St. John rivers (the "Madawaska Maliseets"), in the approximate location of the present-day Reserve, dating back to the late eighteenth century.
25. However, it was not until the mid-1840's that there is any evidence of an intention on the part of the Crown to set aside a parcel of land as a reserve for the Madawaska Maliseets.
26. In 1844, *the Act to Regulate the Management and Disposal of the Indian Reserves in this Province* (the "1844 Act") was passed. The implementation of this legislation included efforts to survey the land where the Madawaska Maliseets had been residing so as to define the territory and set aside a tract of land for their use.
27. In a July 1845 report, John Dibblee noted that there were 17 people and only 10 males young and old in the Madawaska Maliseet settlement. It was his view that allowing the males 50 acres each, or 500 acres in total, the residue of the land in the area could be disposed for their benefit. Since he was unable to state the total number of acres in that area, he engaged Deputy Surveyor Garden to survey the land.
28. In approximately August 1845, Deputy Surveyor Garden prepared a survey map of the "reserve" (bad wording but used in the docs) lands at Madawaska. The survey is identified as a "Sketch of a survey of eight lots on the Indian Reserve near the mouth of the Little Madawaska River as per direction of John Dibblee Esqr. Commission". This survey illustrates eight lots, numbered 1 through 8, comprising approximately 1500 acres.
29. There is no indication that the eight lots set out in Deputy Surveyor Garden's sketch were meant to define the boundaries of the reserve intended for the Madawaska Maliseet. In fact, the evidence suggests that only two of the lots were being considered as possible reserve lands. Marginalia on the survey states "No. 3 & 4 intended for the Indian Locations supposed to contain upwards of 200 acres each".
30. It was not until 1860 that Deputy Surveyor Charles Beckwith is instructed to survey the "Indian Reserve at Little Falls, Madawaska to be made and laid off into lots for sale". The survey, which is dated November 1860, is titled *Plan of a Survey of the Indian Reserve, St-Basile, Victoria County now Madawaska County N.B.*

31. As with the survey prepared by Garden in 1845, the Beckwith survey shows eight numbered lots. However, the lots did not extend nearly as far back from the St. John River as they did in the Garden survey. The Beckwith survey shows the acreage of the reserve as 722 acres.
32. The Beckwith survey was approved and signed by the Chief Surveyor Bray and the Deputy Superintendent General Frank Pedley. While no instrument was adopted to formally confirm the creation of this reserve at Madawaska, the elements required for establishing a reserve for the Band were met by the end of 1860. The land set out in this survey corresponds to the present date Reserve.

*Parcels A, B and C*

33. Parcels A, B, or C did not form part of the lands intended to be reserved for the Madawaska Maliseets as set out in the Beckwith survey of 1860.
34. Parcel A is a 350 acre parcel which is comprised of two parcels located next to one another along the eastern boundary of the current St-Basile reserve: a 250 acre parcel granted to Simon Hebert in 1825 and a 100 acre parcel granted to John Hart in April of 1860.
35. Parcel B is approximately 19 acres located on the western side of the Madawaska River where it joins with the St. John River. In 1829, a licence of occupation was granted to Simon Hebert for that land for a period of 21 years.
36. The grant of the 250 acre part of parcel A and the issuance of the licence of occupation covering parcel B, both to Simon Hebert, took place well before the creation of the Reserve in 1860.
37. With respect to the 100 acre part of parcel A that was granted to John Hart, there is evidence that he began living on the land in the early 1840's with the Band's consent. He received a grant for this land in April 1860, also before the creation of the reserve in April 1860.
38. Parcel C consists of approximately 800 acres and lies contiguous to the St. Basile Reserve on its northern side. This parcel of land appears on the Garden sketch of 1845 as the northern portion of the eight lots.
39. The 800 acre parcel does not appear on the Beckwith survey of 1860, which reflects smaller lots, leading to a total acreage of 722 for the Reserve. This 800 acre parcel was never intended to be part of the reserve.

*Application of the Royal Proclamation and New Brunswick legislation regarding the management and disposal of reserve lands*

40. Neither the Royal Proclamation nor the *Act to Regulate the Management and disposal of Indian Reserves in this Province* create a legal obligation or a fiduciary duty on the Crown regarding the alienation of parcels A, B or C.

*The Royal Proclamation*

41. One of the purposes of the *Royal Proclamation of 1763* was to govern relations between the British North American colonists and the Indians in dealing with the lands occupied by the latter.
42. The Supreme Court of Canada in *R. v. Marshall; R. v. Bernard*, [2005] 2 R.C.S. 220 held that it applied to the ancient colony of Nova Scotia, which then comprised New Brunswick. However, it expressly rejected the argument that it reserved to the Mi'kmaq title in all unceded, unpurchased land in the former Nova Scotia. The Court held that the *Proclamation* did not set aside land for aboriginal people nor did it grant a right to reserve land. The *Proclamation* sought instead to protect existing reserve land to minimize conflict between settlers and aboriginal peoples.
43. Since parcels A, B, or C were not part of a reserve, they did not fall under the protection of the *Proclamation*. Accordingly, the *Proclamation* does not create a legal obligation on the Crown with respect to the disposition of any of these parcels.

*An Act to Regulate the Management and disposal of Indian Reserves in this Province (the "Act")*

44. In 1844, New Brunswick enacted legislation to authorize the leasing and sale of New Brunswick reserves for the best interest of the aboriginal people and the settlement of the country. The monies raised were to be used for the exclusive benefit of the aboriginal people. This *Act* also set out a procedure for the alienation of reserve lands.
45. Since parcels A, B, and C were not part of the reserve, the manner in which they were alienated is not governed by the *Act*.

**Relief (R.42(f))**

46. The Crown seeks dismissal of the Claim in its entirety.

**Communication (R.42(g))**

47. Respondent's address for service of documents:

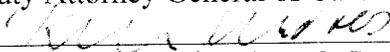
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Dated this 11<sup>th</sup> day of May, 2015 ~~November, 2012~~.

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