

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
F I L E D	D É P O S É
February 2, 2017	
@SFS\Wai W	
Ottawa, ON	44

TOBACCO PLAINS INDIAN BAND

Claimant

v

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

Respondent

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**FURTHER 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*.

TO: Tobacco Plains Indian Band  
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**Table of Contents**

I Status of Claim..... 1

II Conditions Precedent ..... 1

III Validity of the Claims..... 1

IV The Allotment of the Provisional Tobacco Plains Indian reserve No. 2 and the  
Disposition of the Department of Customs’ Request for a 2.97 Acre Parcel in the Reserve  
..... 2

V The Water Right-of-Way ..... 9

VI The Establishment of Tobacco Plains Indian Reserve # 2..... 13

VII Canada Did Not Have Any Statutory Duty..... 13

VIII ~~Canada Did Not Breach Any~~ Fiduciary Duty In Connection with the Customs Lands  
Claim..... 14

IX Canada Acknowledges A Breach of Fiduciary Duty ~~In Connection with the Water Right-  
of-Way Claim~~..... 16

X Acquiescence and Consent in Connection with the Customs Lands Claim ..... 1617

XI No Damages in Connection with the Customs Lands Claim..... 1617

XII Apportionment of Liability in Connection with the Customs Lands Claim..... 17

XIII Relief..... 1718

**I Status of Claim**

1. The Respondent, Her Majesty the Queen in right of Canada (Canada) admits that the Claimant (Tobacco Plains Indian Band) is a First Nation within the meaning of s. 2 of the *Specific Claims Tribunal Act (Act)*.
2. Canada admits that the Tobacco Plains Indian Band is the successor Indian band of the Kootenay Band or Tribe of Indians in connection with the Tobacco Plains Indian Reserve # 2.

**II Conditions Precedent**

3. In response to paragraph 2, Canada admits that this claim is eligible to be filed with the Specific Claims Tribunal pursuant to section 16 (1) of the *Act*.
4. In response to paragraph 3, Canada admits that in 2010 the Tobacco Plains Indian Band filed a specific claim with the Minister of Indian Affairs and Northern Development (the Minister) relating to the taking of 2.97 acres of land from Tobacco Plains Indian Reserve No. 2 for the Roosville Customs house and an area of land across the reserve for a water pipeline and ditch for the Roosville Customs house.

**III Validity of the Claims**

5. The Tobacco Plains Indian Band makes the following two claims for compensation in this proceeding:
  - a) in connection with the taking of a 2.97 acre parcel of alleged Indian reserve land for customs purposes, Canada breached its alleged common law fiduciary duties by failing to:
    - i) minimally impair the Tobacco Plains Indian Band's interest in the 2.97 acre parcel;

- ii) properly value and obtain adequate compensation for the 2.97 acre parcel;  
and
- iii) consult with and obtain the Tobacco Plains Indian Band's consent  
regarding the amount of compensation; and  
(the Customs Lands Claim)

- b) in connection with a water right-of-way (Water Right-of-Way) across the alleged Indian reserve providing water for the customs house, Canada failed to comply with the *Indian Act* in authorizing the Water Right-of-Way and Canada breached its fiduciary obligation in failing to ensure compensation for the Water Right-of-Way.  
(the Water Right-of-Way Claim)

6. Canada's position is that the Customs Lands Claim is, in part, not a valid claim. Canada acknowledges, for the purposes of this proceeding only, that Canada breached its fiduciary duty by failing to properly value the 2.97 acre parcel. Canada agrees that the 2.97 acre parcel should have been valued at \$208 in 1915.

7. Canada's position is that the Water Right-of-Way Claim is a valid claim. While the provisions of the *Indian Act* in connection with the granting of a right-of-way did not apply at the time, Canada acknowledges, for the purposes of this proceeding only, that Canada breached its fiduciary duty by failing to obtain compensation for the lands on the reserve used for a pipeline or ditch from 1918 to 1970.

**IV The Allotment of the Provisional Tobacco Plains Indian reserve No. 2 and the Disposition of the Department of Customs' Request for a 2.97 Acre Parcel in the Reserve**

8. Following British Columbia's entry into Confederation in 1871, Canada lacked the sole authority to allot, set aside, or create reserves in British Columbia. The allotment and creation of reserves required the cooperation of the provincial Crown because the

provincial Crown held underlying title to the lands upon which reserves were to be established. In addition, in the circumstances and relevant time period of this Customs Lands Claim, Canada lacked the sole authority to determine whether land should be taken from an Indian reserve for a federal public purpose while the provincial Crown held underlying title to the land.

9. In 1880, the Governor in Council, by PC OIC 1880-1334, approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, to act as sole commissioner (Reserve Commissioner O'Reilly) on the Indian Reserve Commission.
10. Under the terms of PC OIC 1880-1334, Reserve Commissioner O'Reilly was to act in his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works (CCLW) and the federal Indian Superintendent for British Columbia "as to the particular places to be visited and the reserves to be established". Reserve Commissioner O'Reilly's reserve allotments would be subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, should be referred to the Lieutenant Governor of British Columbia.
11. Canada admits the allegations of fact in paragraph 7 of the Declaration of Claim, that on July 18, 1884, Reserve Commissioner O'Reilly, by Minute of Decision, recommended the allotment of a Kootenay Indian reserve # 2 comprising 10, 560 acres for the Kootenay Band or Tribe of Indians. In further response, Canada states that this allotment was then approved by the Chief Commissioner of Lands and Works on June 10, 1887 (Provisional Tobacco Plains Indian reserve # 2). The underlying title to the Provisional Tobacco Plains Indian reserve # 2 remained with the provincial Crown.
12. Canada admits the allegations of fact in paragraph 8 of the Declaration of Claim that:
  - a) by letter dated in September 1914, the Department of Customs (DOC) inquired with the Department of Indian Affairs (DIA) about placing a Customs building on the Provisional Tobacco Plains Indian reserve # 2;

- b) on September 25, 1914, a Dominion land surveyor, completed a survey of a 2.97 acres parcel of the Provisional Tobacco Plains Indian reserve # 2; and
- c) the 2.97 acre parcel was contiguous to the International Boundary Line with the United States of America.

In further response, Canada states that:

- d) the September 1914 letter from DOC to DIA was dated September 10, 1914 and not September 15, 1914; and
  - e) the surveyor was named Cummings and was both a British Columbia and Dominion land surveyor.
13. Canada admits the allegation of fact in paragraph 9 of the Declaration of Claim that on October 5, 1914 the DOC applied to the DIA for the purchase of the 2.97 acre parcel. In further response, Canada states that the DOC had reasonably determined that the 2.97 acre parcel was required for Customs purposes.
14. Two years earlier, Canada and the provincial Crown had agreed, in the 1912 McKenna McBride Agreement (MBA), to appoint a commission, subsequently named the Royal Commission on Indian Affairs (RCIA), which would have the power to “dispose of a question by an Interim Report” where Canada or the provincial Crown ascertained that part of an Indian reserve was “required for ... any Dominion or Provincial or Municipal Public Work or purpose”. Canada and the provincial Crown agreed to do “everything necessary” to carry the RCIA’s recommendations into effect. (MBA, s 8)

The MBA further provided that the lands comprised in the Indian reserves “as finally fixed” by the RCIA shall be conveyed by the provincial Crown to Canada with full power to Canada to deal with the said lands .... (MBA, s 7).

15. By federal OIC 1912 – 3277, pursuant to the *Inquiries Act*, RSC 1906, c 104, and BC OIC 1912-1341, Canada and the provincial Crown:
  - a) approved the MBA;
  - b) provided that notwithstanding anything in the MBA the acts and proceedings of the RCIA were subject to the approval of Canada and the provincial Crown; and
  - c) provided that Canada and the provincial Crown agreed to consider favourably the reports, whether final or interim, of the RCIA, with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the RCIA.
16. Canada selected two representatives, both lawyers, as Canada's representative members on the RCIA. The provincial Crown selected two representatives, one of whom was a lawyer, as the provincial Crown's representative members on the RCIA. These four members of the RCIA chose a fifth, and final, member of the RCIA. This fifth member was a former Chief Justice of Saskatchewan. This chairman resigned from the RCIA in December 1913 and, by May 1914, was replaced by a lawyer.
17. Under the terms of the MBA, and as the DOC required the 2.97 acre parcel for Customs purposes, Canada, by letter dated in October 1914, referred the question of approval of the matter to the RCIA for its consideration and recommendation.
18. Canada admits the allegations of fact in paragraph 10 of the Declaration of Claim that by letter dated October 15, 1914, the DIA Assistant Secretary and Deputy, McLean (Secretary McLean), asked Inspector of Indian Agencies, Megraw (Megraw):
  - a) to examine the 2.97 acre parcel required for Customs purposes; and

- b) to consult with the Indian council and to endeavour to obtain its concurrence in a reasonable valuation.
19. Canada admits the allegations of fact in paragraph 11 of the Declaration of Claim that by Interim Report in October, 1914 the RCIA recommended that, upon “it appearing that [the land] is required by” the DOC for Customs purposes, the DOC be given permission “to enter upon the [Provisional Tobacco Plains Indian reserve # 2] and to acquire the ... 2.97 acres” for Customs purposes, subject to “such compliance with the requirements of the law” and “proper compensation being made to the Indians”. In further response, Canada states that the Interim Report is dated October 20, 1914, and not October 24, 1914.
20. Canada admits the allegations of fact in paragraph 12 of the Declaration of Claim that Megraw stated in his December 5, 1914 report valuing the 2.97 acre parcel that he thought that the Tobacco Plains Indian Band’s chief, Chief Paul (Chief Paul), “can be got to agree to the generous valuation of \$150.00 for the whole plot of ground to be taken”. In further response, Canada states that:
- a) — ~~Megraw valued the 2.97 acre parcel at \$150; and~~
  - b) — ~~the value of \$150 was arrived at, in part, for the following reasons:~~
    - i) — ~~the 2.97 acre parcel was small for Customs purposes;~~
    - ii) — ~~most of the 2.97 acre parcel was too hilly and rocky to be of much value for farming purposes;~~
    - iii) — ~~approximately one acre of the 2.97 acre parcel was excellent land that could be used for gardening;~~

~~iv) — good farm land in that neighbourhood, but not as well situated as this, had sold for \$35 to \$50 per acre; and~~

~~v) — the valuation valued the 2.97 acres as three acres of farm land at \$50 per acre.~~

21. Canada admits the allegations of fact in paragraph 13 of the Declaration of Claim that:

- a) by memorandum dated December 18, 1914, from DIA Chief Surveyor Bray (Bray) to DIA Superintendent General Scott (Scott), Bray stated that the consent of the Indians was not required; and
- b) in a telegram dated December 22, 1914 from Scott to Megraw, the telegram stated that the Indians' consent was advisable but not necessary and that Scott approved the valuation.

In further response, Canada states that:

- c) in the December 18, 1914 memorandum from Bray, Bray also stated that the consent of the Indians in this case was not necessary as the land was required for a public purpose and that the amount of \$150 appeared to be a fair amount; and
- d) the DIA approved Megraw's valuation of the 2.97 acre parcel at \$150.

22. Canada admits the allegations of fact in paragraph 15 of the Declaration of Claim that on January 16, 1915, the Governor in Council granted an Order in Council (PC OIC 1915-114) purportedly under s 46 of the 1906 *Indian Act*, authorizing the sale to the DOC of the 2.97 acre parcel in the Provisional Tobacco Plains Indian reserve # 2. Canada denies the allegation of fact in paragraph 15 that Megraw reported that Chief Paul was not willing to accept the valuation. In further response, Canada states that:

- a) s 46 of the 1906 *Indian Act* did not apply to the Provisional Tobacco Plains Indian reserve # 2;
- b) PC OIC 1915-114 acknowledged the MBA and the RCIA's recommendation in the October 20, 1914 Interim Report, and, as contemplated by the MBA, PC OIC 1912-3277 and BC OIC 1912-1341, authorized the sale subject to the consent of the Lieutenant Governor of British Columbia;
- c) the Lieutenant Governor of British Columbia approved the sale to DOC, as provided for in PC OIC 1915-114, no later than the time the Lieutenant Governor of British Columbia passed BC OIC 1923-911, which approved the RCIA's final report, with amendments that are not relevant to this case, and confirmed the reserve without the 2.97 acre parcel; and
- d) Chief Paul consented in the valuation of \$150.

23. Canada admits the allegations of fact in paragraph 16 of the Declaration of Claim that:

- a) by memorandum dated February 1, ~~1915~~ 1914 Bray recommended to Scott that, of the \$150 received for the 2.97 acre parcel, \$135 be paid to Chief Paul, and \$15 be placed to the credit of the Tobacco Plains Indian Band; and
- b) by memorandum dated February 9, 1915, from Secretary McLean to the DOC, the DIA informed the DOC that it was now authorized to take possession of the 2.97 acre parcel.

In further response, Canada states that:

- c) the February 1, ~~1915~~ 1914 memorandum also stated that Chief Paul was to get 90% (\$135) and the Tobacco Plains Indian Band was to be credited with 10%

(\$15) and recommended this division in accordance with the ordinary practice of the DIA;

- d) in situations where land in a reserve was occupied by an Indian then it was the DIA's practice to pay 90% of any price paid for the land to that Indian, and the remaining 10% to the credit of the band for the band's "reversionary" interest;
  - e) Chief Paul was the sole occupant of lands that included the 2.97 acre parcel;
  - f) DIA followed its practice and paid the sum of \$135 (90%) to Chief Paul and credited the remaining \$15 (10%) to the Tobacco Plains Indian Band.
24. Canada admits the allegations of fact in paragraph 17 of the Declaration of Claim that, by Minute of Decision dated March 24, 1915, the RCIA ordered that the Provisional Tobacco Plains Indian reserve # 2 be confirmed as then fixed and determined and shown on the official plans of survey as 10, 560 acres, "reduced to 10, 557.03 acres by allowance of 2.97 acres" for Customs purposes.
25. The RCIA's 1916 final report confirmed the Provisional Tobacco Plains Indian reserve # 2, less the 2.97 acre parcel acquired by the DOC. The RCIA's 1916 final report, with amendments that are not relevant to this case, was ultimately approved under federal and provincial statute.

PC OIC 1924-1265, pursuant to the *Indian Affairs Settlement Act*, SC 1920, c 51, s 2  
BC OIC 1923-911, pursuant to the *Indian Affairs Settlement Act*, SBC 1919, c 32, s 2

## **V The Water Right-of-Way**

26. In or before 1917, the DOC applied to the provincial Crown for a licence to divert water to the 2.97 acre parcel.

27. On October 22, 1917, the provincial Crown's Comptroller of Water Rights issued Conditional Water Licence 2778 to the DOC. The Conditional Water Licence authorized the diversion of up to 500 gallons of water per day for year-round domestic use from a spring on Provisional Tobacco Plains Indian reserve # 2 to the 2.97 acre parcel.
28. After receiving the Conditional Water Licence from the provincial Crown, the DOC applied in November 1917 to the DIA to run a pipeline from the spring to the 2.97 acre parcel. While Customs Officer G. Dingsdale (Customs Officer Dingsdale), Customs Officer for the Roosville Customs house, initially indicated that the DOC required a strip eighteen inches wide and 141 feet long, the DOC ultimately applied for a strip eighteen inches wide and 170 feet long for a pipeline from the spring to the 2.97 acre parcel.
29. In response to the allegations of fact in paragraph 18 of the Declaration of Claim, Canada admits that on November 22, 1917, Customs Officer Dingsdale sent H. Nicholson (Nicholson), Acting Collector of Customs, a sketch showing lands required for a right of way to transport water by pipeline from a source on Provisional Tobacco Plains Indian reserve # 2 to the 2.97 acre parcel. Canada further admits that, according to the sketch, the DOC required a right of way eighteen inches wide and 141 feet long from the water source to the boundary of the 2.97 acre parcel.
30. In response to the allegations of fact in paragraph 19 of the Declaration of Claim, in connection with a letter dated November 26, 1917 from Secretary McLean to Indian agent R. Galbraith (Galbraith):
  - a) Canada admits that Secretary McLean informed Galbraith that the Conditional Water Licence was issued by the provincial Crown to the DOC to take water from a spring located on Provisional Tobacco Plains Indian reserve # 2 to the 2.97 acre parcel; and
  - b) in further response, Canada says that Secretary McLean asked Galbraith to report on the matter and, if there were no "special objections", to propose terms on

which permission might be given to lay and maintain the necessary ditch and pipeline. Secretary McLean also asked Galbraith to seek the band council's agreement to his proposed terms.

31. In response to the allegations of fact in paragraph 20 of the Declaration of Claim, Canada admits that on November 27, 1917, Nicholson, not H.L. Nicholas as pleaded, on behalf of the DOC, applied to the Superintendent General of Indian Affairs for a right of way eighteen inches wide and 170 feet long for a pipeline from a spring on Provisional Tobacco Plains Indian reserve # 2 to the 2.97 acre parcel.
32. Galbraith attempted to speak with Chief Paul, who was "chiefly interested" in the lands in question, but he was away from the reserve. Instead, Galbraith spoke to Chief Paul's brother and advised that the amount of water granted – 500 gallons per day – would not materially affect the supply to Chief Paul's ranch because Customs Officer Dingsdale's family and garden were small.
33. By letter dated January 31, 1918, Galbraith reported to the DIA that the opening of a small ditch and laying down a pipe line for a domestic supply to the 2.97 acre parcel would not do much damage to Chief Paul, who was not using the lands for garden purposes. Galbraith further reported that, as the work could not be undertaken before spring, he hoped to see Chief Paul before anything was done and to obtain his assent.
34. In response to the allegations of fact in paragraph 21 of the Declaration of Claim, Canada denies that Galbraith informed Secretary McLean on June 17, 1918 that Chief Paul "required all the water he could get for irrigation." Canada says that Galbraith informed Secretary McLean that Chief Paul "wants all the water he can get for irrigation, but I noticed that he does not conserve what he has so as to use it to best advantage."
35. In further response to the allegations of fact in paragraph 21 of the Declaration of Claim, Canada denies that Galbraith advised that Chief Paul "wanted compensation for the use of the water." Rather, Galbraith informed Secretary McLean that, based on a

conversation with Chief Paul's brother, Galbraith feared that Chief Paul was under the impression that he was losing something as a result of the diversion of some water for the Customs House and that he should get some compensation. Galbraith advised Chief Paul's brother that the amount of water required for the Customs House was "so small," and advised Secretary McLean that compensation should not be considered. Galbraith informed the DIA that he was planning to visit Chief Paul the following week to discuss the matter, "as I do not want any misunderstanding or friction as to his rights."

36. Galbraith made another attempt to speak with Chief Paul, but was unable to do so because Chief Paul was away from the reserve. Finally, in June of 1918, Galbraith reported to Secretary McLean that he had looked over the proposed pipeline to the 2.97 acre parcel and found that it could do no injury to Chief Paul's land, which had not been cultivated for years and was being used as a yard and pasture.
37. On June 26, 1918, Galbraith advised the DIA that the DOC had laid down a pipeline from the spring to the 2.97 acre parcel as well as a ditch to irrigate the Customs house's garden. He reported that the construction for the pipeline and ditch had done no damage to Provisional Tobacco Plains Indian reserve # 2, and that the quantity of water used on the 2.97 acre parcel could easily be spared. He further reported that Chief Paul and his brother assisted Customs Officer Dingsdale with the task and that, accordingly, the matter was "closed satisfactorily".
38. In response to the allegations of fact in paragraph 22 of the Declaration of Claim, Canada admits that on July 4, 1918, Secretary McLean advised DOC's Nicholson that the pipeline may be continued in operation during the pleasure of the Superintendent General of Indian Affairs. Secretary McLean noted that the ditch had been dug and the pipeline laid through Provisional Tobacco Plains Indian reserve # 2, and that the ditch and pipeline had done no damage to the reserve. Secretary McLean also noted that the quantity of water used could be easily spared and that the Tobacco Plains Indian Band did not object to the work.

39. In further response to the allegations of fact in paragraph 22 of the Declaration of Claim, Canada admits that no *Indian Act* authorization was ever provided for the Water Right-of-Way, and that the Tobacco Plains Indian Band never received compensation for the Water Right-of-Way from 1918 to 1970, when it was abandoned.
40. The Conditional Water Licence was ultimately replaced in 1925 by Final Water Licence 4868. The Final Water Licence identified the water source as Gordon Creek. The Final Water Licence enabled Customs to use and divert up to 500 gallons of water per day, year-round for domestic use. This licence, which had a precedence date of November 5, 1915, was abandoned in 1970.
41. In 1924, following a hearing in 1921 by the Board of Investigation established pursuant to the provincial *Water Act*, the Director of Indian Affairs was granted Conditional Water License 7362 for the benefit of the Band. This licence, which took precedence from 1900, authorized the use and diversion of up to 159 acre feet of water per year from Gordon and Phillips Creeks for the irrigation of 53 acres of the southerly portion of Provisional Tobacco Plains Indian reserve # 2.
42. Conditional Water Licence 7362 was replaced by Final Water Licence 11385 in 1941.

## **VI The Establishment of Tobacco Plains Indian Reserve # 2**

43. On July 29, 1938, the provincial Crown transferred the underlying title to the 2.97 acre parcel and to the Provisional Tobacco Plains Indian reserve # 2, less the 2.97 acre parcel, to Canada pursuant to BC OIC 1938-1036. The Provisional Tobacco Plains Indian reserve # 2, less the 2.97 acre parcel, was then formally established by Canada as an Indian reserve, Tobacco Plains Indian Reserve # 2. The reserve was not an Indian reserve within the meaning of an *Indian Act* until then.

## **VII Canada Did Not Have Any Statutory Duty**

44. Canada did not have any statutory duty under the *Indian Act* in the circumstances of this case in connection with either the Customs Lands Claim or, at least until 1938, the Water Right-of-Way Claim.

**VIII ~~Canada Did Not Breach Any~~ Fiduciary Duty In Connection with the Customs Lands Claim**

45. Canada did not breach any alleged fiduciary duty in the circumstances of this case in connection with the Customs Lands Claim insofar as it relates to:
- a) the alleged failure to minimally impair the Tobacco Plains Indian Band's interest in the 2.97 acre parcel;
  - b) the alleged failure to consult with and obtain the consent of the Tobacco Plains Indian Band regarding the amount of compensation; and
  - c) the alleged failure to give the Band an adequate percentage of the compensation paid by Canada for the 2.97 acre parcel.
46. Canada denies that in the circumstances of this case any fiduciary duty arose from the facts to minimally impair the Tobacco Plains Indian Band's interest in the 2.97 acre parcel. In addition:
- a) Canada was required to, and did, refer DOC's request for the 2.97 acre parcel in the Provisional Tobacco Plains Indian reserve # 2 to the RCIA;
  - b) the RCIA recommended approval of the DOC's request;
  - c) Canada complied with the "requirements of the law" and "paid proper compensation ... to the Indians" within the meaning of the RCIA's Interim Decision of October 20, 1914; and

- d) DOC's acquisition of the 2.97 acre parcel was confirmed in the RCIA's final report and subsequently approved under federal and provincial statute.  
PC OIC 1924-1265, pursuant to the *Indian Affairs Settlement Act*, SC 1920, c 51, s 2  
BC OIC 1923-911, pursuant to the *Indian Affairs Settlement Act*, SBC 1919, c 32, s 2
47. In the alternative, Canada did not breach any duty to minimally impair the Tobacco Plains Indian Band's interest in the 2.97 acre parcel. A full interest in the 2.97 acre parcel was reasonably required for Customs purposes.
48. Canada did not breach any fiduciary duty in paying 90% of the compensation for the 2.97 acre parcel to Chief Paul, the occupant of the land, and 10% of the compensation to the Band: to properly value and obtain adequate compensation for the 2.97 acre parcel:
- a) ~~Canada paid appropriate compensation for the 2.97 acre parcel;~~
  - b) ~~Canada consulted and obtained the consent of the Tobacco Plains Indian Band, through Chief Paul's consent, to the valuation of the 2.97 acre parcel at \$150; and~~
  - e) ~~in the alternative:~~
    - a) Chief Paul occupied the 2.97 acre parcel and consented to the valuation; and
    - b) the Tobacco Plains Indian Band had only a "reversionary" interest in the 2.97 acre parcel.
49. Canada did not breach any fiduciary duty to consult with and obtain the Tobacco Plains Indian Band's consent to the amount of compensation for the 2.97 acre parcel:
- a) Canada consulted and obtained the consent of the Tobacco Plains Indian Band, through Chief Paul's consent, to the valuation of the 2.97 acre parcel at \$150; and

b) in any event, Canada denies that in the circumstances of this case any fiduciary duty arose from the alleged facts to consult with and obtain the Tobacco Plains Indian Band's consent to the amount of compensation for the 2.97 acre parcel. The circumstances include the following:

i) ~~Canada had appropriately valued the 2.97 acre parcel in the Provisional Tobacco Plains Indian reserve # 2;~~

i)ii) Chief Paul occupied the 2.97 acre parcel and consented to the valuation;

ii)iii) the Tobacco Plains Indian Band had only a "reversionary" interest in the 2.97 acre parcel; and

iii)iv) Canada, at the time, could not ignore the public interest in providing for Customs purposes. Canada is no ordinary fiduciary and wears many hats and represents many interests and Canada denies that any action in furtherance of this public interest gave rise, in the circumstances, to such a duty owed to the Tobacco Plains Indian Band.

**IX Canada Acknowledges A Breach of Fiduciary Duty ~~In Connection with the Water Right of Way Claim~~**

50. Canada acknowledges, for the purposes of this proceeding only, that it breached its fiduciary duty by failing to properly value the 2.97 acre parcel. Canada agrees that the 2.97 acre parcel should have been valued at \$208 in 1915. Other than as expressly admitted in this paragraph, Canada did not breach a fiduciary duty, or any other duty, to the Tobacco Plains Indian Band in connection with the 2.97 acre parcel.

51. Canada acknowledges that it breached its fiduciary duty to the Tobacco Plains Indian Band by failing to obtain compensation for the lands on Provisional Tobacco Plains

Indian reserve # 2 and, after 1938, Tobacco Plains Indian Reserve # 2, that were used for the pipeline and ditch from the water source to the boundary of the 2.97 acre parcel.

Other than as expressly admitted in this paragraph, Canada did not breach a fiduciary duty, or any other duty, to the Tobacco Plains Indian Band in connection with the Water Right-of-Way Claim.

**X Acquiescence and Consent in Connection with the Customs Lands Claim**

52. In the event that Canada breached any alleged duty in connection with the Customs Lands Claim then the Tobacco Plains Indian Band acquiesced in and/or consented to it.

**XI No Damages in Connection with the Customs Lands Claim**

53. Canada denies that the Tobacco Plains Indian Band suffered any loss or damages caused by any alleged breach of duty by Canada in connection with the Customs Lands Claim, except with respect to the breach of fiduciary duty acknowledged by Canada for failure to properly value the 2.97 acre parcel.

54. ~~Adequate compensation was paid and Canada pleads and relies on section 14 (1) (e) of the Act.~~

55. In the event that that Canada breached any alleged duty causing damages to the Tobacco Plains Indian Band then Canada says that the Tobacco Plains Indian Band's interest at the time was at most a "reversionary" interest in the 2.97 acre parcel, subject to Chief Paul's rights of occupation and to his improvements.

**XII Apportionment of Liability in Connection with the Customs Lands Claim**

56. In the event that Canada is found liable for any damages for an alleged breach of duty in connection with the Customs Lands Claim then the provincial Crown also caused or contributed to the acts or omissions relied on by the Tobacco Plains Indian Band under s

14 (1) of the *Act*, or to the loss arising from those acts or omissions, and Canada pleads and relies on s 20 (1) (i) of the *Act*.

**XIII Relief**

57. Canada seeks to have the Customs Lands Claim dismissed in its entirety part insofar as it relates to the alleged failure to minimally impair the Tobacco Plains Indian Band's interest in the 2.97 acre parcel, the alleged failure to consult with and obtain their consent regarding the amount of compensation and the alleged failure to give the Band an adequate percentage of the compensation paid by Canada for the 2.97 acre parcel.
58. If the Tribunal determines that the taking of the 2.97 acre parcel by Canada was valid, Canada acknowledges that the Tobacco Plains Indian Band is entitled to compensation for failure to properly value the 2.97 acre parcel at \$208 in 1915.
59. Canada acknowledges that the Tobacco Plains Indian Band is entitled to compensation for the use of land on the reserve from 1918 to 1970 in connection with the Water Right-of-Way Claim.

Dated: September 30, 2014



Signature of

Respondent     lawyer for Respondent

**William F. Pentney,**

Deputy Attorney General

**Per: John Russell Kelly Keenan**

Department of Justice

British Columbia Regional Office

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