

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	November 22, 2019	D E P O S É
Isabelle Bourassa		
Ottawa, ON	1	

SCT File No.: 7003-19

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

XA'XTSA

Claimant

v.

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA  
As represented by the Minister of Crown-Indigenous Relations

Respondent

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**DECLARATION OF CLAIM**

**Pursuant to Rule 41 of the**

***Specific Claims Tribunal Rules of Practice and Procedure***

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This Declaration of Claim is filed under the provision of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

**November 22, 2019**

Isabelle Bourassa \_\_\_\_\_

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA  
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**

1. The Claimant, Xa'xtsa, also known as the Douglas First Nation, confirms that it is a First Nation within the meaning of s. 2 of the *Specific Claim Tribunal Act* (the "Act") by 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 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. On or about February 24, 2015, Xa'xtsa filed a Specific Claim in respect to the Division of Douglas Tribe (the "Claim"), with the Specific Claims Branch of the Department of Aboriginal Affairs and Northern Development Canada.
4. The Claim relates to the division of the reserves of the Douglas Tribe in 1956 by the Government of Canada, resulting in the creation of three Bands: Xa'xtsa, the Skatin Band (formerly referred to as the Skookumchuck Band, and alternatively spelt as the Skookum Chuck Band), and the Samahquam Band. Xa'xtsa asserts that the federal government breached its legal obligation and fiduciary duty to Xa'xtsa by consenting in 1956 to the division of reserves of the Douglas Tribe amongst Xa'xtsa, the Skatin Band and the Samahquam Band, which resulted in the alienation of eight reserves which Xa'xtsa has a continuing beneficial interest in.

5. In a letter dated June 14, 2019, the Department of Crown-Indigenous Relations and Northern Affairs Canada notified Xa'xtsa of the Minister's decision not to seek to negotiate a settlement of the Claim:

I am writing to advise you that the assessment of the Douglas First Nation's Division of Douglas Tribe Reserves specific claim has been completed, and to notify you of the decision of the Minister of Crown-Indigenous Relations not to seek to negotiate a settlement of the claim.

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

6. For the purpose of the claim, Xa'xtsa 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 Act:

...

(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;

...

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority.

...

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

8. The “Douglas Tribe”, also referred to as the “Douglas Indians”, as identified by Reserve Commissioner O’Reilly in 1882, comprised what are now present day Xa’xtsa, the Skatin Band and the Samahquam Band. The Royal Commission on Indian Affairs in British Columbia (the “McKenna-McBride Commission”) affirmed a number of reserves for the Douglas Tribe in 1913 and British Columbia Order-in-Council No. 1036, July 29, 1938 (“OIC 1036”) re-affirmed these reserves in 1938, which finalized the creation of reserves in British Columbia. OIC 1036 confirmed Xa’xtsa’s interest in the following reserves:

Sachteen 2	Tipella 7
Sachteen 2A	Douglas 8
Sweeteem 3	Morteen 9
Skookumchuck 4	Franks 10
Sklahhensten 5	Perrets 11
Lelachen 6	

(collectively, the “Douglas Reserves”)

9. Xa’xtsa has been denied joint and beneficial use of the Douglas Reserves, except in respect to Lelachen Indian Reserve No. 6, Tipella Indian Reserve No. 7, and Douglas Indian Reserve No. 8, which are set aside for the use and benefit of Xa’xtsa.

**Terms of Union**

10. In 1871, the Colony of British Columbia (the “Province”) joined Confederation pursuant to the *British Columbia Terms of Union, 1871*, RSC 1985, App II, No. 10 (the “*Terms of Union*”). By Article 13 of the *Terms of Union*, Canada and the Province agreed that Canada would assume the “charge of the Indians, and the

trusteeship and management of the lands reserved for their use and benefit.” Article 13 specifically provided for the creation of Indian reserves.

11. By Article 13, Canada and the Province also agreed on a mechanism for the creation of reserves in the future, which was to embody “a policy as liberal as that hitherto pursued by the British Columbia Government”. On application by Canada, the Province would convey to Canada, in trust for the use and benefit of the Indians, tracts of land “of such extent as it had hitherto been the practice of the British Columbia Government to appropriate for that purpose.”

### **Establishment of Joint Indian Reserve Commission**

12. In 1876, Canada and the Province established the Joint Indian Reserve Commission (the “JIRC”) to implement their obligations under Article 13 of the *Terms of Union* including the establishment of a process to set aside reserve lands for the use and benefit of Indians as contemplated by Article 13.
13. In 1877, Canada and the Province agreed that the JIRC should be dissolved and replaced by a sole Indian Reserve Commissioner.
14. In 1880, the Governor in Council approved the appointment of Peter O’Reilly as an Indian Reserve Commissioner.

### **Reserve Allotment**

15. The Governor in Council passed Order in Council PC 1334 approving the appointment of Commissioner O’Reilly and described his duties as follows:

... the responsible duties connected with which consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes.

16. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate in a letter that included the following:

In allotting Reserve Lands to each Band 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 [sic] towards 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)...

### **Establishment of Reserves of the Douglas Tribe**

17. The Douglas Reserves were allotted by Commissioner O'Reilly from 1882-1897. Commissioner O'Reilly first visited the members of the "Douglas Tribe" in 1882.
18. The "Douglas Tribe", also referred to as the "Douglas Indians", as identified by Commissioner O'Reilly in 1882, comprised what are now Xa'xtsa, the Skatin Band and the Samahquam Band
19. In his report dated March 15, 1882, Commissioner O'Reilly described visiting "...several small encampments, inhabited by portions of the Douglas tribe; they have been attracted to these spots by the fisheries on the Lillooet River, and have made their homes on its banks, where they have cultivated every available nook."
20. In his accompanying minutes of decision dated March 15, 1882, Commissioner O'Reilly allotted the following reserves of the Douglas Tribe:

Samahquam No 1

Sachteen No 2

Sweeten No 3

Skookumchuck No 4

Sklahhesten No 5

21. Commissioner O'Reilly returned to the area in 1884 to allot further reserves to the Douglas Tribe. In his minutes of decision dated June 6, 1884, he allotted the following reserves of the Douglas Tribe:

Lelachen No 6

Graveyard No 7

Douglas No 8

22. Reserves of the Douglas Tribe were first surveyed over the period 1882-1885 by Dominion Land Surveyor William S. Jemmett. Jemmett "[s]urveyed and drawn" the reserves of Xa'xtsa during "1882-83, 1884-85". Both Wm Smythe, C. C. of Lands and Works and Commissioner O'Reilly signed the plan on May 1, 1886.

23. During the fall of 1897, Commissioner O'Reilly once more returned to visit the Douglas Tribe and in minutes of decision dated October 27, 1897, allotted five additional reserves to the Douglas Tribe:

Sachteen 2A

Morteen 9

Sklahhesten 5A

Franks 10

Perrets 11

24. The reserves which were allotted from 1882-1897 by Commissioner O'Reilly were set aside for the benefit of the Douglas Tribe, without differentiating between the smaller sub-groups which would be later recognized as Xa'xtsa, the Skatin Band and the Samahquam Band.

25. The reserves of Xa'xtsa which had been allotted by Commissioner O'Reilly in 1897 were surveyed by Indian Affairs Department Surveyor E. M. Skinner in

1903. Skinner further prepared Plan No. 2 of the Douglas Indian Reserves in 1903. Both W.S. Gore, C. C. of Lands and Works and Commissioner O'Reilly signed Plan No. 2 on February 13, 1904.

26. The Douglas Reserves were confirmed by F.C. Green, Surveyor General of B.C., on March 19, 1940.

### **Establishment of the McKenna-McBride Commission**

27. On September 24, 1912, in an attempt to "settle all differences" regarding reserves, Canada and the Province established the McKenna-McBride Commission.
28. The McKenna-McBride Commission was to review the previous reserve allotments to determine whether the allotments exceeded or were insufficient to satisfy that which is "...reasonably required for the use of the Indians of that tribe or locality..." and make adjustments it considered necessary.
29. On June 30, 1916, the McKenna-McBride Commission released its final report, confirming Commissioner O'Reilly's allotments of the Douglas Reserves.
30. In 1924, by Orders-in-Council, the British Columbia government and the federal government approved the McKenna-McBride Commission's final report.

### **Order-in-Council 1036**

31. On July 29, 1938, the Province issued OIC 1036 which transferred administration and control of reserve lands to the Crown in right of Canada. The accompanying schedule of lands conveyed to his Majesty the King in the right of the Dominion of Canada in trust for the use and benefit of the Indians of the Province of British Columbia set out the reserves of the Douglas Tribe.



32. The accompanying schedule to OIC 1036 lists the Douglas Reserves as reserves of the Douglas Tribe without differentiating between Xa'xtsa, the Skookumchuck Band or the Samahquam Band.

### **1943 Schedule of Reserves**

33. In 1943, the Department of Indian Affairs published a document entitled Schedule of Indian Reserves in the Dominion of Canada, "recompiled and corrected up to March 31, 1943" (the "1943 Schedule of Reserves").
34. The 1943 Schedule of Reserves was compiled primarily from the Federal Collection of Minutes of Decision, correspondence and Sketches from the Indian Reserve Commission, and from the McKenna-McBride final report. The 1943 Schedule of Indian Reserves was recompiled and corrected by C.H. Taggart up to March 31, 1943, and annotated by I.M.D. Fox.

### **Proposed Division of Trust Account No. 386**

35. By letter, dated June 18, 1946, Indian Agent J. Gillett wrote to D.M. McKay, Indian Commissioner for B.C., informing him of a proposed division of Trust Account No. 386 belonging to Xa'xtsa and the Skookumchuck Band.
36. By letter, dated July 15, 1947, McKay wrote to Indian Agent Gillett referring to variations regarding ownership of Douglas Tribe reserves as set out in the McKenna-McBride Commission report of 1913 and as set out in the 1943 Schedule of Reserves. McKay advised "It would appear that the 1913 Schedule is the correct one as it was established as a result of evidence submitted to the Royal Commission, both by Indians and officials...".
37. A joint Band Council Resolution of Xa'xtsa and the Skookumchuck Band was passed on April 15, 1948, which concerned the division of Trust Account monies:

...we are completely satisfied with the division of Band Funds as outlined in the attached statements, said funds now held in Account No. 386.

It is further agreed that \$12,926.06 belongs to Douglas Band, and \$4,301.55 to Skookum Chuck. We request that a new Account be set up for the Skookum Chuck Band, and the amount of \$4,301.55 be transferred from Account 386 for that purpose.

### **1948 Band Council Resolutions**

38. A Band Council Resolution attributed to Xa'xtsa was passed on April 15, 1948, which concerned the division of reserve lands whereupon Xa'xtsa was to receive the following reserves:

I.R. No. 6, known as Lelachen, and containing 37 ½ acres  
I.R. No. 7, known as Grave-yard, and containing 0.75 acres  
I.R. No. 8, known as Douglas, and containing 1030 acres

39. A Band Council Resolution attributed to the Skookumchuck Band was passed on April 15, 1948, which concerned the division of reserve lands whereupon the Skookumchuck Band was to receive the following reserves:

I.R. No. 3, known as Sweeten containing 36 acres  
I.R. No. 4 and 4A, known as Skookum Chuck, containing 7389 acres  
I.R. No. 5, 5A, & 5B, known as Sklahhesten, containing 316 acres  
I.R. No. 9, known as Morteen, containing 125 acres  
I.R. No. 10, known as Franks, containing 111 acres  
I.R. No. 11, known as Perrets, containing 30 acres  
I.R. No. 12, known as Glacier, containing 280 acres

40. By letter, dated April 20, 1948, Indian Agent J. Gillett wrote to the Indian Commissioner for British Columbia W.S. Arneil, in which he advised of the division of reserve lands, referring to a joint meeting of Xa'xtsa and the Skookumchuck Band (the "1948 Joint Meeting") where the previously mentioned Band Council Resolutions were passed:

A joint meeting of the two Bands concerned, Douglas and Skookum Chuck, was held on the 15th of April when the Agent in company with Farming Instructor were present. Both Bands were unanimous as to the allotment of Reserves as outlined in the Resolutions, and I therefore recommend that the Resolutions be approved.

41. As of April 15, 1948, the date of the 1948 Joint Meeting, there had been no formal legal division of the Douglas Tribe pursuant to the *Indian Act*.
42. There is no evidence that a notice of the 1948 Joint Meeting was provided. Further, there is no evidence of a voter's list, minutes of the 1948 Joint Meeting, and no evidence of a certified oath of the 1948 Joint Meeting by the Superintendent General or Indian Agent.
43. By Memorandum to File, dated April 24, 1950, A.G. Leslie, Trusts and Annuities Division, wrote in respect to the ownership of the reserves being considered, advising to leave Trust Account No. 386 in the ownership of Xa'xtsa and the Skookumchuck Band jointly on the basis that:

...Reserves 1A and 1B might properly be regarded as belonging to the Samahquam Band; No. 12 may be regarded as belonging to the Skookumchuck Band. All other Reserves are owned in common by the Douglas Tribe which appears to be comprised of the Samahquam, Skookumchuck, and Douglas Bands.
44. By letter, dated October 9, 1952, J.C. Letcher, the Superintendent, New Westminster Agency, wrote to Arneil, Indian Commissioner for British Columbia, identifying a "question of ownership of the Sachteen I.R. Nos. 2 and 2A" between "members of the Skookum Chuck and Samahquam Bands..." Letcher further stated "we believe that if we try to follow it up too strenuously we will do more harm than good, as arguments and hard feelings will creep in...we recommend that they be considered as owned jointly by the two Bands concerned." In the same letter, Letcher wrote:

If the Department will accept these facts and consider the Reserves as a joint ownership, then we believe that the Douglas-Skookum Chuck Band Account can be divided on the basis already agreed upon by the two Bands.

...

We would ask that if at all possible the Trust Account be divided without any further negotiations...If we proceed with the ownership debate on the reserves in question, there will be continuous friction among the three Bands and nothing will be accomplished.

### **1953 Band Council Resolutions**

45. By three joint Band Council Resolutions of Xa'xtsa, the Samahquam Band and the Skookumchuck Band, dated November 13, 1953 (the "1953 Band Council Resolutions"), the Bands agreed to "clarify the ownership of certain Indian Reserves listed in the Report of the Royal Commission of 1913-1915." According to the 1953 Band Council Resolutions, the Douglas Reserves were to be divided as follows:

#### Douglas Band

Lelachen I.R. No. 6 comprising 37.50 acres  
Graveyard I.R. No. 7 comprising 0.75 acres  
Douglas I.R. No. 8 comprising 1030.00 acres

#### Samahquam Band

Samahquam I.R. No. 1 comprising 249.0 acres  
Samahquam I.R. No. 2 comprising 15.0 acres  
Samahquam I.R. No. 2A comprising 50.0 acres

#### Skookum Chuck Band

Sweeten I.R. No. 3 comprising 36.00 acres  
Skookum Chuck I.R. No. 4 comprising 526.00 acres  
Skookum Chuck I.R. No. 4A comprising 213.00 acres  
Sklahhesten I.R. No. 5 comprising 79.00 acres

Sklahhesten I.R. No. 5A comprising 185.00 acres  
Sklahhesten I.R. No. 5B comprising 87.00 acres  
Morteen I.R. No. 9 comprising 125.00 acres  
Franks I.R. No. 10 comprising 109.00 acres  
Perrets I.R. No. 11 comprising 30.00 acres  
Glazier Creek I.R. No. 12 comprising 280.00 acres

46. A report, dated November 16, 1953, on the meeting of the three Bands was filed by Agent Letcher providing further details on the signing of the 1953 Band Council Resolutions; "We had separate resolutions signed simultaneously by members of each band wherein the said members agreed in the presence of each other as to the ownership of Reserves of each Band that henceforth are to be known as follows...".
47. There is no evidence that a notice of the meeting where the 1953 Band Council Resolutions were signed was provided. Further, there is no evidence of a voter's list, minutes of such meeting, and no evidence of a certified oath of such meeting by the Superintendent General or Indian Agent.

**Trust Account No. 386**

48. By letter, dated November 16, 1953, Letcher, Superintendent, New Westminster Indian Agency, wrote to Arneil, Indian Commissioner for British Columbia, referencing ownership of Sachteen I.R. Nos. 2 and 2A as settled, and seeking division of Trust Account No. 386. A division of Trust Account No. 386 was urged in a further letter by Letcher to Arneil, dated October 1, 1954.
49. By letter, dated October 12, 1954, Arneil wrote to the Indian Affairs Branch, Dept. of Citizenship and Immigration, seeking that "...ownership of the Samahquam, Skookum Chuck and Douglas Reserves be confirmed and that the Douglas-Skookum Chuck Trust Account be divided."

50. A response to Letcher's requests for the division of Trust Account No. 386 from W.C. Bethune, Acting Superintendent, Reserves and Trusts, dated January 19, 1956, provided an accounting of the division of Trust Account No. 386:

...the balance in the Capital Account was \$15,416.47, which we consider should be divided as follows:

Douglas \$12,374.91

Skookumchuck \$3,041.55

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Total \$15,416.46

At the present time there is a balance of \$65,006.76 in the Capital Account but we are having difficulty in determining just what the division should be.

It is asked therefore that you forward a statement of all funds received here to the credit of the Capital account from April 1<sup>st</sup>, 1952 to date, advising which Band is the rightful owner of these funds...

51. The requested information was supplied and a subsequent letter from Bethune to Letcher was dated February 27, 1956 stating "...we are now in a position to divide Capital Account #386 among three Bands, forming the Douglas Tribe. Of the three, of course, the division actually results in only two getting any Capital monies..."

52. A Memorandum, dated July 5, 1956, to the Chief Treasury Officer from Bethune, provided details on the division of Trust Account No. 386 as follows:

...it has been established that as of March 31<sup>st</sup>, 1956 the division of the account should be as follows:

Douglas

Capital \$21,425.38

Revenue \$2,687.38

Skookum Chuck

Capital \$52,761.67

Revenue \$1,423.63

...

**Division of Douglas Tribe**

53. By Memorandum, dated December 14, 1956, H.M. Jones, Director, Indian Affairs Branch, advised the Deputy Minister of Citizenship and Immigration concerning the Douglas Reserves, recommending that pursuant to Section 17 of the *Indian Act*, Chapter 149, Revised Statutes of Canada, 1952 (the "1952, *Indian Act*"), that the Douglas Tribe be divided into Xa'xtsa, the Skookum Chuck Band and the Samahquam Band:

...

I would, therefore, recommend that pursuant to Subsection 1 (a) and Subsection 2, of Section 17 of the Indian Act, Chapter 149, Revised Statutes of Canada, 1952, that the Douglas Tribe of Indians, in the Province of British Columbia, be constituted as three separate Bands; Xa'xtsa, The Skookum Chuck Band, and the Samahquam. Band, and that the Indian Reserves listed hereinbefore, be set apart in accordance with the request of these Indians, set out in the Resolutions of November 13th, 1953.

It is further recommended that the funds, totaling \$92,228.08 as on October 31st, 1956, held in trust for these Indians be divided between the Douglas and Skookum Chuck Bands on the basis agreed upon by Resolution dated April 15th, 1948. As for the Samahquam Band, they already have their funds in a separate trust account and are satisfied with this division due to the fact that this fund was created from revenue arising on the Reserves claimed by the Douglas and Skookum Chuck Bands.

54. The division, as specified, was approved by the Deputy Minister of Citizenship and Immigration on December 14, 1956, the same day, as noted in a Memorandum, dated January 3, 1957, by Bethune, Superintendent, Reserves and Trusts.
55. Journal Voucher No. 560, dated January 23, 1957, transferred \$15,445.38, being capital and revenue monies received during fiscal year 1956-57, from Trust Account No. 386 (Xa'xtsa) to Account No. 457 (Skookum Chuck Band). Journal Voucher No. 561, dated January 23, 1957, transferred \$54,185.30, being capital and revenue monies received for the period to 31 March 1956, from Trust Account No. 386 (Xa'xtsa) to Account No. 457 (Skookum Chuck Band).

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

**Reserve Alienation**

56. This Claim is based on the Crown's breach of its common law fiduciary duty and legal obligation under the *Indian Act* for failing to obtain informed consent of Xa'xtsa prior to approving the division of the Douglas Reserves of the Douglas Tribe through Band Council Resolutions, failing to carry out a surrender vote under the *Indian Act* from members of the Douglas Tribe to obtain informed consent for the division of the Douglas Reserves, and failing to amend OIC 1036 to divide the Douglas Reserves.
57. The division of the Douglas Reserves of the Douglas Tribe resulted in Xa'xtsa being alienated from the following reserves:

Sachteen 2;  
Sachteen 2a;



Sweeteen 3;  
Skookumchuck 4;  
Sklahhesten 5;  
Morteen 9;  
Franks 10; and  
Perrets 11.

(Collectively, the “Alienated Reserves”)

58. There is no evidence of a quit claim being executed by Xa’xtsa in release of its joint legal and beneficial interest in the Alienated Reserves.

### **Source of Fiduciary Duty**

59. Fiduciary duties originate with the *Royal Proclamation, 1763*, which establishes the Crown-Indigenous relationship as fiduciary in nature. The associated precept is the Honour of the Crown.
60. The Honour of the Crown gives rise to a fiduciary duty where the Crown assumes discretionary control over a specific Aboriginal interest.
61. Canada’s fiduciary duty with respect to the reserve creation for Xa’xtsa 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 Xa’xtsa as the exclusive intermediary with the Province in relation to its Aboriginal interests.
62. Canada’s fiduciary obligation arose as an exclusive intermediary with the Province for the purpose of reserve creation in relation to Xa’xtsa’s interest in land habitually and historically used and occupied by Xa’xtsa. Canada’s position as an exclusive intermediary conferred a degree of control that left Xa’xtsa’s

cognizable Aboriginal interest in the Alienated Reserves vulnerable to the adverse exercise of Canada's discretion.

63. Canada's pre-reserve creation fiduciary duties 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.

### **Cognizable Interest**

64. Xa'xtsa's cognizable and beneficial interest in the Alienated Reserves arose upon the allotments of the Douglas Reserves by Commissioner O'Reilly in his minutes of decision dated March 15, 1882, June 6, 1884, and October 27, 1897.
65. The Alienated Reserves as allotted by Commissioner O'Reilly were set aside for the benefit of the Douglas Tribe, without differentiating between the smaller sub-groups which would be later recognized as Xa'xtsa, the Skatin Band and the Samahquam Band.
66. The allotments by Commissioner O'Reilly of the Alienated Reserves were intended to be for the Douglas Tribe as a whole and were the basis for OIC 1036. As part of the Douglas Tribe at the time of the allotments, Xa'xtsa was an intended beneficiary of the Alienated Reserves.
67. The Schedule of Indian Reserves attached to OIC 1036 lists all of the Douglas Reserves which were allotted by Commissioner O'Reilly as being set aside for the benefit of the Douglas Tribe, including the Alienated Reserves.

### **Fully Constituted Indian Reserves**

68. On July 29, 1938, the date in which OIC 1036 was issued, at the latest, the Alienated Reserves became fully constituted *Indian Act* reserves of the Douglas Tribe, for the use and benefit of Xa'xtsa.

69. OIC 1036 is the final legal instrument for the creation of reserves in B.C. and identifies that the Alienated Reserves are jointly held by Xa'xtsa.
70. Any division of the Alienated Reserves of the Douglas Tribe should have been carried out through amending OIC 1036.
71. Once the Alienated Reserves became fully constituted *Indian Act* reserves, Canada's obligations expanded to include the protection and preservation of Xa'xtsa's interest in the Alienated Reserves.

### ***Indian Act* Section 17 Division**

72. At the time the Douglas Tribe was divided under Section 17 of the 1952 *Indian Act*, Xa'xtsa held legal and equitable interests in the Alienated Reserves in common with the Skatin Band and the Samahquam Band.
73. When the Minister exercised their discretion pursuant to Section 17 of the *Indian Act*, it was an undertaking of discretionary control that invokes responsibility in the nature of a private law duty.
74. The *Indian Act* provides a very high degree of protection to reserves and the statutory discretion associated with Section 17 impose fiduciary obligations upon the Crown of the highest order. The discretion afforded by Section 17 engages the Crown's fiduciary obligations and the Minister must exercise that discretion consistent with those obligations.

### **Fiduciary Duties**

75. The duties owed to Xa'xtsa included the duty of ordinary accountability of a fiduciary as well as the duty to preserve and protect Xa'xtsa's interest in the Alienated Reserves from exploitation.

76. The ordinary accountabilities most relevant in this Claim include acting in the best interests of Xa'xtsa, loyalty, good faith, full disclosure, reasonable diligence, ordinary prudence, prevention of improvident transactions, respect for Xa'xtsa's decisions, and acting in accordance with the *Indian Act*. All of these duties were present when Section 17 was exercised.
77. The Minister failed to exercise their statutory discretion with ordinary prudence when they failed to identify Xa'xtsa as a beneficiary of the Alienated Reserves and divested Xa'xtsa of its reserve interests.
78. The *Indian Act* in its various versions prohibited the acquisition of any interest in reserve land by individuals or by agreement, except by a specific statutory authorization and contained prohibitions on the acquisition of interests in reserve land by use and occupation or various forms of acquiescence or agreement.

#### **Improvident Transaction**

79. Divesting Xa'xtsa of its interests in the Alienated Reserves was an improvident transaction for Xa'xtsa. The Band Council Resolutions obtained on April 15, 1948 and on November 13, 1953 do not absolve the Crown of responsibility.

#### **Failure to Obtain Informed Consent**

80. There is no evidence that Xa'xtsa had legal representation at any time when the Crown was exerting pressure to seek the division of the Douglas Tribe, nor does the evidence demonstrate that Xa'xtsa fully understood or was fully informed about what it was entitled to and what it was consenting to forgo. The Crown was also in breach of its duties to evaluate, fully inform, seek directions, and reject improvident transactions. Informed consent prior to a disposition is required as a matter of fiduciary duty.

81. The Crown never sought the Free Prior Informed Consent of Xa'xtsa related to the Division of the Douglas Tribe nor the disposition of the Alienated Reserves.

### **Failure to Obtain Surrender**

82. The Crown did not follow the surrender provisions of the *Indian Act* based upon the absence of supporting documentation:

- a. No evidence of a notice of a meeting;
- b. No voter's list;
- c. No minutes of the meeting; and
- d. No certified oath by the Superintendent General or Indian Agent.

83. Under the *Indian Act*, Xa'xtsa had the right to decide whether to surrender the Alienated Reserves, and its decision was to be respected.

84. If the Crown had sought to divide the Douglas Reserves through a valid surrender pursuant to the *Indian Act*, the Crown would have been able to seek informed consent from Xa'xtsa through a referendum.

### **Fiduciary Duty and Competing Interests**

85. The Crown cannot shirk its fiduciary duty, where it exists, by invoking competing interests.

86. In order for the Crown to resile from an established fiduciary duty, clear statutory language must be present.

87. Section 17 of the 1952 *Indian Act*, does not provide clear language removing, altering, or diminishing established fiduciary obligations.

### **Duty to Correct Error**

88. When an error is made by the Crown, as a fiduciary, it must act with reasonable diligence to correct the error.
89. Where a Band has suffered alienation of reserve lands due to a breach of the Crown, the Crown must restore the lands to the Band.
90. The Crown breached its fiduciary duty by failing to seek a correction of the errors as set out in the 1943 Schedule of Reserves, which were not in accordance with Commissioner O'Reilly's allotments of the Douglas Reserves and not in accordance with OIC 1036.

### **Duty of Minimal Impairment and Failure to Provide Compensation**

91. The Crown had a fiduciary and legal obligation to safeguard and protect Xa'xtsa's interest in its reserve lands and to deal with the Alienated Reserves in the best interests of the members of Xa'xtsa. Disposition of a confirmed reserve interest without informed consent is analogous to an expropriation. The Crown had a fiduciary duty to only grant the minimum interest required, to ensure minimal impairment to the use and enjoyment of the Alienated Reserves by Xa'xtsa, and to provide compensation for necessary losses.
92. There is no evidence that the Crown gave consideration to providing compensation for the deprivation suffered by Xa'xtsa.
93. A 'person of ordinary prudence' would not allow his or her own lands to be taken without a valuation and compensation. The Crown did not meet these obligations and breached its fiduciary duties to Xa'xtsa.

94. Without limiting the foregoing, the Crown acted dishonorably and breached its fiduciary and/or legal obligations to the Band:
- a. by failing to obtain informed consent of Xa'xtsa prior to approving the division of the Alienated Reserves of the Douglas Tribe through Band Council Resolutions;
  - b. by failing to carry out a surrender vote under the *Indian Act* from members of the Douglas Tribe to obtain informed consent for the division of the Alienated Reserves of the Douglas Tribe;
  - c. by failing to amend OIC 1036 to divide the Alienated Reserves of the Douglas Tribe;
  - d. by failing to inquire into or obtain replacement lands for Xa'xtsa;
  - e. by failing to exercise ordinary prudence and accountability when it failed to identify Xa'xtsa's beneficial interest in the Alienated Reserves;
  - f. when it failed to identify Xa'xtsa as a common beneficiary of the Alienated Reserves;
  - g. by failing to protect and preserve the confirmed Alienated Reserves for the benefit of Xa'xtsa from exploitation when the Crown prioritized its interest in avoiding administrative complexities related to the Alienated Reserves over Xa'xtsa's ownership interest in the Alienated Reserves;
  - h. by failing to seek a correction of the errors related to the Alienated Reserves as set out in the 1943 Schedule of Reserves;

- i. by failing to ensure minimal impairment to the use and enjoyment of the Alienated Reserves by Xa'xtsa;
- j. by divesting Xa'xtsa of its interests in the Alienated Reserves without any compensation paid to Xa'xtsa;
- k. when it exceeded its statutory discretion under s. 17(2) of the *Indian Act*;
- l. when it failed in its duties to evaluate, fully inform, seek directions, and reject improvident transactions for the benefit of Xa'xtsa in relation to the Alienated Reserves; and
- m. throughout all times by falling below the standard of conduct mandated by its fiduciary duty to Xa'xtsa.

**VII. Relief Sought**

95. Xa'xtsa seeks:

- a. An order from the Tribunal validating this specific claim of the Band under the *Specific Claims Tribunal Act*;
- b. equitable compensation for the loss of Xa'xtsa's interests in the Alienated Reserves determined by the Tribunal to be in accordance with the principles of equitable compensation and restitution applied by the courts, and as set out by s. 20(1)(c) of the *Specific Claims Tribunal Act*;
- c. interest on compensation;
- d. costs of this claim; and



- e. such other relief or compensation as this Honourable Tribunal deems just.

Dated this 22<sup>nd</sup> day of November, 2019



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Signature of Solicitor

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