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OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:

INNU FIRST NATION OF ESSIPIT

Claimant

– and –

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

As represented by the Minister of Indian
Affairs and Northern Development

Respondent

Benoît Amyot and Léonie Boutin, for the
Claimant

Tania Mitchell and Stéphanie Dépeault, for
the Respondent

HEARD: From September 12 to 16, 2016,
and from October 24 to 26, 2016.

REASONS FOR DECISION

Honourable Johanne Mainville

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Canada v Kitselas First Nation, 2014 FCA 150, [2014] 4 CNLR 6; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Squamish Indian Band v Findlay*, 122 DLR (3d) 377, [1981] 3 CNLR 58 (BCCA); *Okanagan Indian Band v Bonneau*, 2002 BCSC 748, 216 DLR (4th) 210; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 14.

Headnote:

The Claim involves the insufficiency of the lands allocated to the Essipit Innu, then called “the Innu of the Les Escoumins area”, upon the creation of the reserve and the resulting damage and inconvenience.

Relying on paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22, the Claimant alleges that the federal Crown breached or failed to fulfill its legal and fiduciary obligations: (a) by purchasing lands that did not respect the requests made by the Essipit Innu as early as 1843 and supported by the agents of the Crown; (b) by purchasing 97 acres when it had agreed to purchase 230 acres; and (c) by failing to take into account the earlier requests made by

the Essipit Innu and their specific needs related to their way of life, to inform them of the reduced area and to consult them.

The Claimant seeks compensation for the value of the difference in area between the 230 acres originally planned and the 97 acres allocated and the loss of use resulting from this reduction in area.

The Respondent challenges and denies the merits of the Claim on the grounds that there is no legal obligation on the Crown or breach of such an obligation that could arise from the allegations contained in the Claim and challenges the damages claimed.

Facts

The Essipit Reserve lands in dispute were purchased by the federal Crown from a third party on July 23, 1892. The federal order in council confirming the status of the reserve lands was adopted on May 25, 1993. The reserve is located in what was once the King's Domain.

The Claimant situates the facts giving rise to the Claim more specifically between 1879 and 1892, after the territory of the King's Domain was opened up in 1842, while taking into account all of the requests made by the Innu prior to 1879 and the various locations occupied by the Essipit Innu.

In 1842, the King's Domain was opened up to settlement. This change in approach to land use management was to create major upheavals for the Aboriginal people and their way of life.

While the influx of settlers was occurring, between 1843 and 1853, some of the Innu of the Haute-Côte-Nord and Saguenay–Lac-Saint-Jean sent several petitions to government authorities in response to the opening up of the territory to logging and settlement. They denounced the arrival in droves of the white men who were taking their lands and pushing them toward the country's interior and made several requests to obtain land, exclusive hunting and fishing rights in various locations within the territory and monetary compensation.

Following the enactment of *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106, and the 1853 order in council

approving the land distribution schedule, the Government decided to allocate 70,000 acres to create a single, large reserve for all of the Innu of the Haute-Côte-Nord. Thus the Betsiamites Reserve was created in 1861.

The Government's decision to relocate all of the Innu of the Haute-Côte-Nord to a single, large reserve failed in that several of them refused to move there and continued to ask for land in the territories they were occupying.

Following Confederation, in the late 1870s, Justice O'Brien, who had been tasked by the Department of Indian Affairs with gathering information about the Indians of Restigouche and Betsiamites, submitted a broader and more detailed report. Among other things, he recommended the appointment of an Indian Affairs agent to make regular visits to the communities along the shore and maintain an accurate census of the population living there. He also recommended that reserves be created in several locations along the shore, such as in Godbout, Sept-Îles, Mingan and Natashquan, so that the Indians could settle into villages and begin cultivating the land. His report was well received by the federal Crown authorities.

In September 1879, Louis Félix Boucher was appointed Indian Affairs Agent for Côte-Nord, with his residence at Betsiamites. According to his instructions, in the spirit of the O'Brien Report, Agent Boucher was "to report what area of land should be set apart as Reserves for the Indians at the several points above described or at any other places at which you consider it might be advisable to establish Reserve".

On September 20, 1880, after touring the communities, Agent Boucher drafted his report, which was delivered to Mr. Vankoughnet, the Superintendent of Indian Affairs. In his report, Agent Boucher indicated the presence of a small Indian band at Les Escoumins that had for the previous 30 years been occupying a tract of land granted to a certain Édouard Vachon, who was apparently prepared to sell it at a good price for the creation of a reserve.

Following a request from Superintendent Vankoughnet, in a letter dated January 28, 1881, Agent Boucher informed his superior that, according to Mr. Vachon, the tract of land had an area of about 230 acres and was situated on Lot 11 of Range A and on part of Block A, which

the latter was prepared to sell for \$200.00. He included a map outlining the proposed area with a dotted line.

On February 23, 1881, Mr. Vankoughnet approved the purchase of no less than 230 acres for the amount of \$200.00, on the condition that Agent Boucher obtain clear titles; he was then to have the land surveyed, with Mr. Vachon's consent.

Despite not yet having obtained clear titles, Agent Boucher hired a surveyor, Mr. Boivin, to conduct the survey. On November 19, 1881, Mr. Boivin was at work in the field. The survey was conducted in the presence of Reverend Parent, the parish priest of Les Escoumins (representing the absent Agent Boucher); Mr. Vachon; and witnesses Jean Maltais and William Tremblay.

In his report dated November 19, 1881, Mr. Boivin stated that after becoming familiar with the conventions stipulated by Mr. Vachon and Agent Boucher, he had conducted the survey, and that the [TRANSLATION] "total area of the reserve so surveyed was approximately ninety-seven acres (97 acres)". The surveyed lot was situated on only a part of Block A.

On April 7, 1882, Agent Boucher sent Mr. Vankoughnet Mr. Boivin's survey map and two of the surveyor's statements of account. He also stated in his letter that the surveyed land did not have the same area as that mentioned in his letter of January 28, 1881, but was of the same size.

The Department of Indian Affairs then took various steps to obtain a clear title. On August 6, 1886, Mr. Vankoughnet was informed that the property that the federal Crown was considering purchasing for the reserve did not belong to Mr. Vachon, but rather to a certain T.J. Lamontagne, who held clear title to the land. Mr. Vachon was, however, Mr. Lamontagne's son-in-law and representative.

Mr. Vankoughnet then asked the Surveyor General of Canada to confirm whether the area surveyed by Mr. Boivin was accurate. Mr. Bray, a surveyor, who possessed the copy of Agent Boucher's letter of January 28, 1881, mentioning an area of 230 acres and Mr. Boivin's report indicating an area of 97 acres, asked to obtain Mr. Boivin's map, which had been lost by the Department of Indian Affairs. Finally, Mr. Boivin provided another copy of his map, and, on

May 6, 1887, the Surveyor General of Canada confirmed that the area surveyed by Mr. Boivin was 97 acres.

Negotiations dragged on because the parties did not agree on the price. Mr. Lamontagne insisted on receiving \$200.00, arguing that the 97-acre tract of land was same space that the parties had agreed on, while the Crown wanted to pay \$100.00 on the basis that the tract of land had been reduced to 100 acres.

In October 1891, the parties eventually agreed on a price of \$162.75, that is, \$100.00 for the 97 acres, plus 6% interest from January 28, 1881, the date on which Agent Boucher forwarded Mr. Vachon's offer to the Department of Indian Affairs.

The act of sale was signed on July 23, 1892, by Mr. Lamontagne and the federal Crown representative before the notary Jean Alfred Charlebois in Québec. Despite the fact that the technical description of the site was that appearing in Mr. Boivin's field notes and that an area of 97 acres was indicated, the plan identifying the land being sold, appended to the act of sale and signed by the parties, delimited an area by a dotted line enclosing a space situated on Lot 11 of Range A and part of Block A.

Held:

The parties recognize the existence of a cognizable Aboriginal interest, but disagree as to its scope. For the Claimant, this interest involves an area of at least 230 acres. For the Respondent, the cognizable Aboriginal interest is limited to 97 acres.

The Essipit Reserve was created for an extremely vulnerable Aboriginal population that was in great distress. The facts of this case must therefore be reviewed in light of the very particular context of the opening up of the King's Domain.

The evidence in this case demonstrates that a process to create a reserve for all the Innu of the Haute-Côte-Nord was initiated by the colonial government following the adoption of the 1853 Order in Council, which led to the creation of a single reserve in Betsiamites in 1861. However, in 1879, the federal Crown decided to create other reserves for the Innu of the Haute-Côte-Nord after seeing how the creation of a single reserve in that location had failed.

The process of creating a reserve in Essipit crystallized *de facto* in February 1881 with Superintendent Vankoughnet's decision to authorize the process of purchasing no less than 230 acres of land situated on Lot 11 of Range A and a part of Block A to create a reserve for the benefit of the Essipit Innu band.

This undertaking and this acknowledgment required the federal Crown to complete the process of creating a 230-acre reserve and protect the interests of the Innu of the Essipit band.

It is clear that the 1879 Taché plan that was found appended to the act of sale was the plan provided by Mr. Vachon to Agent Boucher and sent to Superintendent Vankoughnet in 1881. It was upon receipt of this plan that Mr. Vankoughnet gave his approval for a reserve area of no less than 230 acres, likely based on his understanding that the area delimited by the dotted line was the land occupied by the 10 Innu families identified by Agent Boucher as making up the Essipit band. It is also just as clear that it was this same land that the Crown's representative recognized as the land he understood to be the area the Crown was purchasing to create the reserve when he signed the act of sale appended to the plan.

The position of Mr. Vachon and Mr. Lamontagne, supported by Agent Boucher and according to which the parties had actually agreed on a parcel of land that turned out to have 97 acres and not one with an area of 230 acres, is implausible and has little probative value.

All of the evidence suggests that, as a question of fact, the parties did indeed agree on the sale a 230-acre area for the sum of \$200.00, but that Mr. Vachon unilaterally backed down and, without permission, reduced the agreed area to 97 acres. And Mr. Boucher either agreed without thinking or was taken in by Mr. Vachon's falsehood that the identified plot had only 97 acres.

The cognizable Aboriginal interest is not a matter of the number of acres a third party may decide to sell, but of the lands occupied by the Innu in the Les Escoumins area and recognized for this purpose by the federal Crown. The discretionary power in question meant ensuring that the reserve creation process was implemented. This discretion belonged to the federal Crown and not a third-party seller.

By February 1881, the federal Crown had demonstrated a plain and clear commitment to create a reserve in Les Escoumins for the Essipit Innu band and had recognized the interest of

this band in the lands covering a minimum area of 230 acres and situated on Lot 11 of Range A and a part of Block A.

The question of the reserve's surface area regarded the Essipit lands occupied by the Essipit Innu and was at the heart of the reserve creation process. In accordance with the Supreme Court of Canada's teachings, this process engages the federal Crown's responsibility to fulfill the basic obligations 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 at para 86, [2002] 4 SCR 245).

Moreover, the cognizable Aboriginal interest was sufficiently specific and defined for the honour of the Crown to mandate that the Crown act in the Essipit Innu's best interest, as a fiduciary, in exercising discretionary control over the reserve creation process, which entailed the duty to consult and to act diligently.

The evidence establishes that the federal Crown breached these duties.

The fact that the Crown dealt with a third party rather than setting apart public lands that belonged to it or acquiring land from the provincial Crown does not diminish the fiduciary duty by which it is bound.

The Claimant should be compensated by the Respondent for the difference between the 230 acres that were originally planned and the 97 acres that were granted, that is, for the portion situated in Block A and Lot 11 of Range A, and for the loss of use of this difference, with interest.

The quantum of damages for the losses accepted by the Tribunal will be determined at the second stage.

TABLE OF CONTENTS

I. CLAIM.....	11
II. EVIDENCE	12
A. Introduction.....	12
B. Land administration and the King’s Domain.....	13
C. The survey of land	14
D. The petitions of the Innu	16
1. The petition of February 1, 1843	17
2. The petition of July 1844	18
3. The petition of August 9, 1844	19
4. The petition of July 1845	20
5. The petition of 1846.....	21
6. The petition of April 1847	23
7. The petition of 1848.....	25
8. The petitions of 1849 and 1850	26
E. The 1850 and 1851 Acts, the 1853 Order in Council and the creation of the Betsiamites Reserve.....	27
F. Justice O’Brien’s report and the appointment of an Indian Affairs agent	29
G. The Crown’s decision to create a reserve at Essipit	31
H. The survey of the reserve, negotiations and creation of the reserve	33
III. LAY WITNESSES	40
A. Chief Martin Dufour	40
B. Didier Ross.....	41
IV. EXPERT EVIDENCE	42
A. For the Claimant	42
1. Paul Charest	42
B. For the Respondent	46
1. Jean-Pierre Garneau	46
2. Stéphanie Béreau	49
C. Notary Guillaume Laperle	53
D. Conclusions regarding the experts	54
V. POSITIONS OF THE PARTIES	54

A. Claimant	54
B. The Respondent	56
VI. ANALYSIS	56
A. What is the scope of the Respondent’s legal or fiduciary duty?.....	56
B. Did Canada breach its fiduciary duty to the Essipit Innu?.....	68
VII. DISPOSITION	76
APPENDIX.....	79

I. CLAIM

[1] The Claim involves the insufficiency of the lands allocated to the Essipit Innu, then called “the Innu of Les Escoumins (or ‘Les Escoumains’) area”, upon the creation of the reserve and the resulting damage and inconvenience.

[2] The Claimant, the Innu First Nation of Essipit, filed a claim with the federal Minister of Indian Affairs in this regard. In a letter dated October 29, 2012, it was informed of the Minister’s refusal to negotiate the settlement of this specific claim. On November 19, 2013, it filed a Declaration of Claim with the Specific Claims Tribunal (the “Tribunal”).

[3] In its Amended Declaration of Claim, relying on paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA], the Claimant alleges that the federal Crown breached or failed to fulfill its legal and fiduciary obligations for the following reasons:

- a. by purchasing lands that did not respect the requests made by the Essipit Innu as early as 1843 and supported by the agents of the Crown;
- b. by purchasing 97 acres when it had agreed to purchase 230 acres; and
- c. by failing (1) to take into account the earlier requests made by the Essipit Innu and their specific needs related to their way of life, (2) to inform them of the reduced area and (3) to consult them.

[4] The Claimant seeks the following:

- a. compensation for the value of the difference in area:
 - i. between the 230 acres originally planned and the 97 acres allocated, and
 - ii. Lot 11 of Range A and the relevant portion of Block A;
- b. compensation for the loss of use resulting from this reduction in area;
- c. interest and costs; and
- d. any other remedy that the Tribunal may consider just.

[5] The Respondent challenges and denies the merits of the Claim on the grounds that there is no legal obligation on the Crown or breach of such an obligation that could arise from the allegations contained in the Claim and challenges the damages claimed (Response, at paras 8–9).

[6] At the start of the proceedings, the parties asked that an order be made to sever the Claim into two stages. A severance order was made on April 2, 2014, stating that, in the first stage, the Tribunal would decide the merits of the Claim and whether the Claimant had suffered compensable losses. In the second stage, if necessary, the Tribunal would assess the amount of compensation to be awarded to the Claimant.

II. EVIDENCE

[7] It should be noted that in order to make the historical texts more readable, unless otherwise indicated, I have corrected any errors appearing in the cited texts.

A. Introduction

[8] The Essipit Reserve lands in dispute were purchased by the federal Crown from a third party on July 23, 1892. The federal order in council confirming the status of the reserve lands was adopted on May 25, 1993. The reserve is located in what was once the King’s Domain.

[9] The Claimant situates the facts giving rise to the Claim more specifically between 1879 and 1892, after the territory of the King’s Domain was opened up in 1842. Nonetheless, extensive evidence was filed by the parties to explain the context that led to the creation of the reserve and, from the Claimant’s point of view, to demonstrate that the purchase of 97 acres of land by the Crown did not respect the requests made by the Essipit Innu as early as 1843.

[10] The evidence therefore includes approximately 868 documents, 807 of which were filed jointly by the parties, and an additional 45 maps.

[11] The Claimant did not present any oral history evidence. It called three witnesses: Martin Dufour, Chief of the Innu First Nation of Essipit; Didier Ross, member of the Innu First Nation of Essipit; and Paul Charest, anthropologist.

[12] The Respondent, on the other hand, called two history experts: Jean-Pierre Garneau and Stéphanie Béreau.

[13] The parties also called a common expert, Guylleume Laperle, a notary. An objection was raised by the Claimant regarding a point made in his report and testimony. I will return to this below.

[14] A visit of the reserve also took place in the presence of Chief Dufour, Didier Ross, counsel for the parties and the Tribunal.

B. Land administration and the King's Domain

[15] In New France, the distribution and occupation of land was governed by the seigneurial system.

[16] At the time of the Conquest in 1760, the British authorities decided to maintain the seigneurial land grants and the rights of the seigneurs (landholders) and censitaires (tenants). At the same time, they retained the right to grant public lands in free and common socage (as townships), exempt of any seigneurial dues. This was the type of tenure adopted by the British regime.

[17] While the public domain was being opened up to settlement and several colonial policies on land management were being put forward by the Government of Lower Canada, the territories of Saguenay–Lac-Saint-Jean and the Haute-Côte-Nord were King's Posts—part of a French land regime called the “King's Domain”.

[18] The land of the King's Domain was subject to a prohibition against settlement from the outset, the Crown's objective being to promote the extraction of natural resources, reap the resulting royalties and maintain control over the land and its inhabitants. After the Conquest in 1760, this approach to developing the land and its resources continued under the British regime.

[19] Throughout its history, the King's Domain was managed through leases granted at public auction to companies or individuals. The lease gave its holder an exclusive right to develop the resources of the territory in exchange for royalties to the Crown. The initial leases were for fur trading activities, but, later, exclusive fishing and logging rights were also granted. The taxation of the extracted resources and the auction price of the lease were major revenue sources for government authorities.

[20] The Aboriginal people occupying the land in the King's Domain were therefore primary agents in its development, directly contributing to its exploitation through, among other things, the fur trade. They were encouraged to pursue their traditional activities on the lands they occupied and to maintain their nomadic way of life.

[21] From 1802 to 1821, the lease was granted to the North West Company, which merged with the Hudson's Bay Company (the "HBC") in 1821. This made the HBC the only non-Aboriginal institution within the King's Domain. It held a lease for the exclusive development of the resources and, in 1840, owned four main trading posts in the Côte-Nord: Tadoussac, Les Îlets-Jérémie (near Betsiamites), Godbout and Sept-Îles.

[22] In the meantime, starting in the 1820s, the authorities of Lower Canada, interested in the region's potential, multiplied the number of investigations and exploratory missions there. At the same time, they were also receiving testimony and petitions from settlers to open up the King's Domain lands to settlement.

[23] In 1842, the King's Domain was opened up to settlement. The HBC had to give up its exclusive rights and make room for competitors. It did maintain its monopoly trading rights at the trading posts, but it had to accept competition from farmers and loggers for the development of the land.

[24] The opening up of the King's Domain to settlement provoked a rapid influx of new occupants. The Crown was therefore required to make decisions regarding land use. It subdivided the land into townships, ranges and lots to facilitate resource development, particularly with respect to forest resources.

[25] This change in approach to land use management was to create major upheavals for the Aboriginal people and their way of life.

C. The survey of land

[26] At the request of the Commissioner of Crown Lands in 1843, George Duberger, a surveyor, Crown lands agent and speaker of the Innu language, undertook one of the first exploratory and surveying trips to what is now known as the Haute-Côte-Nord. He explored the

land with the Innu, as they were the only ones who knew it well. He had the help of surveyor Charles François Fournier and five assistants. For various reasons, the expedition was interrupted. Duberger wrote in his field notes about the presence of “squatters” in the area, particularly along the shoreline of the St. Lawrence River, and that he had received several requests that lands be purchased (Exhibit I-3, at pp 38–39). In the region of Les Escoumins, he noted the presence of the Moreau and St-Onge families and other Indians who asked to be granted the lands they were occupying gratis and with various privileges (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 58).

[27] In 1844, Duberger resumed his explorations of the Haute-Côte-Nord without Mr. Fournier. In his field notes, he recorded the presence of several occupants with irregular status between the sites of Bon-Désir and Les Escoumins who took advantage of his arrival to ask “to be permitted to set fisheries” (Exhibit I-3, at p 40; Exhibit CP-1, Vol 2, Unified Exhibit Ref No 75). It should be noted that, in 1838, Lord Durham, Governor General of British North America, began granting squatters a limited right of first refusal and that, in 1845, Crown lands agents were given instructions to encourage squatters to purchase their land and put an end to their illegal occupation.

[28] Duberger also recorded the presence of Joseph Moreau in Baie des Escoumins, a “Canadian squatter [who] has [been there] . . . 15 years, fishing for the H.H.B. Co”. He also noted that “on the west of the [r]iver, his son Flavien Moreau, a half breed of the mountainer Nation, is settled since last year, leading the same life as his father, but more anxious to cultivate the land, having for that end, cleared a small space near his house with an intention[,] he says, of abandoning the savage life, and turn to farming” (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 75).

[29] In 1845, following another expedition, Mr. Duberger identified two other “squatters” at Pointe-des-Monts, namely, Alexander Jordan, “a half breed”, and Pierre Moreau, “a half breed of the mountainiers tribe”. He wrote that they wished to purchase the lands they were occupying and on which they had built their houses and had begun to clear and cultivate. He went on to note that “[o]thers, also, have cleared small spots and built thereon”, emphasizing, however, that these people preferred hunting and fishing (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 99).

[30] Mr. Duberger wrote that he was in Les Escoumins on July 14, 1845. He was present for the signing of an agreement between “squatter” Joseph Moreau and Jean-Frédéric Boucher, a partner in the Têtu Company, in which Mr. Moreau sold his land to Mr. Boucher and abandoned any claims to the land, “the only spot where Mr[.] Boucher’s saw mill could be erected” (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 99). In 1845, the Têtu family obtained logging permits in the Baie des Escoumins and made plans to build a sawmill. The most appropriate location for its construction was where Joseph Moreau had settled. The logging company was rapidly established (Exhibit I-3, at pp 40–41).

[31] Faced with the problems associated with illegal occupation, Duberger recommended a plan of settlement along the St. Lawrence River, prioritizing the locations where squatters had already settled (Exhibit I-3, at p 41).

[32] It was not until 1847, with the work of surveyor Duncan Stephen Ballantyne, that the surveying work to divide the territory into various townships got under way (Tadoussac, Bergeronnes, Escoumins and Iberville). The settlers had already taken possession of almost all of the lands along the watercourses (Exhibit I-3, at pp 43–45).

[33] Thus, in November 1847, Mr. Ballantyne received surveying instructions from the Department of Crown Lands to explore the region between Tadoussac and Les Escoumins. During his visit, he also noted the presence of “squatters”. He surveyed their lots and recorded the improvements they had made. He also mentioned the presence of Joseph Moreau, who owned a house and was clearing the land (Exhibit CP-1, Vol 3, Unified Exhibit Ref No 129). In March 1848, he was in Les Escoumins, where he surveyed the facilities of the Têtu family, who ran the sawmill (Exhibit I-3, at pp 44–45).

[34] In 1849, Nazaire Têtu requested a new survey, as the Têtus were making plans to establish the village of Les Escoumins on the Pointe des Escoumins, where their sawmills had been built (Exhibit I-3, at pp 46–47). A survey plan was drawn up but never approved by the Crown.

D. The petitions of the Innu

[35] While the influx of settlers was occurring, between 1843 and 1853, some of the Innu of

the Haute-Côte-Nord and Saguenay–Lac-Saint-Jean sent about 10 petitions to government authorities in response to the opening up of the territory to logging and settlement. Without referring to all of them, I will summarize the most important ones for the purposes of this Claim.

1. The petition of February 1, 1843

[36] The first petition was dated February 1, 1843. It was initiated by the Innu of the Les Escoumins area, who sought a total of about 950 arpents gratis (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 51).

[37] Flavien Moreau, Denis Jean Pierre, Joseph Moreau, Édouard Moreau and Charles Moreaux (the last having an “x” at the end of his last name) called themselves [TRANSLATION] “Natural Montagnais, residing in the place called Les Escoumins, in the county of Saguenay, approximately eight leagues from the northeast side of the mouth of the Saguenay, along the St. Lawrence River”, whose [TRANSLATION] “sole means of subsistence, in the past and currently” were “fur trapping and the winter seal hunt”. The petition was addressed to Charles Bagot, Captain General and Governor General of Her Majesty’s Provinces, who received it on February 14, 1843 (Exhibit I-3, at p 126). In the following terms, the petitioners asked to be granted specific parcels of land situated in the King’s Domain gratis:

[TRANSLATION]

Whereas your humble Petitioners have learned that the Government of this Province is about to sell a portion of the lands of the King’s Domain, in the aforementioned County, commonly known as the King’s Posts.

Whereas your humble Petitioners have reason to believe that the places that they have been occupying with their families for more than Fifteen years (which will be listed below) and which they consider the only places where they hope to continue living with their families in the future will also be sold.

Therefore, your humble Petitioners, Montagnais, respectfully take the liberty of approaching Your Excellency, Entreating you to grant them—Gratis in light of your Petitioners’ state of poverty—the following lots of land; Namely:

1° May it please Your Excellency to grant to your humble Petitioners Flavien Moreau and Joseph Moreau the North East Side of the Rivière des Escoumins, along the St. Lawrence River, with fishing and hunting rights in the Rivière des Escoumins, And approximately Four Hundred Arpents of land, in area, along that River and the Baie des Escoumins, with said lot fronting on the St. Lawrence River.

2° May it please Your Excellency to grant to your humble Petitioner Denis Jean Pierre approximately One Hundred and Fifty Arpents of land, in area, in the location called Le Rigolet near the Islets Penchés, with said lot fronting on the St. Lawrence River.

3° May it please Your Excellency to grant to your humble Petitioners Edouard Moreau & Charles Moreaux approximately Four Hundred Arpents of land, in area, in the location called Les Petits Escoumains, on each side of the river known as the Rivière des Petits Escoumins, with hunting and fishing rights in that River, with said lot fronting on the St. Lawrence River.

Whereas your humble Petitioners consider that the sale of these lands of the King's Domain in the locations where they reside to the white inhabitants of this Province will be very damaging to their ability to hunt and fish; Therefore, they entreat Your Excellency to acquiesce to their requests, being your humble Petitioners who have decided that, in the future, they will cultivate the land, as the sole means of subsistence available to themselves and their families.

Your humble Petitioners respectfully take the liberty of suggesting to Your Excellency that, even if they were to be granted these lots of land and these Rivers, they would have the benefit of being able to hunt for seals in the winter, which would give them the means to develop their lands efficiently, and, moreover, your humble Petitioners promise Your Excellency that they will give all of the assistance within their power to shipwrecked travellers, who unfortunately appear on these shores quite frequently.

And your humble Petitioners, in gratitude as in duty bound, will ever pray.

[Emphasis added; Exhibit CP-1, Vol 2, Unified Exhibit Ref No 51]

[38] This is the sole petition in which individual lots were claimed. The Crown gave no response. We know, however, that, two years later, Joseph Moreau sold his land to the Têtu family.

2. The petition of July 1844

[39] On July 5, 1844, the [TRANSLATION] “tribe of Montagnais Indians living in the country watered by the Saguenay and other sites called the King's Posts” addressed a petition to the Governor General, Lord Metcalfe. The petition has disappeared, but its content is known from the correspondence of the superintendent, Duncan Napier (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 70).

[40] Mr. Napier then asked James McKenzie, an HBC representative, to provide him with information about the Innu (the letter from Mr. Napier to Mr. McKenzie has not been filed). On July 29, 1844, Mr. McKenzie wrote the following to Mr. Napier (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 66):

Quebec 29th July 1844

My Dear Sir,

I have this morning received your letter of the 27th instant requesting all the information respecting the nations of the Kings Posts which my long residence among them can enable me to give you.

The tribes of Indians called Montagnards are the original owners of the lands on the North of the St Lawrence below Quebec known as the Kings Posts. They are still the rightful owners of those lands for they have not lost them by conquest nor disposed of them by sale either to the French or British Governments. Unless this assertion can be proved incorrect by documentary evidence or any other evidence carrying conviction with it I cannot for a moment conceive have any doubts should arise as to the Justice and humanity of leaving to those poor harmless beings enough of their birth right to preserve their race from total annihilation in the general [?] to dispossess them of whom their hunting grounds for the benefit of their political adversaries.

The Indians of the Kings Posts are strict Roman Catholics. They are more civilized and better conducted in a moral point of view than their immediate neighbours the Canadians who are now plundering them of their lands with the sanction of the Government. It is clear that if those Indians be deprived of their hunting grounds to satisfy the rapacity of hunters and traders who pretend to be settlers on the lands of the Kings Posts they must in common justice and humanity be allowed to retain a few tracts here and there of their own property to keep them from perishing through cold and hunger and from being hunted like the wild bears of the forest off their own patrimony.

These Indians have hitherto lived by the produce of the chase. They are not acquainted with the process of agriculture, but they can learn it necessity can teach them and they are as faithful subjects to her Majesty as those who [?] so much to become their oppressors.

[Emphasis added; Because of their number, the errors have been reproduced as they appeared in Exhibit CP-1, Vol 2, Unified Exhibit Ref No 66]

[41] On July 31, 1844, Mr. Napier replied to James Macauley Higginson, Civil Secretary, informing him that these Indians were not known to the Department, but that if the Crown considered it appropriate to intervene, he proposed to reserve about 100 acres of land per family for the petitioners, up to a total of 12,000 acres, in Chicoutimi and at Lac Saint-Jean (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 67).

3. The petition of August 9, 1844

[42] On August 9, 1844, a “[d]eputation of Indians of the Montagnard Tribe” travelled to Montréal to submit a new petition to Mr. Napier “for the consideration of the Governor General” (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 70).

[43] The 98 signatories called themselves the [TRANSLATION] “Montagnard Indians inhabiting the North Shore of the St. Lawrence River in the part of Canada under the control of the

Honourable Hudson's Bay Company". First, the signatories denounced the conduct of the HBC employees, who used fraudulent schemes to keep them in a state of extreme poverty. Second, they requested that lands be granted to them (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 69):

[TRANSLATION]

Whereas your Humble Petitioners, further representing to Your Excellency that our forest hunting grounds, our sole means of survival, are growing increasingly distant from our places of habitation And that fishing in the rivers is practised solely by the employees of L.H. Company, Therefore, based on the many grievances inflicted upon our ancestors over the years and now upon ourselves by the Honourable Hudson's Bay Company and on our limited means to meet our most urgent needs through hunting and fishing, we ask Your Excellency to grant us the part of the land situated between the Rivière [Betsimites?] and the Rivière aux Outardes, including these rivers and their tributaries to a distance of five leagues inland from the St. Lawrence River so that we may settle in a fixed location and clear the land so as to be able, with the fruits thereof, to live without fear of being [robbed?].

Therefore, we, your Humble Petitioners, fully persuaded that Your Excellency also wishes for & desires the well-being of this Province, and that you will take into your wise and generous consideration our difficult and confirmed situation and will deliver a prompt and effective remedy to our unfortunate circumstances by procuring food for us for the coming winter, and granting us part of the above-mentioned land with assistance to begin clearing it, to be distributed to us annually by trustworthy individuals.

[Emphasis added; Unified Exhibit Ref No 69]

[44] Following these petitions, an exploratory mission to Saguenay was organized. In charge was Denis-Benjamin Papineau, Commissioner of Crown Lands, whose mission was to see [TRANSLATION] "whether we could find and make available to the Indians a vacant fishing site, not far from the Crown's wild lands, where these Indians could be placed, adopt agricultural practices and little by little achieve a higher degree of civilization" while waiting to be able to implement a better plan (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 84, point 17).

4. The petition of July 1845

[45] In the meantime, in July 1845, government authorities received another petition from the Innu of the Côte-Nord passed on by George Duberger, the Crown lands agent, who received it while he was in Godbout. The petition, signed by 18 people identified as "the Indians of [r]ivière Godbo[ut] in the King's Post[s] county of Saguenay" and written in their language, stated the following (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 81):

We write to you because we are unhappy. You come to sell our lands_ already many white men have taken our Lands. Many of our Brothers & Friends have died of hunger. The same lot [awaits] us if you do not speak for us to your master that he may speak in our favour to our Great Chief at Montreal in order that he may order you to reserve a piece of land for the remainder of our Nation at a spot that hereafter we shall mark out_ Now if you do not speak for us our lot is to die of want. [English translation of the original]

[46] According to Mr. Duberger, the Commissioner of Crown Lands had been made aware of the requests from the Indians of Godbout (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 82).

[47] Mr. Papineau submitted his report in September 1845, without providing a specific response to the question he had been asked. Nor did he make any reference to the Indians of Godbout. However, he did confirm the need to reserve farmland for the Aboriginal populations, namely, [TRANSLATION] “reserving an entire township for each of these Tribes, situated as near as possible to the location of their current residence” (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 84, point 17; Exhibit I 3, at p 129).

[48] Nevertheless, on October 3, 1845, a committee of the Executive Council of the Province of Canada approved the grant of portions of land to the “Montagnais Tribe of Indians . . . in different parts of the county lying on the North Shore of the St[.] Lawrence for the use of the Petitioners, as well as at the place pointed out by Sir Geo Simpson in his letter of the 17th September 1845 viz. between the Rivers Betsiami[te]s and [a]ux [O]utard[e]s” (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 86). However, the grant did not take place.

5. The petition of 1846

[49] During the winter of 1845–1846, in an undated document, [TRANSLATION] “the tribe of Montagnais Indians living in the country watered by the Saguenay and other sites called the King’s Posts” addressed Governor General Metcalfe, reiterating the Innu’s requests for a grant of lands. The document was received by Secretary General James M. Higginson on March 30, 1846.

[50] The petitioners stated that they were being decimated by famine and disease, that white men were arriving in droves, taking their lands and driving them to the interior, that they had never received anything from the government even though the latter was receiving considerable income by leasing the King’s Posts for the exclusive right to trade with them and that this same

government was about to receive revenues from the sale of lands previously considered communal. They therefore made the following request (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 96):

[TRANSLATION]

. . . that Your Excellency order that tracts of fertile land be delimited and reserved for them on the shores of the major watercourses at the posts of the land where they normally gather [Uodeliat?], Lac S[ain]t-Jean, Chicoutimi, the Rivière Betsiamites and Godbout, and that Your Excellency order that a portion of the revenues from the lease of the King's Posts and the sale of the lands be reserved to provide them with some support on account of their great poverty and to assist them in the efforts they must make to cultivate the soil.

...

Signed by a great many Montagnais Indians.

[51] Still on March 30, 1846, in a memorandum addressed to Governor Charles Murray Cathcart, referring to the petition from the Innu, the representative of Saguenay County, Marc-Pascal de Sales Laterrière, stated his strong opposition to the dispossession of the [TRANSLATION] "Montagnais Indians". He wrote the following (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 96):

[TRANSLATION]

Whereas the territory on the shores of the Saguenay, as well as on the shores of several of its tributaries, from Tadoussac on the St. Lawrence River down to the Baie de Lavale, has been open for the past four or five years to agriculture and export timber logging to the detriment, to the absolute ruin, so to speak, of the tribe of Montagnais Indians, who rely entirely for their living on hunting and fishing on this territory of which . . . they have just been dispossessed.

Whereas this tribe has never, since the Conquest, been counted or protected by the Government, while, on the contrary, the Government has always collected a once considerable revenue from the leasing of the King's Posts for the exclusive right to trade with them.

Whereas during the month of June eighteen hundred and forty-two, a new lease on this territory was granted to the Hon. Hudson's Bay Company for a term of twenty-one years with the express condition and limitation that the Government could, at any time it considered appropriate, survey, grant or sell land to form settlements, & & &.

Whereas the Hudson's Bay Company, whose interest in dealing with these Indians has much diminished since the territory was opened up to agriculture and logging, no longer deals with them as they were dealt with before, so that these families numbering twenty-five on the territory of the Saguenay and one hundred and fifty in the King's Posts, on the St. Lawrence River, are exposed to all manner of privations, even death by starvation! Last winter, without the shelter and food provided to them by . . . Mr. Peter McLeod in Chicoutimi, despite being

at the doors of one of the Company's posts, a great number of these poor unfortunate souls would have died of hunger and misery.

The fortieth article of the Capitulation of Montréal states that the Indians shall maintain the possession of the lands they inhabit.

A subsequent Proclamation by His Majesty George III issued in seventeen hundred and sixty-three again guaranteed their continued possession of their hunting grounds. The Indians consider this their charter!

Since 1763, the Government, respecting the Proclamation of that year, has not seen any need to dispossess the Indians of their lands without entering into an agreement with them and providing some form of compensation.

...

Relying on these documents and counting on the protection that the Government has always given all of the Indian tribes of Upper and Lower Canada in such circumstances, the Indians of the Saguenay addressed a petition last year to the Governor General Lord Metcalfe, seeking an annuity and land suitable for agriculture on the southern shores of Lac Saint-Jean, in Chicoutimi and on the shores of the Rivière Betsiamites and the Rivière Godbout to compensate them for the destruction of their forests . . . the destruction of wildlife (their principal source of food), the loss of their rights and independence; the Government having leased their territory to the Hudson's Bay Company with exclusive privileges.

Respectfully taking the liberty of appending a copy of the above-mentioned petition to this memorandum, I also take the liberty of referring, for Your Excellency's consideration, to the 17th paragraph of a report prepared recently for your predecessor Lord Metcalfe, by Hon. D.B. Papineau, following his trip to the Saguenay, in which he suggested that [TRANSLATION] "these Indians should be dealt with by the Government in the same manner as the tribes of Upper Canada are dealt with; i.e. they should receive an annuity and . . . lands in Townships on which they can settle and turn to agriculture as their last chance of salvation."

6. The petition of April 1847

[52] On April 8, 1847, another petition initially written in the Innu language, and translated into French by the Oblate Father Flavien Durocher, was addressed to James Bruce Elgin, Governor General of the Province of Canada, by the [TRANSLATION] "Indians of Tadoussac, Les [Îlets-]Jérémie, the Rivière God[bout] and Sept-[Î]les". It was signed by 131 Innu (Exhibit CP 1, Vol 2, Unified Exhibit Ref No 116).

[53] The petitioners requested that the [TRANSLATION] "tract of land between the Rivière aux Outardes, including the two shores, and the Rivière Bets[iamites], including the two shores, be reserved" for them. They also asked to be granted [TRANSLATION] "the exclusive right to hunt and harvest seals in the summer in the Baie de Kawis, the Baie de Mani[cou]agan, the Baie aux

Outardes and the Baie de Betsiami[te]s and in the winter at Pointe-des-Monts, Point de La Croix, Pointe Betsiami[te]s and Bon[]Désir”, that they [TRANSLATION] “alone be given ownership of the lumber on the Rivière Papinachois and the Rivière Bets[iamites] on the requested reserve, that those from the nation who had taken land elsewhere and had begun clearing it maintain the peaceful possession of their respective locations”. They also requested [TRANSLATION] “finally that [they] be granted compensation for the lands being occupied by the whites on [their] territory being granted and [they would] be satisfied”.

[54] A few days later, Oblate Father Durocher wrote explanatory notes about the petition, stating on the subject of Bon-Désir that an area of 400 arpents (10 arpents of frontage and a depth of 40 arpents) would suffice. As for the Baie de Mille-Vaches, he stated that about ten families were living there and asked that their rights in these lands be protected gratis (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 118).

[55] On June 18, 1847, the petition was presented to the Legislative Assembly by the Member for Saguenay County, Marc-Pascal de Sales Laterrière, who the following week asked the Governor General to turn his attention to it. Despite the support of the clergy and Mr. Laterrière, the review of the petition did not result in any immediate action (Exhibit I 3, at pp 133–34).

[56] A year after this petition, Tancrède Bouthillier, Assistant Commissioner of Crown Lands for Lower Canada, submitted a report dated December 1, 1848. According to his calculations, the requested lands between the Rivière aux Outardes and the Rivière Betsiamites represented 173,000 acres of land, to which needed to be added the distance from Les Escoumins to Pointe-des-Monts, which “seems to be out of question at the present time” (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 136).

[57] However, Mr. Bouthillier was not opposed to the idea of granting to the “Montagnais Indians of the King’s Posts” lands in the locations they were already inhabiting based on a ratio of 100 to 120 acres. He suggested reserving a ratio of 100 to 200 acres per Innu family or male individual of the age of at least 21 years in the locations they were already inhabiting, subject to obtaining legislative sanction, adding that this suggestion was similar to the proposals made by the committee of the Executive Council in 1845 and the Commissioner of Crown Lands in 1846:

From le Escoum[ins] to the Pointe[-des-]Monts, which they require for fishing, would give them from 100 to 120 miles of coast, all within the territory called the King[']s Posts, now under lease to the H. B. Co who claim an exclusive right of fishing within their limits, altho[ugh] that rights is, I believe[,] contested.

The reservation of such large tracts in the vicinity of settlements for the sole purpose of hunting & fishing as required by the Petitioners seems to be out of question at the present time, there would however probably be no objection to lay out in suitable localities at their respective places of abode, for such of those Tribes as may wish to form permanent settlements, [b]locks of land of extents proportioned to their number, at the rate of from 100 to 200 acres of available land to each family or male individual of the age of 21. But permanent appropriations of this description, would it is presumed, require the sanction of the Legislature.

[Emphasis added; Exhibit CP 1, Vol 3, Unified Exhibit Ref No 136]

[58] He also noted his estimate that the entire population made up of the various tribes of the King's Domain was 1,200 souls.

7. The petition of 1848

[59] On February 7, 1848, another petition with 106 signatures of Innu calling themselves [TRANSLATION] "true Indians" was delivered to Lord Elgin, Governor General of United Canada. They reminded him that their requests from four years earlier had not been addressed, that they were miserable, poor and starving, and that foreigners were taking their lands and logging in the middle of the forests, setting fires and destroying the hunting on which they depended for their survival. They asked for assistance, for [TRANSLATION] "tools to work the land, seeds to sow", to obtain [TRANSLATION] "a piece of land at Lac Saint-Jean on the two shores of the Rivière Péribonka and another piece at the mouth of La Grande Décharge, where [they] gather every spring to cast [their] nets, live off the fish and build [their] canoes" and to be masters of the trading posts, including that of Tadoussac with its salmon fishery, once [TRANSLATION] "the bourgeois traders have finished being masters of the trading posts" (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 125).

[60] The petition, supported by a memorandum by Peter McLeod Jr., an Innu through his mother, as well as his father and Mgr. Pierre-Flavien Turgeon, Coadjutor Archbishop of Québec, was reviewed by a committee of the Executive Council. An amount of money was to be entrusted to Mgr. Turgeon, Bishop of Sidyma, for the benefit of the Innu signatories.

8. The petitions of 1849 and 1850

[61] On February 7, 1849, Oblate Father Flavien Durocher intervened “on behalf of the Montagnais Indians” (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 141). That petition has not been found, but it was read before the Legislative Assembly on February 12, 1849 (Exhibit CP-1, Vol 3, Unified Exhibit Ref No 140; Exhibit I-3, at p 136) and appears to have contained three requests (Exhibit CP 1, Vol 3, Unified Exhibit Ref Nos 140 and 141):

1. a monetary grant to the Indians in question, to be taken from the amount of the lease for the King’s Posts;
2. lands located between the Rivière Betsiamites and the Rivière aux Outardes for hunting; and
3. certain other lands for hunting.

[62] Mr. Bouthillier analyzed these claims in February 1849 and, in August 1849, he issued certain comments about them. He mentioned about 1,200 souls spread out among the inland Montagnais (Lac Saint-Jean) and the coastal Montagnais (the Côte-Nord of the St. Lawrence River). And, considering the proposal advanced by Father Durocher, namely a grant of land at Betsiamites, Mr. Bouthillier accepted the idea of a reserve in one location; but as agricultural development was impossible because of the sterile and rocky terrain, he considered it appropriate to grant a large area equivalent to one hundred acres per individual rather than per family. He also noted that the Price & Co Company objected to the Innu receiving land grants near its facilities on the Rivière Papinachois (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 137).

[63] On September 24, 1849, Father Durocher delivered a new petition from the Innu to Governor General Elgin. He sought on [TRANSLATION] “behalf of the Montagnais who lived on the north shore of the St. Lawrence . . . the stretch of land located between the Rivière aux Outardes and the Rivière Betsiamit[e]s”, specifying that some had already taken great pains to clear land in the Baie aux Outardes. Father Durocher also referred to the terrible poverty of the Innu and reiterated their request for money to buy seed. His request was supported by the Archbishop of Québec, Joseph Signay, and by Bishop Pierre-Flavien Turgeon (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 148).

[64] On February 14, 1850, Bishop Pierre-Flavien Turgeon delivered to Lord Elgin a new petition on behalf of the [TRANSLATION] “Montagnais Indians inhabiting the northern part of the St. Lawrence beneath the mouth of the Saguenay River” (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 155). This undated petition was likely drafted in the fall of 1849 (Exhibit I-3, at p 138, note 494). In it, the Innu ask for a square-mile stretch of territory at Bon-Désir as well as the exclusive right to fish in the Rivière Betsiamites. Bishop Turgeon explained that the Innu sought lands in Bon Désir because they had given up their claim on the Rivière Papinachois, given that Mr. Price had been authorized to build sawmills there and to take wood from the surrounding area. He added the following:

[TRANSLATION]

What is prompting them to make these two requests is that the territory they are claiming is ill-suited to agriculture and not suitable for much more than sealing, while Bon[-D]ésir has land well-suited to agriculture, and the Rivière Betsiami[te]s provides a precious source of salmon fishing.

[65] In his 1851 report, Mr. Duberger wrote on the subject of the Les Escoumins area that the land was good for growing wheat, barley, potatoes and other garden vegetables and that the fish were plentiful in the waters along the St. Lawrence shoreline, which attracted those settlers more interested in fishing than in clearing land. He mentioned that he had marked the squatters’ buildings on the map, but that all but four or five were merely fishing shacks, and that the squatters wished to purchase the lots on which the latter were erected. He also noted that some of the land had been cleared by Joseph Moreau, 14 acres in Ranges 15 to 18; Paul St-Onge, Montagnais, 7 acres on Lot 24; and Denis Jean Pierre, Montagnais, 8 acres on Lot 50. Finally, he added that squatters were logging a few trees to establish rights and claims on these lands, which he thought was generally [TRANSLATION] “unjustifiable” (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 165).

E. The 1850 and 1851 Acts, the 1853 Order in Council and the creation of the Betsiamites Reserve

[66] On August 10, 1850, *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42, was enacted to make better provision for preventing encroachments upon and injury to the lands appropriated to the use of the several tribes or bodies of Indians in Lower Canada, and for the defence of their rights and privileges.

[67] On August 30, 1851, the Parliament of United Canada enacted *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the “1851 Act”), giving the Commissioner of Crown Lands the power to designate, survey and set apart two hundred thirty thousand (230,000) acres of land for the Indians of Lower Canada.

[68] Following the enactment of the 1851 Act, during the process of preparing the distribution schedules of 1852 and 1853, the Government selected lands for the use of the Indians of the King’s Domain in two regions: (1) Saguenay–Lac-Saint-Jean, where lands were to be set apart at the Rivière Péribonka and the Rivière Métabetchouane; and (2) 70,000 acres, with about 11 miles fronting on the St. Lawrence River to a depth of 10 miles, from the Rivière aux Vases to the Rivière aux Outardes at Manicouagan for the [TRANSLATION] “Montagnais, Tadoussa[c], Papinachois, Na[skapi], and other nomadic tribes within the King’s Posts”, namely the [TRANSLATION] “Indian tribes whose hunting grounds are located in the territory watered by the tributaries of the northern bank of St. Lawrence, east of the Saguenay River, within the boundaries of the King’s Posts”. The proposed reserve at Manicouagan would ultimately become the Betsiamites Indian Reserve. None of the other requests from the Innu to obtain rights along the shore for sealing or along salmon rivers were granted.

[69] The instrument creating the Pessamit Reserve (formerly called Betsiamites) was signed in 1861.

[70] The Government’s decision to relocate all of the Innu of the Haute-Côte-Nord to a single, large reserve failed in that several of them refused to move there and continued to ask for land in the territories they were occupying. The reasons were that the reserve was too far from their hunting and fishing grounds, and, short of having family ties with Innu who had hunting grounds in that area, they had no place to carry out their traditional way of life.

[71] Therefore, the issue of granting lands to several Innu bands, including the Innu of Les Escoumins, remained.

[72] On December 27, 1851, Robert Bruce, Superintendent of Indian Affairs, wrote to Reverend C.F. Cazeau, Vicar General: “. . . I lean on the authority of an eye witness that the

Escoum[ins] Indians are in great distress . . .” (Exhibit CP 1, Vol 3, Unified Exhibit Ref No 177).

[73] On August 15, 1852, a petition signed at Les Îlets-Jérémie by [TRANSLATION] “[M]ontagnais hunters” implored Lord Elgin to give them assistance, despite the lands they had been granted, because, they said, the hunt had been destroyed by the arrival of the whites and the salmon fishery had been destroyed by the sawmills, while the traders had taken over the other rivers, and they were suffering from extreme poverty (Exhibit CP 1, Vol 4, Unified Exhibit Ref No 182).

[74] On September 21, 1852, in a letter addressed to Oblate Father Santoni, Archbishop of Québec, noted the presence of 40 to 50 [TRANSLATION] “Indian families” between Les Escoumins and Bon-Désir (Exhibit CP 1, Vol 4, Unified Exhibit Ref No 184). On October 10, 1853, in a letter addressed to the Very Reverend Vicar General Cazeau, Father Durocher catalogued 30 families in Les Escoumins (Exhibit CP 1, Vol 4, Unified Exhibit Ref No 196).

[75] On February 4, 1859, in a letter to his superior, Father Arnaud described his life in Les Escoumins. He indicated, among other things, that [TRANSLATION] “hunting is central to the Indians; they do it daily, both on the water and in the forest” and that their cabins were made of [TRANSLATION] “birch poles and bark, and surrounded by boughs of fir covering the snow and the frozen ground” (Exhibit CP 1, Vol 4, Unified Exhibit Ref No 222).

[76] Therefore, despite the creation of the Betsiamites Reserve, the Oblates continued to travel all over the territory, and particularly to Les Escoumins, where several Innu families were living (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 267).

[77] On March 29, 1865, the Province of Canada issued letters patent to Nazaire Têtu for the “lots number[ed] Ten and Eleven in Range letter A . . .” and “[a]lso the lot letter A and the lots number[ed] Ten, Eleven, Twelve and [T]hirteen, and fifty in the First Range, of the said [t]ownship, and [...] part of lot number Fifteen in the said First Range” (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 253).

F. Justice O’Brien’s report and the appointment of an Indian Affairs agent

[78] At the end of the 1870s, Justice Francis Henry O’Brien, having offered his services, was

assigned by the Department of Indian Affairs the task of obtaining information about [TRANSLATION] “the Indians of Betsiamit[e]s and R[es]tigouche”. The results of his inquiry were compiled in a report issued to the authorities on March 1, 1879, and published that same year in the Indian Affairs Annual Report (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 295).

[79] His report was detailed and provided demographic and geographic data about the Innu of the Côte-Nord and the various problems faced by the Innu populations. He made several recommendations, including the following:

- the appointment of an Indian Affairs agent, without which, he explained, any assistance efforts would be wasted. The agent would have to make regular visits to the communities established along the shore and maintain an accurate census of the population living there;
- the creation of reserves in several places along the shore, including Godbout, Sept-Îles, Mingan and Natashquan, so that the Indians might settle into villages and begin cultivating the land; and
- the grant of a licence issued by the Indian Affairs agent to the traders doing business with the Indians living on the shore, to set tariffs for the sale and purchase of furs.

[80] Justice O’Brien refrained from making comments about the Betsiamites Reserve due to “its relatively advanced state” (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 295).

[81] Justice O’Brien’s report was well received by Philip M. Vankoughnet, who had become Commissioner of Crown Lands in 1860 and who, after Confederation, became Assistant Superintendent General of Indian Affairs.

[82] In September 1879, in accordance with Justice O’Brien’s recommendations, Louis Félix Boucher was appointed Indian Affairs Agent for the Côte-Nord and sent to live in Betsiamites (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 308). Mr. Boucher was from the Les Escoumins area, having lived there for 28 years prior to his appointment. He returned there after resigning in 1891.

[83] In the meantime, on September 12, 1879, Théodore-Jean Lamontagne, a well-known businessman and entrepreneur who had acquired the Têtu family properties in Les Escoumins, sent protests via a notary to Édouard Moreau, Paul Ross, Pierre Jacques and Pierre Denis, all Innu, ordering them to move and leave behind the lots they were occupying, including those on the Pointe des Escoumins, without delay, alleging that they belonged to him (Exhibit CP 1, Vol 5, Unified Exhibit Ref Nos 304, 305, 306 and 309).

[84] On October 25, 1879, Mr. Boucher received his instructions from the Department of Indian Affairs. Excerpts from Justice O'Brien's report were enclosed with the instructions and brought to his attention. In accordance with Justice O'Brien's instructions, Agent Boucher was tasked with (1) visiting all the Innu bands along the shore at least once a year; (2) monitoring the fur trade during these visits, prohibiting the use of alcohol, facilitating the settlement of Innu bands in reserves along the shore and promoting alternatives to hunting for subsistence; and (3) overseeing the sound management of the financial assistance provided by Indian Affairs to the Innu (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 310; Exhibit I 3, at p 155).

[85] In the spirit of the O'Brien Report, one of the recommendations of which was to create reserves along the shore, Agent Boucher was required "to report what area of land should be set apart as Reserves for the Indians at the several points above described or at any other places at which you consider it might be advisable to establish Reserve" (Exhibit CP 1, Vol 5, Unified Exhibit Ref No 310).

G. The Crown's decision to create a reserve at Essipit

[86] On September 20, 1880, after touring the communities, Agent Boucher drafted his report, which was delivered to Superintendent Vankoughnet. In his report, Agent Boucher identified several potential locations for the creation of Indian reserves and indicated the presence of a small Indian band at Les Escoumins. On this point, he wrote (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 314):

[TRANSLATION]

ESCOUM[INS]

I met ten families and an old, crippled widow; total, 50 souls.

Escoum[ins] is a former Indian trading post. In the winter they hunt for furs and seals; sometimes they also hunt seals in the summer. They make snowshoes that they sell to the whites.

The women make embroidered caribou skin and sealskin moccasins and sealskin tobacco pouches that they sell to the whites.

They own five small, well-maintained houses, and their clothes are clean. They have no chapel; they attend services at the whites' chapel.

There is no reserve land, they occupy a tract of land now granted to [Mr. E.] Vachon, more than 30 years ago; they live there and the owner would be willing to sell it to them for a low price, if your department is willing to purchase it for them. These Indians ask that you do so. It would establish a small reserve for them. Moreover, if your department would give them potatoes and seeds, which they would sow next spring, it would be of great help for their survival; this land would be relatively easy to cultivate, the seeds would grow and ripen easily. This small band has never received any grants and would be very grateful to receive something now.

Some of these Indian families travel to Tadoussac during the summer, where they have an easier time selling their wares to the tourists who visit the area in the summertime.

These Indians are polite and conduct themselves well; most are sober; the liquor merchants are on alert, I warned them all during my visit last August; I hope it will be to good effect. No disease among them.

[Emphasis added]

[87] On November 5, 1880, following the receipt of Agent Boucher's report, Mr. Vankoughnet asked him to provide him with information, mainly about the price and area of the lands belonging to Édouard Vachon and what part of the year the Indians resided there (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 317).

[88] On January 28, 1881, Agent Boucher provided Mr. Vankoughnet with the following information (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 321; Exhibit I 3, at pp 178–80):

[TRANSLATION]

[Mr.] E. Vachon is asking [\$]200[.00] for approximately 230 arpents of land in area on the point situated to the west of the Rivière des Escoumins, part of which is on Block A and No. 11 of Range A, which is outlined by the dotted line that may be seen on the enclosed map provided to me by [Mr.] E. Vachon for your information. This part of the land is not all first rate, but is all suitable for agriculture. It is a magnificent site, a good road already crosses the lot, there is talk of constructing a dock at the end of the point, which would fall outside this reserve, to bring steamboats with foreigners, which would bring a great deal of attention to the place and provide a market where these Indians live for the wares they produce.

These Indians are brave, wish to grow crops and are always by the water except when the heads of family travel into the forest in the winter to trap furs for a month or two, while their families always remain beside the water.

It is also a good location for sealing.
[Emphasis added]

[89] He concluded his letter by asking Mr. Vankoughnet to send back the map belonging to Mr. Vachon so that it could be returned to him. It should be noted that this is the only source that refers to 230 arpents. All subsequent correspondence refers to 230 acres. The parties agree that 230 acres is what was meant.

[90] On February 23, 1881, Mr. Vankoughnet wrote to Agent Boucher to ask him to obtain clear titles from Mr. Vachon, and then, with the latter's permission, to have the land surveyed (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 322):

. . . I have to inform you that on the next occasion of the visit of a surveyor which you think will likely be the next spring (provided Mr. Vachon can show a clear title to the land, which should be done by an abstract respecting the property in question from the books [?] of the Registry office), you might have with Mr. Vachon's permission the piece of land in question surveyed.

It should not be less than the quantity named in your letter viz 230 acres for which the Dept[.] will agree to pay the price asked by Mr. Vachon viz \$200.00.

[Emphasis added]

H. The survey of the reserve, negotiations and creation of the reserve

[91] At the end of the summer of 1881, without having obtained clear titles or surveyed the land, as Mr. Vankoughnet had asked him to do in his correspondence the previous February, Agent Boucher sought authorization to proceed with the purchase of the lands in question (Exhibit I 3, at pp 181–82). The response from Indian Affairs to this request has not been found, but in October 1881, informed of the intention to survey, Marie-Honorius-Ernest Cimon, the Member for Chicoutimi, proposed to Indian Affairs that Elzéar Boivin be hired as a surveyor (Exhibit I 3, at p 182). On November 4, 1881, Mr. Vankoughnet sent Agent Boucher the letter from Mr. Cimon, recommended that he hire Mr. Boivin and authorized him to use Mr. Boivin's services, adding that first it would be necessary to obtain clear titles and the permission of Mr. Vachon (Exhibit I-3, at p 182; Exhibit CP-1, Vol 6, Unified Exhibit Ref No 329):

. . . to inform you that provided you have, on obtaining an abstract of title from the Registry office as described in letter to you of the 23 Feb. last, satisfied yourself that Mr. Vachon's title to the land is complete + satisfactory, you may employ Mr. Boivin to survey the tract on the understanding, however, that you make an economical arrangement with him.

[92] On November 16, 1881, Agent Boucher provided the following confirmation to Mr. Vankoughnet (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 330):

[TRANSLATION]

I have the honour of informing you that I have just written to the surveyor, Mr. E. Boivin, asking him to chain the land at Les Escoumins acquired from [Mr.] E. Vachon for an Indian reserve and to let me know once the work has been completed.

I have also written to [Mr.] E. Vachon asking him to provide [Mr.] Boivin with all of the information to speed up the surveying and finish as [soon as possible] so that I may inform you of the result.

[93] On the letter of November 16, 1881, there is a note in the margin made by Mr. Vankoughnet and dated November 30, 1881:

Mr[.] Mercill[?] ack[nnowledge] & request Mr[.] Boucher to report whether he made the necessary enquiry into the title of the land & with what result say [?] an abstract from the registry Books [shall] be forwarded to the Dept[.] by him.

[94] On November 19, 1881, barely three days after Mr. Boucher's letter had been sent, Mr. Boivin was at work in the field. The survey was conducted in the presence of Reverend Parent, the parish priest of Les Escoumins (representing the absent Agent Boucher); Mr. Vachon; and witnesses Jean Maltais and William Tremblay.

[95] In his report dated November 19, 1881, Mr. Boivin stated that after becoming familiar with the conventions stipulated by Mr. Vachon and Agent Boucher, he had conducted the survey, and that the [TRANSLATION] "total area of the reserve so surveyed was approximately ninety-seven acres (97 acres)". The land he had delimited was bounded by Lot XI of Range I, by the [TRANSLATION] "part of Lot No XIII occupied by Milan Lepage", by the St. Lawrence River to the south and by the [TRANSLATION] "part of Lot Nos XII and XIII owned by the Lamontagne Company and Vachon" to the north. He added that everything had been performed to the satisfaction of the petitioners and their representatives (Exhibit I 3, at p 182; Exhibit CP 1, Vol 6, Unified Exhibit Ref No 331).

[96] Mr. Boivin did not specify to what [TRANSLATION] "stipulated conventions" he was referring. However, it appears from one of the statements of account later sent by Mr. Boivin to Agent Boucher that he had received oral instructions from the latter on November 14, 1881

(Exhibit CP 1, Vol 6, Unified Exhibit Ref No 336) and from the letter of November 16, 1881, to Mr. Vankoughnet, that Agent Boucher had asked Mr. Vachon to provide Mr. Boivin with all of the information.

[97] On December 3, 1881, a letter from the Department of Indian Affairs was sent to Agent Boucher reminding him that before instructing Mr. Boivin to survey the reserve, he had to validate Mr. Vachon's titles, i.e. he had to obtain and forward to the Department an extract from the land register (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 332).

[98] Several months later, on April 7, 1882, Agent Boucher sent Mr. Vankoughnet Mr. Boivin's survey map and two of the surveyor's statements of account dated February 27, 1882. The first was for \$199.42 for the survey work. The second, in the amount of \$55.32, was for services rendered on [TRANSLATION] "the oral instructions of L.F. Boucher, Esq., Superintendent of Indian Affairs at Betsiamites, on November 14, 1881". These included expenses for copies of the surveying notes, the map and other documents and for the installation of four stone boundary markers (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 336).

[99] In his letter, Agent Boucher also told him that he had travelled [TRANSLATION] "to Les Escoumins to see [Mr.] Boivin's survey of the reserve land, while at the same time visiting the Indians", and that [TRANSLATION] "the survey of the land has been conducted properly, with good stone boundary markers". He also noted that he had received Mr. Boivin's map and report and that the land surveyed did not have the area that had originally been mentioned (Exhibit CP 1, Vol 6, Unified Exhibit Ref No 337; Exhibit I 3, notes 660 and 644; Exhibit R-2, at p 86):

[TRANSLATION]

. . . the north-east road continues to the [St. Lawrence] River.

There is not the amount of land that I mentioned to you in my letter of January 28, 1881, but the same size that I had marked. I spoke about it with [Mr.] E. Vachon and shared your letter of February 23, 1881. [Mr.] Vachon told me that it was about the amount of land he had told me about, without having measured it. [Mr.] Vachon told me that this would have no effect on the price, that [\$200.00] had always been his price, given that the land was taken from the best land of his sawmill facilities, and that the lots had considerably increased in value.

[100] In that correspondence, Agent Boucher stated that Mr. Vachon had [TRANSLATION] "shown the title or letters patent in which the Indian reserve was situated and said that he could

not hand over the letters patent, given that they covered many other tracts of land”. He asked whether he could proceed with the purchase of the land and whether the act of sale had to be prepared by a notary or under private writing, given the absence of a notary in Les Escoumins. He specified that he was sending Mr. Boivin’s map, but that he was keeping the surveyor’s report in the event that he could proceed with the act of sale. He concluded by stating, [TRANSLATION] “[Mr.] Vachon requests that you send him the map that I sent you on January 28, 1881, or a copy thereof, as he has need of it.”

[101] Agent Boucher did not indicate in his letter that the area had been reduced to 97 acres. He sent Mr. Boivin’s map to Mr. Vankoughnet (Exhibit M-1, Unified Exhibit Ref No M-19). It appears that Lot 11 was excluded from the surveyed area. It also appears that Mr. Boivin did not have in hand the map given by Mr. Vachon to Agent Boucher and forwarded by the latter to Mr. Vankoughnet on January 28, 1881, which included Lot 11.

[102] On April 24, 1882, Mr. Vankoughnet was very critical of Agent Boucher for having failed to follow his instructions. He criticized him for not having verified the title to the land at the Registry Office of the District of Saguenay before proceeding with the survey and incurring nearly \$200.00 in surveying expenses that would prove to have been wasted in the event that Mr. Vachon did not hold a valid title. He informed him that merely reviewing the letters patent was insufficient to ensure that the title was clear. He added that he should have checked not only with the Registry Office, but also with the County Sheriff that there were no claims encumbering the title for unpaid taxes and that the sale would take place before a notary once he had received confirmation about the title (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 338).

[103] On April 27, 1882, Mr. Vankoughnet sent the Deputy Minister of the Interior the surveying field notes, which he had most likely obtained from Agent Boucher in the meantime, and Mr. Boivin’s map, as well as the latter’s invoice for fees and expenses, for review by the Surveyor General of Canada (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 339; Exhibit I-3, at p 182, note 657).

[104] On May 2, 1882, the Surveyor General of Canada, noting inaccuracies and irregularities in the map, informed Mr. Vankoughnet of the errors in the map relative to the field notes and asked for a revised map. He also asked that the placement of the occupants’ houses be corrected,

as they were not correctly indicated on the map (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 340; Exhibit I-3, at p 182, note 657).

[105] Mr. Boivin made the requested corrections and produced a final version of the map on July 19, 1882. The map identified nine houses on the [TRANSLATION] “North-East road” and the [TRANSLATION] “central road” of the proposed 97-acre reserve and gave the following list of their owners: (1) Michel Aglée; (2) Jos Nicolas; (3) S. Denis; (4) Michel Napentie; (5) Paul Ross; (6) Ed. Moreau; (7) Chas. Dominique; (8) Léon; and (9) Pierre Denis (presumably referring to Michel Atlé, Joseph Nicolas, S. Denis, Michel Napentie, Paul Ross, Édouard Moreau, Charles Dominique, Léon Dominique and Pierre Denis) (Exhibit M-1, Unified Exhibit Ref No M-19).

[106] On January 4, 1883, at Mr. Vachon’s request, the certificate of ownership was issued by Charles Du Berger, Registrar. In sending the certificate to Mr. Vankoughnet, Agent Boucher noted [TRANSLATION] “that there is no hypothec”, adding that [TRANSLATION] “Mr. Vachon would very much like to be paid as [soon as possible], given that the Indians are occupying the land and getting all the benefit from it” (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 348; Exhibit I-3, at p 183, note 663).

[107] After receiving this letter on January 23, 1883, Mr. Vankoughnet sought the opinion of the Department of Justice. On February 15, the Deputy Minister informed him that the seller’s title was normally reviewed by counsel, and he invited Mr. Vankoughnet to let him know of his intentions in this regard (Exhibit I-3, at p 184; Exhibit R-2, at pp 88–89). On March 16, 1883, Vankoughnet instructed George Wheelock Burbidge, Deputy Minister of Justice and counsel for Indian Affairs, to assign somebody to this task (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 352). F.X. Gosselin, Counsel (also called a notary in some texts), was chosen on March 19, 1883.

[108] Various steps were taken by the Department of Justice to verify the validity of the title. These took time because, despite Mr. Gosselin’s repeated requests, Mr. Vachon did not send the documents necessary for the title search.

[109] Finally, on July 22, 1886, Mr. Gosselin issued an opinion that Mr. Lamontagne’s right of

ownership was established, and on August 6, 1886, Mr. Burbidge informed Mr. Vankoughnet that “the property proposed to be purchased for the Escoum[ins] I[ndian] Reserve belongs to Mr[.] T.J. Lamontagne and that he has a good title free from all encumbrances” and that the Superintendent could therefore proceed with the purchase (Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 391; Exhibit I-3, at pp 184–85 and note 669).

[110] Thus, Mr. Vankoughnet learned five weeks later that the true owner of the proposed reserve lands was not Mr. Vachon, but rather Mr. Lamontagne.

[111] Finally, on August 9, 1886, after the title inspection had been performed on the area surveyed by Mr. Boivin, on a part of Block A only, Mr. Vankoughnet asked the Surveyor General to reach a decision “on quantity of land proposed to be purchased as shown in Mr[.] Boivin’s plan & description of survey”. Surveyor Samuel Bray, who was responsible for following up on the file, informed the Deputy Minister from whom he had received the request that he needed a copy of Mr. Boivin’s map, given that the letter dated January 28, 1881, which had been forwarded to him, mentioned 230 acres, while Mr. Boivin’s report of November 19, 1881, indicated 97 acres (Exhibit I-3, at pp 185–86; Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 397). He received a copy of Mr. Boivin’s map on April 1, 1887.

[112] In the meantime, Mr. Vankoughnet, whose request of August 9, 1886, had gone without a reply, again wrote to the Surveyor General on December 28, 1886, reiterating the request: “What is the area of the tract proposed to be bought as an Indian Reserve at Escoum[ins]?” (Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 396).

[113] On December 29, 1886, Surveyor Samuel Bray informed the Deputy Minister that a preliminary letter on this issue dated January 28, 1881, referred to 230 acres, and that a report dated November 19, 1881, enclosed in the file, that of Mr. Boivin, described a parcel of land of 97 acres. In the circumstances, he concluded, it was likely that the latter area was accurate, but he needed to obtain the reserve map to ensure that the report described all of the lands proposed for purchase for the reserve (Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 397).

[114] On May 6, 1887, after receiving a copy of Mr. Boivin’s map, Mr. Bray confirmed for the Deputy Minister that the area of the reserve was 97 acres (Exhibit CP-1, Vol 6, Unified Exhibit

Ref No 406).

[115] However, several more years passed before the reserve lands were purchased, because the parties did not agree on the purchase price. Mr. Lamontagne insisted on \$200.00, while the Department of Indian Affairs offered \$100.00 because the area was now 97 acres. In June 1887, Mr. Lamontagne wrote to Agent Boucher to inform him that the asking price was unchanged despite the reduction in area (Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 412):

[TRANSLATION]

I would like to point out that although the land in question is not as vast as we had originally supposed, it is still the same tract of land contained within the previously designated boundaries, and that this tract of land had previously been judged sufficient, while also being indispensable and useful for the maintenance of these families.

...

So far the Indians have occupied these lots with no interference on my part, my having desired to let them live in peace and having helped and encouraged them to the best of my ability, with the certainty that your Department would compensate me in due course for the land.

[116] On October 18, 1887, Agent Boucher wrote to Mr. Vankoughnet to inform him that Mr. Lamontagne did not accept the offer from the Department of Indian Affairs. Agent Boucher had also written on August 18, 1887, that he [TRANSLATION] “shared the view of Mr. Lamontagne, who is kind to our Indians, and [that he] requested that they pay the amount asked so that the Indians would not be dispossessed of the land and the improvements they have made to it, especially since the survey was conducted” (Exhibit CP-1, Vol 7A, Unified Exhibit Ref Nos 414 and 420; Exhibit I-3, at pp 186, 188, note 694; Exhibit R-2, at p 91).

[117] Justice Gagné, a close friend of Mr. Lamontagne’s daughter, and Mr. Lamontagne’s son-in-law intervened in support of Mr. Lamontagne’s position, pointing out that the amount of \$200.00 for the land was not based on the number of acres, but applied to the tract of land as it was known (Exhibit I-3, at p 187).

[118] In October 1891, the parties eventually agreed on a price of \$162.75, that is, \$100.00 for the 97 acres, plus 6% interest from January 28, 1881, the date on which Agent Boucher forwarded Mr. Vachon’s offer to the Department of Indian Affairs (Exhibit CP-1, Vol 7B,

Unified Exhibit Ref Nos 446, 449, 450 and 452).

[119] The act of sale was signed on July 23, 1892, between Mr. Lamontagne and C. Panet Angers, counsel for the Department of Justice and the Superintendent General of Indian Affairs, before the notary Jean Alfred Charlebois in Québec. The act of sale states that the 97-acre parcel of land is bounded to the south-west by Lot XI in Range 1 of the Township of Escoumins, to the northeast by part of Lot XIII occupied by Milan Lepage, to the south-east by the St. Lawrence River and to the south-west by Lot XII and part of Lot XIII (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 457).

[120] The act of sale refers to an appended plan. This plan was prepared in 1879 and signed by the surveyor Eugène-Étienne Taché, and is not the plan prepared by Mr. Boivin. On the plan, a black dotted line delimits an area containing Lot 11 and a part of Block A (Exhibit M-1, Unified Exhibit Ref No M-15).

[121] Despite purchasing the lands in 1892, it was not until 1993 that the Crown adopted an order in council confirming the setting apart of the lands purchased by the Crown in 1892 as reserve lands for the benefit of the Essipit band (Exhibit CP-1, Vol 9, Unified Exhibit Ref No 691). The confirmation order excluded the area of the dirt road crossing the reserve, reducing the size of the reserve by about an acre. Since the road is the subject of another claim by the Claimant, that issue has not been submitted for adjudication here.

III. LAY WITNESSES

A. Chief Martin Dufour

[122] Chief Martin Dufour testified on the boundaries of the reserve and the sites of importance to the Essipit Innu, such as Anse à Bélanger, a site of special significance in “innu-aitun”, as Innu culture is called.

[123] Chief Dufour stated that Anse à Bélanger is located on the shores of the St. Lawrence River and provides an easy access point for embarking and disembarking canoes for hunting seal and harvesting sea urchins, soft-shell clams, whelks and other marine molluscs, some of which members of the community still eat today. Anse à Bélanger is located 1 km east of the reserve boundaries and is sheltered from high winds. It is an extremely important archeological site for

the Essipit Nation.

[124] Chief Dufour also mentioned the following sites of significance to the members of the Essipit Nation for the practice of traditional activities: Pointe de la Croix, Pointe aux Sauvages, Bergeronnes and Anse à la Cave. In addition, the Rivière des Escoumins and Îlets Boisés were spots for hunting migratory birds, and Anse à Callus, situated in the Baie des Escoumins, was an important location for gathering soft-shell clams and other molluscs, which is prohibited today because of the presence of toxins. Similarly, Bon-Désir used to be an important location for hunting seal and for trading pelts. All of these places are outside the 97-acre reserve.

[125] Chief Dufour explained that part of the 97-acre reserve consisted of peat bogs, making it very difficult to work the land, and access to the St. Lawrence River is impossible because of the steep cliff at the shore. The east side of the reserve is also very steep. The reserve is on a plateau. A road was built to Anse à Jos, but the swampy ground continues to make access difficult.

[126] According to Chief Dufour, the reserve's small size has always been a problem. Over the years, the Essipit Nation has purchased land to expand the reserve. In 1998, the Government of Canada purchased the lands acquired by the Innu Essipit First Nation to expand the reserve. He added that the question of the reserve boundaries has always been a cause of tension with the people of Les Escoumins.

[127] The Band Council continues to buy other plots of land when the opportunity arises (Exhibit R-1, Vol 3, Unified Exhibit Ref No R-19)—be it sites of interest for traditional activities or plots that could be used to expand the reserve at a future date and to build more housing. The First Nation currently has 740 members. A third of its members live on the reserve, and two thirds outside it. The reserve has reached maximum capacity for residential occupation and is not large enough to accommodate everyone who wishes to live there.

B. Didier Ross

[128] Didier Ross is a member of the Innu Essipit First Nation. He has worked for the community for 34 years and has been responsible for innu-aitun activities for 25 to 30 years.

[129] He testified about seal hunting, which takes place mainly in winter, from December until

late March/early April, and about the importance of the Anse à Bélanger site for this hunt and other activities. He listed other sites of importance for the hunt for migratory birds, namely, Petites-Bergeronnes and the mouth of the Rivière des Petites-Bergeronnes about 15 kilometres away from the reserve, Pointe de la Croix and Pointe aux Sauvages.

[130] Mr. Ross also described the areas where the Essipit Innu would hunt for moose, which was done inland. The family grounds were east of the Rivière des Escoumins, stretching upstream towards Lac des Cœurs and downstream towards the Rivière Portneuf, and back to Les Escoumins. In addition to hunting, the Essipit Innu also trapped, harvested molluscs and gathered wild berries—traditional activities of that people. Mr. Ross also described the Essipit Innu’s traditional territory.

[131] According to Mr. Ross, coexistence between members of the Essipit Innu community and the non-Aboriginal population of Les Escoumins is not always easy. Conflicts arise particularly when the Innu are exercising their rights during hunting and fishing seasons.

[132] Mr. Ross testified remembering that, when he was a child, the residential area in the north of the reserve was a swamp and that the Innu grew a little hay there.

[133] The visit of the reserve and surrounding area, including Anse à Bélanger, allowed the Tribunal to visualize its width, the fact that it is landlocked by the town of Les Escoumins, except for the St. Lawrence River side, which is not accessible however because of the steep slope. The Tribunal was also able to see the steep cliff leading to Anse à Jos and the easy access offered by Anse à Bélanger.

IV. EXPERT EVIDENCE

A. For the Claimant

1. Paul Charest

[134] Paul Charest was called as an expert by the Claimant. His qualifications were not challenged by the Respondent. He was qualified by the Tribunal as an expert in anthropology.

[135] Mr. Charest has considerable expertise in anthropology. He has a Bachelor of Arts from Laval University/Petit séminaire de Chicoutimi, a bachelor’s degree in social sciences from

Laval University, and a master's degree in social sciences and anthropology from Laval University. He has also pursued doctoral studies at the École des Hautes Études in Paris.

[136] He taught in Laval University's Department of Anthropology for 35 years, retiring in 2004. He remains a retired associate professor and works as a regular researcher at the Interuniversity Centre for Indigenous Studies and Research (CIÉRA) based at Laval University. He has devoted many years of his career to researching and developing projects on the Innu of the Côte-Nord. He has produced numerous publications, alone or in collaboration with others, some of which on the Essipit Innu.

[137] Mr. Charest produced a report entitled *Rapport d'expertise en appui à la revendication particulière de la Première nation des Innus Essipit pour la perte de territoire de réserve* (Exhibit R-2).

[138] His report has three main objectives (Exhibit R-2, at p 102) :

1. to present the general sociohistorical context of the Montagnais (now known as the Innu) of the Haute-Côte-Nord, and more particularly, the Montagnais of Essipit when the territory of the King's Posts was opened up to settlement;
2. to present the socioeconomic context in which a reserve was created for the members of this band in 1892; and
3. to describe the reserve creation process.

[139] The first part of his report describes the way of life and culture of the Innu on their territories shortly before the arrival of forestry companies and squatters. Mr. Charest testified that before the territory was opened up to settlement in 1842, the Innu of the Haute-Côte-Nord had a nomadic, relatively stable way of life, combining subsistence activities and trade.

[140] Before 1842, the Innu were nomadic or semi-nomadic hunters who practised a generalist and opportunistic way of life—generalist in that they exploited a wide variety of resources by performing various production activities, such as hunting both game and seal, fishing, particularly salmon, cutting wood, gathering plants and harvesting shellfish; and opportunistic in that they would focus on a particular activity if it benefitted them.

[141] These activities were spread over an annual cycle during which families would travel to various areas within the territory where they could find their resources or easily exploit them. In the case of the Innu of the Haute-Côte-Nord, which includes the Essipit Innu, this cycle ended with a summer sojourn on the coast or at sea so that they could trade the products of the hunt, fur pelts and seal oil, and see the missionaries. During this period, the Innu fished salmon in river mouths, hunted seal and waterfowl and gathered plants. Most Innu, except those who went sealing in winter, would spend the rest of the year inland, hunting and trapping.

[142] The second portion of the report shows how the Innu of the western part of the Haute-Côte-Nord, between Tadoussac and Portneuf, which includes the Les Escoumins area, lost territory and access to wildlife resources as a result of the arrival of non-Aboriginal people.

[143] Mr. Charest testified that the arrival of squatters and forestry companies at the mouths of several rivers resulted in the Innu losing territory and their access to the wildlife on this territory. Surveyors made forest inventories and divided the territory into ranges and lots that were sold by the government at a profit. The Innu, with the help of the Oblates, asserted their rights in petitions addressed to the various government authorities. Their main claims were for the setting apart of lands for reserves, the protection of their traditional activities by giving them exclusive access to certain resources, such as seal and salmon, and the payment of annuities.

[144] Only one of their requests was granted, namely, the creation of a reserve at Betsiamites, by which the government intended to bring together all the Innu of the Haute-Côte-Nord in a single location. Instead of annuities, the government preferred giving temporary assistance to those most in need. Mr. Charest adds that the missionaries blamed the Innu's deplorable socioeconomic circumstances mainly on their having been dispossessed of the coastal portion of their territory and of the salmon rivers.

[145] According to Mr. Charest, the creation of a single large reserve in Betsiamites was an unrealistic plan. The way of life of the Innu of the Haute-Côte-Nord required them to have reserves dispersed across the territory on the mouths of the main rivers and providing a more direct access to the family hunting grounds, as some government representatives had suggested and as the sealers of the Tadoussac-Escoumins area, among others, had requested in the petition of 1847.

[146] Mr. Charest also dealt with (a) the role played by the Oblate missionaries as intermediaries between their religious followers and Indian Affairs administrators until the appointment of Agent Boucher in 1879; (b) the consequences of the HBC losing its monopoly, leading it to change its business structure by consolidating most of its activities in Betsiamites and amending its credit policy for Innu hunters; and (c) the negative impact of these changes on the Innu hunters and the Government of Canada's absence in the Haute-Côte-Nord.

[147] Mr. Charest also criticizes the government for failing to take into account the various requests made by the Essipit Innu, and the land ratio of 100 to 200 acres per family, as had been allocated elsewhere in Quebec and in Western Canada, when the federal Crown purchased the lands that became the Essipit Reserve.

[148] The third part of the report summarizes the history of the creation of the Essipit Reserve between 1880 and 1892 and the downsizing of the reserve to 97 acres.

[149] In short, Mr. Charest finds it hard to believe that a business person such as Mr. Vachon, who must have had a decent understanding of the lands he managed, could have made such a gross error in estimating the size of the land. Mr. Charest feels that one may wonder whether Mr. Vachon wanted to fool Agent Boucher, and, through him, Indian Affairs from the start or whether he reduced the size of the land in order to sell the other portion at a later date.

[150] Mr. Charest finds it curious that Agent Boucher did not verify, in any manner whatsoever, according to the documents consulted, whether Mr. Vachon could have increased the 97-acre area by adding one or more neighbouring lots, given that Mr. Lamontagne owned these too, and it is even more surprising that Agent Boucher, who was from Les Escoumins, did not know that the Lamontagne & Vachon company, when it still existed, owned the adjacent lots.

[151] Mr. Charest finds the whole matter rather nebulous, especially as Agent Boucher later supported Mr. Lamontagne, who was asking the same amount for a plot that was 60% smaller than the initial offer.

[152] Moreover, regarding Agent Boucher's plan to develop farming on the reserve, Mr. Charest notes the contradiction between Agent Boucher's wish for farming to develop on the

reserve and the small area that had been allocated to the Innu. A patch of about 97 acres was typically granted to a single family for farming. It was impossible for about ten families to farm properly when they had less than 10 acres each on average.

[153] Mr. Charest then compares the areas allocated to the Betsiamites Reserve and the three Atikamekw reserves. He indicates that the per capita ratio when the Betsiamites Reserve was created in 1861 was 92.5 acres, based on an estimated population of 767 people across the entire Haute-Côte-Nord. However, because of a surveying error, the actual area was only 63,100 acres. In the case of the Atikamekw reserves, he notes that at Coucoucache and Weymontachie, the chosen ratio was 19 acres per person, with Coucoucache receiving 380 acres for a population of 20 people, and Weymontachie, 6,926 acres for 384 people. Manouane, a reserve that was surveyed in 1906, received 1,906 acres for a population of 74 people in 1898, that is, 25.75 acres per person.

[154] The per capita ratio was also applied in Western Canada in 1890, with the Crown considering that each family had about five members.

[155] For Mr. Charest, the granting of less than two acres per person in Essipit reveals a blatant lack of fairness and an appearance of discrimination. The number of acres granted per person in Essipit for a reserve that was to be used for farming, at least in part, seems vastly insufficient to provide for the sustainable practice of this activity and the future development of the community.

B. For the Respondent

1. Jean-Pierre Garneau

[156] Jean-Pierre Garneau was called as an expert by the Respondent. He was qualified by the Tribunal as an expert anthropologist specializing in research on Aboriginal people in Quebec. His qualification was not challenged by the Claimant.

[157] Mr. Garneau holds a bachelor's degree (1979) and a master's degree (1985) in anthropology from Laval University. He has spent the past 25 years working as a consultant in the field of Aboriginal studies. During his career, he participated in establishing a database called Métrinord at Laval University, a project that was designed to compare various Aboriginal communities from a socioeconomic perspective and to compare them to the towns and villages

of the Minganie and the Basse-Côte-Nord and the mining towns of northwestern Quebec.

[158] During his career, he has also assessed the environmental impacts of hydroelectric, logging and mining projects affecting various Aboriginal communities and, for several years, worked with anthropologist Jacques Frenette on documenting various Aboriginal claims. He has also traced the genealogy of members of the Algonquin Nation. Since 2006, he has been mandated by the Department of Indian Affairs to carry out various historical studies, including on the Atikamekw and the Uashat and Betsiamites Innu.

[159] He has written many research studies and papers, alone or together with other researchers in his field.

[160] Mr. Garneau produced a report entitled *Contre-expertise du Rapport de M. Paul Charest intitulé « Rapport d'expertise en appui à la revendication particulière de la Première nation des Innus d'Essipit pour la perte de territoire de réserve »* (Exhibit I-2).

[161] He stated that he intended to describe Essipit Innu society before and after 1840 in greater detail than Mr. Charest.

[162] He addresses three main issues, namely, (1) the identity of the Innu of the Tadoussac-Escoumins area; (2) the population; and (3) the way of life of the Innu people.

[163] Essentially, Mr. Garneau makes a genealogical inquiry into the origins of today's families of the Essipit First Nation, concluding that they are the descendants of a very small segment of the Innu population of this area in the mid-19th century.

[164] First, he analyzes the issue of Innu identity by reviewing three periods: the period preceding the opening up of the King's Domain (1720–1842); the period from the opening up of the King's Domain to the creation of reserve at Les Escoumins (1842–1891); and administrative [TRANSLATION] “modernity”, the period from 1891 until today.

[165] In broad terms, Mr. Garneau puts forward that the reference that dominates all other bands before 1840 is the Tadoussac band, a [TRANSLATION] “trading post band” that was formed as a result of the presence of fur traders within the territory. According to Mr. Garneau, until

1840, the Innu of the Tadoussac-Escoumins area were members of the Tadoussac band. Its territories included the portion of Charlevoix that is downstream of the Rivière Malbaie, the main rivers of the Bas-Saguenay, and the Haute-Côte-Nord from Tadoussac until at least Baie de Mille-Vaches.

[166] With the opening up of the territory, from 1842 to 1891, the point of reference in terms of identity changed. The Tadoussac site lost its importance, and all of a sudden, the so-called Tadoussac band had to gather elsewhere. The reference point became Les Escoumins, where a village had developed, creating opportunities for the fur trade, stores selling commodities had opened and the Oblates had decided to establish themselves there until they left for Betsiamites in 1861. In Mr. Garneau's view, the Innu of Les Escoumins are essentially the same people as the people formerly known as the Innu of Tadoussac.

[167] With the creation of the Betsiamites Reserve in the late 1850s, the Innu of Les Escoumins had to make a choice. The enormous pressure on them to move to Betsiamites was exacerbated by (1) the Oblate Fathers, who felt that isolating the Innu from Euro-Canadians was in their best interest; (2) the HBC, which, at the time, wished to protect its relationship with the hunters by encouraging them to exploit inland resources rather than marine resources; and (3) the Canadian government, which, by creating the reserve, was also centralizing emergency resources for those in need there. However, this encouragement was not binding, and those who wished to stay in Les Escoumins could do so.

[168] According Mr. Garneau, Betsiamites was at the heart of the territory of the Les Îlets-Jérémie trading post band, the most central and most populous band. It was therefore expected that the other Innu would move there, which they did not do, however. The Innu of Sept-Îles stayed in their territory, as did the Innu of Godbout and of Pointe-des-Monts for decades before joining the neighbouring bands, Sept-Îles or Betsiamites; some families from Les Escoumins also chose to remain in their lands.

[169] In his report, Mr. Garneau argues that the number of families with actual ties to the Tadoussac-Escoumins area, before 1842, was small, no more than ten or so, but suggests that not many of these families moved to Betsiamites. He describes those who remained as the [TRANSLATION] "hard core", they being the descendants of the old Tadoussac band, and explains

that some families and certain descendants of other families decided to settle elsewhere, such as in L'Anse Saint-Jean and Chicoutimi.

[170] Finally, from 1879 onwards, with the appointment of Indian Affairs agent Mr. Boucher, the band internalized all the rules arising from the *Indian Act* and defined their band membership rules, thereby breaking with the old order and resulting in the Essipit First Nation crystallizing its identity.

[171] As for the size of the population, Mr. Garneau estimates that, in the early 1840s, there were no more than 10 families. He concludes from his analysis of certain documents that, in 1842, when the King's Domain was opened up to other developers, the [TRANSLATION] "so-called Tadoussac band was reduced to a very small number" (Exhibit I-2, at p 60). At the end of the 19th century, at the time of the creation of the Essipit Reserve, the decline in the population can be explained in part by families leaving for Betsiamites, [TRANSLATION] "natural" mortality and migration to other areas.

[172] Regarding the Essipit Innu's way of life, Mr. Garneau submits that, before 1840, the marine environment was the main support of the Innu in the Tadoussac-Escoumins area. Marine hunting resources, seals in particular, together with salmon and other fishery resources overshadowed the development of forestry resources. He adds that, before 1840, there was no indication that the Innu in the Tadoussac-Escoumins area had farmed. As for Joseph Moreau, who did engage in some farming according to sources, Mr. Garneau submits that he was not Innu.

2. Stéphanie Béreau

[173] Stéphanie Béreau was called as an expert by the Respondent. The Tribunal qualified her as a historian with expertise in the history of Quebec's Aboriginal peoples and their relations with the State.

[174] Ms. Béreau studied history at Sorbonne University (Paris IV). She obtained a master's degree there in 1997 and a Diplôme d'Études Approfondies [a post-graduate diploma] in 1998. She then pursued doctoral studies at the European University Institute in Florence. Her thesis, on modern history, was defended there in November 2006.

[175] Since 2005, she has been working full-time as a history consultant. She has delivered several research reports on Aboriginal peoples in Quebec to provincial and federal departments as well as private organizations such as museums and publishing houses. She has authored several articles, a book and some conference proceedings.

[176] Ms. Béreau filed a report entitled *La création d'une réserve aux Escoumins (1840-1892)* (Exhibit I-3).

[177] In her introduction, she describes the context of her research as follows (Exhibit I-3, at p 8):

- to provide a short historical overview of the Euro-Canadian presence in the Côte-Nord and especially in the Les Escoumins area, from when the region was opened up to settlement until the end of the 19th century;
- to document the presence of Aboriginal groups in the Côte-Nord during the same period, with a particular focus on the Les Escoumins area;
- to clarify the role played by the Oblate missionaries, first-hand witnesses of the life of the Aboriginal people in the Côte-Nord and the Les Escoumins area, whom they started visiting in 1846 and near whom they settled in 1853;
- to give a short historical overview of the land claims made by the Innu from the 1840s till the end of the 19th century (petitions);
- to determine how Indian Affairs dealt with the Aboriginal people in the Côte-Nord after the end of the HBC's monopoly (by specifically describing how the first Indian Affairs agent, Louis Félix Boucher, was appointed); and
- to relate the specific steps in the negotiations that led to the creation of a reserve at Les Escoumins, from the first requests to the final purchase.

[178] Ms. Béreau first deals with the increased settlement of the Côte-Nord. She submits that many settlers had been moving on to the lands of the King's Domain illegally since 1830 and that, in the mid-1840s, the Côte-Nord territory was quickly settled by squatters, who made their

living by working for the forestry industry, by farming intermittently and by fishing to support themselves. The population of Les Escoumins started growing as a result of the forestry industry: in 1845–1846, Nazaire Têtu and his associate, Jean-Frédéric Boucher, obtained logging permits and built a saw mill. Quickly, almost all of ranges A and 1 were occupied by families, who built small houses or sheds there after clearing some of the land without, however, attempting to obtain proper titles for their land.

[179] Despite the difficulty of determining the exact number of Innu in the Les Escoumins area, Ms. Béreau estimates that, in the 1850s, there were about 150 individuals, or about 30 families. The most well-known family was the family of Joseph Moreau, whom she describes in her report as a [TRANSLATION] “Euro-Canadian” who married Marie Volant, an Innu, in 1822. Records from 1845 also reveal Flavien, the son of Joseph and Marie, Paul St-Onge, and Denis Jean Pierre or Denis Moreau as all being established close to the Baie des Escoumins and as partly living from farming, but mainly from hunting, specifically sealing.

[180] According to Ms. Béreau, the rapid influx of new settlers and loggers in the Côte-Nord had major repercussions for the Aboriginal people in the region. Besides the territorial encroachments suffered by the Aboriginal people as a result of Euro-Canadian families settling in the region, the arrival of new settlers brought epidemics and changed the habits of wildlife. These factors played a part in impoverishing the Aboriginal people and led them to submit various petitions.

[181] Ms. Béreau then deals with the issue of how the lands and reserves were distributed in the Côte-Nord. She submits that the Indian policy of the British in the 1810s and 1820s relied on military alliances, but changed direction in the 1830s, with the long-term priority becoming the [TRANSLATION] “civilization” of the Aboriginal peoples. Initially, the authorities thought about granting land to Aboriginal peoples on an individual basis, but towards the middle of the century, they eventually decided to set apart lands for collective use by Aboriginal bands.

[182] In their petitions, the Innu of the former King’s Domain sought to be granted the plots of land they had been occupying for their personal use in Les Escoumins and on the Baie de Mille-Vaches; they also sought the protection of certain activities, such as fishing and sealing, by asking for exclusive fishing rights and for land at the locations where they traditionally practised

such activities.

[183] In addition to individual plots, the Innu also asked for land at La Grande Décharge and for grants of 400 arpents in Bon-Désir, by the Rivière aux Outardes and by the Rivière Péribonka. The authorities eventually decided to allocate 70,000 acres in Betsiamites, given that three quarters of this area was not suitable for farming and the Aboriginal people would be able to hunt and fish there. In the eyes of the authorities, this choice was justified because the location was far from the settlement areas and was seen as a gathering place for all the Innu communities in the Côte-Nord.

[184] The creation of the Betsiamites Reserve did not solve the problem, given that many Innu refused to move there, hence the creation of the Essipit Reserve, which was negotiated in three stages: (1) the initial offer in 1879, which ended with Mr. Vankoughnet agreeing to the survey, subject to Mr. Vachon allowing it and producing clear titles; (2) from 1881 to 1885, with Mr. Boivin's survey and the government being unable to secure clear title from the owner of Block A; (3) from 1884 to 1892, with the departure of Mr. Vachon, and Mr. Lamontagne's involvement in the tensions surrounding the number of acres and the price and sale of the land.

[185] Ms. Béreau ends her analysis by attempting to answer three questions raised by the creation of the reserve in Les Escoumins.

[186] First, she blames the delays in creating the reserve on the questionable involvement of Mr. Vachon, on the impact of Mr. Lamontagne's financial difficulties and on the loss of Mr. Boivin's plan.

[187] Second, regarding the problem in area, she notes that the reserve was not created under the 1851 Act, but through the sale of a specific parcel of land. It was therefore the sellers who determined the initial area of 230 acres for this sale and who also chose to conclude the sale for 97 acres on the basis of Mr. Boivin's survey.

[188] Ms. Béreau submits that the fact that Lot 11 was originally within the boundaries of the future reserve is entirely logical since it was included in Mr. Vachon's offer and was referred to by Agent Boucher in his letter dated January 28, 1881. She adds, however, that there are no sources to determine why, if this hypothesis is true, it was subsequently and finally not included.

[189] Third, regarding the involvement of the Innu, she submits that despite the silence of the Innu families, the sources she consulted suggest that the Innu themselves asked for the parcel of land in question and that the Innu were established in Block A at the time of the negotiations. However, it is impossible to know to what extent the Innu discussed the proposed reserve with Agent Boucher or how they were later informed of the negotiations and the problems. She notes that the sources she consulted do not suggest that the Innu of the Les Escoumins area were politically organized and led by a band chief. In that case, according to Ms. Béreau, Indian Affairs' preferred intermediary would have been the agent appointed to the community.

[190] Lastly, she concludes that nothing suggests that the silence of the Aboriginal families can be blamed on Agent Boucher, who, in her opinion, would have sought to work in their interests.

C. Notary Guillaume Laperle

[191] The parties jointly appointed the notary Guillaume Laperle to establish the chain of title for certain lots located in the Indian reserve and for the Respondent's lot in the Essipit Reserve.

[192] For this purpose, Mr. Laperle filed a report entitled *Rapport d'expertise sur l'établissement de la chaîne des titres de propriété d'une partie du canton Escoumains* (Exhibit CP-6).

[193] After reviewing the report, the Claimant consented to it being filed subject to an objection to the comments made by Mr. Laperle regarding the plan that should have accompanied the act of sale between Mr. Lamontagne and Her Majesty. It specifically objected to the following paragraphs on page 43 of the report:

[TRANSLATION]

That being said, there is a disparity between the wording of the act of sale (Minute No 4629[]) by Notary Charlebois, which, as we saw earlier, concerns part of Lot A, Range A, and the plan appended to Minute No 4629, which, according to the notary, outlines a perimeter represented by a black dotted line delimiting Lot 11 of Range A and a part of Block A. We find it hard to understand why the January 1882 plan of Elzéar Boivin, which is expressly mentioned in the act of sale (Minute No 4629), is not the plan that is appended to the act of sale.

However, we suspect that the plan dated May 9, 1879, appended to the act of sale (Minute No 4629), and signed by the parties and the notary is not the correct plan

and not the plan that should have been appended to the act of sale (Minute No 4629) as it does not represent the description provided in the act of sale or constitute the latest plan available at the time (Mr. Boivin's 1882 plan being more recent than the 1879 plan prepared by Taché). It is therefore reasonable to believe that the most recent plan (Boivin 1882), which is annotated "Plan of an Indian Reserve", should have been the plan that was appended to the act of sale, especially as the measurements on this plan match the wording of the act of sale (Minute No 4629).

[194] The Claimant is asking the Tribunal to reject these paragraphs as Mr. Laperle is offering an opinion by interpreting the documents, which exceeds his mandate, which was simply to establish the chain of title.

[195] The 1879 plan appended to the 1892 act of sale is at the heart of this matter. It is the Tribunal's role to draw inferences on why it was appended to the 1892 act of sale in light of the facts in evidence and to determine how the actions taken should be interpreted.

[196] The Tribunal therefore maintained the Claimant's objection and will not consider the two paragraphs from page 43 of Mr. Laperle's report quoted above.

D. Conclusions regarding the experts

[197] The experts testified objectively and reliably. The Tribunal did not note any factors that might undermine their credibility. Most of the testimony from the Respondent's experts on the presence of the Innu in the territory and the consequences of development on their way of life is echoed in the testimony of the Claimant's expert. Any discrepancies in the links drawn from the historical facts will be analyzed in light of the entire body of evidence.

V. POSITIONS OF THE PARTIES

A. Claimant

[198] The Claimant bases its Amended Declaration of Claim on paragraph 14(1)(c) of the *SCTA*, which provides as follows:

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:

...

(c) 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; . . .

[199] The Claimant alleges that the Crown breached its fiduciary duty and failed to uphold the honour of the Crown.

[200] The Claimant submits that it has demonstrated that the Essipit Innu occupied not only the Pointe des Escoumins, but also many plots of land along the shore, in addition to their hunting grounds. It argues that it has established the existence of a cognizable Aboriginal interest, not only in the Crown's offer to purchase 230 acres for the Essipit Reserve, but also in the purpose of this offer, namely, purchasing lands occupied by the Essipit Innu band. The Crown therefore had the duty to enquire about the members of the band and their expectations and needs, and which lands were occupied by its members.

[201] The Claimant is not arguing that there is a fiduciary duty predating Confederation. It submits that, in this case, the fiduciary duty arose in 1879–1880, at the beginning of the process to create the Essipit Reserve, when Superintendent Vankoughnet instructed Agent Boucher to examine the lands in the Côte-Nord for the purpose of creating reserves. It submits that the legal analysis of the breaches of the fiduciary duty should also start at this date, adding, however, that, in order to determine whether the honour of the Crown was violated, the Tribunal must consider the factual circumstances before Confederation because the obligation to act with honour arises from these circumstances.

[202] For the Claimant, given the nomadic or semi-nomadic way of life of the Essipit Innu and the fact that its members occupied different areas on the coast, the area required for this purpose could not be identified in a single day in 1881 in a single location by a single surveyor. The federal Crown should have analyzed the situation with a view to creating a reserve that corresponded to the reality and met the needs of the Essipit Innu before moving forward with an area of 97 acres.

[203] Furthermore, the federal Crown should have informed and consulted with the members of the Essipit band on the area to be granted especially after it was reduced by more than half. In failing to do so and in making many mistakes throughout the reserve creation process, it

breached its duty to inform and consult and its duty to act honourably towards the Essipit band.

B. The Respondent

[204] The Respondent submits that regardless of the way of life and the lands occupied by the Indians of the Les Escoumins area before the King's Domain was opened up to settlement and in the years that followed, in 1880, the Indians had a cognizable interest in a part of Block A of Escoumins township, namely the area on which they chose to build their houses and which was surveyed by Mr. Boivin. The cognizable Aboriginal interest is therefore limited to the 97 acres.

[205] The Respondent agrees with the Claimant that the fiduciary duty arose when Superintendent Vankoughnet agreed to purchase the land to create a reserve for the band. It submits, however, that the federal Crown properly fulfilled its duties in this regard.

[206] According to the Respondent, the Crown considered the way of life of the Essipit Innu— seal hunters with a diverse economy who would at times hunt seal but would occasionally, if necessary, farm to support themselves. The location of the reserve suited them entirely. It was they who chose it. They had built their homes within the 97 acres surveyed and asked that their reserve be situated there. The Crown therefore did not breach its fiduciary duty.

[207] Moreover, as the years passed, the reserve was expanded. In 1998, the Crown purchased the lands acquired over the years by the First Nation for reserve land, and it did so at the request of the First Nation.

VI. ANALYSIS

A. What is the scope of the Respondent's legal or fiduciary duty?

[208] The Supreme Court of Canada teaches that the fiduciary relationship between the Crown and the Aboriginal peoples is *sui generis* in nature and can also lead in certain circumstances to judicially enforceable fiduciary duties on the Crown (*Canada v Kitselas First Nation*, 2014 FCA 150 at paras 40–41, [2014] 4 CNLR 6 [*Kitselas* FCA] citing *R v Sparrow*, [1990] 1 SCR 1075 at p 1108, 70 DLR (4th) 385; *R v Badger*, [1996] 1 SCR 771 at para 9, 133 DLR (4th) 324; and *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*]).

[209] Judicially enforceable fiduciary duties of the Crown are not limited to transactions

involving reserve land. They can also be found to exist “where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power” (*Kitselas* FCA, at para 42 citing *Guerin*, at p 384).

[210] A fiduciary duty requires the fiduciary “to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person” (*Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 47, [2013] 1 SCR 623 [*Manitoba Metis Federation*] citing *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at pp 646–47, 61 DLR (4th) 14).

[211] In the Aboriginal context, an enforceable fiduciary duty may arise from the Crown assuming discretionary control over specific or cognizable Aboriginal interests (*Manitoba Metis Federation* at paras 49–50 citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, [2014] 3 SCR 511 [*Haida Nation*] and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36, [2011] 2 SCR 261).

[212] In the matter before me, the parties recognize the existence of a cognizable Aboriginal interest, but they disagree as to its scope. For the Claimant, this interest involves an area of at least 230 acres, but also covers all the requests made by and the areas occupied by the Essipit Innu. For the Respondent, the cognizable Aboriginal interest is limited to 97 acres.

[213] I conclude from the evidence in this case that a process to create a reserve for all the Innu of the Haute-Côte-Nord was initiated by the colonial government following the adoption of the 1853 Order in Council, which led to the creation of the Betsiamites Reserve in 1861. In 1879, despite this reserve having been created, the federal Crown decided to create other reserves for the Innu of the Haute-Côte-Nord after seeing how the creation of a single reserve in Betsiamites had failed.

[214] The fact that Justice O’Brien was tasked in the late 1870s with reporting on the situation of the Indians of the Côte-Nord and that Agent Boucher was appointed to identify new sites for creating reserves is a clear acknowledgment by the federal Crown that the creation of a single reserve in Betsiamites did not adequately meet the needs of all the Innu of the Côte-Nord.

[215] The process of creating a reserve in Essipit crystallized *de facto* in February 1881 with Superintendent Vankoughnet's decision to authorize the process of purchasing no less than 230 acres of land in Essipit for the creation of a reserve on Lot 11 of Range A and a part of Block A for the benefit of the Essipit Innu band.

[216] This undertaking and this acknowledgment required the federal Crown to complete the process of creating a 230-acre reserve and protect the interests of the Innu of the Essipit band.

[217] Here are my reasons supporting these conclusions.

[218] Whether there was an Escoumins band before 1850 or whether the Innu of Les Escoumins or their ancestors were part of the Tadoussac band is irrelevant to this Claim.

[219] Mr. Charest testified that the nomadic Innu peoples had a very informal understanding of the concept of "chief". Their leaders were individuals with influence over their group of related families. Regarding the notion of band, he testified that this concept appeared with the enactment of the *Indian Act* in 1876, and that many years went by before a [TRANSLATION] "formal chief position" was established. His testimony was not contradicted.

[220] For the purpose of creating the Essipit Reserve, the Crown recognized the existence of an Indian band in Les Escoumins in 1880. In his September 20, 1880, report, Agent Boucher noted the band's existence, and Superintendent Vankoughnet recognized it on November 5, 1880, by asking Agent Boucher to provide him with information on the lands being proposed for the band. The evidence does not show that the Crown ever questioned the existence of a band in Les Escoumins.

[221] What is important for our analysis is that by 1880, settlement had reduced the Innu of Les Escoumins to a few strips of land. In other words, the manner in which the Innu of the Les Escoumins area inhabited the land in 1880 had been shaped by the opening up of the territory in 1842. The way in which the Innu occupied Les Escoumins and their traditional territory as a whole was profoundly disrupted by the arrival of settlers after the area was opened up.

[222] With the rapid influx of settlers after the King's Domain was opened up, the Innu, including those of the Les Escoumins area, were pushed aside, and their petitions for rights

regarding the sites they used for traditional and subsistence activities were ignored, with settlers and business people appropriating these sites. The Innu's petitions, the efforts made by the Oblates on their behalf and the various reports submitted to government authorities prove this. Consequently, the Essipit Reserve was created for an extremely vulnerable Aboriginal population that was in great distress.

[223] The facts of this case must therefore be reviewed in light of the very particular context of the opening up of the King's Domain.

[224] What about the scope of the cognizable Aboriginal interest?

[225] On October 4, 1879, Jean-Célestin Desmeules was instructed by the Department of Crown Lands for the Province of Quebec to survey the land in the townships of Bergeronnes, Escoumins and Iberville, following requests by, among others, the municipality of Les Escoumins. Mr. Desmeules began his survey on February 17, 1880, and on October 20, 1880, he moved to Les Escoumins for this purpose (Exhibit I-3, at p 56).

[226] In his field notes, Mr. Desmeules identifies Lot 11 and Block A as being occupied by Mr. Lamontagne. He notes that Lot 11 has an area of 71 acres and Block A, an area of 180 acres, giving a total of 251 acres (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 323, at p 15).

[227] During the same period, Mr. Boucher, recently appointed Indian agent, toured the Aboriginal communities of the Haute-Côte-Nord. In the Les Escoumins area, which he was very familiar with, he observed that for more than 30 years, Indians had been occupying a parcel of land that according to him had been granted to Mr. Vachon. On September 20, 1880, in his report to Superintendent Vankoughnet, Agent Boucher proposed the creation of a reserve for the Essipit Innu band on Mr. Vachon's land. It must be noted that Mr. Vachon, who claimed to be the owner of this land, was in fact Mr. Lamontagne's representative or agent.

[228] On November 5, 1880, Superintendent Vankoughnet enquired about the surface area and the price of the land and during which time of the year it was occupied by the Innu. On January 28, 1881, having obtained this information from Mr. Vachon, Agent Boucher informed Mr. Vankoughnet that the land on offer had an area of about 230 acres, that its asking price was \$200.00 and that it was located on Lot 11 and a part of Block A, as indicated on the plan

provided by Mr. Vachon, delimiting an area by a black dotted line. Agent Boucher also noted that, according to Mr. Vachon, not all of the land was first rate but that all of it was suitable for agriculture.

[229] On February 23, 1881, Superintendent Vankoughnet gave his approval, instructing that “[i]t should not be less than the quantity named in your letter viz 230 acres” and asking that Agent Boucher obtain clear titles and, once this had been done, have the land surveyed. He renewed his permission in August 1881, subject to the same conditions. However, Agent Boucher appointed Mr. Boivin to survey the reserve before obtaining the clear titles. On November 19, 1881, Mr. Boivin surveyed nothing more than a 97-acre parcel of land situated on a part of Block A; Agent Boucher did not attend. Approximately five months after Mr. Boivin’s survey, on April 7, 1882, Agent Boucher informed Superintendent Vankoughnet that the surveyed area was not the same as the area described in his letter of January 28, 1881, writing as follows (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 337):

[TRANSLATION]

There is not the amount of land that I mentioned to you in my letter of January 28, 1881, but the same size that I had marked. . . . [Mr.] Vachon told me that it was about the amount of land he had told me about, without having measured it.

[230] The plan that Agent Boucher sent to Superintendent Vankoughnet with his letter dated January 28, 1881, was not appended to this letter in the archives consulted by Ms. Béreau. However, in the course of his title search, Mr. Laperle found a plan dated May 9, 1879, and signed by Eugène-Étienne Taché, Assistant Commissioner of the Department of Crown Lands of the Province of Quebec, in the register of the notary Mr. Gosselin (Exhibit M-1, Unified Exhibit Ref No M-15). The plan was appended to the act of sale for the 97-acre parcel of land concluded between Mr. Lamontagne and the Crown on July 23, 1892, and signed before the notary Mr. Charlebois (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 457). The plan shows a black dotted line delimiting an area situated on Lot 11 of Range A and a part of Block A (Exhibit M-1, Unified Exhibit Ref No Exhibit M-15). The plan is appended to this decision.

[231] The plan appended to the act of sale reads as follows:

This is the plan referred to in the foregoing deed of Sale and Surrender by Théodore Jean Lamontagne to Her Majesty signed by the parties to the said deed and the undersigned Notary.

[232] Under this note appear the signatures of Mr. Lamontagne and the Crown's representative, C. Panet Angers, that is, the same people who signed the act of sale, and that of Mr. Charlebois.

[233] Under the heading "Description of Property", the act of sale reads as follows:

All and singular that certain portion, parcel or tract of land and premises, situate lying and being in the Township of Escoum[ins], on the North Shore of the River St. Lawrence, Province of Quebec, bounded on the South-West by lot No.XI in the First Range of the said Township of Escoum[ins] on the North-East by that portion of lot No.XIII occupied by Milan Lepage, on the South-East by the River St. Lawrence and on the South-West by lot No.XII and by a portion of lot No.XIII, as surveyed by Elz. Boivin P.L.S. in January eighteen hundred and eighty two [(1882),] containing by admeasurement 97 acres of land . . .

[234] Mr. Charlebois clearly had Mr. Boivin's field notes in hand when he was drafting the contract. However, a note in the margin of the description reads as follows:

as the whole is more fully described on the plan hereunto annexed for identification signed by the parties hereto and the undersigned Notary.

[235] This note is followed by the initials of the parties and the notary. As seen above, the plan appended to the act of sale identified and signed by the parties is Mr. Taché's plan showing Lot 11 and a part of Block A delimited by a black dotted line.

[236] It is therefore clear that the 1879 Taché plan that was found appended to the act of sale was the plan provided by Mr. Vachon to Agent Boucher and sent to Superintendent Vankoughnet. It was upon receipt of this plan that Mr. Vankoughnet gave his approval for a reserve area of no less than 230 acres, likely based on his understanding that the area delimited by the dotted line was the land occupied by the 10 Innu families identified by Agent Boucher as making up the Essipit band. It is just as clear that it was this same land that the Crown's representative recognized as the land he understood to be the area the Crown was purchasing to create the reserve when he signed the act of sale and identified the plan.

[237] In light of all these circumstances, the statements of Mr. Vachon and Mr. Lamontagne, supported by Agent Boucher and according to which the parties had agreed from the outset on a

parcel of land that turned out to have 97 acres and not one with an area of 230 acres, are implausible and have little probative value. Besides the reasons already set out, this assumption is contradicted by a number of other factors:

- a. Mr. Vachon was an unstable, dishonest and rather unprofessional man. He left Les Escoumins in early 1884 and returned in late 1885 only to leave again a few months later, without warning. He was arrested for opium trafficking at the American border in 1888 and imprisoned (Exhibit I-3, at pp 10, 90–94,). As for Mr. Lamontagne, he did not live in Les Escoumins, even though he travelled there regularly, but he was a skillful and conscientious businessman who tightly managed his company (Exhibit I-3, at p 98). He was the sole decision-maker and was made aware of all problems; nothing was done without his approval (Exhibit I-3, at p 95).
- b. Mr. Vachon, who arrived in Les Escoumins in 1877, quickly became the village's mayor and oversaw improvement work in the port of Les Escoumins in addition to managing Mr. Lamontagne's companies (Exhibit I-3, at pp 90–91). As Mr. Lamontagne's manager, he knew his employer's lands well. The 1879 Taché plan indicates that the point of Block A was excluded from the land delimited by the dotted line, making it possible to preserve this area for port activities. Sure enough, a dock was built there a few years later.
- c. On October 20, 1880, Mr. Desmeules was in Les Escoumins and noted that Lot 11 and Block A had a total of 251 acres and belonged to Mr. Lamontagne. As the mayor of Les Escoumins and the manager of Mr. Lamontagne's company, it is not credible that Mr. Vachon was mistaken when he informed Agent Boucher in January 1881 that Lot 11 and a part of Block A offered for the reserve had a total of approximately 230 acres.

[238] In short, it is implausible that Mr. Vachon could have confused 230 acres and 97 acres. What is more,

- a. on July 7, 1881, Mr. Lamontagne sold 12 arpents of land in Block A to Augustin Beaulieu (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 326);

- b. on November 19, 1881, Mr. Boivin, with Mr. Vachon present but Agent Boucher absent, surveyed a parcel of 97 acres in Block A. Agent Boucher had written to Mr. Boivin three days earlier, on November 16, to tell him to get in touch with Mr. Vachon for further information. Several months later, in April 1882, Agent Boucher informed Superintendent Vankoughnet that the plot that had been agreed on did not have the same amount of land but was of the same size and that the price remained the same since, according to Mr. Vachon, the price of land had increased substantially;
- c. in 1882, Mr. Lamontagne tried to sell his establishment in Les Escoumins. Letters from 1883 document that he sold his company, but that the transaction was not completed and discussions continued. He subsequently decided to keep the company. In 1897, Mr. Lamontagne, plagued by financial problems, sold the company to one of his creditors (Exhibit I-3, at pp 92, 98– 99);
- d. in 1885, Mr. Vachon was involved in various transactions to sell Mr. Lamontagne’s plots of land, as, in response to his letter dated January 21, 1885, a certain Mr. Mullonay of London replied, “Would you take \$50,000 for Escoum[ins] & allow \$10,000 for commission”, depending on the outcome of tests looking for potentially lucrative minerals in the area (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 375). It would have been surprising if Mr. Lamontagne had not been informed of these discussions; and
- e. in 1886, Mr. Lamontagne’s cousin urged Mr. Lamontagne to tell him the good news he had heard through the grapevine, [TRANSLATION] “that [his] creditors would not bother [him] for the time being, but only once [he had] sold Les Escoumins, it being said that [Mr.] Price intended to buy, meaning that [he could] put a little something aside in the meantime” (Exhibit CP-1, Vol 7A, Unified Exhibit Ref No 389). His cousin added that he would not betray Mr. Lamontagne’s confidence.

[239] Finally, during the negotiations on the price of the reserve lands in 1887, a dispute arose between the Crown and Mr. Lamontagne. Mr. Lamontagne demanded that interest be calculated as of 1879, claiming this to be the year of the first offer (Exhibit CP-1, Vol 7B, Unified Exhibit

Ref No 444). The documentary evidence shows that Mr. Vachon sold lots 12, 13 and 14 in the first and second ranges of Les Escoumins, and that it is likely that either he or Mr. Lamontagne first proposed the sale to the Crown in 1879, which would explain the Taché plan, before Agent Boucher was appointed. In his letters, neither Superintendent Vankoughnet nor his representatives deny this; indeed, Mr. Vankoughnet disagreed with retroactively imposing interest as of 1879, as there was no talk of price until 1881 (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 446; Exhibit I-3, at pp 178–79).

[240] All of the evidence suggests that, as a question of fact, the parties did indeed agree on the sale a 230-acre area for the sum of \$200.00, but that Mr. Vachon unilaterally backed down and, without permission, reduced the agreed area to 97 acres. And Mr. Boucher either agreed without thinking or was taken in by Mr. Vachon's falsehood that the identified plot had only 97 acres.

[241] Indeed, in his report dated September 20, 1880, Agent Boucher identified the Les Escoumins band as being composed of 10 families, whom he did not name, and an old disabled woman who had been occupying an area that was initially identified as containing 230 acres for the last 30 years. Agent Boucher counted five houses there. Little over a year later, in November 1881, Mr. Boivin surveyed an area of 97 acres and counted nine houses within this territory. There is no record of the Crown questioning this increase in the number of dwellings.

[242] Furthermore, the evidence reveals that, in the 1880s, the Essipit Innu occupied lands other than the 97 acres that became the reserve and that 30 years prior, families were also occupying lands other than this land:

- a. Relying on genealogical research, Mr. Garneau finds it realistic to think that, in 1880, the band recognized by the Crown was composed of 10 families. This would have been the maximum in his opinion. According to Mr. Charest, this would have been the minimum. In turn, Ms. Béreau stated that she did not know whether only the 10 families met by Agent Boucher made up the Essipit band since she had not analyzed the creation of the Essipit Reserve.

However, Mr. Garneau acknowledges that other Innu from the ones identified on Mr. Boivin's plan in 1882 were living in the Les Escoumins area. He named some of

these Innu, including Simon Matapash, who appears on the census by Father Arnault; Germain and Véronique; and possibly a young woman of the name of Mitita and her family.

- b. In 1907, Adolphe Gagnon, the new Indian agent, wrote in his report that a few families had camped in Les Escoumins for the winter and that hunting was the surest means of subsistence (Exhibit CP-1, Vol 8A, Unified Exhibit Ref No 531). Therefore, in 1907, there were still some nomadic Les Escoumins Innu living in tents. One can deduce from this that this would have been the case, too, in 1881 and that these nomadic Innu had not been considered.
- c. In his report on his expedition to the Côte-Nord dated April 27, 1846, George Duberger stated that a squatter called Joseph Moreau, who was occupying the only location where Jean-Frédéric Boucher, an associate of the Têtu family, could build his sawmill, had agreed to give up his plot in exchange for money (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 99). This is the same Joseph Moreau who had signed the petition of 1843 defining himself as a [TRANSLATION] “Natural Montagnais” residing in the [TRANSLATION] “Les Escoum[ins]” area and whose sole means of subsistence were fur trapping and the winter seal hunt (Exhibit CP-1, Vol 2, Unified Exhibit Ref No 51).

It would be inappropriate to engage in a discussion about identity, a sensitive and complex issue that continues to be much debated even today. For the purposes of this case, it suffices to note that, when he sold the land he was occupying, Joseph Moreau was considered to be an Innu by his peers, lived like an Innu and occupied his land as an Innu together with his Innu wife and children;

- d. Moreover, a map of Les Escoumins drawn up by Duncan Stephen Ballantyne on June 25, 1848, shows that Joseph Moreau, Paul St-Onge and Denis Moreau were occupying plots along the St. Lawrence River on the east side of the Baie des Escoumins, that is, on the other side of the Pointe des Escoumins. In Iberville Township, the map also shows the names of Germain François (“Jermain François”), Fabien Moreau and Louis Bacon in various places along the St. Lawrence River

- (Exhibit M-1, Unified Exhibit Ref No M-6). Iberville Township stretches to the Baie de Mille-Vaches.
- e. A plan prepared by the surveyor Mr. Duberger in 1849–1850 also places Paul St-Onge, Denis Jean Pierre and Germain François along the St. Lawrence River, describing them as “Indian squatter[s]” (Exhibit M-1, Unified Exhibit Ref No M-11).
 - f. Moreover, on September 12, 1849, Mr. Lamontagne sent protests via a notary to the Innu Édouard Moreau, Paul Ross, Pierre Jacques and Pierre Denis ordering them to move and leave behind the lots they were occupying, including those on the Pointe des Escoumins, [TRANSLATION] “commonly known as Paul Ross Point” (Exhibit CP-1, Vol 5, Unified Exhibit Ref Nos 304, 305, 306 and 309).
 - g. In his report of June 15, 1881, surveyor Jean-Célestin Desmeules wrote to J. Flynn, Crown Land Commissioner, that [TRANSLATION] “Lot A, which was part of the village of Têtu Ville patented to Nazaire Têtu & Co, now Mr. Théodore Lamontagne[,] and which covers the entire western point of the Baie des Escoumins, is occupied by several Indians and Métis, who live off hunting and a little farming” (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 324).
 - h. The presence of a certain Marc Jacques, hunter and labourer, is confirmed in 1898, the year the Les Escoumins official cadastre was established. The book of reference identifies Mr. Jacques as the owner of Lot A-5 of Range A, which is situated on the Pointe des Escoumins (Exhibit M-1, Unified Exhibit Ref No M-25). The Crown purchased this lot for \$1.00 in 1903 to build a dock on the point. In 1879, Pierre Jacques, Marc Jacques’s father, had received a protest from Mr. Lamontagne, asking him to leave the point.
 - i. In his plan and field notes, Mr. Boivin remarks on the presence of a certain Émilien or Milan Lepage on the point of the Baie des Escoumins, namely, Block A, which he identifies in his notes as being Lot XIII, a lot that does not exist in Range A. Mr. Desmeules did not note the presence of any squatters or a Mr. Lepage in Block A. In the 1881 census, Milan Lepage is counted alongside Polémon Gauthier

and Joseph Lavoie to the west of Block A, (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 318). On November 19, 1883, Milan Lepage purchased the 47-acre Lot 5, situated to the west of Block A, for \$18.81, obtaining the letters patent for it in February 1884 (Exhibit CP-1, Vol 6, Unified Exhibit Ref No 365). In 1891, he was counted as being between Paul Ross's and Denis Bacon's families, closer to the reserve (Exhibit I-3, at p 173).

[243] In short, it is clear from the evidence that the Les Escoumins Innu occupied more than the 97-acre part of Block A that was purchased to create the reserve.

[244] The Respondent argues that the Crown did not control or own the lands and that it depended on the good will of the seller, Mr. Lamontagne, as far as the number of acres it could purchase to create the reserve was concerned. However, the cognizable Aboriginal interest is not a matter of the number of acres a third party may decide to sell, but of the lands occupied by the Innu in the Les Escoumins area and recognized for this purpose by the federal Crown.

[245] In this case, it appears from the evidence that, by February 1881, the federal Crown had demonstrated a plain and clear commitment to create a reserve in Les Escoumins for the Essipit Innu band and had recognized the interest of this band in the lands covering a minimum area of 230 acres and situated on Lot 11 of Range A and a part of Block A.

[246] In the 1880s, the Innu of the Les Escoumins area were very vulnerable. They were wholly dependent on the federal Crown's actions in the creation of their reserve, the Crown acting as their exclusive intermediary with Mr. Vachon and Mr. Lamontagne, and exercising its discretion to fulfill this role.

[247] The discretionary power in question meant ensuring that the reserve creation process was implemented. This discretion belonged to the federal Crown and not a third-party seller.

[248] The question of the reserve's surface area regarded the Essipit lands occupied by the Essipit Innu and was at the heart of the reserve creation process. In accordance with the Supreme Court of Canada's teachings, this process engages the federal Crown's responsibility to fulfill the basic obligations 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 at para 86, [2002] 4 SCR 245 [*Wewaykum*]).

[249] In this case, the cognizable Aboriginal interest was sufficiently specific and defined for the honour of the Crown to mandate that the Crown act in the Essipit Innu's best interest, as a fiduciary, in exercising discretionary control over the reserve creation process, which entailed the duty to consult and to act diligently.

[250] Moreover, the honour of the Crown, which “speaks to *how* obligations that attract it must be fulfilled” (emphasis in original; *Manitoba Metis Federation*, at para 73), “gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest” (*Manitoba Metis Federation*, at para 73; *Haida Nation*, at para 18; *Wewaykum*, at paras 79, 81).

[251] The honour of the Crown is pledged to the fulfilment of its obligations, which requires the Crown to act diligently and to endeavour to ensure its obligations are fulfilled (*Manitoba Metis Federation*, at paras 79–80).

B. Did Canada breach its fiduciary duty to the Essipit Innu?

[252] I find that the evidence establishes that the federal Crown breached its fiduciary duty and its duty to act honourably in light of the facts in evidence, for the reasons explained below.

[253] The evidence reveals many breaches on the part of the federal Crown:

- a. The reserve was surveyed on November 19, 1881, without any member of the band or even an Oblate father being present. In November, the Innu had left the shore for their hunting grounds.
- b. Agent Boucher did not attend the survey, but was represented by the priest of Les Escoumins, secular priest Reverend Parent, who did not have a mission with the Innu.
- c. The experts all stated that the Oblates took care of the Innu's interests, but that the secular priests, apart from celebrating a few ceremonies, such as christenings, did not establish any ties with the Innu. Indeed, there are no records to suggest that Reverend

Parent had been mandated to represent the band or the Essipit Innu. At most, he was mandated by Agent Boucher to represent him.

Not only could the Crown not delegate its fiduciary duties to a third party, it was also responsible for the breaches committed by secular priest Reverend Parent during the survey.

- d. There are no records providing information on or detailing consultations or discussions between the Essipit Innu and the federal Crown regarding the area of the reserve from Agent Boucher's visit to Les Escoumins in 1880 and the purchase of the 97 acres in 1892.
- e. There are no records documenting any exchanges with the Innu or even the Oblates regarding the planned area for the reserve or the sudden reduction in this area. There is no evidence of the Crown's representatives asking whether the 97 acres actually corresponded to the total area occupied by the Innu or why the number of houses had doubled while the area had been halved. The only step Superintendent Vankoughnet did take was to ask the Surveyor General, who forwarded the request to Mr. Bray, to verify whether the reduction in area could be the result of a surveying error.
- f. The records also do not reveal any objections from Agent Boucher to the area being more than halved even though a summary comparison of Mr. Boivin's plan and Mr. Taché's sketch shows that Lot 11 had disappeared from the area surveyed by Mr. Boivin.
- g. There are no records showing that the Crown had attempted to negotiate for more acreage with Mr. Vachon or Mr. Lamontagne after learning in 1882 that the area was 97 acres, this despite Mr. Lamontagne owning several lots he wished to sell.
- h. There are no records showing that the Innu or the Oblates were consulted on the fact that the planned reserve would be landlocked by the town.
- i. In his letter to Superintendent Vankoughnet, Agent Boucher stated that the chosen area was a great place for the seal hunt. Yet the evidence shows that it is impossible

to access the St. Lawrence River from the 97-acre reserve. Once again, there is no record of any discussions with the Essipit Innu about this issue.

- j. Also, in his letter of January 28, 1881, Agent Boucher reports that all the land is suitable for agriculture, even though the evidence establishes that much of it is a swamp.

[254] Ms. Béreau writes as follows in her report: [TRANSLATION] “[w]e found no records that would allow us to comment on the participation of the Innu families in the Les Escoumins area in the process of purchasing the future reserve” (Exhibit I-3, at p 11). Mr. Charest also writes that nothing in known documents suggests that the Innu were consulted (Exhibit R-2, at p 85).

[255] The Respondent submits that an absence of records does not mean an absence of information or consultations. Oral discussions may have taken place. According to the Respondent, moreover, the evidence establishes that the Crown acted diligently and that the error in area was made by Mr. Vachon, not the Crown.

[256] The Tribunal makes its decisions based on the evidence before it. The fact that the experts did not find any records referring to any discussions with the Innu or the Oblates or any information regarding the area of the lands being contemplated and especially the impact of the reduction by more than half of that area makes it more likely than not that there were no discussions and that no information was provided.

[257] In fact, the evidence establishes that, over the 10 years that followed Mr. Boivin’s survey, up to the conclusion of the transaction between the Crown and Mr. Lamontagne in 1892, there were discussions and negotiations on (1) the price in light of the reduced area; (2) the submission and verification of the titles; and (3) the calculation and payment of interest.

[258] Consequently, while the instructions given to Agent Boucher in 1881 mainly concerned the area of the reserve, which was to be no less than 230 acres, from 1887 onwards, following several years of attempts to obtain clear titles, the Crown’s priority became the price to be paid for 97 acres.

[259] The Respondent supports the position maintained by Mr. Vachon and Mr. Lamontagne

that the 97-acre area surveyed by Mr. Boivin is the area that was in fact initially contemplated by the parties. It adds, moreover, that this position was supported by Agent Boucher and Justice Gagné of Chicoutimi.

[260] While it is true that the evidence reveals that Agent Boucher and Mr. Lamontagne's friends, including Justice Gagné, argued in his favour that the 97-acre parcel of land was the same land that had been requested by the band, the evidence establishes the contrary. For the reasons set out above, it is implausible that Mr. Vachon could have confused 230 acres with 97 acres. Lot 11 of Range A, agreed to be part of the reserve, simply disappeared from the survey. Mr. Vachon did not make an error; he simply changed the initial offer for his own ends and those of Mr. Lamontagne after the Crown had accepted the offer. As for Justice Gagné, he did not attend the meeting between Mr. Vachon and Agent Boucher, and his statements mainly concerned the price for which the land was sold.

[261] If we accept the interpretation that the area of "n[o] . . . less than . . . 230 acres" was dependent on the \$200.00 price, it must be concluded that the Crown did not consider the interests of the band when it uncritically decided to go ahead with only 97 acres.

[262] In light of such a significant reduction in the size of the reserve, acting with ordinary prudence with a view to the best interest of the Essipit Innu required the Crown to inform the band and to at least enquire with it, which it failed to do. It had all the more reason to do so given that Agent Boucher did not attend Mr. Boivin's survey and had made several blunders, such as appointing Mr. Boivin to perform the survey before obtaining clear titles, contrary to the instructions he had received, for which he was reprimanded by his superior, Superintendent Vankoughnet.

[263] The fact that the Crown dealt with a third party rather than setting apart public lands that belonged to it or acquiring land from the provincial Crown does not diminish the fiduciary duty by which it is bound.

[264] It is clear that Agent Boucher did nothing to find out the number of Innu in the Les Escoumins area making up the band or to analyze their needs. Based on one visit, he determined that the Essipit band was composed of 10 families occupying the Pointe des Escoumins and that

their claim was for a parcel of land that the seller initially presented as having 230 acres, but which was suddenly reduced to 97 acres, part of which was a swamp.

[265] In fact, as recognized by Ms. Béreau, the size of the area contemplated for creating the reserve was dictated by Mr. Vachon, a shady individual and a criminal.

[266] The Respondent argues that there is no evidence that Agent Boucher acted in bad faith, but good faith is not necessarily a test for determining whether fiduciary duties have been breached.

[267] Having recognized the existence of the Essipit band and having decided to create a 230-acre reserve for this band, the duty of prudence and loyalty required the federal Crown to inform the Innu of the practical effects of this measure and to make a minimal effort to find out the number of families making up the band and their needs and to ensure that this request was in their best interest. A single visit to a specific place is insufficient evidence that the Crown acted diligently and honourably.

[268] As the case law teaches, the statutory right to use and benefit from a reserve “is a collective right in common conferred upon and accruing to the band members as a body and not to the band members individually” (*Squamish Indian Band v Findlay*, 122 DLR (3d) 377 at para 7, [1981] 3 CNLR 58 (BCCA)). Members living off the reserve are also entitled to benefit from the reserve. Section 18 of the *Indian Act* “reflects the importance of preserving land base or ancestral territory for the benefit of its members, whether living on or off the reserve” (*Okanagan Indian Band v Bonneau*, 2002 BCSC 748 at para 27, 216 DLR (4th) 210). Reserve lands represent an “acknowledgment of a historic reality” (*Guerin*, at p 349). An Aboriginal interest in land, including a reserve, will have a unique cultural component (*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 46, [2001] 3 SCR 746).

[269] Moreover, considering a minimal number of 10 families, the federal Crown ended up allocating 9.7 acres per family on lands that were partially swampy and that did not offer direct access to the St. Lawrence River.

[270] In comparison, when creating reserves, the Crown regularly used a ratio of 100 acres per family to determine the area of reserves created on public lands. This ratio would vary according

to a number of factors, including the expected development of the reserve lands, the specific features of the location of the planned reserve, the anticipated use of the reserve, the proximity of the reserve to colonial development areas and the band's way of life (whether it was sedentary or nomadic) (Exhibit R-2, at pp 98–100; Exhibit R-1, Vol 1, Unified Exhibit Ref No R-4, at pp 12–22).

[271] The Respondent argues that the parcel of land chosen by the Essipit Innu was situated on municipal land, that the town's lands were occupied by settlers and that, according to Mr. Garneau, the Innu had no interest in farming.

[272] It is true that we are not dealing with the purchase or the setting apart of public lands. However, during the 10-year negotiations for the purchase of the reserve lands, the Crown could have contemplated purchasing more than 97 acres of land given that Mr. Lamontagne wished to sell his land, but it never attempted to do so.

[273] By way of comparison, the Crown granted an average of 100 acres per family to non-Aboriginal settlers, which they had to clear and cultivate in return. However, they could clear only part of this area as they had to keep trees for firewood. Also, it was standard for settlers to clear about two acres a year on average. Nonetheless, according to Ms. Béreau, many settlers did not clear or cultivate their land, preferring to engage in fishing-related activities, which were more profitable. In addition, many of the settlers were squatters, who had neither a confirmed right nor title in the lands they had taken.

[274] Even though the Innu did not value farming as a way of life, the evidence establishes that neither did the settlers.

[275] However, some Innu had started cultivating the land, including Paul St-Onge. Moreover, the Innu living on the reserve cultivated the reserve lands as best as they could (Exhibit R-2, at p 97); this disposition was part of the Innu way of life described by Mr. Charest. They should, however, been granted enough prime land to be able to cultivate the reserve.

[276] This apparent carelessness in fulfilling its fiduciary duty is also reflected in the manner in which the Crown acted in the administrative process leading to the purchase of the reserve lands.

[277] The Tribunal is not questioning the administrative procedure followed by the federal Crown to acquire the reserve lands, which, according to the evidence, is the same procedure that applied to any land purchase made by the Crown. However, in this case, many errors were made in applying this procedure throughout the process of purchasing the lands for the Essipit Reserve:

- a. In his letter of April 7, 1882, Agent Boucher wrote to Superintendent Vankoughnet that Mr. Vachon had shown him the title in the proposed land for the reserve for the [TRANSLATION] “Indians”. But Agent Boucher did not notice that the seller was Mr. Lamontagne and not Mr. Vachon. Verifying a land owner’s name does not require special skills. A diligent, simple verification by Agent Boucher could have led him to realize his mistake and accelerated the process. Clearly, however, Agent Boucher did not perform this simple verification.
- b. When the surveyor Mr. Bray verified the area of the reserve in 1886, he had in hand Agent Boucher’s letter of January 28, 1881, stating that the land had an area of 230 acres. Yet he estimated from Mr. Boivin’s report that the area of 97 acres was probably accurate and asked for Mr. Boivin’s map to confirm this. Mr. Bray did not ask Agent Boucher about Superintendent Vankoughnet’s original instructions, nor did he request the plan appended to the letter of January 28, 1881. He did not ask any questions. Upon receipt of Mr. Boivin’s plan, Mr. Bray confirmed solely on the basis of Mr. Boivin’s records that the area was 97 acres (Exhibit CP-1, Vol 7A, Unified Exhibit Ref Nos 397 and 406).
- c. Mr. Bray did notice various errors in Mr. Boivin’s boundary report, in which Mr. Boivin stated that the land he had delimited was bounded by Lot 13, occupied by Milan Lepage, in the north-east, yet placing Mr. Lepage in Block A. There is no Lot 13 in Range A or Block A. The act of sale, even though it was verified three times, nonetheless states that the land is bounded in the east by Lot 13 of Range A.
- d. The Crown’s representatives signed an act of sale providing a technical description that does not match the plan confirmed by the parties and appended to the act.

- e. In the months following the transaction, the act of sale underwent several revisions. On January 24, 1893, the Department of Indian Affairs noted errors in the chain measurements recorded in the contract (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 462); on April 11, 1893, the notary Mr. Charlebois told the Crown counsel, Mr. Angers, that he had discovered other errors, including a discrepancy between the plan and the technical description concerning Lot 11, which was the north-west boundary rather than the south-west boundary as indicated on the plan. He noted, however, that these errors were minor and did not change the validity of the act, and he therefore did not make any changes (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 475). Despite these revisions, no one noticed that the appended and signed plan did not match the technical description in the act of sale.

- f. On January 31, 1893, the Department of Indian Affairs informed the Department of Justice that no provision had been made for notary's fees and that there was therefore no money available for them (Exhibit CP-1, Vol 7B, Unified Exhibit Ref No 464).

[278] Having examined the Crown's overall conduct and in light of the particular context of this Claim, I find that the Crown acted with persistent inattention and failed to act diligently in the creation of the Essipit Reserve for which it had recognized an area of 230 acres.

[279] In this case, the process was marred by the mismanagement that typified the overall process of creating the Essipit Reserve. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted through the entire reserve creation period. This persistent pattern of inattention is inconsistent with the honour of the Crown (*Manitoba Metis Federation*, at para 82).

[280] This inattention cannot be blamed on an urgency to act since around ten years went by between the Crown giving its consent and the purchase of the lands.

[281] The situation is exacerbated by the fact that the government authorities were well aware of the extreme vulnerability and distress of the Innu in the Haute-Côte-Nord, caused in part by the influx of white settlers in the region, which played a major role in impoverishing the Innu (Exhibit I-3, at p 65) as a result of its impact on wildlife, trapping and fishing, and the epidemics

that struck the weakened families (Exhibit I-3, at p 65).

[282] The Crown's argument that the Essipit Innu did not complain until recently about the 97 acre area they received has no merit.

[283] The Innu, including the Innu of the Les Escoumins area, complained about the influx of settlers and the loss of their lands on several occasions; they also claimed their rights to those lands. The petition of 1847, recognized by all parties, including the Crown's experts, as expressing the actual wishes of the Innu in this territory speaks for itself. The Innu requested land for clearing and exclusive harvesting rights for seal and for salmon in the smaller rivers, as well as compensation. The petition refers to specific locations, including the Pointe de la Croix. Moreover, in their explanatory note about the petition, the Oblates requested rights for the Innu at Bon-Désir, one of the best spots for harvesting seal and one that was frequented by the Essipit Innu. In response, the Crown created the Betsiamites Reserve over ten years later, but the other requests remained unanswered.

[284] Moreover, in 1905, despite the existence of the Essipit Reserve, Édouard Moreau asked that the Department of Indian Affairs grant him gratis a parcel of land he had been occupying for over fifty years and where he hunted game, which stretched for 90 miles between the Ste Marguerite Saguenay and Grands Escoumins rivers (Exhibit CP-1, Vol 8A, Unified Exhibit Ref No 522), but to no avail.

[285] That being said, in 1881, the Essipit Innu, in their extreme poverty, had been driven back onto a few parcels of land and left to themselves. Given that the Crown knew them to be obedient and destitute, they can hardly be blamed for not taking action earlier, especially as the Crown has waived the limitation in section 19 of the *SCTA*.

[286] In short, this is a clear case of the Crown breaching its fiduciary duty and failing to fulfill its duty to act honourably.

VII. DISPOSITION

[287] For the reasons set out in this decision, I conclude that the Respondent breached its fiduciary duty to the Claimant and did not act in a manner that is consistent with the honour of

the Crown when it purchased 97 acres of land despite having recognized and agreed to acquire 230 acres in order to create the Essipit Reserve.

[288] The Claimant should be compensated by the Respondent for the difference between the 230 acres that were originally planned and the 97 acres that were granted, that is, for the portion situated in Block A and Lot 11 of Range A, and for the loss of use of this difference, with interest. Costs to follow.

[289] Compensation will be determined at the second stage.

JOHANNE MAINVILLE

Honourable Johanne Mainville

Certified translation
Johanna Kratz
Francie Gow

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

Date: 20170130

File No.: SCT-2001-13

OTTAWA, ONTARIO, January 30, 2017

PRESENT: Honourable Johanne Mainville

BETWEEN:

INNU FIRST NATION OF ESSIPIT

Claimant

and

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

Respondent

COUNSEL SHEET

TO: Counsel for the Claimant INNU FIRST NATION OF ESSIPIT
As represented by Benoît Amyot and Léonie Boutin
Cain Lamarre

AND TO: Counsel for the Respondent
As represented by Tania Mitchell and Stéphanie Dépeault
Department of Justice

APPENDIX

****The appendix is not available in this format****