

THE PLAINTIFFS SAY AS FOLLOWS:

1. The Plaintiffs seek relief from this Honourable Court with respect to representations, undertakings, acts and omissions of the Crown concerning lands in and around the immediate vicinity of Listuguj, on the north bank of the Restigouche River near the head of tidewater. **(P-1)**
2. By the said conduct, the Crown breached its constitutional and fiduciary duties owed to the Listuguj Mi'gmaq. The Plaintiffs are entitled to relief from this Honourable Court.
3. The Plaintiffs take the position that the rights, causes of action and relief herein are imprescriptible, and in any case subject to neither federal nor provincial limitations or prescription as a matter of law and under the Constitution.
4. Under reserve of the foregoing, the said rights, causes of action and relief in Canadian law and in fact only arose or were only discoverable as legal rights against the Crown, as a consequence of the decision of the Supreme Court of Canada in *Guerin v. The Queen* ([1984] 2 S.C.R. 335) on November 1, 1984 (or at such later time as subsequent breaches of fiduciary duty occurred).
5. The impossibility for the Plaintiffs to act sooner was compounded here by the institutional, legal and financial barriers raised by the Crown against legal action by Aboriginal plaintiffs and with respect to Indian lands.

The Parties

6. The Plaintiff, Listuguj Mi'gmaq First Nation of Gespegewagi, is part of the wider Mi'gmaq Nation, of which Gespegewagi is the Seventh District.
7. It is also a band for the purposes of the *Indian Act*, s.2 (1).

8. The individual Plaintiffs are all Listuguj Mi'gmaq and members of the band. They sue personally and respectively as the Chief and Councillors of the Council of the Listuguj Mi'gmaq First Nation, also known as the Listuguj Mi'gmaq Government. In their representative capacity they act as fiduciaries for all of the Listuguj Mi'gmaq.
9. The Listuguj Mi'gmaq are one of the Aboriginal Peoples of Canada under the *Constitution Act, 1982*, s.35 and all of the individual Plaintiffs are Indians for the purposes of the *Indian Act* and the *Constitution Act, 1867*, s.91 (24).
10. The Plaintiffs have the interest required to bring these proceedings.
11. The Defendant, Her Majesty the Queen in right of Canada answers for the breaches of fiduciary duties of the Crown and for the wrongful loss of land raised in these proceedings.

Mi'gmaq Presence and Land Interests

12. The present proceedings are under reserve of and strictly without prejudice to the assertion by the Listuguj Mi'gmaq of existing Aboriginal rights and Mi'gmaq Aboriginal Title and Treaty rights in and to all of their traditional lands, waters, marine areas and resources in the Mi'gmaq territory of Gespegewagi.
13. For the purposes of these proceedings, the Plaintiffs only invoke that they are successors to the community of the Mi'gmaq Nation who, at all relevant times frequented, resided at, occupied, possessed and used the lands, waters and resources of and pursued their livelihood and collective life in and around Listuguj (Restigouche), including all of the areas at issue in these proceedings.
14. The security of tenure and Crown acknowledgement of the presence and land interests of the Listuguj Mi'gmaq are reflected in constitutional instruments and in official dealings of the Crown from the earliest period:

- a) Articles of the Capitulation of Montreal, 1760, Art. XL;
 - b) Royal Proclamation, 1763;
 - c) Instructions to Governor Murray, 1763, Articles 61 and 62;
 - d) Royal Grant of 20,000 acres in Province of Quebec to Joseph Philpot, given at Court of St. James, June 18, 1776 and Refusal of Philpot's petition to have 20,000 acres on the north side of the Restigouche River, by Quebec Executive Council in Committee, April 22, 1767; **(P-1A in a bundle)**
 - e) *Quebec Act, 1774*, Art. III;
 - f) Instructions to Governor Carleton, 1775 with annexed conditions 41, 42 and 43.
15. Throughout the last quarter of the eighteenth century, the Listuguj Mi'gmaq made repeated protests and appeals regarding the encroachments of Acadians and Loyalist settlers on their fisheries, hunting grounds and lands. They attempted to exercise their rights and contested the pretensions of others. Similar efforts to exercise rights and to obtain redress continued with varying intensity throughout subsequent periods.
16. One attempt to address this conflict came in 1786 when Lieutenant Governor Hope issued instructions to Deputy Surveyor General John Collins and Lieutenant Governor of Gaspé and Labrador Nicholas Cox for an investigation and survey of land holdings in the Bay of Chaleurs. **(P-2)**
17. Discussions regarding the lands and rights of the Indians took place at three meetings on June 29, June 30 and July 1, 1786. These discussions clearly reflect the Crown's understanding of the Mi'gmaq presence and interest in their lands in and around Listuguj.

18. In the discussions of 1786, the Crown held itself out as assuming power and responsibilities with respect to the land interests of the Mi'gmaq. This included promises of protection and generous treatment that engaged the fiduciary duty of the Crown with regard to the setting aside of lands for the use and benefit of the Listuguj Mi'gmaq.
19. The discussions of 1786 effected no surrender of any rights of the Listuguj Mi'gmaq, including lands in and around Listuguj. The said discussions did not meet the requirements of a legal surrender of Indian interests in land under the constant Imperial strictures and as set out in the Royal Proclamation of 1763 and in the Royal Instructions to Governor Murray in 1763 and to Governor Carleton in 1775.

Breach of Fiduciary Duty as Regards the Mann-Fraser Estate, Including the "Disputed Acreage"

20. This portion of the Plaintiffs' proceedings concerns the breach of the Crown's fiduciary duties with respect to the lands immediately to the east of the present-day Listuguj Reserve.
21. By a petition dated August 10, 1787, Colonel Isaac Mann, a Loyalist, requested for himself and his family a grant of land on either the Restigouche or Bonaventure Rivers. **(P-3)**
22. Guy Carleton, Lord Dorchester, Governor of the province of Canada, issued an Order in Council dated August 14, 1787, directing that Mann's petition be granted to the extent of 2,000 acres on either the Restigouche or Bonaventure Rivers. **(P-4)**
23. The Order in Council required that William Vondenvelden, provincial surveyor, be ordered to survey the area, not interfering with lands claimed by Indians.
24. To the extent it applied to lands on the north side of the Restigouche River, the said Order in Council relied on the supposed surrender of lands obtained by Cox and Collins during the discussions of 1786, described above at

the Northern Banks of the River Restigouche with the sole Right of Fishing in that River". (P-2)

26. On November 21, 1787, pursuant to a Warrant of Survey issued by Cox on October 4, 1787, Vondenvelden reported his field survey of the area on the north side of the Restigouche between the Rivière-du-Loup (or Porcupine River) and the Pointe-à-la-Croix (near present-day Pointe-à-la-Croix), bounded to the north by the base of certain mountains.
27. Vondenvelden stated that this area was "agreeable to the tenor" of the Order in Council; he made no mention in his report of having consulted any of the Mi'gmaq of the area. (P-5)
28. The western boundary of Vondenvelden's survey ran from a point two "chains" west of "the cross standing on Point à la Croix" on an angle N45°W to the base of the mountains.
29. Minutes of the Land Committee's report to the Governor in Council dated April 22, 1788 state that the Manns had petitioned Council for a further grant of 1,400 acres upriver from Pointe-à-la-Croix, due to a lack of sufficient arable land in the tract then contemplated. The minutes record that this petition was refused, along with that of a certain Somerset Lee, also for land west of Pointe-à-la-Croix. (P-6)
30. The grounds for refusing both petitions are stated in the minutes to be that the land above Pointe-à-la-Croix had not yet been ceded to the Crown by the Indians.
31. On May 8, 1788, a further Order in Council was issued, ordering "that the Surveyor General report a Survey, and that [the] Attorney General report a Draft of the patent in Seigniorry, conformable to the Royal Instructions". (P-7)
32. On May 10, 1788, Isaac Mann Junior reiterated to the Council at Quebec his family's complaint that they were not being allotted sufficient arable land, and requested that "when the Lands may be further released by the Savages, the deficiency may be allowed them". (P-8) This complaint is noted, no more, in minutes of the Council's Land Committee dated May 12, 1788. (P-9)
33. On May 22, 1788, pursuant to the Order in Council of May 8, Collins (acting as Surveyor General in the absence of John

Holland) issued the official description of the land to be granted to the Manns, stating that he had "set off from the annexed plan of survey made by Mr. William Vandenvelden... a tract, piece or parcel of land containing two thousand five hundred and twenty acres situate on the north side the river Ristigouche". **(P-10)**

34. In his description, Collins used precise measurements to set the northern and eastern boundaries of the tract to be granted, rather than the somewhat vague boundaries referring to topographical features set out in Vandenvelden's original survey. Collins began to measure the western boundary of the land from the same point on the bank of the river as Vandenvelden had, but ran it along a different angle, namely N12°E. This latter angle was the standard angle used for laying out lands in the surveys of the area at the time.
35. On May 26, 1788, also pursuant to the Order in Council of May 8, Attorney General James Monk presented to the Governor in Council draft letters patent of a grant to Isaac Mann Senior and his sons Isaac Mann Junior, John Mann, Thomas Mann, William Mann, and Edward Isaac Mann, as tenants in common. Monk's draft grant specifically repeats the measurements from Collins's description, including the western boundary of the tract running along an angle N12°E. **(P-11)**
36. A formal patent giving effect to Monk's draft grant was never made.
37. Upon their return from Quebec, the Manns proceeded to act as if they had been granted the whole of the area comprised in Vandenvelden's survey, despite the more limited tract set out by Collins and by Monk in his draft grant.
38. The triangle of land between the N45°W line traced by Vandenvelden and the N12°E line set by Collins and repeated by Monk comprises approximately 1,250 acres, and is sometimes referred to in the land grievances of the Listuguj Mi'gmaq as the "disputed acreage".
39. In keeping with the requirements of the Royal Proclamation of 1763, the constant requirements it reflects and the Instructions issued to Governors Murray and Carleton in 1763 and 1775 respectively, a surrender of the lands claimed by the Mi'gmaq during the discussions of 1786 would indeed

have been required for a valid grant of such lands to be made to the Manns or any other settler.

40. That the Crown understood this requirement is shown by the very fact of Cox's and Collins's visit to Listuguj in 1786, and by references to surrender in the Order in Council of August 14, 1787. This is confirmed by the Council's refusals in May 1788 to grant settlers land upriver from Pointe-à-la-Croix, on the grounds that such lands had not been surrendered by the Mi'gmaq.
41. However, the discussions of 1786 themselves did not constitute a surrender of any land, as they failed to meet most of the key legal requirements for such a surrender. The Order in Council of 1787 could not therefore validly authorize the grant of land to Mann on the north shore of the Restigouche.
42. To the extent it authorized a grant to the Manns on the Restigouche, then, the Order in Council of 1787 violated the Proclamation of 1763 and the Instructions, and the Governor in Council breached its fiduciary duty to the Listuguj Mi'gmaq by approving such grant without first having obtained from them a lawful surrender of the land.
43. The Crown further breached its fiduciary duty to the Listuguj Mi'gmaq by:
 - a) not ensuring the observance of the conditions of the Order in Council of August 14, 1787 that the survey not interfere with lands claimed by Indians;
 - b) not ensuring the observance of the conditions of the Order in Council of May 8, 1788 that the grant be "conformable to the Royal Instructions"; and
 - c) by allowing the letters patent drafted by the Attorney General to remain in draft form, and in permitting the Manns to disregard the draft grant and in spite thereof to occupy the entire tract surveyed by Vondenvelden in violation of the limits prescribed by Collins.
44. In 1819, the parliament of Lower Canada passed *An Act to secure the Inhabitants of the Inferior District of Gaspé, in the*

possession and enjoyment of their Lands, pursuant to which the Gaspé Land Commission was established.

45. On July 13, 1820, Chief François Condeau filed a claim with the Gaspé Land Commission on behalf of the Listuguj Mi'gmaq, which claim included the land occupied by the Manns and was bounded on the east and west by lines running along the usual angle of N12°E, the angle stipulated in Collins's official description and in Monk's draft grant in 1788. As more fully discussed below, Condeau's claim specifically exempted the Mission's claim, also filed before the Commission. **(P-12)**
46. Before responding to the Mi'gmaq claim, the Commission received on February 10, 1821 a conflicting claim from Edward Isaac Mann, which claim included the whole of the land surveyed by Vondenvelden in 1787, bounded on the east by the unusual and unauthorized line running N45°W. **(P-13)**
47. Though the Mann claim was filed almost seven months after the Mi'gmaq claim, the Commission answered the Mann claim first, on November 29, 1823 granting to the locally powerful Manns, as tenants in common, the whole of the land referred to in Vondenvelden's survey.
48. In so doing, the Commission misrepresented the Order in Council of May 8, 1788 as having authorized a grant to the Manns along those lines, ignoring the orders contained therein to Collins and Monk to report a survey and to produce a draft grant, respectively. No mention was made by the Commission of either Collins's description or Monk's draft grant. **(P-13)**
49. Almost five months after its favourable treatment of the Mann claim, the Commission answered the Mi'gmaq claim on April 22, 1824 by adjudging to the Mi'gmaq only a narrow central portion of the tract they had claimed (less lands to the Mission, see below), between the land to the east it had already given to the Manns and certain lands on the west for which Robert Ferguson, another prominent settler (see below for treatment of the Busted claim), had filed oppositions to the Mi'gmaq claim. **(P-12)**
50. The statute establishing the Gaspé Land Commission did not confer any power on the Commissioners to adjudicate with respect to lands never surrendered by the Mi'gmaq. The

actions of the Commission affecting unsurrendered Mi'gmaq lands were therefore *ultra vires* the Commission.

51. In addition, the Commission's decisions violated the terms of the Order in Council of 1787 upon which the Manns ultimately based their claim, namely that the grant, when given, should be on either the Restigouche or Bonaventure Rivers, but that it should not interfere with lands claimed by Indians.
52. If, however, the Commission acted within its powers, which the Plaintiffs deny, it acted on behalf of the Crown and was legally bound to conduct itself as set out in the Proclamation of 1763 and the Royal Instructions.
53. As a representative of the Crown, the Commission had fiduciary obligations to consult the Mi'gmaq, to provide them with full disclosure, and generally to deal with them in a fair and honourable manner with a view to the best interests of the Mi'gmaq. These obligations were not fulfilled.
54. The Listuguj Mi'gmaq have never accepted the usurpation of Mi'gmaq land by the Manns and their successors, nor the complicit role therein played by the Crown, both actively and passively. At varying intervals over the course of the 19th and 20th centuries, the Mi'gmaq have protested repeatedly, formally and informally, within the constraints imposed upon them by the legislation and administrative system put in place by the Crown.
55. In response to Mi'gmaq protests, the Crown has failed to rectify the breaches of its fiduciary obligations, and indeed has further breached such obligations and committed equitable fraud by:
 - a) failing to redress the above-described breaches;
 - b) failing to disclose, on a timely basis and in particular at various intervals when such disclosure would have been specially useful, information in its possession which was pertinent to the Mi'gmaq claims;
 - c) failing to investigate the merits of the Mi'gmaq claims, instead invoking and relying on precisely the acts and omissions here

challenged (such as old survey lines and the adjudication of the Gaspé Land Commission) and thus evading its responsibilities to the Listuguj Mi'gmaq.

Breach of Fiduciary Duty as regards the Busteed estate

56. This portion of the Plaintiffs' proceedings concerns the breach of the Crown's fiduciary duties with respect to the land commonly referred to as the Busteed estate, comprised of Lots 1, 2, and 3 located immediately to the west of the present-day reserve at Listuguj, in ascending order westward.
57. On May 14, 1787, Joseph Claude, Chief of the Mi'gmaq at Restigouche, leased to Jean-Baptiste Marcoux a tract of six *arpents* at Point à Bourdon, at present-day Point-à-Bourdeau, for ten years at an annual rent of ten *piastres* for purposes of his salmon fishery. This land was situated on what would become known as Lot 3 of the Busteed estate. **(P-14)**
58. The Vandenvelden survey of November 21, 1787 noted Marcoux's occupation of the land, but took no note of its ownership by the Mi'gmaq nor any other land interest of the Mi'gmaq. **(P-5)**
59. At some point between 1787 and the lease's expiry in 1797, the leased land by some unknown process passed from Marcoux to Henry Rimphoff.
60. On July 13, 1820, Thomas Busteed filed a claim for Lot 3 with the Commission, reporting that he had purchased Lot 3 from Rimphoff on June 5, 1800. **(P-15)**
61. Also on July 13, 1820, Chief Condeau filed the Mi'gmaq claim before the Commission, which included a claim for Lots 1 and 2, but not for Lot 3. The same day, Robert Ferguson, who had been squatting on Lots 1 and 2 since the 1790s, filed oppositions to Condeau's claim with respect to Lots 1 and 2. **(P-12)**
62. The Commission's decision of April 22, 1824 with respect to the Mi'gmaq claim excluded Lots 1 and 2 from its decision, referring thereto as "the land for which oppositions have been fyled by Robert Ferguson". The Commission proceeded to state that "with respect to the lands for which oppositions

have been filed by the above mentioned Robert Ferguson it is ordered that the parties be heard in due course upon their respective pretensions". The Commission never did, however, rule on Ferguson's claim before it was disbanded in 1825. (P-12)

63. By various subsequent dealings, Lots 1 and 2, the ownership of which had never been adjudicated by the Gaspé Land Commission, passed to Thomas Busteed and his successors over the succeeding decades. Once again, repeated protests with respect to all three lots, and in particular Lots 1 and 2, went unheeded by the Crown each time they were raised.
64. The existence and terms of the lease of 1787 show that even after the Talk of 1786, Mi'gmaq ownership of the land as far west as Lot 3 was universally accepted. This is further reinforced by the minutes of Council dated April 22, 1788, in which petitions for land upriver from Pointe-à-la-Croix were refused for the reason that it had not been surrendered by the Mi'gmaq. Even supposing, as apparently did the Crown, that Cox's and Collins' discussions with the Mi'gmaq in 1786 had constituted a surrender of certain land, it is clear that this supposed surrender was not considered by the Crown or anyone else to include any land upriver from Pointe-à-la-Croix.
65. The fraudulent acquisition of the Busteed estate by settlers dates from the same period as that of the Mann-Fraser estate, and benefits from similarly unconscionable Crown acts and omissions in breach of the Crown's fiduciary obligations towards the Mi'gmaq of Listuguj.
66. In particular, with respect to the Busteed estate the Crown breached its fiduciary duty to the Listuguj Mi'gmaq by:
 - a) allowing the squatting by Robert Ferguson on Lots 1 and 2 from approximately the 1790s, thus allowing the unlawful acquisition by Ferguson of land then recognized as belonging to the Listuguj Mi'gmaq;
 - b) acquiescing in the transfer of Lot 3 by the lessee thereof Marcoux to Rimpfhoff, and from Rimpfhoff to Busteed; thus acquiescing in the unlawful acquisition by Rimpfhoff and Busteed

of land then recognized as belonging to the Listuguj Mi'gmaq;

- c) never seeing to it that a decision be made with respect to the conflicting claims of Chief Condeau or Robert Ferguson with respect to Lots 1 and 2;
 - d) permitting subsequent dealings with respect to Lots 1, 2, and 3 in further fraud of the Listuguj Mi'gmaq rights thereto, thus allowing a fraudulent "chain of title" to develop with respect to the Busted estate.
67. With respect to the adjudications of the Gaspé Land Commission, the Plaintiffs reiterate here their pleadings as set out at paragraphs 50 to 53 of these proceedings.
68. In the face of protests by the Listuguj Mi'gmaq in the 19th and 20th centuries with respect to the Busted estate, the Crown has breached its fiduciary duty to the Listuguj Mi'gmaq in the same manner as is pleaded at paragraph 55 of these proceedings in relation to the Mann-Fraser estate.

Breach of Fiduciary Duty as Regards the Mission Lands

69. This portion of the Plaintiffs' proceedings concerns breach of the Crown's fiduciary duties with respect to a strip of land bisecting the community of Listuguj on which is situated the Catholic Church and Mission of Ste-Anne of Restigouche and with respect to other adjacent parts of the Listuguj reserve.
70. The Crown failed to vindicate the interests of the Plaintiffs as required by law and failed to assist the Plaintiffs in gaining reversion of the lands, opposing surrenders and receiving adequate rents.
71. The specific breaches of the fiduciary duties of the Crown invoked relate to the conversion of the lands to non-religious and non-public uses incompatible with the conditional tenure of the Church, including:
- a) leasing virtually the whole of the acreage for a saw mill with its attendant facilities, including a commercial wharf and houses for workers; and

- b) the sub-division of the lands and their sale for non-Indian residential purposes.
72. In July 1820, Chief François Condeau and Father Jean-François Gagnon filed interlocking claims with the Gaspé Land Commission whereby the Indians claimed a tract from the Rivière-du-Loup to the Pointe-à-Bourdeau excluding 100 acres as "a reserve for the use and behalf of the Curate or Missionary at Restigouche, and his successors for ever". **(P-16)**
73. On April 22, 1824, the Commissioners gave effect to the interlocking claims, in full for the Mission and, as already seen, less lands to the east and the west for the Indians where they abutted the Mann and Ferguson claims.
74. The oral history of the Listuguj Mi'gmaq and the historical record in general confirm that the Church enjoyed the lands in question as a concession from the Indians and strictly for and as long as they served religious purposes.
75. In exchange for not having to pay tithes to the Roman Catholic Church that had become so much a part of the community of what was to become Listuguj, and in order to continue to receive the sacraments that were wrongfully threatened to be withheld pending the payment of such tithes, the Mi'gmaq Chiefs of the day allowed to the Church certain lands to be used for religious purposes.
76. This conditional use of land was acknowledged as late as 1899 by Father Pacifique, Mission priest and also the local Indian Agent. It formed the basis of the "title" that was granted by the Gaspé Land Commission. **(P-17)**
77. The Reserve Land Register of the Department of Indian Affairs (*Indian Act*, s.21) takes the April 22, 1824 determination as the establishment of the Restigouche (now Listuguj) Indian Reserve N^o1 with an original area of 709 acres, including on the plan originally filed, the Mission lands. **(P-18)**
78. From this time the fiduciary duties of the Crown were even more fully engaged.

79. Following repeated protests and petitions in the 1830s regarding the 1,250 acre disputed acreage tract (see above), in 1842 D.C. Napier, Secretary of Indian Affairs, recommended a grant of Crown land to the rear of the reserve and in the "marsh meadows" of the Rivière-du-Loup in lieu of the 1,250 acres. **(P-19)**
80. Land petitions of the Mi'gmaq in 1845 and 1848 led in 1848 to the setting aside by Order in Council of a block of land under certificate of possession. **(P-20)**
81. Further to the 1851 *Act to authorize the setting apart of lands for the use of certain Indian Tribes in Lower Canada* (14-15 Victoria, c.106), in 1853, 9,000 acres were set apart for the Mi'gmaq Indians at Restigouche, bringing the reserve essentially to its current size and configuration. **(P-21)**
82. The added lands were away from the Restigouche River and inland to the north. They comprise mostly rough land and mountains, suitable for hunting and cutting of wood, but not for settlement, agriculture, salmon fishing or other activities.
83. From 1865 to 1899 there were complaints and petitions by the Mi'gmaq regarding the commercial activities carried on by the Mission priest or on the Mission lands. These activities, carried on directly by the priest or by others in collaboration with the Church were:
 - a) selling wood cut by non-Indians on the reserve; and
 - b) operating a store at the Mission.
84. In 1865, a petition signed by 108 Mi'gmaq men of Restigouche was addressed to Governor General Stanley. It reads in part:

The Petition of the Inhabitants of the Mission, County of Bonaventure, Most Humbly Represent That Your Petitioners are desirous to know how the Store occupied by Mr. Soshee was built on Indian

Land without the consent of the the [sic] Indians. Your Excellency will observe that this Store and business carried on by Mr. Soshee has the Priest his son at its head by his own declaration.

We Humbly ask Your Excellency has a Priest power to head any Mercantile firm or engage in it in any manner, Mr. Soshee has been buying wood from Samuel Sake, cut from the Indian Land. Now we would ask Your Excellency what authority has the said Samuel Sake to cut wood from Indian Land without the unanimous consent of all the Indians. We beg to state to Your Excellency that the Priest was highly offended at us for looking out for our lawful rights, and severely reprimanded us for looking out for our lawful rights in the Chapel, And Priest Merchant Magistrate Constable and all as he is [sic] has no thoughts of our interests. **(P-22)**

85. In 1883, the Mission priest was formally hired by the Department of Indian Affairs at a salary of \$200 to act as the Crown's Indian agent.
86. These circumstances provide the context for what followed; industrial uses of the Mission lands and other adjacent parts of the reserve and repeated failure of the Crown to protect the lands and interests of the Listuguj Mi'gmaq.
87. In 1901, a saw mill was proposed for Mission Point, partly on the Mission lands and partly on adjacent parts of the reserve.
88. In a letter of March 23, 1902, J. Maurice, O.M.C., Missionary to the Indians, requested consent to the erection of a sawmill at Mission Point from the Superintendent of Indian Affairs. **(P-23)**
89. On March 25, 1902, the Chief, councillors and band members of the Restigouche Reserve petitioned the Superintendent of Indian Affairs to authorize the construction of the sawmill. **(P-24)**

90. In a general meeting of the Restigouche Band on August 14, 1902, the members agreed to rent land on the reserve to the Chaleurs Bay Mills for an annual rent of \$100.00 subject to a guarantee that the Company would leave a landing place for canoes between the mill and the Mission Brook. In addition, no houses were to be built on the mission property by the Company. The Indian agent, J. Pitre, was not present at the meeting but the missionary, Rev. Maurice was in attendance. **(P-25)**
91. Construction of the mill, piers, and related works was undertaken before surrender or departmental authorization was obtained. At the same time, negotiations were being conducted over the rental price and the length of the lease.
92. Also on or about August 14, 1902, the first of a series of leases and agreements was made. The Church gave up 80 acres of land, virtually the whole of the Mission lands, to Chaleurs Bay Mills for a twenty-year term renewable for a further twenty years, "for the purpose of building a mill and carrying on a lumber manufacturing and shipping business". **(P-26)**
93. Meanwhile, the Indian Agent attempted to obtain Mi'gmaq consent to the surrender for the part of the project on the portions of the Reserve adjacent to the Mission lands, but met objections arising from the belief that the Mission was reserve land and should not be used to build stores and houses for company employees and other non-Indians, and objections to the proposed 50-year length of the lease.
94. On January 30, 1905, after the mill was built and two and a half years after the Mission lease to Chaleurs, a form of surrender of 6.9 acres to site the sawmill was approved, but not in conformity with the mandatory requirements of the then *Indian Act*, R.S.C. 1886, c.43, s.39. **(P-27)**
95. This was followed by a lease of the 6.9 acres by the Crown to Chaleurs Bay Mills (February 7, 1905) and an Order in Council approving the transaction (March 11, 1905). **(P-28)**

96. The fixed lease term of 50 years exceeded that granted by the Mission and had been specifically objected to by the Mi'gmaq.
97. The Crown breached its fiduciary duty to the Mi'gmaq in these transactions and is liable for damages in that the Crown:
 - a) failed to respect the legal requirements for surrender of the 6.9 acres;
 - b) failed to respect the conditions demanded by the Mi'gmaq, namely a term of less than 50 years;
 - c) failed to act so as to recover direct Mi'gmaq control of the Mission lands when the religious purposes conditions on the occupancy by the Church were clearly breached; and
 - d) failed to obtain any accounting for the revenues from the leases by the Mission to Chaleurs and its successors and to ensure recovery of those revenues by the Mi'gmaq.
98. On July 14, 1912, the Crown leased a further 1.0 acre of the reserve to Chaleurs for 50 years commencing on the date of the 1905 lease, but this transaction was not preceded by the required Indian consents.
99. The operations of the mill, including extensive buildings, equipment, piers, yards and other works continued.
100. In 1926 and again in 1928, the mill, including the leases, was sold successively to Canadian International Paper Co. and Madawaska Corp.
101. The Crown simply accepted these assignments and failed to seize these opportunities to meet its fiduciary obligations to the Listuguj Mi'gmaq by procuring the return of the lands, an accounting and compensation in respect

to the use of the Mission lands for purposes incompatible with the Church's tenure, such as it was.

Recent Sub-division of the Mission Lands

102. The Crown has further breached its fiduciary duties in the period since 1960 by:

- a) failing to prevent the further conversion of the Mission lands to real estate development purposes;
- b) failing to ensure that the revenues associated with the sale of lots and taxes collected by the Municipality of Pointe-à-la-Croix accrue to the benefit of the Mi'gmaq;
- c) discouraging the Listuguj Mi'gmaq from taking legal action against the Church;
- d) failing to procure the return of the Mission lands as being no longer required for religious purposes; and
- e) obliging the Listuguj Mi'gmaq to purchase lands still in Church hands, as well as lots and houses sold off to third parties, as if the Mission owned the land in unconditional property.

103. The subdivision of the Mission property was finalized by September 1960. Roughly one-third of the tract, or approximately 26 acres, was divided into 60 lots. While none were sold immediately, the purpose of the division was clearly to permit sale to private individuals.

104. The first sale was registered on September 5, 1961, just one year after the subdivision had been accomplished. In this transaction, lots #6 and #7 were sold for \$1,313.00, and resold to the band in 1979 for the price of \$25,600.00, for a profit of over \$24,000.00.

105. The sales took place at a relatively slow pace such that by July 1967, the Carleton Registry showed that only nine of the 60 lots had been sold.
106. The real estate transactions of the Mission were met by the Listuguj Mi'gmaq with protest, unrest, political action, petitions to the Crown, negotiations and attempts to get legal help.
107. Throughout, the Crown denied any legal interest of the Listuguj Mi'gmaq in the lands and did not act on and in conformity with its fiduciary duties, put forth specious and misleading arguments on the status of the Mission lands and even discouraged legal action.
108. From 1976 to 1993, the Listuguj Mi'gmaq, the Department of Indian Affairs and the Church authorities were engaged in a process whereby the Crown for Listuguj, and in some cases the Listuguj Mi'gmaq directly, purchased "back" the residential properties and the remaining undeveloped Mission lands.
109. In all, the purchases of land and associated costs totaled some \$432,000. Insofar as these monies, paid for land that should have simply reverted, were disbursed by the Crown, it is not clear the extent to which there was corresponding reduction in the Department of Indian Affairs' capital and operating funds for Listuguj.
110. An accounting and appropriate money remedy is required.
111. On December 2, 1993, by Order in Council P.C. 1993-1959, the purchased 26.1 ha (64.5 acres) was formally recognized as reserve land. **(P-29)**
112. By reason of the Crown's breaches of its fiduciary duty with respect to the Mission lands, the Plaintiffs are entitled to claim and the Crown is liable to bear the cost of compensating the Listuguj Mi'gmaq for loss of use of the Mission lands since 1902, together with an accounting for profits and rents, damages for thwarted efforts to assert Mi'gmaq rights and to recover the lands, damages for the negative social and economic impact of the physical

division of Listuguj, costs of land rehabilitation, and general damages.

Breaches of Fiduciary Duty Regarding Lands for Provincial Highway N°6 or N°132

113. This portion of the Plaintiffs' proceedings concerns remedies for breach of the Crown's fiduciary duties with respect to the taking of portions of Listuguj Indian Reserve N°1 for the right of way of Quebec Provincial Highway N°6, later N°132.

114. The Crown breached its fiduciary duties in that:

- a) the Crown failed to prevent or allowed the establishment and widening of the Provincial Highway #6 in or before 1949, without informing and obtaining the consent of the Listuguj Mi'gmaq, without proceeding by way of surrender under the *Indian Act*, without obtaining compensation for the Listuguj Mi'gmaq and without ensuring that the land taken was the minimum required in the circumstances;
- b) acting in 1968, purportedly further to a 1949 band council resolution, the extraordinary power of consenting to the expropriation and transferring the lands to the province was exercised, without complying with the policy requirement of fresh band consent to the taking and without compensation;
- c) the Order in Council of 1968 retroactively granting the right of way to the province was adopted without informing the Listuguj Mi'gmaq of the exercise of this power affecting reserve land rights, even though the right of way had remained part of the reserve for many years.

115. What is now known as Highway 132 was previously referred to as Gaspé Highway #6 or Kempt Road.

116. The original small road existed as early as 1833, after the 1824 date recognized by the Department of Indian Affairs as the formal beginning of the reserve.
117. Highway #6 was established in 1940. The Quebec Department of Roads undertook to repair and widen Highway # 6 in 1949.
118. A band council resolution of November 16, 1949 confirmed that 13 individuals were the rightful holders of the lands appropriated by the province for the road expansion, and compensation totaling \$694.12 was subsequently paid out by Canada. **(P-30)**
119. A band council resolution dated April 21, 1950 confirmed the names of five other band members whose lands had been appropriated for the expansion of Highway #6. A cheque requisition prepared by the Department of Indian Affairs on May 29, 1950 listed the amounts owed to each of these land owners. **(P-31)**
120. The Band Council did not adopt a resolution regarding compensation for the original road (which became the centre strip of the widened road) or for the band interest in the parcels of land allocated to individuals. It was never compensated in either respect.
121. That the whole of the right of way still remained part of the reserve is confirmed by the Description for Transfer, prepared by the Surveyor General, dated April 22, 1960, which reads, in part, as follows:

...the whole of a right-of-way according to plan fifty thousand one hundred and eight (50108) in the Canada Lands Surveys Records...said right-of-way containing by admeasurement five acres and thirty-five hundredths of an acre, more or less.
(P-32)
122. The Highway #6 land and compensation issue remained dormant for several years. It was revived in 1967, following the Listuguj Mi'gmaq's announced intention to restrict the speed limit on Highway #6.

123. In 1968, it was decided to proceed with the federal Crown transfer to the province of the Highway #6 right of way pursuant to section 35 of the *Indian Act*, without prior consultation with or approval of the Band.
124. The band was not advised of this transaction of reserve land that had never before been surrendered or transferred to the province.
125. Order in Council 1968-1902 adopted on October 8, 1968 recites the application of the province for the lands and refers to the band council resolutions of 1949 and 1950 and "compensation" totaling \$862.25 thereunder as approval of the provincial application by the Listuguj Council. **(P-33)**
126. The Crown, through its agents in the Department of Indian Affairs, breached its fiduciary duty to the Mi'gmaq by deliberately or negligently concealing information from the band in regards to the expropriation of Highway #6 in the 1960s. Officials decided not to seek the band's consent, fearing Mi'gmaq consent would be denied.
127. In these dealings, the Crown breached its fiduciary duty to the Listuguj Mi'gmaq with respect to reserve lands.
128. In particular, the Crown breached its obligations of loyalty, good faith, full disclosure and prudence in the interests of the Aboriginal beneficiaries.
129. The unconscionable behavior of the Crown and the circumstances of the case amount furthermore to equitable fraud.
130. Section 35 of the *Indian Act* interposes the federal Crown between the Indians and the expropriating body. Indian lands cannot be expropriated without the consent of the Governor in Council. In this context, the Crown had a duty to notify the band of the expropriation proceedings, fully disclosing all relevant information, to consult with them and attempt to obtain their consent for the taking of the lands, and to provide adequate compensation, none of which it fulfilled.

Breaches of Fiduciary Duty in Regards to the Interprovincial Bridge Approach

131. This portion of the Plaintiffs' proceedings concerns the breach of the Crown's fiduciary duties with respect to the construction by the Province of Quebec on reserve lands of part of the roadway leading to the Quebec side of the Interprovincial Bridge across the Restigouche River to Campbellton, New Brunswick.
132. In summary, the Crown breached its fiduciary duties in regard to these reserve lands by:
 - a) failing to prevent the conversion by the province of a temporary permit for construction purposes to permanent occupancy of a right of way;
 - b) failing to prevent the taking of the reserve land interest and proceeding with construction of the roadway without a valid surrender, transfer or expropriation under the *Indian Act*; and
 - c) failing to obtain or provide adequate compensation to the band for the lands taken.
133. On October 6, 1953, the construction of an interprovincial bridge across the Restigouche River was proposed. The plan required building one of the approaches to the bridge on the Restigouche reserve.
134. On November 4, 1958, the Restigouche Band Council adopted a Band Council Resolution approving an application by the Quebec Department of Roads for permission to establish a temporary road on a parcel of band land and land allocated to Mr. Frank P. Isaac. The road was to be used for the hauling of materials related to the construction of the bridge. **(P-34)**
135. At the time it was expected that "both the Band and Mr. Isaac will be compensated for use of the road and the matter of compensation...should be discussed with the Department of Roads".

136. In a letter dated December 2, 1958, it was confirmed to Indian Affairs Headquarters that the Provincial Department of Highway would require permanent use of land on the reserve. This land consisted of "a small parcel of land which belongs to Mr. Frank P. Isaac, C.P. 4028 in Block 4 Lot 17 and also a small parcel of land belonging to the Band [lot 10] adjoining the one of Mr. Frank P. Isaac". **(P-35)**
137. Band Council Resolution #18 of February 1, 1961, states that Mr. Joseph William Jerome, not the band, was the holder of the whole of Lot 10.
138. Neither Jerome nor the Band was ever compensated for the taking of Lot 10.
139. The issue of compensation was not settled before work on the bridge approach began in earnest. In January 1959, the Band Council threatened to put a stop to the construction if not contacted by the Department of Roads in regards to compensation. **(P-36)**
140. It was not until April 1962 that the Province of Quebec made different offers to the band for compensation. These offers were rejected by the Band Council. **(P-37)**
141. Indian Affairs Regional Director R. Boulanger wrote to the province on October 22, 1964 stating that the Department normally does not proceed under section 35 of the *Indian Act* without the consent of the Indian band concerned. However, he intimated that the expropriation might go through without this consent since the lands were already being used by the Province for their road network. **(P-38)**
142. On August 12, 1964 the Band Council adopted Band Council Resolution #64 authorizing payment of compensation to the individuals or the estate involved.
143. With respect to the interest of the band, the Band Council refused the amount of \$751.80 offered by the province. The Band Council indicated it would accept no less than \$32,000.00, as the corresponding land on the

Campbellton, New Brunswick side of the bridge had been expropriated in exchange for \$42,000.00. (P-39)

144. Order in Council 1964-1997 was adopted on December 23, 1964. It reads as follows:

WHEREAS the Minister of Roads, Province of Quebec, has applied for 2.67 acres of land in Restigouche Indian Reserve N°1...

[...]

THEREFORE His Excellency the Governor General...pursuant to section 35 of the *Indian Act*, is pleased hereby to consent to the taking of the said land by the Province of Quebec, the administration and control thereof to be transferred to Her Majesty in right of the Province of Quebec, after payment by the Province of compensation in an amount acceptable to the Band Council and the Indian land owners. (P-40)

145. On April 2, 1969, the Quebec Regional Office of Indian Affairs and the Expropriation Division of the Roads Department of the Province made another offer. This offer was also rejected by the Band Council.
146. Since the Band Council has not agreed to the amount of compensation, the transfer of land to Quebec has not fulfilled the conditions of its authorization and therefore has never legally taken place.
147. The preamble of Order in Council 1964-1997 states that the provincial application for the taking of lands had been approved by the Band Council by resolution dated November 4, 1958. In fact, the resolution referred to simply permitted the Department of Highways to establish a working road on Lot 17, land allocated to Frank Isaac. It is specifically mentioned in the resolution that: "...this [is] a temporary arrangement... not affecting [sic] final expropriation or sale of land".

148. The Crown is liable to the Plaintiffs for breach of fiduciary duty in allowing the construction without surrender, consent and compensation.
149. As regards all of the breaches of fiduciary duty in these proceedings, the Plaintiffs are entitled to relief for the breach of the Crown's fiduciary duties and for loss of the use of lands since the encroachment, and to adequate compensation since the actual taking or loss of the land, the whole in the amount of one hundred million dollars (\$100,000,000) subject to the right of amendment, plus pre-judgment interest, interest, additional indemnity and costs, all as set out in the relief sought.
150. As regards Federal Court Rule 182, the damages claimed herein greatly exceed \$50,000.
151. The Plaintiffs are entitled to obtain from this Court the reservation of all of their other rights and remedies.
152. The Plaintiffs' action is well founded in fact and in law.
153. The Plaintiffs propose that this action be tried in Montreal.

Relief Sought

THE PLAINTIFFS THEREFORE CLAIM RELIEF AS FOLLOWS:

A) **JUDGE OR DECLARE** that as detailed in these proceedings, the Crown breached its fiduciary duties owed to the Plaintiffs with respect to protection, preservation and vindication of Indian interests in land and reserves, and in particular as regards:

- i) the Mann-Fraser Estate and the "Disputed Acreage";
- ii) the Busted Estate;
- iii) the Mission lands and other adjacent reserve lands;
- iv) the right of way for Highway N°6 / N°132;
- v) the Interprovincial Bridge approach.

B) **CONDEMN** the Crown to pay to the Plaintiffs one hundred million dollars (\$100,000,000) for the said breaches of its fiduciary duty, including relief for:

- i) the Crown's repeated failure to honour its obligations of loyalty, good faith, full disclosure and regard for the best interests of the Plaintiffs;
- ii) loss of use of lands;
- iii) loss of profit;
- iv) unaccounted-for revenues that have accrued to the Crown or third parties from the lands in question;
- v) illegal, unauthorized and uncompensated surrenders or takings and grants of lands to third parties;
- vi) the Crown's failure to take and support steps to protect, preserve and recover such lands;
- vii) general and punitive damages for equitable fraud, denial of access to land imposed on the Plaintiffs, and for the negative social, economic and political impact of the Crown's breaches of its fiduciary duties to the Listuguj Mi'gmaq; and
- viii) including all costs in researching the breaches and in bringing the Plaintiffs' claims and these proceedings, including pre-judgment interest, interest and an additional indemnity.

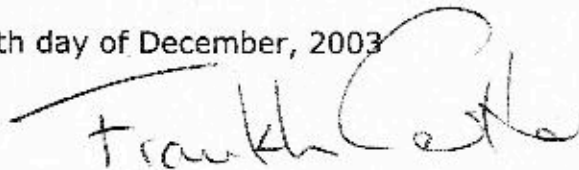
C) **RESERVE** to the Plaintiffs all of their other rights and remedies.

D) **ORDER** the execution of the judgment herein notwithstanding appeal.

- E) **SUCH FURTHER** and other relief to which the Plaintiffs are entitled and that this Honourable Court orders.
- F) **THE WHOLE** regardless of the Plaintiffs' success herein, with all costs against the Defendant on a solicitor and client basis including expertise, gathering documents and oral history and all disbursements and expenses in these proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Montreal, the 30th day of December, 2003



FRANKLIN GERTLER, Attorneys

Aldred Building

507, Place d'Armes, Suite 1200

Montreal, Quebec, H2Y 2W8

per: Me Franklin S. Gertler

Phone: (514) 842-0748

Fax: (514) 842-9983

E-mail: admin@gertlerlex.ca

FEDERAL COURT OF CANADA

Between:

LISTUGUJ MI'GMAQ FIRST NATION,

**CHIEF ALLISON METALLIC,
et al.**

Plaintiffs

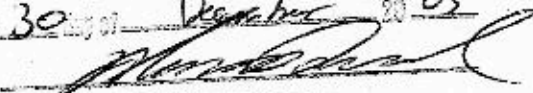
AND:

**HER MAJESTY THE QUEEN
IN RIGHT OF CANADA,**

Defendant

STATEMENT OF CLAIM

I HEREBY CERTIFY that the above document is a true copy of the original issued and at / filed in the Court on this 30 day of December 2003
Dated this 30 day of December 2003


ALAIN DERYN
Agent for plaintiff
Registry Officer