FILE NO.: SCT-1001-12
CITATION: 2017 SCTC 5
DATE: 20171128

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
MADAWASKA MALISEET FIRST NATION Claimant	Patricia Bernard and Paul Williams, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Reinhold Endres and Patricia MacPhee, for the Respondent
	HEARD: May 15-19, 2017, June 19-23, 2017 and July 25-27, 2017

REASONS FOR DECISION

Honourable Barry MacDougall

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

Cases Cited:

Ross River Dena Council v. Canada, 2002 SCC 54; *R. v. Marshall; R. v. Bernard*, 2005 SCC 43; *Canada v Kitselas First Nation*, 2014 FCA 150; *Wewaykum Indian Band v Canada*, 2002 SCC 79; *Manitoba Métis Federation Inc v Canada (Attorney General); Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 2,14, 20.

Indian Act, RSC 1985, c I-5.

Royal Proclamation, 1763.

Headnote:

Aboriginal law – reserve creation – reserve lands – Lands reserved for Indians – Royal Proclamation of 1763 – fiduciary duty – Honour of the Crown

The Claimant, the Madawaska Maliseet First Nation (Madawaska Maliseet), seeks compensation from Canada for the loss of lands lying within a red-lined tract on a survey by George Sproule, Surveyor General of New Brunswick, dated 1787 (Sproule Boundary Survey). The Claimant alleged certain parcels were illegally alienated from their St. Basile Indian Reserve No. 10 (IR No.10) through Crown-approved land instruments issued prior to Confederation. IR No.10 is located near the confluence of the St. John River/Wəlastəkw and Madawaska Rivers in New Brunswick.

There are three categories of land within the red-lined tract: Parcel A, consisting of 250 acres granted to Simon Hebert in 1825 and 100 acres granted to John Hartt in 1860; Parcel B of approximately 19 acres, for which Simon Hebert received a 21-year Licence of Occupation in 1829; and the “Remaining Lands”, which by Confederation were no longer within IR No. 10.

The Maliseet Nation/ Wəlastəkwey Nekwtohkəmikek traditional way of life involved following an annual cycle through the St. John River valley, though the Madawaska Maliseet village was a place of council and congregation at key times of year and one principal village of the Maliseet Nation. In the 1780s, the *Royal Proclamation of 1763* had been proclaimed by the British Crown, and Treaties in the mid-18th century were entered into between the Maliseet and the British Crown. Colonial settlement in the area was actively promoted by the Crown and land allocation pressures in the area were mounting on the newly formed New Brunswick Government.

In 1787 Governor General Dorchester instructed Lieutenant Governor Carleton to dispatch Surveyor General Sproule to carry out several tasks in and around Madawaska. As part of this work, Sproule conducted a detailed survey at Madawaska that demarcated a black-lined tract for settlers and, adjacent to it, the red-lined tract for the Madawaska Maliseet.

The Claimant alleged that the red-lined tract was a "reserve" within the meaning of the *Royal Proclamation* prior to the 19th century alienations and that the passage of the *Royal Proclamation* requiring reserve alienations to be consented to by the 'Indians' and surrendered only to the Crown, applied to render illegal the alleged "frauds and abuses" committed in this Claim.

Based on the political, historical and legal context of the time, the evidence taken together establishes that the New Brunswick government had reserved the red-line tract for the Madawaska Maliseet during the earliest period of settlement of the area in accordance with Crown policy and surveying practice of laying out reserves for Indigenous inhabitants in the colony at the same time that they defined tracts for the settlers to receive grants. These demarcations of lands for both the Madawaska Maliseet and the setters, done on order of the Lieutenant Governor of New Brunswick, reserved lands for the Madawaska Maliseet within the meaning of the *Royal Proclamation*, being "Lands reserved to the said Indians".

This policy enabled settlers and the Madawaska Maliseet to live peacefully together side-by-side in the colony. It brought Madawaska Maliseet into the fold of the British's Crown's influence and protection, and achieved the ultimate Crown policy of establishing Loyalist settlers in the area without conflict. As such, the Crown was honour bound to recognize the red-lined

tract for the benefit of the Madawaska Maliseet alongside the settlers' grants. The Crown-approved land instruments alienating parts of this red-lined tract to the settlers post-1825 was done in direct contravention of the *Royal Proclamation* and therefore illegal or invalid within the meaning subsection 20(1) of the *Specific Claims Tribunal Act*, S.C. 2008, c.22.

In *Ross River Dena Council v Canada*, 2002 SCC 54 [*Ross River*], the Supreme Court dealt with mid-20th century reserve creation in the Yukon, and whether the land in issue was a "reserve" within the meaning of the *Indian Act*. The Supreme Court: emphasized that reserve creation happened at different times and in different ways through the history of Canada; stated explicitly that it was not intending to make a definitive statement of a test for reserve creation under the *Indian Act*; and, underscored that any determination of reserve creation must be highly sensitive to the particular context of the matter in issue. Because the context of *Ross River* was so different, it is in many ways distinguishable.

Ross River gave this general guidance: the Crown must have had an intention to create a reserve; the intention must be possessed by Crown agents holding sufficient authority to bind the Crown; steps must be taken to set apart land for the benefit of Indigenous group; and the Indigenous group must have accepted the setting apart and begun making use of the land set apart (para 67).

If each *Ross River* criterion is applicable to this post-confederation Claim in the Maritimes in the late 18th Century, then that test is satisfied. The actions of the highest level government officials in the colony created a "reserve" in respect of the red-lined tract of land demarcated on Sproule's 1787 Boundary Survey, for the exclusive use of the Madawaska Maliseet, and within the meaning of the *Royal Proclamation*.

In 1787 at Madawaska there was no order in council, comprehensive regulation or legislation dealing specifically with reserves made for Indigenous groups. Regarding sufficient authority to bind the Crown, the royal prerogative to create reserves would, at the time, have rested with Governor General Dorchester, or his brother, Lieutenant Governor of New Brunswick, in the latter's absence. Surveyor General George Sproule was second in command to Carleton and was part of the Executive Council, and he had demarcated the red-lined tract of land pursuant to the Order of the Lieutenant Governor. No Order in Council declared the reserve

as created, but this is not determinative, particularly in the context of this time period.

It is also necessary to consider the perspective of the Maliseet. The Madawaska Maliseet understood that the red-lined tract had been reserved by Sproule for their benefit and use, and that he was acting on authority of the New Brunswick government in doing so. For Canada to suggest that there is no evidence of representations made to the Madawaska Maliseet that a reserve had been created for them in 1787, in the face of the evidence that the Madawaska Maliseet apparently believed that the reserve existed as reported many times and up until 1860, is problematic, not only on the existing evidence, but also given the evidence of poor record keeping in the early 19th century. In this instance, where important key documents which could shed further light on this question are missing as a result of Crown mismanagement, the honour of the Crown requires that any ambiguity on this question, should it exist, must be resolved in favour of the Madawaska Maliseet.

Lastly, the Madawaska Maliseet accepted and made use of the demarcated lands surrounding their historical village, which were within their traditional lands. They had indicated to Sproule that they required it for their use, which he reflected on his survey.

What Sproule did to produce the 1787 Boundary Survey was by order of the New Brunswick government. Sproule's survey was accepted without dispute at the highest executive levels and for a time, local officials recognized the land as reserved. The Madawaska Maliseet accepted the demarcation by Sproule, assisted him, and quite reasonably, relied on his representations. After Sproule completed his survey, the granting of land to settlers proceeded apace, in reliance on the survey and the relative security so achieved. *Ross River* is distinguishable; but if it does apply, then the criteria were met.

As no evidence was presented by Canada that the Madawaska Maliseet surrendered or consented to the alienation of any portion of that land, the Claimant has proven that Parcel A and B were illegally alienated at the moments they were illegally alienated to the settlers, and the Remaining Lands to the extent they were disposed of contrary to the *Royal Proclamation*. The Claim is therefore validated under *SCTA*, s. 14(1)(b) and s.14(1)(d).

If the above finding on reserve creation is incorrect, then Sproule's Boundary Survey was

a step in the reserve creation process. The treaty relationship set the stage. Reserves were being established in an uncoordinated manner in New Brunswick by 1787. Sproule's mandate involved securing land for settlers and the Madawaska Maliseet, and the Boundary Survey was an important step.

By the time Sproule completed his Boundary Survey, the Claimant had a delineated, identifiable, cognizable interest in the red-lined tract. It was then up to the colonial government to complete the process of reserve creation. When colonial officials removed Parcels A and B and permitted the erosion of the Remaining Lands from the area identified by Sproule, these were acts of discretionary control over the Claimant's cognizable interest in the red-lined tract. A *sui generis* fiduciary duty existed based on: (a) a specific or cognizable, communal Aboriginal interest; and, (b) an assumption by the Crown of discretionary control over that interest (*Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 49). The fiduciary duties that attach during reserve creation were owed (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 94).

The 1825 and 1860 grants and 1829 licence of occupation occurred without any consensual release by the Madawaska Maliseet to the Crown, and without compensation. Once Sproule's Boundary Survey demarcated a specific tract and facilitated security on the ground for settlers and the Maliseet, the honour of the Crown then required that the Crown follow through with reasonable diligence. There is no indication in the evidence to suggest that the colonial authorities gave serious attention to the interests of the Madawaska Maliseet when approving the two grants and the licence of occupation in question and reducing the size of the red-lined tract reserve. In disposing of Parcels A, B and failing to take any account of the Remaining Lands in later descriptions of the reserve, the Crown breached its fiduciary duties to the Madawaska Maliseet.

If the findings that a reserve had been created by the New Brunswick government in the late 18th Century within the meaning of the *Royal Proclamation* are in error, then the Claimant has proven a valid claim under section 14(1)(c) of *SCTA*.

As this Claim was bifurcated into Validity and Compensation Stages, compensation for the loss of the Claimed Lands will be determined at a future compensation hearing, if necessary.

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I. INTRODUCTION

A. The Claim

[1] The Claimant, the Madawaska Maliseet First Nation (Madawaska Maliseet), is a First Nation within the meaning of subsection 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], by virtue of being a "Band" within the meaning of the *Indian Act*, RSC 1985, c I-5, as amended, in the Province of New Brunswick. The Respondent is Her Majesty the Queen in Right of Canada (Canada) as represented by the Minister of Indian Affairs and Northern Development.

[2] The Claimant seeks compensation from Canada for lands outlined within a red-lined tract of land on a Survey by George Sproule Esq., Surveyor General of New Brunswick, dated 1787 (Sproule Boundary Survey) (Exhibit 1, Tab 58), which the Claimant alleges had been illegally alienated from their St. Basile Indian Reserve No. 10 (IR No.10) through Crown-issued land instruments from the 1820s onwards. There were also lands within this red-lined tract of land on the south side of the St. John River which were ultimately removed from New Brunswick's jurisdiction following the confirmation of the international border between New Brunswick and the state of Maine, United States of America, in 1842.

[3] The remainder of this red-lined tract now makes up IR No.10 which would become, approximately 700 acres by 1842/1860. IR No.10 is located east of the St. John River and below the Madawaska River. Today it is larger than the approximately 700 acres due to recent additions to reserve for reasons unrelated to this Claim.

[4] The Claim involves three categories of land within the red-lined tract on the Sproule Boundary Survey that are referred to here for the purposes of this Claim as follows:

- "**Parcel A**" which is an approximately 350-acre parcel lying west of and contiguous to IR No.10, consisting of:

    i. a 250-acre lot that was granted to Simon Hebert in 1825 ("**Parcel A1**"); and,

    ii. a 100-acre lot granted to John Hartt in 1860 ("**Parcel A**2");

- "**Parcel B**" which consists of approximately 19 acres and lies on the western side of the Madawaska River where it joins with the St. John River. In 1829, a Licence of

Occupation was granted to Simon Hebert for this parcel for a period of 21 years; and,

- "**The Remaining Lands**", which consists of the remaining lands outlined in red in the Sproule Boundary Survey excepting IR No.10 (roughly 700 acres), Parcel A and Parcel B, as well as the approximately 1040 acres on the south side of the St. John River which ended up being in the State of Maine.

[5] For ease of reference, the above categories of land are referred to collectively as the "Claimed Lands".

[6] The Claimant did not present any argument that the lands within Spoule's red-lined tract of land which ended up in the United States had been wrongfully alienated from IR No. 10 as a result of a breach of a legal obligation of Canada owed to the Madawaska Maliseet, and consequently, this portion of the red-lined area is not a matter upon which the Specific Claims Tribunal (Tribunal) will decide.

[7] The Parties at this stage can agree that Parcel B and much of Parcel A (if not all of Parcel A) are within the tract of land outlined in red by Sproule. The Remaining Lands' acreages also have not been precisely calculated by the Parties. Such exact calculations are a matter for determination at the Compensation Stage, should there be one, and are not consequential to the determination of the validity of the Claim.

[8] Finally, in the alternative, the Claimant claims "**Parcel C**" in accordance with a survey by Deputy Surveyor H. M. Garden, conducted in 1842 (Exhibit 5, Tab 184). This Parcel consists of approximately 800 acres of land and lies contiguous to IR No.10 on its northern side. The Parties agree that Parcel C is not within the red-lined tract of land on the Sproule Boundary Survey. At the hearing, the Claimant did not advance argument with respect to Parcel C and there can be no determination made with respect to Parcel C.

[9] The Claimant bases its Claim on five of the six grounds available under subsection 14(1) of the *SCTA,* as set out in its Further Amended Declaration of Claim which was filed with the Tribunal on January 27, 2017:

a. a failure to fulfill a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

b. a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

c. a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

d. an illegal lease or disposition by the Crown of reserve lands; and

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

[10] The Claim is a pre-Confederation claim based on events before 1867, and paragraph 20(1)(i) of the *SCTA* applies.

B. The History of the Proceeding

[11] The Claimant formally submitted its Claim to the Minister of Indian Affairs and Northern Development (Minister) on April 16, 1998 (Original Claim). Upon the coming into force of the *SCTA* on October 16, 2008, the Claimant was advised that the Original Claim met the minimum standard and was deemed to have been filed with the Minister under section 42 of the *SCTA*.

[12] The Original Claim alleged that the Crown illegally disposed of three parcels of reserve lands, being the aforementioned Parcels A, B and C. Specifically, it stated that the land was *de facto* Indian reserve land as of 1792 or before, and that the Crown had a legal obligation to protect the existing land base of the Maliseet at Madawaska, based on Drummer's Treaty (1725) and Mascarene's Treaty (1726), which includes the so-called Mascarene's Promises, as well as Belcher's Proclamation and the *Royal Proclamation of 1763*. These obligations were allegedly breached by the alienation of Parcels A, B, and C.

[13] On January 13, 2009, eleven years later, the Claimant was notified by the Minister in writing that the Original Claim had not been accepted for negotiation. The reason given was provided in a one-line statement: “the land was not an Indian reserve”. No further explanation or reasoning was provided.

[14] On August 13, 2012, the Claimant filed its Declaration of Claim before the Tribunal. On December 12, 2012, a section 22 Notice was issued to the Attorney General of the Province of New Brunswick. Receipt of the Notice was acknowledged on January 11, 2013. The Province did not take any steps to become a party to the Claim.

[15] On May 1, 2014, Madawaska applied to amend its Declaration to reflect changes in the law given the significant passage of time since the Original Claim had first been submitted. Canada initially opposed the Application on the basis that the requested additional ground was not before the Minister, but withdrew its objection on March 13, 2015.

[16] On April 7, 2015, the Claimant amended the Claim to add an additional allegation “based in the Crown’s breach of its common law fiduciary duty with respect to the alienation of parcels A, B, and C and additionally, with respect to its failure to meet its legal obligations under *The Royal Proclamation* and *An Act to regulate the management and disposal of [the] Indian Reserves in this Province* when it alienated parcels A, B, and C”.

[17] The Further Amended Declaration of Claim filed on January 26, 2017 added lands for compensation, being the Remaining Lands within the red-line tract on the 1787 Sproule Boundary Survey. This had been done by the Claimant in recognition of the fact that paragraph 15(3)(a) of the *SCTA* would prohibit the filing of another claim or claims “that are based on the same or substantially the same facts”. As such, the Claim was expanded to cover all the lands encompassed within the 1787 red-lined tract on the Sproule Boundary Survey.

[18] The Parties agreed to bifurcate the Claim into two separate stages according to an Endorsement of this Tribunal dated July 8, 2016, where “if there is a finding of validity, questions of historical value and present value will be dealt with in the Compensation Phase of the process in one or two sub-phases as may be appropriate”. The Parties consented to an Order issued by the Tribunal on April 21, 2017, bifurcating the Claim into a Validity Stage and a

Compensation Stage.

[19] The Parties agreed to a Common Book of Documents, but no agreement on common facts or issues in dispute was reached by the Parties to assist the Tribunal.

C. Terminology Used[*]

[20] Andrea Bear Nicholas, in her expert report, explains the various names given to the Wəlastəkwey Nekwtohkəmikek (Maliseet Nation) as presented in the historical evidence during this Claim (Exhibit 22 at page 2):

> Wəlastəkwey Nekwtohkəmikek is the Maliseet Nation. It is the nation indigenous to the valley and headwaters of the Wəlastəkw (the St. John River), which in Maliseet means "the beautiful river." As the people of this river we call ourselves the Wəlastəkwiyik, though we have been historically called many names, including "Etchemin," "Abenaki," and "St. John River Indians." The name Maliseet or Malecite, was applied to us early on by the Mi'kmaq. Though it was mildly pejorative, meaning "slow or lazy talkers" due to the slower cadence of our language compared to that of the Mi'kmaq, it has remained the name by which we are currently known.

[21] IR No. 10 has been called the "Madawaska Maliseet Reserve", the "St. Basile Indian Reserve" and the "St. John Indian Reserve" in the historical written record.

[22] As the Claimant has referred to itself in its submissions as the "Madawaska Maliseet", and the Nation as a whole as the "Maliseet" or "Maliseet Nation", the same terminology will be employed here wherever possible.

[23] No attempts are made in this decision to correct terminology or spelling as presented in original texts when quoted.

II. OVERVIEW AND HISTORICAL EVIDENCE

[24] The Parties did not produce an Agreed Statement of Facts. The Tribunal must therefore in large part cite to the Parties' submissions and secondary sources presented by the Claimant, and

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[*] A note on terminology: the terms Aboriginal, Indigenous and Indian are used in this Decision as appropriate in the context. The usage of the term "Indian" reflects its usage in the law and in history, but is not an endorsement of its usage in the present era.

to the expert reports to some degree, but in all cases the historical documents relied on have themselves been verified for the facts being set out.

A. Historical Context and Background (16th to 18th Centuries)

1. Maliseet Nation History, Traditional Territory and the Peace and Friendship Treaties

[25] As Professor Andrea Bear Nicholas explains, the *Wəlastəkwiyik Nekwtohkəmikek* (i.e. the Maliseet Nation) have been the people of the valley and headwaters of the *Wəlastəkw* (i.e. the St. John River) for thousands of years, and hence, derive their name from this important river system:

> Wəlastəkwey Nekwtohkəmikek is the Maliseet Nation. It is the nation indigenous to the valley and headwaters of the Wəlastəkw (the St. John River), which in Maliseet means "the beautiful river." As the people of this river we call ourselves the Wəlastəkwiyik

[26] The Claimant's Factum, particularly at paragraphs 19, 30 and 31 (and quoting at times from the expert report of Professor Nicholas), fairly summarizes Maliseet history, population, traditional territory and political relations with French and English from before contact to the 19th Century in the Eastern part of what became the colony of New Brunswick along the St. John River. I have extracted and paraphrased what follows.

[27] As mentioned, the Maliseet have been the people of the valley of the St. John River for thousands of years. Their way of life had involved following an annual cycle throughout the valley, but some places were of vital importance: Meductic, Ekwpahak, and Madawaska, the first in the lower valley and the second opposite Fredericton, and Madawaska in the upper valley, were places of council and congregation at key times of year.

[28] The Maliseet population at Madawaska fluctuated according to the time of year, but several maps show a village site at that location, and several documents indicate that the village, by the late 1700s, had become a place of permanent residence by some Maliseet, who had begun not just gardening but farming.

[29] After contact with Europeans, possibly as early as the 1500s, the Maliseet world has been

turned upside down by war, disease, and famine. The Maliseet economy had also been shifted by the participation in the fur trade, even though the European population of the upper St. John River Valley was minimal during the 17th and 18th centuries.

[30] Politically, the history of the Madawaska area during the 18th century reflected the continuing contest between England and France for control in North America, including the present Maritime Provinces of Canada and the valley of the St. Lawrence River.

[31] Initially, the Maliseet had allied with the King of France, as the French promised protection for Maliseet land at the time when the French had asserted control over the eastern part of Canada. Many Maliseet had also been converted to Catholicism by the French Jesuits. The British in the area were generally known as Protestants.

[32] The British Crown then asserted its sovereignty and jurisdiction over parts of the Madawaska area as a result of the 1713 Treaty of Utrecht, and the rest of the area after its conquest of New France in 1759-1760.

[33] Professor Nicholas recounted in her expert report and during testimony that during this period of contests between European powers for dominion or control over parts of what would become of eastern Canada and the US, the British Crown had also established solemn political relations with the Maliseet and Mi'kmaq. The Crown had entered into a treaty-relationship with the Wabanaki Confederacy starting with Treaties in 1725 and 1726, the latter also known as the "Mascarene Treaty" which was signed at Annapolis Royal, Nova Scotia, on June 4, 1726. This Treaty was subsequently renewed and updated in 1749 and then again in 1760 (Exhibit 1, Tabs 9, 12 and13).

[34] Professor Nicholas describes in her expert report the Treaties from her vantage point garnered from her work with Maliseet Elders and through archival research on the subject (Exhibit 22):

> That our [Maliseet] leaders signed several treaties with the Crown in the Eighteenth Century was largely a consequence of repeated periods of war triggered by English encroachments and treaty violations either in our territory or in that claimed by our close allies in the Wabanaki Confederacy (Kennebecs, Penobscots, Passamaquoddies and Mi'kmaq). In fact, there is much evidence that at one time we were one people with the Kennebecs, Penobscots and

> Passamaquoddies. The signing of several treaties was also a consequence of the fact that our culture was an oral one, totally dependent on memory, which meant that periodic reaffirmation of the relationship was needed to negotiate the details of changing circumstances.
>
> It is important to note that the treaties between the Maliseet Nation and the Crown were signed by Maliseet chiefs on behalf not only of their families, but of the entire Nation. It is also important to note that most treaties were signed by leaders of allied nations in the Wabanaki Confederacy, either independently or together (as in the case of the Treaty of 1725/26). The terms of the treaties with all of these nations were similar, varying in details only according to the particular concerns of each different English colony claiming our lands (Massachusetts or Nova Scotia).
>
> The Treaty of 1725/26 became a template upon which successive treaties were built. It was not only about peace and friendship, but about mutual respect for two very different modes of life and land use. Since we surrendered no land in any of the treaties we agreed only to respect any English settlements "lawfully to be made", which in our understanding meant that no land could be taken from us for settlement except by lawful means under English law. It also meant that we would respect the settlements that resulted. The English on the other hand agreed in the treaties to respect us in our hunting, fishing, and planting grounds. This was an implicit commitment to respect our mobile form of life, which saw us engaged in a yearly round of activities in various parts of our watershed, from the river valleys for planting and fishing, to the headwaters for hunting and trapping. The treaty clearly stated that neither party would molest the other in their respective forms of life, and that only in this way could peace prevail.

[35] Canada's expert, Dr. Wicken, in his expert report and during testimony provides additional details regarding the Maliseets' household economy and traditional territory from the perspective of his research of the historical written record and other evidence, such as archeological evidence. In his expert report dated September 30, 2014 (Exhibit 25), he explained as follows:

> The Malecite were primarily fishers, hunters, and trappers before and after contact and generally did not live in one place 12 months of the year. They also were horticulturalists.
>
> There are several known areas of the Saint John River where Malecite people lived before contact. One of those places was near the confluence of the Madawaska and Saint John Rivers.
>
> …
>
> Though the population changed, there was a consistent presence of Malecite families at the confluence of the Madawaska and Saint John Rivers from 1787 to 1867.
>
> …

> It is highly probable that people lived along the Madawaska before and after contact. Perhaps no clearer evidence of this is that the name Madawaska is derived from a Malecite word and, according to Charles Collins, meant 'porcupine place' of 'junction of rivers'. There is also consistent archaeological evidence that the general region formed an important nexus point.
>
> …
>
> It also seems probable that the Malecite used the area near the confluence of the Madawaska and Saint John Rivers.
>
> …
>
> The Malecite household economy before contact was focused around four main activities, fishing, trapping, hunting, and harvesting various plant foods. After contact, they also cultivated food crops, the most important of which were corn and beans. Because their economy involved harvesting an array of resources, which could not be found in a constant supply, families had to move.
>
> …
>
> Once food was no longer available these Malecite communities would disperse into smaller familial-based groups. This was more likely to occur during winter when food was scarcer. However, we also might assume that if families had sufficient supplies for the winter, then they would remain together.

[36] Acadians who had escaped the British deportations of Acadians to southern parts of the continent between 1755 and 1758 began to settle along the banks of the St. John River at this time. The arrival of the Acadians to the Madawaska area also left lasting impacts on the Maliseet, as explained by Dr. Wicken in his aforementioned report at pages 32-32:

> While we don't know exactly how the Acadian presence affected the Malecite of the Upper St. John, we should assume that the intrusion was not benign. Before 1785, the Malecites had exercised an absolute dominion over their lands and resources. This meant they had the ability to exploit the land without interference of others. This included their two main sources of food, fish and wildlife.

2. The *Royal Proclamation of 1763*

[37] On October 7, 1763, King George III issued the *Royal Proclamation of 1763* which established the terms of governance for the colonies acquired by the British in the Seven Years War (1756-63), including Quebec (Exhibit 1, Tab 16).The text of the *Royal Proclamation of 1763* with particular relevance to this Claim is as follows:

> And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; in order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of

> our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any lands reserved to the said Indians, within those parts of our Colonies where, we have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, and some public Meeting or Assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of our Colony respectively within which they shall lie[.]

[38] Adherence to the above passage of the *Royal Proclamation* has been generally described as wanting in the case of the former colony of Nova Scotia not long after its issuance. As described in L.F.S. Upton's book: *Micmacs and Colonists: Indian: White Relations in the Maritimes, 1713-1867* at 104-06, which is cited in the Claimant's expert reports and Factum as well as by Canada's expert in Dr. Wicken's report at page 93 (Exhibit 25, Tab 4):

> Their [i.e. the 'Indians''] special status was to be safeguarded by regulations against the private purchase of their lands. Montague Wilmot, newly installed as Governor of Nova Scotia, acknowledged receipt of the *Royal Proclamation* "relative to the newly conquer'd countries in America" and promised to give it the widest circulation. That was all he said, for he obviously did not consider that it related to his province, which it been conquered 50 years earlier. Both he and his successors ignored the proclamation, and when they came into existence so did the governments of the other Maritime Provinces. It was as though it had never been made.

3. Publication of the Maliseet Petition Complaint in the Quebec Gazette (1765)

[39] Just over one-year following the issuance the *Royal Proclamation* on October 7, 1763, on January 24, 1765, a Petition addressed to the Governor of Quebec by the Maliseet Nation was published in the Quebec Gazette (Exhibit 1, Tab 18). The government published Petition included a notice from the "His Excellency the Governor in Council" dated 19 January 1765 and signed by Deputy Secretary James Goldfrap supporting the Petition which would be "allowed and confirmed to them" unless someone could provide just cause to the contrary.

[40] The Petition complained about encroachments by people from Quebec (described as "the Canadian Inhabitants") hunting beaver on lands "which have ever belonged to, and are the Property of the Said Nation". The Maliseet had wanted their "exclusive privilege" of hunting beaver in the time of the French government to be continued "by forbidding the Inhabitants of

this Province to hunt Beaver on said Grounds".

[41] The said lands described were between Lake Temiscouata at the headwaters of the Madawaska River, and Grand Falls on the St. John River, which included the entire Madawaska River and part of the upper St. John River. The area or "tract" was described in the Petition as "Lands belonging to the [Maliseet] Nation by which your Petitioner has been deputed".

B. Historical Evidence During the Material Time of the Claim (1783 to 1860)

1. New Colony of New Brunswick and Arrival of the British Loyalists (1783/1784)

[42] In the summer of 1784, after the American Revolutionary War had ended in 1783, the Crown separated New Brunswick from the Colony of Nova Scotia and declared it a separate colony.

[43] On August 18, 1784, Royal Instructions were issued and as concerns this new Province. In respect of the "Indians" inhabiting it, the following instruction to the New Brunswick government was provided:

> 63 And Whereas it is highly necessary for our service that you should cultivate and maintain a strict Friendship and good Correspondence with the Indians, Inhabiting within our Said Province of New Brunswick, that may be induced by degrees not only to be good Neighbours to Our Subjects, but likewise themselves to become good Subjects to US, You are therefore to use all proper means to attain those Ends, to have Interviews from time to time, with the several heads of the said Indian Nations or Clans and to endeavour to enter into Treaty with them promising them Friendship and Protection on our Parts.
>
> [Exhibit 1, Tab 39]

[44] About 10,000 to 15,000 British Loyalists came to settle in New Brunswick in 1783 and 1784. Some settled on the St. Croix River; others along the St. John from its mouth, the site of the City of Saint John, to past the new provincial capital of Fredericton.

[45] The new provincial government, headed by the first Lieutenant Governor of New Brunswick (Lt. Gov. of NB) Thomas Carleton, would undertake to settle the Loyalists who needed land immediately.

[46] Large land grants and a massive influx of settlers would negatively affect Maliseet and their way of life, particularly on the lower St. John River between Fredericton and Saint John. Lands along the St. John River in particular were prized for settlement.Madawaska nonetheless remained an important Maliseet refuge and village site after the Loyalist arrival.

[47] From the Maliseet perspective, as Professor Nicholas explained, the arrival of the Loyalists in the span of two or three years following the American Revolution in 1783 caused serious changes to Maliseet's way of life and control over territory, land and resources. Malnutrition among the Maliseet resulted from over-fishing and over-hunting, as well as from massive clear-cutting of hunting territory as new villages and farms were established in the area and as the international timber market grew.

[48] Richard H. Bartlett in his publication: *Indian Reserves in the Atlantic Provinces of Canada*, Native Law Centre, University of Saskatchewan, 1986, in the chapter "*Dispossession of Traditional Lands"* at p.14 (referenced by the Claimant in its Factum at para 324) stated that in the face these changes, some protections were made for Maliseet land, starting with a grant of land at St. Anne's first made in 1765 and confirmed in 1779:

> Nova Scotia was partitioned in 1784, the mainland side of the Bay of Fundy then became New Brunswick. New Brunswick was the traditional territory of the Maliseet and Micmac tribes of Indians. The Micmac occupied the North Shore from Gaspé to Nova Scotia and the head of the Bay of Fundy. The Maliseet occupied the St. John River Valley and the Passamaquoddy region.
>
> The influx of loyalist settlers at the end of the war of the American Revolution disrupted the traditional possession of the lands of the Indians. No treaties or agreements were made with the Indian tribes regarding the occupation by settlers of traditional lands. The need to protect the Indians in the possession of their lands led to the issuance of licenses of occupation.
>
> The first provision of lands to Indians in New Brunswick was made to the Maliseet tribe in 1765; 704 acres were granted on the St. John River at St. Anne's. The grant was confirmed in 1779 to the Superintendent of Indian affairs and the Indian Chiefs "in trust, for and in behalf of the said Maliseet Indians, inhabiting as aforesaid, their heirs forever."… Under the grant the lands could only be sold with the consent of the Governor or Commander-in-Chief.

2. George Sproule's 1786 Boundary Survey and his Related Instructions and Tasks

[49] In 1784, the Acadians, under the leadership of Louis Mercure, began to lobby for land above Grand Falls (Exhibit 1, Tab 38). Louis Mercure, was an "Acadian who came lately into this Province as a Guide […]" according to a letter written in November 27, 1783 by General Frederick Haldimand to Governor Jonathan Parr of Nova Scotia (of which New Brunswick was then part). "My plan", wrote General Haldimand, "is to grant them lands at the Great Falls on the River St. Johns, which in time may form settlements to extend almost to the River St. Lawrence, which will contribute much to facilitate communication so much to be desired between the two Provinces […]" (Exhibit 1, Tab 37).

[50] However, according to Memorials issued in December of 1786 to Thomas Carleton, Lt. Gov. of NB, the New Brunswick Council was only prepared at this time to give the settlers Licenses of Occupation "til a proper Survey [could] be obtained preparatory to a Grant" (Exhibit 1, Tab 51).

[51] In a letter dated January 3, 1787, from Governor General of British America, Lord Dorchester (who was residing in Québec), to Thomas Carleton (Lord Dorchester's younger brother), Lord Dorchester expressed his concern about settler relations with the Madawaska Maliseet in the area and how the matter might be settled, including grants to be made out in due course to the Acadians:

> I received your letter No. 1 on the 25th ult., by which I learn that the Settlers on the upper part of the River St. John are alarmed by the menaces of the Indians in that District. The measures you have taken to enable the Settlers to defend themselves, I very much approve of. When I arrive at New Brunswick, I propose to review your Militia, and hope to find them so well armed and arrayed, as to give the province all reasonable security.
>
> At the same time that You take proper measures, for the defense and security of the province, good policy requires, that the Indians should be treated with civility and kindness. You may at a cheaper rate secure their friendship, than repel[l] their hostilities. Besides the policy of this conduct, common justice requires some attention and some compensation to these people, whose lands we come and occupy. This I fear, owing to their distance from Halifax, then the seat of Government, has not been fully observed.
>
> **I would recommend, that on every opportunity these Indians be benevolently treated and occasionally sent home with presents for their families. But this should be more particularly practised, and the presents should be more considerable, before any new Concessions of land, so that they may be entirely satisfied with the transaction**.

> The Chiefs should also be encouraged to come in, and make their complaints, when any of their tribes receive ill treatment.
>
> It has been reported, that a soldier shot one of them, and wounded a woman. It is said also, that the malefactor has been hanged. If so, Justice has been satisfied, but the Indians should be assured of the fact. This is the more necessary, as one of those tribes has been executed here, not very long since, for a like crime.
>
> I detained your Messenger till I was able to send a confidential Interpreter with him. Such a one now goes with compliments of condolence, and a promise of presents at a proper season to cover the dead. He is to invite some of their Chiefs to come to Quebec next summer, and open all their complaints. He also carries a message to the Acadians, who I hear have not only been driven off their lands, but other ways ill treated. To prevent a misfortune of the kind in future, a Grant should be made out for them in due form.
>
> I understand the high land, which runs by the great rapids on the River St. John, is the boundary, and separates Canada from New Brunswick and the New England Provinces. Therefore all who choose to settle west of that range of hills will become Canadians; those who remain to the East are of course New Brunswickers, and will deserve your protection.
>
> In the meanwhile, and until the business is ripe for regular Grants, they can only have general assurances, that they shall have them as soon as regularity will permit, and this promise should remain inviolate.
>
> [Exhibit 1, Tab 61; emphasis added]

[52] As concerned the Maliseet Madawaska, significantly Dorchester instructed his brother that "before any new Concessions of land" be made, the practice of providing presents should "be more particularly practiced" and "be more considerable" than the usual, so that the Madawaska Maliseet should be "entirely satisfied with the transaction".

[53] As concerned the Acadians who had "been driven off their lands", he instructed Carleton to assure them that they would receive the grants they had been requesting in "due form".

[54] On that same day, Dorchester also wrote Carleton enclosing a plan prepared by Deputy Postmaster General of Quebec, Hugh Finlay, "for establishing a regular conveyance of Letters between Halifax and Quebec". He asked Carleton to take it into consideration and to report back his opinion on the plan, as Dorchester considered regular communication between the two Provinces to be of important public utility, and wanted his brother's assistance in this aim (Exhibit 1, Tab-60).

[55] In letter dated May 29, 1787, Dorchester again wrote to Carleton on this subject as well as on the subject of the boundary issue. He asked Carleton to instruct the Surveyor General of New Brunswick, George Sproule, to meet with the Surveyor General of Québec, Samuel Holland on July 15th of that year at "the Great Galls on the River Saint John… for the purpose of settling the Boundaries between the two Provinces". On the matter of creating a regular postal route/service, he wrote:

> This done [i.e. establishing the boundaries], it will be expedient to grant the Lands at the different Carrying Places as soon as possible, that a road of communication may be established, and the proposed Plan for a Regular conveyance by Post once a month between Halifax and this place since it has met with your approbation and that if Lieutenant Governor Parr. [This task is to be] carried into execution without delay; I am convinced many advantages will result therefrom immediately, though the Carrying Places between this and Frederickton must be tolerably settled, before a complete security can be expected.
>
> I purpose to send Mr. Finlay in order to make the necessary arrangements with the Postmasters of Nova Scotia and New Brunswick.

[56] As background to the boundary issues in the area, the Claimant fairly explained the contested matter at paragraphs 48 to 52 in its Factum:

- The boundary between Quebec and Nova Scotia/Acadia had been ambiguous since the 1713 Treaty of Utrecht. The 1774 *Quebec Act* described the location of the Quebec boundary with Nova Scotia (later New Brunswick) as the height of land between the waters that flow into the St. Lawrence River and those that flow into the Atlantic Ocean. Both British and US officials in Paris did not that there was more than one height of land between the Atlantic and the St. Lawrence.

- Due to lack of knowledge about the geography of the area, officials in London did not realize that the boundary defined in the *Quebec Act* could not be surveyed without adjusting the terms of the Act. The area in the disputed territory included the land between Grand Falls on the upper St. John River and Lake Temiscouata.

- The 1783 Treaty of Paris ending the American Revolution likewise ambiguously described the boundary between British North America and the eastern United States as the St. Croix River and from its headwaters to the height of land separating the

waters flowing to the Atlantic from the waters flowing to the St. Lawrence. Both British and US officials in Paris did not realize that people in North America were not in agreement as to which river was the St. Croix.

- A British-US commission agreed on which river was the St. Croix River in 1798. But from the headwaters of the St. Croix to the height of land was still undermined and would remain so until the 1842 Webster-Ashburton Treaty. A final resolution to the boundary between Quebec and New Brunswick came in 1851.

[57] To recap, there were two tasks based on direct correspondence to George Sproule which would require him to travel to the upper St. John River and visit the Madawaska area in July and August 1787:

1. Attempt to obtain agreement with the Surveyor General from Quebec (who was replaced in the field by his son, John Frederick Holland) on the New Brunswick and Quebec boundary.

2. Facilitate and take part in a survey of the route between Fredericton and the St. Lawrence River, for the purpose of establishing a postal communication between Fredericton and Quebec.

[58] Also recall that Carleton had not yet had opportunity to address two other tasks as instructed by Dorchester in the latter's letter to Carleton dated January 3, 1787, being: (1) appease the Madawaska Maliseet by entering into a satisfactory "transaction with them" in the manner described; and, (2) carry out the eventual issuing of grants to the Acadians in response to the fact that they had been driven off their land. As Carleton did not personally visit the area during these intervening months, Sproule, as his next in command, dealt with both matters through his surveying work as depicted on both in the results of his 1787 Boundary Sproule Survey and his 1790 Grant Plan.

3. George Sproule's Trip to Madawaska and his Boundary Survey (1787)

[59] As explained in the Claimant's expert report at page 2, George Sproule was appointed

Surveyor General of New Brunswick on September 2, 1784 and remained in the post until 1817. He established the Surveyor General's Office and a number of Deputy Surveyors were commissioned to assist him.

[60] George Sproule had by this time accumulated 20 years of experience as a surveyor in North America. He began his career as an assistant to both Samuel Holland (Surveyor General of Quebec, 1764-1801) and J. F. W. Des Barres, prominent figures in the history of surveying in the North Atlantic region, and by whom he was highly regarded. In 1774, he was appointed Surveyor General of the New Hampshire colony and held this post until the onset of the American War for Independence, at which time he became a military officer in the service of the British Crown.

[61] According to a memorandum written by Finlay and Holland dated July 16, 1787, as well as a letter from Holland to Dorchester on July 26th, Sproule had arrived at the "St. John's River opposite the River Madawaska" just before the former two had arrived. Sproule did not go to Grand Falls because he did not agree the boundary should be there based on geographical knowledge he had and his understanding of the *Quebec Act*, believing instead that the boundary should be located between Lake Temiscouata and the St. Lawrence River. He thus first met these two officials "at the Acadian settlement opposite Madawaska" on July 16th (Exhibit 1, Tabs 67 and 68).

[62] Although the boundary would remain undetermined, Sproule proceeded with his other tasks, including surveying a tract of land for the Acadians and Canadians to lay out their lots as had been requested by Louis Mercure, and surveying the routes of communication on the St. John River watershed.

[63] Sproule subsequently conveyed the results of his efforts in two large survey maps – the 1787 Sproule Boundary Survey and a Communications/Postal Route Survey – both of which he would have executed and did execute in great detail upon returning to Fredericton in August. The information contained on these surveys demonstrates extensive discussions with the Maliseet pertaining to portage routes on the St. John watershed which Sproule had depended on to supplement his geographical knowledge of the area as contained in these surveys.

[64] Sproule's Boundary Survey outlined in black ink a 16,000 acre tract of land which he labelled, "French Settlements". Near the black outline on the 1787 Boundary Survey, Sproule wrote:

> The tract of Land Included within the black lines is laid out into 80 Lots or Plantations fronting on each side of the River for the Acadians and other French Settlers.

[65] Sproule also demarcated a large tract of land with red ink (enclosing about 3,500 to 3,700 acres, though as mentioned, the precise calculations were not provided) on both sides of the Madawaska River and St. John River and which abutted the Acadian/French Settlement tract outlined in black on the one side. Of this red-lined tract, he wrote:

> The Indians require the tract of Land included within the red lines to be reserved for their use. Except Kelly's Lot.

[66] The 1787 Sproule Boundary Survey also depicts within the large red-lined tract an Indian Village at the confluence of the Madawaska River and St. John River, on the east side of the St. John River with a boundary encircling the indicated buildings and the caption, "Indian Village".

[67] On the opposite side of river, across from the Indian Village, and within this large red-lined tract, one building is indicated and is similarly enclosed with its own outer boundary indicating a small lot or tract of land to be demarcated out from the larger tract of land required by the Madawaska Maliseet. Sproule's caption reads "Lot improved by S. Kelly".

[68] Sproule's 1787 Boundary Survey was entitled, in full: *A Survey from the Great Falls of the River St. John to the head of Lake Tamascouta with part of the Portage leading from that Lake to the River St. Lawrence Taken in July and August 1787 by George Sproule Esq. Surveyor General of New Brunswick* ***by Order of His Excellency Lieut. Governor Carleton*** (emphasis added).

[69] Surveyors in the 18th century, including those in New Brunswick, kept field surveyor notes and journals as a matter of standard practice. They generally described the country the surveyor passed through or surveyed, as well as the meetings or encounters the surveyors had. Unfortunately, George Sproule's field notes and journal have not been found. They may have shed more light on the nature of the consultations Sproule had had with the Madawaska Maliseet,

discussions which evidently did occur based on the fact that they had indicated to Sproule what lands they did "require" and he did demarcate this tract on his Boundary Survey accordingly.

[70] Shortly after Sproule had visited Madawaska, a letter dated August 16/18, 1787, from Carleton to Dorchester, suggests that Dorchester may have directed Carleton as concerns the Madawaska Maliseet. Carleton wrote:

> I have the honor to acknowledge the receipt of your Lordship's letter No. 15**. I have also received a letter from Mr. Coffin inclosing by your Lordship's direction a copy of part of a speech of the Madawaska Indians and your Lordship's answer.**
>
> It gave me concern to find that the Surveyors could not settle the boundary between the two Provinces. Mr. Sproule informs me that he has explored some part of the Country of which I have directed him to prepare a sketch and report to be transmitted by the first conveyance for your Lordship's information.
>
> [Exhibit 1, Tab 70; emphasis added]

[71] Unfortunately, not only did the initial letter from Mr. Coffin not survive, but the "part of a speech of the Madawaska Indians" and Lord Dorchester's direction did not survive either.

[72] According to a letter dated October 29, 1787, Carleton sent a copy of "a Map" to Dorchester described as being "of a part of the Country including the great falls on the River Saint John, and thence extending across to the River Saint Lawrence made by Mr. Sproule" (Exhibit 2, Tab 73). It is not evidently clear which map he was referring to in this particular letter, which could have been either the Sproule Boundary Survey or the Communications/Postal Route Survey (latter survey is described next).

[73] In any event, the Sproule Boundary Survey was completed by Order of Carleton as stated directly on the Survey itself, and so presumably, Carleton had reviewed a draft before it was finalized, and it generally met with his approval enabling Sproule to indicate that it was produced at his Order.

[74] New Brunswick Executive Council did in fact later instruct Sproule on December 28, 1787, to return to the Madawaska area in order to register "the inhabitants near Madawaska" to their respective lots "conformably to a Plan of that settlement this day exhibited by the Surveyor General" (Exhibit 2, Tab 74). Conceivably again, Carleton would have seen the entirety of the

survey map as prepared by Sproule at this Council meeting.

[75] A copy of the Sproule Boundary Survey was ultimately located in the archives in London, meaning it had been forwarded to the Imperial Office as well.

4. George Sproule's Communications/Postal Route Survey Plan (1787)

[76] With the assistance of Hugh Finlay, Deputy Postmaster General of Quebec, Sproule also produced a detailed Communications Plan on the same trip that summer, as he was also instructed to do so by Carleton at the originating instruction of Dorchester.

[77] Information contained on the Communication Plan explicitly indicates that Sproule received assistance from the Maliseet Madawaska in completing his survey work, including the identification of portage routes.

[78] Sproule's Communication Plan was entitled: "*Plan of the Communication by the River Saint John, from Fredericton in New-Brunswick*…[.]" It included a notation at the mouth of the Madawaska River: "Indian Village principal residence of the St. John tribe". An accompanying notation stated:

> **This tribe consists of about 60 families** who are generally dispersed on the River Saint John and its various branches in pursuit of game. They hold their Grand Council annually at this village, & are attended by a Roman Catholic priest from Canada of their own choice. They are much on the decline from the immoderate use of Spirituous liquors.
>
> [Emphasis added]

5. Dismissal of the Doucet Petition and Minutes of the Committee on Crown Lands, Quebec (1788)

[79] Laurent Doucet, an Acadian from Ste.-Anne-des-Pays-Bas, New Brunswick settled at St. Roch, Quebec after the arrival of the Loyalists. On January 25, 1788, Doucet petitioned the Quebec government for a parcel of land "at the carrying place on the Madawaska River". The Petition, which was written in French, starts with the following address, as transcribed to English according the Parties' transcription in the Common Book of Documents (Exhibit 2, Tab 75):

> To His Excellency the Honourable Guy-Lord Dorchester, General Captain and Governor in Chief of the provinces of Quebec, Nova Scotia, and New Brunswick, Vice-Admiral [illegible] Supreme Commander of all her Majesty's troops in the said provinces and the province of Newfoundland.

[80] Doucet's petition stated that his homestead had been taken over by government officials and made available to the recently arrived Loyalists.

[81] The Minutes of the Committee on Crown Lands in Quebec dated February 22, 1788, recorded comments made by Hugh Finlay, the Deputy Postmaster General in Quebec and a member of Quebec's Executive Council. (Exhibit 2, Tab 75) Finlay had been tasked by Lord Dorchester and had accompanied Surveyor General George Sproule in the summer of 1787 to set out the Communications route, and had first encountered Sproule at Madawaska on July 16, 1787. The Minutes record that Governor General Dorchester was also present at this Executive Council meeting.

[82] The Minutes stated in part that:

> Mr. Finlay informed the Committee that he thinks the place mentioned in Doucet's petition **is included in a tract of land laid out by the order of the Government of New Brunswick for the use of the Saint John Indians, who are in actual possession of it**. It is within a quarter of a Mile of their Village… [.]
>
> [Emphasis added]

[83] Correspondingly, on the outside or back page of Doucet's petition, there is a notation written in English that states, in part:

> Read in Committee 22 Feb 88.
>
> The land applied for by this Petitioner **has been lately secured to the Indians residing near that place by warrant from the government of New Brunswick.**
>
> [Exhibit 2, Tab 75; emphasis added]

[84] The Minutes go on to suggest that Doucet was told that there was alternative land that might be available for him elsewhere in the area. Where the proposed alternative land might actually be located or whether he ever obtained alternative land is not clear or known on the basis of the evidence.

[85] In any event, Doucet's petition for the land in question being requested by him was evidently denied by the Council of Quebec on the basis that Finlay thought the land was "included in a tract of land laid out by the order of the Government of New Brunswick for the use of the Saint John Indians, who were in actual possession of it". This was about six to seven months after Sproule had demarcated the Madawaska Maliseet parcel of land in the summer of 1787.

6. Grant Plan for Joseph Mazerolle and Other Acadians/French Settlers (1787-1790)

[86] On December 28, 1787, the Committee of Council on Land of New Brunswick issued a direction or "Memorial" to the Lieutenant Governor of New Brunswick that the "[i]nhabitants near Madawaska" should be registered for their lots "conformably to a Plan of that settlement this day exhibited by the Surveyor General" (Exhibit 2, Tab 74). The Council's reference was to the two tracts of land on either side of the St. John River outlined in black on Sproule's 1787 survey plan and captioned "French Settlements".

[87] Meanwhile, on July 18, 1788, George Sproule had directed his Deputy Surveyor to do a similar type of survey in Northumberland as he had done in Madawaska, in accordance with a "Warrant of Survey" he had obtained from Carleton as follows:

> **Pursuant to a Warrant of Survey of this date from his Excellency the Lieut Governor to me directed ordering** "to admeasure and lay out lots not exceeding 200 Acres each at the expence of the [applicant?] in the County of Northumberland for such Persons as are ready in the several districts of that County to make immediate settlement on their respective allotments, **and you are also in the like manner to ascertain the limits of the Indian Villages as near as may be their number of inhabitants at Richibucto and Chibuctouchi**.
>
> You are hereby required and directed to proceed without loss of time and execute the said warrant as above ordered, the respective applicants paying you all charges attending this duty **except the Indians whose Survey will be paid for by the Government.** In addition to your General instructions you will observe the following.
>
> 1st = The 200 Acre lots to be Sixty Poles in front unless where it is necessary to extend them in order to cover improvements which must be secured in all cases to the processor […].

> **11th = You will lay out so much land contiguous to the aforesaid Indian Villages or any others you may meet, as shall appear to you to afford them a sufficient limit, should their claims be extravagant you will only report them, returning only so much as you may judge necessary, but at the same time you must sooth them and endeavor to keep them in temper**[.]

[88] On March 6, 1790, the British Government passed an Order in Council (OIC) regarding "Additional Instructions to Our Right trusty and well-beloved Guy Lord Dorchester Knight of the most honorable Order of the Bath, our Captain Genl. and Governor in Chief in and over Our Province of New Brunswick in America, or in his absence to the Lieutenant Governor or Commander in Chief of Our said province for the time being" (Exhibit 2, Tab 82).

[89] The OIC directs that while Dorchester had been given "full power and authority by and with the advice and consent of Our Council of Our said province to settle and agree with the Inhabitants for such lands, tenements, and hereditaments, as now are, or hereafter shall be in Our power to dispose of […]" this power was to be "wholly suspended for the present" as regards Crown grants for lands where a warrant of survey had already been obtained.

[90] Lord Dorchester then sent Carleton a copy of the Order in Council on May 12, 1790 stating:

> I inclose a copy of an Additional Instruction received here on the 10th instant , xx restraining the farther Grants of lands within the province under Your Government.
>
> You are however to understand, that it is not His Majesty's intention, in any case, where a warrant of survey has already been obtained, that the completion of the grant shall be prevented, or to preclude any claim to a grant of land, founded on any antecedent step that in equity gives a title to such grant.
>
> [Exhibit 2, Tab 83]

[91] According to Bartlett at p.14 "[f]rom 1790 to 1802 the Imperial government imposed a restraining order on all grants for land, thereby precluding grants to settlers or Indians".

[92] Sometime in 1790, George Sproule returned to the Madawaska area to prepare the Grant Plan subdividing the "French Settlements" black-lined land tracts for the purpose of issuing individual land grants to the French/Acadian settlers.

[93] On this Grant Plan (Exhibit 26; Exhibit 2, Tab 88), Sproule laid out 78 lots of approximately 200 acres each, bordering on both sides of the St. John River (exact sizes of these

lots vary, due to the fact of the river's natural boundary edge varies and conceivably, due to the decision to recognize actual improvements and subdivisions made already by the settlers themselves, as explained in the aforementioned Warrant of Survey for Northumberland).

[94] The most westerly Acadian lots are immediately adjacent to the most easterly boundary of the red-lined area shown on Sproule's 1787 Boundary Survey to be reserved for the Madawaska Maliseet's use. That is, the red-lined tract is immediately to the west of the Acadian land grant tract.

[95] Pierre Duperre was the first to receive the Grant (being for Lot no. 38 on Sproule's Grant Plan) (Exhibit 2, Tabs 84 and 88). This Grant for 213 acres was "Given Under the Great Seal of our Province New Brunswick" by Thomas Carleton on June 11, 1790, and registered as no. 210 on June 14, 1790 (Exhibit 2, Tab 84).

[96] All other lots were granted under the Grant to "Joseph Muzeroll and 48 Others", which was "Given Under the Great Seal of our Province New Brunswick" by Thomas Carleton on October 1, 1790, and registered on the 15th day of a month in 1790 (the month is illegible) as No. 226 with the signature of "Jon^{n} Odell Reg^{r}" (Exhibit 2, Tab 88 (transcript)). The Grant was for 11,248 acres in total.

[97] 1780 Sproule Grant Plan shows the 78 lots laid out and a part of the area to the west showing the Madawaska River where it joins the St. John River. The significance of other grants and notations made on this plan will be discussed further under Discussion and Findings.

7. Maliseet Petition for a Grant (1792)

[98] About two years after the Grants were made to the Acadians in the Madawaska region at the behest of Council (who had directed New Brunswick Lieutenant Governor Carleton to see that the Grants were made), the Madwaska Maliseet held a General Assembly and produced a petition dated October 3, 1792, signed by Noel Bernard, Lewis Denis and Simon Xavier and addressed to Governor Carleton.

[99] The Petition heading states, "Simon Fran. Xavier and others in behalf of the Melecite Tribe of Indians ask [for] a tract of land above the Madawaska Settlement" below which is the

statement “complied with 4th Jany 1792” which is crossed out (Exhibit 2, Tab 94).

[100] This October 3, 1792, petition was for a tract of land in the district of Madawaska or at the mouth of the Madawaska River. They requested a “Space of Land for the Establishment of the whole of their Nation, as the same has Granted in all other Provinces”.

[101] The Petition also provided a detailed description referring to specific markers relating to this tract, including: “Birch tree Number thirty-seven…”; and “Spruce Tree Numbered & Marked ‘A’ Nineteen Acres Above the mouth of Madowoiska [*sic*] River in front of the Said River St. Johns [*sic*]”.

[102] The 1792 petition is accompanied by a covering letter from Thomas Costin, dated October 4, 1792. Costin, a Justice of the Peace for the Madawaska Acadian settlement, would have drafted the Madawaska Maliseet petition. Costin’s letter is addressed to “J. Odell Esqr, Secretary of the Province of New Brunswick, Fredericton”, who must be the same J. Odell who registered the aforementioned Grants in Madawaska. Written upside down on this first page is the following: “Indian Applicatn above Madawaska. Received At Madawaska. Dismissed”. A date of the noted dismissal is not indicated.

[103] In his letter, Costin had concluded by stating that “**I imagin [*sic*] that Capt. Sproule hath surveyed**. Therefore, here in Closed [*sic*] his [*sic*] a Memorial to His Excellency **hoping that the same may be Granted**” (emphasis added).

[104] This Permit was submitted during the years that grants were not being granted, unless they had been previously been made under Warrant of Survey (or apparently by Memorial of the Lt. Gov. of NB as was obtained for the Acadians prior to the ban taking effect).

8. Executive Council of New Brunswick Prohibits Sale or Exchange of Lands Reserved for the Use of the Indians

[105] Richard Bartlett in Indian Reserves in The Atlantic Provinces of Canada at p. 30 states that in 1815, the Executive Council of New Brunswick passed an Order prohibiting “the sale or exchange of lands reserved for the use of the Indians”.

> In excess of 100,000 acres had been set aside for reserve lands in New Brunswick by 1810. But the pressures of European settlement were considerable. **The settlers either "squatted" upon the Indian lands or sought by private arrangement with the Indians the right to occupy such lands**. **In 1815 the Executive Council declared:**
>
> > **No sale or exchange <u>of the lands reserved for the use of the Indians</u> will be allowed of and any persons committing a trespass on any of those lands will be prosecuted by the Attorney General**.
>
> [Emphasis added]

9. Joseph Treat's "Journal of Plans & Surveys" Report (1820)

[106] Joseph Treat was surveyor working for the new state of Maine. In his "Journal & Plans of Surveys" dated 1820, on page 7, Joseph Treat wrote an entry on September 16, 1820, indicating that he was instructed by the Governor of Maine, William King, "to proceed up the Penobscot – thence through the Lakes and River St. John, &c, for the purpose of examining and ascertaining the quality of the soil and growth on the Public Land in that vicinity" (Exhibit 3, Tab 111).

[107] Firstly, Treat had visited the "Settlement of French Madawaskians", which he described as follows on page 115 of his report:

> The Settlement of French Madawaskians from Baker's down River extends about 5 miles – […] The rain continues **–** at 5 P.M. **at the confluence of Madawaska and St. John, being dark cannot plan any farther** – **go down 2 miles to monsieur Simobear's – where we arrive at ½ past 5 P.M. where we stay this night** – and after getting supper, I make up my survey and journal from the upper Madawaska settlement down to Madawaska River – At 12 at night having finished I retire very sick with a cold, head ache and fever.
>
> [Emphasis added]

[108] As mentioned in the quote, Treat had lodged with "monsieur Simonbear", or properly spelled, Simon Hebert, who lived "2 miles down" from the "confluence of Madawaska and St. John". On Page 122 of his report, he writes as concerns the Madawaska Maliseet "tract of land" and describe it as being about "1/2 a township" in size:

> <u>Note.</u> The St. Johns Indians hold under a grant from the King of England **a tract of land beginning 1 mile below Madawaska River running 4 miles up the St. John, making 6 miles on that River, thence northerly up the Madawaska about 2 miles making about ½ township. Their town and head quarters for hunting is at and a little below Madawaska_ This tribe consists of about one thousand to 1500 souls_ and perhaps 300 fighting men**_ there are a very few

> of them here now _ Some hunting up the Rivers _ some below, and at Frederickton _ **Some of these cultivate their land keep cows and horses**_ they appear to be very civil and good Indians and are more industrious than the Penobscot Indians _ Many of them speak very good English and are very intelligent _ their principal town is 20 miles below Maducktuk where they have a church _ good houses and farms _ some keep horses. _
>
> [Emphasis added]

10. Surveyor General's Office Records in Chaos and appointment of Thomas Baillie (1824)

[109] Anthony Lockwood was Surveyor General in New Brunswick from 1819 to 1823, until he suffered from mental illness in the spring of 1823 and was arrested after bouts of "erratic violence in Saint John". When Acting Surveyor General George Shore replaced Lockwood in 1823 for about one year, in a letter dated June 14th, 1823, he wrote to the President and Commander in Chief of New Brunswick explain that he found the Surveyor General's Office in a state of disarray:

> […] I have now the honor to report that I have carefully examined the publick documents in the Office of the Surveyor General, and find that, the system established by the first Surveyor General, the Honorable George Sproule, and which has been acted upon by those who have succeeded him, of Recording the Grants as they pass through the Office, and of invariably entering in a Book kept for that express purpose, a particular Description of each, and filing the Copies.
>
> Copies of the Grant plans, has, since the appointment of Mr. Lockwood been generally neglected; and in some instances, the Returns of the Deputy who surveyed the land, has been substituted in the room of the Grant plans a very great number of which are not to be found, and of those that are in the Office, some have been much abused by improper handling, and others so cut and mutilated as to destroy their authenticity.
>
> […]
>
> [Exhibit 3, Tab 116]

[110] In 1824, Thomas Baillie became the Commissioner of Crown Lands and Surveyor General of New Brunswick, and remained in that office for three terms; 1824-1825, 1829-1840, and 1842-1851.

[111] While Shore had recommended that "some fit person should be immediately employed for the purpose of Recording the Grants that have passed since Mr. Lockwood has been Surveyor

General, and also to renew such Grant plans as have been destroyed, or neglected to be made out and filed" (Exhibit 3, Tab 116), Baillie, who took up the post, was described by the *Dictionary of Canadian Biography* as being an "appointment of a young, relatively inexperienced man to a post that was second in importance only to that of the lieutenant governor". Baillie "was criticized at the time, and many years later[,] Sir James Stephen, the colonial undersecretary, described it as having been repayment for 'the services of his father in elections in England'" (Exhibit 8, Tab 394: Dictionary of Canadian Biography, vol. 9, University of Toronto/Université Laval, 2003-, accessed June 9, 2015, http://www.biographi.ca/en/bio/baillie_thomas_9E.html).

11. Unsuccessful Petitions for Land: Joseph Martin and Francis Rice (1824/1825)

[112] The OIC dated March 6, 1790, suspending the issuance of new surveys and associated land grants was no longer in effect when petitions from Joseph Martin and Francis Rice were made in 1824 and 1825 respectively for lands at Madawaska.

[113] In 1824, Joseph Martin unsuccessfully petitioned the colonial government of New Brunswick (then Sir Howard Douglas) for 400 acres "above the land assigned to [Simo. Ebe[re?]] …", i.e. referring to Simon Hebert. Thomas Baillie wrote on the outside of this petition, dated October 19, 1824: "The Situation herein described **is within the bounds of a Tract reserved for the Madawaska Indians, and is ungranted Land**" (Exhibit 3, Tabs 122 and 123; emphasis added).

[114] In July 1825, Francis Rice, a settler from Quebec, resettled at Madawaska and also unsuccessfully petitioned the Lt. Gov. of NB for 200 acres of land "above the Madawaska River and joining the Indian Reserve". The petition states, "[Rice] Humbly prays your Excellency for a Grant: for two Hundred Acres, lying above the Madawaska River **and joining the Indian Reserve**" (emphasis added). Baillie's note made on July 15th, 1825 indicates, that "[t]he Situation herein described is vacant Crown Land, unapplied for" (Exhibit 3, Tab 127).

12. The Alleged Alienations of "Parcel A1" & "Parcel B" to Simon Hebert (1825 & 1829)

a) The Simon Hebert Grant: "Parcel A1" of the Claimed Lands (1825)

[115] In the same year that Joseph Martin unsuccessfully petitioned for land "within the bounds of Tract reserved for the Madawaska Indians", in 1824, Simon Hebert petitioned the New Brunswick colonial government for a land grant near the confluence of the Madawaska and St. John rivers. He did so on the basis that he had allegedly, in 1821, "purchased a tract of the Indians claiming a right to Land" and made certain improvements. The Petition set out as follows, in part:

> The Petition of Simon Ebere Native of Quebec fifty eight years resident in this Province, a Married man
>
> Humbly Sheweth,
>
> That he is a Subject of the British Government, has never received any Land from the Crown with the exception of the Land on which he now resides containing 250 acres on which he has made very great improvements; that in February 1821 he **purchased a tract of the Indians claiming a right to Land surrounding a village formerly settled by them above the French – grants on the East side of St. John River, the tract purchased by him embracing ninety rods front on St. John River and taking in the Falls of the Madawaska River containing 300 acres more or less**.
>
> […]
>
> [Exhibit 3, Tab 119; emphasis added]

[116] The Petition sworn before a Justice of the Peace was witnessed by "P. Duperre", likely being the Acadian who received the Grant registered no. 119.

[117] George Shore, Acting Surveyor General at the time, made a note on this Petition on January 14, 1824 as follows:

> The situation herein described is ungranted Crown Land and embraces a part of the tract which the Indians have been in the habit [of considering?] a reservation for them, but no official record of it is made in this Office.

[118] This note on the Petition was made less than a year after Shore had described the fact that the Surveyor General's Office was in a state of disarray, and oddly, within the same year that Thomas Baillie would later describe the tract as being reserved for the Madawaska Maliseet when considering the Martin Petition.

[119] Another note on page 5 of Hebert's Petition, dated March 5, 1825, states as follows: "Delivered to Mons. Hebert the Deed to Simon Hebert from a Number of Indians which was annexed to this Petition".

[120] On page 7, a sketch of the 300-acre lot was depicted, with handwritten notes indicating that "Simon Ebert Purchase from the Indians", with the title "Indian Reserve" stretching over land located in between the Louis Mercure lot *into* the 300-acre lot being requested by Hebert. The 300-acre parcel lot also stretched onto the west side of the Madawaska River covering the peninsula of land where the St. John and Madawaska Rivers meet (but excluding any claim to the river itself).

[121] On the next page, it is written, as translated from French to English:

> Undersigned [certifies] that **Mr. Simon [Hebert/Eber?], an inhabitant of Madawaska [bought] from the [savages?] of the Madawaska tribe of each side of the [mouth] of the Madawaska River** [Earth/Land?] the [forehead?] of the River Saint John **three hundred acres of land more or less** which is greatly approved of each side of the small River **a good house [established?], barn**, of the [Earth/Land?] [ready?] to plant for [harvest?] the next Year 260 to 300 bushel of [wheat?] or [peas?], another [house?] that [illegible] would be [towards?] on the [left?] side of the Madawaska [face-to-face/facing/next to] **the other house** [face-to-face/facing/next to] the Little Falls of the River given on the 27[th?] of September 1823 Madawaska County [of?] York Province of New Brunswick.
>
> P. Duperre
>
> [illegible] Captain."
>
> [Emphasis added]

[122] A minute "In Council" dated March 4, 1824 (what Council persons were present for this order is not indicated on the document itself), adopted the exact language as used by Hebert himself to describe the land in his Petition:

> Simon Hebert for land near the falls of Madawaska River purchased by him in 1821 February 1821 [*sic*] from the Indians claiming a right to land surrounding a village formerly settled by them above the French grant on the East side of the River St. John said Purchase embracing 90 Rods front on the St. John and taking in the Falls of the Madawaska River and containing 300 acres.
>
> [Exhibit 3, Tab 121]

[123] The Executive Council Minutes then decided that Hebert:

> **May have 250 acres in the situation pointed out, not crossing the Madawaska River** and reserving along the bank of that River a sufficient breadth for a road and other public purposes.
>
> [Exhibit 3, Tab 121; emphasis added]

[124] The formal Grant signed by William J. Odell (Provincial Secretary) and registered by him on May 17, 1825, as No. 1808, included a metes and bounds description of the lands and references "the attached Plan". The attached Plan contains Thomas Baillie's signature and the prominent words, "Indian Reserve", with the word "Indian" on the west side of the Madawaska River and the word "Reserve" on the east side of the Madawaska River between the eastern boundary of the Hebert grant (but this time, not stretching into Hebert's Lot as Hebert had depicted it in his application). The western boundary of Louis Mercure's granted lot is adjacent to Jean Tardiff's granted lot and the granted lots of Pierre Duperre and Augustin Dube are indicated on opposite side of the Saint John River, all in accordance with the 1790 Grant Plan. The remaining granted Acadian lots which can be seen on the Plan are noted as "Granted" (Exhibit 3, Tab 125). Reserved out of the 250-acre lot is a "reserved landing" spot or small parcel of land connecting to right-of-way like parcel along the Madawaska River indicated as being reserved for road purposes.

[125] Hebert was claiming that he had "purchased" a 300-acre parcel of land "from the Indians" that was mainly on the east side of the Madawaska River but also partially on the west side of the Madawaska river covering the peninsula of land at the confluence of the St. John and Madawaska Rivers. Council however, at least at this time, had restricted Hebert's grant to a 250-acre parcel entirely on the east side of the Madawaska River, as evident from the description in the Executive Council Minutes and from the formal Grant's attached survey plan (Exhibit 3, Tab 125).

[126] As for the aforementioned 1790 Grant Plan, the indicated tracing copy of Sproule's 1790 Grant Plan (Exhibit 1, Tab 2) as well as on the document which might be the original but modified or added to post-1825 (Exhibit 26), includes the same 250-acres plot of land for Simon Hebert, though on the version which is indicated as being a copy "Simon Hebert" name is spelt correctly (Exhibit 1, Tab 2), while Exhibit 26 is harder to read but appears to state for "[?]. Ebert". This addition to the 1790 Grant Plan versions must have come after its granting to Hebert

in 1825. Thomas Baillie also added his signature to the 1790 Grant Plan beside where G. Sproule had added his signature. It would have been added after he became Surveyor General in 1824 (Exhibit 1, Tab 2; Exhibit 26).

[127] Though Council did not include the requested peninsula piece of land in the official grant at this time, it is outlined in the 1790 Grant Plan (and in both versions) in what appears to cover the same peninsula of land as depicted in Hebert's own version of the initially requested 300-acre lot. The Parties agree that the peninsula of land is one and the same with the License of Occupation he obtained in 1829 (Parcel B), described next.

[128] Also, it should be noted that on the copy of Sproule's 1790 Grant Plan (Exhibit 1, Tab 2) as well as what might be the original but modified version of the 1790 Grant Plan (Exhibit 26), a Deputy Surveyor in the land office, J.A. Beckwith added this note with an asterisk:

> *Simon Ebert has purchased the right of Indians to the Brook According to Document produced by him. Jany 21st 1826.

[129] It is not entirely clear whether this notation relates to the 1825 Grant (no. 1808), or whether it relates to a License of Occupation granted to Hebert in 1829 (described next), though evidence relating to the latter below, including reference to a "Brook" seems to suggest that the notation relates to the License of Occupation granted in 1829, but the date (1826) might suggest it relates to the Grant. In any event, this notation was clearly added by Beckwith on or after January 21, 1826.

b) Simon Hebert License of Occupation: "Parcel B" of the Claimed Lands (1829)

[130] In a Petition dated June 19, 1829, Simon Hebert subsequently applied for a Licence of Occupation for a period of 21-years for the piece of land on the West side of the Madawaska River he still desired claiming that he had "… in the month of February … 182[1?]… **purchased from the Madawaska Indians their right to a Tract of land** commenced at a marked Elm Tree on the North easterly Bank of the River St. John, and extending up to a certain Brook about forty rods **above the mouth of the Madawaska River** comprising a Front of about ninety Rods" (Exhibit 3, Tabs 136 and 137; emphasis added).

[131] Hebert's intention, as set out in the Petition, was to construct buildings for the

accommodation of travellers and a ferry service as "the Ferry on the Great Road to Canada must be at that place[.]"

[132] Thomas Baillie, still Surveyor General and Commissioner of Crown Lands, endorsed Hebert's petition on what appears below a note "Recd 27 July 1829, See minutes" stating, "I beg to leave to recommend …this Petition be complied with **the Indians having no claim to the land"** (Exhibit 3, Tabs 136 and 137; emphasis added).

[133] In 1829, the colonial government of New Brunswick issued a Survey Warrant to the Surveyor General Thomas Baillie "to admeasure and layout for Simon Hebert a certain lot of land, commencing at the mouth of the Madawaska River, and extending up to a certain Brook about 40 rods above the [same?] on the River St. John […]" (Exhibit 29; emphasis added). According to the Parties, about 19-acres was included.

[134] On the return or outside page of the warrant George Baillie as "Commissioner of Crown Lands" noted on September 1830 that "[t]he within described situation **is not compromised in the Boundaries of any Reserve made for the use of the Crown**[.]" (Exhibit 29; emphasis added).

[135] The Parties agree that this License of Occupation is clearly within the larger red-lined area of George Sproule's 1787 Boundary Survey being Parcel B.

13. Deanne and Kavanagh Report (1831)

[136] On July 11, 1831, John Deane and Edward Kavanagh received instructions from the Governor of Maine to travel through the St. John River territory and report on settlers and their land holdings. Specifically, they were asked to indicate:

> […] at what time and under what circumstances those settlements were commenced, and inquire by what authority the several individuals claim to hold the lands they occupy. If any persons claim under the color of title, you will inquire the origin and extant of such claims and whatever the same is by grant, deed, lease, or other conveyance, and from what authority the same is pretended to have derived, at what time the conveyance was made, and at what time possession was obtained under the same. You will observe what improvements the several occupants have made on the land they claim and ascertain whether such improvements were made by the present occupants, or others to whom they have succeeded, by purchase inheritance, or otherwise.

[Exhibit 3, Tab 144]

[137] The report prepared by Deane and Kavanagh to the Governor of Maine made references to the Madawaska area as follows:

> 6. 372
>
> The next possession on the north bank is claimed and occupied by John Harford and his son, Phinehas [Randall?] Harford. **John Harford says he began on the lot in 1816 –**
>
> **He also says that he began to clear at Madawaska point in 1815 and was encouraged to do so by Simon Hebert** – ['X' marked in pencil] **He cleared two acres, built a log house, and remained there during the year, but at length was driven away by Simon Hebert and the Indians**. – **Hebert refused to pay him any thing for his improvements and now has the lot in possession** – We were subsequently informed that Harford had sold his claim to John Baker.
>
> […]
>
> 40. 406
>
> Pierre Lizotte futher says, that his native place was Canada, and that he, at the age of 14, came through the forest, and spent the winter with the Indians at Madawaska, returned in the spring, and his half brother, Pierre Duperre came with him the next season, and they established themselves there. **The Indians were of the tribe called Maréchites and consisted of 250 families, but are now reduced to 5 or 6 families**. A Catholic priest used to visit and spend six weeks with them annually.
>
> The grant consists of [illegible] extending from near the mouth of Green River to the Indian settlement or one and an half or two miles below the mouth of Madawaska River.
>
> […]
>
> 42. 408
>
> [At bottom of page]
>
> Next – The Indians have 3 or 4 houses apparently as commodious and comfortable as many of the houses of the white inhabitants, and have 20 or 30 acres of cleared land. There are only 5 or 6 families, the remnant of a tribe, which was numerous when the white's first began the settlement at Madawaska.
>
> Next – **Simon Hebert has a deed from the British dated May 16, 1825 of 250 acres of land with an** [page 43, #409; At top of page] **allowance of 10 per cent for waste land and roads.**

> Next. Madawaska river. This river flows from the Temiscouata Lake. It is crooked and estimated to be 28 miles long, and its average breadth is 20 rods. At its mouth there is a fall of about 4 feet, and with the exception of that fall is boatable its whole length. There are 2 Islands below the mouth of the river not valuable.
>
> 44. 410
>
> [at middle of page]
>
> **We now return to the mouth of Madawaska river**, and continue our account of the possessions on the North bank of the St[.] John.
>
> **The first lot, bounded Easterly by the Madawaska and Southerly by the St[.]John, is the place where John Harford began to clear** and which John Baker claims, as is mentioned in the former part of this report**. It is said, that Simon Hebert has a late grant or some certificate frome** [*sic*] **the British of it, and under which he claims it.** He is clearing the land. **The Indians had built 2 houses on it, one a very good one equal to half the dwellings of the French and lived in them. We were told, that Simon Hebert, last year or the year before, by the aid of a British civil officer, turned them out, and now has the possession of the houses and cleared land. The mouth of the Madawaska was the head quarters of the Indians.** It is due to justice - before any adjustment is made of Simon Hebert's claims or of the claims of his Sons, Simonet and Joseph, all of whom declined giving us any account of their possessions, that they should be thoroughly investigated, and wrongs, if any, righted.
>
> [Exhibit 3, Tab 144; emphasis added]

[138] This report challenges the claim made by Hebert to the Government of New Brunswick that he had purchased his initially requested 300-acre tract of land from willing Madawaska Maliseet sellers. The improvements Hebert allegedly could also be the same "2 houses" that "Simon Hebert, last year or the year before by the aid of a British civil officer, **turned them out, and now has the possession of the** houses **and cleared land**" (emphasis added).

[139] Edward Kavanagh's private journal dated July 11, 1831, stated in part that (starting at page 5):

> […] **The Indians who were formally settled at the Mouth of Madawaska and of which so small a remnant remain were called Marichites and so late as fifty years ago they were numbered as high as 250 families**. The tribe has been dispersed by emigration: they then had periodical visits from Canadian Missionaries. The Acadians who first settled this Country about 48 years ago were descended from those who were settled in Nova Scotia before the banishment of 1755. A few Young Men escaped to Canada others to the Baye du Chaleurs. After the cession of Canada to Great Britain in 1763 they established themselves at what they called the Parish of St. Anne now Frederickton. In 1784 [t]hey had made considerable improvements had cleared up land, built houses

> and [illegible] stock. But their lands were divided among the Soldiers of a British Regiment commanded by one Lee. They remonstrated and as an act of special favour they were allowed to retain 200 feet square of land around their dwelling houses. They refused this boon and again started for some other settlement. **At first two families came here; they were followed the next by twelve men and in 1790 they received from the British Government a grant of the lands which they had occupied, 200 acres or thereabout: this grant extended to about 20 families** […].
>
> Aug 9th – We were called on by Simon Hebert who had refused answering our inquiries = he appeared to labour under great anxiety. He called me aside: we talked half an hour together = he wished me to say in the report that he had given as a reason for not rendering an amount of his possessions that the dispute about territory had not been decided &c &c . I answered that I could not put anything in the report contrary to the dignity of the State &c.
>
> [Emphasis added]

[140] According to the information provided to Kavanagh, the latter Acadian settlers would have arrived in the area in about 1783, the year it had been reported that "Mercure, the Acadian" had "came lately into this Province as a Guide […]"(Exhibit 1, Tab 37). And evidently, they had cleared land and built homes by 1784, and received their grants to their 200-acres lots of thereabout in 1790, as also confirmed by the above historical documents.

[141] "Fifty years ago", when the Madawaska Maliseet families were reported to be "numbered as high as 250 families", would have been around the year 1781. If this information too was fairly accurate, 1781 or so would have been only six years before the Sproule Boundary Survey of 1787. Sproule on his Communication/Postal Route Survey had indicated that the Madawaska Maliseet numbered about 60 families.

14. Alleged Alienation of "Parcel A2": John Hart Grant of 100 acres (1860)

[142] John Hartt was a settler who had squatted on the Madawaska reserve for decades before receiving his grant. This might be the same John "Harford" that Deane and Kavanagh mentioned in their 1830 report. He ran an entertainment house and sold liquor**.** In his petition dated February 12, 1853, John Hartt acknowledged that he was on "a small portion of the reserve"… "now called the Indians land".

> **That the lot of land comprises only a small portion of the reserve** and least valuable for agricultural purposes of which is now called the Indian lands included in the area of 30 rods and extending along the upper side of the same lot and containing 70 acres not more of which are fit for agricultural purposes the rear being a mountain about 9 acres between the river and highway and including 8 acres of the flat.

[143] The Petition refers to Hartt having a conversation with the Surveyor General Thomas Baillie who informed Hartt that "there would be no difficulty on the part of the Government in his settling there safely if he could arrange [for the land transaction directly] with the Indians":

> That in the autumn of 1849 your petitioner intending to settle in the vicinity of Little Falls in the upper part of the Madawaska settlement **had a conversation with the Honourable Thomas Baillie the Surveyor General relative to the lot of land on which he now resides** and was informed that the land could be then sold in the Madawaska settlement **but Mr. Baillie referred to the Indian residing thereon stating that there would be no difficulty on the part of the Government in his settling there safely if he could arrange with the Indians**.
>
> [Exhibit 7, Tab 307; emphasis added]

[144] Hartt claimed in his Petition that he had "applied to Louis Bernard residing thereon and who had there lived then sixty-years having succeeded his father in the possession and Bernard agreed to rent your petitioner the present allotment for seven pounds ten shillings per year for two years and after the expiration of the lease your Petitioner agreed with him for the purchase of the title thereto which title was subsequently [executed?] by the said Bernard and his only son John Bernard and your petition has paid upwards of one hundred pounds [therefor?] as the Indians can testify".

[145] Hartt argued that he occupied the lot "long before the Treaty of Washington was settled" but "which the Indians [initially] occupied …upwards of eighty years having lived thereon and cultivated the flat and cut wood and timber from the highlands". He claimed, under the provisions of that treaty, he should have had a grant, given the improvements he said he made to the land. Hartt was bringing his Petition for a grant because he said he was being threatened with legal action by the Attorney General as a "trespasser", and "unless he make terms with the Government he [would continue to] be dealt with as such".

[146] On March 17, 1853, R.D. Wilmot wrote to the Crown Land Office enclosing a copy of the Petition from John Hartt "praying for a Grant of a **part of the Madawaska Indian reserve**"

and references that he was directed by Lt. Gov. of NB to request the Indian Commissioners to report thereon (Exhibit 7, Tab 307; emphasis added). In reply, letter to R.S. Wilmot, dated 23 April 1853, Indian Agent John Emmerson wrote:

> In answer to yours of 17th [?] March I beg to report the following facts elicited from the Indians and other parties regarding the Indian reserve to the village of Edmunston. Lewis Bernard states that in the spring of 1842 John Hartt applied to him for a lease of a piece of ground one acre square and that he agreed to allow Mr. John Hartt to occupy the ground at the rate of 5 pounds per year.
>
> That in 1845 John Hartt applied to him for another acre of ground stating at the same time he wanted it for a place for Mr. James Tibbetts to build a store upon. That he allowed him to occupy the ground for that purpose at the above rates of 5 pounds per annum and in 1850 he allowed Mr. Hartt to occupy another half acre at the above rates.
>
> That he received from Hartt some years L15 and others L18 and one year he received L20 for all the hay cut on the interval. Mr. Hartt never gave the Indians one farthing for nothing either to pay doctor or priest for the… but that was deducted from the above rent. **Mr. Hartt applied to him Bernard repeatedly to dispose of a part of the reserve and to deed it to him. That he constantly refused Mr. Hartt telling him that the ground was reserved for use of the Indians and could not be sold**.
>
> **Lewis Bernard and the other Indians residing on the reserve declare that they do not wish the government to dispose of any part of the reserve.**
>
> [Exhibit 7, Tab 310; emphasis added]

[147] John Hartt received a grant from the New Brunswick government on April 11, 1860 for 100 acres of land on the Madawaska Indian Reserve adjacent to Simon Hebert's lot (Exhibit 7, Tab 340). He was granted lot number one according to H.M. Garden's survey of 1842.

C. Treatment of Indian Reserves (Post-1838/1840)

1. Moses Perley Report (1842)

[148] In 1841, Moses Perley was appointed as the first Indian Commissioner by Lieutenant Governor Colebrooke to conduct a personal visit to the areas of New Brunswick where the Indians live and report back. Until the appointment of Moses Perley in 1841, there were no civil servants with special responsibility for dealing with the Indigenous peoples in the colony of New Brunswick. The government had taken little interest in these lands reportedly reserved for the use of the Indigenous inhabitants, to the point that it did not know, in any systematic way, and to

varying degrees, where the reserves were, how large they were, or how they had been created and set aside.

[149] As described in para 122 of the Claimant's Factum, an interest in the reserves in the Province in the late 1830s originated in a desire to find more ways to raise Crown revenue, as opposed to a desire to protect them from alienations:

> In 1837, under the *Civil List Act*, the New Brunswick Assembly was given control of provincially raised revenues from Crown Lands and management of ungranted Crown Lands in exchange for agreeing to pay the salaries of all colonial government officials. However the law officers of the Crown concluded that reserves were excluded from the *Civil List Act*.
>
> After the Assembly was granted control of Crown Land revenue, it was interested in knowing the extent of Crown Lands and those lands on which there were restrictions, such as Indian Reserves. Thus on January 24, 1838, the Assembly asked Thomas Baillie for a list of Indian Reserves.
>
> [Exhibit 20, Tab 2; Exhibit 4, Tab 162]

[150] Perley's Report to the Lieutenant Governor dated January 1, 1842, entitled *Reports on Indians Settlements, &c.* reported on all of his visits "where the Indians live" (Exhibit 5, Tab 186). Moses Perley had heard of a settlement of Madawaska Maliseet Indians in the area of the confluence of the Madawaska and St. John rivers and proceeded to visit them.

[151] In his report, Perley had several negative things to say regarding Simon Hebert's dealings with the Madawaska Maliseet. With respect to Hebert's claim to Parcel A1, where he reported to have purchased a 300 tract from the "Indians", Perley reported that Hebert's "purchase" was for 9 acres and not 300 acres as alleged. With respect to the area for which Hebert received his Licence of Occupation on the west side of the Madawaska River, Perley reported that a Maliseet individual, Pierre Denis, had a house on the west side of the Madawaska River, and that he refused to give up his possession to Simon Hebert. An order was passed that Hebert "should pay to Denis a certain sum for his house, which was appraised at fifty dollars, and on the promise of that sum being paid, Denis quit the land in 1837". Perley was so upset at Hebert's actions that he wrote: "On behalf of the Indians, I claim the land now held by [Simon Hebert] under the License of occupation, and pray that he may be compelled to pay Pierre Denis the sum due by appraisement for his improvements, or else allow him to re-occupy them".

[152] The version of Perley's report published in the Royal Gazette of the extract written by the Private Secretary on 12 August 1841 added: "He complained to me that the fifty dollars had never been paid him, and begged me, while at Madawaska, to call on Mons. Hebert for the amount. I did so, and although Mons. Hebert is rolling in wealth, he laughed at the demand, and declared that he would never pay a single sum".

[153] Perley also reported on his meeting with Pierre Denis and the Madawaska Maliseet member Louis Bernard, who was in his sixties. They told Perley that when Bernard was a youth, the Madawaska Maliseet's were occupying land on both sides of the Madawaska River and Bernard proceeded to describe this tract of land they had occupied.

[154] In 1838, at the New Brunswick Executive Council Committee meeting, the Committee members passed a motion asking the Commissioner Crown lands and Surveyor General's office to set out:

> What lands were reserved for the use of the Indians in this province, where situated, the time such reserves were made, the nature of the reserves, and the particular tribes of Indians for whose benefit such reserves were respectively made.

[155] Apparently, the Executive Council of the New Brunswick colonial government did not have this information. In fact, this was the first attempt by the colonial government to catalogue what lands were reserved for the Indians in New Brunswick. The request for a list of reserves in 1838 also came at a time when interest in Britain in Indigenous peoples had increased, and the Imperial government sought reports on their condition in all British colonies.

[156] Accordingly, the then Commissioner Crown Lands and Surveyor General, Thomas Baillie, prepared the first such Schedule on January 31, 1838 and submitted it to the New Brunswick government, admittedly within a seven day period from the date of the request, and 51 years after Surveyor General Sproule's Survey Plan of 1787.

[157] Baillie's Schedule lists 13 separate tracts of lands under four separate Counties. As concerns how the reserves came to be created, the information provided at the time was porous:

- 9 of the reserves are listed without any reference as to how those reserves came to be or "recognized" as reserves other than that the tracts referred to were reported to be "occupied" or "inhabited" by a band of Indians;

- 2 reserves were listed as being "occupied" by a band but Baillie reports that "no record appears";

- Only 1 reserve had been surveyed and an Order in Council had been passed with respect to that reserve.

[158] Baillie did not include a reserve for the Madawaska Maliseet in this Schedule. Despite Baillie's acknowledgement of an Indian Reserve for the Madawaska Maliseet in 1825 according to the Plan affixed to Hebert's Grant which he signed, 13 years later, Baillie prepared this first Schedule of Indian Reserves leaving out this reserve.

[159] Bartlett states that the reserve was included in the 1938 Schedule of Indian Reserves, however, he is an error in that regard, as it was not listed in this first Schedule produced by Thomas Baillie, Surveyor General. In connection with this list, Baillie had noted that Indian reserves remained "ungranted" Crown lands and that their nature was simply "to occupy and possess during pleasure" (Exhibit 4, Tab 163).

[160] In 1840, Thomas Baillie had been temporarily suspended from his duties as a result of his financial issues and was replaced by John Saunders. In 1841, Surveyor General John Saunders, reported to the Lieutenant Governor on the lack of important information regarding the Indian reserves, and on the issue of settlers squatting on the reserves.

[161] IR No. 10 was first listed in the 1842 Schedule of Indian reserves with an approximate acreage of 700 acres. The full title was "Schedule of **Reserved** Indian Lands, in the Province of New Brunswick" (emphasis added). The description of the reserve provided was "East side of River St. John below the Grant to S. Hebert, near the mouth of the Madawaska River" (Exhibit 5, Tab 191).

[162] Saunders report again highlights the fact that the information regarding the Indian reserves was still incomplete. In many cases, boundaries of the reserves had not been surveyed

and consequently, squatters settling on Indian lands continued to be a problem. Furthermore, while the problem of encroachments was persistent and well known, the Crown stood idly by as it happened, the Indian Commissioners not having been given the power to enforce and prosecute known trespassers.

[163] In the *Schedule of Lands Reserved for Indians* attached to John Saunders report, he also did not list a reserve for the Madawaska Maliseet's in the County of Carlton. Even though the reserve for the Madawaska Maliseet is not shown, however, under the Appendix entitled: *Return of the number of persons who have settled upon and occupy portions of the Indian Reserves in the Province of New Brunswick, 1811, under Carlton County, Madawaska,* Saunders reports that there are between 1 and 17 "squatters".

[164] It appears that as a result of Indian Commissioner, Moses Perley's report of a Maliseet settlement at Madawaska, the subsequent 1842 Schedule of Indian Reserves, listed a 700 acre reserve for the Madawaska Maliseets.

[165] In the Journal of the House of Assembly of 1843 in the *Schedule of Reserved Indian Lands*, a 700 acre reserve is listed near the mouth of the Madawaska River. Under the Appendix, one person is listed as a squatter on that Reserve.

[166] In 1842, under the direction of John Dibblee, Indian Commissioner for Carleton County, Deputy Surveyor, H.M. Garden sketched out a 1600 acre reserve for the Madawaska Maliseets, which he marked out into 8 lots of 200 acres each, situated between Simon Hebert's grant on the west and the Mazorelle grants on the east. Garden's survey was of the Madawaska reserve titled, "Sketch of a survey of eight lots on the Indian Reserve near the mouth of the Little Madawaska River as per direction of John Dibblee Esq. Commissioner" (Exhibit 5, Tab 184).

[167] Garden's survey added a boundary line at the back of the reserve that was well beyond the boundary line at the back of Simon Hebert's lot and what Sproule had demarcated as the north boundary of the reserve. Garden did not include the small parcel of land on the west side of the Madawaska River adjacent to the St. John River where Hebert had received his License of Occupation in 1829. This survey added roughly 800 acres to the reserve and what the Claimant claimed in the alternative, as Parcel C.

[168] A further development affecting Indian reserves occurred in 1844. As summarized at paras 144-145 of the Claimant's factum:

> On 13 April 1844 the New Brunswick government passed *An Act to regulate the management and disposal of the Indian Reserves in this Province* in 1844. It legislated the reduction of Indian Reserves, whereby the Indians would receive between five and fifty acres of reserve land for the "exclusive benefit of the Indians", and the remainder, considered excess, would be sold or leased to settlers through auction upon being advertised in the *Royal Gazette*. An 'Indian fund' was to be established from the proceeds.
>
> The opinion provided by the Attorney General and Solicitor General on 22 February 1842 suggested that:
>
> > The Executive Government should not sell any of the Lands thus reserved for the benefit of the Indians except by Instructions from the home Government, but they will be quite justified in Leasing any part or parts thereof at a reasonable rent – And we do not think they can with propriety be made subject of Legislative Interference.
>
> [Exhibit 6, Tab 256; Exhibit 5, Tab 188]

[169] Members of the Legislative Assembly were divided about the Act, for example, between its supporters Robert Hazen and John Ambrose Street and, Moses Perley and Lieutenant Governor William Colebrooke who were against it.

[170] A suspending clause had been added to the 1844 Act, under section XIII:

> And be it enacted, [t]hat this Act shall not come into operation until Her Majesty's Royal approbation shall be thereunto first had and declared.

[171] On 13 June 1844 Lord Stanley wrote to Colebrooke:

> you are invested with extensive powers in respect to the leasing or sale of the lands of the Indians, I think it right to guard you against giving too great facilities in the alienation of their property.

[172] The government's intended sale of lots from the Madawaska reserve did not result in any actual sales. As Dr. Cuthbertson provided in his evidence, the legislation failed for a variety of reasons and never resulted in actual sales of the reserve at this time.

[173] A further illustration of the confusing and incomplete and inaccurate records of colonial New Brunswick, relates to the reported acreage of the Madawaska Maliseet reserve. I note that the first schedule that listed the Madawaska reserve in 1842 describes the reserve as consisting of

700 acres.

2. Surveyor General Beckwith Survey (1860)

[174] In 1860, Deputy Surveyor Charles Beckwith completed a survey of the Madawaska reserve which he titled “Plan of the survey of the Indian Reserve at St. Basil Victoria County now Madawaska County N.B”. He drew in eight lots which he numbered from west to east. John Hartt’s 100 acre grant was shown as Lot 1.

[175] Beckwith drew a boundary line at the north end of the reserve that lines up with the north boundary line of Simon Hebert’s grant immediately to the west. This makes the reserve much smaller in size from the reserve shown on the Garden survey. Beckwith drew the “Post Road” or Communication Route passing through Simon Hebert’s lot and the Madawaska reserve.

III. EXPERT OPINIONS

A. The Claimant’s Experts

1. Dr. William Parenteau

[176] Dr. William Parenteau was retained as an expert for the Claimant and he prepared two reports that have been filed dated October 10, 2014 and November 4, 2015 (Ex-17 and Ex-18 respectively). Dr. Parenteau has a PhD in Canadian history from the University of New Brunswick where he is a professor. He is currently the Director of Graduate Studies in the Department of History at UNB.

[177] Dr. Parenteau has previously testified as an expert witness in lands claims and treaty rights cases. He has served as the editor of the journal, *Acadiensis: Journal of the History of the Atlantic Region.* He has also made numerous conference presentations on Native issues and published a number of papers on Native issues in the Atlantic provinces.

[178] Dr. Mancke is a colleague of Dr. Parenteau and worked with Dr. Parenteau in the research and preparation of his reports prepared for this Claim. Unfortunately, due to ill health, the Claimant informed the Tribunal that Dr. Parenteau would not be able to testify at the hearing and the Claimant proposed to have Dr. Mancke testify in place of Dr. Parenteau. Canada’s counsel agreed that Dr. Mancke could testify as an expert who had contributed to

aforementioned reports.

2. Dr. Elizabeth Mancke

[179] Dr. Mancke is a historian of British North America with a specialization in the period 1600 to 1840 on those parts of British North America that became Canada and more specifically, Atlantic Canada. She has published in Indigenous History and the history of settler societies in Acadia, Nova Scotia, New Brunswick and New England.

[180] Dr. Mancke stated that Lord Dorchester's letter to Lieutenant Governor Carleton in 1787, acknowledged the Crown's recognition of the tension arising from the displacement of Indigenous peoples and the need to make accommodations to keep the peace in the region.

[181] In the summer of 1787, it was hoped that the Surveyor Generals from Quebec and New Brunswick could agree on the location of the Quebec/New Brunswick border. This they were unable to accomplish, and New Brunswick's Surveyor General, George Sproule carried on to survey the region for a communications route and produced his 1787 Boundary Survey.

[182] This Boundary Survey, prepared by George Sproule in 1787, shows the boundaries of the lands reserved for the Maliseet at Madawaska, as well as the tracts where Sproule would subsequently survey the individual lots for the Acadians and Canadians who received a group grant in 1790.

[183] She noted that George Sproule's Communication Plan prepared that same summer with the assistance of the Maliseet, included numerous notations based on evidence the Maliseet had provided, an indication of his frequent consultation with them, if not their active inclusion in the surveying.

[184] Dr. Mancke testified that Sproule's 1790 Grant Plan formed the basis for the grants to Joseph Muzeroll and the other Acadian settlers. Dr. Mancke believes there is no question that Sproule had labelled the area northwest of their lots "Indian Reserve" in 1787, and in the same location he had put it on his 1787 Boundary Survey, though "Indian" on the west side is crossed out and moved over. It is her opinion that this crossing out and moving over was likely done by Thomas Baillie.

[185] She believes that by marking the area of the “Indian Reserve”, Sproule defined the western edge of the settler lots and their relation to Maliseet land, and documented the Crown’s acknowledgement of an Indian Reserve at Madawaska. A portion of the Reserve’s southeasterly boundary is delineated, namely the boundary with the French grants, but the other boundaries are beyond the edges of the paper on which the Grant Plan was drafted.

[186] It was her opinion that this designation followed the policy of the Surveyor General’s office that where Indigenous peoples had villages, such as at Madawaska, those lands were to be given priority and set aside before the surveying and granting of settler lots. Thus the Grant Plan for the Muzeroll lots needed to acknowledge the adjoining Reserve.

[187] Dr. Mancke presented what she considered to be substantial evidence corroborating how the 1787 Boundary Survey and the 1790 Sproule Grant Plan came into existence, their importance to decisions made by officials in New Brunswick over subsequent decades, and their relevance for documenting the existence of the Reserve for the Maliseet in Madawaska.

[188] Her list of “corroborating evidence” began with an executive decision in Quebec in 1765 that recognized Maliseet claims in the Madawaska area, an early British administrative decision, her analyses of the significance of the 1787 Sproule Boundary Survey and the 1790 Grant Plan, concluding with the 1842 “Schedule of Indian Reserves” which recognized what remained of the reserve at the time.

[189] Dr. Mancke discussed how the traced copy of Sproule’s Grant Plan (Exhibit 1, Tab 2) was in her opinion prepared in consulting the original Grant Plan from 1790 (Exhibit 26), though that version includes with several alterations, additions and deletions which involve the Hebert Grant and License of Occupation post-1825. With respect to the signatures that appear on the copy, Dr. Mancke stated that, George Sproule’s signature on the Grant Plan was in his handwriting, and J.A. Beckwith and Thomas Baillie (later Surveyor Generals), signed the copy of Sproule’s Grant Plan likely when Baillie had overseen the Grant and License of Occupation instruments.

[190] At one or more times, notations were also added to the copy of Sproule’s Grant Plan. One changed notation including an alteration to the extent of the “Indian Reserve” from the original

Grant Plan. As well, on the copy, on the west side of the Madawaska River, someone wrote in "New Brunswick has no jurisdiction here". In Dr. Mancke opinion, the Council gave Hebert a license of occupation on the west side of the river, demonstrating that it had *de facto* jurisdiction.

[191] With reference to the 1842 Schedule of Indian Reserves, Professor Mancke noted that the Madawaska Reserve was listed at 700 acres, approximating what is indicated on the copy of the 1790 Grant Plan. However, as she had stated, on the original 1790 Grant Plan, the "Indian Reserve" spanned the Madawaska River. The original also testifies to bureaucratic attempts to change prior agreements between the Crown and the Maliseet with overwriting and later annotations. However, the original labelling on the 1790 Grant Plan remained, albeit with crosshatching over it; the original labelling of the Reserve is, however, still legible. The 1787 Sproule Boundary Survey however remained untouched, and it showed that the tract of land demarcated for the use of the Indians included lands on both sides of the Madawaska River, and both sides of the St. John River.

[192] The red-lined tract was approximately 3,930 acres and appears to have remained intact until the 1820s. At times, the New Brunswick government was complicit in the alienation of specific parts of the reserve, as with Simon Hebert's grants. At other times it feigned ignorance, as with the 1838 and 1841 Schedules of Indian Reserves prepared by the Crown Lands Office.

[193] Through the 1840s and 1850s, various offices of the New Brunswick government actively sought to dispossess the Maliseet of most of the Madawaska Reserve, but were persistently challenged, but most particularly by Louis Bernard. Louis Bernard had lived there his whole life, as had his father, and had been a young man when Sproule laid out the tract of land required for the use of the Indians. In May 1861, at around 90 years of age, Louis Bernard petitioned Lt. Gov. Sutton that he not be dispossessed in the last years of his life. Over his lifetime 80 percent of the original reserve had been alienated, contrary to Crown policy.

[194] Professor Mancke in her direct testimony was of the opinion that George Sproule in demarcating the red-lined tract with his words that this was the tract required for the use of the Indians, was of the opinion that Sproule, as Surveyor General "created the reserve" for the Madawaska Maliseets. In her cross-examination, she changed her opinion and stated that Sproule did not create a reserve by the red-lined area and his words that were on his 1787 Boundary

Survey, but Sproule was only making a recommendation that a reserve be created.

3. Dr. Brian Cuthbertson

[195] Dr. Cuthbertson, in addition to his PhD, has an M.A. in Atlantic Provinces history. He worked as a government Record Archivist in the Public Archives of Nova Scotia for 10 years. He has acted as a historical researcher for Specific Claims and is the author of historical publications.

[196] Dr. Cuthbertson was retained by the Claimant to research and prepare a report on the effect of the 1844 New Brunswick legislation pertaining to Indian Reserves in that province. This proposed legislation was to regulate the management and disposal of Indian reserves in the province.

[197] Dr. Cuthbertson described the issues facing Lieutenant Governor Colebrook at the time where squatters had occupied parts of Indian Reserves and there was a proposal to sell those parts of the reserves that were not being used for agricultural purposes with the intent to use the money from the sales to assist the Indians.

[198] He also described the plan for the appointment of Indian Commissioners for each county to look after the reserves, to visit them and to ascertain the extent of the squatter occupation.

[199] This led to the engagement of H.M. Garden to survey and prepare a sketch of 8 lots on the Madawaska Maliseet reserve. Dr. Cuthbertson reported that the Madawaska Maliseet Indians, however, were averse to the disposal of any of their lands.

[200] According to Dr. Cuthbertson, the proposed sale did not result in any actual sales. The government's attempt to implement the proposed legislation, supposedly for the benefit of the Indians, and to deal with the prevailing squatter problem, had mostly ended in failure. However, the fact that the reserve was eventually surveyed with clearly defined boundaries would have inhibited further squatting by the settlers.

4. Andrea Bear Nicholas

[201] Professor Bear Nicholas is Professor Emeritus, St. Thomas University, Fredericton, New

Brunswick and previously served as Chair in Native Studies at St. Thomas University. She is a member of the Maliseet, Nekotkok (Tobique First Nation). She is a Maliseet scholar who was qualified at trial as an expert for the Claimant on Maliseet history, society, and relationship with the British Crown.

[202] Professor Bear Nicholas authored published articles in the University of New Brunswick Law Journal, including one entitled, *"Mascarene's Treaty of 1725"* and one published in the Maliseet Aboriginal Reports entitled, *"Maliseet Aboriginal Rights and Mascarene's Treaty, Not Dummer's Treaty"*. Both of these articles were attached to her expert's report entitled, *Report on the History of Maliseet Treaties with the Crown* filed in these proceedings.

[203] Professor Bear Nicholas described the early history of the Maliseet people living on the shores of the St. John River and how their lives were changed for the worse after European contact due to war, disease and famine, that drastically reduced their population.

[204] Families from across the watershed of the St. John River would gather regularly to hold Grand Councils conducted by the Chiefs who spoke on behalf of their families.

[205] She described the importance of the treaty relationship for the Maliseets as being the most important aspect of the treaties entered into.

[206] As the Maliseet culture was an oral one, totally dependent on memory, this meant that periodic reaffirmation of the relationship was needed to negotiate the details of changing circumstances. The Treaty of 1725/26 became a template upon which successive treaties were built. It was not only about peace and friendship, but about mutual respect for two very different modes of life.

[207] Professor Bear Nicholas stated that according to the Treaty of 1725/26, the Maliseets would respect any settlements "lawfully made" and the British would respect the Maliseets in their hunting, fishing and planting grounds. This mutual exchange would respect the Maliseet's mobile form of life, which involved a yearly round of activities in various parts of the areas they used. The only way that peace would prevail was that neither party would molest the other in their respective forms of life.

[208] With the large influx of Loyalist settlers, some of whom squatted on the Indian lands, the granting of lands that were Indian lands, was contrary to the treaties. As a result, the Maliseets wanted assurance that at least some of their lands bordering on the rivers would be reserved for their use.

[209] Professor Bear Nicholas disagreed with Dr.Wicken's opinion that colonial government officials were not predisposed to create a reserve for their "former enemies". She said that the Madawaska Maliseet had been neutral or had in fact supported the British in the conflicts.

[210] She also testified that there were three main gathering places along the St.John River that were important to the Maliseet people, and Madawaska was one of them (the others were Meductic and Ekwpahak [Fredericton]).

B. The Respondent's Expert: Dr. William Wicken

[211] DR. William Wicken has a Ph.D., Canadian History and is a Professor in the Department of History, York University.

[212] He is the author of:

> *The Colonization of Mi'kmaw Memory and History, 1794-1928, The King v Gabriel Sylliboy. Toronto: University of Toronto Press, and, Mi'kmaq Treaties on Trial: History, Land and Donald Marshall Junior. Toronto: University of Toronto Press. Reprinted 2008, 2011, and 2012.*

[213] He has also co-authored in 2004, with John G. Reid, Maurice Basque, Elizabeth Mancke, Barry Moody, and Geoffrey Plank, *The Conquest of Acadia, 1710: An Interpretive and Contextual History*. Toronto: University of Toronto Press.

[214] Dr. Wicken has extensive expert testifying as an expert witness in numerous cases, particularly Aboriginal Rights and Title cases in the Maritimes, and in many cases he has testified on behalf of a First Nation or First Nation organization.

[215] Dr. Wicken prepared several reports in this case for Canada, dated September 30, 2014, August 31, 2015, December 30, 2015, and June 2017, each in response to the Claimant's three experts' own reports.

[216] Based on an examination of extant documentation and the context in which the Sproule's Boundary Survey was undertaken, Dr. Wicken concluded that the government did not reserve lands for Malecite use at the confluence of the Madawaska and St. John Rivers in 1787 or shortly thereafter. It was his opinion that the government would not have confirmed the reserve at this material time. It would however be first recognized by the government in the 1842 Indian Reserve Schedule, as described before. This act of recognition thus "created" the reserve in 1842, at which point, the reserve was estimated to be about 700 acres large.

[217] Dr. Wicken sets out five reasons for his opinion:

[218] Firstly, Sproule's notation on the map only shows that the Indian community asked that land be reserved and that it is reasonable to assume that Sproule communicated this request to the Lieutenant Governor. But since there is no indication that any land was reserved at this time, we can only conclude that Lieutenant Governor Carleton rejected the request, or at least, at this time.

[219] Secondly, five years later, the Malecites petitioned the colonial government for a grant of land at the mouth of the Madawaska. If the government had reserved land for Malecite use following Sproule's Boundary Survey in 1787, then why, we would ask, did they again submit a request for land five years later? The only logical conclusion in his opinion is that land was not reserved in 1787 and this was the reason why the Malecites made another request.

[220] Thirdly, if land had been set aside, as European settlement of the area increased and settlers encroached on their reserve, the Malecites would have complained to colonial officials, which in Dr. Wicken's opinion, no such complaints were made.

[221] Fourthly, given the strategic location of the Madawaska River for traveling to and from Quebec, Dr. Wicken was of the opinion that the colonial government would not likely reserve land for Malecite use at the mouth of the river, especially since some Malecite had sided with the American rebels, just a few years before. By relinquishing control of the land adjacent to the route between Fredericton and Canada, Carleton would have placed the new colony in a potentially vulnerable position.

[222] Fifthly, according to Dr. Wicken, "[t]he Government had not declared an intention to

create a reserve in the area before 1842 because the population of the Malicite fluctuated considerably" (Ex-25, report dated September 10, 2014 at p.8, para 54).

[223] In sum, Dr. Wicken opined that the notation which the Surveyor-General, George Sproule wrote on Boundary Survey of the Upper St. John River in 1787 cannot be used to show that a reserve was created for the Madawaska Malecites at the confluence of the Madawaska and St. John Rivers.

[224] With respect to the "Peace and Friendship" Treaties, Dr. Wicken disagreed with the opinion of Professor Andrea Bear Nicholas as he was of the opinion that the neither the treaties the Maliseet made with the British Crown between 1725/26 and 1778, nor the Crown policies as of 1787, required that the land in issue be reserved for Maliseet use.

IV. DISCUSSION AND FINDINGS: MAIN ARGUMENT

A. Significance of Dorchester's letter of Instructions to Carleton (January 3, 1787)

[225] Canada argues that "reserve creation" was far from Dorchester's mind when he wrote to Carleton on January 3, 1787, and that the Claimant's expert reads in too much from the letter from Dorchester to Carleton regarding plans to appease the Madawaska Maliseet, there being no explicit instruction to set aside a reserve in this letter. Canada argues as follows on this point:

> 57. In that letter, Dorchester speaks to the desirability of treating the Indians with civility and kindness, and the need for some compensation by way of presents, and more considerable presents before any new concessions of land are made, so that they may be satisfied. Paragraphs three and four read as follows, Tab 59:
>
> > At the same time that You take proper measures, for the defence and security of the province and security of the province, good policy requires, that the Indians should be treated with civility and kindness. You may at a cheaper rate secure their friendship, than repell their hostilities. Besides the policy of his conduct, common justice requires some attention and some compensation to these people whose lands we come and occupy. This I fear, using to their distance from Halifax, Then the seat of Government, has not been fully observed.
> >
> > I would recommend that on every opportunity these Indians be benevolently treated and occasionally sent home with presents for their families. But this should be more particularly practised, and the presents should be more considerable before any new Concessions of land, so that they may be entirely satisfied with the transaction.

> 58. **Since Dorchester differentiates between 'presents' and 'land', we can conclude that when he spoke of "more considerable presents" for the Indians, he was not referring to land**.
>
> [Emphasis added]

[226] The evidence we do have from what Sproule did when he visited the Madawaska Maliseet was that he did survey a tract of land for the Madawaska Maliseet. What we don't have is evidence that he had provided presents at this time. If anything, the evidence we do have confirms the fact that rather than provide presents only, 'new concessions of land' was the result of that trip, which was an option available as well.

[227] The main passage as concerns that instruction letter is the following:

> I would recommend that on every opportunity these Indians be benevolently treated and occasionally sent home with presents for their families**. But this should be more particularly practised, and the presents should be more considerable before any new Concessions of land, so that they may be entirely satisfied with the transaction.**
>
> [Emphasis added]

[228] I find that when you read this paragraph and the last sentence together, it reads as though Dorchester is recommending to his brother that before any new concessions of land are given, more considerable presents should be given than the occasional present, to ensure the Madawaska Maliseet may be "entirely satisfied with the transaction". In other words, "new Concessions of land" would be part of the "transaction" which Carleton could entertain.

B. Significance of Sproule's Boundary Survey and his 1790 Grant Plan and the intentions and actions of the New Brunswick Government

[229] George Sproule, as the Surveyor General of New Brunswick, was a very experienced surveyor and was a member of the Executive Council of the colonial government of New Brunswick. In the Province of New Brunswick, Sproule was second in authority only to the Governor of New Brunswick, being Thomas Carleton at the time of Sproule's survey.

[230] Through his senior level position and with his extensive experience in surveying he would have been well informed of the purpose of preparing the 1787 Boundary Survey for the colonial government.

[231] Sproule spent a considerable period of time that summer in the field with the Madawaska Maliseet in order to obtain important and necessary information from them in order to complete the 1787 Boundary Survey and the Communications Plan. As noted, he specifically acknowledged the important information the Madawaska Maliseet had provided to him to complete the Communications Plan.

[232] In all of the circumstances, it is only reasonable to conclude that the very experienced Surveyor General would have followed the instructions from New Brunswick's Lt. Gov. in providing all the necessary and essential information from his surveying work in the field. Sproule would have been aware of the importance of identifying and demarcating an area within which the colonial government would be able to issue land grants not only to the settlers already located along the banks of the St. John River but also other settlers, including the loyalists who had flooded into the colony after the American Revolution.

[233] Sproule would also have been aware that issues had arisen in terms of animosity between the Madawaska Maliseet and the settlers who were squatting on Madawaska Maliseet lands which had created tension and sometimes violence between the Indians and the settlers. Government officials, including Governor General Dorchester, were anxious to take all reasonable steps to promote peace in the area as concerned these ongoing land disputes.

[234] I do not accept the argument advanced by Canada that Sproule had been acting without requisite instructions or clear authority from his superiors when he did demarcate the red-lined tract of land in 1787 in his Boundary Survey, and that his doing so was somehow influenced by Madawaska Maliseet's persuasive efforts on the ground rather than the result of any stated intention or acceptance on part of the New Brunswick Government to reserve this tract of land to the Madawaska Maliseet at this time.

[235] I find that there is no indication whatsoever that Sproule did not have authority to do what he did as Surveyor General when he demarcated the red-lined tract for the Madawaska Maliseet. What Sproule undertook to do in the field ultimately resulted in the 1787 Boundary Survey as had been done by the Order of the New Brunswick Government. Sproule, being his second in command at all times and conditioned to take orders, acted pursuant to the Lieutenant Governor Carleton's wishes and instructions when he carried out his surveying work in the field

at Madawaska, Subsequently, he obtained the Carleton's approval as indicated on the Sproule Boundary Survey itself.

[236] The title Sproule affixed to his Boundary Survey conspicuously states in very large script, that the Survey was prepared "**by Order of Thomas Carleton, Lieutenant Governor of New Brunswick**" (emphasis added).

[237] The non-existence of clear instructions or a Warrant of Survey (which may have existed, but did not survive) for Madawaska does not negate the fact that ultimately, the 1787 Boundary Survey was endorsed by "Order" of the Governor General, according to the Survey itself. There is no evidence that Carleton rejected the red-lined tract of land on this survey at this time or at any time.

[238] Furthermore, what Sproule did at this time, laying out a tract of land both for the Madawaska Maliseet and the Acadian/French settlers at the same time (where the latter would eventually receive the land grants to their respective 200-acres or so lots including their improvements), was in practice and policy endorsed by Carleton a year later for the county of Northumberland. As Sproule described when instructing his Deputy Surveyor on July 18, 1788, he had obtained a "Warrant of Survey" from Carleton to carry out the following tasks:

> **Pursuant to a Warrant of Survey of this date from his Excellency the Lieut Governor to me directed ordering** "to admeasure and lay out lots not exceeding 200 Acres each at the expence of the [applicant?] in the County of Northumberland for such Persons as are ready in the several districts of that County to make immediate settlement on their respective allotments, **and you are also in the like manner to ascertain the limits of the Indian Villages as near as may be their number of inhabitants at Richibucto and Chibuctouchi**.
>
> You are hereby required and directed to proceed without loss of time and execute the said warrant as above ordered, the respective applicants paying you all charges attending this duty **except the Indians whose Survey will be paid for by the Government.** In addition to your General instructions you will observe the following.
>
> 1st = The 200 Acre lots to be Sixty Poles in front unless where it is necessary to extend them in order to cover improvements which must be secured in all cases to the processor […].
>
> **11th = You will lay out so much land contiguous to the aforesaid Indian Villages or any others you may meet, as shall appear to you to afford them a sufficient limit, should their claims be extravagant you will only report**

> **them, returning only so much as you may judge necessary, but at the same time you must sooth them and endeavor to keep them in temper**[.]
>
> [Exhibit 2, Tab 77; emphasis added]

[239] Sproule's Deputy Surveyor was to use his discretion and judgment in laying out land of "sufficient limit" for the "Indians" contiguous to their villages, being careful only to return "so much as you may judge necessary" and only to "report" any "extravagant" request beyond what he deemed sufficient. The Deputy Surveyor, in laying out a sufficient limit of land contiguous to the "Indian village", was also to consider "their number" in the area. At the time Sproule had produced his 1787 Boundary Survey, there were at least 60 Maliseet families in the area according to him. By contrast, the Acadian families that would receive their grants in 1790 were numbered at 50 families, and the Acadian/French tract of land in total was considerably larger more than what had been laid for the Madawaska Maliseet.

[240] Dr. Cuthbertson had the following to say on this aforementioned Warrant of Survey in Northumberland:

> In July 1788, George Sproule ordered one of his deputy surveyors, Stephen Millidge, to go Northumberland County, where he was to lay out lots for those settlers ready to make immediate settlement and pay for the surveys. He was in a "like manner to ascertain the limits of *the Indian villages* and as near as may be their number of inhabitants at Richibucto and Chibuctouche." He was also to lay out so much land on any other *villages* he might meet and to appear to him to afford them a sufficient limit. Millidge's report is not extant. Sproule in using the term *villages* clearly involved the laying off of lands for Indians. Beginning with issuing of a licence of occupation for Eel Ground Reserve in 1789, the government ceased using the term *villages*. [Ex-19 at p.11; emphasis in original]

[241] Importantly, such a practice of demarcating land for the local Indigenous population at the same time as they were doing the same for the settlers would enable the government to "sooth" the local Indigenous population and "endeavor to keep in them in temper" while the government could move forward with the goal of successfully establishing new colonial settlements in the County, maintaining the peace and gaining loyalty of their subjects, and ensuring the establishment of communication posts and their desired presence and reach (militarily and otherwise) in the area.

[242] We also know that according to Joseph Treat, who visited the Madawaska area in 1820, that a large tract of land had been issued by grant of the King of England for the "St. John

Indians". The Parties can debate the exact size as would have been conceived of by Treat at the time, but what he described as being the size of ½ township, is on any measure, a sizeable tract of land, which he also described as being distinct and in addition to Madawaska Maliseet's "town and head quarters for hunting" which was described as being "a little below Madawaska". While no such grant from the King exists, he reported that the tribe "consists of about one thousand to 1500 souls, and perhaps 300 fighting men".

[243] I also find that Canada's expert, Dr. Wicken, in his report has described the lifestyle and "household economy" of the Madawaska Maliseet in the relevant time frame that supports the amount of land that would be necessary for survival of the band. His report also supports the area that the Madawaska Maliseet were using and occupying in the 1780's as shown on Sproule's Boundary Survey.

[244] Furthermore, Deputy Postmaster Hugh Finlay, who had accompanied Sproule in the field that summer, reported to Quebec Council in February of 1788 that the Indians were "in actual possession" of the tract of land. The Deputy Postmaster who was part of the Quebec Council, Mr. Finlay, had met with Sproule in person just after the latter's arrival in the Madawaska area, and was evidently left with the impression that the red-lined tract of land had been laid out for the Madawaska Maliseet by Warrant of Survey at Carleton's Order.

[245] As the Minutes from this Committee on Crown Lands at Quebec, dated February 22, 1788, states in part:

> Mr. Finlay informed the Committee that **he thinks the place mentioned in Doucet's petition is included in a tract of land laid out by the order of the Government of New Brunswick for the use of the Saint John Indians, who are in actual possession of it**. It is within a quarter of a Mile of their Village… [.]
>
> [Emphasis added]

[246] And correspondingly, on the outside or back page of Doucet's petition, there is a notation written in English that states in part:

> Read in Committee 22 Feb 88.

> The land applied for by this Petitioner **has been lately secured to the Indians residing near that place by warrant from the government of New Brunswick**.
>
> [Emphasis added]

[247] Given this notation on the outside of the Petition, I do not agree with Canada's interpretation of the Minutes that Mr. Finlay was not sure whether "a tract of land laid out by order of New Brunswick for the use of the Saint John Indians, who are in actual possession of it" had in fact been laid out, as he stated that he only "thought" this might be so. Clearly, the emphasis of the word "think" relates to whether or not Doucet's requested land was in fact located within this tract of land "secured to the Indians". The outside of the petition confirms that there was no uncertainty that the Madawaska Maliseet "residing near that place" had "lately secured" the "land applied for by this Petitioner" by "warrant from the government of New Brunswick".

[248] Council at Quebec, including Governor General Dorchester, declined the petition of Doucet on the basis that Mr. Finlay informed them that this tract might have been located in the tract of land as laid out by that government for the Madawaska Maliseet. While the Doucet petition may have gone to the Quebec Council in error, given the Madawaska area was within New Brunswick jurisdiction, the decision of the Quebec Council, including the top British official in the Colonies, Governor General Dorchester, to decline the Petition nonetheless demonstrated that when lands were reserved for the Indigenous inhabitants in the colonies by the colonial government, such reserved lands were to be protected from competing land grant applications from settlers.

[249] I also disagree with the suggestion by Dr. Wicken, Canada's expert, that the redlined area was simply being marked out by Sproule as a favor to the Indians and that they were "requesting" this tract of land be set aside for their use.

[250] To determine the boundaries of where the settlement could extend it made sense that Sproule wanted first to identify the boundaries of the tract of land "required" for the use by the Indians. He would have accomplished this through his discussion in the field with the Madawaska Maliseet, who he had apparently consulted in the preparation of his Survey and Communications map as well.

[251] In preparing the Boundary Survey, George Sproule knew that with respect to the black-lined area, the purpose of that demarcation was to eventually subdivide the tract further for the desired individual Acadian family grants.

[252] By contrast, because the tract of land to be reserved for the Madawaska Maliseet would be in the nature of community property for use of the band as a collective and would not be broken down into individual lots, the boundaries of the area would have been laid out with great care. I accept Prof. Mancke's testimony that from her personal observation of what may be the original Sproule Boundary Survey document in the archives, it showed the usual *indicia* of "astronomical bearings" which would confirm that the red-lined boundary had been officially surveyed by Sproule.

[253] It is important to note that the area demarcated in black lines was immediately contiguous to the tract outlined in red. The Boundary Survey also marked the location of the Indian village and its buildings, the islands in the St. John River, the boundaries of Kelly's lot that was to be excluded, as well as the homesteads already developed by the French and Acadian settlers. The specifically excluded lot settled by a non-Indian, S. Kelly, was on the opposite side of the St. John River from where the primary Madawaska Maliseet village was located.

[254] We also know that a copy was sent to the Imperial office in London (as this Sproule Boundary Survey was found in the archives in London) where the Boundary Survey may have first received a Board of Ordinance stamp. A Board of Ordinance stamp which is affixed to a survey acknowledges that the survey is an official survey for British military purposes. Whether or not this was done in New Brunswick or in London, and whether or not the map had been forwarded to London by Carleton or by his brother, Dorchester is of no real consequence to the fact it ultimately obtained military recognition and ended up in London. That a copy ended up with the British military where it was designated as an Ordinance Map as an official map of the British military is significant in terms of its acceptance by the Imperial office.

[255] Also, while we don't have evidence that Carleton for a fact forwarded the Sproule 1787 Boundary to Dorchester, it would be reasonable to presume that Lord Dorchester would have received a copy of the Sproule Survey Boundary map because the Survey had been carried out at Dorchester's originating instruction.

[256] After Sproule's Boundary Survey was delivered, on December 28, 1787, Council for New Brunswick issued a Memorial to the Lieutenant Governor of New Brunswick that the government now needed to proceed with issuing the grants to the settlers in accordance with Sproule's Boundary Survey.

[257] Accordingly, very shortly after Carleton had received the Boundary Survey, Carleton and his Executive Council did proceed with the issuing of grants on the basis of this Survey. George Sproule was then authorized to proceed to prepare a Grant Plan showing the final boundaries of the individual lots within the black-lined boundary of his Boundary Survey.

[258] Importantly, the New Brunswick Council had agreed that the grants should be proceeded with expeditiously even though the boundary between Québec and New Brunswick had not yet been established. Both Provinces had in practice honoured each other's land grants as colonial boundaries shifted in the past. These grants also occurred even though by 1824, the Acadians grants on the south side of the St. John River would become part of America's jurisdiction.

[259] It is reasonable to conclude that on December 28, 1787, the government of New Brunswick accepted the survey information *in toto* as exhibited on Sproule's Boundary Survey and as result of having been satisfied that the tract of land identified and demarcated in red was to be reserved from colonial settlement, the granting of lands within the French Settlement tract on both sides of the St. John River could proceed.

C. Edits/Changes Made to Sproule's 1790 Grant Plan

[260] There are certain modifications and additions made to the 1790 Grant Plan which show up on the copy of the Grant Plan filed as an exhibit which post-date 1825 and clearly relate to Hebert's land instruments as discussed above.

[261] Another modification is the word "Indian Reserve". On the westerly side of the Madawaska river is the word "Indian" and on the East side of the Madawaska River is the word "Reserve". The word "Indian" on the west side has a cross line through each of the letters. In a smaller font, the word "Indian" appears on the East side of the Madawaska river, immediately above the word "Reserve" which is in type font similar to the word "Indian" which was crossed out. Also the words, "New Brunswick has no jurisdiction here" are written so that it stretches on

both sides of the Madawaska River.

[262] I find that there is no reasonable basis to assume that George Sproule had made a mistake on his original 1790 Grant Plan and had decided to strike out the word “Indian” on the West side of the Madawaska River and replace it with a different size font on the East side of the Madawaska River, immediately above the word “Reserve”, so that the word “Indian” conveniently fit in between Hebert’s grant (which came later) and the Acadian grants. There were no other such mistakes made or crossing-out done in respect of the other grants depicted which had been granted in 1790.

[263] The government had accepted Sproule’s Boundary Survey as final copy and it contained the information that Sproule had been directed to produce in 1787, and there were no such corresponding changes made to this Survey.

[264] I am satisfied on the evidence that the words “New Brunswick has no jurisdiction here” that appears on a copy of Sproule’s 1790 Grant Plan were words that were not put there by Sproule on his original 1790 Grant Plan. There are three main reasons for this conclusion.

[265] Firstly, Sproule in 1787 clearly made his opinion known that the boundary between Quebec and New Brunswick should be between Lake Temiscouata and the St. Lawrence River, further west of the junction of the Madawaska River and St. John River. Furthermore, the boundary had not yet been settled so there could be no determination that New Brunswick had no jurisdiction, and it would not make sense for Sproule to do so or be directed to do so.

[266] Secondly, I find that Baillie’s plan attached to Hebert’s grant in 1835, also shows the Indian Reserve extending across the west side of the Madawaska River, indicating that Baillie, as the then Surveyor General, would have copied this information from an original version of Sproule’s 1790 Grant Plan.

[267] Thirdly, I do not accept Canada’s submission that because the Quebec/New Brunswick border had still not yet been agreed to, that New Brunswick would have been reluctant to reserve a tract of land for the Indians where a portion of the reserved lands could end up in Quebec. There is evidence that the Ekwphak reserve when first created was in colonial Nova Scotia. After New Brunswick came into existence as a separate colony, and the reserve was now located

within New Brunswick's territory, the New Brunswick government reissued the grant for the reserve. There was also a practice among the colonies to honour each other's grants, if required, when boundaries changed. We also have Lord Dorchester stating that the granting of land to the Acadians should proceed and that the Maliseet should be appeased, as provided for in separate instructions from the issue of the boundary dispute.

[268] I do not have any evidence that if it turned out that if the Madawaska Maliseet reserve ended up on the Quebec side of the border, this eventually would pose a significant problem for that government. Accordingly, I find that even though the boundary between Quebec and New Brunswick had not been agreed to in the 1787-1790 period, the possibility that the red-lined tract of land on Sproule's Boundary Survey could end up partially in New Brunswick and partially in Quebec was not sufficiently concerning at this time that it would have deterred New Brunswick from proceeding to reserve the red-lined tract for the Indians.

D. Findings and Interpretation of the Historical Facts Taken Together

[269] I find that the combination of the facts, in their totality, as described above and further summarized below, result in my finding that in the years 1787 to 1790, the colonial government of New Brunswick did direct the Surveyor General, George Sproule, to identify, survey and demarcate on his Boundary Survey, two large tracts of land on the St. John River Valley beside each other and consisting of land on both sides of the St. John River. One tract was to be available for individual land grants to the settlers and the other tract was to be reserved from settlement for use of the Madawaska Maliseet.

[270] This task was completed by Sproule in his surveying work in the summer of 1787 leading to his Boundary Survey which was presented and accepted by the Lieut. Gov. of New Brunswick and presumably, Governor General Lord Dorchester. After his Boundary Survey was accepted, as planned, the New Brunswick government proceeded with the land grants for the settlers and Sproule was tasked with completing the Grant Plan in 1790 which, Grant Plan was later modified and added to evidently by Thomas Baillie and Beckwith post-1825.

[271] A summary of the material facts and findings based on the facts leading to this finding are as follows:

1. George Sproule's 1787 Boundary Survey was completed as a result of his directive from Lieutenant Governor Thomas Carleton (who in turn, had been directed by Governor General Dorchester to address these two tasks in January 3, 1787) with the red-lined tract area and Sproule's words setting out that "the Indians require the tract of Land included within the red lines to be reserved for their use";

2. the fact that the red-lined tract was surveyed as demonstrated by the astronomical survey markings and that Kelly's lot was to be "excepted" from the lands required by the Indians, show that the surveying was done with great care and for a definite purpose as described on the Boundary Survey;

3. the circulation and apparent acceptance of all the details on Sproule's Boundary Survey among the highest-level government officials including the Imperial office in London and the recognition by the British military of its significance;

4. the decision by Carleton and his Council to proceed with the issuance of land grants within the black-lined tract to the settlers and in accordance with the Sproule Boundary Survey;

5. the recorded statements from Hugh Finlay less than one year later (in February 1788) to the Committee on Crown Lands in Quebec that the tract of land was laid out by order of the New Brunswick government for the "Indians" who were "in actual possession of it", and the resulting decision of that Council that it would not be available for the settler, Doucet;

6. The denial of the Martin and Rice petitions as the lands petitioned for were identified by Baillie as reserved for the Madawaska Maliseet;

7. The survey policy described by Sproule to his Deputy Surveyor pursuant to a "Warrant of Survey" from Carleton in the summer of 1788 in respect of Northumberland county, being the laying out of reserves for the Indigenous population in the county at the same time as land would be identified for settlers in lots of about 200-acres, mirroring what had been done by the Surveyor General himself in Madawaska only one year before;

8. Sproule's recording of the word "Indian Reserve" on his Grant Plan completed in 1790 further confirming that this information represented the government's intention that the tract of land within the redlined area from the 1787 Boundary Survey was reserved from settlement for the use of the Indians;

9. the subsequent references on survey plans and maps showing the Indian lands, including in 1825, by then Surveyor General Baillie's official Plan for Simon Hebert's grant where the plan clearly states "Indian Reserve" on both sides of the Madawaska River, conforming with what Sproule had initially reserved, but including the Hebert Grant;

10. it was well-known for many decades that there was a Madawaska Maliseet Village and tract set apart as attached to that village. The location of the village was recorded on numerous maps and surveys as well;

11. the lifestyle and household economy of the Madawaska Maliseet was also common knowledge, including that they grew crops, hunted, fished, trapped and gathered berries, and had homes similar to the French, and accordingly, would require a large tract of land and access to resources to be available to their community for their continued survival;

12. in that regard, considering his task of identifying the boundaries of the tract to be reserved from settlement for the use of the Indians, Sproule's 1787 Boundary Survey would have in his estimation, demarcated a sufficient area of land (but not an "extravagant" amount) for their needs in consultation with the Madawaska Maliseet; and,

13. that from that time the government decided to proceed to issue grants to the settlers in 1788 up until Hebert request for a grant in 1825 was successful, no evidence exists to indicate that there was any issue of any significance that had arisen between the Madawaska Maliseet and the settlers which would indicate that the boundaries that had been set aside by the government for the settlers and for the Madawaska Maliseet were not honoured by the Crown.

E. Dr. Wicken's Theory Does Not Accord with the Historical Facts of the Claim

[272] I disagree with Dr. Wicken's opinions that the colonial government of New Brunswick would not have wanted to create a reserve for the Indians in or shortly following 1787, due to Carleton and Dorchester being military men who would have distrusted the Madawaska Maliseet following colonial wars which had happened in the years or decades prior and the Maliseet Nation's evolving political and military alliances.

[273] I am not persuaded, as suggested by Dr. Wicken, that the government officials at the time would not want to create a reserve for them as they were sufficiently worried about the loyalty of the Madawaska Maliseet as some had sided with the French during the Seven Years' Wars (1756-63) or because George Washington had attempted to recruit the Maliseet Nation to further the American Revolution. As the Claimant reasons at para 274 of its Factum:

> Were the Madawaska Maliseet "still" sympathizers with the United States [in 1787]? Professor Andrea Bear Nicholas pointed out that their Chief, Francis Xavier, had spent much of the late war in Fredericton, and that the Madawaska Maliseet had been neutral or had supported the British. In any event, Dr. Wicken could point to no document that said that the British in 1787 had any reason to distrust the Madawaska Maliseet, or that the British did not want to have a Maliseet reserve at that strategic location.

[274] The facts rather establish that the British Crown entered into Peace and Friendship Treaties with the Wabanaki Confederacy including the Maliseet Nation starting in 1725 and 1726, which were subsequently renewed and updated in 1749 and then again in 1760, the latter treaty occurring a year after the taking of Quebec by British Forces.

[275] In the summer of 1784, over twenty years later and significantly *right after* the American Revolutionary War had ended, Royal Instructions were issued from the King, presumably to his highest-level officials in New Brunswick (being then Dorchester and Carleton) directing them to "cultivate and maintain a strict Friendship" with the "Indians … [i]nhabiting within our Said Province of New Brunswick" which was "highly necessary for our service". The instructions read as follows:

> 63 And Whereas it is highly necessary for our service **that you should cultivate and maintain a strict Friendship and good Correspondence with the Indians, Inhabiting within our Said Province of New Brunswick**, that may be induced by degrees not only to be good Neighbours to Our Subjects, but

> likewise themselves to become good Subjects to US, You are therefore to use all proper means to attain those Ends, to have Interviews from time to time, with the several heads of the said Indian Nations or Clans **and to endeavour to enter into Treaty with them promising them Friendship and Protection on our Parts**.
>
> [Exhibit 1, Tab 39; emphasis added]

[276] The desire to "cultivate and maintain" Maliseet loyalty and friendship, not only so that they would be "good Neighbours" to the King's subjects, but also in hopes that the Maliseet would "become good Subjects to US", as a strategic political and military approach, made perfect sense at this time as it did during the period of entering into Peace and Friendship Treaties.

[277] This Peace and Friendship approach was also echoed in the correspondence between Lord Dorchester and his brother Thomas Carleton, written by Dorchester less than three years later (on January 3, 1787). As Dorchester instructed his brother in part:

> At the same time that you take proper measures, for the defense and security of the province, good policy requires that the Indians be treated with civility and kindness. You may at a cheaper rate secure their friendship then repell [*sic*]their hostilities, besides the policy of this conduct, common justice requires some attention and some compensation to these people whose lands we come and occupy. This I fear, owing to their distance from Halifax, then the seat of Government, has not been fully observed.
>
> I would recommend that on every opportunity these Indians be benevolently treated and occasionally sent home with presents for their families. But this should be more particularly practised, and the presents should be more considerable before any new Concessions of land, so that they may be entirely satisfied with the transaction.
>
> The Chiefs should also be encouraged to come in, and make their complaints, when any of their tribes receive ill treatment.

[278] Rather than being distrustful of the Maliseet at this time, it would make more sense that the Crown would undertake to reserve lands from the settlers for the use of the Madawaska Maliseet and gain their loyalty in the process, while at the same time advance the ultimate goal of greater Loyalist settlement without further conflict. This even more so given the onslaught of Loyalists moving from the 13 colonies looking for desirable land in the St. John River Valley at the time the Acadians were asking for grants to protect their land. Add to this dynamic the reported need to manage the hostility arising from the Maliseet as described by Dorchester in his

December 1787 letter in his opening address:

> I received your letter No. 1 on the 25th ult., by which I learn that the Settlers on the upper part of the River St. John are alarmed by the menaces of the Indians in that District. The measures you have taken to enable the Settlers to defend themselves, I very much approve of. When I arrive at New Brunswick, I propose to review your Militia, and hope to find them so well armed and arrayed, as to give the province all reasonable security.
>
> At the same time that you take proper measures, for the defense and security of the province, good policy requires that the Indians be treated with civility and kindness.

[279] Dr. Wicken was also more specifically of the opinion that the area of the confluence of the two rivers were of such "strategic importance" to the British officials for military/communication reasons that this view would be another reason that no reserve would have been intended by the government post-1787. Again I disagree.

[280] The Maliseet had reserves and settlements in the St. John River Valley and all along the St. John River. If they wanted to interfere with communication efforts, the confluence of the Madawaska River and St. John River was not the only spot they could have done so. There is no indication in the record that the other areas in the St. John River Valley occupied by other Maliseet bands created any issue in setting up the Communication Plan. Accordingly, there is no reason to believe that the area occupied by the Madawaska Maliseet posed any particular challenge to the Communication Plan. If that had been the case, it would have been expected that the Deputy Postmaster General Hugh Finlay would have brought this to Lord Dorchester's attention when the Executive Committee in Québec met in 1788 to consider Doucet's petition.

[281] The communication route had been set up by Sproule and Hugh Finlay with the assistance of the Maliseet, who acted as guides for these men on their travels. As argued by the Claimant at para 274 of its Factum:

> Finally, there is the issue of the strategic importance of the communication route from Fredericton to Quebec. Dr. Wicken asserted that the Crown would not want to have Maliseet in control of any part of that route. At the same time, he admitted that the route was the entire St. John River; that the Maliseet were the people of that river and their settlements were at various places along it; that the Crown had no intention of moving their villages, including Madawaska. As for George Sproule and the suggestion that he would not have allowed the reservation of land for the Maliseet at Madawaska, because the Crown could not

> trust the Maliseet, Dr. Wicken agreed that Sproule had undertaken a lengthy journey in the company of Maliseet canoe-men. The notes on his survey map, on each of the rivers flowing into the Wəlastəkw / St. John, indicate that he learned most of what he wrote about those rivers from the Maliseet.

[282] There is no historical document at the material time of this Claim or at any time indicating that the Governor General and Lieutenant Governor of New Brunswick actually distrusted the Maliseet and that this location in particular was of grave concern to them for strategic reasons, necessitating the rejection of the reserve at this time. Instead, we have Royal Instructions and Dorchester's letter setting out a British policy of promoting and seeking continued peace and friendship with the Indigenous inhabitants of the new province.

[283] I also disagree that the boundary issue over the border between New Brunswick and United States and the border issue between Québec and New Brunswick would have been another reason why Lord Dorchester and Carleton would not have wanted to reserve Crown lands for the Madawaska Maliseet's use. New Brunswick agreed to grant lands to the settlers while acknowledging that once the New Brunswick/Québec border was established, depending on where the border was determined to be, it might mean that some of the settlers would end up on the Québec side of the border. The New Brunswick Council approved the issuing of grants to the settlers nonetheless. We know too that the Acadian settlements on the south side of the St. John River became part of America when that boundary was finally settled.

[284] With respect to Dr. Wicken's opinion regarding Britain's lack of interest in creating Indian reserves in the 1780s, the record shows that a reserve in the County of Northumberland in New Brunswick for the Miramichi tribe in 1789 was listed in the 1838 Schedule of Indian Reserves – the same reserve as laid out by Sproule's Deputy Surveyor according to a Warrant of Survey issued by Carleton describing the delineating of boundaries between the Indigenous lands and lands available for settlement. As well, the government of Nova Scotia had created a reserve in Ekwpahak in the central St. John River Valley, in the vicinity of what would become Fredericton in 1779. This area subsequently became part of New Brunswick and in 1792, the New Brunswick government reissued the grant to the Maliseet.

[285] I find that it made perfect sense for Sproule to outline a tract of land with all four borders marked for the "Indians" in order to accomplish one of the purposes of his surveying tasks of

demarcating a tract of land for grants to the settlers that would not interfere with a tract of land required for the Madawaska Maliseet. He would not have been able to accomplish this purpose in a practical and efficient manner by merely either demarcating the black lined area for the settlement or by drawing a boundary line that would somehow only demarcate the settlement on the East side of the line without reference to the lands to the west of that boundary line. The fact that Sproule marked out the redlined area with all boundaries delineated confirms that Sproule was identifying this tract of land that would not be available for the settlers.

[286] I find that the words noted on the Boundary Survey that "the Indians require this tract of Land included within the red lines to be reserved for their use" support the fact that Sproule was performing his proper surveying duties as Surveyor General in accordance with his instructions, implicit in the result, if not explicit in any originating instructions that survive, to identify and demarcate the tract of land to be reserved by the Crown from settler occupation.

[287] The title that Sproule gave to his survey, including the words, "by Order of His Excellency Lieut. Governor Carleton", corroborates the fact that, as ordered by Carleton, Sproule demarcated the tract that was to be divided into individual grants for the settlers and demarcated the adjoining tract of land that was to be reserved from the settlers for the use of the Indians.

[288] Furthermore, less than one year later, Sproule, according to Warrant of Survey for Northumberland dated July 1788, would distinguish between what was to be surveyed, being what the Deputy Surveyor "judg[ed] necessary" to afford the "Indians" "a sufficient limit" "contiguous to the aforesaid Indian Villages" and what to report, beyond that sufficient/necessary limit, if the surveyor considered their claims to be extravagant:

> 11th = You will lay out so much land contiguous to the aforesaid Indian Villages or any others you may meet, as shall appear to you to afford them a sufficient limit, should their claims be extravagant you will only report them, returning only so much as you may judge necessary, but at the same time you must sooth them and endeavor to keep them in temper[.]
>
> [Exhibit 2, Tab 77]

[289] Dr. Wicken in my view in his attempt to characterize what Sproule was doing on his official survey executed by Order of the New Brunswick Lieutenant Government as merely "noting the wishes expressed by the Indians to Sproule which Sproule would be passing on to

government officials in his report" ignores the important role that Sproule and his surveyors were doing at the time, as the Crown's officials on the ground with the requisite expertise and practical ability to determine various Crown reserve land uses versus private settlement land uses and carry out their surveying work accordingly.

[290] Dr. Wicken also improperly replaced the word "required" that was clearly marked on the Boundary Survey with the word "request" in several instances in his reports. Those two words have quite different meanings. Given the number of times that Dr. Wicken incorrectly referenced the word "request" in his report, I can conclude that the use of that word was self-serving to support his theory that Sproule was merely recording the "Indians' wishes" but nothing more. I find this alteration was misleading and negatively impacted the objectivity of Dr. Wicken's opinion as Canada's expert.

[291] I find for all of the above reasons that Sproule's Boundary Survey became an official government document setting out government's intentions that the tract of land was to be reserved for the use of the Madawaska Maliseet.

[292] As noted, the Boundary Survey was forwarded (either by Lieut. Gov. Carleton or by Governor General Lord Dorchester in Quebec) to the Imperial office in London. In London, the Boundary Survey was designated by the British military as an official military document. The reception of the Boundary Survey by the highest government officials without any record of any government official taking issue with the redlined area and notation by Sproule of the purpose of the redlined delineation, lends further support to the fact that what Sproule had done and recorded was all within Sproule's responsibilities and all with the intention of the highest government officials.

[293] With respect to the Maliseet's 1792 Petition, I find that that Petition on behalf of several Maliseet bands or the Maliseet Nation as a whole was for a *grant* for the tract of land as likely surveyed by Sproule, as stated and described in the Petition itself, and not a "request" for an Indian reserve, as no such request was made in this Petition.

[294] The Maliseet Nation would have likely been aware that the government had converted the settlers' licenses of occupation into grants (just two years earlier) in order to give the settlers

the security and comfort that came with receiving title to their lands. The Petition had been written by the Justice of the Peace, from Madawaska/Acadian settlement, on behalf of the Maliseet Nation. Costin would have been well aware of what the Acadians had received grant-wise. The Petition also referenced such grant or grants provided in "other Provinces", perhaps based on their experience with the grant provided for their reserve in Nova Scotia and/or other Indigenous groups who received grants throughout the colonies around this time. As mentioned, the government of Nova Scotia had created a reserve in Ekwpahak in the central St. John River Valley by grant in that case, and when it later became part of New Brunswick, the New Brunswick government reissued the grant to the Maliseet in 1792.

[295] Not surprisingly, given the ongoing problems that the Maliseet had with respect to settlers encroaching on their lands, the Maliseet would have wanted to be treated in a similar fair fashion and may have thought that a grant of title could have assisted them further in this plight.

[296] Canada's other submission is that the Joseph Treat report in 1820 should be given no weight because he may have been incorrect regarding the size of the Indian reserve at Madawaska , and that he spoke of a "grant" from the King to the Madawaska Maliseet which does not in fact exist on the evidence. I find however, that the significance of the Treat report confirms that, along with many other references previously discussed, there was considerable opinion that an Indian Reserve had been designated by the government and that it consisted of a large tract of land in the area of the Madawaska and St. John Rivers and which extended beyond the Madwaska Maliseet's "town" or "headquarters".

[297] The significance of the redlined area and Sproule's notation is further corroborated by the Minutes of the Committee in Québec dated February 22, 1788, which records Finlay's observations when Doucet applied for a grant which was denied. This was in the presence of Lord Dorchester who, according to the minutes did not take issue with Finlay's statement that the government of New Brunswick had set aside this tract of land to be reserved for Madawaska Maliseet who were in actual possession of that land. Furthermore, he supported the denial of the Petition on the basis that it was within the tract of land reserved for Madawaska Maliseet's use.

[298] In subsequent surveys, there are references on those survey plans and sketches that are consistent with the red-lined demarcation on Sproule's Boundary Survey showing that the lands

around the Indian village on both sides of the Madawaska River were understood to be reserved for the Indians.

V. CANADA'S CHALLENGE: ATTEMPTING TO FIND AN EXACT DATE FOR THE MOMENT OF "RESERVE CREATION" OR "CROWN RECOGNITION"

[299] Canada's expert evidence and submissions focused on determining when exactly the reserve had been "created" for the Claimant in the latter part of the 18th century, absent Minutes of the Executive Council explicitly stating as much post-1787. In Canada's estimate, the best indication of Crown recognition that a reserve was created as IR No. 10 was through the report of the Surveyor General in 1842, at which point it becomes recognized by the government as a "*de facto* occupation reserve" (and it is largely reduced in size to about 700 acres).

[300] Canada's expert, Dr. Wicken, was of the opinion that the best evidence of Crown recognition was its inclusion in the Surveyor General's Schedule of Indian Reserves in 1842. The inclusion at this time, Dr. Wicken suggests, was due to Moses Perley's investigation and estimation of the reserve then.

[301] In my view, there are several serious difficulties with this supposition.

[302] For one, why would it be reasonable to accept that in 1842, as Dr. Wicken suggests, that Saunders, as Surveyor General, could somehow "create a reserve" by simply listing the reserve in his Schedule and by estimating the reserve size, without actually surveying the boundaries at this time? And yet, Canada argues that George Sproule, Surveyor General in 1787-90, supposedly did not likewise have such authority?

[303] It is also the case that this Schedule dated April 19, 1842 is entitled "Schedule of **Reserved** Indian Lands, in the Province of New Brunswick", and not one of the 16 reserves listed include a "creation date" (Exhibit 5, Tab 191). Rather, Saunders was listing existing reserves in an attempt to compile this information in a comprehensive way since 1838. As stated in the "Report from Committee on Indian Affairs" dated March 23, 1842, "there **are extensive Reserves** in different parts of the County **set apart by the Government in the early settlement of the Province for the benefit of these People** […]" (Exhibit 5, Tab 190; emphasis added).

[304] Furthermore, what evidence was there to determine the size of the "*de facto* occupation

reserve" that was eventually recognized in 1842? It would appear that the only reason 700 acres was recorded on the 1842 Schedule was that it was an "estimate" of the "left over land" on the East side of the Madawaska River between Simon Hébert's grant and the Mazerolle grants. The next survey conducted in that year by Garden had the reserve at 1600 acres. It would not be surveyed again until 1860.

[305] Saunders either wasn't aware of what was depicted on Surveyor General Sproule's Boundary Survey, or on his original Grant Plan, or on the survey Plan of Surveyor General George Baillie's attached to Simon Hebert's 1825 grant. He might have consulted the copy of the 1790 Grant Plan, or perhaps, the original version but which had been modified to account for Hebert's grant in 1825 and License of Occupation. The Parties were unable to locate an unaltered, pristine version from 1790.

[306] Canada's focus and reliance on the significance of the "Schedule of Reserved Indian Lands, in the Province of New Brunswick" to support its argument of "reserve creation" is implicated by several other factors that need to be kept in mind. For example:

i. a long history of very poor government record keeping including, missing and altered records of origin;

ii. numerous references in some of the Schedules where there is either no reference as to why those particular reserves received recognition, or reporting that those reserves were being recognized, in spite of the fact that there was "no government record"; and,

iii. many of the reserves included in the Schedules were located to the east of the Madawaska area and consequently were likely better known due to the fact they were closer to larger non-Indian settlements in places such as Fredericton.

[307] With respect to the issue of the necessity of a survey having to be done before a tract of land is considered an "official Indian reserve", Canada relies on the 1860 Beckwith survey of the 700 acre parcel on the East side of the Madawaska river. It would seem, however that the fact that a reserve may have not been surveyed did not seem to affect reserves being put on the Schedules. In the 1838 and 1842 Schedules there is only one reserve listed as having been

surveyed.

[308] In reviewing the Schedules of Indian Reserves, it becomes apparent that New Brunswick "recognized as an official Indian reserve" areas where there was an Indian band's *occupation* of an identified tract of land. Therefore, it was the *occupation* of these tracts that was the key element with respect to most of the reserves included in the Schedules.

[309] The problem for Canada is that, having recognized the Madawaska Maliseet reserve as a "*de facto* occupation reserve", the question becomes, when should that "recognition" have properly taken place? And, what evidence should have been used to determine the actual size of the reserve? According to Canada, the size would be as a result of a survey conducted in 1860, which somehow should be retroactively tied to the moment of recognition in the 1842 Schedule where 700 acres is indicated.

[310] In my view, it would not be reasonable to argue that fifty years after Sproule's survey was carried out, when the New Brunswick government finally "got around" to compiling a list of reserves in the region in the form of an Indian reserve schedule, that this act of compiling apparently, incomplete information on the existing reserves in New Brunswick would be the *most* significant act, on the evidence, demonstrating the requisite intent of New Brunswick government officials that IR No. 10 was now an Indian reserve at about 700 acres, give or take. This strikes me as an unreasonable position to take, given the totality of the evidence presented to the Tribunal.

[311] I don't find that the material time of reserve creation or recognition by the Crown came in the 1840s. I find that what Sproule did in 1787 and the acceptance of his Boundary Survey in the years following 1787, including acts in 1788 and 1790, together exhibited an acknowledgement that a reserve from Crown land had been made for the use of the Madawaska Maliseet as laid out by Sproule by Order of the New Brunswick government. As stated in Saunders "Report from Committee on Indian Affairs" dated March 23, 1842 "there are extensive Reserves in different parts of the County set apart by the Government in the early settlement of the Province for the benefit of these People […]" (Exhibit 5, Tab 190; emphasis added).

VI. ANALYSIS OF THE ALLEGED INVALID ALIENATION OF "PARCELS A" AND "PARCEL B"

A. Simon Hebert's Grant ("Parcel A1") and Licence of Occupation ("Parcel B")

[312] In Hebert's petition, he claimed that he had "purchased" a 300-acre parcel of land that was mainly on the east side of the Madawaska River but also partially on the west side of the Madawaska river. Council however, restricted Hebert's grant to a 250-acre parcel entirely on the east side of the Madawaska River, stressing that it would not cross the Madawaska river.

[313] With the map information contained in Hebert's petition as he had presented it, the Executive Council was made aware that "he purchased a tract of the Indians claiming a right to Land" which was depicted as an "Indian Reserve" and on both sides of the Madawaska River, consistent with Sproule's red-lined demarcation of the tract that was on both sides of the Madawaska River.

[314] As well, on the map attached to the Grant, as previously discussed, there was specific wording stating "Indian Reserve" on both the east and west sides of the Hebert Grant. The attached map was signed by Thomas Baillie, as Surveyor General. This identification of an Indian Reserve was included on the Grant document, even though, rather peculiarly, George Shore, Acting Surveyor General for a very short period of time, had characterized the land in supporting the Petition to Council as "ungranted Crown Land" (technically true) and a "tract Indians have been in the habit [of considering?] a reservation for them", though "no official record of it made in this Office". Shore may have been confused and looking for a Grant. The official survey attached to the Grant however was clear that reserved land for the Madawaska Maliseet existed.

[315] In any event, the highest government officials at this time in New Brunswick (which no longer included Carleton as Governor General), were aware or should have been aware that Hebert's Grant included lands that were part of the Indian reserve.

[316] Hebert's Petition was in the same time frame as the petitions for land grants that were sought by Joseph Martin and Francis Rice. As previously noted, both Martin's and Rice's Petitions were denied with the explanation that they were seeking a land grant on or right beside lands considered to have been reserved for the Madawaska Maliseet. Perhaps notably, neither

claimed to have purchased the reserved land directly from the Madawaska Maliseet.

[317] In 1829, Hebert requested a License of Occupation for land on the west side of the Madawaska River (Parcel B). Despite signing his name on the aforementioned Plan or survey depicting an Indian Reserve on both sides of the Madawaska River, as part of Hebert's grant, issued just four years earlier, Thomas Baillie endorsed Hebert's petition stating, "I beg to leave to recommend …this Petition be complied with the Indians having no claim to the land". According to Baillie's notation on the outside page of the Survey Warrant issued to layout Simon Hebert's license of occupation, the land was "not comprised in the Boundaries of any Reserve made for the use of the Crown".

[318] I note that on the copy of Sproule's Grant Plan of 1790, when additions and changes were added, the then Deputy Surveyor General, Beckwith added this note:

> Simon Ebert [*sic*] has purchased the right of the Indians to the Brook according to document produced by him Jany 21st, 1826.

[319] Despite this previous official recognition in 1825 of an Indian Reserve on the East and West side of the Madawaska River, the colonial government of New Brunswick in 1829, at the request of Simon Hebert, nevertheless issued a License of Occupation for the triangular piece of land (Parcel B) on the West side of the Madawaska River. This area would also be within the redlined area of George Sproule's 1787 Boundary Survey.

[320] In this instance, it would appear that the New Brunswick officials were ignoring the previously acknowledged Indian reserve, this time on the West side of the Madawaska River.

[321] Also perplexing, in the same time period that the Martin and Rice Petitions were denied and they sought grants on what was stated by Thomas Baillie to be "within the bounds of a Tract reserved for the Madawaska Indians" (in the case of Martin) or else "joining the Indian Reserve" (in the case of Rice), Hebert's grant of 350 acres, acknowledged by him to be part of the Indian Reserve, was successfully granted. As well, Hebert was given a Licence of Occupation on what was also acknowledged to be Indian Reserve by Baillie's own survey Plan affixed to the 1825 Grant.

[322] Could it be explained that the government officials were simply mistaken that non-

Indians could legally acquire Indian reserve lands by purchasing them directly? That would seem so, as it would differentiate Hebert's petitions from the two other unsuccessful ones in this period, except, Baillie made a point to state, as concerned the 1829 License of Occupation Survey Warrant, that "the within described situation is **not** comprised in the Boundaries of any reserve made for the use of the Crown" (emphasis added).

[323] Or, could it be because of the information that George Baillie, the Surveyor General provided may have "misled" the government? Or, did Simon Hebert have power and influence over the Colonial government? Perhaps the only reasonable conclusion to reach on the evidence is that, as Dr. Wicken states in his September 30, 2014, report, Simon Hebert was a man of significant political influence. Dr. Wicken states at p. 87:

> …there was the man himself [Hebert], a prominent landowner and merchant whose loyalty was best to nurture, than to antagonize. Deane and Kavanaugh, the two American Commissioners would later write to the Governor of Maine that 'Hebert is very much in favour of the British and opposed to this State. He had been much favored by them, and has, by their aid, disposed several settlers, and he and his family are now enjoying the fruits of their labours.'

B. The 1860 Hartt Grant ("Parcel A2")

[324] As noted, John Hartt received a grant from the New Brunswick government on April 11, 1860 for 100 acres of land on the Madawaska Indian Reserve adjacent to Simon Hebert's lot. He was granted lot No. 1 according to H.M. Garden's survey of the 8 lots sketched out on the Indian Reserve lands.

[325] As Hartt had been facing warnings from government officials that he was a trespasser who had been squatting on the lands without legal authority, it would appear that Hartt's only other option was to apply for a grant with the rationale that, given the improvements he said he had made to the land that he had been "renting" from "Lewis Bernard", that the government of the day should come to "his rescue" and grant him the land even if the land was acknowledged to be on an Indian reserve.

[326] From the relevant documents filed, I find that:

i. both John Hartt and the government officials dealing with his petition were aware that the lot for which Hartt was seeking a grant was clearly on Indian reserve land. The sketch accompanying Hartt's petition has "Indian reserve" written across the lot;

ii. the Indians' position at the time was that, as this was Indian reserve land for their use and benefit, it could not be sold by the Indians;

iii. the Indians did not wish for the government to dispose of any part of their reserve; and,

iv. that according to Hartt's petition, he represented that the 100 acres that he was seeking was only "a small part of the reserve" and that it seems reasonable that Hartt therefore, was representing that the reserve consisted of more than 800 acres if his 100 acres constituted "only a small part of the reserve".

[327] It would seem therefore that the only explanation as to why, under these circumstances, the New Brunswick colonial government decided to issue Hartt a grant on acknowledged Indian reserve lands, was that Hartt had improved the property, erected buildings and was carrying on a commercial operation. This apparently was all to the liking of the government officials as he was "putting the land to good use" as would be viewed by colonial officials.

VII. APPLICABLE LAW: MAIN ARGUMENT

A. *Ross River Dena Council v. Canada,* 2002 SCC 54

[328] In *Ross River Dena Council v. Canada*, 2002 SCC 54, the Supreme Court of Canada dealt with the question of reserve creation in the non-treaty context of the Yukon Territory during the period of the 1950s-1960s, and in the circumstance where, as with this Claim, there was no Order in Council explicitly setting out the lands Ross River claimed to be a reserve within the meaning of the *Indian Act*. As the *Indian Act* does not provide any formal mechanism for the creation of reserves (only dealing with reserve administration and protection once created), the main issue to be decided in *Ross River* was "the nature of the legal requirements which must be met for the establishment of a reserve **as defined in the *Indian Act***" (para 30; emphasis added).

[329] The Supreme Court's majority decision (provided by LeBel, J.) set out the following test for reserve creation within the meaning of the *Indian Act*. Provided each criterion was satisfied by Ross River, an *Indian Act* reserve would be found to exist as follows:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record.
>
> [Paragraph 67]

[330] In the case of *Ross River*, the legal status of Ross River's land was called into question as a result of a refund of tobacco tax claim from a store in Ross River's village on the basis that an *Indian Act* tax exemption could be claimed in respect of this village and land. In the 1950s, after a long history of being shifted or pushed from place to place since the predecessors of the Department of Indian Affairs and Northern Development (DIAND) took them under its wing, the members of the Ross River First Nation were allowed to settle down on the site of their village, located at the junction of the Pelly and Ross Rivers (para 14). This triggered administrative internal discussions and recommendations from some officials that an Indian reserve be established, though ultimately "Ottawa did not act on the request" (para 15) and eventually dismissed the recommendation to establish 10 new reserves including the one at Ross River (para 16 and 73).

[331] Based on these facts, the Supreme Court sided with Canada, finding that while the land had been "set aside" (as that word is used in the definition of "reserve") and accepted and used by Ross River, some support and recommendations from lower-level government officials to confirm the reserve which ultimately failed, did not set out requisite intent to create an *Indian Act* reserve on the part of persons having sufficient authority to bind the Crown.

[332] However, as mentioned in the passage cited above, the Supreme Court was careful to note that reserve creation is a fact-specific process which involved in that case reviewing the bureaucratic and legislative context surrounding Canada's administrative relationship with the Ross River First Nation's land starting in the 1950s. The Supreme Court also cautioned that its findings in this case would *not* be a "panacea" for reserve creation under the *Indian Act* going forward:

> Some of the parties or interveners have attempted to broaden the scope of this case. They submit that it offers the opportunity for a definitive and exhaustive pronouncement by this Court on the legal requirements for creating a reserve under the *Indian Act*. Such an attempt, however interesting and challenging it may appear, would be both premature and detrimental to the proper development of the law in this area. Despite its significance, this appeal involves a discussion of the legal position and historical experience of the Yukon, not of historical and legal developments spanning almost four centuries and concerning every region of Canada.
>
> [Paragraph 41]

[333] Undoubtedly, the process of reserve creation has a long, varied history as the Supreme Court continued to explain:

> Canadian history confirms that the process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments. Procedures and legal techniques changed. **Different approaches were used, so much so that it would be difficult to draw generalizations in the context of a specific case, grounded in the particular historical experience of one region of this country.**
>
> In the Maritime provinces, or in Quebec, during the French regime or after the British conquest, as well as in Ontario or later in the Prairies and in British Columbia, **reserves were created by various methods**. **The legal and political methods used to give form and existence to a reserve evolved over time**. **It is beyond the scope of these reasons to attempt to summarize the history of the process of reserve creation throughout Canada.** Nevertheless, its diversity and complexity become evident in some of the general overviews of the process which have become available from contemporary historical research. […]
>
> [Paragraphs 43-44; emphasis added]

[334] While this Claim is in the Maritimes and nearly two centuries removed from the time period in Ross River, perhaps the most significant distinguishing feature in this Claim is the fact that it is a pre-confederation reserve. This Claim's facts pre-date Confederation and the first enactment in 1868 of the predecessor legislation to the *Indian Act* by about 80 years. The

meaning of "reserve" in this Claim cannot properly be informed by judicial interpretation of "reserve" as defined under the *Indian Act*, as it did not yet exist.

[335] As the Supreme Court noted, the definition of "reserve" in subsection 2(1) of the *Act* "exists primarily to identify what lands are subject to the terms of the Act. The Act outlines property rights of Indians on reserves, establishes band governments and outlines their powers, identifies how Indians are or are not subject to taxation, and provides for a variety of other matters" (at para 49). In other words, finding an *Indian Act* reserve is created, means finding that the Crown intended that an exhaustive body of federal legislation would apply to regulate the reserve, necessitating a degree of federal administration, control and corresponding duties and costs that come along with the legislative imposition. By contrast, during the early colonial history of the Maritimes in the 18th century, there was no Crown legislation dealing specifically with the management and administration of Indian reserves. The "evolution" of the establishment of "Indian reserves" by the Crown over time as described by the Supreme Court, was in an early stage of development and in considerable flux, during the time period of this Claim.

[336] Furthermore, the definition of "reserve" under the *Indian Act* constrains the royal prerogative power to create reserves over Crown lands only, meaning reserves created by grants of title would not be considered reserves within the meaning of the *Indian Act*:

> In my view, the statutory framework described by the appellants has limited to some degree but not entirely ousted, the royal prerogative in respect of the creation of reserves within the meaning of the *Indian Act* in the Yukon. **Whenever the Crown decides to set up a reserve under the *Indian Act*, at a minimum, s. 2(1) puts limits on the effects of the decision of the Crown in the sense that the definition of a "reserve" in the *Act* means (1)** that the title to reserve lands remains with the Crown, and **(2)** that the reserve must consist of lands "set apart" for the use and benefit of a band of Indians. **If the royal prerogative were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members.** However, in the Yukon, so long as the Crown intends to create a reserve as defined by the *Indian Act*, Parliament has put limits on the scope and effects of the power to create reserves at whim, through the application of the statutory definition of a reserve in s. 2(1). **If the Crown intended to transfer land to a First Nation outside the scope of the *Indian Act*, the role and effects of the prerogative would not be constrained by this Act and would have to be examined in a different legal environment.**

[Para 58; emphasis added]

[337] We know some Indian reserves had in fact been created through title grant in the Maritime region and elsewhere in the colonies and recognized as reserves by colonial governments, providing one example of the different legal environment in this Claim than the one post-*Indian Act*. Hence, the Supreme Court was also careful to explain that if the Crown transferred land to a First Nation "outside the scope of the *Indian Act*"; the royal prerogative in that case would need to be examined in this "different legal environment".

[338] As the colonial history of New Brunswick unfolded, it is apparent that lands were reserved for the use of Indigenous inhabitants as part of the policy of settlement of the colonies at this time. Sometimes this resulted in grants or confirmation in Minutes of Council, but the colonial record was spotty at best and there was no one consistent approach.

[339] Bartlett at p.18 provides a "Historical table of the Reserves in New Brunswick". He notes the "Historical table" was "derived from various sources", which he references. The "Historical table" sets out 5 separate categories of interest to this Claim:

1. Reserves established by License of Occupation and/or Minute of Executive Council – 13 such reserves are listed.

2. *De Facto* Occupation Reserves – 5 such reserves are listed, including Madawaska Maliseet's IR No. 10.

3. Grant or Purchase Reserves – 2 such reserves are listed.

4. Special Reserves – 2 such reserves are listed.

5. Post-Confederation Reserves – 7 such reserves are listed.

[340] Nonetheless, the Parties tended to agree that *Ross River* could be of some assistance to the Tribunal to determine whether or not the red-lined tract in Sproule's Boundary Survey was a "reserve", within the meaning of the *SCTA* or other historically relevant legislation or law. The main issue to determine is whether Crown intent of those with sufficient authority to bind the Crown and create a reserve for the Madawaska Maliseet existed in respect of the red-lined tract

on the Sproule Boundary Survey.

[341] The Supreme Court's majority decision (provided by LeBel, J.) describes the royal prerogative as follows:

> **Generally speaking, in my view, the royal prerogative means "the powers and privileges accorded by the common law to the Crown"** (see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 1:14). **The royal prerogative is confined to executive governmental powers, whether federal or provincial**. The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute [citations omitted]."
>
> [Paragraph 54; emphasis added]
>
> […]
>
> **The royal prerogative in Canada is exercised by the Governor General under the letters patent granted by His Majesty King George VI <u>in 1947</u>** (see Letters Patent constituting the office of Governor General of Canada (1947), in Canada Gazette, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31)). In the usual course of things, the Governor General exercises these powers for the Queen in right of Canada, acting on the advice of a Committee of the Privy Council (which consists of the Prime Minister and Cabinet of the government of the day). Thus, if the power to create reserves is derived from the royal prerogative, the Governor General, or Governor in Council, would normally exercise that power. On the other hand, s.18(*d*) of the 1952 *Territorial Lands Act* specifically designates the Governor in Council as the holder of the power to set apart and appropriate lands for the fulfilment of treaty obligations. In effect, the holder of the power is the same person in both cases.
>
> The question arises in both cases as to whether the powers of the Governor in Council must be exercised personally or if those powers may be delegated to a government official. **As the intervener Coalition submits, one must look both at the Crown and Aboriginal perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve**. In my view, the correct test of this is to be found in this Court's judgment in *R. v. Sioui*, [1990] 1 S.C.R 1025, at p. 1040:
>
> > To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

> **While these words were said in the context of treaty creation, they seem relevant in principle to the creation of a reserve. In both cases, an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown.** The Crown agent makes representations to the First Nation with respect to the Crown's intentions. **And, in both cases, the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular piece of land.**
>
> [Paras 64-65; emphasis added]

[342] Notably, *Ross River* finds that the royal prerogative necessary to create a reserve may only be exercised by those with executive governmental powers, though the Supreme court analyzes who holds those powers or delegated powers in the Canadian period of the 1950-1960s (which includes the Governor General).

[343] Furthermore, displacement or limitation on the royal prerogative power "occurs only to the extent that statute does so explicitly or by necessary implication" (*Ross River*, para 54). As was the case with the Mi'kmaq as explained in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 and quoted in *Ross River*, the royal prerogative with respect to the Madawaska Maliseet would have been unfettered:

> The appellants concede that the royal prerogative was the original source of the Crown's authority to create a reserve. In such instruments as the Mi'kmaq treaties in the early 1760s discussed in *R. v. Marshall*, [1999] 3 S.C.R. 456, **the Crown interacted directly with the First Nations without the interposition of any statutory authority. Such a situation is a pure act of prerogative authority**. Only since the latter part of the eighteenth century has legislation been enacted which could eliminate or reduce the scope of the royal prerogative with respect to reserve creation.
>
> [Para 52; emphasis added]

[344] As stated in *Ross River* at para 58, "if the royal prerogative were completely unlimited by statute, the Crown would essentially be able to create reserves, in any manner it wished, including the transfer of title by sale, grant or gift to a First Nation or some of its members".

[345] Who may exercise the royal prerogative power or delegated power to create reserves in the colony of New Brunswick must be considered through the lens of the historical and political period of the Claim. Though in doing so, "one must look both at the Crown and Aboriginal

perspectives to determine on the facts of a given case whether the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown to act to appropriate or set apart the lands and then to designate them as a reserve" (*Ross River* at para 64).

B. *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 and Application of the *Royal Proclamation* of 1763

[346] Very much like the *Indian Act* that did not explicitly set out a process to create reserves, the legal instrument as concerned Indigenous lands in the colonies, the *Royal Proclamation of 1763*, also did not set out a process to create reserves but only provided for their protection once created.

[347] The *Royal Proclamation of 1763* was considered in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 a case where the Mi'kmaq attempted to argue that they did not need to obtain provincial authorization to log Crown lands in New Brunswick because they had commercial logging rights pursuant to Treaty or Aboriginal Title. The two accused had argued that the *Royal Proclamation of 1763* or *Belcher's Proclamation of 1762* granted Aboriginal Title to the Mi'kmaq. The Supreme Court found that "the text, the jurisprudence and historic policy" supported the finding that neither the *Royal Proclamation of 1763* nor *Belcher's Proclamation* reserved Aboriginal Title to the Mi'kmaq in the former colony of Nova Scotia over all lands which were unceded or unpurchased.

[348] The historical reason for and purpose of the *Royal Proclamation of 1763* was explained in some detail by the Supreme Court and has direct relevance to this Claim:

> Finally, the historical context and purpose of the *Royal Proclamation* do not support the claim that the *Royal Proclamation* granted the colony of Nova Scotia to the Indians. The *Royal Proclamation* was concluded in the context of discussions about how to administer and secure the territories acquired by Britain in the first Treaty of Paris in 1763. In the discussions between the Board of Trade and the Privy Council about what would eventually become the *Royal Proclamation*, the imperial territories were from the beginning divided into two categories: lands to be settled and those whose settlement would be deferred. **Nova Scotia was clearly land marked for settlement by the Imperial policy promoting its settlement** b**y the "Planters", "Ulster Protestants", Scots, Loyalists and others**. The Lords of Trade had urged "the complete Settlement of Your Majesty's Colony of Nova Scotia": Lords of Trade to Lord Egremont, June 8, 1763, in *Documents Relating to the Constitutional History of Canada, 1759-*

> *1791* (2nd ed. rev. 1918), Part I, at p. 135. **The settlement aspirations of the British were recognized by Binnie J. for the majority in *Marshall 1* when he stated that the recently concluded treaties with the Mi'kmaq of 1760‑61 were designed to facilitate a "wave of European settlement"** (para. 21). **The *Royal Proclamation* sought to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions.** Reserving Nova Scotia to the Indians would completely counter the planned settlement of Nova Scotia.
>
> [Para 95; emphasis added]

[349] The Supreme Court also found that as concerns this Claim, that the *Royal Proclamation* does apply to the former colony of Nova Scotia, which became New Brunswick and Nova Scotia in 1784:

> **The *Royal Proclamation* must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples**: *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36. **Further, the *Royal Proclamation* must be interpreted in light of its status as the "Magna Carta" of Indian rights in North America and Indian "Bill of Rights"**: R. *v. Secretary of State for Foreign and Commonwealth Affairs*, [1982] 1 Q.B. 892 (C.A.), at p. 912. I approach the question on this basis. The first issue is whether the Royal Proclamation applies to the former colony of Nova Scotia. The Royal Proclamation states that it applies to "our other Colonies or Plantations in America" and at the beginning annexes Cape Breton and Prince Edward Island to Nova Scotia. Other evidence, including correspondence between London and Nova Scotia, suggests that contemporaries viewed the Royal Proclamation as applying to Nova Scotia (Marshall, trial decision, at para. 112). **Interpreting the *Royal Proclamation* liberally and resolving doubts in favour of the aboriginals, I proceed on the basis that it applied to the former colony of Nova Scotia.**
>
> [Para 86; emphasis added]

[350] The following significant passage from the *Royal Proclamation* is the first articulation of a Crown policy to "reserve" Crown lands to the "Indians", at which point certain procedural safeguards would need to be followed whenever the Indigenous collective was inclined to dispose of their reserved lands:

> **And whereas great Frauds and Abuses have been committed in the purchasing Lands of the Indians**, to the great Prejudice of Our Interests, and to the great Dissatisfaction of the said Indians; **in order therefore to prevent such Irregularities for the future**, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, **strictly enjoin and**

> **require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, that same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively**, within which they shall lie.
>
> [Emphasis added]

[351] The Supreme Court also noted that this relevant provision would apply in respect of "newly reserved lands as it is to previously reserved lands":

> The third **provision of the *Royal Proclamation*** upon which the respondents rely requires **that "no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement".**
>
> The respondents argue that this reinforces reservation of Nova Scotia to the Indians. **This language, however, is equally consistent with referring to newly reserved lands as it is to previously reserved lands and does not definitively argue in either direction.**
>
> The jurisprudence also supports the Crown's interpretation of the text of the *Royal Proclamation*. **In *R. v. Sioui*, [1990] 1 S.C.R. 1025, this Court held that "the Royal Proclamation of October 7, 1763 organized the territories recently acquired by Great Britain and reserved two types of land for the Indians: that located outside the colony's territorial limits and the establishments authorized by the Crown inside the colony** [citation omitted]."
>
> [Para 93; emphasis added]

[352] This policy of reserving lands to an Indigenous collectivity inside the established colonies and requiring the consent of the collective before the Crown would accept the surrender on their behalf. It was intended to limit the various "Frauds and Abuses" which had been reportedly occurring throughout the colonies in cases where private purchasers were buying up lands directly from Indigenous nations or Indigenous persons through questionable transactions. This policy of protection of reserved lands and the need to obtain informed consent to dispose of the reserved lands which could only be done through the Crown would eventually become codified in the surrender provisions of the *Indian Act*.

VIII. DISPOSITION: MAIN ARGUMENT

[353] I am satisfied that the actions of the highest level government officials in the colony of

New Brunswick created a “reserve” in respect of the red-lined tract of land demarcated on Sproule’s 1787 Boundary Survey for the exclusive use of the Madawaska Maliseet Indians within the meaning of the *Royal Proclamation* and in the historical political context of the time.

[354] Based on the political, historical and legal context of the time, the evidence taken together establishes that the New Brunswick government had reserved the red-line tract for the Madawaska Maliseet during the earliest period of settlement of the area in accordance with Crown policy and surveying practice of laying out reserves for Indigenous inhabitants in the colony at the same time that they defined tracts for the settlers to receive grants. These demarcations of lands for both the Madawaska Maliseet and the setters, done on Order of the Lieutenant Governor of New Brunswick, reserved lands for the Madawaska Maliseet within the meaning of the *Royal Proclamation*, being “Lands reserved to the said Indians”.

[355] This policy enabled settlers and the Madawaska Maliseet to live peacefully together side-by-side in the colony. It brought Madawaska Maliseet into the fold of the British’s Crown’s influence and protection, and achieved the ultimate Crown policy of establishing Loyalist settlers in the area without conflict. As such, the Crown was honour bound to recognize the red-lined tract for the benefit of the Madawaska Maliseet alongside the settlers’ grants. Crown-approved land instruments alienating parts of this red-lined tract to the settlers post-1825 was done in direct contravention of the *Royal Proclamation* and therefore illegal or invalid within the meaning subsection 20(1) of the *SCTA*.

[356] If *Ross River* criterion is applicable to this post-confederation Claim in the Maritimes in the late 18th Century (developed in the context of the 1950s and 1960s Yukon territory, and post-*Indian Act*), I find that the test is satisfied in the historical and legal context of this (very) historical claim as well.

[357] Founding members at this time in the history of the Colony included the Governor General of North America, Lord Dorchester, and his brother, the first Lieutenant Governor of New Brunswick. His Surveyor General at time, George Sproule, was only second in command to the Lieutenant Governor of New Brunswick and was part of the Executive Council. As evident from the early colonial history as presented to the Tribunal, these three would carry out and establish the earliest land settlement and other policies in the region and in New Brunswick

which would enable the colony to be opened up to loyalist settlement.

[358] On the question of sufficient authority to bind the Crown to create the Madawaska reserve within the meaning of the time and the *Royal Proclamation*, I find that the royal prerogative to do so would have rested with Governor General Dorchester, or his brother in the latter's absence in the colony of New Brunswick. In this case, many other reserves were recognized by the colony of New Brunswick but not likewise confirmed by Minutes of Council. I do not find that the Council, either of the New Brunswick colony or other would need to provide its explicit stamp of approval through Minutes of Council or Order in Council for the necessary manifest Crown intent to be proved in this Claim. The Supreme Court of Canada already stated that Orders in Council, while the most explicit method available to create a reserve (and in the context of an *Indian Act* reserve), were not determinative of the matter, if absent. Furthermore, I am to consider the perspective of the Maliseet (which I will expand on shorty).

[359] There was certainly an explicit requirement (by Order in Council from the British government dated March 6, 1790), that Council and the Lieutenant Governor approve land grants from petitioners seeking to obtain title to Crown lands, and we see that this practice correspondingly did occur on a regular basis. In that OIC, the British government granted extensive delegated powers to the Governor General as concerned the management of Crown lands. The Governor General had existing "full power and authority by and with the advice and consent" of the New Brunswick Council to settle and agree with the Inhabitants for such lands, tenements, and hereditaments, as now are, or hereafter shall be in Our power to dispose of […]. In his absence, and practically speaking, the "Lieutenant Governor or Commander in Chief of Our said province for the time being" exercised the Governor General's delegated power in New Brunswick. In 1785, Regulations for the Province of New Brunswick had been developed in respect of "farms", including rules such as "no person petitioning for Lands is to have more than two hundred Acres granted him […]" though there were stated exceptions (Exhibit 1, Tab 41).

[360] In any case, there was no such Order in Council or comprehensive regulation or legislation at this time dealing specifically with reserves made for Indians, never mind how they were to be created. The *Royal Proclamation* however does provide that certain procedural protections would be provided over "Lands reserved to the Indians". As the Supreme Court

found in *Marshall; Bernard* at para 93, the noted procedural safeguards would apply to "newly reserved lands" as well as "to previously reserved lands". More fully it sets out that: "We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any lands reserved to the said Indians, within those parts of our Colonies where, we have thought proper to allow Settlement".

[361] As the Supreme Court noted, the purpose of this passage in the *Royal Proclamation* was "**to ensure the future security of the colonies by minimizing potential conflict between settlers and Indians by protecting existing Indian territories, treaty rights and enjoining abusive land transactions**" (para 95; emphasis added).

[362] I thus find that starting with Dorchester's instruction letter sent to Carleton on January 3rd, 1787, through to the subsequent carving up of the Madawaska area into separate, yet abutting tracts of lands for the Acadians and the Madawaska Maliseet, that the Lieutenant Governor of New Brunswick, did, for reasons explained more extensively under my section on Discussion and Findings, intend to and did reserve the red-lined tract to the Madawaska Maliseet within the meaning of the *Royal Proclamation*. In so doing, Carleton and Sproule had set aside lands for both groups to live peacefully together side-by-side in the colony, in keeping with the ultimate policy of establishing loyal settlers in the area as well as bringing the Madawaska Maliseet into the fold of the British's Crown's influence. The Crown was thus honour bound to recognize the red-lined tract for the benefit of the Madawaska Maliseet alongside the settlers grants.

[363] Secondly, if *Ross River* is authority in this Claim, as concerns Crown intent, I should also consider the "Aboriginal perspective" to determine whether "the party alleged to have exercised the power to create a reserve could reasonably have been seen to have the authority to bind the Crown" in the creation of the reserve.

[364] The evidence we do have points to the perspective of the Madawaska Maliseet that the red-lined tract had been reserved by Sproule for the Madawaska Maliseet's benefit and use. Undoubtedly, the Madawaska Maliseet were in the habit of considering that a reserve had been laid out for them by Sproule, as George Shore put it. Louis Bernard very much believed that a reserve had been created by Sproule. Indian Agent John Emmerson in 1853 reported that Louis Bernard and other Maliseet "residing on the reserve declared that they do not wish the

government to dispose of any part of the reserve" as it "was reserved for use of the Indians and could not be sold".

[365] We could speculated on what Sproule may or may not have represented to them when he surveyed the tract "required" by them, but whatever was said, the Madawaska Maliseet were evidently of the view that their lands were reserved by Sproule and that he was acting on authority of the New Brunswick government in doing so.

[366] Furthermore, it would be reasonable to assume that what the New Brunswick government did was to induce the Madawaska Maliseet to settle on the particular tract as surveyed (at the Crown's cost) and to consider it as their own area free from settlement. This allowed for the speedy settlement of the Acadians on their own improved lots, without further conflict. Such inducement was entirely in keeping with the policy that Dorchester set out to his brother in December of 1787.

[367] For Canada to suggest that there is no evidence of "representations made" to the First Nation that a "reserve had been created" for them in 1787 seems problematic in the face of the evidence that the Madawaska Maliseet apparently believed that the reserve existed as reported many times and up until 1860. This is significantly so given the incomplete record in this Claim. Missing documents include from that summer of 1787:

- A direction that Dorchester had made to Carleton regarding the Madawaska Maliseet in August of 1787, likely after or around the time Sproule was surveying Madawaska;
- A speech the Madawaska Maliseet had made to Dorchester, and his response to them, also made and exchanged at this time; and,
- Sproule's field notes and report from Madawaska and his originating Warrants of Survey.

[368] I find that the Honour of the Crown in this instance, where the record is incomplete and important key documents which could shed further light on this question are missing as a result of Crown mismanagement of these important documents, requires that any ambiguity on this question, should it exist, must be resolved in favour of the Maliseet Madawaska.

[369] Secondly, it is abundantly clear on the archival evidence that the Madawaska Maliseet accepted and made use of the demarcated lands surrounding their historical Village which they had indicated to Sproule that they required for their use. There are reports that they were in actual occupation of the tract of land as surveyed by Sproule, and the specific tracts of lands alienated to Hebert and Hartt were of course formerly occupied by and allegedly purchased from the Madawaska Maliseet. I am also satisfied Madawaska Maliseet made use of the entire demarcated tract located within their traditional lands as they had done since time immemorial.

[370] This brings me to my finding on the multiple breaches established in this Claim in respect of the Madawaska Maliseet reserve. The Parties agreed that if the Tribunal were to find that the red-lined tract was "reserved" to the Indians as described in the *Royal Proclamation*, then the procedural protections as set out therein would apply to the Madawaska Maliseet's reserve.

[371] Having found that the government of pre-confederation New Brunswick did reserve for the use of the Madawaska Maliseet, the red-lined area on the 1787 Sproule Boundary Survey within the meaning of the *Royal Proclamation*, and as there was no evidence presented by Canada that the Madawaska Maliseet surrendered though a Meeting of their Assembly any portion of that tract of land or consented to the alienation of any portion of that land, the Claimant has proven the validity of its Claim, being that Parcel A and B and the Remaining Lands within the tract were illegally alienated at the moment they were transferred to settlers, in direct contravention of the *Royal Proclamation*.

[372] Compensation for the illegal alienations of the Madawaska Maliseet reserve from the date of alienations onwards is owed and will be determined at the Compensation Stage of this Claim in accordance with the provisions of subsection 20(1) of the *SCTA* relating to an illegal taking.

[373] I should also note as is relevant to this Claim, that apparently sales of reserves post-1815 may have also been done in direct contravention of the New Brunswick's Executive Minutes dated 1815, which are cited in Richard Bartlett in *Indian Reserves in The Atlantic Provinces of Canada* at p. 30:

> In excess of 100,000 acres had been set aside for reserve lands in New Brunswick by 1810. But the pressures of European settlement were considerable. The settlers either "squatted" upon the Indian lands or sought by private

> arrangement with the Indians the right to occupy such lands. **In 1815 the Executive Council declared:**
>
> > **No sale or exchange of the lands reserved for the use of the Indians will be allowed of and any persons committing a trespass on any of those lands will be prosecuted by the Attorney General.**
>
> [Emphasis added]

However, the historical document cited in support was not included in the record for this hearing.

[374] I find the following two grounds advanced by the Claimant on the main argument have been established as breached by Canada under subsection 14(1) of the *SCTA*:

> (b) a breach of a legal obligation of the Crown under the *Indian Act* **or any other legislation – pertaining to Indians or lands reserved for Indians** – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada; and
>
> (d) an illegal lease or disposition by the Crown of reserved lands.
>
> [Emphasis added]

IX. ALTERNATE ARGUMENT

A. Claimant's Position

[375] The Claimant submits that if the Tribunal found that the New Brunswick colonial government did not reserve the re-lined tract of land on Sproule's Boundary Survey, then in the alternative, Sproule's 1787 demarcation of the red-lined tract along with his notation that: "The Indians require the tract of land included within the red lines to be reserved for their use. Except Kelly's lot", was "the first step in the process of reserve creation".

[376] The Claimant states that having started the process of reserve creation with the 1787 survey, the Crown has a fiduciary obligation to see it through to completion. Although the Claimant did not explain in detail how this obligation arose in the context of Maliseet-Crown relations, this may be because the Claimant had already explained its theory of that relationship in its primary submissions.

[377] The Claimant further submits that it had a cognizable interest in the area surveyed by Sproule, over which the Crown assumed discretionary control. This imposed a fiduciary duty on the Crown, which the Crown failed to fulfill.

[378] The Claimant bases its cognizable interest on historic and contemporary use, combined with Sproule's survey, which rendered the red-lined area clearly delineated and identifiable as of 1787. It says the Crown assumed discretionary control over its cognizable interest in the land surveyed by Sproule when it diminished the acreage, such that only 700 acres remained in 1867. The Claimant alleged that "[t]he rest were disposed of by the Crown". Because those alleged dispositions occurred without surrender, consultation, consent or compensation, the Claimant said the Respondent breached its fiduciary obligation owed to it in law.

[379] The Claimant emphasized that the honour of the Crown is bound up in the Crown's relations with it with respect to land. Regarding the *Royal Proclamation*, the Claimant did not argue that it created fiduciary duties with respect to the land in issue, but the Claimant did say that the *Royal Proclamation* spoke to the relationship between the Crown and Maliseet. The treaties of 1725/26, 1749 and 1760 between the Crown and Maliseet did not create specific entitlements to reserves, but nevertheless spoke to the evolving relationship between the Crown and Maliseet, which inevitably would require future negotiations over land. The Claimant viewed Sproule's arrival, discussions with the Maliseet, and demarcation of land for them and for the neighbouring settlers as part of this longer process of reconciliation.

[380] Consequently, I understood the Claimant's alternative submission to be saying that, if Sproule's survey did not create the reserve in law, then his survey and the Crown's subsequent treatment of the land within the red-lined area were moments in a process of reserve creation that flowed from this history of Crown-Maliseet relations, in which the honour of the Crown was engaged, and to which fiduciary obligations should attach.

[381] More specifically, the treaties between the Maliseet Nation and the Crown, beginning in 1725, have as a fundamental principle the coexistence of two distinct societies, each following its own way of life without interference from the other. Initially, this was described in terms of the permanent settlements of the Crown's subjects and the hunting and fishing of the Maliseet. By the 1780s, in a time of rapid settlement by unforeseen numbers of Loyalist refugees, the Crown and the Maliseet had agreed to establish reserved lands for the Maliseet. This was consistent with the *Royal Proclamation of 1763*, interpreted prospectively. It was also consistent with the original principles of the Treaties.

[382] The Claimant said, therefore, fiduciary obligations attached to the Crown's treatment of the land outlined in red on Sproule's survey, including the Crown's treatment of Parcels A and B and the Remaining Lands. The Claimant submitted that the fiduciary obligation includes seeing the reserve creation process to completion, and that a disposition without surrender, consultation, consent or compensation is, on its face, a breach of the fiduciary duties that attach. Consequently, the exclusion of Parcels A and B and the Remaining Lands from the reserve at Madawaska were breaches of the Crown's fiduciary duty to the Madawaska Maliseet.

B. Respondent's Position

[383] As a preliminary matter, the Respondent submitted that the Claimant cannot base its claim, and particularly its assertion of a cognizable Indigenous interest in land, on Aboriginal rights, which are beyond the jurisdiction of the Tribunal. I would dispense with this submission by noting that the Claimant's references to historic and contemporary use and occupation, and Sproule's conclusions about the land to be included in the red-lined area on his survey, are not submissions about Aboriginal rights or title. They are submissions about use and occupation at the relevant time and Sproule's conclusions after visiting the Maliseet and walking the land. In *Canada v Kitselas First Nation*, 2014 FCA 150 at para 54 [*Kitselas*], the Court of Appeal recognized historical and contemporary use and occupation as part of the basis for the cognizable interest in that specific claim.

[384] The Respondent also submitted that there was no evidence that the Crown took discretionary control over a cognizable, communal, Indigenous interest, or that Sproule placed the red-lined area on the path to reserve creation. What was missing was evidence of a cognizable interest sourced in recognized use and occupation of the tract of land outlined in red on Sproule's 1787 survey plan, and evidence of a Crown undertaking of discretionary control of that interest.

[385] The Respondent distinguished *Kitselas* on the basis that the historical context was different: specifically, it included Article 13 of the Terms of Union and the establishment and actions of the Indian Reserve Commissions. In the Respondent's view, Sproule was not instructed to create a reserve and did not have that authority. Instead, the Crown exercised public law duties when dealing with the disputed land between 1787 and the 1840s, and wore "many

hats" (citing *Wewaykum* at para 96).

[386] Regarding use and occupation, the Respondent submitted that the evidence demonstrated a village site and some farming, but the evidence did not encompass most of the red-lined area on Sproule's survey: "There is no evidence before the Tribunal that would tend to differentiate the area outlined in red on Sproule's plan, other than the village site, from any other area in the upper St. John River and beyond, in terms of the Madawaska Maliseet's use and occupation. The Madawaska Maliseet use and occupation of land was largely unrestricted" (RMFL at para 212). The Respondent says the lack of evidence of the boundary of the Claimant's "use and occupation" means it fails to meet the test for "physical occupation" in *R v Marshall*, 2005 SCC 43 at para 56 [*Marshall*].

[387] The Respondent concluded: "all that we have here is an outline of a tract of land, accompanied by a note that speaks to the Indians requiring the land to be reserved for their use. There is no underlying history that would indicate that what we see on Sproule's plan was part of a process of reserve creation" (RMFL at para 221).

C. Applicable Law

[388] Of the two methods for establishing the existence of fiduciary obligations described in *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 49-50 [*Manitoba Métis*], only the first is in issue in this claim. This is the *sui generis* fiduciary duty, which requires:

a. a specific or cognizable, communal Aboriginal interest; and,

b. an assumption by the Crown of discretionary control over that interest (*Manitoba Métis* at para 49).

[389] As expressed by the Respondent:

> The first method of establishing a fiduciary duty emanates from the honour of the Crown [citation to *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18 [*Haida*]. It flows from the historic powers and responsibilities assumed by the Crown over Aboriginal peoples' sui generis interest in land [citation to *Wewaykum* at para 78]. Where the Crown has assumed discretionary control over specific aboriginal interests, the honour of the Crown gives rise to a

> sui generis fiduciary duty [citation to *Haida* at para 18]. The honour of the Crown "is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled" [citation to *Manitoba Metis* at para 73; Respondent's Written Submissions at paras 209-210]

1. The Cognizable Interest in the Red-lined Tract on Sproule's 1787 Survey

[390] The evidentiary record has gaps in it, as noted already. Nevertheless, sufficient evidence exists to establish the required "cognizable interest".

[391] It is undisputed that a Madawaska Maliseet village existed at the confluence of the St. John River and the Madawaska River when Sproule visited. Numerous documents refer to a village there. The Respondent's expert, Mr. Wicken, affirmed that one of the places the Maliseet lived pre-contact was at the confluence of the two rivers.

[392] Other evidence in the record helps fill in the broader picture. The Maliseet way of life, presence on the land in the area of the Madawaska Maliseet reserve, and uses of the land in the late 18th century, have already been described.

[393] As previously noted, on January 24, 1765, a petition of the Maliseet Nation was published in the Quebec Gazette (Exhibit 1, Tab 18). As described in paras. 41-44 of the Claimant's Written Submissions:

> The petition complained about encroachments by people from Quebec hunting on lands between Lake Temiscouata at the headwaters of the Madawaska River, and Grand Falls on the St. John River. Those lands include the entire Madawaska River and part of the upper St. John River.

[394] This Maliseet petition of 1765 states that the area between Grand Falls and Lake Temiscouata are *"Lands belonging to the [Maliseet] Nation"*. The government published the petition and accompanied it with a notice from the governor supporting the petition, dated 19 January 1765 and signed by Deputy Secretary James Goldfrap, stating that the *"Lands therein mentioned, which have ever belonged to, and are the Property of the said [Maliseet] Nation"*.

[395] The 1765 petition shows that the Maliseet Nation used, occupied, and had intimate knowledge of the land between Grand Falls and Lake Temiscouata, including Madawaska.

[396] This petition is evidence of the Maliseet point of view as of 1765, and is also evidence that the Crown was informed at the highest levels of that point of view.

[397] The most specific pieces of evidence related to this issue are Sproule's 1787 Boundary Survey and Communications Plan. The red-lined tract and accompanying notations have already been described. The Boundary Survey and Communications Plan indicate that Sproule had discussions with the Maliseet at Madawaska regarding their uses of land beyond the village itself (see above). In addition to the notations on the Boundary Survey, on the Communications Plan Sproule wrote: “This tribe consists of about 60 families who are generally dispersed on the River Saint John and its various branches in pursuit of game. They hold their Grand Council annually at this village…”. At the mouth of the Madawaska River Sproule wrote: “Indian Village principal residence of the St. John tribe”.

[398] Considering Sproule’s experience as the Surveyor General and his first-hand experience during his visit, he would have been aware of how the Madawaska Maliseet lived, including the fact that they grew crops, hunted, fished, trapped and picked berries. He would have been aware that they would require a fairly significant tract of land to be secured from settlers, to have a viable existence for their community. He would also have been aware that he needed to set aside enough land to support the broader purposes of the survey, which included demarcating land to facilitate peaceful coexistence between the settlers and the Maliseet. Sproule was accompanied by members of the band when he surveyed that tract of land that the Maliseet would have identified for him. The Maliseet specifically pointed out that they would not have been “using or occupying” the area that was identified as “Kelly’s lot” and that that lot should not be part of the lands to be reserved from settlers.

[399] Sproule was also accompanied in the field by Hugh Finlay, the Deputy Postmaster and a member of Quebec’s Executive Council, in the summer of 1787. As described above, in 1788 Finlay reported to the Executive Council that the Maliseet were “in actual possession of the tract of land” within the red-lined boundary on Sproule’s Boundary Survey, causing the Council to deny Doucet’s very sympathetic petition for a land grant.

[400] As noted previously, Sproule was tasked with identifying, surveying and demarcating the tract of land that would be granted to settlers and, of necessity in the circumstances (as I have

found above), land that would not be available for settlement and instead would be reserved for the use of the Madawaska Maliseet, contiguous to the tract of land made available for settler grants. The evidence taken as a whole indicates that the tract identified as reserved for the Maliseet on the Boundary Survey would have been the lands that were their traditional lands that they had and continued to "use and occupy".

[401] Once the red-lined area had been marked by Sproule on the Boundary Survey, it was clearly delineated and identifiable. As discussed in detail in the above findings on reserve creation, local authorities were aware of IR 10, and accepted and protected it early on. The evidence is also incontrovertible that the Maliseet occupied IR 10 when Sproule allotted it, and afterward.

[402] I note that Canada, in describing the criteria of evidence proving occupation and possession, referred to the necessity of proving "physical possession" and cites the Marshall case at para 56, as authority for that proposition. The context in the Marshall case, however, was the issue of "proving aboriginal title", a very different issue from what is before the Tribunal.

[403] I find that the Claimant had a cognizable Aboriginal interest in the red-lined tract identified on Sproule's survey by the time Sproule completed his survey, at the latest.

2. Assumption of Discretionary Control by the Crown

[404] As discussed, the Maliseet Nation was a party to several *"Peace and Friendship Treaties"* with the British Crown in 1726, 1749, in 1760. The intent of these treaties, as the name implies, was to provide for peaceful coexistence between the Maliseet and the British settlements in the traditional territory of the Maliseet. This relationship is described in more detail by Professor Nicholas under the section entitled "Maliseet Nation History, Traditional Territory and the Peace and Friendship Treaties" at paragraph 34.

[405] In addition to the *Peace and Friendship Treaties,* the British monarch issued the *Proclamation* (Exhibit 1, Tab 16). As noted in the Claimant's Written Submissions at paragraphs 37-39:

> The Proclamation also protected the lands of the "several Nations and Tribes of Indians with whom We are connected and who live under our protection, should

> not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to or purchased by US, are reserved to them, or any of them, as their Hunting Grounds." That provision was for all of "our colonies."

[406] One of the purposes of the *Royal Proclamation of 1763* (the *Proclamation*) was to govern relations between British North American colonists and Indigenous people in dealing with lands occupied by the latter. The *Proclamation* sought to protect existing Indigenous lands to minimize conflict between the settlers and the Indigenous people.

[407] With respect to land within the colonies that had already been established in 1763, the *Proclamation* contains an official directive that no warrants of survey or land grants were to be issued for territories which had not been ceded to, or purchased by the Crown. It enjoined private persons from making any purchase from the "Indians" of any lands reserved to them.

[408] As referenced earlier, Lord Dorchester in his January 3, 1787 letter to his brother Thomas Carleton, the Lieut. Gov. of New Brunswick, directed Carleton with the instructions that the Madawaska Maliseet should be treated with civility and encouraged Carleton to take steps to "secure their friendship" Further, Lord Dorchester reminded Carleton that, "… justice require some attention and some compensation to these people whose lands we come to occupy".

[409] The historical sequence has already been described above in greater detail, but these brief references highlight the relationship between the Crown and the Maliseet leading up to Sproule's visit in 1787. It is important to recall the historic powers and responsibilities assumed by the Crown over the Maliseet's *sui generis* interest in land engage the "honour of the Crown". By the 1780's, the Crown needed to make decisions regarding the increasing conflict with settlers moving onto Maliseet traditional territory, to satisfy the needs of both the large loyalist population seeking desirable land in the St. John River valley, and the Maliseet. In order to demarcate the boundary for settler grants, the Crown needed to come to a decision as to the surrounding area that would be identified as only for the use of the Maliseet.

[410] Implicit in this description is the fact that the Crown had discretionary control over the disposition of as yet ungranted land. This was the setting of Sproule's visit to Madawaska and survey effort. This situation engaged the Honour of the Crown.

[411] I find that when Sproule visited the Maliseet and carried out his survey in 1787, this was part of a process of reserve creation that flowed from the specific historical relationship that had been established as of that date between the Crown and the Maliseet. Even if I am found to be incorrect in concluding that the reserve was in fact created in law in the manner described in the first part of this decision, the evidence taken as a whole regarding Crown officials' strategic and practical needs, intentions and acknowledgements, is at least sufficient to support the view that with Sproule's survey, the Crown was engaged in the process of reserve creation, if not the conclusion of it.

[412] Moving beyond 1878, the alienation of Parcels A and B and the "remaining lands" from the area surveyed by Sproule, and eventually from the Crown, were also acts of discretionary control over the Claimant's specific, cognizable, communal interest in the land outlined in red on Sproule's survey.

[413] I therefore agree with the Claimant's submission that the Madawaska Maliseet had a cognizable interest in the red-lined tract of land as result of their prior use and occupation of that land, followed by the identification and demarcation of that land by Surveyor General Sproule in 1787. I also agree that the Crown assumed discretionary control over Parcels A and B and the Remaining Lands in the red-lined area when disposing of them without Madawaska Maliseet knowledge or consent.

[414] As the Claimant is not relying on the second method by which a fiduciary duty may arise (Manitoba Métis at para 50), it will not be necessary to analyze that issue.

3. Content of the Fiduciary Duty

[415] The duty on the Crown during the reserve creation process includes: "… obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary". In Blueberry River McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'" (*Wewaykum* at para 94).

4. Did the Crown Breach its Fiduciary Duty?

[416] Sproule's red-lined tract on the 1787 Boundary Survey comprised 3,700 acres in 1787. The reserve as it existed upon Confederation was only 700 acres. The Claimant alleged the dispositions of Parcels A and B, and a lack of reasonable diligence through the process of reserve creation, were breaches of fiduciary duty. The Claimant did not pursue Parcel C at the hearing or in written submissions.

[417] The 1825 grant to Hebert has been described already. This grant occurred without consultation or any form of consensual release by the Madawaska Maliseet, and without any compensation. The survey plan attached to the grant said "Indian Reserve" on its face. The presence of the Madawaska Maliseet and their desire for recognition of their claim to the land were known to the local authorities including Thomas Baillie, the Executive Council, and Lieutenant Governor Carleton, as evidenced by:

i. Sproule's 1787 survey

ii. Doucet's petition

iii. The Madawaska Maliseet's 1792 petition

iv. The 1820 Treat report

v. The rejection of the 1824 Martin petition and 1825 Rice petition

[418] If the land was not yet a reserve, then the 1825 Hebert grant was nonetheless a breach of fiduciary duty. The decision to approve the grant to Hebert demonstrated at least a lack of reasonable diligence and ordinary prudence with respect to the Madawaska Maliseet's interest in the land surveyed by Sproule, and possibly bad faith by Thomas Baillie, who had only a year before described the land as "reserved for the Madawaska Indians".

[419] The licence of occupation granted to Hebert in 1829 was signed by the same person as the 1825 grant: Thomas Baillie. This again demonstrated at least a lack of reasonable diligence and ordinary prudence, and possibly bad faith.

[420] The grant to Hartt in 1860 lay adjacent to the 1825 grant. By this time, the Madawaska Reserve had already been listed in the 1842 Schedule of Reserves as encompassing only 700

acres. Nevertheless, the Madawaska Maliseet continued to assert their view of the situation. Hartt's petition in 1853 specifically referenced that the land was "Indian Reserve". In 1853 the Indian Agent, John Emmerson, wrote to the Surveyor General, R.S. Wilmot, saying that Lewis Bernard and other "Indians" residing on the reserve did not wish the government to dispose of the land sought by Hartt. However, that is what happened in 1860.

[421] There is no indication in the evidence to suggest that the colonial authorities gave serious attention to the interests of the Madawaska Maliseet when approving these two grants and the licence of occupation.

5. Diligence

[422] The Claimant argued that once a tract of land is on the path to reserve creation, "the Crown has a fiduciary obligation to see it to completion, and has fiduciary obligations to the Indigenous people during the land's journey along the path" (Claimant's Written Submissions at 360).

[423] As discussed, Sproule's survey clearly demarcated a specific tract and facilitated security on the ground for settlers and the Maliseet. The honour of the Crown then required that the Crown follow through with reasonable diligence. It is unnecessary on the facts of this claim to decide whether the Crown had a duty to recognize the reserve precisely on Sproule's boundaries once the survey was complete. The record is sufficient to demonstrate that the Crown failed to act with "…full disclosure appropriate to the matter at hand and in what it reasonably and with diligence regards as the best interest of the beneficiary".

[424] The unusual circumstances of the "recognition" of the Madawaska Maliseet reserve by colonial New Brunswick reveal that it was only New Brunswick's first Indian Commissioner, Moses Perley's 1841 report of the Madawaska Maliseet at the confluence of the Madawaska and St. John Rivers that led the Crown Land Office to include in its Schedule of Reserves, a "de facto occupation" reserve with an estimated area of 700 acres. As previously noted, this 700 acre "de facto occupation" reserve for the Madawaska Maliseet continued to be the "official" Madawaska Maliseet reserve at the time of Confederation.

[425] This process of reserve recognition of New Brunswick begs the obvious question, as

discussed earlier, that if in 1787 – 88, the Crown Land Office officials were aware as Hugh Finlay was aware, that the Maliseet were in actual possession of the tract of land outlined in Sproule's Boundary Survey and followed the same reporting procedure, the Madawaska Maliseet would have been listed as having a "de facto occupation reserve" with substantially increased acreage. As referred to earlier, in Thomas Baillie's 1838 Schedule of Indian Reserves, of the 13 reserves listed, only one reserve was "created" by an Order in Council in May of 1804. Another reserve claimed as having been "created"- "under orders from the government" but Baillie reported that "no record appears".

[426] The balance of the reserves listed were on the Schedule because of those bands "having occupied" a tract of land according to the then Surveyor General, Thomas Baillie.

[427] This history does not reflect reasonable prudence or diligence on the part of the Crown.

[428] The Crown, in disposing of Parcels A, B and failing to take any account of the Remaining Lands in later descriptions of the reserve, incurred the following breaches of its fiduciary duties to the Madawaska Maliseet:

i. Failing to protect Parcels A and B and the Remaining Lands, or alternatively, consult and seek a consensual release of parcels A and B and the Remaining Lands with compensation; and,

ii. Failing to act with reasonable diligence and care with regard to the best interest of the Claimant during the process of reserve creation.

X. DISPOSITION: ALTERNATIVE ARGUMENT

[429] For the foregoing reasons, I find that the Claimant has proven, on a balance of probabilities, a valid claim under the *SCTA* as concerns the alternative argument.

[430] I find that the Respondent breached fiduciary duties during the process of reserve creation, and the Claimant has established a valid claim under section 14(1)(c) of *SCTA*: a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands.

[431] As a concluding observation, the opinion of New Brunswick's first Commissioner of

Indian Lands, Moses Perley in 1844, were prescient. Moses Perley's report is contained in L.F.S Upton's text, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: UBC Press, 1979). At pages 110-11, Upton wrote:

> Given Perley's views, the then Lieutenant Governor of New Brunswick had decided that the government could no longer employ Perley "in any capacity among the Indians. His zeal had antagonized both council and assembly and led him to think of himself as the 'diplomat of an independent power', treating between the Indians and government." [The Lieutenant Governor]… emphasized that he was faulting Perley for an excess of zeal rather than incompetence. As a farewell tribute, the lieutenant-governor enclosed Perley's memorandum on the history of the Indians of the province with his dispatch (sic). That said review showed how accurately Perley saw what was happening and how such perception had made him a sore embarrassment. As he summed up the history:
>
> > The first step was a joint occupation of the country by the Indians and the British settlers: the second was assigning to the Indians certain districts of counties, within which they were not to be disturbed, the next, confining each tribe to a certain tract portion of land called a reserve and finally, reducing those reserves by degrees until in 1842 only one half remained… And to conclude by selling all that remains… Without any provision for their [the Indians] future welfare.

BARRY MACDOUGALL

Honourable Barry MacDougall

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20171128

File No.: SCT-1001-12

OTTAWA, ONTARIO November 28, 2017

PRESENT: Honourable Barry MacDougall

BETWEEN:

MADAWASKA MALISEET FIRST NATION

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 MADAWASKA MALISEET FIRST NATION**
As represented by Patricia Bernard and Paul Williams

AND TO: **Counsel for the Respondent**
As represented by Reinhold M. Endres and Patricia MacPhee
Department of Justice