

Court File No.: T-1929-19

FEDERAL COURT

MARGUERITE MARY (MARGARET) BUCK, DOROTHY ANNE SAVARD,
SYLVIA M. MCGILLIS, FRANCES JUNE MCGILLIS,
FLORENCE JOYCE L'HIRONDELLE, AND MARILYN MCGILLIS

AND:

ATTORNEY GENERAL OF CANADA



DEFENDANT

STATEMENT OF CLAIM TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

(Date): NOV 29 2019

Issued by: _____ (Registry Officer)
ORIGINAL SIGNED BY
FRANK FEDORAK
A SIGNÉ L'ORIGINAL

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701 West Georgia Street
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TO: Attorney General of Canada
c/o British Columbia Regional Office
Department of Justice Canada
900 - 840 Howe Street
Vancouver, British Columbia, V6Z 2S9
Attention: Ms. Patrice Robinson, Counsel

STATEMENT OF FACTS

Plaintiffs

1. The Plaintiffs, Marguerite Mary (Margaret) Buck, Dorothy Anne Savard, Sylvia M. McGillis, Frances June McGillis, Florence Joyce L'Hirondelle, and Marilyn McGillis (collectively the "McGillis Family") are all status Indians, as that term is defined in the *Indian Act* RSC 1985 c 1-5 and registered members of the Enoch Cree Nation ("ECN"), a Band as that term is defined in the *Indian Act.*, RSC 1985 c 1-5.
2. All of the Plaintiffs, except for Florence Joyce L'Hirondelle, live in Enoch, Alberta. The address for service for the Plaintiffs is c/o Donovan & Company, 6th Floor, 73 Water Street, Vancouver BC, V6B 1A1 Attn: Mr. Karim Ramji.

The Defendant

3. The Defendant, the Attorney General of Canada ("Canada") is the representative of Her Majesty the Queen in Right of Canada and the Government of Canada, its departments and ministries, including the Department of National Defence ("DND") and the Minister of Indian Affairs (the "Minister") pursuant to subsection 23(1) of the *Crown Liability and Proceedings Act*, RSC 1985, c. C-50.

The Reserve Lands

4. The ECN's main reserve is the Stony Plain Reserve No. 135 (the "Reserve") which has an area of approximately 52 sq. kilometers. The Reserve is located just west of the municipal boundaries of the City of Edmonton.

History of the McGillis CP Lands

5. The McGillis Family collectively hold Certificates of Possession issued by the Minster for lands legally described as Section 15 TWP 52 RGE 26 W4M SE 1/4 CLSR T1121 (the "McGillis CP Lands"), as follows:

• Marguerite Mary (Margaret) Buck	CP #121631 (1/7 th) CP #162522 (1/35 th)
• Dorothy Anne Savard	CP #121634 (1/7 th) CP #162521 (1/35 th)
• Sylvia M. McGillis	CP #121637 (1/7 th) CP #162520 (1/35 th)
• Florence Joyce L'Hirondelle	CP #121635 (1/7 th) CP #162518 (1/35 th)
• Frances June McGillis	CP #121636 (1/7 th) CP #162519 (1/35 th)
• Marilyn McGillis	CP #139523 (1/7 th)
6. The McGillis CP Lands covers 160 acres within the Reserve fronting on Yekau Lake.
7. The current holders of the McGillis CP Lands are all descendants and relatives of the late John McGillis. The Certificate of Possession for the McGillis CP Lands was formally issued to John McGillis by the Minister on November 16, 1951. John McGillis and his family have used and occupied the McGillis CP Lands since the early 1940's.
8. Following the death of John McGillis, the McGillis CP Lands were transferred to his spouse, Margaret McGillis on September 29, 1967. After Margaret McGillis' death, the McGillis CP Lands were transferred to her seven children on July 29th, 1997 to the following (each of whom acquired an undivided 1/7th interest):

- James Lawrence McGillis;
 - John Robert McGillis;
 - Marguerite Mary (Margaret) Buck;
 - Dorothy Anne Savard;
 - Florence Joyce L'Hirondelle;
 - Frances June McGillis; and
 - Sylvia M. McGillis.
9. On January 31, 2002, the undivided 1/7th interest in the CP Lands of John Robert McGillis who had passed away was transferred to his wife, Marilyn McGillis.
10. On December 15th, 2008, an application was made by the estate of James Lawrence McGillis to transfer his interest to Marguerite Mary (Margaret) Buck, Dorothy Anne Savard, Florence Joyce L'Hirondelle, Frances June McGillis and Sylvia M. McGillis, each of whom acquired an undivided 1/35th interest. The members of the McGillis Family as holders of Certificates of Possession are also known as locatees.

DND Lease

11. On March 5, 1942 Canada, through DND, was granted a lease (the "Lease") for Section 14 and Sections 15 of the Reserve which was approximately 1,280 Acres of the Reserve from the Minister (the "Leased Lands") pursuant to Section 50 of the Indian Act, RSC 1927.
12. The McGillis CP Lands which were formally granted by the Minister to the late John McGillis on November 16th, 1951 constitute, in terms of geographic area, 1/8th of the Leased Lands.

Bombing Range

13. The Leased Lands were used by DND at various times between at least 1942 and 1946, for the purposes of conducting extensive aerial bombing operations (the

"Operations"). In the course of the Operations, DND dropped thousands of bombs on the Leased Lands.

14. Following the conclusion of the Operations, Canada left on the Leased Lands, debris from exploded munitions ("Munitions Scrap") and unexploded munitions ("UXOs").
15. The primary target for the Operations on the Leased Lands was Yekau Lake. As the McGillis CP Lands front Yekau Lake, the amount of Munitions Scraps and UXOs on the McGillis Family CP Lands is far greater in proportion than the 1/8th geographical area of the Leased Lands.

Legacy Sites Program

16. In about 2005, DND established the UXO and Legacy Sites Program (the "Legacy Sites Program") by which DND intended to meet its obligation to oversee the clearance and remediation of Munitions Scrap and UXOs on all lands across Canada that had been used by DND for its war time military operations.
17. Canada has failed to maintain and preserve any records of the discharge of the bombs on the Leased Lands, including the CP Lands. The number, type, size and location of the bombs is unknown.
18. Canada has confirmed that the Leased Lands are under its Legacy Sites Program.
19. In or about July 2008, Canada, without the consent of the McGillis Family, carried out some preliminary investigations in relation to the Munitions Scrap and UXOs on the Leased Lands, including the McGillis CP Lands. However, Canada has refused to provide any of these investigative reports (the "Reports") to the McGillis Family, despite numerous requests.
20. Despite the Reports, Canada has failed to conduct any proper assessment or

investigation to determine the quantity, depth, and location of the Munitions Scrap and UXOs on the Leased Lands, including the McGillis CP Lands.

21. Canada has also refused to provide, despite numerous and ongoing requests, any information, data, studies reports or investigations related to the Munitions Scrap and UXOs on the McGillis CP Lands and the impacts on health, the environment and safety concerns (the "Bombing File").
22. The amount, extent, kind and location of Munitions Scrap and UXOs on the Leased Lands, including the McGillis CP Lands is not known but is believed to be extensive.
23. As a result of the serious risks posed by the Munitions Scrap and UXOs, the ECN in 2014 was forced to close down its golf course operations and use of its cultural grounds, both of which are on the Leased Lands.
24. Despite numerous requests to the Minister and the ongoing safety, environmental, and health risks, Canada has not provided to the McGillis Family any information on the Bombing File, the Reports and has refused to engage with the McGillis Family.

LEGAL BASIS

Legal Consequences of Certificate of Possession

25. The legal consequences of issuing a Certificate of Possession are the following:
 - a. The McGillis Family has acquired all incidents of ownership in the McGillis CP Lands, except legal title which remains vested with the Queen (see paragraph 26, below);
 - b. The issuance of the Certificate of Possession shifts the communal right of use and possession of the lands covered by the McGillis Family CP from the ECN to McGillis Family (see paragraph 27, below);

- c. The communal interest of ECN in the McGillis CP Lands has disappeared or been suspended (see paragraph 27, below);
- d. The McGillis Family have for all practical purposes the equivalent of a fee simple title in the McGillis CP Lands (see paragraph 28, below); and
- e. The legal right to sue for trespass and damages lies with the McGillis Family alone and not ECN (see paragraph 29, below).

26. In the decision of the British Columbia Court of Appeal in *Joe v Findlay*, [1981] 3 CNLR 58, the Court held:

[9] ... I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands, which right is given by statute to the entire band in common, but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members, thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown. *Brick Cartage Ltd. v. R.*, [1965] 1 Ex. C.R. 102. (emphasis added)

27. The decision of the Federal Court of Appeal in *Boyer v The Queen*, 1986 CanLII 3988 (FCA), the Federal Court of Appeal held at paragraph 13:

...To me, the "allotment" of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the band to being the individual and personalized right of the locatee. The interest of the band, in the technical and legal sense, has disappeared or is at least suspended. ... (emphasis added)

28. The decision in *Dale v. Paul*, 2000 ABQB 411, specifically deals with the ECN Reserve lands. The Court noted at paragraph 4:

[4] The portions of the Indian Act that were provided to me show that there is a system of landholding among the Indian population who live on a reserve that requires the approval of the Minister of Indian and Northern Affairs and the Council of the Band in question. The evidence is unassailable that the applicant has the highest form of title an Indian can have to land that is part of an Indian reserve. It appears to me in fact that a certificate of possession is very close for all practical purposes to a fee simple certificate of title.(emphasis added)

29. The BC Supreme Court in its decision in relation to the Westbank Indian Band, in *Louie v. Normand*, [1994] 3 CNLR 197, noted:

He failed to appreciate fully the significance of what was subsequently said by the Court of Appeal in the above quote that when a part of reserve land is allotted to an individual Band member, as was done here under a certificate of possession from the Crown with the consent of the Band, all the incidents of ownership in the allotted part vests in the individual member with the exception of the legal title to the land itself, which remains with the Crown. Accordingly, the right to claim damages to the lands allotted to Gary Swite rests with him personally, and also to those lands allotted to his relatives to the extent that he holds from them. The Westbank Indian Band has no right to sustain an action to the farm lands in question as the incidents of ownership have passed from it to Gary Swite and his relatives.(emphasis added)

30. Accordingly, the case law is clear that it is the McGillis Family alone who can assert trespass, demand removal of the Munitions Scrap and UXOs, remediation of the McGillis CP Lands, and claim damages from the Canada for the Operations as it relates to the McGillis CP Lands, and not ECN.

Lease was Void Ab Initio

31. The Lease was granted by the Minister to DND pursuant to Section 50 but without complying with the statutory requirements of Section 51 of the *Indian Act RSC 1927*. In particular, there was no formal surrender for the Leased Lands as required by Section 51. Without the formal surrender, the Lease was *void ab initio* pursuant to Section 51:

Except, as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or any individual Indian, shall be binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.

32. Accordingly the Leased Lands were used by DND without any legal authority and the use of the Leased Lands for the Operations and the placement of the Munitions Scrap and UXOs constitutes an ongoing and continuing trespass.
33. If the Lease was not *void ab initio*, then in the alternative, the Lease was subject to an express or implied term that DND would repair all damage done to the Leased Lands and remove all of the Munitions Scrap and UXOs and remediate and restore the Leased Lands.
34. If the Lease was not *void ab initio*, then in the further alternative, the Lease with DND was entered into by Canada on behalf of the ECN in circumstances in which Canada was acting as an agent of or trustee for the ECN and would have required the removal of all of the Munitions Scrap and UXOs at the end of the Operations. Canada has failed to discharge its obligations as prudent trustee.
35. In the further alternative, by its conduct in establishing the Legacy Sites Program, Canada has acknowledged its obligation and liability for its deposit of and failure to remove the Munitions Scrap and the UXOs from the Leased Lands, including the McGillis CP Lands.

Trespass Ongoing

36. The Munitions Scrap and the UXOs placed by Canada on the Leased Lands, including the McGillis CP Lands, are the property of Canada and constitute an ongoing trespass, nuisance and hazard to the Leased Lands, including the McGillis CP Lands because they are inherently dangerous and were placed without any legal authority: the Lease was *void ab initio*.
37. As a result of the continuing trespass, the McGillis Family is entitled to claim against Canada because:
 - a. There is no limitation period that bars an action for continuing trespass; and
 - b. A subsequent transferee may also sue for continuing trespass.

38. The Saskatchewan Court of Appeal in *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 (leave to the SCC refused) noted:

[122] The decision in *Johnson* provides a similar analysis. This case involved the construction of power lines across the plaintiff's reserve land used for fishing and hunting. Justice Murray held that the erection of the power lines was a continuing trespass which gave rise to a new cause of action each day. In coming to this conclusion he relied on the following passage from *Fleming*:

If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions *de die in diem* until the condition is abated. Likewise, if the chattel was initially placed on the land with the possessor's consent, termination of the licence creates a duty to remove it; and it seems that, according to modern authority, a continuing trespass is committed by failure to do so within a reasonable time. In all these cases, the plaintiff may maintain successive actions, but in each damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss.

39. Canada, through DND, knew or ought to have known that its Operations would leave behind both Munitions Scrap and UXOs which would:
- a. be a significant and ongoing safety, environmental and health hazard;
 - b. would cause immediate and long term chemical contamination to Yekau Lake and pose an ongoing risk to humans, livestock and wildlife;
 - c. would diminish the potential uses and value of the Leased Lands; and
 - d. require the removal of the Munitions Scrap and the UXOs and the remediation and restoration of the Leased Lands, including Yekau Lake, before abandoning the Leased Lands.

40. The presence of the Munitions Scrap and the UXOs on the Leased Lands, including the McGillis CP Lands poses an ongoing health, safety and environmental hazard and is a restriction and unlawful interference with the McGillis Family's use and enjoyment of the McGillis CP Lands.
41. Canada is under a legal obligation to the McGillis Family to remove the Munitions Scrap and the UXOs from the McGillis CP Lands, and to remediate and restore the McGillis CP Lands, which legal obligation continues to this day.
42. By reason of Canada's unlawful deposit of the Munitions Scrap and UXOs on the Leased Lands, including the McGillis CP Lands, the McGillis CP Lands have been damaged and rendered unfit for ordinary use, and the McGillis Family has suffered losses and damages.
43. As a result of the continued presence of the Munitions Scrap and UXOs on the McGillis Family CP Lands, the lack of sufficient information as to the location of the Munitions Scrap and UXOs, the McGillis Family is unable to fully use or occupy the McGillis CP Lands.

Canada's Fiduciary Obligations

44. At all material times, Canada has had exclusive authority to grant the right to possess, use or occupy the Reserve to persons other than the ECN or its members. In exercising this authority, Canada has undertaken discretionary control over the ECN's interest in the Reserve.
45. Canada's powers and discretion in relation to the Reserve have been exercised unilaterally so as to affect the ECN interests. Canada was and is under a fiduciary duty to the ECN in respect of Canada's exercise of discretion or control in relation to the Reserve.
46. The granting of Lease by the Minister to DND for the Operations was putting the

interests of DND ahead of those and in conflict with the duties of good faith and loyalty required of a prudent trustee knowing that the Leased Lands would be irreparably damaged by the Operations. Canada was in a conflict of interest and breached its fiduciary duties to ECN, including the McGillis Family by putting the interests of DND ahead of its duties of good faith and loyalty to the ECN, including the McGillis Family.

47. Once Canada declared the Leased Lands as a Legacy Site, including in relation to the clearance of the Munitions Scrap and UXOs from the Leased Land, it was doing so in its capacity as trustee and a fiduciary.
48. Canada has breached its fiduciary obligations to the McGillis Family who are particularly vulnerable because of the Operations by:
 - a. Refusing to engage with the McGillis Family in relation to these matters;
 - b. Failing to provide to the McGillis Family any information from the Bombing File and the Reports;
 - c. Failing to warn the McGillis Family on the health risks, environmental impacts and safety hazards of using the McGillis Family CP Lands following the Operations;
 - d. Failing to properly investigate and assess the scope and extent of the Munitions Scrap and UXOs on the McGillis CP Lands;
 - e. Failing to remediate and restore the McGillis CP Lands; and
 - f. Failing to remedy Canada's continuing and ongoing trespass on and nuisance to the McGillis CP Lands.

Losses Suffered by the McGillis Family

49. As a result of Canada's wrongful conduct set out above, the McGillis Family have suffered losses and damages, particulars of which are as follows:
 - a. the past loss of use of the McGillis Family CP Lands that contain or are contaminated by Munitions Scrap and UXOs, from the time of the issuance of the Certificate of Possession for the McGillis CP Lands;
 - b. the future loss of use of the McGillis Family CP Lands required for a proper

- investigation, assessment and full clearance of the Munitions Scrap and UXOs.
- c. damages in relation to the McGillis Family Lands that contain or are contaminated by Munitions Scrap and UXOs which have diminished in value and are not suitable for use as a result of the presence of the Munitions Scrap and UXOs or both;
 - d. damages for environmental damage and degradation of the Yekau Lake, the water, flora, fauna and wildlife; and
 - e. damages for impacts on the health of the members of the McGillis Family.

Relief Sought

1. The Plaintiffs claim a declaration that Canada has and continues to be in trespass on the McGillis CP Lands.
2. The Plaintiffs claim a declaration that Canada has breached its fiduciary duties to the McGillis Family.
3. The Plaintiffs claim a declaration that Canada is under an affirmative duty to the McGillis Family to forthwith take all necessary steps to properly investigate, assess and remove all the Munitions Scrap and UXOs from the McGillis Family CP Lands and to fully remediate and restore the lands and waters, and to pay all costs and expenses associated with the same directly to the McGillis Family.
4. The Plaintiffs claim general damages for their loss of use, the past and ongoing trespass, nuisance, diminution in land value, and impacts on their health.
5. The Plaintiffs claim statutory or equitable interest.
6. The Plaintiffs claim costs.

The Plaintiffs propose that this action be tried at Vancouver, British Columbia.

(Date): November 30, 2019



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SOR/2004-283, s. 35

I HEREBY CERTIFY that the above document is a true copy of
the original is filed out of / filed in the Court on the _____
day of NOV 29 2019 A.D. 20____

Dated this _____ day of NOV 29 2019 20____



FRANK FEDORAK
REGISTRY OFFICER
AGENT DU GREFFE