Innu Essipit First Nation

Brief submitted to the

House of Commons Standing Committee on Indigenous and Northern Affairs

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The Innu Essipit First Nation has confidence in the future. True to its motto "For our fathers and our children," it extends a hand to all those who believe it is better to live ***in peace and friendship****.*

The Innu Essipit First Nation wishes to submit this brief to the House of Commons Standing Committee on Indigenous and Northern Affairs in connection with its study of specific claims and comprehensive land claims.

1. Comprehensive land claim

   The Essipiunnuat have been involved in negotiations with the federal and provincial governments for more than 30 years in an effort to conclude a modern treaty. On March 21, 2004, the Agreement-in-Principle of General Nature was signed by the two governments, the Innu Essipit First Nation and two other Indigenous nations. The First Nation has thus been engaged in a process of self-determination and transition to complete governmental autonomy for years.

   However, in this brief, it is not the First Nation's intention to go into detail on its situation with regard to comprehensive land claim negotiations. Rather, the First Nation wishes, with this document, to recount its experience with the specific claims process and the federal policy that sets out its framework.

2. Specific claims

   Before the Standing Committee on Indigenous and Northern Affairs, hereinafter referred to as "the Committee," the First Nation wishes to share its history and experience with regard to two specific claims that it submitted to the federal government: the insufficient provision of land when the reserve was created, and the illegal transfer of the Chemin du Quai. As you will see, we feel that this process is widening the gap between our nations and contributing to the existing feelings of mistrust and hostility instead of promoting reconciliation following an undistinguished past.

   2.1. Insufficient provision of land when the reserve was created

      Limited by the 97-acre size of its reserve, Essipit undertook a project to enlarge the reserve in the 1980s. In the course of our research and the

process of increasing the size of the reserve, we discovered many documents and a great deal of information about the history of the creation of the Essipit Indian reserve. While the small size of the reserve and its status as an enclave in the municipality of Les Escoumins have always been issues in the community, we learned that the situation should have been quite different.

On the basis of the documents we obtained, we realized that the community had been deprived of more than half of the projected reserve land for more than 100 years, and that it should have had better access to the sea since its establishment. The historical situation is well documented, and the facts seem clear to us:

- while Canada made a written commitment in 1881 to acquire approximately 230 acres for the purpose of creating a reserve for the Innu Essipit First Nation, it acquired only 97 acres;
- the error was apparently due to a land survey for which Canada and the Essipiunnuat were not present, leaving the vendor to his own devices;
- however, the vendor was a private landowner whose reputation and ethics were highly questionable;
- after noticing the difference in area, Canada merely negotiated a lower purchase price and never considered whether the land would be sufficient for the First Nation;
- Yet the error in area appears on the front page of the sales contract signed in 1892, while the map appended to it differs substantially from the cadastral description included in the contract.

Moreover, the research conducted in connection with the project to enlarge the reserve showed that the 97 acres of land purchased by Canada in 1892 was never given the legal status of a reserve. This discovery will give Canada the power to regularize, as it sees fit, the controversial status of the road that runs through the reserve to the federally owned wharf. This situation will be discussed below.

After obtaining this information, the Essipiunnuat also realized that many land disputes with the neighbouring municipality of Les Escoumins could have been avoided if they had been given 230 acres when the reserve was created. Aside from the land and its monetary value, the insufficiency of the reserve land had serious consequences of a non-pecuniary nature.

In 1993, therefore, Essipit submitted this specific claim to the Government of Canada concerning the reserve creation process and the

insufficient land provided for the reserve. On the basis of the above-mentioned facts, it was claimed that the reserve should have had a minimum area of 230 acres when it was acquired in 1892, instead of the 97 acres purchased.

Ten years later, on November 8, 2004, Canada rejected Essipit's specific claim. Canada's position, reiterated in 2012, is mainly based on the following arguments:

- the reserve was created through the exercise of royal prerogative at the discretion of the Crown;
- having dealt with a private vendor, the Crown could not force him to sell a larger area, nor can it be held liable for his actions;
- a large reserve had been created at Betsiamites in 1861 for all of the Montagnais;
- no fiduciary obligation of the Crown was formed when land was set aside for Essipit.

Hence, the stage was set for long legal battle, which was initially fought before the Indian Claims Commission and finally before the Specific Claims Tribunal.

Ultimately, on January 30, 2017, the Specific Claims Tribunal handed down a decision in which it concluded that Canada had failed to fulfil its fiduciary obligation and failed to uphold the honour of the Crown. The Tribunal recognized in the decision that Canada had committed an error by acquiring 97 acres of land when it had accepted and agreed to acquire 230 acres for the creation of the Essipit reserve. Canada did not refer the decision for judicial review.

Hence, 24 years of discussions and court proceedings were needed to obtain recognition of an error that appeared to be painfully obvious. However, the fight is not over, since it is now necessary to discuss compensation with Canada, a process that is currently under way.

2.1.1. Difficulties experienced

2.1.1.1. Delays

At the end of this long history, Essipit would like to bring to the Committee's attention how terribly slow the claims settlement process is. Since 1993, Essipit has been demanding that the federal government acknowledge an

error it made in purchasing the reserve land. Remarkably, it was necessary for a tribunal to rule, in January 2017, nearly 24 years later, on the Crown's breach. The Specific Claims Tribunal emphasized the mismanagement by the federal government that characterized the entire process of creating the Essipit reserve. In the First Nation's opinion, the entire settlement process is also marked by mismanagement. As mentioned above, 11 years elapsed between the submission of the claim and Canada's response. Fortunately, the *Specific Claims Tribunal Act* has now shortened that period to three years. That limit was needed because of previous delays. If the response time limit cannot be made shorter than three years, that legal limit must, at a minimum, be maintained. It is also important to mention the delays incurred by the enactment of the *Specific Claims Tribunal Act*. Such reforms and changes to policies and laws result in further delays. While one of the Act's aims was to reduce delays, the transitional provisions in the Act actually lengthened the three-year process of dealing with our claim. The temporary rules associated with those reforms should be such that they do not hamper existing cases.

In addition to the considerable length of time taken to analyze the claims submitted to the Department, Essipit can only make the following observation: proceedings in the Specific Claims Tribunal are just as arduous and time-consuming.

The statement of claim was filed with the Tribunal on November 19, 2013, and the hearing on the Crown's liability was held nearly three years later, in the fall of 2016. Although the action-splitting procedure would have reduced the community's costs in the event that the decision on liability had gone against it, it is now resulting in a return to square one. Preparations now have to be made for another hearing, once again involving expert studies, testimony from witnesses and complex, voluminous evidence.

Fortunately, Canada has not applied for judicial review of the January 30, 2017, decision in the Essipit case. However, we notice that, until recently, Canada has

made many judicial review applications in cases where its liability has been recognized by the Tribunal. Canada appears to be using this legal procedure as if it were an appeal process as there is no right of appeal under the Act. In a context where a number of parties have elected to split actions to reduce costs and avoid unnecessary delays, Canada's systematic use of the judicial review process is a serious obstacle. As the saying goes, "justice delayed is justice denied." Back in 2006, this Committee noted how slow the land claims process was, and for the First Nation, there is no doubt that this problem is still unresolved.

2.1.1.2. Means of defence and absence of recognition

The First Nation acknowledges that in litigation, an adversarial relationship between the parties is inevitable. However, the federal government is being more than adversarial; its behaviour regarding the case is offensive and disconcerting, as it is unwilling to give any ground.

The First Nation's bemusement began when it received the Specific Claims Branch's analysis in 2004, which was reiterated in 2012. The analysis stated that there was no breach on the government's part, noting that the size of the reserve was not an issue in the creation of the Essipit reserve. It denied any commitment on the government's part concerning a specific number of acres, a specific plot of land or an acres/population formula for calculating the area of the projected reserve. It also refused to acknowledge the government's fiduciary obligation to the First Nation. In addition, it patted itself on the back for creating the reserve, noting that it could have refused and pointing out that the Betsiamites reserve had also been created for them.

While the January 30, 2017, decision demonstrates the claim's validity, Canada has refused to participate in the mediation process despite being invited to attend more than once. This attitude exacerbates the feeling of hostility between Canada and the First Nations.

At the hearing, the community was just as dismayed to hear the federal government's arguments for defending

itself tooth and nail. In addition to showing no willingness to listen to the community's arguments, the federal government once again denied making any errors of any kind with respect to the Essipiunnuat, even going so far as to contradict the repeated instructions of the country's highest court regarding the liberal approach that should be taken in Indigenous land claims cases. Concerned solely with ensuring that it would not be found liable, Canada invoked every argument that might further its case, to the detriment of its fiduciary relationship with the First Nations and its obligation to conduct itself honourably. In particular, Canada maintained that

- it could not be found liable for actions that took place before Confederation, thereby denying the First Nations any recourse for acts committed before 1867;
- it could not be held liable for the vendor's dishonesty, as simple diligence would have sufficed to detect the insufficiency of the land being sold;
- even though no consultation or information process was organized by Canada, it was up to the Essipiunnuat to request more land if they had wanted it;
- the Essipiunnuat could have used the Betsiamites reserve created in 1861, as Canada's expert witnesses told the Tribunal that the gathering of Indians on that reserve was an inadequate solution for their needs.

Flouting the Supreme Court's instructions, Canada again openly denied its fiduciary obligation to the First Nation and its obligation to conduct itself honourably. However, the Tribunal set the record straight, noting that the fact that the Crown had done business with a third party instead of setting aside public land that it owned or acquiring land from the provincial Crown did not diminish its fiduciary obligation. Justice Mainville also pointed out the obvious vulnerability of the Essipiunnuat, which was completely disregarded by Canada in its arguments.

To summarize, although the First Nation won an initial victory regarding the Crown's liability in its case, it still

has bitter feelings about the federal government's conduct. Thus, for the First Nation, the desired reconciliation with respect to this claim is seriously tainted, even ruined, by the trustee's intransigent positions. It is more than worrisome to hear Canada deny and attempt to shirk its constitutional obligations to the First Nations when it still shares a fiduciary relationship with them and they are still vulnerable in certain respects.

2.1.1.3. Compensation

At this stage, which entails determining compensation, it seems important for Essipit to mention a particularly disappointing argument put forward by Canada. For the federal government, the fact that the First Nation undertook to enlarge its reserve in 1998 remedies the breach and halts the accrual of damages. Canada also maintained that this argument is especially true since some of the land included in the vendor's offer in 1880 would have been part of that addition. These arguments merely intensify the First Nation's disillusionment with the promises of reconciliation, since it is clear to the First Nation that its own efforts do nothing to remedy the injury caused as a result of Canada's breaches. The federal government's error remains, and the losses associated with the absence of the missing land persist through time, independent of the enlargement.

It is quite clear to the community that if it had had that land in 1892, its growth, plans and development would have been different; acquiring that land today does not restore what was lost and does not remedy the past. It is upset that this pretext is being used to reduce the amount of compensation. However, it is not the only pretext being used to reduce the amount of compensation. The federal government is simply acting like an insurance company: it wants to pay as little as possible. Is this not rather surprising from a trustee that is unable to acknowledge its mistakes, does not learn from its errors and still has difficulty furthering anything but its own interests?

Also on the subject of compensation, it is inconceivable to the First Nation that the Specific Claims Tribunal would be unable to award compensation for damages other than pecuniary damages. For example, no current remedy can compensate the Essipiunnuat for the damages suffered because of its turbulent relationship with the neighbouring municipalities. The municipalities have always believed that the First Nation was claiming something to which it was not entitled. Past relations between the Essipiunnuat and neighbouring residents have been punctuated by territorial disputes and various acts tainted by discrimination and animosity, most of them based on the controversial nature of the reserve's land base.

2.1.1.4. Funding

Another issue we would like to raise is funding. Although funding in the form of contributions provided by the federal government is available to the First Nation, the First Nation has had to deal with a funding decrease that is inversely proportional to the progress in its case. Specifically, at the time when the community needed funding most to prepare for the scheduled hearing, the funding was substantially reduced. Obviously, the First Nation could not suspend its efforts or reduce the work pending the arrival of additional funding: it had to prepare for the hearing.

In June 2016, the First Nation received a third of what it considered necessary. Between the two hearings on liability, it had to submit an additional request for funds, having quickly used up the amount provided. In 2017, as the First Nation commences the second part of the action, which requires a number of expert studies and additional research, the federal government is providing nearly $60,000 less than the $208,000 requested.

Hence, we must make it clear to the Committee that specific claims funding is insufficient and inadequate.

These comments conclude what we wanted to tell you about the specific claim entitled "Insufficient provision of land when the Essipit reserve was created." We now want to provide you with some information about the claim concerning the illegal transfer of the Chemin du Quai. In particular, we want to mention Canada's actions with regard to the remedy it offered to address the situation.

2.2. Illegal transfer of the Chemin du Quai

Although this claim shares some factual information with the previous claim, a separate claim was filed with the Specific Claims Branch. Despite Canada's refusal to negotiate on the band's principal allegations, the case has not yet been submitted to the Specific Claims Tribunal.

A brief history of the facts surrounding this claim is therefore in order. In 1903, the Mayor of Les Esoumins began making arrangements to have a road built across the reserve to the new federally owned wharf. As everyone believed that the land had the status of an Indian reserve, the procedures for a land transfer under the *Indian Act* were initiated. However, Essipit maintains that the transfer was not made in keeping with the applicable legal and fiduciary obligations.

In the 1950s, Canada realized that the land used for the road had not been transferred to the municipality in a valid manner. Since then, the Crown has been aware that the Chemin du Quai was encroaching on land that was still part of the reserve.

2.2.1. Undue pressure

While Essipit was in the process of enlarging the reserve, Canada explicitly demanded, in writing, that the First Nation resolve the issue of the Chemin du Quai before it would confirm the reserve status and ultimately approve the First Nation's plan. Since it wanted to enlarge its reserve, the First Nation had to cede the Chemin du Quai land, situated at the centre of the reserve, to the governments, thus dividing its land base in two. Reserve status was then granted for the initial lands, excluding the Chemin du Quai, and Essipit was finally able to proceed with the enlargement process.

In a sense, then, Canada used this case as a bargaining chip, since Essipit had submitted a request to enlarge the reserve under the Policy on Additions to Reserve.

To the Essipiunnuat, it is particularly odd that a government that espouses remedying the errors of the past would commit further errors so recently, forcing through a transaction that completely ignores the First Nation's interests. At a time when it is hoped that the specific claims settlement process will serve to correct historical mistakes and prevent such actions in the future, it is disappointing to see Canada committing new breaches in an attempt to conceal old ones. This behaviour is contrary to the proclaimed spirit of reconciliation. Furthermore, such repeated actions are contributing to a climate of suspicion and an unhealthy loss of trust between the two nations.

To date, the First Nation has not been compensated for these breaches associated with the Chemin du Quai.

3. <u>The general repercussions of government policies and the legislative framework concerning specific claims</u>

In addition to the difficulties it has experienced in settling its specific claims, the First Nation wishes to make some general points about the associated government policies.

First, the rigid process for government handling of specific claims is not consistent with the principles of reconciliation currently espoused by the Crown. Canada itself has made the following statement:

"[…] the existing specific claims policy and process, including the question of equitable compensation, are not in keeping with a recognition of rights, or a reconciliation-based approach to addressing issues between the Crown and Indigenous peoples."[1]

The restrictive framework of the Specific Claims Policy, the *Specific Claims Tribunal Act* and the Tribunal's rules of procedure excludes any form of remedy other than monetary remedy, which applies only to pecuniary damages. There is no provision for complementary remedies to bind the wounds of the First Nations and their members. Yet the introduction of non-

[1] Joint Statement from Ministers Wilson-Raybould and Bennett regarding Huu-ay-aht First Nation Litigation, September 6, 2017.

pecuniary remedies and actions would probably contribute to satisfactory reparations. Despite this need, the Crown is taking a confrontational and adversarial attitude in the settlement process. We do not need to repeat the above-mentioned actions of the Crown to convince you of this.

With regard to procedures, we do not wish to enumerate here all of the minor irritants that the Specific Claims Tribunal Rules of Practice and Procedure may cause; rather, we want to point out how heavy the administrative and substantive burden is, particularly with respect to compensation. In an argument where the burden of proof lies with the First Nation, every allegation must be meticulously supported with detailed evidence. Once again, the flexibility advocated by the Supreme Court with regard to Indigenous issues is not very evident in the Tribunal hearings. Instead of simplifying and streamlining the proceedings, Canada increases the burden by systematically denying every point that might hurt its case, which forces the First Nation to submit thousands of exhibits.

It bears repeating that the *Specific Claims Tribunal Act* is painfully restrictive, as it does not allow the Tribunal to award exemplary or punitive damages, or damages for cultural or spiritual losses. As explained previously, the Tribunal has no power to sanction or even punish the Crown for mismanagement in the process of creating the Essipit reserve. Nor does it have the authority to sanction the Crown for its extremely confrontational attitude regarding liability or its penny-pinching arguments concerning compensation.

While the Indigenous peoples never chose to be under the aegis of the federal government, in other words to be the beneficiaries of that *sui generis* fiduciary obligation, they are not deciding when they will be able to dispense with it, either. Despite numerous errors in the past, for which, more often than not, only monetary remedy was made, with no apology or admission of wrongdoing, the First Nations of Canada have no choice but to continue relying on the Crown and, in particular, trust the Crown. The First Nations are tied to the federal government, which is at once a trustee, a co-contracting party, a funding provider, a creditor, a granting body and a lender.

4. Recommendations and demands

As the Innu Essipit First Nation is confident in the future and wishes to offer a helping hand to anyone who asks, it is only natural that it should propose solutions to the problems it has experienced.

First and foremost, it is inappropriate that the only remedy the Specific Claims Policy and the Specific Claims Tribunal can make is monetary compensation. Moreover, the amount of monetary compensation should not be calculated using a general mathematical formula based solely on the principles of expropriation. Providing alternative, complementary forms of compensation cannot be ignored as a potential solution, as it would support a form of acknowledgement of past wrongs. Restorative justice, in all of its flexibility, should be the fundamental principle of the Specific Claims Tribunal, and it should also be the basis for any settlement agreement between the Crown and the First Nations.

In light of the *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law* adopted by the United Nations General Assembly,[2] the remedy for any specific claim should be based on the following principles: compensation, restitution, rehabilitation, satisfaction and prevention.[3] As soon as possible, restitution of the appropriated or damaged land should be made a priority. Since that land has no equal, its irreplaceable nature means that there can be no more complete remedy than return of the appropriated or damaged property. However, if complete or partial restitution is impossible in the immediate or near future, other land of comparable quality and title should be offered. Obviously, that land should be chosen in conjunction with the First Nation. If financial compensation is the only possible avenue, it should take into account the injury due to the impossibility of recovering the appropriated or damaged land.

The financial compensation should reflect the nature of the Crown's breach and should not be based solely on expropriation-related compensation. Loss of benefit, loss of opportunity, collateral damages, and benefit realized by third parties or the Crown as a result of the breaches should all be considered in the calculation of financial compensation. Particularly with regard to the status of reserve land, damages associated with the absence of delineation and the absence of title should also be compensated, including the frustration and annoyances experienced by First Nations members as a result of these territorial ambiguities. Adhering strictly to legal principles is a dishonour to all of the spiritual and cultural importance that the First Nations attach to ancestral and reserve lands. As a concrete example, the

[2] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by United Nations General Assembly resolution 60/147, December 16, 2005.

[3] *More than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title*, Brenda L. Gunn, (2013) 46 UBC L Rev 299 – 348.

establishment of a cultural and spiritual development fund for the benefit of community members might constitute a worthwhile form of reparation.

The third and fourth principles set forth are rehabilitation and satisfaction. It makes perfect sense to include a form of reparation aimed at remedying all incidental effects. For example, public apologies, acknowledgement of the obligations to the Indigenous peoples, publication and public explanation of the settlement agreement are all avenues that might, some more than others, enhance the sense of reparation. Such measures might help remedy the false ideas held by the public concerning the First Nations and their claims. Another deficiency of the current process is the absence of specific remedies for the collateral damage to relations between the First Nations and third parties. For example, the error caused by Canada in the creation of the Essipit reserve resulted in turbulent relations between the municipality of Les Escoumins, its residents and the Essipiunnuat, which are still having repercussions to this day. Such a situation cannot be remedied by compensation solely for pecuniary damages. Hence, it is important, even essential, for the reparation mechanism to attempt to redress the specific wrongs done to the First Nation making the claim that go beyond pecuniary damages.

With regard to the final principle, prevention, which is the Crown's commitment to ensuring that the breaches do not recur, it could consist in the introduction of monitoring mechanisms or procedures for coordination and communication between the two nations, which would help avert an imbalanced relationship based on the powers of one party and the vulnerability of the other power.

By way of conclusion, the key change desired in the process would be a change of attitude. Instead of addressing specific claims in an adversarial context in which Canada's main goal is to limit its liability, it would be desirable to take an approach that is compatible with the distinctive, ongoing relationship between the nations. The approach being taken now is incompatible with the desired reconciliation.

Chief Martin Dufour,
Innu Essipit First Nation

Appendix 1

General description of the Innu Essipit First Nation

The Innu Essipit First Nation

Since time immemorial, the Essipiunnuat have occupied a vast territory on the North Shore stretching from the Batiscan River to the Lower North Shore and extending up to the watersheds of the rivers that flow into the St. Lawrence River and the Gulf of St. Lawrence. Traditionally nomads and hunter-gatherers, the Essipiunnuat gathered in the summer on the shores of the main watercourses and the St. Lawrence River to have feasts and engage in trade and commerce. In the fall, they went inland in smaller family bands and returned to the hunting grounds of which they were the stewards, where they hunted and trapped fur-bearing animals.

Today, the Innu Essipit First Nation (Essipit) is a community whose priorities centre on economic development and community engagement. In keeping with Innu fundamental traditional values, the Essipit "community system" is founded on a philosophy of community development, based on the creation of jobs in industries aimed at maintaining and furthering traditional values. Accordingly, the First Nation is involved in a number of sectors, including tourism, through the establishment of outfitters and whale-watching cruises, and renewable energy, through wind-generation partnerships and exploitation of marine resources, with commercial fishing and downstream industries.