

**SPECIFIC CLAIMS TRIBUNAL**

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TRIBUNAL DES REVENDIGATIONS PARTICULIÈRES		
F I L E D	November 23, 2017	D É P O S É
David Burnside		
Ottawa, ON	16	

BETWEEN:

ESK'ETEMC FIRST NATION

Claimant

v.

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

Respondent

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**AMENDED RESPONSE**  
**Pursuant to Rule 42 of the**  
***Specific Claims Tribunal Rules of Practice and Procedure***

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This Amended Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

TO: Esk'etemc First Nation  
As represented by:  
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Overview

1. The Esk'etemic First Nation (the "First Nation") alleges that Queen in Right of Canada ("Canada") breached statutory and fiduciary duties in relation to the pre-emption of 320 acres of meadowland in the Alkali Lake region of B.C. in 1893 by settler William Wright and Canada's failure to recover the pre-empted lands as reserve lands for the Esk'etemic First Nation. Canada acknowledges that in 1881 the Indian Reserve Commission allotted six reserves on the basis of lands that were requested by the First Nation; in 1881 the 320 acres of meadowland was a dammed lake. In 1891 or 1892 the First Nation destroyed the beaver dam, flooding the land and hay began to grow. The First Nation cultivated the hay, as well as constructed pithouses, log houses, stables, corrals and a seasonal road to the meadowlands. In 1893 Wright swore a Declaration that the land being pre-empted was not an "Indian settlement or any part thereof". Between 1893 and 1896 federal and provincial government agents visited the area and discussed and attempted to settle the dispute regarding the pre-emption. In 1896 Canada allotted an additional seven reserves to the First Nation. In 1899 Wright received a Crown grant for the meadowlands (the "Meadow Lands").
2. Canada is obligated to respond to this claim according to the *Specific Claims Tribunal Rules of Practice and Procedure* (SOR/2011-119) and consistent with Canada's duties and functions in the conduct of litigation. In accordance with the preamble of the *Specific Claims Tribunal Act* (S.C. 2008, c. 22) Canada agrees that resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations. The Government of Canada recognizes that reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships. Canada will pursue reconciliation and is committed to a renewed nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership. Canada must work in other contexts beyond pleadings to achieve the fulfilment of those commitments.

**I. Status of Claim (R. 42(a))**

3. The First Nation submitted a claim, the Wright's Meadow Pre-emption Specific Claim, to the Minister of Indian Affairs and Northern Development Canada ("Minister") on March 15, 1995 ("Specific Claim").
4. The Specific Claim concerned a pre-emption the Meadow Lands that the First Nation alleged were the site of an Esk'etemic Indian settlement. The First Nation alleged breaches of statutory and fiduciary duty by Canada to set aside the Meadow Lands as reserve lands for the First Nation.
5. On January 10, 2000, the First Nation was notified of the Minister's decision not to accept the Specific Claim for negotiation.
6. In reply to paragraph 4 of the Declaration of Claim, Canada says that the findings of the Indian Claims Commission with respect to the "Wright's Meadow Pre-emption Specific Claim" are irrelevant to the within proceedings as claims filed before the Specific Claims Tribunal (the "Tribunal") proceed *de novo*.
7. In further reply to paragraph 4 of the Declaration of Claim Canada says that, beyond the establishment of this Tribunal's jurisdiction, the contents of the May 28, 2009 letter from the Minister are either irrelevant to this proceeding, or if they are relevant, they are privileged.

**II. (a) Validity (R. 42(b))**

8. Canada accepts the validity of the claim that it breached a fiduciary obligation owed to the First Nation by not challenging Mr. Wright's pre-emption of the Meadow Lands. Canada denies the validity of any other allegation that Canada has failed to meet or otherwise breached a lawful obligation.

**(b) Basis for the Tribunal to Award Compensation (R. 42(c))**

9. Canada says that section 20(1)(c) may provide the basis for the Tribunal to award compensation.

**III. Admissions, Denials or No Knowledge (Rule 42(d))**

10. Canada admits the facts in the Declaration of Claim, paragraphs 1, 2, 3, 7, 9 - 14, 17, and 21.
11. Canada has no knowledge of the facts set out in paragraph 5 of the Declaration of Claim.
12. In reply to paragraph 8 of the Declaration of Claim, Canada admits that on January 4, 1860, James Douglas, Governor of the Colony of British Columbia, issued *Proclamation No. 15*, excluding "the site of an existent or proposed town, auriferous land ... or an Indian reserve or settlement" from the lands available for pre-emption. Subsequent pre-emption legislation maintained these exclusions.
13. In reply to paragraph 15 of the Declaration of Claim, Canada admits that on July 8, 1893, the Province of British Columbia issued a Certificate of Pre-emption Record No. 745, not No. 793, to Mr. Wright for 320 acres of land at Alkali Lake Creek.
14. In reply to paragraph 16 of the Declaration of Claim, Canada admits that Indian Agent Laing Meason ("IA Laing Meason") wrote a letter to British Columbia Indian Superintendent A. W. Vowell ("Superintendent Vowell") on July 16, 1893 to alert the Province of the land dispute between Mr. Wright and the First Nation. IA Laing Meason reported that the First Nation would not allow Mr. Wright to take possession of the Meadow Lands and that he had sent word to Chief August that: they could not occupy lands outside of the reserve; he had no power to give them authority to occupy the Meadow Lands; and that Chief August would be in serious trouble if he were to harm Mr. Wright.
15. In further reply to paragraph 16 of the Declaration of Claim, Canada states that IA Laing Meason wrote a letter to Superintendent Vowell dated July 19, 1893, where he advised that very few meadows were requested when Commissioner O'Reilly had set aside lands for reserves because only the Indians who had cattle required hay and there was sufficient grass in the neighbourhood of the reserve. IA Laing Meason further stated that the First Nation was now in need of more meadow land

and the resident settlers had respected the squatters' rights of the Indians to meadows by never attempting to possess or purchase such lands when utilized by the Indians. He finished his letter to Superintendent Vowell by asking if some arrangement with the Provincial Government could be made whereby the Meadow Lands could be secured for the First Nation.

16. In reply to paragraph 18 of the Declaration of Claim, Canada says that Indian Agent Gomer Johns ("IA Johns") stated that there was a little hay, not "little hay", on the First Nation's other reserves. Canada admits that IA Johns stated that the loss of the Meadow Lands "will certainly be a very serious loss to them; apart from the loss of the meadow itself, the disturbance caused by the intrusion of a white settler on a range practically enclosed by these 5 Reserves will be a constant source of annoyance, besides the loss of pasturage of which hitherto they have had a monopoly".
17. In reply to paragraph 19, Canada admits the facts in this paragraph except that Canada has no knowledge of whether the First Nation resided at the Meadow Lands through the winter and Canada says that the Province became involved in July 1893, when IA Laing Meason alerted Superintendent Vowell of the land dispute between Mr. Wright and the First Nation.
18. In reply to paragraph 20 of the Declaration of Claim, Canada admits the facts set out in this paragraph but also says that, in his letter dated August 6, 1894, Superintendent Vowell reported to the Deputy Superintendent General of Indian Affairs Hayter Reed ("DSGIA Reed") that when the reserves were allotted in July 1881 the First Nation had very few cattle, but as the area had become increasingly settled, the First Nation's livelihood of hunting had been impaired, and as a result they had comparatively little cultivable land. Superintendent Vowell further advised that he told the First Nation that he would "endeavour to procure these pieces of meadow land for them but at the same time impressed upon them that they should not attempt to interfere with the lawful rights of others, whiteman or Indian, and that at present the only land they could claim was that lawfully reserved for them."

19. In reply to paragraph 22 of the Declaration of Claim, Canada has no knowledge if a final decision was made by the B.C. Chief Commission of Lands and Works F.G. Vernon ("CCLW Vernon") that the First Nation was barred from acquiring the land. Canada states that on September 4, 1894, CCLW Vernon reported that the First Nation would claim compensation for the Meadow Lands if they were barred from acquiring them. He instructed Provincial Agent F. Soues ("Agent Soues") to go to Alkali Lake to obtain information on the Meadow Lands and to make a valuation on the improvements the First Nation has made to the property, as well as any made by Mr. Wright.
20. In reply to paragraph 23 of the Declaration of Claim, Canada admits the facts as set out in this paragraph except that it has no knowledge of whether the First Nation was offered compensation or was ever compensated for its improvements to the Meadow Lands.

**IV. Statements of Fact (R. 42(e))**

***The allotment of reserves generally***

21. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the *Terms of Union*, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission. It was established in 1876 and was comprised of three commissioners, one of whom was Gilbert Sproat ("Commissioner Sproat"). The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.
22. Following Commissioner Sproat's resignation, in 1880 the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner ("Commissioner O'Reilly").
23. The order in council appointing Commissioner O'Reilly, P.C. 1334 dated July 19, 1880, stated that the duties of the commissioner "consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands

have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes". Commissioner O'Reilly's terms of appointment included to act in his own discretion "in furtherance of the joint suggestions of the Chief Commissioner of Lands and Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and the Reserves to be established". Commissioner O'Reilly's reserve allotments would be subject to confirmation by these same officials on behalf of their respective governments and, failing agreement, should be referred to the Lieutenant Governor.

24. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate. Those instructions provided that, in allotting reserve lands, he should have "special regard" not just to the interests of the bands, but to the claims of "white settlers" as well. The instructions further provided, among other things, that Commissioner O'Reilly was to be careful not to disturb the Indians in the possession of any "villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached".
25. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely (he was originally appointed for only twelve months). O'Reilly remained reserve commissioner until his retirement in 1898.
26. Canada lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the Crown in right of British Columbia because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

***The allotment of reserves to the Alkali Lake Band***

27. In or around 1861, 40 acres of land was set aside by the Colony of British Columbia as a reserve for the Alkali Lake Band, this area is now known as Indian Reserve #1 ("IR #1").

28. In July 1881 Commissioner O'Reilly returned to the Alkali Lake area where he increased the area of IR #1 to 550 acres, allotted five more reserves, and two fishing stations for the use of the First Nation, containing a total of 3310 acres, including considerable hay and pasture lands.
29. The reserves were surveyed by W.S. Jemmet in 1883 and were approved by the Chief Commissioner of Lands and Works in 1884.
30. In approximately 1891 or 1892 the First Nation destroyed a beaver dam on Alkali Lake Creek. This allowed a lake to be drained and meadowlands were created opening up the land up for new uses by the First Nation.
31. In 1893 William Wright, a settler, staked out a pre-emption of 320 acres of land in the Alkali Lake Creek area of British Columbia.
32. On July 8, 1893, the Province of British Columbia issued a Certificate of Pre-emption Record No. 745 to Mr. Wright for 320 acres at Alkali Lake Creek described as:

...commencing at Stake marked A about 10 miles North from Alkali Lake, thence North 80 chains, West 40 chains, South 80 chains, East 40 chains to initial point.
33. IA Laing Meason learned of the pre-emption of the Meadow Lands on July 15, 1893, when Mr. Wright told him that the First Nation would not allow him to take possession of some of the lands he had pre-empted.
34. On July 16, 1893, IA Laing Meason wrote Superintendent Vowell to alert the Province of the land dispute between Mr. Wright and the First Nation and to set out what steps he had taken to address the situation.
35. On July 19, 1893, IA Laing Meason wrote Superintendent Vowell asking if some arrangement with the Provincial Government could be made whereby the Meadow Lands could be secured for the First Nation.
36. On September 21, 1893, IA Johns reported to Superintendent Vowell that Mr. Wright had offered to pay \$200.00 to the First Nation for their improvements or

sell to them the Meadow Lands for \$250.00 but that the First Nation would not accept Mr. Wright's offer. IA Johns asked Superintendent Vowell if some way could be found to secure the Meadow Lands for the First Nation as he did not anticipate that Mr. Wright would be allowed to take peaceful possession of the land.

37. On October 26, 1893, Chief August wrote Superintendent Vowell asking for his assistance in securing the Meadow Lands that his people had been cutting hay from for several years.
38. On November 17, 1893, IA Johns wrote Superintendent Vowell to report on his visit to Alkali Lake to meet with the First Nation to assess if their need of the disputed Meadow Lands was valid. He confirmed that the First Nation had been cultivating most of its hay outside of the reserves in recent years. IA Johns also reported that the loss of the Meadow Lands would be serious but also that the disturbance caused by the intrusion of a white settler on a range practically enclosed by these 5 Reserves would be a constant source of annoyance, besides the loss of pasturage of which the First Nation had previously had a monopoly.
39. On February 7, 1894, Commissioner O'Reilly reported to the B.C. Attorney General the facts of the 1881 reserve allotment to the First Nation. Commissioner O'Reilly advised that he had not received any request in 1881 or any time since to set aside the Meadow Lands as a reserve for the First Nation. He reported that if the First Nation was cutting hay on any other meadows not legally held by whites, besides those pre-empted by Mr. Wright, that they may be secured for their use. Commissioner O'Reilly suggested that no further pre-emption applications be accepted for the district.
40. In July 1894 Superintendent Vowell journeyed to Alkali Lake to meet with the First Nation and to inspect the disputed Meadow Lands. In a letter dated August 6, 1894, he reported to DSGIA Reed that when reserves were allotted in 1881 there were few Indians with cattle so not many meadows were requested. As the area has become increasingly settled, the First Nation's livelihood of hunting has been impaired and more meadowlands are needed as they now had 200 head of

cattle and many horses. The First Nation requested Superintendent Vowell's assistance and advised that he would "endeavour to procure these pieces of meadow land for them but at the same time impressed upon them that they should not attempt to interfere with the lawful rights of others, whiteman or Indian, and that at present the only land they could claim was that lawfully reserved for them."

41. Superintendent Vowell further reported in his letter to DSGIA Reed that the First Nation agreed to not interfere with Mr. Wright if he tried to take possession of the Meadow Lands and to try and settle the dispute with Mr. Wright amicably.
42. On August 13, 1894, DSGIA Reed wrote back to Superintendent Vowell and advised that "if the Indians arrange to induce Mr. Wright to relinquish his claim, you should without delay approach the Provincial authorities, through the Reserve Commissioner if necessary, to endeavour to get them to secure the land to the Indians, or failing that ask them to apportion some others in lieu of the meadow."
43. On August 22, 1894, CCLW Vernon advised Commissioner O'Reilly that his Department had been contacted regarding the land dispute between Mr. Wright and the First Nation. CCLW asked O'Reilly if the First Nation had any claim or necessity for this land, and whether sufficient land had been set aside for the First Nation.
44. On August 24, 1894, Commissioner O'Reilly replied to CCLW Vernon and stated that his letter to the Provincial Attorney General, dated February 3, 1894, set out all the facts regarding the reserves set aside for the First Nation and that he had no further information to provide.
45. On September 4, 1894, CCLW Vernon advised Agent Soues that the First Nation would claim compensation for the improvements they had made to the Meadow Lands if they were barred from acquiring them. He instructed Agent Soues to go to Alkali Lake to obtain information on the Meadow Lands and to make a valuation on the improvements the First Nation has made to the property.

46. On October 16, 1894, Provincial Agent G. Phair ("Agent Phair") reported to the Deputy Chief Commissioner of Lands and Works W. S. Gore ("DCCLW Gore") that the First Nation's improvements to the Meadow Lands should be valued at \$190.00. Agent Phair further advised that Mr. Wright had made no improvements to the Meadow Lands.
47. In 1895, Commissioner O'Reilly returned to Alkali Lake and met with the First Nation to set aside additional lands as reserves. Commissioner O'Reilly allotted seven new reserves, which included additional hay and pasturage lands as requested by the First Nation. Notably, Commissioner O'Reilly allotted Samson's Meadow as a reserve which was located immediately west of the Meadow Lands.
48. On May 23, 1899, Mr. Wright received a Certificate of Improvement for Lot 323 from the Province of British Columbia.
49. On June 22, 1899, Mr. Wright received Crown Grant No. 1145/103 for Lot 323 from the Province of British Columbia.
50. In the early 1920s, a dam on Place Lake was constructed to hold water for the Alkali Lake Ranch. The dam flooded the Meadow Lands and, as a result, they no longer exist as haylands.

**V. Relief (R. 42(f))**

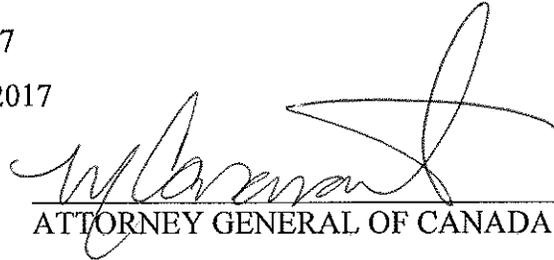
51. Canada agrees that the First Nation should be compensated for breaches of a lawful obligation in accordance with the evidence and applicable law.

**VI. Communication (R. 42(g))**

52. Email address for the service of documents.

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