

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES		
F I L E D	February 12, 2018	D É P O S É
David Burnside		
Ottawa, ON	43	

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

ᑭAKISᑭNUK FIRST NATION

CLAIMANT

v.

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

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

TO: ᑭAKISᑭNUK FIRST NATION  
As represented by Darwin Hanna, of  
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## I. Overview

1. The ʔAkisq̓nuk First Nation, formerly known as the Akisq̓'nuk First Nation and before that, the Columbia Lake Indian Band (the "First Nation"), alleges that the Respondent breached fiduciary obligations in connection with the 1883 pre-emption of Lot 108, an area of land north of what became the Columbia Lake Indian Reserve No. 3 ("IR 3"). The First Nation alleges Lot 108 should have been protected from alienation as it was an Indian settlement. The First Nation further alleges that by failing to protect Lot 108, the Respondent breached fiduciary obligations in connection with water licences and the First Nation's access to Windermere Creek.
2. The Respondent says that at all material times it acted with loyalty and good faith in the First Nation's best interests, thereby meeting any fiduciary obligations it owed in relation to Lot 108. The Respondent says that it had no fiduciary obligation in relation to the water licences, which are under the jurisdiction of the Province of British Columbia ("British Columbia").
3. The Respondent is mandated to respond to this claim by the terms of the *Specific Claims Tribunal Rules of Practice and Procedure* (SOR/2011 – 119), and consistent with the duties and functions of the Crown in right of Canada in the conduct of litigation. The Respondent affirms the relationship between resolution of specific claims and the broader goal of reconciliation between First Nations and the Crown, and adopts the commitment to resolution of specific claims in a "just and timely manner" as set out in the preamble to the *Specific Claims Tribunal Act* (the "Act").

## II. Status of Claim (R. 42(a))

4. The First Nation submitted a specific claim to the Minister in February 1994 concerning Lot 108.
5. The Minister notified the First Nation in writing on March 15, 2011 of his decision not to accept the claim for negotiation. The Respondent says that the contents of the Minister's March 15, 2011 letter are protected by settlement privilege.

**III. Validity (R. 42(b) and (c))**

6. The Respondent denies the claims set out in the Amended Declaration of Claim, and in particular denies:
  - (a) the alleged 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;
  - (b) the alleged 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;
  - (c) the alleged illegal lease or disposition by the Crown of reserve lands.

**IV. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))**

7. The Respondent admits the facts as set out in the following paragraphs of Part V of the Amended Declaration of Claim: 14, 15, 17, 18, 20, 21, 22, 23, 24, 27, 28, 31, 34, 35, 36, 43 and 44.
8. In reply to paragraph 8 of the Amended Declaration of Claim, the Respondent admits that Lot 108, otherwise known as Elkhorn Ranch, is comprised of 320 acres located north of IR 3 and east of Windermere, and that it has a legal description of District Lot 108. The Respondent does not know to what extent, if any, the lands which comprise Lot 108 are included within the traditional territory of any First Nation.
9. In reply to paragraph 9 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes legal interpretation, not fact.

10. In reply to paragraph 10 of the Amended Declaration of Claim, the Respondent says that the colonial legislation is neither relevant nor applicable to this claim. The Respondent says that the purpose of post-Confederation provincial legislation was to regulate the acquisition of “unoccupied and unreserved, and unsurveyed Crown land in British Columbia”.
11. In reply to paragraph 11 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes argument, not fact.
12. In reply to paragraph 12 of the Amended Declaration of Claim, the Respondent says that the colonial legislation is neither relevant nor applicable to this claim. The Respondent says that the purpose of post-Confederation provincial legislation was to regulate the acquisition of “unoccupied and unreserved, and unsurveyed Crown land in British Columbia”.
13. In reply to paragraph 13 of the Amended Declaration of Claim, the Respondent admits that the British Columbia *Land Act, 1875* withdrew “Indian settlements” from unoccupied Crown lands that were otherwise available for pre-emption. The Respondent denies that the federal Crown approved the British Columbia *Land Act, 1875*. In reply to the last sentence in paragraph 13, the Respondent says that the sentence constitutes argument, not fact.
14. In reply to paragraph 16 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes legal interpretation, not fact.
15. In reply to paragraph 19 of the Amended Declaration of Claim, the Respondent admits that by January 1876 the Governor General of Canada and the Lieutenant Governor of British Columbia had agreed to establish a Joint Indian Reserve Commission to allot Indian reserves in British Columbia.
16. In reply to the first sentence of paragraph 25 of the Amended Declaration of Claim, the Respondent admits that I.W. Powell wrote the Superintendent General of Indian Affairs on April 17, 1883 with respect to the establishment of reserves in the Kootenay district, and other regions of British Columbia, during Commissioner O’Reilly’s leave of absence. In reply to the second sentence of paragraph 25, the Respondent admits that Powell’s letter

expressed concern about delaying reserve creation in the Kootenay district until the spring of 1884. In reply to the third sentence in paragraph 25, the Respondent says that this statement constitutes argument, not a fact. The Respondent has no knowledge of the facts alleged in the last sentence of paragraph 25.

17. In reply to paragraph 26 of the Amended Declaration of Claim, the Respondent says that the statement in this paragraph constitutes argument, not fact.

18. The Respondent has no knowledge of the facts alleged in paragraph 29 of the Amended Declaration of Claim.

19. In reply to paragraph 30 of the Amended Declaration of Claim, the Respondent says that G.H. Johnson's Certificate of Record, dated October 27, 1883 referenced a "Form No. 2 – Declaration", which is not in evidence.

20. In reply to paragraph 32 of the Amended Declaration of Claim, the Respondent says that Commissioner O'Reilly, wrote to William Smithe, the Chief Commissioner of Lands and Works, on April 10, 1884 to suggest that no applications for pre-emptions or purchases in the area be granted in light of Commissioner O'Reilly's upcoming visit to the Kootenay district.

21. The Respondent has no knowledge of the facts alleged in paragraph 33 of the Amended Declaration of Claim.

22. In reply to paragraph 37 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes argument, not fact.

23. In reply to paragraph 38 of the Amended Declaration of Claim, the Respondent admits that, on August 5, 1884, Commissioner O'Reilly recorded information about the First Nation, including the population, livestock holdings and land expectations of the First Nation.

24. In reply to paragraph 39 of the Amended Declaration of Claim, the Respondent:

- a. admits the first sentence, except that the Respondent denies that Commissioner O'Reilly found "500 cattle and 800 horses" to have been owned by the First Nation;
- b. admits the second sentence; and
- c. admits the third sentence, but says that Commissioner O'Reilly was writing in this passage about the Kootenay Indians as a larger group, and not specifically about the First Nation.

25. In reply to the first sentence in paragraph 40 of the Amended Declaration of Claim, the Respondent says that this constitutes argument, not fact. The Respondent has no knowledge of the facts alleged in the remainder of paragraph 40.

26. In reply to the first and second sentences in paragraph 41 of the Amended Declaration of Claim, the Respondent admits that F.W. Aylmer surveyed Lot 108 and that the survey field notes record the presence of an "Indian cabin" on Lot 108 at the time of the survey, but the Respondent does not know the exact date of Alymer's survey. In reply to the third sentence in paragraph 41, the Respondent says that the sentence constitutes argument, not fact. The Respondent admits the fourth sentence in paragraph 41, but says that the last sentence constitutes argument, not fact.

27. In reply to paragraph 42 of the Amended Declaration of Claim, the Respondent:

- a. admits that Commissioner O'Reilly wrote an August 9, 1884 Minute of Decision allotting proposed reserve lands, but denies that all these lands subsequently became part of IR 3;
- b. admits that the area allotted was described in Commissioner O'Reilly's Minute of Decision as comprising 8,320 acres; and
- c. admits that Commissioner O'Reilly was guided in his allotment of proposed reserve lands by the "habits, wants and pursuits" of the First Nation.

28. In reply to paragraph 45 of the Amended Declaration of Claim, the Respondent admits that lands which subsequently became IR 3 were surveyed by E.M. Skinner in September 1886.

The Respondent further says that the concluding statement in this paragraph constitutes argument, not fact.

29. In reply to paragraph 46 of the Amended Declaration of Claim, the Respondent admits that the McKenna-McBride Commission was established by the Respondent and British Columbia in an attempt to “settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province”. The Respondent further admits the content of the excerpt from the memorandum of agreement establishing the McKenna-McBride Commission, with the exception of the words “and that the Commission’s proposals.”
30. In reply to paragraph 47 of the Amended Declaration of Claim, the Respondent:
- a. admits the first sentence;
  - b. admits that Chief Arbel told the McKenna-McBride Commission that the reserve “was given to me by Mr. O’Reilly”; but
  - c. denies the remainder of the paragraph.
31. In reply to paragraph 48 of the Amended Declaration of Claim, the Respondent admits that a member of the First Nation, Ignatius Eaglehead, testified before the McKenna-McBride Commission that, “From the Windermere side right of the reserve line there is a good piece of land there that the Indians cultivate... That is where I think it is good land...” The Respondent has no knowledge of whether this is a reference to the Elkhorn Ranch.
32. In reply to paragraph 49 of the Amended Declaration of Claim, the Respondent says that Ignatius Eaglehead, not Chief Arbel testified about water issues before the McKenna-McBride Commission. The Respondent has no knowledge of whether Ignatius Eaglehead’s discussion of Windermere Creek referred in any way to “Elkhorn Ranch”.
33. In reply to paragraph 50 of the Amended Declaration of Claim, the Respondent has no knowledge of the water licences issued for Windermere Creek, including the licence holders

or purposes of the licences. The Respondent further says that the issuance of water licences falls within provincial jurisdiction.

34. In reply to paragraph 51 of the Amended Declaration of Claim, the Respondent admits that the First Nation utilized water from Windermere Creek for irrigation purposes and it was accessed by means of a ditch. The Respondent has no knowledge of the facts alleged in the remainder of paragraph 51.
35. In reply to paragraph 52 of the Amended Declaration of Claim, the Respondent has no knowledge of the facts alleged in this paragraph.
36. In reply to paragraph 53 of the Amended Declaration of Claim, the Respondent has no knowledge of the facts alleged in this paragraph.
37. In reply to paragraph 54 of the Amended Declaration of Claim, the Respondent admits that Canada held legal title to Lot 108 from 1924 – 1936 and that Lot 108, which was operated as an “Experimental Farm”, was used for agricultural purposes during this time.
38. In reply to paragraphs 55 and 56 of the Amended Declaration of Claim, the Respondent admits that Chiefs Arbel and Michell of the First Nation wrote to federal Crown officials in 1939 and 1943, respectively, concerning the extent of the First Nation’s reserve interests, but denies that either Chief was addressing the lands within Lot 108, or “Elkhorn Ranch”, specifically.
39. In reply to paragraph 57 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes argument, not fact.
40. In reply to paragraph 58 of the Amended Declaration of Claim, the Respondent says that the whole of this paragraph constitutes argument, not fact.
41. In reply to paragraph 59 of the Amended Declaration of Claim, the Respondent admits that a September 24, 1991 plan signed by D.B. Taylor plots Aylmer’s field notes, Skinner’s field

notes, and O'Reilly's Minute of Decision on a sketch of the northern portion of IR 3 and Lot 108. The Respondent says that the concluding statement in this paragraph constitutes argument, not a fact.

**V. Statements of Fact (R. 42 (a))**

42. In addition to the foregoing, the Respondent pleads the following facts.

*The allotment of reserves generally in British Columbia*

43. 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. By 1876 the Governor General of Canada and the Lieutenant Governor of British Columbia had reached an agreement that settlement of the Indian Land question in British Columbia was to be referred to a Joint Indian Reserve Commission comprised of three Commissioners; one appointed by Canada, one by British Columbia, and the third jointly named by both governments. This agreement is documented in a report entitled "Report of a Committee of the Honourable the Executive Council, approved by His Excellency the Lieutenant-Governor", dated January 6, 1876. The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880, at which time Peter O'Reilly was appointed as the sole Indian Reserve Commissioner.

44. Commissioner O'Reilly's terms of appointment included that he was to act in his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works and the federal Indian Superintendent for British Columbia "as to the particular places 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.

45. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate. The instructions 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".
46. In 1881, the Governor in Council extended Commissioner O'Reilly's position indefinitely (he was originally appointed for only twelve months). Commissioner O'Reilly was away on medical leave between May 1 and October 31, 1883. Following his return from medical leave, Commissioner O'Reilly remained reserve commissioner until his retirement in 1898.
47. The Respondent 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 provincial Crown because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

### *The allotment of IR 3*

48. Commissioner O'Reilly visited the Kootenay district for the purpose of allotting lands for Indian reserves there during the summer of 1884.
49. On or about August 5, 1884 Commissioner O'Reilly met with settlers in the Kootenay district and notes were recorded of their discussions concerning the Kootenay and Shuswap peoples living in the Kootenay district. The notes document information Commissioner O'Reilly learned about the First Nation's population, livestock and land expectations.
50. On or about August 6, 1884, Commissioner O'Reilly met with Chief Moyes of the Columbia Lakes area and others for the purpose of identifying an appropriate reserve allotment for the First Nation. They discussed summer and winter grazing requirements, population, and numbers of livestock. Commissioner O'Reilly asked the Chief and others to show him the best places in the area because he was unfamiliar with the territory. Commissioner O'Reilly

warned Chief Moyes that he may not be able to allot all the lands it desired, since there were “other peoples interests to be considered”.

51. On August 9, 1884, Commissioner O'Reilly completed his Minute of Decision for the allotment of the lands which subsequently became IR 3, which included a metes and bounds description of the allotted reserve lands as well as his sketch of its boundaries. Commissioner O'Reilly estimated the size of the reserve at approximately 8,320 acres. His allotment included lands that had been previously pre-empted by settlers but were considered abandoned at the time of Commissioner O'Reilly's visit to the area.
52. The lands which subsequently became IR 3 were surveyed by E.M. Skinner in September 1886. Surveyor Skinner submitted his report and survey sketch on May 12, 1887 to Commissioner O'Reilly noting changes he had made to the original boundaries described in Commissioner O'Reilly's Minute of Decision. Surveyor Skinner estimated the size of the reserve he surveyed, with adjusted boundaries, at 8,456 acres. Commissioner O'Reilly signed Surveyor Skinner's survey sketch.
53. On June 10, 1887 both Commissioner O'Reilly and the Chief Commissioner of Lands and Works signed the official *Plan of Kootenay Indian Reserve No. 3, Lower Columbia Lake, Kootenay District, British Columbia* which incorporated Surveyor Skinner's boundary changes. Another copy of this plan was signed by the Superintendent General of Indian Affairs.

***Lot 108***

54. Pre-emption was a method of acquiring provincial Crown land by claiming it for settlement and agricultural purposes. The *Land Act*, 1875, S.B.C. 1875 set out the steps and documentation that were required to pre-empt provincial Crown land. The provincial *Land Act* withdrew “Indian settlements” from Crown lands that were otherwise available for sale or pre-emption, but the legislation did not define the term “Indian settlement”.

55. The Kootenay district of British Columbia had not attracted much settlement prior to about 1882, after which time, the number of settlers claiming land by pre-emption significantly increased.
56. On October 27, 1883, G.H. Johnson registered his pre-emption of Lot 108. He submitted a declaration that Lot 108 was available for pre-emption on this date. The Certificate of Record notes the land as “Lot 108.9.1 Kootenay District” and describes it as follows: “Upon a Creek called Sheep Creek commencing at a post marked G.H.J. – N.E. thence running South 40 chains to a tree marked G.H.J. – S.E. thence West 50 chains to a tree marked G.H.J. – S.W. thence North 40 chains to a post marked G.H.J. – N.W. thence East 50 chains to initial point.”
57. G.H. Johnson paid \$320 for Lot 108, the last of his three payments being made on July 5, 1889. G.H. Johnson was issued four Certificates of Improvements to Lot 108 and received the Crown Grant No. 449/43 for Lot 108 on December 18, 1889.
58. From 1924 – 1936 Canada held title to Lot 108 and other adjacent lots. During this time, Lot 108 was used for experimental agricultural purposes.

***The McKenna-McBride Commission and the First Nation***

59. On September 24, 1912, the federal and provincial Crown signed an agreement establishing a Royal Commission on Indian Affairs for British Columbia, “to settle all differences between the Governments of the Dominion and the Province respecting Indian Lands and Indian Affairs generally [...]”. The Commission’s powers included the ability to recommend reserve allotments. This agreement was approved by reciprocal federal and provincial orders in council which included the following provision:

[...] notwithstanding anything in the said [McKenna-McBride] Agreement contained, the acts and proceeding of the Commission shall be subject to the approval of the two Governments [emphasis added].

60. On September 21, 1914, the First Nation met with the McKenna-McBride Commission. Chief Arbel described his concerns about land pre-emptions in the area and the First Nation's grazing land requirements. He requested more land for the First Nation. The McKenna-McBride Commission also heard from Ignatius Eaglehead about the First Nation's land use and requirements.

61. The issue of adding Lot 108 to IR 3 was never raised by First Nation members in their testimony before the McKenna-McBride Commission.

62. On October 28, 1914, the McKenna-McBride Commission examined Indian Agent Galbraith who testified about the survey of IR 3. Indian Agent Galbraith advised the McKenna-McBride Commission that the First Nation had asked for more land at the time of Commissioner O'Reilly's allotment:

They asked that a little piece of more land be given to them for their cattle. They were under the impression that Mr. O'Reilly's line; that is the west line would continue straight north down to the second jog in the reserve survey as they knew perfectly well that G.H. Johnston's land was taken up.

63. On December 9, 1914 Indian Agent Galbraith submitted a map to the McKenna-McBride Commission on which he had marked out an area he thought could possibly be provided to the First Nation as additional reserve land for their cattle and horses.

64. On February 12, 1915, Indian Agent Galbraith further reported to the McKenna-McBride Commission:

The only available land I find near [IR 3] is north of Lots 122, 115 & 124 and is partially covered with some small timber and is not fit for cultivation. If 3000 acres can be found near there, I would recommend it be added to the reserve.

65. The McKenna-McBride Commission confirmed IR 3 as "now fixed and determined" on March 24, 1915. On March 25, 1915, it recommended the addition of 3,040 acres to IR 3. On March 29, 1915, it rescinded its first recommendation and instead recommended that a 2,960 acre parcel be added to IR 3.

66. On June 30, 1916, the McKenna-McBride Commission released its final report, including the recommendation that a 2,960 acre parcel should be added to IR 3.

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

67. The Respondent denies the entitlement of the relief sought and seeks to have the claim dismissed in its entirety.

68. The Crown seeks its costs in the proceedings.

69. If the Respondent is liable, which is not admitted, then the Crown asserts that British Columbia contributed to the acts or omissions and any losses arising therefrom, as set out in paragraph 20(1)(i) *Act*.

70. The Respondent pleads and relies on section 20 of the *Act*.

71. Such further relief as this Honourable Tribunal deems just.


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

Respondent's address for service: Department of Justice  
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Signature of  
 Respondent     lawyer for Respondent  
**William F. Pentney,**  
Deputy Attorney General  
**Per: Whitney Watson**  
Department of Justice  
British Columbia Regional Office