

SPECIFIC CLAIMS TRIBUNAL	
F I L E D	TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES
April 14, 2023	
Dragisa Adzic	
Ottawa, ON	23

SCT File No.: SCT-6002-20

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

ONION LAKE CREE NATION, COLD LAKE FIRST NATIONS,
FROG LAKE FIRST NATION and KEHEWIN CREE NATION
(collectively the “ONION LAKE AGENCY FIRST NATIONS”)

Claimants

v.

~~HIS~~ ~~HER~~ MAJESTY THE KING ~~QUEEN~~ IN RIGHT OF CANADA
as represented by the Minister of Crown-Indigenous Relations

Respondent

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

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

Original Filed: January 26, 2021

Amended: April 14, 2023

TO: Onion Lake Agency First Nations
as represented by:

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I. Overview

1. The Respondent, ~~His Her~~ Majesty the ~~King Queen~~ in right of Canada as represented by the Minister of Crown-Indigenous Relations (“Canada”), is committed to reconciliation and a renewed nation-to-nation relationship with Indigenous peoples based on recognition of rights, respect, cooperation and partnership. Canada endeavors to embody these principles as it assists the Tribunal in adjudicating matters brought before it.
2. Canada favours resolving claims made by Indigenous peoples through negotiation and settlement. Canada is open to using the processes of the Tribunal to facilitate the resolution of issues and to narrow the matters for determination.
3. The Claimants, Onion Lake Cree Nation, Cold Lake First Nations, Frog Lake First Nation, and Kehewin Cree Nation, will be collectively referred to as “the First Nations.”
4. The Amended Declaration of Claim asserts that Canada alienated and disposed of certain lands (“the Lands”), and failed to reserve sub-surface rights, in breach of its statutory, fiduciary, and honourable obligations.
5. Canada did not breach any lawful obligation or any statutory or fiduciary duty in disposing of the Lands, whether in relation to surface or sub-surface interests being claimed. Canada allowed the First Nations to utilize the Lands for grazing their cattle and maintaining the Agency Herd, however, the Lands were not set apart for the use and benefit of the First Nations.
6. Canada admits only that it breached its pre-reserve creation fiduciary obligations to the First Nations. Specifically, the Department of Indian Affairs’ (“DIA”) relinquished the Lands to the Department of Interior (“DI”) without acknowledging and addressing the First Nations’ interest in such land, in breach of Canada’s fiduciary obligations. The Crown breached its fiduciary obligations when it failed to protect the First Nations’ cognizable interest in the hay lands. The cognizable interest arises from the First Nations’ regular use

and occupation of the subject lands for the purposes of maintaining both their herd and the Agency Herd of cattle.

II. Status of Claim

7. Canada agrees the requirements in s. 16(1) of the *SCTA* are satisfied, as pleaded in paragraphs 3 through 5 of the Declaration of Claim. The particulars are:
 - a. The First Nations submitted a specific claim on May 16, 2016, which was deemed filed with the Minister of Indian Affairs and Northern Development (“Minister”) on October 19, 2016;
 - b. On November 15, 2019, the Minister (by that time, the Minister of Crown-Indigenous Relations and Northern Affairs Canada) offered to negotiate a single aspect of the claim.

III. Canada’s position with respect to Validity of the Claim

8. Canada does not accept the validity of the totality of the claim set out in the Amended Declaration of Claim (the “Claim”).
9. Canada admits only that it breached its pre-reserve creation fiduciary obligations to the First Nations in relation to Canada relinquishing the Lands to third parties without acknowledging and addressing the First Nations’ interest in such lands. Canada’s breach arose from failing to protect the First Nations’ cognizable interest in the lands, namely their regular use and occupation of the Lands for the purposes of maintaining their herds and the Agency Herd. Canada denies that it breached, or failed to comply with any other lawful obligation, statute or fiduciary duty.
10. If the Tribunal should find that the Claim is valid, Canada states that:

- a. Paragraphs 20(1)(a) to (c) of the *SCTA* may provide the basis for the Tribunal to award compensation; and
- b. Any compensation is subject to subsection 20(4) and to any applicable deduction or set-off calculated in accordance with subsection 20(3) of the *SCTA*.

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

A. Pleading of Evidence

11. In response to the whole of the Claim, and to paragraphs ~~9-51~~ 9-53 in particular, Canada states that the First Nations have pleaded evidence contrary to Rule 39 of the *Specific Claims Tribunal Rules of Practice and Procedure*, SOR/2011-119. Despite this, Canada has attempted to respond to the Claim in a substantive manner.

B. The First Nations

12. In response to paragraph 1 of the Claim, Canada acknowledges that the First Nations are “First Nations” within the meaning of section 2 of the *SCTA*, and a “band” within the meaning of subsection 2(1) of the *Indian Act*, RSC 1985, c I-5.
13. In response to paragraph 2 of the Claim, Canada agrees that the Lands, which are the subject of this specific claim, are located in the Province of Alberta, and were at all material times within the Onion Lake Indian Agency (“Onion Lake Agency” or “Agency”). Canada does not agree that the Lands were set apart for the joint use and benefit of the First Nations.

C. Treaty 6

14. In response to paragraph 8 of the Claim, Canada agrees that the First Nations are signatories to Treaty No. 6. On September 9, 1876, Cree Chiefs Kee-ye-win (Kehewin

First Nation), See-kahs-kootch and Oonah-tah-mee-nah-hoos and Chipewyan Chief Kin-oo-say-oo (Cold Lake Band) signed Treaty 6 near Fort Pitt. On August 19, 1878, Cree Chiefs Puskee-yah-kay-wee-yin and Mah-kayo signed an adhesion to the Treaty.

15. In response to paragraph 9 of the Claim, Canada agrees that Treaty Commissioner Lieutenant-Governor Alexander Morris (“Morris) stated that “...the Indians were anxious to make a living by the soil”, and recommended that some instruction in farming be given to them in his report dated December 4, 1876.
16. In response to paragraph 10 of the Claim, Canada agrees that Indian Reserves No. 119, 120, 121, 122 and 123 were surveyed and set apart and confirmed by Order-in-Council PC 1151 of May 17, 1889.
17. In response to paragraph 11 of the Claim, Canada agrees that it set apart Indian Reserve No. 149 for Chief Kin-oo-say-oo of the Cold Lake Band. Canada adds that Indian Reserve No. 149 was confirmed by Order-in-Council PC 688 on April 19, 1904.

D. Development of Agriculture and Cattle Herds

18. In response to paragraph 12 of the Claim, Canada acknowledges that a letter from L. Vankoughnet to E. Dewdney dated October 28, 1885 stated that “the superintendent general agrees with Mr. Reed’s suggestion that the tribal system should be broken up as much as possible, so that each individual Indian may be dealt with instead of through the Chiefs”.
19. In response to paragraph 13 of the Claim, Canada agrees that:
 - a. Following the 1885 North-West Rebellion, the government began to sub-divide larger Indian Agencies such as the Fort Pitt District. As a result of this initiative, the Fort Pitt District became the Onion Lake Agency;

- b. The creation of the Onion Lake Agency resulted in the separation of the Cree Bands in the Fort Pitt District into two groups: those who wished to pursue farming and those who wished to remain on their reserves to hunt and trap;
 - c. The Cree who wished to farm were moved to Seekaskooth Reserve No. 119 where the Onion Lake Agency was established and to Mahkayo Reserve No. 120. The DIA through rations, farming instruction, cattle and other incentives, aided the Cree who chose to farm; and
 - d. The Chipewyan at Cold Lake were not moved to the Onion Lake reserves and subsisted principally by hunting, fishing, and cattle raising.
20. In response to paragraph 14 of the Claim, Canada agrees that, according to the DIA 1898 Annual Report, a group at Onion Lake had 160 head of cattle, while the Chipewyan at Cold Lake maintained a register of 128 head of cattle.
21. In response to paragraph 15 of the Claim, Canada agrees that an “Agency Herd” existed. In 1889, the Agency Herd numbered 98 head of cattle, and in 1891 the Agency Herd had increased to 195 head of cattle. Canada agrees that cattle at the Onion Lake Agency supplied sustenance to members of that Agency. Canada further agrees that members of the Onion Lake Agency worked to maintain both the Agency Herd and their own cattle.
22. In response to paragraph 16 of the Claim, Canada agrees that in 1891, the First Nations assisted the Agency employee, Mr. Boudreau, in cutting and stacking eight hundred tons of hay for the Agency Herd. The Onion Lake Band put up 600 tons of hay for their own use while the Cold Lake Band put up 400 tons of hay for their cattle.
23. In response to paragraph 17 of the Claim, Canada agrees that the Onion Lake Band put up 900 tons of hay, the Cold Lake Band put up 600 tons of hay, and the First Nations had put up 968 tons of hay for the Agency Herd.

24. In response to paragraph 18 of the Claim, Canada agrees that according to his November 1893 report, Inspector of Indian Agencies Alex McGibbon (“Inspector McGibbon”) noted that 1,500 tons of hay had been put up for the Agency Herd at “Cattle camp, Long Lake” and 1,200 tons had been put up for the herd owned by Band No. 119. In addition, 600 tons of hay had been put up by the Cold Lake Band for their cattle, for a total of 3,300 tons of hay.
25. In response to paragraph 19 of the Claim, Canada agrees that in 1895, it was reported that 1,500 tons of hay was cut and stacked for the Agency Herd, 1,200 tons for the “Band 119 herd” (or the Onion Lake Band herd), as well as 700 tons for the “Band 124 herd” (or the Cold Lake First Nations herd).
26. In response to paragraph 20 of the Claim, Canada agrees that:
 - a. According to the DIA Annual Report of 1895, the “department herd” (or the Agency Herd) numbered 755. All beef supply for the Onion Lake Agency had been taken from this herd, and “a few head [had] been sold”; and
 - b. The Chipewyan Band No. 124 (Cold Lake) earned over \$6,000 and the money was expended on food, clothing and other necessities.
27. In response to paragraph 21 of the Claim, Canada acknowledges that Edmond Waskewitch, an Elder of Onion Lake, in providing oral history to Candice Metallic of Maurice Law on February 9, 2010, described how after the Agency Herd was transferred to Long Lake [Kehewin Lake] in 1889, the necessity of finding adequate hay led to the founding of the No. 3 ranch near Barreyre Lake (“Big Swamp”).

E. Establishing “Big Swamp” as Haylands IR123A

28. In response to paragraph 22 of the Claim, Canada agrees that:

- a. The DIA erected a stable at Big Swamp in or around 1893. The stable at Big Swamp was expressly for the calves of the Agency Herd and was maintained by two members of the Onion Lake Agency. In his 1893 annual report, Inspector McGibbon noted that a new stable, 60 feet by 30 feet, with four compartments and a corral for keeping hay, had been put up about a mile east of the Agency where the calves of the Agency Herd would be wintered;
 - b. In his next year's report, Inspector McGibbon clarified that the stable he had described in 1893 was at Long Lake (Kehewin), and had been found unsuitable as the Department's calves were continually becoming mixed into the First Nations' own herds. A new 100 feet by 20 feet stable had been erected at a place called "Big Swamp about fifteen miles north of the other stables", where hay and water were plentiful.
29. In response to paragraph 23 of the Claim, Canada states that in or around July 1885, Indian Agent George Mann ("Agent Mann") requested through the Indian Commissioner that certain lands at "Long Swamp" be set aside as hay lands for the Agency Herd. He further indicated that his own personal calf ranch, which he had been in possession of for over two years, was located at Long Swamp and that he had cut hay for over 400 head of cattle there that summer.
30. In response to paragraph 24 of the Claim, Canada states that:
- a. On July 29, 1895, Acting Deputy Superintendent General of Indian Affairs, Duncan Scott ("ADSGIA Scott") forwarded Agent Mann's request that Big Swamp be reserved as hay lands for the Agency Herd to the Secretary of the DI;
 - b. ADSGIA Scott noted the area in which the land was located had not then been surveyed, and that an accurate description of the land was impossible to provide. He instead enclosed a rough sketch of the land. The letter stated that:

“In addition to the Indian stock the Department has a large herd of cattle in the Onion Lake Agency, the animals being used for the purpose of supplying destitute Indian beef, and it is important to the Government that means of support [of the cattle] should be afforded. The Department would therefore be glad if the land in question could be reserved, and I should like to inform the Agent as soon as possible, in order that arrangements be made for the winter”; and

- c. On the same day, Deputy Superintendent General of Indian Affairs, Hayter Reed (“DSGIA Reed”), wrote R.J. Hall, Acting Deputy Minister, DI, requesting that the DI not grant hay lands in the locality to private individuals until the tract required by the DIA had been properly surveyed.
31. In response to paragraph 25 of the Claim, Canada agrees that L. Pereira, the Acting Secretary, DI (“Pereira”), on behalf of the Acting Deputy Superintendent of Indian Affairs, sent instructions to the Dominion Lands Agent, asking them to refrain from granting permits to cut hay in Township 62, Range 5, West of the 4th Meridian, without referring the applications to the DI.
 32. In response to paragraph 26 of the Claim, Canada agrees that Dominion Land Surveyor A.W. Ponton (“Surveyor Ponton”) conducted a survey of the Lands from October 6, 1897 to October 15, 1897. On April 12, 1898, Surveyor Ponton forwarded this plan of survey to the Secretary of the DIA, J.D. McLean (“Secretary McLean”), advising that he conducted his survey in accordance with an application made by Agent Mann to have certain lands lying north of Kehewin’s Reserve set aside to provide hay for the Government cattle in his charge. In the memo from Surveyor Ponton dated April 12, 1898 W.A. Orr, Clerk in Charge of the Lands and Timber Branch, wrote that in this case the DI should be asked to set aside the lands. The notation “Approved” appears in the margin of the memo.
 33. In response to paragraph 27 of the Claim, Canada agrees states that:

- a. Surveyor Ponton informed Secretary McLean that it would be necessary to run a tie line to connect the hay reserve to the Dominion Lands Survey, in order to enable the DI to locate it on the map of the North West Territories before applying for an Order-in-Council; and
 - b. A plan dated October 1897 entitled “Treaty No. 6 N.W.T. Plan of Hay Lands near Moose Lake in the Onion Lake Agency set apart for the Department of Indian Affairs” indicates an area of 26.5 square miles. Canada does not agree that the area is calculated at 17,851 acres.
34. In response to paragraph 28 of the Claim, Canada has no knowledge of whether Elder evidence shows Kehewin First Nation’s reliance on the Lands to support and maintain their thriving cattle industry. However, Canada agrees that a transcript of an interview between William Kehewin and Gilbert Eagle Bear states that there were stakes marked “I.R.” (for Indian Reserve) about one mile east and one mile south of Bonnyville. Canada further states that in this transcript, William Kehewin indicates that while some people used to go and make hay in the hay lands near Bonnyville, the land was used largely for hunting and trapping because there was generally enough hay for the cattle on the Kehewin Reserve.
35. In response to paragraphs 29 and 30 of the Claim, Canada agrees that in March 1900, in response to a request from the Deputy Minister, the Chief Surveyor of the DIA Samuel (“Chief Surveyor Bray”) forwarded the Secretary of the DIA a schedule of Indian Reserves in Manitoba and the North West Territories. The Schedule included “hay lands for 120, 121, 122 and 123” in the “Schedule of Indian Reserves in the Provisional District of Saskatchewan,” ascribing it Reserve 123A.

F. Indian Affairs Relinquishment of the Lands

36. In response to paragraph 31 of the Claim, Canada agrees that it procured several surrenders of reserve land from Bands on the prairies between 1896 and 1911. Canada

does not agree that the Crown introduced a number of policies and legislative amendments to the *Indian Act* that were designed to encourage and induce Bands on the prairies to surrender some or all of their reserve lands for sale to settlers. Further, Canada states that this claim amounts to legal argument.

37. In response to paragraph 32 of the Claim, Canada agrees that:

- a. Due to unusually wet seasons in 1900 and 1901, the Lands flooded and it became necessary to establish new ranches;
- b. The DIA had been urged to consider draining the hay lands at Long Swamp but opted not to do so, as it would involve considerable expense, and would be of little benefit to the Department “as the tract of land containing the Long Swamp is not the property of the Indians”; and
- c. A February 6, 1902 letter from Secretary McLean to David Laird states:

“In your letter last referred to you suggest that the heifers from the government herd be distributed among the herds of the Indians with a view to increasing their numbers, and you say that the lands outside the reserve will probably soon be taken up by settlers and the range for the herd materially lessened.”

38. In response to paragraph 33 of the Claim, Canada denies that the First Nations held a beneficial interest in the Lands, as the Lands were not held for the exclusive use and benefit of the First Nations. Canada has no knowledge of the facts upon which the First Nations rely in relation to the asserted abrogation of their interest. Canada agrees that:

- a. In a letter to the Indian Commission dated January 9, 1902, Indian Agent W. Sibbald (“Agent Sibbald”) noted that, owing to the wet seasons in 1901 and 1902, the Onion Lake Agency had to establish new winter ranches on the south side of the Saskatchewan River, far removed from the old ranches. Agent Sibbald indicated that, while the old ranches had hay lands reserved for the DIA, settlers

could come into the area around the new winter ranches at any time and hinder the hay cutting; and

- b. In a letter to the Indian Commissioner dated February 6, 1902, Secretary McLean inquired whether, in view of the prospective increase in the First Nation herds and the curtailment of the range for the cattle, the Department should consider draining the Long Swamp hay grounds even if the Agency Herd was done away with.
39. In response to paragraph 34 of the Claim, Canada agrees that, according to the 1902 Annual Report of the DIA, due to excessive rain, five large winter stables at the Lands had to be abandoned, and the Agency Herd was moved in 1901 to the south side of the river where hay was available. In April 1903, Agent Sibbald requested that the new hay grounds be reserved for the use of the Agency, as it was likely that these lands would be settled, leaving the Agency without any place to cut hay.
40. In response to paragraph 35 of the Claim, Canada agrees that, according to the 1902 Annual Report of the DIA, by 1902 the Agency Herd had decreased by 20%. As a result, the Agency needed to purchase beef from First Nations members for the Agency supply, which in the past had been obtained from the Agency Herd. Canada admits that in 1903, in some cases, First Nations of the Onion Lake Agency reported a loss of herd as high as 8%. Canada also reported in 1903 that last season the hay lands on the reserves and in the vicinity were severely taxed to obtain the hay required.
41. In response to paragraph 36 of the Claim, Canada agrees that the 1904 Annual Report of the DIA notes that some Cree members who had dwelt for a time on the reserves at Onion Lake had recently returned to the outlying reserves. This movement was encouraged since the necessary hay supply for a large herd of cattle was no longer obtainable in the immediate vicinity of Onion Lake, due to settlers partially taking up a portion of the hay lands which the First Nations formerly utilized. While Canada agrees that this movement increased the reliance of the First Nations on their own reserves for

hay production, it has no knowledge as to whether these reserves, with the exception of the Kehewin Reserve, were deficient in hay resources. Canada further agrees that in the fall of 1903, Canada transferred the greater part of the Agency Herd to the First Nations.

42. In response to paragraph 37 of the Claim, Canada agrees that the 1906 Annual Report of the DIA reported separately on the Onion Lake Band, the Frog Lake Band, Keeheewin's Band, and the Chipewyan Band.
43. In response to paragraph 38 of the Claim, Canada agrees that in August 1907, the DI decided to subdivide Townships 61 and 62, Range 5, West of the 4th Meridian. Township 62, Range 5, West of the 4th Meridian had been previously set aside as a hay reserve for Onion Lake. Secretary McLean advised that the proposed plan was satisfactory to the DIA. Canada does not agree that the subdivision amounted to trespass or encroachment.
44. In response to paragraph 39 of the Claim, Canada agrees that in October 1908, settlers had made inquiries in relation to the northwest quarter of Section 36, Township 61, Range 5, West of the 4th Meridian. Canada agrees that the DIA advised that "as this land [had] not been surrendered by the Indians, it [was] not on the market."
45. In response to paragraph 40 of the Claim, Canada does not agree that in January 1909, the DIA arbitrarily decided that the Lands were no longer a reserve.
46. In further response to paragraph 40, Canada agrees that:
 - a. On January 13, 1909, in response to a letter inquiring if the "hay reserve in this agency [was] required for Indian purposes", Agent Sibbald stated to Deputy Superintendent General of Indian Affairs, Frank Pedley ("DSGIA Pedley"), "I fully understand that the place is not an Indian Reserve"; and

- b. On November 24, 1906, in a letter from Secretary McLean to Agent Sibbald regarding “the tract known as the government hay reserve,” Secretary McLean stated that:

“[t]he said hay reserve is situated in Tp. 61 and 62, R.5.W.4.M. It is not an Indian Reserve. It is simply a tract set apart for the use of this Department, consequently the Indians will not be required to give their consent.”
47. Canada also states that in June 1909, Secretary McLean advised the Deputy Minister of the DI that squatters should move elsewhere, stating “as the land will be required by this Department for an indefinite number of years, I would suggest that the said squatters be advised accordingly and warned to move to some other locality.”
48. In response to paragraph 41 of the Claim, Canada agrees that:
 - a. In June 1910, the DI records showed that homestead entries had been granted for the East half and Southwest quarter of Section 26, and the Northeast quarter of Section 36, Township 61, Range 5, West of the 4th Meridian;
 - b. In September 1910, in a letter to the Secretary of the DIA, the Assistant Secretary of the DI noted that the reservation of the lands reserved for the DIA for hay purposes in Townships 61 and 62, Ranges 4 and 5, West of the 4th Meridian had been cancelled; and
 - c. In a letter to the Secretary of the DIA dated September 8, 1911, the Assistant Secretary of the DI noted that it had been decided to withdraw the Southwest quarter of Section 2 and the Southeast quarter of Section 3 in Township 62, Range 5, West of the 4th Meridian from the hay reserve located in Townships 61 and 62, Range 5, West of the 4th Meridian.
49. In response to paragraph 42 of the Claim, Canada agrees that in a letter dated March 24, 1920, Secretary McLean wrote to Agent Sibbald, noting that the DI had decided to

withdraw certain portions of the hay reserve located in Township 62, Range 5, West of the 4th Meridian. The letter asked Agent Sibbald to report whether the remaining lands would provide a sufficient supply of hay for his Agency.

50. In further response to paragraph 42 of the Claim, Canada states that:
- a. In a letter to Indian Agent Lang Turner (“Agent Turner”) dated November 28, 1929, the Acting Assistant Deputy and Secretary of the DIA, A.F.M. MacKenzie (“AADS MacKenzie”), noted that the DI had issued patents for the Southwest quarter of Section 25, Township 61, Range 5, West of the 4th Meridian, the Southwest quarter of Section 3, Township 62, Range 5, West of the 4th Meridian, and the Southeast quarter of Section 4, Township 62, Range 5, West of the 4th Meridian, and that they also held application for homestead entry on the Southwest quarter of Section 4, Township 62, Range 5, West of the 4th Meridian;
 - b. AADS MacKenzie indicated that it appeared to him that the First Nations had not been utilizing the lands for hay purposes for some time and that the DIA was proposing to relinquish its claim on the Southwest quarter of Section 4, Township 62, Range 5, West of the 4th Meridian unless Agent Turner considered that efforts should be made to hold this fractional quarter section; and
 - c. In response to AADS MacKenzie’s letter, Agent Turner indicated that he knew of no reason why efforts should be made to hold the fractional quarter section since, in recent years, the First Nations had not found it necessary to go outside of their regular reserve to secure hay.
51. In response to paragraph 43 of the Claim, Canada agrees that on January 9, 1930, AADS MacKenzie informed Dominion Lands Agent J.W. Martin that the fractional southwest quarter of Section 4, Township 62 was no longer required to be temporarily reserved for the DIA for hay purposes.

52. In response to paragraph 44, Canada does not agree that the Lands were created as a “reserve” under the 1886 *Indian Act* upon approval of the plan of survey on April 12, 1898. Further, Canada does not agree that it expressed an intention to set aside the Lands for the First Nations, or that Canada had surveyed and set apart the Lands as an *Indian Act* reserve.
53. In further response to paragraph 44, Canada admits that the First Nations used the Lands, and that the Lands were essential to support their agricultural livelihood and growing cattle herds.
54. In response to paragraph 45, Canada states that this paragraph, consisting of a summary of evidence in support of the First Nations’ claim, amounts to legal argument. Canada does not agree that the Lands were created as a reserve within the meaning of the *Indian Act*.
55. In response to paragraph 46, Canada does not agree that the Crown intended to create a reserve interest. Further, Canada does not agree that the Crown’s agents’ conduct represents affirmative acceptance of the Lands as an *Indian Act* reserve for hay purposes.
56. In response to paragraph 47, Canada states that the Lands were not set apart for the use and benefit of the First Nations, and therefore Canada was not required to comply with the surrender provisions of the *Indian Act* in force at the time the DIA relinquished the Lands. Canada does not agree that the disposition of the Lands was invalid and contrary to express provisions of the *Indian Act*.
57. In response to paragraph 48, Canada does not agree that it breached its statutory, fiduciary and honourable obligations by relinquishing the Lands between 1904 and 1930. As the Lands were not set apart for the use and benefit of the First Nations, Canada was not required to comply with the surrender provisions of the *Indian Act* that were in force at the time that the DIA relinquished the Lands and subsequently granted them to third

parties. As a result, relinquishing the Lands was neither illegal nor in breach of Canada's honourable obligations.

58. In further response to paragraph 48, Canada does not agree that it breached a fiduciary obligation to protect and preserve the Lands from exploitation, as Canada does not agree that the Lands were reserve lands.

~~59.~~ In response to paragraphs 49 and 50, Canada has no knowledge of the facts upon which the First Nations rely with respect to persistent requests of other interests resulting in Canada issuing letters patent over the entirety of 123A, and Canada cannot currently admit those facts. Canada denies that the First Nations had a beneficial interest in sub-surface rights in the Lands, as the Lands were not set apart for the use and benefit of the First Nations. Canada denies that it breached any obligations to preserve sub-surface rights for the First Nations.

~~60.~~ In further response to paragraphs 49 and 50, Canada has no knowledge of the facts on which the First Nations rely with respect to the presence of sub-surface mines and minerals in relation to the Lands, and Canada cannot currently admit those facts.

~~59~~ 61. In response to paragraph ~~49~~ 51, Canada admits that it breached its pre-reserve creation and fiduciary obligations to the First Nations by failing to address the First Nations' interest in the Lands when relinquishing the Lands to third parties.

~~60~~ 62. In response to paragraph ~~50~~ 52, while Canada admits that it did not consult with or inform the First Nations that the Lands would not be set aside for their exclusive use and benefit, Canada does not agree that it required the consent of the First Nations to relinquish the Lands. Canada states that relinquishing the Lands was not unlawful. Canada admits that it did not pay compensation to the First Nations related to the disposition of the lands.

~~61-63.~~ In further response to paragraph ~~50~~ 52, Canada does not agree that the disposition of the Lands resulted in the collapse of the First Nations' expanding cattle raising industry.

Canada states the First Nations have not put forth any facts to support this claim. Further, Canada states that the First Nations had not been using the Lands for hay purposes for some time:

- a. AADS MacKenzie wrote to Agent Turner on November 28, 1929, stating that:

“From this it would appear that the Indians of that band have not been utilizing these lands for hay purposes for some time and the Department proposes to relinquish its claim on the S.W. ¼ Sec. 4-62-5-W.4.M., unless you consider efforts should be made to hold this fraction quarter section (45.2 acres)”;

- b. Agent Turner responded to AADS MacKenzie on December 27, 1929, stating that:

“... I know of no reason why efforts should be made to hold fractional quarter section 4-62- 5, west of the 4th meridian. Of late years these Indians have not found it necessary to go outside of their regular reserve to secure hay, and I do not think it now necessary that special lands should be withheld for this purpose”; and

- c. On January 9, 1930, AADS MacKenzie informed the DI that the fractional quarter-section was “no longer required to be temporarily reserved for this Department for hay purposes.”

~~62~~ 64. In response to paragraph ~~51~~ 53, Canada does not agree that it failed to act in accordance with the honour of the Crown when it relinquished the Lands. Canada states it did not survey and set apart the Lands for the use and benefit of the First Nations, and therefore they were not reserve lands.

V. Statements of Facts (R. 42(a))

~~63~~ 65. Canada relies upon the facts set out under heading “IV. Allegations of Fact – Declaration of Claim”.

- 64 66. On July 16, 1895, Agent Mann of the Onion Lake Agency wrote a letter to ADSGIA Scott, inquiring about the possibility of having an undeveloped portion of land at Long Swamp set apart for the use of the Agency Herd as hay meadows.
- 65 67. On July 29, 1895, the DIA forwarded Agent Mann's request to set aside the requested lands for hay meadows to the DI. The letter from the ADSGIA Scott explained that the request was being made to support the hay needs for both the Agency Herd and cattle belonging to individual members of the First Nations.
- 66 68. On August 7, 1895, Pereira addressed DSGIA Reed to acknowledge the July 29, 1895 request that the Long Swamp "be reserved for the Indians for hay purposes." Pereira further asked that the tract's position be shown on one of the latest DI maps since the description furnished made it impossible to plot the tract applied for on the records of the DI.
- 67 69. On August 23, 1895, in a letter initialed by ADSGIA Scott, the DIA asked John R. Hall, Acting Deputy Minister of the DI, to take measures to prevent the granting of hay lands to private individuals in the locality described in Agent Mann's request until the tract required by the DIA had been properly surveyed and located.
- 68 70. The DIA further wrote Agent Mann on the same date stating that Indian Commissioner A.E. Forget ("Commissioner Forget") had been informed and the Lands would probably be surveyed as soon as convenient. He stated further that, in the meantime, application had been made to the DI to prevent the granting of hay lands in the locality to private individuals.
- 69 71. On July 14, 1896, DSGIA Reed wrote Commissioner Forget concerning "the matter of securing hay lands to provide for the wants of the Government herd at Onion Lake". Commissioner Forget responded on July 24, 1896 by referring DSGIA Reed to the initial request by Agent Mann, and to the DIA's letter of August 23, 1895, which had requested

the DI to prevent the granting of hay lands to private individuals until the tract required by the DIA had been properly surveyed and located.

~~70-72.~~ On July 31, 1896, DSGIA Reed replied to Commissioner Forget's letter by reminding Commissioner Forget of the August 1895 instructions to the Lands Agent not to issue permits to cut hay in Township 62, Range 5, West of the 4th Meridian without contacting the DI first. DSGIA Reed stated that this action was taken upon a request to have the lands in the vicinity reserved until such time as the tract required by the DIA could be properly surveyed and located.

~~71-73.~~ Commissioner Forget replied to the July 31, 1896 letter on August 8, 1896, stating that he had advised Agent Mann to notify the Dominion Lands Agent at Battleford, in connection with the instructions given in August 1895 by the DI, "that he will this year occupy the hay lands on the Township referred to."

~~72~~ 74. On August 4, 1897, Commissioner Forget instructed Surveyor Ponton to survey the Lands. Surveyor Ponton met Agent Mann at the "hay camp" on October 4, 1897, drove with Agent Mann to inspect the hay on October 5, and surveyed the boundaries for the Lands between October 6, 1897 and October 15, 1897.

~~73~~ 75. Surveyor Ponton submitted his plan of survey to Secretary McLean on April 12, 1898. The covering letter that Surveyor Ponton included along with his survey indicated that "several similar applications have been made by Agents to have hay lands reserved, and they have been advised that lands for this purpose would not be set apart for them, and have been directed to make application annually to the Department for a permit...". He stated further that:

"the cattle for which hay is required is a Government Herd, and not the private property of the Indians, and if, on this account, it is thought advisable to have the lands set aside as a Government Reserve, the Department of the Interior should be requested to take action in the matter."

- 74 76. When the DIA, Lands and Timber Branch, received the plan of survey from Surveyor Ponton, W. A. Orr, Clerk in Charge of the Lands and Timber Branch, wrote that in this case the DI should be asked to set aside the lands. Secretary McLean added the word “Approved” in the margin notes.
- 75 77. Surveyor Ponton sent the survey plan and field notes of the 1898 survey to the DIA on May 12, 1899.
- 76 78. On October 24, 1899, Secretary McLean wrote to the Secretary of the DI that a Survey had been made of the land referred to in Agent Mann’s request, which the DIA required to “provide hay for the Government herd of cattle in the Onion Lake Agency.” Secretary McLean asked that the DI take such steps as necessary to secure the land for the use of the DIA.
- 77-79. On November 20, 1899, Pereira, sent instructions to the Dominion Lands Agent in Edmonton. Pereira stated that the DIA had asked that a certain tract of land be reserved for the “Indians of the Onion Lake Agency for hay purposes.” A copy of the plan of the survey of the tract was enclosed. Pereira instructed the Dominion Lands Agent to issue a free permit each year “to the Indian Agent to cut whatever quantity of hay [was] required for the use of the Indians.” He added, however, that if the First Nations desired to sell the hay, they would be required to pay the same dues as others who obtained permits for such purpose. He also instructed the Dominion Lands Agency not to issue permits to others to cut hay on the tract shown on the enclosed plan without first referring the application to the DI in order that it could be decided whether issuing such permits would be detrimental to the interests of the First Nations. Pereira sent a copy of the above instructions to Secretary McLean.
- 78 80. The hay reserve did not appear in the official “Schedule of Indian Reserves in the Dominion” printed in the DIA Annual Reports for 1898 or 1899.

~~79~~ 81. The hay reserve appeared in a list of Indian reserves that Surveyor Ponton prepared in March 1900, in response to a request made by the Deputy Superintendent General for a statement showing the various reservations in Manitoba and N.W.T.. The list prepared by Surveyor Ponton described Reserve 123A as “Hay Lands for 120 [Makaoo, Onion Lake], 121 [Onee pow o hay, Frog Lake], 122 [Pus ke ah ke he win] and 123 [Kehewin, Long Lake]”.

~~80~~ 82. On November 16, 1908, the Deputy Minister of the DI, W.W. Cory, informed Superintendent General of Indian Affairs Pedley (“SGIA Pedley”) that some years previously, certain lands were set aside for hay purposes at Onion Lake. He stated further that:

“a number of squatters who have located within this reserve have been urging their claims to entry for their respective holdings, and, as it is represented that the lands in question are not now being used by the Indians for hay purposes, I would be glad to know whether your Department is still desirous that the reserve should be maintained. I may add that we are anxious that these squatters’ claims should be favourably considered if it is at all possible to do so.”

~~81~~ 83. On November 20, 1908, at the request of SGIA Pedley, Chief Surveyor Bray prepared a short report on the status of the Lands. According to Chief Surveyor Bray, the land referred to was a hay reserve set apart specifically to provide hay for the government’s herd (i.e. the Agency Herd). Chief Surveyor Bray notes that the hay reserve existed only under the authority of a letter from the DI that directed its Lands Agent to issue a free permit to cut whatever quantity of hay was needed for the use of the First Nations, and not to issue permits to others to cut hay on the lands.

~~82~~ 84. Chief Surveyor Bray clarified in his report that no action in the way of an Order-in-Council was taken with respect to the hay reserve and wrote, “I think that the Agent should state if the whole or any part of the tract is no longer required. The Indians will not require to be consulted as to surrender. As stated above, it was not understood to be an Indian Reserve.”

83 85. On November 24, 1908, Secretary McLean wrote to Agent Sibbald stating that the tract in question is not an Indian Reserve; rather, it is “simply a tract set apart for the use of this Department, consequently the Indians will not be required to give their consent.”

VI. Relief

84 86. Canada seeks the following relief:

- a. Dismissal of the claims set out in paragraph ~~52~~ 54 of the Claim relating to a breach of Canada’s statutory, fiduciary and honourable obligations, by relinquishing the Lands to third parties, or a failure to reserve sub-surface rights, predicated on the basis that an *Indian Act* reserve was created or set apart for the use and benefit of the First Nations;
- b. If the Tribunal finds Canada liable to pay compensation to the First Nations then Canada relies upon subsection 20(3) of the *SCTA* in order to claim a deduction or set-off of the value of any benefit received by the First Nations from such compensation deemed to be owed, and upon subsection 20(4) of the *SCTA* which states that two or more specific claims shall be treated as one claim if they are made by the same claimant and are based on the same or substantially the same facts, or if they are made by different claimants and are based on the same or substantially the same facts and relate to the same asset;
- c. ~~Such costs as the Tribunal deems just;~~ Canada is not seeking its costs at this time but reserves its right to do so; and
- d. Such further relief as Canada may request and the Tribunal deems just.

VII. Communication (R. 42(g))

85 87. Canada’s address for service of documents is

Department of Justice
300, 10423-101 Street
Edmonton, Alberta T5H 0E7
Tel: 780-495-8364
Fax: 780-495-2964

Attention: Dalal Mouallem / ~~Rory Tighe~~

86 88. The facsimile number for service of documents on Canada is 780-495-2964.

87 89. The email addresses for the service of documents on Canada are:

dalal.mouallem@justice.gc.ca
rory.tighe@justice.gc.ca

DATED at the City of Edmonton, in the Province of Alberta, this 14th ~~26th~~ day of April ~~January~~,
2023 ~~2021~~.

Dalal Mouallem "Digitally Signed"

Rory Tighe "Digitally Signed"

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
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Per: Dalal Mouallem / ~~Rory Tighe~~

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Counsel for the Respondent
His ~~Her~~ Majesty the King ~~Queen~~ in Right of
Canada