

**SPECIFIC CLAIMS TRIBUNAL**

BETWEEN:

AHOUSAHT FIRST NATION

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
September 6, 2012	
Guillaume Phaneuf	
Ottawa, ON	4

CLAIMANT

v.

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

RESPONDENT

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**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: AHOUSAHT FIRST NATION  
As represented by Stan H. Ashcroft of  
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**I. Status of Claim (R. 42(a))**

1. The Ahousaht First Nation (the “First Nation”) submitted a claim to the Minister in May 2002 alleging, among other things, that Canada, through the actions of Indian Reserve Commissioner O’Reilly, breached its fiduciary duty and duty of care to the First Nation in connection with the creation of Marktosis I.R. 15.

2. The Minister notified the First Nation in writing on August 6, 2009 that its specific claim had not been accepted for negotiation.

3. In response to paragraph 1 of the Declaration of Claim, Canada admits that the First Nation is a “band as defined in subsection 2(1) of the *Indian Act*”.

4. In response to paragraph 2 of the Declaration of Claim, Canada admits that the specific claim meets the conditions precedent set out in paragraph 16(1)(a) of the *Specific Claims Tribunal Act*.

5. Canada says that the legal identity of the Respondent should properly be “Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development”.

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

6. Canada does not accept the validity of any of the claims set out in the Declaration of Claim including those in paragraphs 6 and 17, and in particular the allegation that Commissioner O’Reilly, as an agent of the Crown, breached his fiduciary obligations and duty of care owed to the First Nation by:

- a. failing to accurately ascertain the requirements of the First Nation;
- b. failing to allot sufficient lands (in quality and size) to meet their needs;
- c. failing to allot lands that were clearly Indian “clearings, burial places and fishing stations occupied by them and to which they may be specially attached”; and
- d. failing to allot the lands comprising Lot 363 as part of Marktosis I.R. 15.

7. If Canada is liable, which is not admitted, Canada denies that the First Nation suffered a loss as a result, and further Canada denies that it owes the First Nation compensation as alleged at paragraph 18, or at all.

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

8. Unless expressly admitted, Canada denies each and every allegation of fact or law in the Declaration of Claim and puts the Claimant to the strict proof thereof.

9. In response to paragraph 3 of the Declaration of Claim, Canada states that the First Nation submitted its specific claim entitled “Allotment of Marktosis IR 15 – June 1889” on May 22, 2002. Pursuant to s. 42(1) of the *Specific Claims Tribunal Act*, the claim is deemed to have been filed with the Minister on October 16, 2008.

10. In response to paragraph 4 of the Declaration of Claim, the fact that the Minister notified the First Nation in writing of his decision not to accept the claim for negotiation is admitted in paragraph 2 above. Beyond the fact of rejection, the contents of the letter of August 6, 2009 are irrelevant to this proceeding. If they are relevant to a matter in issue, then Canada asserts that the contents of the letter are privileged.

11. Canada admits the facts in paragraph 7 of the Declaration of Claim but denies that they fully represent Commissioner O’Reilly’s terms of appointment as set out on the historical record.

12. In response to paragraph 8 of the Declaration of Claim, Canada admits the facts as alleged with the exception of the allegation that O’Reilly spent “a week” in the vicinity of Clayoquot Sound. According to O’Reilly’s diary, he spent nine days in the vicinity of Clayoquot Sound, from June 17 to June 25, 1889. O’Reilly later wrote that the work of defining 29 reserves “occupied me seven days”.

13. In response to the first sentence at paragraph 9 of the Declaration of Claim, Canada admits only that on June 22, 1889, Commissioner O’Reilly met with the Ahousaht and

Manhousaht Chiefs, after which he laid off reserves at Trout River, Catface Mountain and Matilda Creek. In response to the second sentence at paragraph 9, Canada admits that on June 24, 1889 (not June 23, 1889), Commissioner O'Reilly marked off eight more reserves, four each for the Ahousaht and Manhousaht.

14. In response to paragraph 10 of the Declaration of Claim, Canada admits the facts as alleged other than to say that F.A. Devereux's survey of Marktosis IR 15 took place in September 1893 (not 1892) and that he described "the soil" as worthless, consisting of rock and moss.

15. The statements at paragraphs 11 and 16 of the Allegations of Fact are opinions, rather than facts, and therefore should not have been included in the Declaration of Claim. Canada says that if the First Nation is seeking to rely on such opinion evidence, it must comply with the Rules concerning expert evidence (Rules 85 to 93 of the *Specific Claims Tribunal Rules of Practice and Procedure*). Canada further says that paragraphs 11 and 16 of the Declaration of Claim set out evidence to support facts asserted by the First Nation which is contrary to Rule 39 of the *Specific Claims Tribunal Rules of Practice and Procedure*.

16. In further response to paragraph 11 of the Declaration of Claim, Canada says that the allegations contained therein would be relevant to a claim of Aboriginal title, but that such a claim is not properly before this Tribunal. Canada pleads and relies on section 15(1)(f) of the *Specific Claims Tribunal Act*.

17. The first sentence at paragraph 12 of the Allegations of Fact is opinion, rather than fact, and therefore should not have been included in the Declaration of Claim. In response to the second sentence at paragraph 12, Canada admits only that in 1904, Lot 363 was purchased from the government of British Columbia by the Board of Trustees of the Presbyterian Church in Canada.

18. The statement at paragraph 13 of the Allegations of Fact is argument rather than a fact and therefore should not have been included in the Declaration of Claim.

19. In response to paragraph 14 of the Declaration of Claim, Canada admits only that in 1904, Lot 363 was purchased from the government of British Columbia by the Board of Trustees of the Presbyterian Church in Canada.

20. In response to paragraph 15 of the Declaration of Claim, Canada admits that Chief Kietler gave evidence before the Royal Commission on Indian Affairs for BC in 1914. Canada denies that Chief Kietler's responses to the questions he was asked about Marktosis I.R. 15 could properly be characterized as complaints.

#### **IV. Statement of Facts (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. The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.

22. Following Sproat's resignation, the Governor in Council, in 1880, approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner, having been found suitable and recommended by senior federal and provincial government officials.

23. The Order in Council appointing Commissioner O'Reilly, P.C. 1334, stated that the duties of the commissioner "consist mainly in ascertaining accurately the requirements of the Indian Bands in that Province [British Columbia], 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 that he was to act in his own discretion "in furtherance of the joint suggestions" of the Chief Commissioner of Lands and Works and the Indian Superintendent for British Columbia "as to the particular places to be visited and 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. Commissioner O'Reilly was further instructed to "make no attempt to cause any violent or sudden change in the habits" of the Indians. He was also not to "divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in".

26. 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.

27. The Crown in right of 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 for the First Nation***

28. In June 1889, Commissioner O'Reilly travelled to the Clayoquot Sound area for the purpose of setting aside Indian reserves for the First Nation as well as the Clayoquot, Kelsemart and Manhouset bands. Commissioner O'Reilly would later write that he found it difficult not to treat the four bands as "one tribe" because "they are now so intermarried, and intermixed". He noted that the population of Clayoquot Sound was 696.

29. Between June 17 and June 25, 1889, Commissioner O'Reilly diarized some of the details of his visit to the region, including three entries which specifically referred to reserves he allotted to the First Nation. On June 19<sup>th</sup>, Commissioner O'Reilly "...[l]aid off a reserve outside for the Ahouset – in Open Bay, South End". On June 22<sup>nd</sup>, he "...had a long chat with Nokamis Chief of Ahouset and Yat-sim-a-house (Swan) Chief of Man-hou-sat..." and it was on that day he marked off reserves at Trout River, Catface Mountain and Matilda Creek. On June 24<sup>th</sup>, Commissioner O'Reilly marked off four fishing reserves for the First Nation which he noted made "11 in all".

30. In a letter to the Superintendent General of Indian Affairs dated March 5, 1890, Commissioner O'Reilly explained that on the 19<sup>th</sup> of June, he met and had a "long conversation" with the Chief and "such of his people as were not absent engaged in sealing, or working at the canneries". Commissioner O'Reilly "ascertained from them where the several fisheries were situated that they wished to have reserved" and he "undertook to visit" all of them. At the invitation of Commissioner O'Reilly, members of the tribe accompanied him and assisted him in defining 29 reserves, including Marktosis I.R. 15.

31. There is no information on the historical record that Commissioner O'Reilly was advised that the First Nation wished to have the lands adjacent to the southern boundary of Marktosis reserved.

32. There is no information on the historical record that Commissioner O'Reilly was advised of the presence of burial sites or other significant places on the lands adjacent to the southern boundary of Marktosis.

33. There is no information on the historical record that there was any disagreement between the First Nation and Commissioner O'Reilly regarding the size, location or number of reserves to be allotted to the First Nation.

34. As a result of his visit to the Clayoquot Sound area, Commissioner O'Reilly composed a Minutes of Decision on June 24, 1889. Marktosis I.R. 15 was described as "a reserve of two

hundred and thirty (230) acres, situated on the southeast coast of Flores Island, Clayoquot Sound, and at the head of Matilda Creek...”

35. The Marktosis I.R. 15 was surveyed by F.A. Devereux in September 1893. The total acreage of the reserve is not shown on the survey.

36. The official plan was approved by Commissioner O'Reilly and F.G. Vernon, BC Chief Commissioner of Lands and Works on May 16, 1894. The plan shows Mark-to-sis I.R. No. 15 on Flores Island as 260 acres (as opposed to the 230 acres which had been estimated by Commissioner O'Reilly in his Minutes of Decision). Both the 1902 and 1913 Dominion Schedules of Indian Reserves list 11 reserves (Nos. 15-26) for the First Nation, including Marktosis I.R. 15 at 260 acres.

*The Royal Commission on Indian Affairs for B.C.*

37. On September 24, 1912, the Dominion and Provincial governments established a joint Royal Commission on Indian Affairs for B.C. “to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia...”. The Royal Commission’s mandate included the provision of additional reserve lands.

38. On May 18, 1914, the Royal Commission met with the First Nation on their Marktosis I.R. 15 and interviewed Band representatives regarding their land requirements among other things. Chief Kietler also gave evidence as to the existing reserves of the First Nation, including Marktosis I.R. 15.

39. At the time of the Royal Commission, the First Nation did not apply to enlarge its Marktosis I.R. 15. Rather, the First Nation applied for land on Vargas Island, Mosquito Harbour and Blunden Island, which were reported to be unavailable and therefore not allowed by the Royal Commission; and Kutcous Point and Bartlett Island, which were approved as additional reserve lands by the Royal Commission.

40. B.C. Order-in-Council No. 911 of July 26, 1923 and Dominion Order-in-Council No. 1265 of July 19, 1924 provided final approval for the Royal Commission's decisions regarding the First Nation.

41. On July 29, 1938, under B.C. Order-in Council 1036, the Province of British Columbia transferred administration and control of Indian reserve lands to Canada. Marktosis I.R. 15 was on an attached schedule of reserves.

***Lot 363***

42. The First Nation passed an Ahousaht Council Resolution (the "ACR") dated January 8, 2008 requesting that Lot 363 be set apart as reserve land. The ACR provided, among other things, that the First Nation was occupying Lot 363 with the permission of the owner, Weyerhaeuser Company Limited ("Weyerhaeuser").

43. On February 24, 2009, Weyerhaeuser and Canada entered into an agreement setting out the terms and conditions of the proposed gifting of Lot 363.

44. By Order in Council P.C. 2009-138 dated January 29, 2009, the subject lands were set apart for the use and benefit of the First Nation as an addition to the Marktosis I.R. 15 effective March 5, 2009, which was the date on which Canada became the registered owner of the lands pursuant to the British Columbia *Land Title Act*, R.S.B.C. 1996, c. 250.

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

45. Canada seeks to have the claim dismissed in its entirety.

46. Canada pleads and relies on the *Crown Liability Act*, S.C. 1952-53, c. 30, as amended, and in particular section 24.

47. If Canada is liable, which is not admitted, Canada asserts that the Province of British Columbia caused or contributed to the acts or omissions and any losses arising therefrom as set out in section 20(1)(i) of the *Specific Claims Tribunal Act*.

48. Canada pleads and relies on section 20 of the *Specific Claims Tribunal Act*, including but not limited to section 20(3).

49. Canada seeks its costs in the proceedings.


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

Respondent's address for service: Department of Justice  
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Dated: September 7, 2012

  
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Signature of  
 Respondent     lawyer for Respondent  
**Myles Kirvan,**  
Deputy Attorney General  
**Per: Tanya L. Jorgenson**  
Department of Justice  
British Columbia Regional Office