

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

METLAKATLA INDIAN BAND

Claimant

v.

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

Respondent

AMENDED RESPONSE
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure
Clean Version as per CMC Direction

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

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I Claimant and Respondent

1. The Respondent, Her Majesty the Queen in right of Canada (Canada) admits that the Claimant (Metlakatla) is a First Nation within the meaning of s. 2 of the *Specific Claims Tribunal Act*.
2. The correct legal name for the Minister is the Minister of Indian Affairs and Northern Development (Minister).

II Conditions Precedent

3. With one possible exception, Canada admits that the claim as set out in the Declaration of Claim has been previously filed with the Minister.
4. Insofar as Metlakatla claims in the Declaration of Claim, at paragraphs 17, 33 and 42, that the 1906 surrender was invalid as a surrender of alleged Indian reserve lands because the Lax Kw'alaams (Port Simpson) Indian Band may have had an interest in the alleged Indian reserve at the time of the surrender and that that band did not consent to the surrender, then this claim (Additional Claim) is not a claim that has been previously filed with the Minister and this Tribunal does not have jurisdiction over this Additional Claim. Paragraphs 17 and 33 should be withdrawn, or struck, from the Declaration of Claim pursuant to ss. 16 (1) and 17 (b) of the *Specific Claims Tribunal Act*.
5. Insofar as Metlakatla does not make this Additional Claim, then paragraphs 17 and 33 should be withdrawn, or struck pursuant to s. 17 (c) of the *Specific Claims Tribunal Act*, from the Declaration of Claim as they are frivolous, vexatious and irrelevant to the rest of the Declaration of Claim.

6. In the remainder of this response Canada pleads to the resultant claim (Claim) without reference to any Additional Claim or to paragraphs 17 and 33 of the Declaration of Claim.

7. In response to the allegations of fact in paragraph 3 of the Declaration of Claim, Canada admits that Metlakatla did submit a claim submission dated December 31, 2008. However, this submission did not meet the minimum standard (Minimum Standard) established by the Minister pursuant to s. 16 (2) (a) of the *Specific Claims Tribunal Act* as set out in the *Specific Claims Policy and Process Guide*. Accordingly, the Minister:
 - a) did not accept, under s. 16 (3) of the *Specific Claims Tribunal Act*, the December 31, 2008 claim submission as filed with the Minister;
 - b) notified Metlakatla that the claim submission did not meet the Minimum Standard; and
 - c) did not notify Metlakatla in writing that the claim submission had been accepted as filed with the Minister under s. 16 (2) (c) of the *Specific Claims Tribunal Act*.

8. In response to the allegations of fact in paragraph 4 of the Declaration of Claim, Canada admits that Metlakatla did submit a claim submission dated May 29, 2009. The Minister determined that this claim submission did meet the Minimum Standard. Accordingly, the Minister:
 - a) notified Metlakatla that the claim submission met the Minimum Standard; and
 - b) notified Metlakatla in writing that the claim submission dated May 29, 2009 met the Minimum Standard and had been accepted as filed with the Minister on June 3, 2009, under s. 16 (2) (c) of the *Specific Claims Tribunal Act*.

9. Canada admits the allegations of fact in paragraph 5 of the Declaration of Claim. The Minister decided not to negotiate the claim and has notified Metlakatla in writing of this decision.

III The Claim Is Not a Valid Claim

10. Canada's position is that the Claim is not a valid claim.
11. Metlakatla's main allegations in the Claim are based on Metlakatla demonstrating that the 1906 surrender was invalid (see for instance paragraph 42 of the Declaration of Claim). Metlakatla seeks compensation that flows from the alleged invalid surrender. In response Canada notes that the *Indian Act*, including the surrender provisions did not apply at the time. In this context, Canada further responds as follows. Canada:
 - a) denies that the surrender was invalid, either in the sense that it did not set out Metlakatla's wishes, or in a technical sense that it did not comply with requirements of the *Indian Act*; and
 - b) notes that Metlakatla admits, at paragraph 43 (e), that the 1906 agreement to sell and surrender set out Metlakatla's wishes.
12. Notwithstanding paragraph 42 of the Declaration of Claim, Metlakatla claims, effectively in the alternative, based on a valid surrender. In particular:
 - a) Metlakatla claims for compensation flowing from an alleged failure by Canada to comply with Metlakatla's 1906 agreement to sell and surrender by including additional lands in the lands to be transferred to GTP than had been agreed to by Metlakatla in the surrender. With the exception of Island Number One and Island Number Two as referred to below in paragraphs 58A and 58B, Canada denies that Canada failed to comply with Metlakatla's agreement to sell and surrender or that

Canada included additional lands in the lands to be transferred to GTP beyond what been agreed to by Metlakatla in the surrender.

- b) Insofar as Metlakatla claims that, while the surrender of the lands was valid, the sale agreement between Metlakatla and GTP would have been different if Canada had complied with certain alleged fiduciary duties, and, in particular, the sale price would have been higher, then Canada denies that Canada breached any statutory or fiduciary duty that did arise.
13. In the event that Canada breached any alleged duty then Canada denies that any breach of that duty caused any damage to Metlakatla. The price paid by GTP represented fair value for the lands at the time. No damages are owing as the fair market value of the lands at the time of the surrender was not higher than the price GTP paid to Metlakatla. At the time GTP kept open alternative possibilities for the location of the western terminus.

IV The Establishment of Metlakatla Indian Reserve No. 2

14. Canada admits that a pre-confederation, colonial government reserve (Government Reserve) was set apart in 1863 for the use and benefit of a religious Indian mission community under the auspices of William Duncan and the Christian Missionary Society.
15. The Government Reserve was not set apart in 1863 for the use and benefit of an Indian band or tribe. Canada denies that the Government Reserve was an Indian reserve in 1863.
16. Following British Columbia's entry into Confederation in 1871, and pursuant to Article 13 of the *Terms of Union (British Columbia)*, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission which was established in 1876.

17. In 1880, the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, to act as sole commissioner on the Indian Reserve Commission.
18. The order in council appointing 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, to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes". 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.
19. Canada lacked the sole authority to allot, set aside, or create reserves in British Columbia. The allotment and creation of reserves required the cooperation of the Crown in right of British Columbia because the lands upon which reserves were to be established were provincial Crown lands.
20. In a Minute of Decision dated October 29, 1881 O'Reilly recommended the allotment of eleven reserves for the Tsimpsean Indians. Among the allotments, O'Reilly recommended, as I.R. No. 2, a "Reserve of 70,400 acres -(approximately) situated on the Tsimpsean Peninsula, between Fort Simpson and the Southern end of Digby Island." The allotment of I.R. No. 2 included the Government Reserve. O'Reilly treated the Indians at Metlakatla and Fort Simpson as "one tribe". As the Fort Simpson settlement lay outside the boundaries of the Government Reserve, O'Reilly recommended extending the boundaries of the reserve to include the Fort Simpson settlement.

21. As of February 14, 1884, none of O'Reilly's allotments in the Metlakatla region had been confirmed or assented to by the provincial government.
22. In 1886, William Duncan and the majority of the religious Indian mission community left the Government Reserve and moved to Alaska.
23. O'Reilly made several alterations to the allotment of I.R. No. 2. In 1886, he submitted an amended Minute of Decision to the Chief Commissioner of Lands and Works. In 1888, the allotment of I.R. No. 2 was altered again when it was divided in half, with the northern portion being allotted for the benefit of the Fort Simpson people and the southern portion being allotted for the benefit of Metlakatla.
24. On January 26, 1892, both O'Reilly and the Chief Commissioner of Lands and Works signed the completed survey of I.R. No. 2.
25. Canada admits that by 1892 land in the Government Reserve was also the subject of a provisional Indian reserve (Provisional Indian Reserve), known as Metlakatla Indian Reserve No. 2. The Provisional Indian Reserve was for the provisional use and benefit of an Indian band, the Metlakatla Indian Band (Metlakatla), with title in the Crown in right of British Columbia.
26. Canada denies that the Provisional Indian Reserve was an Indian reserve within the meaning of the *Indian Act*, R.S.C. 1886, c. 43, as amended (*1886 Indian Act*) or an Indian reserve within the meaning of the *Indian Act*, R.S.C. 1906, c. 81, as amended (*1906 Indian Act*)¹.
27. Metlakatla Indian Reserve No. 2 was formally created as an Indian reserve in 1938 when BC transferred the underlying title to Canada pursuant to BC Order-in-Council 1036 dated July 29, 1938.

¹ The 1906 *Indian Act* did not come into force until January 31, 1907, Can. Proclamation dated January 25, 1907, issued pursuant to the *Act Respecting the Revised Statutes of Canada*, S.C. 1903, c. 61.

28. In response to the allegations of fact in paragraph 9 of the Declaration of Claim, Canada admits that the Government Reserve covered the area described in that paragraph.
29. Canada admits the allegations of fact in paragraphs 10-11 and 13-16 of the Declaration of Claim.
30. In response to the allegations of fact in the third sentence in paragraph 31 of the Declaration of Claim, Canada admits that all of the lands agreed to be surrendered were in the Provisional Indian Reserve.
31. Canada denies the allegations of fact in paragraphs 8, 12, and 41 of the Declaration of Claim unless, and then only to the extent that, they are expressly admitted in this response.

V The Surrender Requirements Under the *Indian Act*

32. The surrender requirements of the *1886 Indian Act* (ss. 39 and 41) and, where and if applicable, the *1906 Indian Act* (s. 51) did not apply to the Provisional Indian Reserve because:
 - a) Metlakatla Indian Reserve No. 2 was not an Indian reserve within the meaning of the *1886 Indian Act* and the *1906 Indian Act*; and
 - b) The surrender provisions of the *Indian Act*, S.C. 1876, c. 18 were suspended by Proclamation of the Privy Council made December 15, 1876 (*The Canada Gazette*, December 30, 1876, vol. X, No. 27). This suspension and Proclamation remained in effect in 1906 and 1907 and applied to the surrender provisions in the *1886 Indian Act* and *1906 Indian Act*.

33. In the alternative that Metlakatla Indian Reserve No. 2 was a Colonial Indian Reserve in 1906 then the surrender requirements of the *1886 Indian Act* and, where and if applicable, the *1906 Indian Act* did not apply because they were suspended.

VI The February 1906 Surrender Agreement between the Metlakatla Band and GTP for the Surrender and Sale of Certain Provisional Indian Reserve Lands

34. From January 31 1906 to February 7, 1906, Metlakatla negotiated with GTP and agreed (Surrender Agreement) with GTP to a proposed surrender of certain described lands in Metlakatla Reserve No. 2 for sale to GTP at \$ 7. 50 per acre. Bishop Duvernet (aka Bishop Du Vernet) of Caledonia assisted and advised Metlakatla in these negotiations and in reaching the Surrender Agreement.
35. Metlakatla acted autonomously in negotiating with, and in entering into the Surrender Agreement with, GTP. Canada did not intervene between Metlakatla and GTP. As Metlakatla admits in paragraph 43 (e) of the Declaration of Claim, Metlakatla's wishes are expressed in the Surrender Agreement.
36. The Surrender Agreement provided for Metlakatla's agreement to surrender and sell the lands described as follows:

The mainland portion bordering on Venn Passage and Tucks Inlet. Beginning at the Southern Post of the Eastern boundary line of the Mainland Indian Reservation, thence running North about two (2) miles, thence West about two and three-quarter (2 3/4) miles, to the point of intersection with a Western boundary line as hereinafter defined. (viz.) A line running North from the shore of the Mainland, which when extended south across Venn's Passage, will be immediately to the West of the islands of Lak-wilgiapsh, and Lak-anian, so that these Islands are included in the portion to be surrendered. Thence from this point of intersection as above defined, South to the Shore of the Mainland, thence in an Easterly direction, following the shoreline to the point of commencement.

On Digby Island, all land lying South of a line drawn East and West, which is determined by the high water mark at the head of the Bay, on the East

side of Digby Island, known as Sh-Kgueak, and also the triangle of land lying to the East of the line, which is determined by the extension South to Digby Island, of the North and South line, which lies immediately West of the Islands of Lak'Wilgiapsh and Lak'Anian.

Also the Indian reservation of or on Kai'En Island as per survey.

37. Canada admits the allegations of fact in paragraphs 22, 24 and 28 of the Declaration of Claim as they apply to Metlakatla Indian Reserve No. 2.
38. Canada denies the allegations of fact in paragraphs 25-27 of the Declaration of Claim unless, and then only to the extent that, they are expressly admitted in this response. Metlakatla specifically retained substantial acreage out of the Provisional Indian Reserve lands that GTP had wanted. Canada admits that GTP, Metlakatla and Canada did not conduct an appraisal. Metlakatla did not ask Canada to conduct an appraisal.

VII The August 1906 Surrender

39. At meetings of Metlakatla on August 16 and 17, 1906, Metlakatla consented to the surrender of essentially the same lands as agreed to be surrendered in the Surrender Agreement. Metlakatla orally agreed at these meetings that the surrender (Surrender) also included all the islets immediately contiguous to the part of Digby Island that is in the lands described in the Surrender. The Surrender was assented to by a majority of the male members of the band of the full age of 21 years and habitually resident on or near Metlakatla Reserve No. 2 at a meeting or council of the band summoned for that purpose and held in the presence of an officer of the Department of Indian Affairs duly authorized to attend. Bishop Duvernet of Caledonia assisted and advised Metlakatla on the Surrender.
40. The Surrender provided for Metlakatla's surrender of the lands described in the Surrender document and oral term as follows:

that certain parcel or tract of land and premises, situate, lying and being in the County of Atlin and Province of British Columbia containing by admeasurement Thirteen thousand five hundred and nineteen acres (13,519) be the same more or less and being composed of certain portions of their reservation on Kai-En Island, Digby Island and a portion of the mainland reservation bordering on Tuck Inlet and Venn Passage as hereinafter described.

Beginning at the southern post of the eastern boundary line of the Mainland Indian reservation, thence running north about two (2) miles, thence west about two and three-quarter (2 3/4) miles, to the point of intersection with a western boundary line as hereinafter defined. (viz.) A line running North from the shore of the mainland, which when extended south across Venn's Passage, will be immediately to the west of the islands of Lak-Wilgiapsh, and Lak-Anian, so that these islands are included in the portion to be surrendered. Thence from this point of intersection as above defined, south to the shore of the mainland, thence in an easterly direction, following the shoreline to the point of commencement.

On Digby Island, all land lying south of a line drawn east and west, which is determined by the high water mark at the head of the Bay, on the east side of Digby Island, known as Sh-Kgueak, and also the triangle of land lying to the east of the line, which is determined by the extension south to Digby Island, of the north and south line, which lies immediately west of the Islands of Lak'Wilgiapsh and Lak'Anian.

The Indian reservation of or on Kai'En Island as per survey.

All the islets immediately contiguous to the part of Digby Island that is in the parcel or tract of land to be surrendered.

[This last paragraph is the oral term.] (the Surrendered Lands)

41. The Surrender document describes the Surrendered Lands identically to the description in the Surrender Agreement except that some capital letters have changed to small letters, or *vice versa*; the word “also” is missing in the last paragraph of the Surrender document as compared to the Surrender Agreement; and there is the addition of the islets.
42. The Surrender document states that the Surrendered Lands as described therein are 13,519 acres in size “more or less”. The Surrendered Lands on the mainland, Digby Island and the other islands, other than Kaien Island, had not been surveyed at the time of the Surrender.

43. While the Surrender document does not expressly refer to the sale to GTP set out in the Surrender Agreement, Canada acknowledges that the Surrender was for the purpose of the sale to GTP as set out in the Surrender Agreement.
44. S. 39 of the *1886 Indian Act* set out requirements for a surrender by an Indian band, but this provision did not apply to Metlakatla Indian Reserve No. 2.
45. Canada acknowledges, for the purposes of this proceeding only, that, whether Metlakatla Indian Reserve No. 2 was a Provisional Indian Reserve or Colonial Indian Reserve in 1906, Canada had a duty to act with ordinary prudence with a view to the best interest of Metlakatla in supervising Metlakatla's substantial consent to the proposed surrender of certain lands in Metlakatla Indian Reserve No. 2.
46. Canada satisfied this duty. Metlakatla consented or substantially consented to the Surrender Agreement and Surrender.
47. In the alternative that the Tribunal were to find that s. 39 of the *1886 Indian Act* did apply, then Canada's duty was to ensure that the substance of the requirements in s. 39 was met. Canada satisfied this duty. Metlakatla consented or substantially consented to the Surrender Agreement and Surrender.
48. In either alternative, the Surrender was valid as a surrender. Whether s. 39 of the *1886 Indian Act* did or did not apply, Metlakatla consented or substantially consented to the Surrender Agreement and the Surrender of whatever interest they had at the time in the Surrendered Lands.
49. Canada admits the allegations of fact in the first and fourth sentences of paragraph 31 of the Declaration of Claim.

50. Canada denies the allegations of fact in the second and fifth sentences of paragraph 31 of the Declaration of Claim, unless, and then only to the extent that, they are expressly admitted in this response.²

VIII The Governor in Council's September 1906 Consent to the Surrender

51. The Governor in Council accepted the Surrender by Metlakatla by Order in Council of September 21, 1906.
52. S. 39 (b) of the *1886 Indian Act* provided that a surrender was subject to the acceptance of the Governor in Council, but this provision did not apply to Metlakatla Indian Reserve No. 2.
53. Canada acknowledges, for the purposes of this proceeding only, that, whether Metlakatla Indian Reserve No. 2 was a Provisional Indian Reserve or Colonial Indian Reserve in 1906, Canada had a duty to act with ordinary prudence with a view to the best interest of Metlakatla in reviewing and accepting Metlakatla's substantial consent to the Surrender Agreement and Surrender.
54. Canada satisfied this duty. Metlakatla had consented or substantially consented to the Surrender Agreement and Surrender and the Governor in Council reviewed and accepted that.
55. In the alternative that the Tribunal were to find that s. 39 (b) of the *1886 Indian Act* did apply, then the Governor in Council's role was to use ordinary diligence to prevent an exploitative bargain or a bargain that was improvident or foolish by refusing the surrender. Canada denies that Canada breached this duty. Canada denies that the Governor in Council ought to have found that the Surrender for the sale to GTP at the price set out in the Surrender Agreement constituted an exploitative bargain, at the time,

² The third sentence of paragraph 31 of the Declaration of Claim is relevant to the reserve creation section of this response.

or that Metlakatla's agreement to the Surrender for the sale to GTP at the price set out in the Surrender Agreement was improvident or foolish at the time. The Governor in Council's role was not to make a new decision for the band. In particular:

- a) Canada reasonably believed that Metlakatla was capable of making the best decision in its own interests on the terms of the Surrender Agreement and Surrender. Metlakatla was assisted and advised by Bishop Duvernet of Caledonia;
- b) Metlakatla was careful in its negotiations with GTP to reserve part of the best land on the waterfront for themselves and to not include it in the lands surrendered. This land would have been reasonably expected to substantially increase in value at the time if and when GTP's western terminus was located on or near the Surrendered Lands;
- c) Metlakatla reasonably considered that it would have adequate lands for its own use after the Surrender;
- d) It was reasonably possible that GTP could have chosen another location outside the reserve for its western terminus if it had been unable to secure the lands from Metlakatla at a price it considered acceptable. This would likely have resulted in no sale to GTP and a far lower value for those lands;
- e) Metlakatla was reasonably aware of the prospective value of the Surrendered Lands;
- f) The price was, at the least, an adequate price for the Surrendered Lands; and
- g) It was reasonable for Metlakatla, and Canada, to presume that GTP would require full title to the Surrendered Lands in the event they were to become, or were to be

adjacent to, the envisaged western terminus of the national transcontinental railway.

56. Subject to the above, Canada admits the allegations of fact in paragraph 32 of the Declaration of Claim.

IX The June 1907 Letters Patent

57. By letters patent (Purported Crown Grant) issued June 25, 1907 the Governor in Council purported to grant lands that were surrendered by Metlakatla to GTP's subsidiary, Grand Trunk Pacific Town and Development Company, Limited, for the sum of \$106, 200.
58. The Purported Crown Grant describes the lands granted as follows:

all those parcels or tracts of land situate, lying and being in the Southern part of the Tsimpsean Indian Reserve Number Two, in the Coast District, in the Province of British Columbia in Our Dominion of Canada, composed of a portion of Digby Island, all that portion of Kaien Island lying within the limits of the said Reserve and a portion on the Main-land North of the said Kaien Island, together with Lakanian and Lakwilgiapsh Islands, and eight small Islands adjacent to Digby Island, and to the said Mainland. The said Islands comprising all the Islands adjacent to the above mentioned land which pertain to the said Indian Reserve and which may be described as follows:-

FIRSTLY: Commencing at the point on the main land where the East boundary of the said Reserve strikes the water's edge of the channel between the said main land and Kaien Island; thence North along the said boundary eleven thousand four hundred and eighty-two feet to the North boundary of a lot numbered 443; thence S. 89° 40' 30" W. along the said North boundary of lot 443 produced Westerly fifteen thousand five hundred and thirty feet more or less to a line drawn North astronomically from low water mark at the extreme Westerly point of Lakanian Island; thence South along the said line twelve thousand and four hundred feet more or less to the water's edge of the Channel between the main land and Digby Island; thence Easterly following the sinuosities of the shore to the point of commencement containing approximately four thousand five hundred and ninety-two acres of land be the same more or less.

SECONDLY: Commencing at the water's edge on the North Easterly shore of Digby Island where a line drawn south astronomically from the aforesaid low water mark at the extreme Westerly point of Lakanian Island strikes the same; thence south on the said line fifteen hundred and sixty-five feet more or less to a line drawn East astronomically from high water mark at the head of the large Bay at the North Easterly end of the said Digby Island, known as Sh-kgeauk Bay; thence West astronomically on the said line nineteen hundred feet more or less to the said Bay and again West astronomically on the said line produced eight thousand eight hundred feet more or less to where the said line first strikes the West shore of Digby Island; thence South Easterly, Northerly, Westerly, South Easterly and North Westerly following the sinuosities of the shore of the said Digby Island to the point of commencement, and containing Six thousand eight hundred and forty acres of land be the same more or less.

THIRDLY; Commencing at the point on the North Westerly shore of Kaien Island where the East boundary of the said Indian Reserve strikes the water's edge; thence south along the said boundary twenty-eight thousand four hundred and forty-six feet more or less to the water's edge at the South Westerly shore of the said Kaien Island; thence North Westerly and North Easterly following the sinuosities of the shore to the point of Commencement, containing two thousand six hundred and eighty acres of land, be the same more or less.

FOURTHLY; Ten Islands described approximately as follows:-Lakanian Island above mentioned lying between Digby Island and the main land containing nineteen acres be the same more or less; Lakwilgiapsh Island situated south of Lakanian Island and distant about 460 feet therefrom, containing nine acres be the same more or less. Island Number One, adjacent to the shore of the portion of land firstly described above containing ten acres be the same more or less; Island Number Two, situated East of Lakanian Island and distant about 1000 feet therefrom, containing one acre, be the same more or less; Islands Numbers Three and Four adjacent to the Easterly shore of Digby Island containing respectively one acre and one acre and seventy-five hundredths of an acre, be the same more or less; Island Number Five adjacent to the Eastern shore of the Peninsula at the South end of Digby Island, containing one-half of an acre be the same more or less; and finally Islands Numbers Six, Seven and Eight adjacent to the south westerly shore of Digby Island, containing respectively one acre and seventy-five hundredths of an acre, two acres and half an acre, and one acre and half an acre be the same more or less reserving from the lands firstly above described an area not exceeding five per cent for roads and the right of the Crown to lay out roads where necessary; together with all rights to the foreshores and rights of access to the water which may pertain to the lands above described.

- 58A. The Purported Crown Grant purported to grant "eight small islands adjacent to Digby Island, and to the said Mainland ... [including] Island Number One, adjacent to the shore of the portion of land firstly described above containing ten acres be same more or less; Island Number Two, situated East of Lakanian Island and disant about 1000 feet therefrom, containing one acre, be the same more or less; ..."
- 58B. At meetings on August 16 and 17, 1906 Metlakatla orally agreed that the Surrender also included the islands that were immediately contiguous to the part of Digby Island that was included in the Surrender. Only Islands Numbered Three to Eight are immediately contiguous and were intended by Metlakatla to be included in the Surrender. Island Number One and Island Number Two are not immediately contiguous and were not intended by Metlakatla to be included in the Surrender. Canada admits that the Purported Crown Grant erroneously purports to grant Island Number One and Island Number Two.
59. With the exception of Island Number One and Island Number Two, the lands purported to be granted in the Purported Crown Grant are essentially the same lands as the Surrendered Lands as:
- a) The Surrender document describes the Surrendered Lands primarily by description and not by acreage. The description was the controlling feature;
 - b) The Surrendered Lands were surveyed after the Surrender, which allowed the acreage to be more accurately computed in the Purported Crown Grant. GTP paid for the costs of, and obtained, a survey of the Surrendered Lands. Accordingly, the area of 14, 160 acres in the Purported Crown Grant reasonably comes within the expression 13, 519 acres in size "more or less" in the Surrender document;
 - c) Accordingly, the length (11, 482 feet which is approximately equal to 2.175 miles³) of the eastern boundary of the mainland portion of the reserve in the Purported Crown Grant reasonably comes within the expression "about" 2 miles

³ 1 mile equals 5, 280 feet.

in the Surrender document. GTP and Metlakatla agreed and intended that the eastern boundary would extend to the northwest corner of the adjacent Lot 443 owned by GTP at the time;

- d) The specific anchor locators in the Surrender document for the eastern and western boundaries are controlling features in the description of the Surrendered Lands. Accordingly, the description of the eastern and western boundaries of the portion of the mainland reserve in the Surrender document and the description of the length of the eastern boundary in the Surrender document are controlling features of the description of the portion of the mainland reserve as compared to the description of the length of the northern boundary; and
 - e) Accordingly, the length (15, 530 feet which is approximately equal to 2.941 miles) of the northern boundary of the portion of the mainland reserve reasonably comes within the expression “about” 2 ³/₄ miles in the Surrender document.
60. S. 51 of the *1906 Indian Act* (and s. 39 (b) of the *1886 Indian Act*) provided that surrendered lands were to be sold as the Governor in Council directed subject to the conditions of the surrender, but these provisions did not apply to Metlakatla Indian Reserve No. 2.
61. Canada acknowledges, for the purposes of this proceeding only, that, whether Metlakatla Indian Reserve No. 2 was a Provisional Indian Reserve or Colonial Indian Reserve in 1907, Canada had a duty to act with ordinary prudence with a view to the best interest of Metlakatla to use a post-survey description of the lands to be (purportedly) granted in substantial compliance with the pre-survey description of the lands to be surrendered in the Surrender.
62. With the exception of Island Number One and Island Number Two as referred to above in paragraphs 58A and 58B, the legal description of the lands in the Purported Crown Grant

was in substantial compliance with the description of the lands to be surrendered in the Surrender.

63. In the alternative that the Tribunal were to find that s. 51 of the *1906 Indian Act* did apply, then the Governor in Council's duty was to use ordinary diligence to carry out the terms of the Surrender and for the sale to GTP at the price per acre set out in the Surrender Agreement. With exception of Island Number One and Island Number Two, the lands granted in the Purported Crown Grant were, essentially, the Surrendered Lands
64. With the exception of Island Number One and Island Number Two as referred to above in paragraphs 58A and 58B, Canada denies the allegations of fact in paragraphs 35-36 of the Declaration of Claim, unless, and then only to the extent that, they are expressly admitted in this response.
65. Canada used the survey information obtained by GTP in drafting the Letters Patent. Canada admits that the Purported Crown Grant erroneously purports to grant Island Number One and Island Number Two as referred to above in paragraphs 58A and 58B.
- 65A. The Surrender Agreement, including the sale price, was a good agreement for Metlakatla for reasons including:
 - a) by August 16, 1905, Bishop DuVernet was aware that GTP had secured 10,000 acres (10,000 Acres) on and around Kaien Island from the Province. Bishop DuVernet knew that GTP had paid for the 10,000 Acres;
 - b) Canada, the provincial Crown and the public knew that other potential sites (such as Port Simpson) for the terminus existed. At the time of the negotiations for the Surrender Agreement, they did not know which site GTP would finally decide on;
 - c) Bishop DuVernet was present for, and advised the Metlakatla throughout, the meetings leading up to and including the Surrender Agreement with GTP;

- d) Metlakatla negotiated with GTP's Russell over 5 days and finally agreed with GTP on February 7, 1906 to sell less land than GTP had requested for more money per acre than GTP had offered;
- e) Indian Agent Morrow and Bishop DuVernet were advocating on behalf of the Metlakatla;
- f) Canada was aware of Bishop DuVernet's role and that he was aware of the 10,000 Acres. Canada trusted Bishop DuVernet to provide good advice to Metlakatla;
- g) Bishop DuVernet was aware that these 10,000 Acres included the lands to the east of the mainland parcel that Metlakatla agreed to surrender for sale to GTP;
- h) Metlakatla and GTP understood that concluding the Surrender Agreement increased the likelihood that GTP would decide on Kaien Island as the terminus site rather than at another location (such as Port Simpson);
- i) if Kaien Island became the terminus site, then there would be an increase in the value of the Surrendered Lands as well as of the lands retained by Metlakatla;
- j) if GTP had not reached agreement with Metlakatla, then GTP would have sought to establish its terminus elsewhere, such as at Port Simpson. For instance, GTP could have negotiated with the Port Simpson Indian Band for the original 1600 acres it had wanted in the reserve at Port Simpson for railway use and sought more lands from that reserve;
- k) if GTP had not reached agreement with Metlakatla and had established its terminus at Port Simpson then the lands that Metlakatla in fact agreed to surrender and sell would have been worth little, taking the terrain into account; and

- l) Canada understood that the Surrender Agreement, including the sale price, was an excellent agreement for Metlakatla.
- 65B. ~~Canada admits that GTP, Metlakatla and Canada did not conduct an appraisal.~~ It was reasonable for Canada to rely on Metlakatla's local advisors, the Indian Agent and Bishop DuVernet, to provide advice on value, because the Indian Agent and Bishop DuVernet were:
- a) reasonably well informed in connection with valuation of the reserve land;
 - b) reasonably well informed in connection with GTP's uncertain commitment to the location of the terminal and townsite;
 - c) reasonably able to provide, and did provide, advice to Metlakatla on value; and
 - d) independent of GTP.
- 65C. It was reasonable for Canada to not also seek an appraisal because:
- a) there were no professionally-recognized appraisers at the time;
 - b) it was likely that any other person independent of GTP who valued the land would not know more about the circumstances than the Indian Agent or Bishop DuVernet;
 - c) valuation would be met with the difficulty of valuation where the provincial Crown claimed a reversionary interest in the surrendered Indian reserve lands; and
 - d) Metlakatla did not ask Canada to conduct an appraisal.

65D. After the Surrender Agreement, there was no change in circumstances that would have required Canada to seek to re-negotiate the sale price. In particular, any subsequent increase in the fair market value of the Surrendered Lands that occurred because of the following changes in circumstances did not require Canada to seek to re-negotiate the sale price:

- a) GTP's definitive choice in October 1906 of the general location of the western terminus on Kaien Island, instead of at Port Simpson; and
- b) GTP's later definitive choice in 1908 and 1909 of the specific location of the townsite on Kaien Island.

65E. Only after the Surrender document was approved did GTP seek to firm up the choice of the general location of the terminus on Kaien Island. In particular:

- a) GTP applied by letter dated October 26, 1906 to the Department of Railways for formal approval by "the Government and the Minister of Railways" of "the general location of" GTP's "line from the junction of Big Salmon and Willow Rivers to the Pacific Coast terminus, under " the *Railway Act*, s 122. This included the application for approval of the general location of the western terminus on Kaien Island. This represented GTP's formal application to the Minister of Railways to generally locate the terminus on Kaien Island; and
- b) the Minister of Railways approved the general location of the route including the terminus on Kaien Island on November 24, 1906.

65F. GTP paid the main amount of \$103,202.50 towards the purchase price for the Surrendered Lands on December 17, 1906. This amount equals \$7.50 an acre for the early estimate of 13,567 acres plus the \$1,450 for individual improvements; and

- 65G. On May 23, 1907, Canada and GTP reached agreement on the land description for the letters patent and on the areas as computed by GTP from their recent surveys. On June 14, 1907, GTP paid the remaining amount required by the more accurate areas for the Surrendered Lands;
- 65H. It took until February 29, 1908 for GTP to reach agreement with the provincial Crown on the provincial Crown's reversionary interest claim in the Surrendered Lands and on the general location of the terminus and townsite on the 10,000 Acres and/or the Surrendered Lands on Kaien Island;
- 65I. It was later in 1908 and 1909 that GTP obtained approval from the Board of Railway Commissioners for the specific location of the terminus, and obtained agreement with the provincial Crown on the specific location of the terminus and townsite, in part on the 10,000 Acres on Kaien Island and in part on the Surrendered Lands on Kaien Island. In particular:
- a) the Board of Railway Commissioners approved the specific location of the terminus on Kaien Island on June 3, 1908;
 - b) GTP took steps to commence construction of the railroad terminus at Prince Rupert and of the railroad line eastward from Prince Rupert in the spring or summer of 1908; and
 - c) the Provincial Crown approved the specific location of the townsite on August 11, 1908, September 8, 1908 and March 12, 1909. This is when it could be said that the townsite would definitely be partially on the Surrendered Lands on Kaien Island.
- 65J. The Crown grants of the 10,000 Acres and the Surrendered Lands were not registered until after GTP had determined the specific location of the terminus and townsite. In particular:

- a) GTP registered the Provincial Crown Grant of the 10,000 Acres in the Land Registry on October 9, 1908; and
- b) GTP registered the Provincial Crown Grants of the Surrendered Lands in the Land Registry on March 20, 1909.

65K. Subsequent to the Surrender Agreement, Canada unsuccessfully attempted to seek the provincial Crown's waiver of its reversionary interest claim. The provincial Crown's waiver might have allowed some legitimate re-negotiation of Metlakatla's agreed sale price with GTP. However, the provincial Crown refused to waive its reversionary interest by BC OIC dated May 7, 1906 and by its later conduct.

65L. Canada otherwise denies the allegations of fact in paragraphs 37-38 of the Declaration of Claim.

X The Nature of Canada's Relationships with GTP and the Metlakatla Band

66. Canada entered into an agreement (1903 Canada GTP Agreement) with agents for a company, GTP, to be incorporated, dated July 29, 1903, that provided for the construction of a national transcontinental railway from the city of Moncton, in New Brunswick, to the navigable waters of the Pacific Ocean at or near Port Simpson or some other port in British Columbia, and to, amongst other things, develop commerce through Canadian ports and develop northern Canada. The 1903 Canada GTP Agreement included:

- a) a promise by Canada to guarantee, up to a certain amount, certain bonds to be issued by GTP ~~to finance the construction of~~ so soon as the national transcontinental railway is constructed from Winnipeg to the pacific coast, and equipped ready for operation;

- b) GTP's agreement that these bonds were to be secured by a first charge mortgage on GTP's undertaking and property;
 - c) GTP's undertaking that Grand Trunk Railway Company of Canada would acquire and hold \$24, 999, 000 worth of common stock in GTP for the duration of the bonds guaranteed by Canada;
 - d) GTP's agreement to provide a \$5 million dollar security deposit as security for the construction of the railway from Winnipeg to the pacific coast;
 - e) Canada's agreement to pay interest on the security deposit;
 - f) Canada's agreement to pay interest on certain of the bonds, attributable to construction of the mountain section, for 7 years from the date of issue of the bonds, to be held to be in discharge of Canada's liability on the guarantee; and
 - g) Canada's agreement to procure lands, without compensation, required for the railway from Winnipeg to the pacific coast, insofar as the lands were vested in Canada.
67. GTP was incorporated by the *Act to Incorporate the Grand Trunk Pacific Railway Company*, S.C. 1903 (3 Edward VII), c. 122.
68. The 1903 Canada GTP Agreement was ratified, confirmed and declared to be legally binding by section 2 of the *Act Respecting the Construction of a National Transcontinental Railway*, S.C. 1903 (3 Edward VII), c. 71.
69. Canada lawfully entered into the 1903 Canada GTP Agreement and Parliament validly enacted the *Act to Incorporate the Grand Trunk Pacific Railway Company* and the *Act to Incorporate the Grand Trunk Pacific Railway Company*.

70. Canada admits that, generally speaking, the relationship between Canada and the Aboriginal peoples of Canada is a fiduciary relationship and that, in certain circumstances, the relationship may give rise to or require the performance of specific fiduciary duties, however:
- 70A. Canada denies that in the circumstances of this case, Canada owed, at any material time, any fiduciary duties to the Metlakatla other than the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of Metlakatla. These fiduciary obligations arose in the following circumstances:
- a) in supervising Metlakatla's substantial consent to the Surrender Agreement and Surrender of the Surrendered Lands in Metlakatla Indian Reserve No. 2;
 - b) in reviewing and accepting Metlakatla's substantial consent to the Surrender Agreement and Surrender;
 - c) in using a post-survey description of the lands to be (purportedly) granted in substantial compliance with the pre-survey description of the lands to be surrendered in the Surrender; and
 - d) in the task of obtaining adequate compensation for Metlakatla for the lands surrendered.
- 70B. Canada denies that it breached any of these fiduciary obligations.
- 70C. In the alternative that the Tribunal were to find that s. 39 of the *1886 Indian Act* and/or s. 51 of the *1906 Indian Act* (or s. 41 of the *1886 Indian Act*) did apply, Canada denies that in the circumstances of this case, Canada owed, at any material time, any fiduciary duties to the Metlakatla other than:

- a) the duty to ensure that the substance of the requirements in s. 39 was met;
- b) the duty to seek to avoid an exploitative bargain under s. 39 (b) of the *1886 Indian Act*; and
- c) the duty to use ordinary diligence to carry out the terms of the Surrender for the sale to GTP at the price per acre set out in the Surrender Agreement under s. 51 of the *1906 Indian Act* (or s. 41 of the *1886 Indian Act*).

71. At the time of the negotiations between Metlakatla and GTP, Canada was exercising its public law duties in providing for the proposed national transcontinental railway. Canada is no ordinary fiduciary and wears many hats and represents many interests and Canada denies that exercising these public law duties gave rise, in the circumstances, to any fiduciary duty owed to Metlakatla. Canada further denies that Canada interfered in the negotiations between Metlakatla and GTP, or otherwise subjugated the interest of Metlakatla to those of Canada or of the GTP in connection with the Surrender Agreement and Surrender.

72. Canada shared appropriate information with Metlakatla before the Surrender Agreement. In particular:

- a) Canada understood that the western terminus would likely be at either Port Simpson or on Kaien Island, with GTP seeking Indian reserve lands at each of the two locations; and
- b) by letter dated November 28, 1905, DSGIA Pedley summarized Canada's knowledge of GTP's applications to the Department of Railways and DIA for Indian Agent Morrow, indicating that GTP had filed applications to secure part or all of the Indian reserves at Port Simpson, Digby Island and Kaien Island.

73. In the event that Canada did owe an additional alleged duty to Metlakatla, then Canada denies that Canada breached that duty. In particular,
- a) Metlakatla, with the assistance and advice of Bishop DuVernet, would reasonably be expected, at the time, to be aware of Canada's financial arrangements with GTP. These financial arrangements were appropriate for a proposed national transcontinental railway and were enshrined in statute and a matter of public record;
 - b) In any event, Canada denies that Canada did not inform Metlakatla of Canada's financial arrangements with GTP; and
 - c) Canada denies that Metlakatla was unaware of material information when entering into, or was ill-advised in entering into, the Surrender Agreement or the Surrender.
74. Canada denies the allegations of fact in paragraphs 19, 20 and 34 of the Declaration of Claim, unless, and then only to the extent that, they are expressly admitted in this response. Canada denies that Metlakatla was unaware of material information when entering into the Surrender Agreement and Surrender.
75. Canada admits the allegations of fact in paragraph 30 of the Declaration of Claim except that GTP's description of the area of land was "13, 519 acres more or less".

XI GTP and BC

76. In 1904 BC agreed to sell 10,000 acres of Crown land in the vicinity of Tuck Inlet to GTP on the understanding that GTP would build the western terminus of the national transcontinental railway on those lands.

77. In 1905, Crown grants were drawn up for the BC Crown grant of the 10,000 Acres. The 1905 Crown grants of the 10,000 Acres were not registered at the land registry office until October 9, 1908 (application for registration on October 1, 1908).
78. By an agreement (1908 BC GTP Agreement) dated February 29, 1908, BC, GTP and Grand Trunk Pacific Town and Development Company, Limited finally agreed as follows:
- a) GTP to build its western terminus at Prince Rupert, a new townsite to be laid out on the 10,000 Acres or the Surrendered Lands;
 - b) BC to sell its interest in the Surrendered Lands to Grand Trunk Pacific Town and Development Company, Limited;
 - c) Grand Trunk Pacific Town and Development Company, Limited to survey and subdivide the 10,000 Acres and the Surrendered Lands into townsite and other lots;
 - d) BC to provide Crown grants for the subdivided lots in the 10,000 Acres and Surrendered Lands to Grand Trunk Pacific Town and Development Company, Limited after Grand Trunk Pacific Town and Development Company, Limited completed the surveys and subdivisions;
 - e) BC to provide to GTP, without compensation, BC Crown lands, in addition to the 10,000 Acres, required for the national transcontinental railway across British Columbia;
 - f) BC to provide Grand Trunk Pacific Town and Development Company, Limited all foreshore and riparian rights that BC may have abutting the 10,000 Acres and Surrendered Lands;

- g) GTP to obtain an exemption from assessments and taxes under the *Railway Assessment Act*, S.B.C. 1903, c. 58;
 - h) Grand Trunk Pacific Town and Development Company, Limited to reconvey to BC 25% of the lots in the Surrendered Lands and 25% of the townsite lots in the 10,000 Acres; and
 - i) Grand Trunk Pacific Town and Development Company, Limited to pay BC an amount equal to \$2.50 an acre, calculated on the area of the Surrendered Lands.
79. The 1908 BC GTP Agreement was ratified, confirmed and declared to be legally binding and the 1905 Crown grants of the 10,000 Acres were ratified and confirmed by the *Grand Trunk Pacific Railway Act*, S.B.C. 1908, c. 19, in force March 7, 1908.
80. Canada admits the allegations of fact in paragraph 29 of the Declaration of Claim except that the description of the area of land was “about 13, 519 acres”.
81. Canada denies the allegations of fact in paragraph 39 of the Declaration of Claim, unless, and then only to the extent that, they are expressly admitted in this response.

XII Damages

- 82A. Section 20(3) of the *Specific Claims Tribunal Act* provides that the current value of the sale proceeds received by Canada on behalf of Metlakatla in respect of Island Number One and Island Number Two should be deducted from any compensation found owing by the Tribunal:

Deduction of benefit

20(3) The Tribunal shall deduct from the amount of compensation calculated under subsection (1) the value of any benefit received by the claimant in

relation to the subject- matter of the specific claim brought forward to its current value, in accordance with legal principles applied by the courts.

- 82B. In the event the Tribunal finds that any other lands were sold although not included in the Surrender, which is not admitted but denied, then the current value of the sale proceeds received by Canada on behalf of Metlakatla for the sale of those lands should be deducted from any compensation found owing by the Tribunal.
83. In the event that Canada breached any alleged duty then Canada denies that any breach of that duty caused any damage to Metlakatla. The price paid by GTP represented fair value for the lands. No damages are owing as the fair market value of the lands at the time was not higher than the price GTP paid to Metlakatla. At the time GTP kept open alternative possibilities for the location of the western terminus. After the Surrender any increase in the fair market value of the Surrendered Lands occurred because of:
- a) GTP's definitive choice of the western terminus on and adjacent to the Surrendered Lands. GTP's choice of the western terminus on and adjacent to the Surrendered Lands was not finalized until in or about 1908 when GTP obtained:
 - i) the Surrender and a subsequent provincial Crown grant of the full interest in the Surrendered Lands. GTP did not obtain the full interest in the Surrendered Lands until after BC agreed to provide BC's interest in the Surrendered Lands on February 29, 1908; and
 - ii) title to the 10,000 Acres adjacent to the Surrendered Lands, but the BC Crown grant of 10,000 Acres was not registered at the land registry office until October 9, 1908; and
 - b) other events.
84. Canada denies the allegations of fact in paragraph 40 of the Declaration of Claim.

85. The Crown pleads and relies on section 20 of the *Specific Claims Tribunal Act*.

XIII Relief

87. Canada seeks to have the claim dismissed in its entirety with costs.

XIV Communication (R.42(g))

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Dated: September 16, 2013

Signature of
 Respondent lawyer for Respondent
William F. Pentney,
Deputy Attorney General
Per: John Russell
Department of Justice
British Columbia Regional Office



Amendment Dated: February 26, 2021

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Table of Authorities

Tab	Constitution Act	Para.
1.	Article 13 of the <i>Terms of Union (British Columbia)</i> , U.K. O.I.C. dated May 16, 1871, reprinted in R.S.B.C. 1979, vol 7 (App.), at s 13	16

Tab	Statutes	Para.
2.	<i>Specific Claims Tribunal Act</i> , S.C. 2008, c.22, ss. 2, 16 (1), 16 (2), 16 (3), 17, 20	1, 4, 5, 7, 8 (b), 85
3.	<i>Indian Act</i> , S.C. 1876, c. 18	32 (b)
4.	<i>Indian Act</i> , R.S.C. 1886, c. 43, as amended, ss. 39, 41	11, 26, 32, 33, 44, 47, 48, 52, 55, 60, 70 (b)
5.	<i>Indian Act</i> , R.S.C. 1906, c. 81, as amended, s. 51	26, 32, 33, 60, 63, 70 (b) (iii)
6.	<i>Act to Incorporate the Grand Trunk Pacific Railway Company</i> , S.C. 1903 (3 Edward VII), c. 122	67, 69
7.	<i>Act Respecting the Construction of a National Transcontinental Railway</i> , S.C. 1903 (3 Edward VII), c. 71	68, 69
8.	<i>Railway Assessment Act</i> , S.B.C. 1903, c. 58	78 (g)
9.	<i>Grand Trunk Pacific Railway Act</i> , S.B.C. 1908, c. 19	79
10.	<i>Negligence Act</i> , R.S.B.C. 1996, c. 333, as amended, ss. 1 and 2	86
11.	<i>Act Respecting the Revised Statutes of Canada</i> , S.C. 1903, c. 61	footnote 1

Tab	Orders in Council / Proclamations / Regulations	Para.
12.	P.C. 1880/1334	18
13.	B.C. O.I.C. 1036 dated July 29, 1938.	27
14.	Proclamation of the Privy Council made December 15, 1876 (<i>The Canada Gazette</i> , December 30, 1876, vol. X, No. 27)	32 (b)
15.	Can. O.I.C. 1906/1859, dated September 21, 1906	51
16.	Can. Letters Patent dated June 25, 1907	57
17.	B.C. Crown grants dated March 10, 1905	77, 83 (a) (ii)
18.	Specific Claims Policy and Process Guide	7
19.	Can. Proclamation dated January 25, 1907	footnote 1