

SPECIFIC CLAIMS TRIBUNAL

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F I L E D	<p>October 8, 2015</p> <p>Nicholas Young</p>
Ottawa, ON	5

BETWEEN:

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

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*.

TO: Metlakatla Indian Band

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I Claimant

1. The Respondent, Her Majesty the Queen in right of Canada (Canada), admits that the Claimant, the Metlakatla Indian Band, is a First Nation within the meaning of s 2 of the *Specific Claims Tribunal Act (Act)*.

II Conditions Precedent

2. Canada admits the allegations of fact in paragraphs 2 to 5 of the Declaration of Claim.

III The Claim Is Not a Valid Claim

3. Canada's position is that the claim made in the Declaration of Claim is not a valid claim.

In particular:

- a) Indian Reserve Commissioner O'Reilly's recommended allotment for a proposed Cloyah Reserve, in his Minute of Decision of 1881, O'Reilly included:
 - i) a church and some houses that he had identified; and
 - ii) unsubmerged lands on both the west and east sides of Cloyah Bay within his metes and bounds description in the Minute of Decision;
- b) the proposed reserve, as surveyed in 1887 and approved in 1892, included:
 - i) the church and houses that O'Reilly had identified in 1881; and
 - ii) the unsubmerged lands that came within O'Reilly's metes and bounds description in the Minute of Decision; and

- iii) additional unsubmerged lands on the west, south and east sides of Cloyah Bay. These additional unsubmerged lands included land where the surveyor found a potato patch in 1887;
- c) in 1892, O'Reilly formally approved the proposed reserve as it had been surveyed in 1887;
- d) O'Reilly's 1881 approximation of 120 acres for the area of the recommended allotment of unsubmerged lands within his metes and bounds description was a rough and non-controlling estimate, given the then undetermined extent of submerged lands of Cloyah Bay within the metes and bounds description. The actual area of the recommended allotment of unsubmerged lands within the metes and bounds description was substantially less than 80 acres; and
- e) Canada did not breach any fiduciary duty as alleged.

IV The Establishment of Cloyah Indian Reserve

- 4. Following British Columbia's entry into Confederation in 1871, 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 provincial Crown because the provincial Crown held underlying title to the lands upon which reserves were to be established. 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.
- 5. In 1880, the Governor in Council, by PC Order in Council 1880-1334, approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, to act as sole commissioner (O'Reilly) on the Indian Reserve Commission.

6. In August 1880, O'Reilly received instructions to act in his own discretion "in furtherance of the joint suggestions" of the provincial Chief Commissioner of Lands and Works (CCLW) and the federal Indian Superintendent for British Columbia "as to the particular places to be visited and the reserves to be established". 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 of British Columbia. O'Reilly's instructions also stated that his duties "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" and that he was to "have special regard to the habits, wants and pursuits of the Bands, to the amount of territory in the Country frequented by it, as well as the claims of the White settlers (if any)." O'Reilly was asked to be "specially careful not to disturb the Indians in the possession of any villages, ..., settlements, clearings, ... and fishing stations occupied by them and to which they may be specially attached."

7. Canada denies the allegations of fact in paragraphs 8 and 9 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada admits that at least one of the Metlakatla Indian Band and the Port Simpson Indian Band (now known as the Lax Kw'alaams Indian Band) had a fishing station, together with a small church and a few houses for summer residence, on the west side of Cloyah Bay in or about October 1881. O'Reilly treated the Indians at Metlakatla and Port Simpson as "one tribe" and called them the Tsimpsean Indians or Tsimpsean Tribe of Indians (Tsimpsean Tribe of Indians).

8. Canada denies the allegations of fact in paragraphs 10 and 11 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. In particular, in minutes of decision dated October 29, 1881, O'Reilly recommended the allotment of eleven reserves for the Tsimpsean Tribe of Indians.

9. Further in response to paragraphs 10 and 11 of the Declaration of Claim, among these minutes of decision was a minute of decision (Minute of Decision) recommending an allotment for a Cloyah Indian Reserve (Cloyah Indian Reserve), as follows:

A Reserve of 120 acres (approximately), situated at the mouth of “Cloyah” river, on the Western shore of the Tsimpsean Peninsula.

Commencing at a Spruce marked “Indian Reserve”, and running West 20 chains; thence South 30 chains; thence East 60 chains; thence North 30 chains; and thence West to place of commencement.

Fishery

The exclusive right of fishing in Cloyah river for a distance of 1 1/2 miles from its mouth, is reserved.

[The underlining, quotation marks and parentheses are in the original copy of the Minute of Decision sent by O’Reilly to the CCLW.]

10. O’Reilly exceeded his authority in the event that he recommended the allotment of exclusive fishing rights, as distinct from a reserve or fishing station on unsubmerged lands, as part of the proposed Indian reserve. In addition, it was not Canada’s policy to approve, and Canada did not approve, the allotment of exclusive fishing rights as part of proposed Indian reserves. These are relevant background matters that are not raised as issues in this proceeding.
11. The metes and bounds description in the Minute of Decision defined a rectangle that included both unsubmerged land, not under the tidal waters of Cloyah Bay, that O’Reilly recommended for allotment and submerged land under the tidal waters of Cloyah Bay. The unsubmerged lands defined two parcels within the proposed reserve that were separated by Cloyah Bay. These were:
- a) a parcel (West Parcel) on the west side of the southern half of Cloyah Bay starting at the land at the west side of the mouth of the southern half of Cloyah Bay, then going west and following the distance measurements in the Minute of Decision until the eastbound line crossed into Cloyah Bay, further to the south; and

- b) a parcel (East Parcel) on the east side of the southern half of Cloyah Bay, starting at the point on the east shore that was due east of the starting point for the west side parcel, continuing east until reaching a point 60 chains due east of the north west corner of the west parcel, then going south 30 chains, then west until reaching the east side shore of Cloyah Bay, further to the south.
12. O'Reilly's approximation of 120 acres for the area of the recommended allotment was a rough and non-controlling estimate, given the then undetermined extent of submerged lands under the tidal waters of Cloyah Bay within the rectangle defined by the metes and bounds description in the Minute of Decision. The actual area of the recommended allotment was substantially less than 80 acres.
13. Canada denies the allegations of fact in paragraph 12 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada admits that the Indian Reserve Commission surveyor, Ashdown Green (Green) drew a rough sketch of a proposed Cloyah reserve in October 1881. This rough sketch appears to outline unsubmerged land that is substantially different in shape and size from the unsubmerged land O'Reilly recommended in his metes and bounds description in the Minute of Decision.
14. Canada denies the allegations of fact in paragraph 13 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. In particular, Canada admits that in a letter to the Superintendent General of Indian Affairs (SGIA) dated April 8, 1882, O'Reilly described this recommended allotment to the Tsimpsean Tribe of Indians as:
- another fishing station, and summer residence on the same Inlet above the rapids. Here the Indians have built a small Church and a few houses. The soil is worthless but heavily timbered.
15. O'Reilly's recommended allotment included the fishing station, church and houses.

16. Canada denies the allegations of fact in paragraph 18 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada states that, by letter dated May 5, 1882, O'Reilly provided the CCLW with his Minute of Decision.
17. Further in response to the allegations of fact in paragraphs 10 and 18 of the Declaration of Claim, O'Reilly included a "rough plan" of the recommended allotment with his Minute of Decision that he sent to the CCLW. This rough plan outlines unsubmerged land that is substantially different in shape and size from the unsubmerged land O'Reilly recommended in his metes and bounds description in the Minute of Decision. This rough plan is also substantially different from Green's rough sketch. This rough plan outlines unsubmerged land all the way around the southern half of Cloyah Bay. In addition, this rough plan depicts a rectangle of unsubmerged and submerged lands and provides measurements for the lengths of the sides of the rectangle that are the same measurements as in the metes and bounds description of the Minute of Decision. However, these measurements are substantially incorrect when used with the rough plan, given the dimensions of Cloyah Bay. The rectangle of unsubmerged and submerged land depicted in the rough plan was not the same rectangle of unsubmerged and submerged lands that O'Reilly defined in his metes and bounds description in the Minute of Decision. Similarly, this rough plan did not outline the unsubmerged lands that O'Reilly had recommended for allotment in his metes and bounds description in the Minute of Decision.
18. Canada denies the allegations of fact in paragraph 14 of the Declaration of Claim.
19. Canada denies the allegations of fact in paragraph 15 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. In particular, by letter dated August 19, 1886, O'Reilly gave Indian Reserve Commission surveyor, Tuck general instructions to survey all the allotments of reserves recommended by O'Reilly for the Tsimpsean Tribe of Indians. These general instructions included the following provisions:

In surveying the different reserves made by me on the Northwest coast you will understand that should you discover any error in which the sketches or minutes do not agree with the land obviously intended to be given to the Indians, the spirit and not the letter of the same, is to be taken.

Also that should any claim (for which a legal title exists) have been encroached upon in error, you will be careful to exempt it from the intended reserve as defined in the minutes.

Should you find it necessary to alter any course or distance, you will please report the same to me as soon as convenient, stating your reasons for such alteration, and enclose a plan of the proposed deviation.

20. Canada denies the allegations of fact in paragraph 16 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. In particular, Canada admits that Tuck did receive the Minute of Decision and rough plan. Canada repeats Canada's allegations about the nature of the recommended allotted reserve in paragraphs 11, 12, 15 and 17 above.

21. Canada denies the allegations of fact in paragraphs 17, 18 and 19 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada admits that Tuck surveyed the recommended allotment in October of 1887. Tuck followed the spirit and letter of O'Reilly's recommended allotment in his October 1881 Minute of Decision by:
 - a) surveying the West Parcel and East Parcel of O'Reilly's Minute of Decision, following the metes and bounds description in the Minute of Decision. The West Parcel included the fishing station, church and houses in the West Parcel; and

 - b) on finding a potato garden at the south end of Cloyah Bay, while traversing the shore line of Cloyah Bay, including it as part of the unsubmerged lands in an "additional" rectangle of unsubmerged land and submerged land under the tidal waters of Cloyah Bay, defined by distance measurements, and immediately adjacent to the eastern part of the south side of the original rectangle defined by the metes and bounds description in O'Reilly's Minute of Decision. The additional rectangle went a further 20 chains south than the original rectangle and was 30 chains wide in an east-west direction going west from the line formed by the extension southward of the eastern boundary of the original rectangle. The original rectangle of submerged and unsubmerged land, and the additional rectangle of submerged and unsubmerged land, taken together, included most of the southern half of Cloyah Bay and the whole of the mouth of the southern half of Cloyah Bay. The

unsubmerged land in this additional rectangle included four parcels of land on the west, south, including the potato garden, and east shores of Cloyah Bay.

22. Further in response to the allegations of fact in paragraphs 18 and 19 of the Declaration of Claim, Canada repeats Canada's allegations of fact in paragraphs 11, 12, 15, 17 and 21 above. Tuck surveyed the proposed reserve by first surveying a single rectilinear shape, comprised of the original rectangle and the additional rectangle, which included, as unsubmerged lands, the six separate parcels of land. The six parcels were the proposed reserve as surveyed. Tuck installed corner posts for the corners of each of these six parcels of land. Tuck calculated the area of the recommended allotment, as he had surveyed, and including the recommended addition, as approximately 77 acres.
23. Further in response to the allegations of fact in paragraph 18 of the Declaration of Claim, Canada admits that Green questioned why more land was not surveyed. Tuck explained the circumstances as set out in Canada's allegations of fact in paragraphs 11, 12, 15, 17, 21 and 22 above. Tuck's survey for the proposed Cloyah Indian Reserve was then accepted.
24. Canada denies the allegations of fact in paragraph 20 of the Declaration of Claim, Canada admits that in February 1881, on the instructions of O'Reilly, Green informed Tuck that Tuck's services would not be required after March 31, 1888. Green found Tuck's plotting of survey plans from his field notes to be very slow and that the time it was taking Tuck to complete the survey plan work was unsatisfactory. In a subsequent letter dated April 14, 1888 to BC Indian Superintendent of Indian Affairs, Powell, Green stated that he had generally had "no opportunity of judging" the "correctness of Mr. Tuck's work". Green did go on to question the style of Tuck's field books, calling them "not those of a practical surveyor" and to state that Tuck was "utterly incompetent" as a draughtsman. However, Tuck's survey was carried out under the applicable rules governing surveys and followed the metes and bounds description in the Minute of Decision, and added some additional land, given the presence of a potato field.

25. Canada denies the allegations of fact in paragraph 21 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada repeats Canada's allegations of fact in paragraph 23 above.
26. Canada denies the allegations of fact in paragraph 22 of the Declaration of Claim, except and to the extent that they are specifically admitted in this Response. Canada admits that on January 26, 1892, both O'Reilly and the CCLW approved the completed survey plan of the Cloyah Indian Reserve, based on Tuck's survey, as a provisional Indian reserve for the Tsimpsean Tribe of Indians.
27. Further in response to the allegations of fact in paragraph 22 of the Declaration of Claim, Canada admits that O'Reilly and Green were dissatisfied with the time it took Tuck to plot survey plans from his field notes. However, Tuck's survey plans were accepted as appropriate and were subsequently endorsed by O'Reilly and the CCLW.
28. Canada admits that by 1892 Cloyah Indian Reserve had become a provisional Indian reserve (Provisional Cloyah Indian Reserve) for the provisional use and benefit of the Tsimpsean Tribe of Indians, with underlying title in the provincial Crown.
29. Canada denies that the Provisional Cloyah Indian Reserve was an Indian reserve within the meaning of the *Indian Act*, RSC 1886, c 43, as amended (1886 *Indian Act*) or an Indian reserve within the meaning of the *Indian Act*, RSC 1906, c 81, as amended (1906 *Indian Act*)¹.
30. The Metlakatla Indian Band would have been aware of the boundaries of the recommended allotment of Cloyah Indian Reserve, as augmented, and surveyed as augmented, by Tuck in October 1887, from and after Tuck's survey in October 1887.
31. In 1912, the Royal Commission on Indian Affairs for British Columbia (the McKenna McBride Commission) was established to deal with certain outstanding issues related to the establishment of reserves in British Columbia. Between 1913 and 1915, the

¹ The 1906 *Indian Act* did not come into force until January 31, 1907.

McKenna McBride Commission travelled throughout British Columbia meeting with Indian groups throughout the province. The McKenna McBride Commission also met separately with the Indian Agents. In 1915, the McKenna McBride Commission travelled to the Northwest Coast Agency. On September 27, 1915, the McKenna McBride Commission met with the Metlakatla Indian Band. The issue of fisheries was discussed. The Metlakatla Indian Band requested that three new fisheries be set aside for them along the Nass and Skeena Rivers. Their concern was access to fisheries in order to be able to work with the canneries. They also raised fishery disputes between themselves and the Nishga (Nass people) and the Indians at Kitsumkalum. The Metlakatla Indian Band did not make any complaint to the McKenna McBride Commission regarding the Provisional Cloyah Indian Reserve, including with respect to its size or shape, or to access to the fishery. The Metlakatla Indian Band did not seek an addition to the Provisional Cloyah Indian Reserve.

32. Northwest Coast Indian Agent C.C. Perry gave evidence before the McKenna McBride Commission on December 17, 1915 about the Provisional Cloyah Indian Reserve. Perry stated that there were no houses on the reserve. He stated that the reserve was used as a fishing station and that the Indians "put up a sort of tent house and they fish there for commercial purposes under drag seines." He confirmed that the reserve was "an important fishing station" and that the timber was merchantable.
33. In its final report, the McKenna McBride Commission confirmed the Provisional Cloyah Indian Reserve, as surveyed, without addition or alteration, as a provisional Indian reserve for the Metlakatla Indian Band. This confirmation was approved by BC Order in Council 1923-911 on July 25, 1923 and by PC Order in Council 1924-1265 on July 19, 1924.
34. Canada admits the allegations of fact in paragraph 23 of the Declaration of Claim. In particular, the Cloyah Indian Reserve was formally created as an Indian reserve for the use and benefit of the Metlakatla Indian Band in 1938 when the provincial Crown

transferred the underlying title to Canada pursuant to BC Order-in-Council 1036 dated July 29, 1938.

35. The Metlakatla Indian Band surrendered Cloyah Indian Reserve in its entirety in 1949.
36. In October 1949, Canada's Surveyor General advised the Department of Indian Affairs that the area of Cloyah Indian reserve as set out in the reserve schedule was incorrect. The Surveyor General's office determined that the area of the reserve was 80.10 acres.
37. The Metlakatla Indian Band did not, at any time from October 1887 until, and including, 1949, complain to the Department of Indian Affairs about the size or shape of the Provisional Cloyah Indian Reserve.

V Canada Proposed a Reserve as Surveyed that Included More Land than O'Reilly Had Proposed for Allotment: No Breach of Fiduciary Duty

38. Canada included all the unsubmerged lands that came within O'Reilly's metes and bounds description in the Minute of Decision in the Provisional Cloyah Indian Reserve, that is, in the proposed reserve, as surveyed in 1887 and approved in 1892. In addition, Canada included additional land in the Provisional Cloyah Indian Reserve. Accordingly, Canada did not breach any fiduciary duty as alleged. During the time period from October 1881 until 1892:
 - a) the October 1881 Minute of Decision did not give rise to any specific, cognizable Aboriginal interest of the Metlakatla Indian Band in having more of the lands around Cloyah Bay being part of the surveyed Provisional Cloyah Indian Reserve than those that were within the reserve as surveyed;
 - b) the Metlakatla Indian Band did not at any relevant time put Canada on notice that the Metlakatla Indian Band wanted more of the lands around Cloyah Bay to be part of the surveyed Provisional Cloyah Indian Reserve than those that were within the reserve as surveyed, or otherwise rely on Canada to include more of the

lands around Cloyah Bay to be part of the surveyed Provisional Cloyah Indian reserve; and

- c) accordingly, Canada was not under a private-law-like undertaking to seek to include more of the lands around Cloyah Bay to be part of the surveyed Provisional Cloyah Indian Reserve than those that were within the reserve as surveyed.

VI Acquiescence and Consent

- 39. In the event that Canada breached any alleged fiduciary duty, then the Metlakatla Indian Band acquiesced in and/or consented to the fact that the surveyed Provisional Cloyah Indian Reserve did not include more of the lands around Cloyah Bay.

VII Damages

- 40. Canada denies that the Metlakatla Indian Band suffered any loss or damages caused by any alleged breach of duty by Canada.
- 41. Canada pleads and relies on section 20 of the *Act*.
- 42. In the event that Canada breached any alleged duty causing damages to the Metlakatla Indian Band then Canada says that the Metlakatla Indian Band failed to mitigate those damages.

VIII Apportionment of Liability


- 43. In the event that Canada is found liable for any damages for an alleged breach of duty, then the Metlakatla Indian Band was also at fault for causing the damages and Canada pleads and relies on ss 1 and 2 of the *Negligence Act*, RSBC 1996, c 333, as amended. Particulars of the Metlakatla Indian Band's contributory negligence include failure to

exercise due diligence in that the Metlakatla Indian Band did not advise Canada at any reasonable time that the Metlakatla Indian Band wanted the surveyed Provisional Cloyah Indian Reserve to include more of the lands around Cloyah Bay.

IX Relief

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

Dated: October 7, 2015



Signature of
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