

SPECIFIC CLAIMS TRIBUNAL	
TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	
April 28, 2020	D É P O S É
Dragisa Adzic	
Ottawa, ON	47

SCT File No.: SCT – 7001-15

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 Canada

Respondent

AMENDED DECLARATION OF CLAIM
Pursuant to Rule 41 of the
Specific Claims Tribunal Rules of Practice and Procedure

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

Date _____

(Registry Officer)

TO: ~~Assistant Deputy Attorney General of Canada, Litigation, Justice Canada~~
~~Bank of Canada Building~~ Per: John Russell and Peri Smith
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I. Claimant (R. 41(a))

1. The Claimant, Metlakatla Indian Band (“Metlakatla”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, in the Province British Columbia.

II. Conditions Precedent (R. 41(c))

2. The following conditions precedent as set out in s. 16(1) of the *Specific Claims Tribunal Act*, have been fulfilled:

16. (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and

(a) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part.

3. Metlakatla filed the Cloyah Indian Reserve No. 5 (“I.R. No. 5” or the “Reserve”) Claim with the Specific Claims Branch (“SCB”) on January 31, 2008. That Claim raised three allegations: (1) improper survey of I.R. No. 5; (2) expropriation of a portion of I.R. No. 5 for a highway; and (3) improper surrender of I.R. No. 5. The Claim herein relates only to the improper survey of I.R. No. 5 (“the Claim”).
4. On July 27, 2010 the SCB provided Metlakatla with additional documents arising from the SCB’s confirming research process.
5. On July 25, 2011, Canada advised Metlakatla that it rejected the Claim.

III. Claim Limit (Act, s. 20(1)(b))

6. For the purposes of this Claim, Metlakatla does not seek compensation in excess of \$150 million.

IV. Grounds (Act, s. 14(1))

7. The following are the grounds for the Claim, as provided for in s. 14 of the *Specific Claims Tribunal Act*:

c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation.

V. Allegations of Fact (R. 41(e))

8. ~~Metlakatla traditionally occupied a territory encompassing coastal and interior areas that stretched from the Nass River to the Skeena River, including, as it relates to the Claim, the area at the mouth of the Cloyah River, around Cloyah Bay.~~
9. ~~On October 5, 1881, members of Metlakatla wrote to Indian Reserve Commissioner Peter O'Reilly ("O'Reilly") to inform him that they had been in possession of the whole area from the Nass River to the Skeena River from time immemorial, and to request that the whole of the Tsimpsean Peninsula be reserved for their use and benefit.~~
10. ~~On October 29, 1881, O'Reilly allotted I.R. No. 5 to Metlakatla (which he referred to as the "Tsimpsean Indians") comprising approximately 120 acres, situated at the mouth of the Cloyah River on the western shore of the Tsimpsean Peninsula. The Minute of Decision detailed that the Reserve commenced at a Spruce marked Indian Reserve, and ran west for 20 chains, then south for 30 chains, then east 60 chains and north 30 chains, and then back to the Spruce. The accompanying sketch showed the Reserve comprising a rectangle around the head of Cloyah Bay measuring 60 chains by 30 chains and extending a distance along the Cloyah River.~~
11. ~~Also at this time, O'Reilly specified "the exclusive right of fishing in 'Cloyah' river for a distance of 1 1/2 miles from its mouth is reserved."~~
12. ~~Department of Indian Affairs Surveyor Ashdown Green ("Green"), who accompanied O'Reilly to visit Metlakatla, drew a rough sketch of the~~

~~Reserve also showing it as one parcel including the mouth of the Cloyah River and some distance upriver.~~

- ~~13. In an April 8, 1882 letter to the Superintendent General for Indian Affairs ("SGIA"), O'Reilly noted that the Reserve was to include Metlakatla's fishing station as well as the lands on which they had built their homes and a church.~~
- ~~14. On May 8, 1882, George Walkem, the provincial Chief Commissioner of Lands and Works ("CCLW"), approved the Reserve.~~
- ~~15. On August 19, 1886, O'Reilly instructed surveyor S.P. Tuck ("Tuck") to survey the Reserve he allotted. He specifically instructed that if Tuck discovered "an error in which the sketches or minutes did not agree with the lands obviously intended to be given the Indians, the spirit and not the letter of the same, is to be taken." O'Reilly instructed Tuck to report to him regarding any deviations from the Minute of Decision and the reasons for any such alterations.~~
- ~~16. Tuck received the Minute of Decision and attached sketch, which showed I.R. No. 5 as one parcel comprising 120 acres including the mouth of the Cloyah River.~~
- ~~17. Tuck surveyed the Reserve in 1887. His field book from October 1887 contains a sketch of I.R. No. 5 as he had surveyed it, noting the area as 77 acres.~~
- ~~18. Whereas O'Reilly's sketch accompanying the Minute of Decision had shown that a large rectangular area extending up the Cloyah River was to be reserved, Tuck's sketch showed six smaller parcels around Cloyah Bay, excluding the Cloyah River as well as other areas shown included on O'Reilly's sketch. The field book contains a notation from Green, questioning why more land was not given to Metlakatla by the surveyor as per the Minute of Decision.~~

- ~~19. Tuck's survey plan and associated correspondence show I.R. No. 5 at 77 acres.~~
- ~~20. In the spring of 1888, Green wrote to the Indian Superintendent for British Columbia, Lieutenant Col. I.W. Powell ("Powell"), with regard to Tuck's methods and slow progress in surveying the First Nation's reserves. He noted that Tuck's field books were "not those of a practical surveyor" and that as a drafter Tuck was "utterly incompetent."~~
- ~~21. The Department of Indian Affairs ("DIA") did not further question Tuck's survey, and Tuck did not provide an explanation as to why his survey deviated from O'Reilly's Minute of Decision and why over 40 acres of the land allotted to be reserved had been cut off.~~
- ~~22. Despite general dissatisfaction with Tuck's surveys of Metlakatla's reserves, and Green's specific question asking why I.R. No. 5 had not been surveyed as allotted, Tuck's survey plan was approved by O'Reilly and CCLW Vernon in January 1892.~~
- ~~23. On July 29, 1938, the province executed British Columbia Order in Council 1036 ("OIC 1036") conveying I.R. No. 5 as surveyed by Tuck at 77 acres to the federal Crown.~~
8. O'Reilly allotted I.R. No. 5 by his October 29, 1881 MOD which stated:
- 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 Clo-yah river for a distance of 1 1/2 miles from its mouth, is reserved.
9. Tuck surveyed the allotment of I.R. No. 5 in October 1887.

10. O'Reilly sent the survey plan of I.R. No. 5 to the Chief Commissioner of Lands and Works (CCLW) for approval by letter dated January 18, 1892.
11. The CCLW approved the survey plan of I.R. No. 5 on January 26, 1892.
12. I.R. No. 5, as surveyed in 1887 and approved in 1892, was about 80 acres in area.
13. I.R. No. 5 is the land above the high water mark as set out within the two yellow rectangles on the plan in Figure 1 below. The lower rectangle is immediately to the west of the red square.

VI The Basis in Law on Which the Crown is Said to Have Failed to Meet or Otherwise Breached a Lawful Obligation:

24. ~~This Claim is based on the Crown's breach of its common law fiduciary obligation to complete the reserve creation process and, in particular, the Crown's failure to ensure that the 120 acres of land at Cloyah Bay that were allotted by O'Reilly in 1881 were surveyed and set apart as a reserve and protected for Metlakatla's exclusive use and benefit. In failing to do so, the Crown breached its legal obligations and acted in a manner not consistent with the honour of the Crown.~~
25. ~~Metlakatla had a cognizable interest in the 120 acres of lands at Cloyah Bay and the Crown assumed discretionary control in relation to that interest.~~
26. ~~The Crown had a fiduciary duty to discharge its mandate to oversee the reserve creation process in good faith, acting with loyalty and care, providing full disclosure, and exercising a standard of ordinary prudence and reasonable diligence with a view to Metlakatla's best interests.~~
27. ~~The Crown breached its fiduciary obligations to Metlakatla in the reserve creation process by failing to ensure that the entirety of the Reserve comprising 120 acres, in one parcel at the head of Cloyah Bay and~~

including the mouth of the Cloyah River as allotted by O'Reilly, was properly surveyed and included in I.R. No. 5.

- ~~28. The surveyor's failure to adhere to the instructions and the Crown's failure to ensure such adherence fell below the standard of ordinary prudence and reasonable diligence. In addition, the Crown's failure to inquire into or correct these deviations from the Minutes of Decision fell below the standard required of a fiduciary.~~

VII VI Agreement on Validity

14. Metlakatla and Canada have agreed, for the purposes of this proceeding only, as follows:
- a) the Claim is valid for approximately 40 acres additional to the Reserve and no more. The additional land ("Additional Land") is above the high water mark as set out within the red square and attached blue rectangle immediately to the east of the red square in Figure 1 below. The red square contains approximately 31 acres of land above the high water mark. The blue rectangle contains 9 acres of land.
 - b) I.R. No. 5 plus the Additional Land creates an approximately 120 acre reserve (the "Agreed Reserve");
 - c) Canada admits that Metlakatla has a 100% beneficial interest in the Agreed Reserve; and
 - d) Metlakatla will provide Canada with the indemnity and release provided for in s. 35 of the *Specific Claims Tribunal Act* when there is a resolution of the amount of compensation, such as when the parties reach settlement in respect of the appropriate compensation for the Additional Land, or compensation is awarded by the Tribunal.

Figure 1



VI Relief Sought:

VII Damages

15. Metlakatla seeks compensation from Canada for the failure to complete the reserve creation process for the entire Reserve as allotted to it by O'Reilly in 1881 and approved by the Province in 1882.
15. The Tribunal is to determine the amount of compensation for Metlakatla's loss of the Additional Land.
16. In an April 8, 1882 letter to the Superintendent General for Indian Affairs ("SGIA"), O'Reilly noted that the Reserve was to include Metlakatla's fishing station as well as the lands on which they had built their homes and a church.

17. Metlakatla says it is entitled to compensation under subsections 20(1) (g) and (h) of the *Specific Claims Tribunal Act*.

All of which is respectfully submitted.

Dated: August 17, 2015 April 28, 2020



~~Maria Morellato, Q.C.~~

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