

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

METLAKATLA INDIAN BAND

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| SPECIFIC CLAIMS TRIBUNAL | | |
| F I L E D | TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES July 11, 2013 Amy Clark | D É P O S É |
| Ottawa, ON | 1 | |

Claimant

v.

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

Respondent

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

This 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: July 11, 2013

Amy Clark

(Registry Officer)

TO: Assistant Deputy Attorney General, Litigation, Justice Canada
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Ottawa, Ontario K1A 0H8
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I. Claimant (R. 41(a))

1. The Claimant, the 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 of 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 Tsimpsean Indian Reserve No. 2 (Colonial Reserve) Claim (the “Claim”) with the Specific Claims Branch (“SCB”) on December 31, 2008.

4. On May 29, 2009, Metlakatla filed revised submissions relating to the Claim with the SCB.

5. On May 17, 2012, Canada advised Metlakatla that it decided not to accept the Claim for negotiation.

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

6. For the purposes of the 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*:

b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation, pertaining to Indians or lands reserved for Indians, of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;

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;

d) an illegal lease or disposition by the Crown of reserve lands; and

e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority.

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

8. The Metlakatla have lived in the region of present-day Prince Rupert, British Columbia in and around the village of Metlakatla since time immemorial.

9. In 1863, the colonial government of British Columbia set aside a government reserve in trust for the use and benefit of the Indians ("Colonial Reserve") covering a "circle of three miles radius described round Mission Point in Metlakahtla Channel, Chatham Sound, as a centre: together with such addition in a north-easterly direction as may include all the land from Mission Point to the Summit of the Mountains on the West Coast of the Chimpsean Peninsula" as well as Tugwell Island, Devastation Island, Digby Island and all "small Islands and Rocks" adjacent to these three islands.

10. In 1864, the Governor of British Columbia directed that the Colonial Reserve be "extended to a distance of five miles on each side of the Mission Point and five miles back from the coast line."

11. British Columbia joined Confederation pursuant to the *Terms of Union, 1871*, under which Canada assumed the "charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit". Thereafter, Canada negotiated with British Columbia regarding Indian reserves in the Province culminating in an agreement in 1875/1876 to establish the Joint Indian Reserve Commission ("JIRC"). Three Commissioners were appointed: A. McKinlay for the Province, A.C. Anderson for Canada and G.M. Sproat representing both governments. In 1878, the JIRC was replaced by Sproat acting as sole Commissioner. Sproat was replaced in 1880 by Peter O'Reilly ("O'Reilly").

12. The mandate of the JIRC and sole Commissioners was set out in Orders in Council and instructions to the Commissioners. The Commissioners were to adopt a liberal policy toward the Indians, to have regard for the Indians' habits, wants and pursuits, and to make a full enquiry into all matters affecting the settlement of Indian reserves. O'Reilly's allotments were subject to the approval of the provincial Chief Commissioner of Lands and Works ("CCLW") and the federal Indian Superintendent.

13. Initially, O'Reilly dealt with the Indians at Port Simpson and at Metlakatla as "one tribe" which he referred to as the Tsimpsean Indians. O'Reilly allotted eleven Indian reserves for the Tsimpsean Indians by Minutes of Decision dated October 29, 1881 including Indian Reserve No. 2 comprising approximately 70,400 acres and encompassing the Tsimpsean Peninsula, between Fort Simpson and the Southern end of Digby Island and including a part of Kai-en Island, Pike Island, Shrub Island, and the islands to the east of them ("Tsimpsean IR No. 2").

14. In 1892, the CCLW and O'Reilly purported to approve a Plan of Tsimpsean IR No. 2 showing the Reserve divided in two.

15. The northern portion of Tsimpsean IR No. 2 was purportedly allocated to the Port Simpson Band (also known as Lax Kw'alaams) and now forms part of Lax Kw'alaams IR No. 1.

16. The southern portion of Tsimpsean IR No. 2 comprising 47,145 acres was purportedly allocated to Metlakatla ("IR No. 2").

17. Neither Lax Kw'alaams nor Metlakatla surrendered the portion of Tsimpsean IR No. 2 that now purportedly was held solely by the other Band.

18. The Grand Trunk Railway Company (the "GTP") was incorporated in 1903 for the purpose of constructing a national railway terminating on the coast of British Columbia (the "Railway").

19. Canada and the GTP entered into an agreement in 1903 by which Canada agreed to guarantee the principal and interest of bonds issued by the GTP, to pay interest on the

bonds, to hold not less than \$24.9 million worth of shares in the GTP, and to procure for GTP lands for the railway (the "Canada-GTP Agreement").

20. Soon after, Canada ratified the issuance of first mortgage bonds for the GTP that were guaranteed by the federal government.

21. In 1904/1905, British Columbia sold 10,000 acres of land adjacent to IR No. 2 to the GTP for \$1 per acre on the condition, *inter alia*, that the Province retained a one-quarter interest in the lands when divided into lots (the "BC-GTP Agreement").

22. On May 26, 1904, the GTP made a preliminary request to Canada for the transfer of certain portions of IR No. 2 for a terminus.

23. In February 1905, concerned that British Columbia purportedly had a reversionary interest in IR No. 2, the GTP sought to obtain the Province's reversionary interest in the reserve lands it proposed to purchase, offering the Province a one-quarter interest in the lands after they were transferred to the GTP.

24. In April 1905, the GTP requested from Canada additional portions of IR No. 2.

25. In January and February 1906, meetings were held between members of Metlakatla, the GTP and Canada to discuss and negotiate the GTP's proposal to acquire a portion of IR No. 2.

26. An agreement was eventually reached that Metlakatla would surrender 13,519 acres of Reserve land at a rate of \$7.50 per acre provided that the GTP accept different lands than in the original application, namely only the southern portion of Digby Island, a portion of the Reserve on Kaien Island, and a part of the Reserve on the Tsimpsean Peninsula and that the GTP compensate Band members for their interest in their gardens on the surrendered lands. There was no discussion of Metlakatla retaining any portion of the lands as the Province had. No appraisal was conducted.

27. Metlakatla endorsed the agreement by a Band Council Resolution dated February 7, 1906 (the "1906 BCR").

28. While the GTP had sought to obtain all of Digby Island, Metlakatla had refused to surrender the northern end of Digby Island where many of their gardens and burial grounds were located as well as other parts of the Reserve. Metlakatla promised to give the GTP first option to purchase the lands not included in the agreement if Metlakatla decided to dispose of them subject to certain conditions.

29. By Order-in-Council dated May 7, 1906, British Columbia rejected a proposal by Canada that British Columbia waive its interest in the 13,519 acres of IR No. 2. The proposal was rejected in part because of the belief that "if the western terminus of the said railway were located on the said lands...the reversionary interest in the Indian Reserve in the vicinity would be greatly enhanced, great benefit to the Province thereby ultimately accruing."

30. On May 23, 1906, notwithstanding the outstanding issues relating to the Province's purported reversionary interest in the lands, the GTP wrote to Canada to make a formal offer to purchase "13,516 acres more or less" of the Reserve.

31. On August 17, 1906, members of Metlakatla signed a surrender document agreeing to the surrender for sale of 13,519 acres of IR No. 2 "be the same more or less" (the "1906 Surrender"). The lands to be surrendered were described identically to the 1906 BCR. All of the lands to be surrendered were within the Colonial Reserve. Attached to the surrender document was an affidavit of Albert Leighton. There was no written notice, voters list, or record of a vote.

32. The 1906 Surrender was accepted by Canada by an Order-in-Council dated September 21, 1906 ("1906 OC").

33. Lax Kw'alaams were not involved in the negotiations and did not consent to either the February 7, 1906 BCR or the Surrender Document.

34. Neither Canada nor the GTP informed or disclosed to Metlakatla in advance of the 1906 BCR or the 1906 Surrender, pertinent and highly relevant information including:

- a) the existence and details of the Canada-GTP Agreement and that as a result of the Canada-GTP Agreement, Canada had a financial interest in the GTP;
- b) the existence and details of the BC-GTP Agreement, in particular, though not limited to, the fact that the Province would retain interests in the lands it sold; and
- c) the likely potential high value of the surrendered IR No. 2 lands, including for sub-division lots in a townsite, once the Railway was built.

35. In June 1907, by Letters Patent, Canada purported to transfer to the GTP 14,160 acres of IR No. 2 – approximately 641 acres more than had been identified in the 1906 BCR and in the 1906 Surrender (the “Letters Patent”).

36. The Letters Patent incorporated changes to the description of the surrendered lands based on an amended description and survey map produced by the GTP after the signing of the Surrender Document, including, *inter alia*:

- a) extending the northern boundary of the surrendered lands on Digby Island further north; and
- b) including additional islands and islets.

37. Canada did not undertake a survey or an appraisal of the Lands before issuing the Letters Patent.

38. Canada did not consult with the Band regarding the discrepancies in the acreage and description of the land between the Surrender Document and the Letters Patent.

39. In February 1908, British Columbia and GTP came to an agreement that the Province would sell its purported interests in the surrendered Reserve lands for \$2.50 an acre on the condition, *inter alia*, that one quarter of the lands sub-divided would be re-conveyed to the Province.

40. The value of land in the Metlakatla/Prince-Rupert area rose steeply in the years that followed.

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

41. IR No. 2, being an Indian reserve set apart by the Colony in 1863/1864, was an Indian reserve under the *Indian Act* in 1906

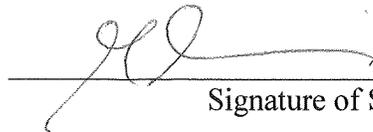
42. The 1906 Surrender was not valid and Canada breached its legal obligations under the *Indian Act*.

43. Further, the Crown also breached its duty to act honourably, and its fiduciary obligations to Metlakatla before and after the surrender of a portion of IR No. 2. In particular, the Crown:

- (a) failed to fully disclose to Metlakatla material information with respect to and pertinent to the surrender, including the Canada-GTP Agreement, the BC-GTP Agreement, and available information as to the likely future value of the surrendered lands;
- (b) failed to properly advise Metlakatla in its negotiations with the GTP;
- (c) failed to exercise due diligence to prevent Metlakatla from being subject to an exploitative bargain;
- (d) failed to act with loyalty and good faith in the best interests of Metlakatla;
- (e) did not comply with the wishes of the Metlakatla as expressed, *inter alia*, in the 1906 BCR and 1906 Surrender; and
- (f) purported to transfer lands that were not included in the 1906 Surrender.

44. As a result of these breaches Metlakatla has suffered damages for which Canada is liable.

Dated this 17th day of July, 2013.



Signature of Solicitor

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