

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

METLAKATLA INDIAN BAND

F I L E D	SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDEICATIONS PARTICULIÈRES	D E P O S É
	May 12, 2017	
	David Burnside	
Ottawa, ON		41

Claimant

v.

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

Respondent

and

KITSUMKALUM INDIAN BAND

Applicant

**RESPONSE OF
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
TO APPLICATION FOR LEAVE TO INTERVENE BY THE
KITSUMKALUM INDIAN BAND
Pursuant to Rule 35 of the
*Specific Claims Tribunal Rules of Practice and Procedure***

TO: **KITSUMKALUM INDIAN BAND**
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AND TO: **METLAKATLA INDIAN BAND**
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1. Her Majesty the Queen in Right of Canada (Canada) takes no position on Kitsumkalum Indian Band's (Kitsumkalum) application to intervene for the reasons set out below.
2. The questions of whether Kitsumkalum had a beneficial interest in Tsimshian IR # 2 from 1881 to 1892 and whether the 1892 division of Tsimshian IR # 2 was legally valid (Questions) are irrelevant to this Specific Claims Tribunal (SCT) proceeding. In particular:
 - a) there is no live issue on the pleadings as between Metlakatla Indian Band (Metlakatla) and Canada as to the Questions:
 - Metlakatla pleads at paragraph 13 of the Declaration of Claim that:

[i]nitially, O'Reilly dealt with the Indians at Port Simpson and 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 Kaien Island, Pike Island, Shrub Island, and the islands to the east of them ("Tsimpsean IR No.2").
[underlining added]
 - Canada pleads at paragraph 20 of the Response that

[i]n 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".
[underlining added]
 - Metlakatla pleads at paragraphs 14 and 16 of the Declaration of Claim that:

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

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

- Canada pleads at paragraphs 23 to 25 of the Response that:

...[i]n 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. ...

On January 26, 1892, both O'Reilly and the Chief Commissioner of Lands and Works signed the completed survey of I.R. No. 2. ...

Canada admits that by 1892 the Government Reserve had become a provisional Indian reserve (Provisional Indian Reserve), known as Metlakatla Indian Reserve No. 2, 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.

- b) there is no logical need to decide the Questions in order to determine Metlakatla's SCT claim; and
- c) this is not an interpleader matter where two different Indigenous Peoples are claiming inconsistent beneficial proprietary interests in the same reserve as at the same time. Kitsumkalum has submitted on this application that they take no position on the validity of the 1906 surrender. They have also submitted that they have filed a specific claim regarding the 1892 division. Under the specific claims process they can only obtain compensation. Accordingly, Kitsumkalum only seek compensation for what they allege was an invalid division of Tsimshian # 2 in 1892 and they do not seek an on-going beneficial proprietary interest in Tsimshian # 2 after 1892. Canada's position on this intervention application is premised on

Kitsumkalum not seeking an on-going beneficial proprietary interest in Tsimshian # 2 after 1892.

3. Accordingly, the Tribunal need not, and ought not, decide the Questions. The Tribunal might consider expressly leaving the Questions open to make it plain that the Tribunal has not decided them.
4. If the Tribunal were to grant leave for Kitsumkalum to intervene then Canada is concerned that:
 - a) *res judicata* or a similar legal principle might apply and bind Canada in Kitsumkalum's specific claim; and
 - b) consequently, Canada would need to do further research on the Questions and actively litigate them in the Metlakatla SCT proceeding when there would otherwise be no need to do so.

Accordingly, if the Tribunal grants leave for Kitsumkalum to intervene, then Canada seeks a case management conference to clarify whether the Questions will be treated as live issues in the Metlakatla SCT proceeding.

All of which is respectfully submitted.

Dated: May 12, 2017

Signature of 
 Respondent lawyer for Respondent

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