

SPECIFIC CLAIMS TRIBUNAL

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TRIBUNAL DES REVENDICATIONS PARTICULIÈRES	
June 7, 2017	
David Burnside	
Ottawa, ON	37

B E T W E E N:

WE WAI KAI NATION

Claimant

v

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

Respondent

FURTHER AMENDED RESPONSE
to the
REVISED FURTHER AMENDED DECLARATION OF CLAIM
Pursuant to Rule 42 of the
Specific Claims Tribunal Rules of Practice and Procedure

This Further Amended 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

1. The Respondent, Her Majesty the Queen in right of Canada (Canada), admits that the Claimant, the We Wai Kai Nation, also known as the Cape Mudge Band, is a First Nation within the meaning of s 2 of the *Specific Claims Tribunal Act (Act)*.
2. Canada admits that the We Wai Kai Nation is the successor Indian band of the Laich kwil tach (Euclataw) Indians in connection with the Drew Harbour Indian reserve.

II Conditions Precedent

3. Canada admits the allegations of fact in paragraphs 3 to 5 of the Revised Further Amended Declaration of Claim with regard to the nature of the specific claim filed with the Department of Indian Affairs and Northern Development, Specific Claims Branch.

III The Claim Is Not a Valid Claim

4. Canada's position is that the claim made in the Revised Further Amended Declaration of Claim is not a valid claim. Canada denies the allegation of fact in the Revised Further Amended Declaration of Claim unless otherwise expressly admitted in this Further Amended Response.

IV The Establishment of the O'Reilly Indian Reserve Commission

5. Following British Columbia's entry into Confederation in 1871, Canada lacked the sole authority to allot, set aside, or create reserves in most of 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 most of the reserves were to be established.

68. In 1880, the provincial Chief Commissioner of Lands and Works (CCLW) and the federal Indian Superintendent for British Columbia agreed on Peter O'Reilly as the new Indian Reserve Commissioner. The Governor in Council, by PC OIC 1880-1334, dated July 19, 1880, approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, to act as sole commissioner (Reserve Commissioner O'Reilly or O'Reilly) on the then Indian Reserve Commission (O'Reilly IRC).
- 79 Under the terms of PC OIC 1880-1334, Reserve Commissioner O'Reilly was to act, from a practical and functional point of view, as an agent of both the provincial Crown and Canada. In particular, Reserve Commissioner O'Reilly was 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". "The action of [Reserve Commissioner O'Reilly] should in all cases be subject to confirmation" by these same officers on behalf of their respective governments and, failing their agreement, should be referred for settlement to the Lieutenant Governor of British Columbia.
810. On August 9, 1880, the Deputy Superintendent General of Indian Affairs issued a memorandum of instructions (O'Reilly's Instructions) to Reserve Commissioner O'Reilly stating that "[i]n allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a 'liberal policy' being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any)."
11. ~~Reserve Commissioner O'Reilly exercised powers granted pursuant to an exercise of the federal Crown prerogative. powers. Contrary to the We Wai Kai Nation's assertion in paragraph 26 a) of the Amended Declaration of Claim, the reserve approval mechanism set out in PC OIC 1880-1334 appointing O'Reilly was not a statutory process. PC OIC~~

~~1880-1884 was an exercise of federal prerogative powers, not an exercise of statutory powers.~~

V The Earlier Sproat Allotment

97. Canada admits the allegations of fact in paragraph 9 of the Revised Further Amended Declaration of Claim. Indian Reserve Commissioner Sproat allotted a reserve at Drew Harbour for the We Wai Kai Nation in October 1879. This reserve was not surveyed and was not approved by the CCLW.

VI Early Non-Indigenous Interests in Rebecca Spit: Miller and Sayward

1012. In response to the allegations of fact in paragraphs 10 and 11 of the Revised Further Amended Declaration of Claim, Canada admits that:

- a) on August 28, 1884 Mr. E. Priest (Priest), a land surveyor, carried out a field survey of land (the Rebecca Spit Parcel) on or near Rebecca sSpit, for Mr. J. Miller (Miller); and
- b) Priest's field survey notes indicate that the shoreline of the Rebecca Spit Parcel was unbroken and that there was no passage or other interruption in the shoreline.

Canada does not know whether Priest's field survey was made at high tide. Canada denies the other allegations of fact, and

11. Further in response to the allegations of fact in paragraphs 10 and 11 of the Revised Further Amended Declaration of Claim, Canada states that Priest's field survey notes:

- ae) note the existence of an unidentified "Indian Reserve", referring to the reserve that Sproat had allotted;

- bd) indicate that Priest ~~surveyed along the line of coast around Rebecca Spit following~~ noted the high water mark; and
- ce) indicate that Priest surveyed a line across the base of the 20 Acre Parcel, as the southern boundary line for the Rebecca Spit ~~lot~~ Parcel, which lot ~~was at that time,~~ ~~or~~ later became Lot 33, and placed survey posts (Priest's Survey Posts) at the west and east ends of the southern boundary line.;

In additional response, Canada states that:

- df) ~~Mr. J.~~ Miller was a "White settler" within the meaning of O'Reilly's Instructions; ~~and~~
- e) the area of the Rebecca Spit Parcel was approximately 54 acres;
- f) the Rebecca Spit Parcel includes a 20 acre parcel (the 20 Acre Parcel) south of the narrow, low-lying isthmus of the Rebecca Spit Parcel; and
- g) under ~~the Lands (Crown Amendment) Act, SBC 1879, c 21, s 8, and~~ the *Crown Lands Act* SBC 1884, c 16, in force February 18, 1884 (*1884 Crown Lands Act*), s 70, ~~each~~ under the heading "System of Surveys" at paragraphs 17, 18 and 19, Priest was required to, and did, thoroughly blaze the boundary line through timber up to 12 feet wide and mark bearing trees for each survey post.

12. Miller had earlier taken initial steps to purchase the Rebecca Spit Parcel. On July 17, 1884, Miller published notice, dated July 14, 1884, of his intention to purchase "Rebecca Spit" in the British Columbia Gazette (Gazette). The lot was described as follows:

... commencing at north-east corner Indian Reserve, Drew's Harbour; thence northerly along the east shore to end of said Spit; thence westerly around the point to Drew Harbour; thence southerly along the shoreline of Drew Harbour, to the

Indian reserve; thence along the north line of Indian reserve, to point of commencement.

13. Canada admits the allegation of fact in paragraph 12 of the Revised Further Amended Declaration of Claim that Miller did not proceed to file an application to purchase the Rebecca Spit Parcel. Canada denies the allegation of fact in paragraph 12 of the Revised Further Amended Declaration of Claim that Priest's survey was not registered with the British Columbia Surveyor-General's Office.

14. Canada admits the allegations of fact in paragraphs 16 to 18 of the Revised Further Amended Declaration of Claim.

15. Further in response to the allegations of fact in paragraphs 12 and 16 to 18, of the Revised Further Amended Declaration of Claim:

a) Miller knew William P. Sayward (Sayward) by the time of Miller's notice in the Gazette on 14, July 1884;

b) 14(a) by notice dated October 26, 1886, and published in the Gazette on November 4, 1886, Sayward gave notice of his intention to purchase Rebecca spit. He described the land as follows:

Commencing at a stake on the east shore of Drew's Harbour, near the head, thence east to east shore of Rebecca Spit; thence northerly along the shore line to the north end of said Spit; thence westerly around the north end of Spit to Drew's Harbour; thence southerly along the shore line to point of commencement;

~~notice published in the B.C. Gazette on November 4, 1886, William P. Sayward (Sayward), gave notice of his intention to apply for permission to purchase Rebecca Spit from the provincial Crown. Further in response, Canada states that:~~

~~a) — Sayward's notice was dated October 26, 1886; and~~

~~c)14 (b)~~ Sayward was a “White settler” within the meaning of O’Reilly’s Instructions;

~~d) 16.~~ on January 6, 1887, Sayward applied to purchase the land referred to in his notice of intention to apply to purchase Rebecca Spit lot from the provincial Crown under s 30 of the 1884 *Crown Lands Act*. Sayward’s application was for 54 acres of land ~~that became Lot 33~~. Sayward paid a 10 % deposit of \$13.50;

~~e)17~~ in partial response to the allegations of fact in paragraph 1715 of the Further Amended Declaration of Claim, Canada states that on at some time before January ~~629~~, 1887 Priest prepared a survey plan of the Rebecca Spit ~~lot~~ Parcel from his 1884 field survey notes. Priest’s survey field notes and survey plan of the Rebecca Spit Parcel were then filed with the Department of Lands and Works on January 6, 1887, further to Sayward’s application to purchase. This indicated to the Department of Lands and Works that Sayward was applying to purchase the Rebecca Spit Parcel;

~~f)~~ the Surveyor-General of British Columbia accepted the survey and the CCLW published a notice of Priest’s survey in the Gazette on January 27, 1887. The notice did not refer to Rebecca spit or otherwise specify the land. The notice did not refer to the date of Sayward’s published notice of intention to apply to purchase. The notice did refer to Sayward and to the date of Sayward’s application to purchase;

~~g)17.~~ Canada denies admits the allegations of fact in paragraph 15 of the Amended Declaration of Claim that on January 29, 1887, the Surveyor-General for British Columbia plotted Priest’s survey the Rebecca Spit Parcel into the provincial Crown’s survey-based, land administration system. On or about January 29, 1887, the Surveyor-General for British Columbia assigned the lot number, Lot 33, to the Rebecca Spit Parcel ~~lot~~ Sayward was applying to purchase; and

~~h)18.~~ ~~Canada admits the allegations of fact in paragraph 1816 of the Further Amended Declaration of Claim.~~ ~~o~~On February 10, 1888, the provincial Crown granted Lot 33, the Rebecca Spit ~~Parcel~~~~lot.~~ ~~Further in response, the provincial Crown granted Lot 33~~ to Sayward under the 1884 *Crown Lands Act* in consideration of the payment by Sayward of the sum of \$135.

VIII The Establishment of the Drew Harbour Indian Reserve

16. In the meantime, O'Reilly visited Drew Harbour and allotted a reserve on October 8, 1886. Canada denies the allegations of fact in paragraph 13 of the Revised Further Amended Declaration of Claim unless otherwise expressly admitted in this Further Amended Response. In particular:

13a) O'Reilly, with IRC surveyor Ashdown Green, visited the Laich kwil tach (Euclataw) Indians, including the We Wai Kai Nation, on ~~the 5th~~ October 5, 1886, and following days. O'Reilly he did not succeed in meeting any considerable number of the Laich kwil tach (Euclataw) Indians, yet at each village that he visited, including the winter village of the We Wai Kai Nation on what became the proposed Cape Mudge Indian reserve, a few members were present and he explained that he was there to consult with them as to their requirements for Indian reserves. With their assistance, he proposed 10 reserves for the Laich kwil tach (Euclataw) Indians including a proposed Drew Harbour Indian reserve (the Proposed Unsurveyed Drew Harbour Indian reserve);

13b) O'Reilly and Green arrived at Drew Harbour on October 7, 1886 at 2 p.m. and left Drew Harbour at 5: 45 a.m. on October 8, 1886. There was a high tide and partial gale from the southeast when they arrived;

c) Ashdown Green, with O'Reilly assisting, surveyed the shoreline of the proposed Drew Harbour reserve on October 7, 1886, starting with the Drew Harbour shoreline and then following the shoreline of the west side of the 20 Acre Parcel

until about 1500 feet south of the narrow, low-lying isthmus. They then crossed over the 20 Acre Parcel from west to east and proceeded southward surveying the outer coast shoreline;

d) O'Reilly made a Minute of Decision dated October 8, 1886 and Ashdown Green made a colour sketch. Further,

i) O'Reilly's Minute of Decision describes the reserve as follows:

A reserve of 210 acres situated on Drew Harbour, Valdes island. Commencing at the SE corner post of section 7, and running W along the southern boundary of section 7 to a point 40 chains E of the SW corner thereof. Then S 30 chains. Then E to the seacoast. Then following the shoreline in a northerly and westerly direction to the place of commencement.

O'Reilly's Minute of Decision, his reporting letters to the Superintendent General of Indian Affairs and the CCLW, and his diary do not mention Rebecca spit; and

ii) Green's colour sketch shows the reserve on Drew Harbour. It indicates that the reserve goes northward to a passage coloured blue, referencing water, between the allotted reserve and an island to the north, with Rebecca Point on the northern end of the island. The colour sketch does not mention Rebecca spit but does refer to Rebecca Point at the northern end of the island. The blue passage is where the narrow, low-lying isthmus of the Rebecca Spit Parcel is located;

e)b) ~~to the extent that the rough colour sketch and Minute of Decision, taken together,~~ set out a definite plot of land, the Proposed Drew Harbour Indian reserve, that included the 20 Acre Parcel, but not the rest of the Rebecca Spit Parcel to the north; ~~then the rough sketch indicates that the Proposed Unsurveyed Drew~~

~~Harbour Indian reserve's northernmost boundary was to be in the base of Rebecca Spit where the "passage" coloured blue is noted; and~~

- ~~f)13~~ O'Reilly estimated the size of the Proposed Unsurveyed Drew Harbour Indian reserve ~~was~~ a reserve of 210 acres, situated on Drew Harbour. It was chiefly used by the We Wai Kai Nation when working in the neighbouring logging camps. The soil was poor and the timber small though straight, and of good quality. ~~;~~ ~~and~~

17. Canada denies the allegations of fact in paragraph 29 (c) of the Revised Further Amended Declaration of Claim. Further in response to the allegations of fact in paragraph 29 (c), the only part of the Rebecca Spit Parcel that O'Reilly allotted as part of the Proposed Unsurveyed Drew Harbour Indian reserve was the 20 Acre Parcel. O'Reilly did not allot that part of the Rebecca Spit Parcel to the north of the 20 Acre Parcel for the following reasons:

- a) O'Reilly and Green shared a common belief at the time of the 1886 allotment, when there was a high tide and partial gale from the southeast, that there was a natural boundary between the 20 Acre Parcel and the remaining part of the Rebecca Spit Parcel to the north. Accordingly, there was no discrepancy between O'Reilly's Minute of Decision and Green's colour sketch.
- b) It was a "close-call" and inconclusive at the time of the 1886 allotment as to whether the narrow, low-lying isthmus was above or below the ordinary high water line. Accordingly, it was a "close-call" and inconclusive at the time as to whether there was a natural boundary between the 20 Acre Parcel and the remaining part of the Rebecca Spit Parcel to the north. In particular:
- i) there was no land-based vegetation noted on the narrow, low-lying isthmus on any of the 1860-1864 Admiralty Chart, Priest's Survey or survey plan, Green's field notes or Skinner's survey;

- ii) while the 1860-1864 Admiralty Chart originally named the land as Rebecca spit and did not show a natural boundary between what would become the 20 Acre Parcel and the remaining part of the Rebecca Spit Parcel to the north, the Chart would not have been conclusive on this point. The Chart was primarily crafted for navigational purposes and did not involve a land-based survey crew doing an accurate natural boundary survey;
 - iii) Miller followed the Admiralty Chart's lead and called the land Rebecca spit in 1884; and
 - iv) Priest followed the Admiralty Chart's lead and called the land Rebecca spit and treated the narrow, low-lying isthmus as above the ordinary high water mark, and so not establishing a natural boundary, in his 1884 Priest Survey. Priest's survey had not been filed and accepted by the Surveyor-General of British Columbia at that time. Accordingly, Priest's Survey was not available to O'Reilly and Green at that time.
- c) The circumstances justify consideration of O'Reilly's Minute of Decision together with the colour sketch, to aid in interpretation of O'Reilly's Minute of Decision:
- i) O'Reilly sent the Minute of Decision and colour sketch together to the CCLW for approval;
 - ii) the Minute of Decision without the colour sketch would have been considered ambiguous at the time as to whether the remaining part of the Rebecca Spit Parcel to the north of the sea passage or narrow, low-lying isthmus was included; and

iii) O'Reilly and Green were under a fundamental misunderstanding as to the presence or absence of a natural water boundary at the time of the 1886 allotment. It was not until after Priest's survey was filed and accepted by the Surveyor-General of British Columbia, that Skinner and O'Reilly accepted that the narrow, low-lying isthmus was above the ordinary high water mark.

d) In any event, O'Reilly and Green's fundamental misunderstanding as to the presence or absence of a natural water boundary at the time of the 1886 allotment does not affect O'Reilly's intention at the time. O'Reilly clearly intended only to allot up to the narrow, low-lying isthmus, whether it was a sea passage or above the ordinary high water mark.

1813. In response to the allegations of fact in paragraph 14 of the Revised Further Amended Declaration of Claim, Canada admits that by letter dated October 29, 1886, Reserve Commissioner O'Reilly provided the CCLW with his a-Minute of Decision and attached Green's rough colour sketch for the CCLW's his information and recommended a proposed-unsurveyed Drew Harbour Indian reserve (the Proposed Unsurveyed Drew Harbour Indian reserve). Canada denies the other allegations of fact in paragraph 14 of the Revised Further Amended Declaration of Claim except where expressly admitted in this Further Amended Response. Further in response Canada states that:

1915. In response to the allegations of fact in paragraph 15 of the Revised Further Amended Declaration of Claim, Canada admits that on November 5, 1886 the CCLW, acting under PC OIC 1880-1334, purported to preliminarily approve the Proposed Unsurveyed Drew Harbour Indian reserve, as set out in Green's the rough colour sketch and O'Reilly's Minute of Decision. Canada denies the other allegations of fact.

2015. Further in response to the allegations of fact in paragraph 15 of the Revised Further Amended Declaration of Claim, and in response to the allegations of fact in paragraph 19 of the Revised Further Amended Declaration of Claim, Canada admits that there was an

overlap between the Rebecca Spit Parcel and the Proposed Unsurveyed Drew Harbour Indian reserve. The overlap was the 20 Acre Parcel below the narrow, low-lying isthmus of the Rebecca Spit Parcel. Canada admits that neither O'Reilly nor Canada did not protest the any alleged overlap, between Lot 33 or what became Lot 33 and the Proposed Unsurveyed Drew Harbour Indian reserve;. However, the CCLW, O'Reilly and Canada were not aware that there was an overlap at that time. In particular:

~~b) — Canada denies that there was any such overlap, or any such definite overlap;~~

~~ab) Canada states that the CCLW was not aware at that time that there was any overlap or potential overlap between the Proposed Unsurveyed Drew Harbour Indian reserve and the “white settler” interests, as neither Priest’s survey nor the Proposed Unsurveyed Drew Harbour Indian reserve had been plotted into the provincial Crown’s survey-based land administration system at that time. Priest’s survey had not been filed with, or approved by, the provincial Crown and the Proposed Unsurveyed Drew Harbour Indian reserve had not been surveyed, the survey filed with, and approved by, the provincial Crown;~~

~~be) O'Reilly’s practice was to check into Crown grants, applications to purchase and surveys at the provincial Lands and Works Department shortly before at the time of allotment. This potential overlap would not have come to O'Reilly’s reasonable attention, or Canada’s reasonable attention, at that time as O'Reilly’s attendance at the Lands and Works Department in Victoria and a review of past Gazettes would not have found any active interests in purchasing some land below the narrow, low-lying isthmus in the Rebecca Spit Parcel. Priest’s survey was not filed with the Lands and Works Department at that time and neither Miller nor Sayward had filed an application to purchase that land at that time. Miller had published a Notice of his Intention to Purchase “Rebecca Spit” in the Gazette on July 17, 1884 but had not pursued an application to purchase. Sayward did not publish a Notice of his Intention to Purchase “Rebecca Spit” in~~

the Gazette until his notice dated October 26, 1886 and published November 4, 1886; and

~~cd)13~~ O'Reilly and Green did not know to look for, or see, Priest's Survey Posts, blazed boundary line ~~and/or~~ marked bearing trees from 1884.

b) ~~Canada denies that there was any such overlap, or any such definite overlap;~~

~~2121.~~ Canada denies the allegations of fact in paragraphs 21 and, 22 and 23 of the Revised Further Amended Declaration of Claim except where expressly admitted in this Response. In further response, and in response to the allegations of fact in paragraph 20 of the Revised Further Amended Declaration of Claim, Canada states that:

a) Canada denies that Skinner was a surveyor for the Indian Affairs department at that time. Skinner was a surveyor for the O'Reilly IRC;

b)~~21~~ Skinner's survey instructions (Skinner's Instructions) included the following:

- i) "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. 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 enclosing a plan of the proposed deviation";
- ii) "[b]efore leaving Victoria, you will supply yourself with copies of ... Crown grants and applications to pre-empt or purchase lands in the vicinity of the reserves ..."; and

- iii) “you must be governed by the Provincial land regulations”; and
- c)20 Canada admits that on April 21, 1888, the O’Reilly IRC Indian Reserve Commission surveyor Ashdown Green instructed surveyor Skinner to continue the surveys on the Northwest coast, including the survey of the Proposed Unsurveyed Drew Harbour Indian reserve;
- d) Skinner then obtained copies of Sayward’s application to purchase dated January 6, 1887, the filed Priest survey, and the Crown grant of Lot 33 to Sayward, shortly after April 21, 1888;
- e) Skinner then knew that Priest had posted corner posts on each side of the southern boundary of Lot 33 in 1884, before O’Reilly’s allotment, and that the Rebecca Spit Parcel overlapped with the Proposed Unsurveyed Drew Harbour Indian reserve by including the 20 Acre Parcel;
- f) Skinner then informed O’Reilly about the overlap shortly after April 21, 1888 and O’Reilly approved that the 20 Acre Parcel should not be included in the survey. O’Reilly approved this following Skinner’s Instructions, O’Reilly’s Instructions and the approach in the 1884 Crown Lands Act that generally required new surveys to tie-in with, and fit in with, the surveys already filed with the Department of Lands and Works and accepted by the Surveyor-General of British Columbia;
- g)21 Skinner conducted the survey of the Proposed Unsurveyed Drew Harbour Indian reserve on July 28, 1888 and found Priest’s posted corner posts on each side of the southern boundary of Lot 33; and
- hd)21 following O’Reilly’s approval, Skinner’s instructions, O’Reilly’s Instructions and the approach in the 1884 *Crown Lands Act* that generally required new surveys to tie-in with, and fit in with, the surveys already filed with the

Department of Lands and Works and accepted by the Surveyor-General of British Columbia, Skinner made the boundary line made by Priest's Survey Posts the northern boundary of the Indian reserve at the base of Lot 33. Skinner then set his own boundary survey posts (Skinner's Survey Posts) there; and

~~ie)-21~~ otherwise, Skinner field surveyed the proposed reserve generally following ~~Reserve Commissioner~~ O'Reilly's "~~rough~~" colour sketch and Minute of Decision. Skinner's surveyed reserve was larger in acreage (240.5 acres) than the acreage that O'Reilly had estimated (210 acres);

~~jb)-21~~ Canada admits that Skinner reported to ~~Reserve Commissioner~~ O'Reilly about alterations to two other proposed reserves for the Laich kwil tach (Euclataw) Indians in his reporting letter dated November 21, 1888, and did not report, in his reporting letter dated November 21, 1888, any "alteration" to the Proposed Unsurveyed Drew Harbour Indian reserve. Skinner had previously advised O'Reilly of this, and had obtained O'Reilly's approval to the "alteration", as set out in subparagraph (f) above;

~~k)-22~~ Skinner prepared a survey plan of the reserve from his field survey notes and O'Reilly approved the Drew Harbour Indian reserve (Surveyed Drew Harbour Indian reserve) as surveyed in Skinner's survey plan. On May 18, 1889, the CCLW approved the Surveyed Drew Harbour Indian reserve as surveyed in Skinner's survey plan; and

~~l)~~ O'Reilly confirmed that the 20 Acre Parcel should not be included in the Surveyed Drew Harbour Indian reserve when he approved Skinner's survey plan.

22. After the Surveyor-General of British Columbia had accepted Priest's survey, on or shortly before January 27, 1887, neither O'Reilly nor Canada would have been able to take any reasonable steps to challenge Sayward's application to purchase the Rebecca Spit Parcel, or his subsequent Crown grant, because:

- a) neither O'Reilly nor Canada had any evidence of any provable breach of the 1884 Crown Lands Act that would render Sayward's application to purchase or Crown grant voidable;
- i) the provincial Department of Lands and Works treated land as "unsurveyed" within the meaning of the Act until a survey of the land was filed with, and accepted by, the CCLW;
- ii) neither O'Reilly nor Canada were aware of any evidence that the Rebecca Spit Parcel was "occupied" within the meaning of the Act. The Royal Navy on the 1860-1864 Admiralty Chart, Priest, O'Reilly, Green and Skinner did not note any occupation of land in what became or was the Rebecca Spit Parcel; and
- iii) the provincial Department of Lands and Works only treated land as "reserved" within the meaning of the 1884 Crown Lands Act if the Lieutenant Governor had declared a (government) reserve by notice signed by the CCLW and published in the Gazette. However, from and after, at the latest, February 5, 1879, no notice of a reserve would be declared under the 1884 Crown Lands Act for an allotted Indian reserve, and an allotted Indian reserve would not be treated as "reserved" within the meaning of the 1884 Crown Lands Act, until after the Indian reserve was surveyed and a copy of the survey received by the Department of Lands and Works, in accordance with a resolution passed by the BC Legislature on February 5, 1879;
- b) Sayward had the legal right to acquire the Rebecca Spit Parcel under s 30 of the 1884 Crown Lands Act;

- c) Sayward was a well-known business person and would reasonably be expected to pay the full purchase price;
- d) Sayward’s statutory rights would have been considered paramount at the time over the allotted reserve which was made under orders-in-council that were exercises of prerogative power;
- e) under the provincial Crown’s system pursuant to the 1884 *Crown Lands Act*, and in the absence of evidence of “occupation” within the meaning of the Act, the CCLW would, *prima facie*, give priority to the first person, in this case Sayward, to file an accepted survey in support of a claimed interest in land;
- iA) any claimed interest that the We Wai Kai Nation had in the lands in any overlap was subject to previously-acquired rights under the 1884 *Crown Lands Act* and its predecessor legislation; and
- f) consequently, neither O’Reilly nor Canada could reasonably expect any success in challenging Sayward’s application to purchase or Crown grant before the CCLW, the Lieutenant Governor of British Columbia, or a court. It did not make sense for O’Reilly or Canada to challenge the application to purchase before the CCLW, the Lieutenant Governor of British Columbia, or a court;
- gi) B19 in any event, Reserve Commissioner O’Reilly and Canada the Indian Superintendent of British Columbia reasonably knew, in all the circumstances, including the provincial Crown’s on-going obstructionist approach in the establishment of Indian reserves when non-Aboriginal interests were at stake, that the CCLW and the Lieutenant Governor of British Columbia would not agree to permit some or all of Rebecca Spit to become part of the reserve because of the February 10, 1888 provincial Crown grant to Sayward and the prior “White settler” interests and. O’Reilly and also reasonably knew that contesting the validity of Sayward’s application to purchase or the provincial Crown grant to

Sayward, without the security of an approved survey for the Indian reserve, was not a reasonable course of action to take for the additional reason that as it would have resulted in delay in establishing the reserve obtaining the CCLW's approval of the surveyed Indian reserve once it was surveyed and in the potential for "white settlers" to seek other interests in the Proposed Unsurveyed Drew Harbour Indian reserve lands to the detriment of the We Wai Kai Nation. Accordingly, acting reasonably, they would not have sought that redress; and

hd)19 in practice, the CCLW's formal approval of the surveyed reserve was required followed by the provincial Crown's transfer of the surveyed reserve's underlying title to Canada before the proposed reserve could be established and become a reserve within the meaning of an *Indian Act* and before Canada gained discretionary control over the land.

23. Neither O'Reilly nor Canada knew about the potential for an overlap between the Rebecca Spit Parcel and the Proposed Unsurveyed Drew Harbour Indian reserve until, at the earliest, the publication by Sayward of his notice of his intention to purchase Rebecca spit in the Gazette on November 4, 1886. The survey season for 1886 was then over, and the 1887 survey season would not start until the spring of 1887, due to weather and transportation issues. However, before O'Reilly or Canada could get the Unsurveyed Drew Harbour Indian reserve surveyed and the survey filed with the CCLW for approval, Sayward filed his application to purchase, and the Priest survey, on January 6, 1887, and the Surveyor-General of British Columbia accepted Priest's survey on or shortly before January 27, 1887. Neither O'Reilly nor Canada had any reasonable opportunity to obtain and file an acceptable survey of the Unsurveyed Drew Harbour Indian reserve before then.

2423. In response to the allegations of fact in paragraph 24 of the Revised Further Amended Declaration of Claim, Canada admits that:

- a) on August 14, 1914, the McKenna-McBride Commission issued a Minute of Decision confirming the Surveyed Drew Harbour Indian reserve;
- b) the Surveyed Drew Harbour Indian reserve was further confirmed in the McKenna-McBride Commission's final report and approved by BC OIC 1923-911 on July 25, 1923 and by PC OIC 1924-1265 on July 19, 1924.

~~Canada denies the other allegations of fact. In further response, Canada states that~~

2524. The Surveyed Drew Harbour Indian reserve was formally established as an Indian reserve (Drew Harbour Indian Reserve) in 1938 when the provincial Crown transferred the underlying title to Canada pursuant to BC OIC 1938-1036 on July 29, 1938.

2625. In further response to the allegations in ~~paragraphs 23 to 26 of~~ the Revised Further Amended Declaration of Claim as a whole, the We Wai Kai Nation were a party to the claims decided by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, 2002 SCC 79 (*Wewaykum*). That decision decided that the reserves in question were not established, and did not become reserves within the meaning of an *Indian Act*, until BC OIC 1938-1036 on July 29, 1938. The principle of *res judicata* applies to the We Wai Kai Nation and the We Wai Kai Nation are precluded from taking a position inconsistent with the findings in *Wewaykum*.

VIII The We Wai Kai Nation's Alleged Use of Rebecca Spit

276. Canada denies the allegations of fact in paragraph 8 of the Revised Further Amended Declaration of Claim. Further in response, Canada states that:

a) in the 1700s and the first part of the 1800s, there were Coast Salish villages at Gowland and Cape Mudge and a Coast Salish defensive site on Rebecca Spit;

b) by sometime in the mid-1800s, the We Wai Kai Nation drove out the Coast Salish and established the We Wai Kai Nation's winter village at Cape Mudge; and

- c) there were no We Wai Kai Nation houses on the Rebecca Spit Parcel at the time of O'Reilly's allotment;
- i) the Royal Navy's 1860-1864 Admiralty Charts indicate a "Yaculta" village near Cape Mudge but do not indicate any Indian settlement or house at Drew Harbour or Rebecca Spit.
- ii) when Sproat made his Minute of Decision for a reserve at Drew Harbour, in 1879, he did not note any winter dwelling, Indian house, burial place, fishing station, old camping ground, cultivation or improvements. Sproat normally mentioned such matters if he found them;
- iii) when Priest did his survey of Rebecca spit in 1884, he did not note any Indian house or Indian uses. Priest was required by the land survey system set out in the s 70 of 1884 Crown Lands Act under the heading "Field Notes" to comply with the following:
- (12) Indian villages or settlements, houses and cabins, fields, or other improvements, shall be carefully described and noted
- iv) when O'Reilly allotted the reserve, with Ashdown Green, they did note several Indian houses next to the beach area on Drew Harbour, in the allotted reserve. They did not note any Indian houses or Indian uses on the Rebecca Spit Parcel; and
- v) when Skinner surveyed the reserve he found several Indian houses next to the beach area on Drew Harbour, in the surveyed reserve. He did not note any Indian houses or Indian uses on the Rebecca Spit Parcel.

IX Non-Indigenous Ownership and Uses of Rebecca Spit

28. From and including Sayward, the owners of the Rebecca Spit Parcel were as follows:

- a) Sayward from 1888 to 1906
- b) Joseph Austin Sayward from 1906 to 1909
- c) James Clandening from 1909 to 1930
- d) Joseph Gordon Clandening from 1930 to 1953
- e) Mary Elizabeth Clandening from 1953 to 1959
- f) the provincial Crown from 1959 to the present for use as the Rebecca Spit Marine Provincial Park

29. Non-Indigenous uses of the Rebecca Spit Parcel included the following:

- a) the Rebecca Spit Parcel was used for annual community picnics starting in the late 1890s and for jamborees and camping by the boy scouts while the Clandenings were owners;
- b) William Maxwell had a farm on the 20 Acre Parcel from about 1909 into at least the nineteen teens.
- c) Joseph Gordon Clandening lived on the Rebecca Spit Parcel in the 1920s and 1930s. He continued to live there after the second world war and operated a machine shop on the Rebecca Spit Parcel. The machine shop and his house, garden, boat dock and a picnic area were on the 20 Acre Parcel;
- d) a small parcel at the northern tip of the Rebecca Spit Parcel was expropriated in 1930 for use as a lighthouse; and
- e) the public has used the Rebecca Spit Parcel as a provincial park since 1959.

XV Canada Did Not Breach Any Statutory Duty

3026. Canada denies the allegations in paragraphs 27 and 28 of the Revised Further Amended Declaration of Claim in connection with an alleged breach of statutory duty. Canada did not breach any alleged statutory duty in the circumstances of this case. In particular:

- a) PC OIC 1880-1334, which governed the roles of O'Reilly and Skinner in the process leading to the formal establishment of Drew Harbour Indian Reserve in 1938, were exercises of federal prerogative powers, not ~~an~~ exercises of statutory powers;
- b) Canada denies that the Proposed Unsurveyed Drew Harbour Indian reserve and the Surveyed Drew Harbour Indian reserve were Indian reserves within the meaning of the *Indian Act*, RSC 1886, c 43, as amended, or the *Indian Act*, RSC 1906, c 81, as amended. The Surveyed Drew Harbour Indian reserve did not become an Indian reserve within the meaning of the *Indian Act* until the provincial Crown transferred the Surveyed Drew Harbour Indian reserve's underlying title to Canada in 1938; and
- c) the relevant *Indian Acts* did not set out any statutory requirements for the establishment of Drew Harbour Indian Reserve, or for the protection of any interest in the Proposed Unsurveyed Drew Harbour Indian reserve or the Surveyed Drew Harbour Indian reserve.

XIV Canada Did Not Breach Any Fiduciary Duty

27. ~~No federal Crown fiduciary duty arose from the alleged facts. In particular:~~

- ~~a) —no federal Crown fiduciary duty arose before the CCLW formally approved the surveyed reserve (that is, the Surveyed Drew Harbour Indian reserve). During that time period:~~

- i) ~~the We Wai Kai Nation did not have any specific, cognizable Aboriginal interest in Rebecca Spit being part of the Surveyed Drew Harbour Indian reserve arising from O'Reilly's allotment of the Proposed Unsurveyed Drew Harbour Indian reserve;~~

- iii) ~~Canada did not have a private-law-like discretionary control over whether Rebecca Spit would be included in the Surveyed Drew Harbour Indian reserve. At the time Canada was also acting in furtherance of the public interest in providing for settlement of "White settlers". Canada is no ordinary fiduciary and wears many hats and represents many interests and Canada denies that any action in furtherance of this public interest gave rise, in the circumstances, to any fiduciary duty owed to the We Wai Kai Nation;~~

- iv) ~~;~~ and

- v) ~~Canada was not under a private-law-like undertaking to seek to include Rebecca Spit in the Surveyed Drew Harbour Indian reserve;~~

- vi) ~~the approval in or before 1889 by O'Reilly and in 1889 by the CCLW of the Surveyed Drew Harbour Indian reserve crystallized any cognizable Aboriginal interest arising from the Proposed Unsurveyed Drew Harbour Indian reserve; and~~

- vi) ~~however, from a practical and functional point of view, Reserve Commissioner O'Reilly, including Skinner under him, acted as an agent of the provincial Crown when "white settler" interests were at stake; and~~

~~b) no federal Crown fiduciary duty arose after the CCLW formally approved the surveyed reserve, the Surveyed Drew Harbour Indian reserve. The Surveyed Drew Harbour Indian reserve did not include Rebecca Spit.~~

31. Canada denies the allegations in paragraphs 25 and 26 of the Revised Further Amended Declaration of Claim. In any event, any deprival of any WWKN interest in the Proposed Unsurveyed Drew Harbour Indian reserve was not caused by reason of any breach of fiduciary or statutory duty by Canada.

3228. Even if ~~In the alternative that~~ a fiduciary duty did arise before the CCLW formally approved the surveyed reserve, then. Canada denies the allegations in paragraph 29 of the Revised Further Amended Declaration of Claim. Further in response to the allegations in paragraphs 27, 28 and 29 of the Revised Further Amended Declaration of Claim in connection with an alleged breach of fiduciary duty, ~~No~~ no federal Crown fiduciary duty arose in the circumstances. Canada acted reasonably in the circumstances and denies any breach of ~~that~~ fiduciary duty: with regard to not including any allotted part of the Rebecca Spit Parcel in the reserve as surveyed in 1888 and subsequently transferred to Canada in 1938. In particular:

a) ~~27iv)~~ neither O'Reilly nor Canada would have been able to take any reasonable steps to challenge Sayward's application to purchase the Rebecca Spit Parcel, or his subsequent Crown grant of Lot 33. Canada refers back to the pleading above at paragraph 22 of this Further Amended Response;

b) the We Wai Kai Nation knew that the reserve did not include the Rebecca Spit Parcel. Priest's and Skinner's Survey Posts were visible to the We Wai Kai Nation for 30 to 40 years. Skinner's Survey Posts were marked "IND RES" and clearly indicated the boundaries of the reserve to the We Wai Kai Nation; and

c) ~~27ii)~~ notwithstanding this, the We Wai Kai Nation did not at any relevant time put Canada on notice that the We Wai Kai Nation wanted some or all of the Rebecca

Spit ~~Lot~~ Parcel to be in the Surveyed Drew Harbour Indian reserve, or otherwise rely on Canada to include some or all of the Rebecca ~~s~~Spit Parcel in the Surveyed Drew Harbour Indian reserve;

33. Further in response to the allegations in paragraph 29 (c) of the Revised Further Amended Declaration of Claim, O'Reilly did not allot that part of the Rebecca Spit Parcel that does not include the 20 Acre Parcel. Canada refers back to the pleading above at paragraph 17 of this Further Amended Response.

XIV Acquiescence and Consent

3429. In the event that Canada breached any alleged duty, then the We Wai Kai Nation acquiesced in and/or consented to the fact that the Surveyed Drew Harbour Indian reserve and the Drew Harbour Indian Reserve did not include the Rebecca Spit Parcel.

Particulars include:

- a) Priest's and Skinner's Survey Posts were visible to the We Wai Kai Nation for 30 to 40 years. Skinner's Survey Posts were marked "IND RES";
- b) the We Wai Kai Nation did not at any relevant time, and notwithstanding the non-Indigenous uses of the Rebecca Spit Parcel, put Canada on notice that the We Wai Kai Nation wanted some or all of the Rebecca Spit Parcel to be in the Surveyed Drew Harbour Indian reserve;
- c)23 while the We Wai Kai Nation sought additions to other surveyed reserves before the McKenna-McBride Commission, the We Wai Kai Nation did not seek an addition to the Surveyed Drew Harbour Indian reserve to add Rebecca Spit. This was at a time when William Maxwell operated a farm on the 20 Acre Parcel, the non-Indigenous people on Quadra Island had annual picnics on the Rebecca Spit Parcel, and the scouts had jamborees and camps on the Rebecca Spit Parcel;

- d) Chief Billy Assu of the We Wai Kai Nation gave remarks at the official opening of the provincial park at Rebecca Spit in June 1959. At the opening, Chief Billy Assu bestowed upon the Honourable Earle C. Westwood, the provincial Minister of Recreation and Conservation, the name “Gua-Gua-Klissa” meaning “one big mountain”. We Wai Kai Nation dancing was part of the opening ceremony; and
- e) Harry Assu of the We Wai Kai Nation co-wrote a book entitled Assu of Cape Mudge that was published in 1989. The book sets out a plan of the We Wai Kai Nation reserves that does not include the Rebecca Spit Parcel or any part of it. The book identifies three reserves that Harry Assu says should be reserves. These do not include the Rebecca Spit Parcel or any part of it.

XIII Damages

3530. Canada denies that the We Wai Kai Nation suffered any loss or damages caused by any alleged breach of duty by Canada.
3634. Canada pleads and relies on section 20 of the *Act*.
3732. In the event that ~~that~~ Canada breached any alleged duty causing damages to the We Wai Kai Nation then Canada says that the We Wai Kai Nation failed to mitigate those damages.

XIV Apportionment of Liability

3833. In the event that there was any fault in the reserve allocation process that caused the We Wai Kai Nation any alleged loss of the inclusion of some or all of the Rebecca Spit Parcel in the reserve then:
- a) the provincial Crown was solely responsible for that loss; and

- b) in the event that Canada is found liable for any damages for an alleged breach of duty then:
- i) the provincial Crown also caused or contributed to the acts or omissions relied on by the We Wai Kai Nation under s 14 (1) of the *Act*, or to the loss arising from those acts or omissions, and Canada pleads and relies on s 20 (1) (i) of the *Act*; and
 - ii) the We Wai Kai Nation 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 and the sub paragraph of this Response that is immediately above this subparagraph. Particulars of the We Wai Kai Nation's contributory negligence include failure to exercise due diligence in that the We Wai Kai Nation did not advise Canada at any reasonable time that the We Wai Kai Nation wanted the Rebecca Spit Parcel included in the Surveyed Drew Harbour Indian Reserve.

XVX Relief

3934. Canada seeks to have the claim dismissed in its entirety, with costs in accordance with ss 13 (1) and (2) of the *Act* and Part 14 of the Specific Claims Tribunal Rules of Practice and Procedure.

Dated: ~~September 19, 2014~~ April 15, 2016

June 7, 2017

Signature of _____
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Updated Table of Authorities

	Provision	Para.
1.	Article 13 of the <i>Terms of Union (British Columbia)</i> , UK OIC dated May 16, 1871, reprinted in RSBC 1979, vol 7 (App.)	5
2.	<i>Lands (Crown Amendment) Act</i> , SBC 1879, c 21, s 8	12 (g)
3.	<i>Crown Lands Act</i> SBC 1884, c 16, in force February 18, 1884 (1884 <i>Crown Lands Act</i>), s 70	12 (g), 16, 19 (c) (i) (A), 21 (d)
4.	<i>Specific Claims Tribunal Act</i> , SC 2008, c 22, ss 2	1, 31, 33 (b) (i), 34
5.	<i>Indian Act</i> , RSC 1886, c 43	26 (b)
6.	<i>Indian Act</i> , RSC 1906, c 81	26 (b)
7.	<i>Negligence Act</i> , RSBC 1996, c 333	33 (b) (ii)