

SPECIFIC CLAIMS TRIBUNAL

BETWEEN:

KITSELAS FIRST NATION

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	October 28, 2011	D É P O S É
Chantal Houle-Mrak		
Ottawa, ON	3	

CLAIMANT

v.

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development Canada

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: **KITSELAS FIRST NATION**
As represented by Stan H. Ashcroft, of
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I. Status of Claim (R. 42(a))

1. The Kitselas First Nation (the “First Nation”) submitted a claim to the Minister in April 2000 alleging, among other things, that the Crown breached its fiduciary obligations to the First Nation in connection with the exclusion of Lot 113 from Kitselas Indian Reserve 1 in 1891.
2. The Minister notified the First Nation in writing on October 21, 2009 of his decision not to accept the claim for negotiation.

II. (a) Validity (R. 42(b) and (c))

3. The Crown does not accept the validity of the claim set out in the Declaration of Claim, namely that the Crown had a fiduciary obligation to include Lot 113 in the land allotted as Kitselas Indian Reserve 1 (“IR 1”) by Indian Reserve Commissioner Peter O’Reilly.

III. Allegations of Fact – Declaration of Claim (R. 41 (e)): Acceptance, denial or no knowledge (R. 42(d))

4. In reply to paragraph 4 of the Declaration of Claim, the fact that the Minister did not accept the claim for negotiation is admitted in paragraph 2 above. Beyond the fact of rejection, the contents of the letter of October 21, 2009 are irrelevant and privileged.
5. The facts as set out in paragraphs 4 to 6 of the Declaration of Claim are irrelevant and refer to documents that are privileged.
6. The Crown admits the facts in paragraph 10, other than the Federal Order in Council was 1334, not 1344, but denies that they fully represent Commissioner O’Reilly’s terms of appointment.
7. With respect to paragraph 11, the Crown admits that Kitselas Chief Samuel Wise wrote to Commissioner O’Reilly but has no knowledge that Chief Wise wrote the letter “as instructed by Commissioner O’Reilly to determine the lands to be reserved”. Further, the Crown is unable to admit whether the sketch map attached to that letter included Lot 113.

8. The Crown admits the facts as set out in paragraph 12 of the Declaration of Claim.
9. With respect to paragraph 13, the Crown admits the facts, but states that the reason for omitting the ten acres from IR 1 was set out in a letter from Commissioner O'Reilly to BC's Chief Commissioner of Lands and Works, F.G. Vernon, and that Vernon approved both Commissioner O'Reilly's letter and Minute of Decision.
10. With respect to paragraph 14, the Crown admits the facts surrounding E.M. Skinner's survey in 1901 and F.A. Devereux's survey, other than the fact that the latter's survey was in 1901 and not 190. The Crown denies the other facts.
11. The Crown states that the facts set out in paragraphs 15 to 19 of the Declaration of Claim have no relevance to determining whether the Crown breached its fiduciary duties to the First Nation in failing to include Lot 113 in the land allotted as Kitselas IR 1 in 1891. Rather, these facts would only be relevant to the issue of compensation if the Crown breached its fiduciary duty, which is expressly denied. In addition, Canada states that the facts set out in paragraphs 15 to 19 do not contain the full factual record for assessing compensation as that was not considered by the parties prior to the filing of the claim with the Tribunal.
12. Subject to the qualifications set out in paragraph 11 above, the Crown states the following:
 - (a) with respect to paragraph 15, the Crown admits that part of the archeological site excavated by Louis Allaire in 1968 was located on Lot 113 and that Allaire's findings were published in 1978 and 1979. The Crown admits that part of the town of Kitselas was built on the site which was determined in the 1960s to have been part of the ancient aboriginal village site known as Gitaus;
 - (b) the Crown admits the facts in paragraph 16 except the fact that the Hudson's Bay Company ("HBC") paid the provincial government the same price as that paid for other town lots within Lot 113. There were three different prices for town lots depending on their proximity to the river, and the price paid by HBC to the

provincial government was not equivalent to the price paid for the same acreage of other riverfront lots;

- (c) with respect to paragraph 17, the Crown admits that the town of Kitselas was deserted after 1912 but pleads no knowledge of exactly when it became deserted. The fifty town lots within Lot 113 reverted to the province between 1918 and 1951 due to unpaid property taxes;
- (d) the Crown admits the facts set out in paragraph 18, but states that the recreation site report finds that the Indian site is located on IR 1; and
- (e) the Crown admits the facts in paragraph 19.

IV. Statements of Fact (R. 42 (a))

The allotment of reserves generally

13. Following British Columbia's entry into Canada in 1871, and pursuant to Article 13 of the *Terms of Union*, Indian reserve commissions were established to allot Indian reserves in British Columbia. The first commission was the Joint Indian Reserve Commission. It was established in 1876 and was comprised of three commissioners, one of whom was Gilbert Sproat. The Joint Indian Reserve Commission was followed in 1878 by Commissioner Sproat, acting as sole commissioner, until his resignation in 1880.

14. Following Sproat's resignation, in 1880 the Governor in Council approved the appointment of Peter O'Reilly, a County Court Judge and Stipendiary Magistrate, as Indian Reserve Commissioner, having been found suitable and recommended by senior federal and provincial government officials.

15. The order in council appointing Commissioner O'Reilly, P.C. 1334, stated that the duties of the commissioner "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". Commissioner O'Reilly's

terms of appointment included that he was to act in his own discretion “in furtherance of the joint suggestions” of the Chief Commissioner of Lands and Works and the Indian Superintendent for British Columbia “as to the particular places to be visited and the reserves to be established”. Commissioner 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.

16. In August 1880, the Deputy Superintendent General of Indian Affairs provided instructions to Commissioner O’Reilly with respect to the discharge of his mandate. Those instructions provided that, in allotting reserve lands, he should have “special regard” not just to the interests of the bands, but to the claims of “white settlers” as well. The instructions further provided, among other things, that Commissioner O’Reilly was to be careful not to disturb the Indians in the possession of any “villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached”.

17. In 1881, the Governor in Council extended Commissioner O’Reilly’s position indefinitely (he was originally appointed for only twelve months). O’Reilly remained reserve commissioner until his retirement in 1898.

18. The Crown in right of Canada lacked the sole authority to allot, set aside, or create reserves for the First Nation. The allotment and creation of reserves required the cooperation of the Crown in right of British Columbia because the lands upon which reserves for the First Nation were to be established were provincial Crown lands.

The allotment of reserves for the First Nation

19. In September 1891, Commissioner O’Reilly travelled along the Skeena River with the aim of setting aside Indian reserves for the First Nation and other bands. In anticipation of meeting with Commissioner O’Reilly, Chief Wise and other Kitselas chiefs wrote to Commissioner O’Reilly requesting that a rectangular parcel of land be set aside for the First Nation.

20. On October 5, 1891, Commissioner O'Reilly met with Chief Wise and other members of the First Nation about reserve allotments. Chief Wise identified the places the First Nation wished to have. After a long discussion of two and a half hours, Commissioner O'Reilly travelled along the river accompanied by Chief Wise, an interpreter, and five members of the First Nation, examining the places requested. Commissioner O'Reilly had another long conversation with Chief Wise in which the chief indicated that he would be content with a timber reservation above Kitselas canyon and a large village reservation.

21. The next day, Commissioner O'Reilly allotted several reservations for the First Nation, including IR 1 where he marked the location of the village. O'Reilly excluded from IR 1 a ten acre parcel – which would eventually become Lot 113 – on which a HBC storehouse and a steamboat landing were located.

22. Commissioner O'Reilly advised Chief Wise of the extent of the reserves he had allotted, including the exclusion of the ten acre parcel from IR 1. Chief Wise indicated at that time that he wanted another reserve for a new village. O'Reilly complied with this request, setting aside Kshish IR 4. In total, O'Reilly set aside six reserves in 1891 for the First Nation comprising an estimated total of 2910 acres, of which IR 1 contained an estimated 2110 acres.

23. In 1892, F.G. Vernon, British Columbia's Chief Commissioner of Lands and Works, approved Commissioner O'Reilly's Minutes of Decision for IR 1 and covering letter, which advised of Commissioner O'Reilly's reason for omitting the ten-acre parcel.

The exclusion of Lot 113

24. Commissioner O'Reilly excluded the ten-acre parcel because he believed "it would prove a convenience to the public to have this land declared a public reserve", specifically noting the presence of the HBC storehouse.

25. The Crown has no knowledge of exactly how long the HBC storehouse or the steamboat landing had been located on the parcel prior to 1891. However, prior to being acquired by the

HBC, the storehouse had belonged to the Singlehurst Mining Company, which had mining operations near Kleanza Creek in the vicinity of what later became Kitselas IR 1.

26. In 1891, Commissioner O'Reilly did not know that Lot 113 was the site of an ancient aboriginal village site. There were no First Nation buildings or improvements on Lot 113 in 1891. First Nation improvements in the vicinity of the HBC storehouse were included in the allotment of IR 1.

27. The ancient aboriginal village site subsequently discovered by archeologists in 1968 on Lot 113 – Gitaus – had been abandoned several centuries prior to European contact. At European contact, the First Nation occupied two village sites on the lands that subsequently became Kitselas IR 1. Gitlaxdzawk was a small village site on the right bank of the Skeena River. Gitsaex was a larger village on the left bank, and is in the same area as the village marked by Commissioner O'Reilly on his map of Kitselas IR 1. Gitsaex was the only site marked as a village on IR 1 when O'Reilly allotted IR 1.

Lot 113

28. In May 1901, E.M. Skinner surveyed Kitselas IR 1, as amended by Commissioner O'Reilly in 1893. Skinner noted that there was a large Indian house just inside the boundary of the reserve adjacent to Lot 113. The day after Skinner completed his survey of that part of IR 1 surrounding Lot 113, F.A. Devereux, a Provincial Land Surveyor, surveyed Lot 113 for HBC. Devereux determined that Lot 113 comprised 10.5 acres, several acres of which were swamp.

V. Relief (R. 42(f))

29. The Crown seeks to have the claim dismissed in its entirety.

30. The Crown seeks its costs in the proceedings.

31. If the Tribunal finds that the Crown had a fiduciary obligation to include Lot 113 in the land allotted as IR 1 by Commissioner O'Reilly, then the Crown asserts that the Province of

British Columbia contributed to the acts or omissions and any losses arising therefrom, as set out in subparagraph 20(1)(i) of the *Specific Claims Tribunal Act*.

32. Such further relief as this Honourable Tribunal deems just.

VI. Communication (R. 42(g))

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Dated: October 28, 2011



Signature of
 Respondent lawyer for Respondent

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