

SPECIFIC CLAIMS TRIBUNAL

SPECIFIC CLAIMS TRIBUNAL TRIBUNAL DES REVENDICTIONS PARTICULIÈRES		
F I L E D	September 29, 2011 Guillaume Phaneuf	D E P O S E
Ottawa, ON	1	

B E T W E E N:

KITSELAS FIRST NATION

Claimant

v.

HER MAJESTY THE QUEEN IN THE 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: September 29, 2011

Guillaume Phaneuf

(Registry Officer)

TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

As represented by the Minister of Aboriginal Affairs and Northern Development
Treaties and Aboriginal Government
Suite 600 – 1138 Melville Street
Vancouver, BC V6E 4S3
email: jacques.siegrist@inac-ainc.gc.ca

I. Claimant (R. 41(a))

1. The Claimant, Kitselas First Nation (“Kitselas”) confirms that it is a First Nation within the meaning of s. 2(a) of the *Specific Claims Tribunal Act*, by virtue of being a “band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, as amended, 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. Kitselas originally filed a claim respecting various alleged breaches of Canada’s fiduciary duties, statutory duties and/or their duty of care owed to Kitselas.
4. In a letter dated October 21, 2009, Canada stated “it is the decision of the Minister of Indian Affairs and Northern Development not to accept the Exclusion of Lot 113 from Kitselas IR 1 in 1891 specific claim for negotiation on the basis that there is no outstanding lawful obligation on the part of the Government of Canada”.
5. On November 19, 2009, Kitselas’ legal counsel, Mr. Stan Ashcroft, replied to Canada’s letter of October 21, 2009 on behalf of Kitselas re-stating some of the evidence that refutes the facts set out in Canada’s letter.
6. No further correspondence was received from Canada.

7. According to the status report on the Specific Claims Branch's website on July 28, 2011, the Specific Claim shows as "Not Accepted for Negotiations" as of October 21, 2009.

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

8. Kitselas does not seek compensation in excess of \$150 million for exclusion of Lot 113 from Kitselas Indian Reserve #1.

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

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

14.(1) Subject to section 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;

(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))

10. Commissioner O'Reilly's mandate was, as indicated in Federal Order in Council 1344, to allot reserve lands after ascertaining "accurately the requirements of the Indian Bands" and he was instructed by the Deputy Superintendent General of Indian Affairs to "interfere as little as possible with any tribal arrangements being specially 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".
11. On September 29, 1891, Chief Sam Wise on behalf of the Kitselas First Nation (the "Band") wrote to Commissioner O'Reilly stating, as instructed by Commissioner O'Reilly to determine the lands to be reserved, that a general

meeting had been held. He indicated that “we don’t enlarge the land in our modern days; but it was the same size we own years ago” and the “length we wish to have (to be reserved for us) is from Kshigingat on the upper side of Giatzilash village down to Gankshpai road (on the way down from Giatzilash village. The whole place squared off.”. A sketch map was attached to the letter and the area included what was later to be known as Lot 113.

12. In 1891, Commissioner O’Reilly arrived in Kitselas Canyon and met with the Band on October 5th and 6th at which time Chief Wise reiterated the Band’s request for reserve lands.
13. By Minutes of Decision dated October 6, 1891, Commissioner O’Reilly allotted 6 reserves to the Band. In allotting I.R. No. 1, Commissioner O’Reilly omitted a 10 acre parcel of land right in the centre of the reserve at its southern boundary stating “I have omitted from Reserve No. 1 Kitselas ten acres on the left bank of the river immediately below the canōn as I believe it would prove a convenience to the public to have this land declared a public reserve, and that you might think it advisable to act on my suggestion. The Hudsons Bay Company (“HBC”) have already erected a small storehouse thereon.”. This 10 acre parcel was Lot 113. BC’s Chief Commissioner of Lands and Works Vernon approved of O’Reilly’s Minutes on February 4, 1892.
14. Evidence indicates that the Band was not aware of the exemption of Lot 113 and there is ample evidence to indicate that Lot 113 had once been a significant winter village for the Band. At the time the reserve was to be surveyed by E.M. Skinner in 1901, he recorded the presence of a large Indian house on just the other side of the “HBC Lot’s” southeastern boundary. The “HBC Lot” was surveyed by F.A. Devereux for HBC on May 26, 190 and designated as Lot 113.
15. In 1968, a Canadian archaeologist, Louis Allaire, excavated the southern end of Kitselas canyon on the Skeena river, on the north bank, where the river swings

east. The remains of Kitselas' winter village, called Gitaus, were located and Allaire recorded that the boundary of Lot 113 ran right through the site. He also noted that the village site of Kitselas had been "disturbed by whites". His findings were published in 1978 and 1979 in the Mercury Series for the Archaeological Survey of Canada. There are other secondary sources that state that the town of Kitsilas was built on top of the Gitaus village site.

16. Lot 113 was surveyed into ordinary town lots in 1904. In 1906 the townsite lots were auctioned off. Block 1 was designated as "H.B.C.". On November 12, 1909 a letter was sent from the HBC's law firm to the Deputy Commissioner of Lands in Victoria stating that the HBC had been soliciting the Lands Department since 1901 and 1902 in attempts to have Block 1 crown granted to them. Eventually HBC paid the same price as the other lots had been auctioned for and on February 25, 1910 the BC government issued Crown Grant #475/244 to HBC for the sum of \$50.00.
17. The new Kitselas townsite became deserted after 1912 and due to unpaid taxes all of Lot 113 reverted to the Provincial Crown.
18. In the summer of 1967 a recreational Site Report entitled "Kitselas Indian Village" was completed by a BC Parks Branch field crew. As a result the BC Parks Branch lobbied the Director of Lands to add more district lots, including District lots 985 and 113, to Kleanza Creek Park to develop a historic Indian village. The report stated that the site was of interest because it contained an old historic Indian village, a cemetery and a pair of mysterious large flat stones. The report further stated that the main historic feature was owned by the Indians.
19. A provincial Order in Council was approved on July 5, 1979 wherein Lot 113 was placed within the boundaries of the provincial park known as Kleanza Creek.

VI. The Basis in Law on Which the Crown is said to have failed to meet or otherwise breached a lawful obligation:

20. This claim is based on the Crown's fiduciary obligations at common law relating to the failure to include Lot 113, which was the site of the old Kitselas Indian village, in the land allotted as Kitselas IR#1.

21. Kitselas seeks compensation from Canada for the loss of Lot 113.

Dated this 22ND of September, 2011


Stan H. Ashcroft
Counsel for the Claimant

Ashcroft & Company
Barristers & Solicitors
#205 – 1544 Marine Drive
West Vancouver, BC V7V 1H8
Phone: (604) 913-1611
Fax: (604) 913-1622
Email: stan@ashcroftlaw.com