

**SPECIFIC CLAIMS TRIBUNAL**

**BETWEEN:**

**LAKE BABINE NATION**

SPECIFIC CLAIMS TRIBUNAL		
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES		
F I L E D	July 31, 2012	D É P O S É
Amy Clark		
Ottawa, ON	6	

**CLAIMANT**

v.

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

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

**RESPONDENT**

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**RESPONSE**

**Pursuant to Rule 42 of the**

***Specific Claims Tribunal Rules of Practice and Procedure***

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This Response is filed under the provisions of the *Specific Claims Tribunal Act* and the *Specific Claims Tribunal Rules of Practice and Procedure*.

**TO: LAKE BABINE NATION**  
As represented by Maria Morellato, of  
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**I. Status of Claim (R. 42(a))**

1. The Lake Babine Nation (the "Nation") submitted a claim under the Specific Claims Policy to the Minister of Indian and Northern Affairs and Northern Development Canada (the "Minister") on or about June 27, 1997, with supplemental submissions submitted on or about August 18, 1998 (the "Original Specific Claim").
2. Pursuant to s. 42(1) of the *Specific Claims Tribunal Act* (the "Act"), the Original Specific Claim is deemed to have been filed with the Minister on October 16, 2008.
3. Canada admits that the Nation is a First Nation within the meaning of the *Act*, as pleaded in paragraph 1 of the Declaration of Claim (the "Declaration").
4. Canada also admits, in answer to paragraph 2, that the specific claim meets the conditions precedent, as set out in paragraph 16(1)(a) of the *Act*, and that the specific claim is properly before the Specific Claims Tribunal (the "Tribunal").
5. Canada says that paragraphs 3, 4 and 5 are irrelevant to the within proceedings.
6. In answer to paragraph 6, Canada says that, beyond the establishment of this Tribunal's jurisdiction, the contents of the May 25, 2011 letter from the Minister are either irrelevant to this proceeding, or if they are relevant, they are privileged.
7. Canada says that the legal identity of the Respondent should properly be "Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development".

**The Lands in Issue**

8. For ease of reference, the following is an outline of the lots/geographical areas that are the subject of this specific claim and their historical treatment:

- a) The Final Report of the Royal Commission on Indian Affairs for B.C., otherwise known as the McKenna McBride Commission (the Commission”), dated June 30, 1916 (the “Final Report of the Commission”), included a decision with respect to then Fort Babine Band’s Application No. 84, allotting “Indian Reserve” No. 25 on a lot **south** of the Fulton River at the confluence of the Fulton River and Babine Lake, comprising 128 acres, more or less, then referred to as ungazetted Lot No. 1353, and sometimes referred as the latter of “E. ½ Lot No. 1354 and the Lot directly N. thereof”, adjoining Lot No. 1611A to the West, which decision was approved by B.C. Order in Council No. 911 dated July 26, 1923, and Dominion Order in Council No. 1265 dated July 19, 1924, and schedules thereto, subject to survey (the “Proposed Reserve”).
- b) In or about 1927 or 1928, the Proposed Reserve was surveyed in a location other than as described by the Commission and approved by the referenced Orders in Council; the Proposed Reserve was surveyed **north** of the Fulton River at the confluence of the Fulton River and Babine Lake, on the then Eastern portion of Lot No. 1610A, consisting of 116.2 acres, including an island at the said confluence. The Eastern portion of Lot No. 1610A, and the island on which “Indian Reserve” No. 25 was situated, was renamed Lot No. 1353, (the “Current Babine I.R. No. 25”).
- c) At the same time, in or about 1927 or 1928, ungazetted Lot No. 1353 to the south of the Fulton River was surveyed and renamed Lots. 2173, 2174 and 2175, consisting of approximately 126, 1.00, and .73 acres respectively, adjoining Lot No. 1611A to the East.
- d) All lot references herein are to District Lots, Range 5, Coast Land District of British Columbia.

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

9. Canada does not accept the validity of any of the claims set out in the Declaration, including those in paragraphs 8, 28 and 29 of the Declaration, and in particular:

- a) 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, pursuant to s. 14(1)(c) of the *Act* or otherwise;
- b) that the Crown breached its common law fiduciary obligations to complete the reserve creation process relating to the lands south of the Fulton River, and in particular to ensure that these lands were surveyed as an Indian Reserve and protected for the exclusive use and benefit of the Nation; and
- c) that the Crown failed to follow through on promises made to the Nation to protect the lands and failed, when the opportunity arose, to remedy previous breaches of its fiduciary obligations by taking steps to reserve the lands for their benefit.

10. If Canada is liable, which is not admitted, Canada denies that the Nation suffered a loss as a result, and further Canada denies that it owes the Nation compensation as alleged at paragraph 30, or at all.

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

11. Canada admits the facts as set out in the following paragraphs of the Declaration: 10, 13, 20, 23 and 25.

12. Canada also admits the facts as set out in the following paragraphs of the Declaration, with exceptions as noted:

- a) In response to paragraph 11 of the Declaration, Canada admits the existence of a 1913 Bulkley Sheet Pre-emptor's Map, originating from the Province of British Columbia's Department of Lands (the "1913 Provincial Pre-emptor's Map"), which shows a portion of land south of the Fulton River, on the shores of Lake Babine depicted as "Ind. Res". However, Canada says that this map was created by the Province of British Columbia, the circumstances surrounding which

Canada has no knowledge, and Canada specifically denies that such an Indian Reserve, including a provisional reserve, existed in 1913.

- b) In response to paragraph 14 of the Declaration, Canada says that while the Minute of Decision of the Commission was dated May 30, 1916, it was not “issued” until the Final Report of the Commission, and then only as a recommendation of the Commission to the Province and Canada pursuant to the relevant legislation and instruments establishing the Commission.
- c) In response to paragraph 15 of the Declaration, Canada admits the existence of an undated sketch prepared by Ashdown Green, but says that “Indian Reserve No. 25” was not in fact an Indian Reserve, and further that pursuant to the Commission’s Application No. 84 Decision, proposed Indian Reserve No. 25 was stated to comprise 128 acres, “more or less”.
- d) In response to paragraph 19 of the Declaration, Canada admits the facts as alleged, with the exception of the misstatement of the word “inspected”, which should read “expected”.
- e) In response to paragraph 21 of the Declaration, Canada admits the facts as alleged, with the exception of the allegation that the survey contains an “old log bldg” on Lot 2174 close to the road. Canada says that the “old log bldg” referenced in the survey is located on the road between Lots 2174 and 2175.
- f) In response to paragraph 24 of the Declaration, while Canada admits that Hazelton Indian Agent S. Mallinson wrote a letter to D.M. MacKay, Indian Commissioner for B.C. dated May 30, 1940, Canada says that by way of the referenced letter, Mallinson specifically inquired whether it would be possible to obtain a portion of Lot 2173 located south of Fulton River, occupied by certain Indians, as a reservation “some 200 feet in length by 75 to 100 feet in depth”.

13. Canada denies the facts as set out in the following paragraphs of the Declaration: 9, 12, 16, 17, 18, 22, 26 and 27.

14. In response to paragraph 9 of the Declaration, Canada says that the allegations that the Nation “traditionally used and occupied the lands around Fulton River, where it meets Lake Babine”, and that “the Nation had at least two settlements in this area; one north of the Fulton River (Tachet), and one south of the Fulton River (Topley Landing)”, are both excessively vague, as to time period and location, and irrelevant to any matter properly before the Tribunal, and accordingly Canada denies paragraph 9. Canada further pleads s. 15(1)(f) of the *Act*, and says that a First Nation may not file a claim with the Tribunal that is based on aboriginal rights or title.

15. In response to paragraphs 18 and 22 of the Declaration, Canada denies that the said blue-print was “received from the Indian Commissioner in 1926”. Canada says that the copy of said blue-print in its possession was created subsequent to the November 1927 survey of Current Babine I.R. No. 25 by Surveyor V. Schjelderup (“Schjelderup”), and further says that it presently has no knowledge of a blue-print received from the Indian Commissioner in 1926, other than as referenced in a September 24, 1931 letter from G.C. Mortimer, Hazelton Indian Agent, to W.E. Ditchburn, Indian Commissioner for B.C., which blue-print is not attached.

16. In further response to paragraphs 18 and 22 of the Declaration, Canada admits that an undated blue-print depicts seven “Indian houses” on Lot No. 2173 south of the Fraser River, on the shore of Lake Babine, and that Schelderup’s 1927 survey and field-notes regarding Lot 2173 indicate that there were no improvements on Lot 2173.

17. In response to paragraph 27 of the Declaration, Canada admits the existence of the statutory declarations, but denies the remainder of the allegations therein.

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

##### **The Application for a New Reserve**

18. The Commission was established pursuant to Dominion Orders in Council dated November 27, 1912 and June 10, 1913, and Provincial Order in Council dated December 18, 1912.

19. The "Lands Applied For" under Additional Land Application No. 84 to the Commission, in relation to the Fort Babine Nation (now the Nation), are set out in the "Babine Agency – Additional Land Applications" schedule to the Final Report of the Commission as follows:

"Reserve" [quotations in original] at the confluence with the Babine River of a creek flowing south out of Fulton Lake, shewn on Pre-emptors' Selection Map 1913, Bulkley Sheet, but not appearing as a Reserve in the Official Schedule

20. The "Ind. Res" allegedly depicted on the 1913 Provincial Pre-emptor's Map, a creation of the Province of British Columbia, is not included in the 1913 Schedule of Indian Reserves in the Dominion, as noted in the Final Report of the Commission in respect of Application No. 84.

21. There was no existing reserve belonging to the Nation or any other First Nation, provisional or otherwise, in or near the location of the "Ind. Res." depicted on the 1913 Provincial Pre-emptor's Map, in 1913 or at any time prior to Application No. 84.

22. Indian Agent R. E. Loring testified before the Commission on November 4, 1915, with respect to Application No. 84, advising that a reserve could not be located south of the Fulton River.

23. In a September 30, 1931 letter from W.E. Ditchburn, Indian Commissioner for B.C., and the representative of Canada that reviewed the Final Report of the Commission, responding to a September 24, 1931 letter from Hazelton Indian Agent G.C. Mortimer, with respect to a blue-print alleged to indicate an old reserve to the north of Fulton River, he stated as follows:

...I beg to say that there was no old reserve at Fulton River and I do not know why a map showing such a reserve colored in red should have been issued.

24. A witness testified before the Commission on July 13, 1915, that members of the Nation occupied and/or used land north of the Fulton River, on a portion of then Lot No. 1610A, which forms part of the Current Babine I.R. No. 25.

25. A 1909 survey of Lot No. 1610A by J.H. Brownlee depicted three "Indian Shacks" on the eastern portion of Lot No. 1610A, on the shore of the Fulton River, at the confluence of the Fulton River and Babine Lake, across from an island, which also forms part of the Current Babine I.R. No. 25.

26. At all material times prior to the decision of the Commission with respect to Application No. 84, the whole of Lot No. 1610A was subject to an Application to Purchase by Jas Cronin, made in or around 1909, which was subsequently cancelled. More particularly, R.A. Renwick, B.C. Deputy Minister of Lands informed the Commission Secretary, by way of letter dated November 23, 1915, that "the whole of lot 1610A is covered by an application to purchase in the name of Jas Cronin, apparently in good standing".

27. Canada says, and the fact is that the decision of the Commission was to allot to the Nation one lot in respect of Application No. 84; the Final Report of the Commission, dated June 30, 1916 includes a May 30, 1916 Minute of Decision relating to Application No. 84, allotting Indian Reserve No. 25 to the Nation, being "ungazetted Lot No. 1353, Range 5, Coast Land District, containing an area of 128 acres, more or less", being the Proposed Reserve, and which was referenced in the Schedule of New Reserves for Babine Agency as Indian Reserve No. 25 (the "Commission's Application No. 84 Decision").

28. The Final Report of the Commission includes a 1916 map entitled "Babine Agency", dated 1916 and signed by Ashdown Green, showing "old reserves confirmed, cut-offs or reductions, and new reserves". The map depicts a new reserve to be created on the south side of the Fulton River, but does not show an existing/old reserve or proposed new reserve on the north side of the Fulton River.

29. On March 29, 1919, the Province of British Columbia passed the *Indian Affairs Settlement Act* (Statutes of British Columbia 1919, c. 32), and on July 1, 1920 Canada passed the *British Columbia Land Settlement Act* (Statutes of Canada 1920, c. 51), which approved the

Final Report of the Commission, subject to any further review the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada may find necessary.

30. Major J.W. Clark, on behalf of British Columbia and W.E. Ditchburn, the then Indian Commissioner for British Columbia on behalf of Canada, reviewed the Final Report of the Commission, and made no adjustments or alterations to the Commission's Application No. 84 Decision.

### **Approval of the Final Report of the Commission**

31. On July 26, 1923 and July 19, 1924 respectively, B.C. Order In Council No. 911 and Dominion Order in Council No. 1265 passed, approving the Final Report of the Commission as amended by Clark and Ditchburn, including the schedule of New Reserves for the Babine Agency attached thereto, with respect to Application No. 84 and Indian Reserve No. 25 as follows:

at the confluence with the Babine River of a Creek flowing S. out of Fulton Lake, being ungazetted Lot 1353, R. 5, Coast Land District, 128.00 Acres, more or less [the Proposed Reserve].

32. Pursuant to the provisions of B.C. Order In Council No. 911, and Dominion Order in Council No. 1265, as follows, the Proposed Reserve was required to be surveyed:

AND TO RECOMMEND That the Report of the Royal Commission of Indian Affairs as made under date of the 30<sup>th</sup> day of June 1916, with amendments thereto made by the representatives of the two Governments, viz: Mr. W.E. Ditchburn, representing the Dominion Government and Major J.W. Clark, representing the Province...be approved and confirmed....Provided that all new reserves and the lines necessary to define the cut-offs and the new boundaries of the reserves affected thereby be surveyed by duly qualified British Columbia Land Surveyors under the direction of, and at the expense of the Dominion Government. The appointment of such surveyors shall be subject to the approval of the Surveyor-General for the Province. The work to be carried out under the provisions of the Land Act and general instructions for British Columbia surveyors and the field notes and plans shall be subject to the approval of the

Surveyor-General for the Province, a copy of same to be deposited in the Department of Lands...Provided also that upon completion and due acceptance of such surveys, conveyance be made by the Province to the Dominion in accordance with...

### **Survey of the Proposed Reserve**

33. Neither of Ashdown Green's undated sketch referred to in paragraph 12 c), or Ashdown Green's 1916 Map referred to at paragraph 28 herein, constituted a formal survey. To the best of Canada's knowledge, Ashdown Green did not visit the Proposed Reserve, and based his sketches upon information provided through the Commission or from the B.C. Department of Lands.

34. By way of letter dated April 13, 1927, Indian Affairs Assistant Deputy and Secretary J.D. McLean instructed Surveyor Schjelderup to "make such surveys as are necessary to properly define the following Indian reserves", including to survey ungazetted Lot No. 1353, containing 128 acres, more or less, as Indian Reserve No. 25 in respect of Application No. 84. McLean instructed Schjelderup, "Before organizing, you should communicate with Indian Commissioner, Mr. W.E. Ditchburn and also with Mr. J.E. Umbach, Provincial Surveyor General".

35. The **Provincial** Surveyor General, J.E. Umbach ("Umbach") instructed Schjelderup to relocate the Proposed Reserve to the north of the Fulton River, indicating that this was the preferred location desired for the Proposed Reserve. More particularly, by way of letter dated May 21, 1927, Umbach wrote to Schjelderup instructing him as follows:

...I beg to advise you that in accordance with our interview it has been decided to cancel the survey of Lot 1610-A, Range 5, Coast District. It is understood that the area desired for the Indian Reserve is the easterly portion of said Lot 1610-A, lying north of the river, and that you intend to survey the reserve as Lot 1353, Range 5, Coast District [the Current Babine I.R. No. 25].

36. By way of the same letter dated May 21, 1927, Umbach, on behalf of the Province, instructed Schjelderup, "in view of the above" to survey the area lying to the south and adjoining Lot 1611-A on the east, being formerly ungazetted lot No. 1353, into one or more district lots.

37. In November of 1927, Schjelderup surveyed "Indian Reserve" No. 25 in relation to Application No. 84, north of the Fulton River, on what was formerly an eastern portion of Lot No. 1610A, and on an island located at the confluence of the Fulton River and Babine Lake, renaming it Lot No. 1353, comprising 116.2 acres, which now constitutes the Current Babine I.R. No. 25.

38. Schjelderup's field-notes for the Province, in relation to the survey of the Current Babine I.R. No. 25, depict the following: three "log cabins" with two nearby "stables" located within the Current Babine I.R. No. 25, on the bank of the Fulton River, just across from the island; four caches and two smokehouses on the island located within the Current Babine I.R. No. 25; and, an "Ind. Log Bld under construction" just north of the boundary of Current Babine I.R. No. 25, to be moved across the line on to the Current Babine I.R. No. 25.

39. Schjelderup's Indian Affairs Survey Record No. B.C. 581, dated December 3, 1927 regarding the Current Babine I.R. No. 25, labels the area near the three log cabins and two stables on the shore, and the island, as "Tachek" Indian Village.

40. Schjelderup's field-notes for Canada, in relation to the survey of the Current Babine I.R. No. 25, state that "The Tachek Village is very old", and further that "the island is considered part of Tachek Village", and contains two smokehouses and four caches.

41. In November of 1927, Schjelderup surveyed the Proposed Reserve (former ungazetted Lot No. 1353 south of the Fulton River) into three lots as follows: Lot No. 2173 of 126 acres; Lot No. 2174 of 1.00 acre; and Lot No. 2175 of .73 acres, which survey was at all materials times under the instruction of and at the expense of the Province. In his field-notes, Schjelderup noted that there were no improvements on Lot No. 2173.

42. Members of the Nation occupied and/or used Current Babine I.R. No. 25, and a portion of the Proposed Reserve, following the November 1927 survey of Current Babine I.R. No. 25.

43. Subsequent to being contacted by Daniel J. Leon on September 4, 1931, as alleged at paragraph 23 of the Declaration, Canada attempted to purchase and/or lease a portion of the Proposed Reserve from the Province of British Columbia, on behalf of the Nation, which the Province denied. As title to the Proposed Reserve remained with the Province, Canada had no ability to deal with the Proposed Reserve without the cooperation of the Province.

#### **The Establishment of the Current Babine I.R. No. 25**

44. The Current Babine I.R. No. 25 was not finally established as an Indian reserve within the meaning of the *Indian Act* until July 29, 1938. By B.C. Order in Council No. 1036 dated July 29, 1938, and schedules thereto, the Province formally transferred to Canada the administration and control of reserve lands in the Province, including the Current Babine I.R. No. 25, described as “at the mouth of Fulton River on Babine Lake, known as Lot 1353, Range 5, Coast District”, consisting of 116.2 acres.

45. In addition to the foregoing, Canada notes the following with respect to the survey of the Proposed Reserve to the north of the Fulton River, in the location of Current Babine I.R. No. 25:

- a) A member of the Fort Babine Band testified before the Commission on July 13, 1915 that he and his extended family lived north of the Fulton River, in an area corresponding to a portion of the Current Babine I.R. No. 25, and that there were no Indians living south of the Fulton River;
- b) At all material times, an Indian Settlement, sometimes referred to as “Tachek Indian Village”, and associated with the Fort Babine Band, was located on the Current Babine I.R. No. 25, including: as early as 1909; at the time of the relevant

Commission hearings; and, at the time of Schjelderup's 1927 survey of the Current Babine I.R. No. 25;

- c) The Fort Babine Band, or members thereof, did not have a permanent settlement and/or houses on the Proposed Reserve when Schjelderup conducted his survey of those lands in 1927;
- d) The Current Babine I.R. No. 25 was not available at the time of the Final Report of the Commission, due to an Application to Purchase, which was subsequently cancelled;
- e) The Current Babine I.R. No. 25 was no longer subject to the said Application to Purchase at the time of Schjelderup's survey in or about 1927/1928;
- f) A September 30, 1931 letter from W.E. Ditchburn, Indian Commissioner for B.C., and the representative of Canada that reviewed the Final Report of the Commission, includes the following:

The Royal Commission did set aside a reserve at Fulton River generally thought to be South of the River. When Mr. Surveyor Schjelderup went there he found several Indian families settled North of Fulton River and surveyed 116 acres describing the same as lot 1353.

- g) An October 2, 1940 Memorandum from the then Provincial Surveyor General, G.C. Green, to the Chief Forester, states the following with respect to the survey of the Current Babine I.R. No. 25:

In a number of instances, such as the present one, it was found that strict conformance with the description would leave out areas actually in occupation by the Indians, and it is considered that instructions issued to the surveyor permitted changes to be made in such instances. In the present case, the surveyor found that the Indians were occupying an area north of the river, and being Crown Land, he surveyed it in lieu of the area on the south side of the river.

- h) An October 15, 1940 Memorandum from the Provincial District Forester to the Chief Forester outlines that Daniel Leon and his family had lived at Fort Babine, and moved to Topley Landing, located within the Proposed Reserve, in or about 1927 or

1928, and further that “I understand the other Babine Lake Indians feel he has severed his connection with the band, and has no community rights to Babine Indian Reserve property”.

46. Canada says, and the fact is that the Nation was only ever allotted one reserve pursuant to the Commission’s Application No. 84 Decision, confirmed by B.C. Order in Council No. 911 and Dominion Order in Council No. 1265, and surveyed as the Current Babine I.R. No. 25, which reserve came into existence with the passing of B.C. Order in Council No. 1036 in 1938.

47. Canada pleads and relies generally on:

- a) Dominion Orders in Council dated November 27, 1912 and June 10, 1913, and Provincial Order in Council dated December 18, and related instruments, establishing the Commission;
- b) the *Indian Affairs Settlement Act* and the *British Columbia Land Settlement Act*, and related instruments;
- c) B.C. Order In Council No. 911 and Dominion Order in Council No. 1265, and related instruments; and
- d) B.C. Order in Council No. 1036, and related instruments.

**V. Relief (R. 42(f))**

48. Canada denies the entitlement of relief sought and seeks to have the claim dismissed in its entirety.

49. If Canada is liable, which is not admitted, Canada asserts that the Province of British Columbia contributed to the acts or omissions and any losses arising therefrom, as set out in Section 20(1)(i) of the *Act*.

50. If Canada is liable, which is not admitted, Canada denies that the Nation suffered a loss as a result, and further Canada denies that it owes the Nation compensation as alleged at paragraph 30, or at all.

51. If Canada is liable, which is not admitted, Canada says that in calculating an amount of damages or compensation, if any, pursuant to Section 20 (3) of the *Act*, the Tribunal must deduct the value of the benefit received by the Nation in relation to, but not limited to the following:

- a) the allotment and creation of the Current Babine L.R. No. 25, comprising 116.2 acres north of the Fulton River; and
- b) the continued occupation and use of portions of the Proposed Reserve by members of the Nation.

52. Canada pleads and relies on Section 20 of the *Act*, including, but not limited to Section 20(3).

53. Canada seeks to have its costs in the proceedings.

**VI. Communication (R. 42(g))**

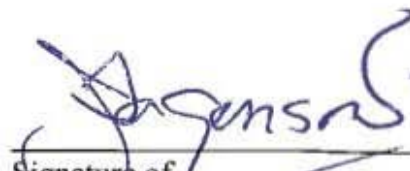
Respondent's address for service: Department of Justice  
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Attention: Tanya L. Jorgenson

Fax number address for service: (604) 666-0718

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Dated: July 31, 2012

  
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Signature of  
 Respondent     lawyer for Respondent  
**Myles Kiryan,**  
Deputy Attorney General  
**Per: Tanya L. Jorgenson**  
Department of Justice  
British Columbia Regional Office