

SPECIFIC CLAIMS TRIBUNAL	
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August 21, 2020	Isabelle Bourassa
Ottawa, ON	1

SCT File No.: SCT-7003-20

SPECIFIC CLAIMS TRIBUNAL

B E T W E E N:

KITSELAS FIRST NATION

Claimant

v.

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations**

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*.

August 21, 2020

Isabelle Bourassa

(Registry Officer)

**TO: HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
Assistant Deputy Attorney General, Litigation, Justice Canada
Bank of Canada Building 234 Wellington Street East Tower
Ottawa, Ontario K1A 0H8
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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 initially filed the O'Reilly Reduction of Kitselas I.R. 1 Specific Claim with the Department of Indian Affairs, Specific Claims Branch on or about October 2008 in respect of breaches by Canada relating to the Commissioner Peter O'Reilly cutting off 640 acres from Kitselas Indian Reserve No. 1 in 1893 (the "Claim").
4. On October 21, 2009, Michel Roy, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, wrote to Kitselas stating that "...it is the decision of the Minister of Indian Affairs and Northern Development not to accept for negotiation the specific claim concerning Indian Reserve Commissioner O'Reilly's reduction of Kitselas IR 1 by 640 acres in 1893 on the basis that there is no outstanding lawful obligation on the part of the Government of Canada".

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

5. Kitselas does not seek compensation in excess of \$150 million for the purposes of this Claim.

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

6. The following are the grounds for this Claim, as provided for in s. 14(1) of the *Specific Claims Tribunal Act*:

- (b) a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians- of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada; and
- (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))

7. On September 29, 1891, Kitselas Chief Samuel Wise and other Chiefs of Kitselas wrote to Commissioner O’Reilly (“O’Reilly”) requesting that lands be reserved for Kitselas stating:

We will be very glad if you will permit us to have as much land we desire to be reserved for us. On which are forefathers have been working and got their living and we wish by the grace of the Queen to keep the land hereafter?

This is the length we wish to have (to be reserved for us) is from Kshinginat on the upper side of Giatzilash village down to Gankshpai road (on the way down from Giatzilash village down to Gankshpai road (on the way down from Giatzilash village the whole place squared off.

We don’t enlarge the land in our modern days; but it was the same size we own years ago And hoping shall still be Useful to us in the future.

8. O’Reilly met with members of Kitselas on October 5 and 6, 1891. Chief Wise reiterated Kitselas’ request, as previously stated in his letter of September 29, 1891.

9. O’Reilly’s undated field notes regarding Kitselas Indian Reserve No. 1 (“IR 1”) describe it as follows:

No. 1 Kitselas, containing 2110 acres; it is situated at and includes, the cañon of Kitselas where very valuable fisheries exist.

The land is poor, and but little attempt has been made to cultivate. There is an abundance of timber for all purposes. The village, which is on the left bank of the river, contains nine houses, but there is evidence that a much larger settlement formerly existed here.

10. By Minutes of Decision dated October 6, 1891, O'Reilly allotted 6 reserves to Kitselas, one of which was IR 1. These Minutes of Decision describe IR 1 as follows:

Kitselas, a reserve of two thousand, one hundred, and ten (2110) acres, situated at the Kitselas canñ on the Skeena river.

Commencing on the right bank of the Skeena river, at a Cedar tree marked Indian reserve, and running South two hundred and sixty (260) chains; to the mouth of the Kle an za river; thence West one hundred (100) chains; thence North two hundred and sixty (260) chains, and thence East one hundred (100) chains to the place of commencement.

Ten (10) acres on the left bank of the Skeena river, at the mouth of the canñ, on which the Hudsons Bay Company's storehouse stands, is not included in this reservation.

11. On February 4, 1892, Chief Commissioner Vernon approved the October 6, 1891 Minutes of Decision. It is the Kitselas position that this completed the reserve allocation process with respect to IR 1 and it then became a reserve, or at least a "provisional reserve", set apart for the use and benefit of Kitselas.

12. In September of 1893, O'Reilly returned to Kitselas canyon and met once more with certain members of Kitselas. It would appear that Indian Superintendent Vowell ("Vowell") had visited Kitselas earlier in 1893 and advised Kitselas to abandon the village site on IR 1 in favour of Kshish Indian Reserve No. 4, an area located approximately 2 miles below. Following Vowell's advice, Kitselas had commenced building houses on IR 4 prior to O'Reilly's visit in the fall of 1893.

13. There appears to have been some confusion among Kitselas members about the extent of Commissioner O'Reilly's 1891 allotment on IR 1. A Kitselas member (William Young) spoke as follows at the meeting with O'Reilly on September 12, 1893:

I heard you had reserved ten miles for us. If you have done so we thank you. We saw the paper and it was only 3 ½ miles. We told Mr. Vowell we wanted 10 miles last year. He saw the place and said it was of no use, he said the Indians had better build below Ksh-ish and that Mr. O'Reilly would give it them when he came up.

14. It is not clear if Kitselas' desire for lands at Ksh-ish was the reason for O'Reilly's visit. At a meeting with Kitselas on September 12, 1893 his first words were:
- I see a number of you who were at the meeting two years ago. At that time you asked me to give you land above the cañon. I told you that place was worthless but you wanted it and I included it in the reserve. I hear you have found it is valueless and that you want to exchange it for land below the cañon. I do not want to do it, but if you wish it done I can do it. Mr. Todd tells me you wanted more land for a new townsite two miles below this at Ksh-ish
15. What is clear on the evidence is that Kitselas was not willing to give up any land on IR 1 in exchange for lands at Ksh-ish; instead, they appeared to be willing to forgo the approximately 6 ½ mile discrepancy between the requested "10 miles" and the allotted "3 ½ miles". In his diary, O'Reilly recorded the following in his entry for September 12:
- ... Held conference with the Inds at Canion. **They desired their new village site below the Canion enlarged, but objected to give up any acres above Canion.** Chief George said he was willing to relinquish - Told them to think it over before my return went in canoe through the Canion, the others walked - Marked of [sic] Res - for George left bank of river 5 miles above Canion where we camped. [Emphasis added.]
16. O'Reilly insisted that Kitselas "surrender" the northern portion of IR 1 in exchange for more land at Ksh-ish:
- I was here two years ago and I gave notice as I went up that I should return and all who wished to speak to me should meet me. If William was not here it was his [fault]. I never promised the Indians 10 miles. They asked for ten miles. I told them to shew me the best land and three people were with me when I marked the boundaries. William says the land is bad. I cannot help that. I did not come up here to discuss the [suitability] of the reserves, that is all settled. I have no wish to alter the boundaries of them. **I will not extend Ksh-ish unless you surrender an equal amount of land above the cañon.** [Emphasis added.]
17. Ultimately, Kitselas agreed to O'Reilly's terms, but while the reserve at Ksh-ish was extended by 490 acres (i.e. I.R. No. 4A), IR 1 was reduced by 640 acres.
18. O'Reilly cancelled the October 6, 1891 Minute of Decision for IR 1 and replaced it with a September 18, 1893 Minute of Decision.

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

19. Canada breached its fiduciary duty in protecting Kitselas's interests in land they sought to have added as reserve and was in fact allotted as IR 1 in 1891.
20. As a provisional reserve Kitselas had a cognizable Indian interest in IR 1. Canada had assumed discretionary control over the reserve lands.
21. Canada had fiduciary obligations of loyalty, good faith, full disclosure and ordinary prudence to act in the best interests of Kitselas to not surrender any portion of IR 1 in which they held a cognizable Indian interest.
22. The Crown's breached its statutory and fiduciary duties and legal obligation to protect the Kitselas interests in reducing IR 1 by 640 acres and in failing to ensure that the 640 acres in question continued to be held by Canada as reserve lands for Kitselas.
23. Kitselas seeks compensation from Canada for:
 - a. breaches of lawful obligation;
 - b. compensation for the 640 acres of IR 1 reserve land that was taken away; and
 - c. such other damages or compensation as this Tribunal deems, just.

Dated this 21st day of August, 2020



Signature of Solicitor
Stan H. Ashcroft

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