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## Canadian Specific Claims Tribunal's First Decision Case Comment on *Re Kitselas First Nation* 2013 SCTC 1

By Kate Buttery

When the *Specific Claims Tribunal Act* was enacted in 2008, there was a great deal of uncertainty among First Nations across Canada about what role the new Specific Claims Tribunal would play in their ongoing efforts to secure justice from Canada for historical claims, most of which relate to their reserve lands.

Having been in total control of the Specific Claims process for so long and having been able to ignore the findings and recommendations of the now defunct Indian Claims Commission, how would Canada respond to Superior Court judges making binding decisions on the validity and value of claims? With the release of *Re Kitselas First Nation*, the Tribunal's first substantive decision, we finally have an indication of what to expect.

### What it is about

When the Joint Indian Reserve Commission allotted reserve land to the Kitselas First Nation on the Skeena River in northwestern B.C. in 1891, it failed to include a 10.5 acre parcel of land on which a Hudson's Bay Company Storehouse was located. The HBC storehouse stood on Gitaus, an ancient village site of the Kitselas people. Based on this omission the Kitselas' submitted a specific claim, which, after being rejected by Canada, was filed with the Tribunal. The Tribunal's recent decision is on the issue of whether or not Kitselas had a valid claim.

### What the Tribunal said

Based in part on Kitselas elders' evidence of use and occupation of the Gitaus village site, the Tribunal concluded that Canada had a fiduciary duty to Kitselas to include most of the 10.5 acres in its reserve and had breached the duty.

The next stage of the hearing of the claim will be evidence, argument and a decision by the Tribunal on the value of the claim. The Tribunal can only award monetary compensation and its awards cannot exceed \$150 million.

### Why it matters

The decision is a first glimpse into the Tribunal's hearing processes. We can expect future claims to be handled similarly: first a decision on whether they are valid; if they are found to be valid, then a second decision on the amount of compensation owed.

Importantly for First Nations across Canada, the Tribunal appears willing to take seriously its special powers under the *Specific Claims Tribunal Act* by giving substantial weight to First Nation oral history evidence.

The Tribunal also rejected two of Canada's long-stated positions on specific claims in general. First, the Tribunal rejected Canada's argument that First Nations cannot rely on any evidence at the Tribunal that was not

included as part of their statement of claim filed with Canada at the outset of specific claims process. Second, the Tribunal rejected Canada's narrow reading of its fiduciary responsibilities for reserve-creation in B.C. This bodes well for First Nations across Canada.

We will not have a full picture of what this all means until stage two of the Kitselas claim hearing. Will Canada argue that the province, which is not bound by the Tribunal's decision, should pay part of any compensation owed Kitselas? Will the Tribunal accept such an argument? There is still the possibility that despite its victory, Kitselas may ultimately be unable to recover a portion of the Tribunal's final compensation award.

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