

FEDERAL COURT OF APPEAL

BETWEEN:

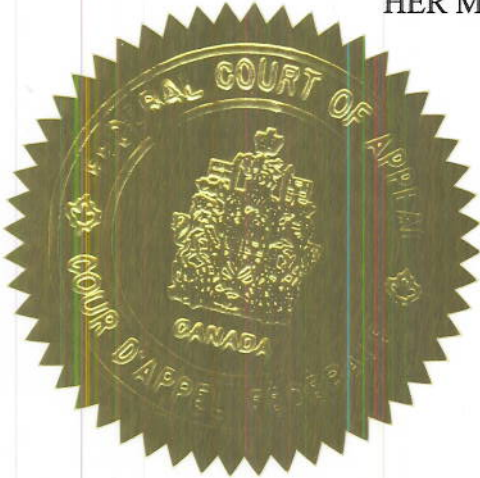
HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Applicant

and

KITSELAS FIRST NATION

Respondent



NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: MAR 2 1 2013

Issued by:



VIK PRASAD
REGISTRY OFFICER
AGENT DU GREFFE

(Registry Officer)

Address of
local office:

Federal Court of Canada
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TO: KITSELAS FIRST NATION
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APPLICATION

This is an application for judicial review in respect of:

1. The decision of the Specific Claims Tribunal dated February 19, 2013 in the matter of *Kitselas First Nation v. Her Majesty the Queen in the right of Canada (As represented by the Minister of Indian Affairs and Northern Development Canada)*, 2013 SCTC 1 (the “Decision”).

The Applicant makes application for:

2. An order quashing or setting aside the Decision of the Tribunal;
3. An order substituting the decision of the Tribunal with an order that Her Majesty the Queen in the right of Canada (the “Crown”)
 - a. did not have a fiduciary duty to the Kitselas First Nation in the reserve allotment process;
 - b. alternatively, did not breach any fiduciary duty to the Kitselas First Nation in connection with the exclusion of Lot 113 from the Kitselas Indian Reserve No. 1 in 1891;
4. Alternatively, an order referring the matter back to the Tribunal to a different decision-maker for determination in accordance with such directions as are considered to be appropriate;
5. Costs; and
6. Such other relief as this Honourable Court may deem appropriate.

The grounds for the application are:

Background

7. The Decision concerns the allotment of Indian reserves in British Columbia in the late nineteenth century by Indian Reserve Commissioner Peter O’Reilly.

8. Commissioner O'Reilly allotted six reserves for the Respondent Kitselas First Nation in 1891, including Indian Reserve No. 1 ("IR 1"), which encompassed over 2000 acres.
9. Commissioner O'Reilly recommended the exclusion of a 10 acre parcel of land from IR 1 because he believed "it would prove a convenience to the public to have this land declared a public reserve." Prior to 1891, the Hudson's Bay Company had already erected a small storehouse on the excluded parcel. There was also a steamboat landing there. This 10 acre parcel became known as Lot 113 in 1901, when the parcel was surveyed by a provincial land surveyor and determined to contain 10.5 acres.
10. The Crown in right of Canada lacked the sole authority to allot, set aside, or create Indian reserves on provincial Crown lands. The provincial government's Chief Commissioner of Lands and Works approved Commissioner O'Reilly's recommendation. The short-lived town of Kitselas emerged on Lot 113 after 1901, and was abandoned after 1913 when the Grand Trunk Pacific Railway was built on the other side of the river.
11. Archaeological research in the 1960s concluded that Lot 113 included part of an ancient aboriginal village site known as "Gitaus," which had been abandoned as a village site around 500 A.D. There is no evidence that O'Reilly knew or was informed about Gitaus, or was aware of any particular use, occupation or significance of the parcel.
12. There was evidence of First Nation improvements in the vicinity of Lot 113, but O'Reilly included all of these improvements in his allotment of IR 1.
13. There is no evidence of any complaint by any member of the First Nation about the exclusion of Lot 113 between 1891 and 2000, when the Respondent submitted a specific claim to the Minister of Indian Affairs and Northern Development (the "Minister") pursuant to the Crown's Specific Claims Policy.

14. The Respondent's specific claim alleged, among other things, that the Crown breached fiduciary obligations to the Kitselas First Nation in connection with the exclusion of Lot 113 from IR 1 in 1891.
15. The Minister notified the First Nation in writing on October 21, 2009 of his decision not to accept the claim for negotiation.
16. Pursuant to the *Specific Claims Tribunal Act*, S.C. 2008, c.22, on September 29, 2011 the Respondent filed a Declaration of Claim with the Specific Claims Tribunal. The Crown filed its Response on October 28, 2011.
17. On July 3, 2012, by consent, the Tribunal ordered that the hearing of the matter proceed in stages. That is, the issue of the validity of the claim was bifurcated from the issue of compensation, if any. The terms of this bifurcation order provide that "the second stage of this claim pertaining to compensation, if necessary, will not begin until the issue of validity is decided and the parties have exhausted any rights they may have for judicial review to the Federal Court of Appeal or appeal to the Supreme Court of Canada."
18. During 2012, the parties filed memorandums of fact and law, an Agreed Statement of Facts and a Common Book of Documents. The claim was heard on the First Nation's Indian Reserve 1, near Terrace, British Columbia, on November 20, 21 and 22, 2012 before Mr. Justice Harry Slade.
19. In the Decision, the Tribunal held that
 - a. The Crown had a fiduciary duty to the Kitselas First Nation in the reserve allotment process;
 - b. The Crown breached its fiduciary duty in two respects: 1) by failing to disclose the exclusion to the First Nation in an appropriate manner; and 2) by excluding more land than the one acre requested in 1892 by the Hudson's Bay Company, which constituted a failure to act reasonably in the circumstances.

- c. The Crown was the exclusive intermediary between First Nations and the provincial government and was thus solely liable for breaches of duty in connection with the allotment of Indian reserves.

20. Section 34 of the *Specific Claims Tribunal Act* provides that a decision of the Tribunal is subject to judicial review under section 28 of the *Federal Courts Act*.

Errors in the Decision

21. In making the above findings, the Crown says that the Tribunal
 - a. acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
 - b. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
 - c. erred in law in making its decision, whether or not the error appears on the face of the record;
 - d. based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it;
 - e. acted in any other way that was contrary to law.
22. The Tribunal erred in law when it found the existence of a fiduciary duty in the circumstances. More specifically, the Tribunal erred by finding the existence of a cognizable Indian interest, discretionary control by the Crown over a cognizable Indian interest, and a fiduciary undertaking based on Article 13 of the *Terms of Union* upon which British Columbia joined Confederation.
23. The Tribunal erred in mixed fact and law when it concluded that the Crown breached its duty by failing to make full disclosure appropriate to the matter at hand and by failing to act reasonably and with diligence with regard to the best interest of the Kitselas First Nation.

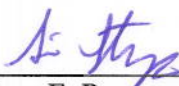
24. The Tribunal erred in mixed fact and law when it concluded that there were no “claims of white settlers” in relation to Lot 113, which was a site of strategic public importance for the regional transportation network at the time.
25. After correctly finding that Commissioner O’Reilly was not informed by the Kitselas First Nation of the historical existence or cultural significance of the ancient village site of Gitaus, the Tribunal erred in mixed fact and law when it found that the Crown breached a fiduciary duty by not including Lot 113 as a reserve in 1891.
26. The Tribunal erred in fact when it concluded that:
 - a. Commissioner O’Reilly did not disclose to the Kitselas First Nation the exclusion of Lot 113 from IR 1;
 - b. contrary to the Agreed Statement of Facts, that the ancient village of Gitaus had not been abandoned in or about 500 A.D;
 - c. the land at Lot 113 was being used by the Kitselas First Nation at all in or around 1891 or that it was being used more intensively compared to land that was reserved;
 - d. there were visible indications of the use of the Gitaus village site in 1891; and
 - e. the ancient village of Gitaus was the same parcel of land as Lot 113.
27. The Tribunal erred in mixed fact and law when it concluded that the Crown is solely liable for any loss suffered by the Respondent as a result of the exclusion of Lot 113.
28. The Tribunal failed to observe a principle of natural justice or procedural fairness when it found the existence of a fiduciary duty based on Article 13 – a legal theory that was not advanced by either party and on which the Crown did not have an opportunity to provide submissions.
29. Such further and other grounds as counsel may advise and the Court may permit.

This application will be supported by the following material:

30. Certified copy of the Tribunal's file;
31. Affidavit of Natasha Muskovic;
32. Such other material and affidavits as counsel may advise and this Honourable Court may permit.

Pursuant to Rule 317 of the *Federal Court Rules*, the applicant requests the Specific Claims Tribunal to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the *Tribunal* to the applicant and to the Registry: a certified copy of the Tribunal's Record in file number SCT-7003-11.

DATE: March 21, 2013



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File: 2-276060

Solicitor for the Applicant

THIS NOTICE OF APPLICATION IS PREPARED ON BEHALF OF THE APPLICANT BY THE DEPUTY ATTORNEY GENERAL OF CANADA WHOSE PLACE OF BUSINESS AND ADDRESS FOR SERVICE IS THE DEPARTMENT OF JUSTICE, 900 - 840 HOWE STREET, VANCOUVER, BRITISH COLUMBIA, V6Z 2S9, TELEPHONE: 604-775-6015, FACSIMILE: 604-666-5925, ATTENTION: Rosemarie Schipizky.