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CITATION: 2013 SCTC 1
DATE: 20130219

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN: KITSELAS FIRST NATION Claimant **– and –** HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Stan H. Ashcroft, for the Claimant Rosemarie Schipizky and Chris Elsner, for the Respondent **HEAR.D:** November 20, 21 & 22, 2012

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Alberta v Elder Advocates of Alberta Society, 2011 SCC 24, [2011] 2 SCR 261.
Guerin v R, [1984] 2 SCR 335, 13 DLR (4th) 321.
Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511.
Mitchell v MNR, 2001 SCC 33, [2001] 1 SCR 911.
R. v Sparrow, [1990] 1 SCR 1075, 70 DLR (4th) 385.
Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245.
Williams v Scott, [1900] UKPC 7 (BAILII), 1900 AC 499 (PC).

Statutes and Regulations Cited:

British Columbia Terms of Union, RSC 1985, App II, No 10, Art 13.
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5, s 91(24).
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
Indian Act, 1876, SC 1876, c 18.
Specific Claims Tribunal Act, SC 2008, c 22, ss 14(1)(c), 15(1)(f).

Headnote:

Aboriginal Law – Specific Claim –Reserve Creation – British Columbia — Village Sites – Article 13, Terms of Union- Joint Indian Reserve Commissioner instructions – Oral History – Fiduciary Duty - Whether the Claimant First Nation had a cognizable interest in a 10.5 acre parcel of land that the Joint Indian Reserve Commissioner did not include in the allotment of their reserve – In the affirmative, whether the Crown, Canada, assumed discretionary control over that interest.

This specific claim arises out of the non-inclusion of a 10.5 acre parcel of land in a reserve initially set apart in 1891 for the Kitselas Nation by the Joint Indian Reserve Commission

("JIRC"). The excluded portion included the site of an ancient village site, Gitaus. A Hudson's Bay Company Storehouse was located on the subject 10.5 acres.

The Claimant First Nation filed a claim with the Minister in April 2000. The Minister notified the Kitselas First Nation of its decision not to negotiate the claim on October 21, 2009. The Claimant filed a Declaration of Claim with the Specific Claims Tribunal on September 29, 2011.

The Crown obligation is assumed by Article 13 of the Terms of Union, which defines a specific obligation, assumed in the broader context of the fiduciary relationship that originated with the "historic powers and responsibility assumed by the Crown" in relation to Indian interests in land. The intent is based on habitual use of the land, a factor that the JIRC was required to consider. The Crown undertook discretionary control of this interest at the earliest stage of the reserve creation process.

The Kitselas used and occupied the Gitaus site. In the context of Article 13 and the terms of operation of the Joint Indian Reserve Commission, the Claimant established that there was a cognizable interest.

The Crown had a fiduciary duty to ensure that Gitaus (now known as Lot 113) was allotted as reserve in 1891, with the exception of the 1 acre requested by the Hudson's Bay Company for their storehouse.

Held: The Claimant Kitselas First Nation has established a breach of legal obligation of the Crown.

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I. HISTORY

A. The Claim

[1] This specific claim arises out of the non-inclusion of a 10.5 acre parcel of land in a reserve initially set apart for the Kitselas Nation in 1891.

[2] The excluded portion included the site of an ancient village, Gitaus. Many centuries before colonization there was a shift of the Kitselas population toward a village known as Gitsaex, located a short distance to the north at a narrows of the Skeena River. Gitsaex and another village, Gitlaxdzawk, a fortress on the opposite bank of the Skeena, were strategically located for the collection of tolls on travellers at the narrows known as the Canyon.

[3] By 1891 the indigenous population of the region had been decimated by epidemics of smallpox and measles. A population, by some accounts as high as 6,000, had been reduced to 300 or fewer.

[4] There were, however, dwellings at the Gitaus site in 1891. It was also the southern terminus of a portage bypassing the Canyon up to Gitsaex.

[5] The *Indian Act, 1876*, SC 1876, c 18 constituted the Kitselas peoples as a "band". The *Specific Claims Tribunal Act*, SC 2008, c 22, (the "*Act*") uses the term "First Nation" to describe a band.

[6] The Kitselas First Nation submitted a specific claim to the Minister in April 2000 alleging that the Crown breached its fiduciary obligations to the Kitselas First Nation in connection with the exclusion of Lot 113 (as the Gitaus site had become known) from Kitselas Indian Reserve No. 1.

[7] The Minister notified the Kitselas First Nation in writing on October 21, 2009 of his decision not to accept the claim for negotiation.

B. The Evidence

1. Introduction

[8] The historical context for this specific claim is the same as that considered by the

Supreme Court in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]. Much of the evidence in that case is also in the record before the Tribunal. A significant factual distinction in the present claim is that the land here in question, unlike that in *Wewaykum*, was not allotted by the Indian Reserve Commission, and thus was not a provisional reserve.

2. Documentary Evidence and Agreed Facts

[9] British Columbia entered confederation in 1871 under terms set out in the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*]. Article 13 addresses Indians and Indian lands:

> The charge of Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of Land of such extent as it has hitherto been the practice of the British Columbia government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of Land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.
>
> [Emphasis added]

[10] Canada and British Columbia negotiated the terms on which effect would be given to the requirement that land be set aside for the Indian Nations. In the result, Canada and British Columbia approved, by Executive Orders, the establishment of the Joint Indian Reserve Commission ("JIRC"). The Memorandum attached to the Governor in Council's approval on November 10, 1875 provided, in part:

> That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly.
>
> That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian Tribes speaking the same language) in British Columbia, and after full

> inquiry on the spot into all matters affecting the question, to fix and determine for each nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.
>
> ...
>
> That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments which contemplates a "liberal policy" being pursued towards the Indians, and in the case of each particular nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the White settlers.
>
> [Emphasis added]

[11] The JIRC was established in 1876. There were three commissioners: Alexander C. Anderson (appointed by Canada), Archibald McKinlay (appointed by British Columbia) and Gilbert M. Sproat (jointly named by Canada and British Columbia).

[12] The JIRC as originally constituted was dissolved late in 1877. Commissioner Sproat continued as the sole Commissioner. A Memorandum annexed to the Order(s) in Council of March 1878 stated:

> By this means the continuity of the present Commission would be preserved and the Indians would have a guarantee that the same policy which has hitherto guided the Commission in dealing with their Reserves would be continued in the future.
>
> [Emphasis added]

[13] Commissioner Sproat resigned in 1880. Peter O'Reilly was appointed by Order of the Governor in Council to serve as Indian Reserve Commissioner for twelve months. A year later, the Governor in Council extended Commissioner O'Reilly's position indefinitely.

[14] Order in Council 1334, appointing Commissioner O'Reilly, included the following:

> ... That it consequently becomes necessary to procure the services of a suitable person to fill the position rendered vacant by Mr. Sproat's resignation; the responsible duties connected with which consists mainly in ascertaining accurately the requirements of the Indian Bands in that Province, to whom lands have not been assigned by the last Commission, and allotting suitable lands to them for tillage and grazing purposes. ...
>
> That Mr. Trutch suggests that the Reserve Commissioner instead of being placed, as at present, under the direction of the Indian Superintendent for British

> Columbia, should act on his own discretion in furtherance of the joint suggestions of the Chief Commissioner of Lands and Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established and that the action of the Reserve Commissioner should in all cases be subject to confirmation by those officers; and that, failing their agreement, any and every question at issue between them should be referred for settlement to the Lieutenant-Governor, whose decision should be final and binding. ...
>
> [Emphasis added]

[15] In August 1880, the Department of Indian Affairs provided instructions to Commissioner O'Reilly with respect to the discharge of his mandate in a letter that included the following:

> ... The Order in Council as you will observe provides inter alia that you are not to be under the Indian Supt. at Victoria as Mr. Sproat lately was but are to act on your own discretion upon the joint suggestions of the Hon. The Chief Comm of Lands & Works for British Columbia representing the Provincial Government and M. Powell Esq. M.D. Indian Supt for that Province representing the Dominion Government as to the [illegible] to be visited and reserves to be assigned by you to the Indians.
>
> In allotting Reserve Lands you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a liberal policy being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of the Reserves as well as in all other matters, informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scale so as ultimately to enjoy all the privileges and advantages enjoyed by their white fellow subjects.
>
> ...
>
> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to initiate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specifically 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 especially attached. ...
>
> You will observe also from the copy of the Order-in-Counctl enclosed herein that your decisions as to Reserves allotted are subject to the joint approval of the Hon' Commissioner of Lands and Works for British Columbia and the Indian Supt for the Province and in the event of their disagreement on any question, the same is

> to be referred to His Honor the Lt Gov of British Columbia whose decision is to be final.
>
> [Emphasis added]

[16] Commissioner O'Reilly was also directed to Commissioner Sproat's 1878 Report of Progress. In his report, Commissioner Sproat stated in part:

> My duties to the Indians, however, form only part of my work as a Reserve Commissioner. I have, to justify the confidence which successive governments of the province have extended to me, by a proper care of the interests of the white settlers who of course, form the backbone of our mixed population.
>
> The proper management of Indian affairs in this province is a difficult practical problem, but so far as the assignment of land reserves is concerned the broad lines to be drawn are, in my judgment, very obvious. ...
>
> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> [Emphasis added]

[17] The territory historically occupied by the Kitselas is along the Skeena River at an area upstream from Port Essington, which is located near the mouth of the river. Indigenous occupation in the area has been dated as far back as 4,000 years.

[18] The Hudson's Bay Company ("HBC") and others had sent explorers up the Skeena River at various times in the 1800s. By the mid-1860s, the Skeena had become a supply route to the interior. Canoes and sternwheelers were primary modes of transport. Port Essington was the starting point for the Skeena River steamers. The first sternwheeler reached 144 kilometers (or some 90 miles) up river in 1864. There was a steamboat landing at the site of Gitaus.

[19] Gold was discovered in the Kitselas territory in 1870. At an unknown date, the Singlehurst Mining Company erected a building on the left bank of the Skeena in the area of the Canyon. This building was acquired by the HBC, and was being used as a storehouse in 1891.

[20] In September 1891, Commissioner O'Reilly travelled along the Skeena River to identify land to set apart as reserve for the Kitselas and other Indian Nations.

[21] In anticipation of meeting with Commissioner O'Reilly, Chief Samuel Wise and other Kitselas Chiefs wrote to Commissioner O'Reilly to request that land be set aside for the Kitselas peoples. The letter, dated September 29, 1891, read, in part:

> We will be very glad if you will permit us to have as much land we desire to be reserved for us.
>
> On which our forefathers have been working and got their living. And we wish by the grace of the Queen to keep the land hereafter.
>
> And we also; desire; mostly (that after your work respecting the land we wish to be reserved for us) to be at peace with others and no more to be deprived of the land of our own forefathers.
>
> This is 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.
>
> We don't enlarge the land in our Modern days; but it was the same size we own years ago. And hoping shall still will be Useful to us in the future.

[22] The requested land extended from Gitsaex (Giatzilash), ten miles along the Skeena in each direction.

[23] On October 5 and 6, 1891, Commissioner O'Reilly met with Chief Wise and other members of the Kitselas Nation. Commissioner O'Reilly's written record includes the following:

> Kitselas 5th Oct 91
>
> Rained incessantly all night. Tent leaks badly everything damp and uncomfortable. Arrived at Canon 10 a.m. Held meeting eleven Inds. - present. Peter Haldane Interpreter. The Chief Samuel Wise reiterated the demand made in his letter for [space] miles of the river.
>
> Tuesday 6th Oct.
>
> Fine day - up at 5 Frank [illegible] as cook and did very well. Proceeded down the river at 7:30 -Marked off Timber Res., poor quality, including small fishery; also Village Res which commences about 2 miles above Village - includes all Canon and about 3 miles below, except about 10 acres at HB Warehouse.

[24] The following was recorded of the exchange between Commissioner O'Reilly and Chief

Samuel Wise at Kitselas on October 5, 1891:

> 12 present Kitselas Cañon
>
> Monday Oct. 5th / 91
>
> Ag [sic] Todd
> Pop n 300 according to Indians Interpreter Peter Haldane
> Chief Sam Wise
>
> *Chief Sam Wise*:
>
> We Know you are authorized by the Gov. to define our reserves and you know by the letter I gave you yesterday the land I want reserved [sic] it includes all the land we use. I should not ask for that extent if it were of no use to us. We get all the timber to build our villages in the upper part of the land. In the lower part are the rocks, we get fish. On the mountains we hunt and get berries to dry. We also make canoes of the trees on the river banks which we sell to other Indians. At the foot of the mountains we put up our tents. On your way down you will see some streams where we fish. They are all useful to us. We all hope our children will be able use them and that their number will increase [although] we are not [as many now as we have been]. [We hope you will give us] the land we ask for [unreadable] [land in] the other village [illegible] [we work on boundaries]. We hope when you have finished your work we shall be at peace and not be troubled.
>
> *Luke*: We cannot say anything more than the Chief has said and the places he mentioned to be reserved for us. And all the people were glad when they heard you were coming.
>
> And you have seen all the places. We put our building on these places as we make our living at them as our forefathers did. We wish to know how long we can use the land after it is reserved.
>
> *Commissioner O 'Reilly:*
>
> How could I define where you go to hunt? You go everywhere, the same with regard to the berrying grounds. When the reserves are made surveyors come and define the boundaries and maps will be made and sent to the Chief. Luke asked how long they were to use the reserves. I answer forever. I am afraid someone has told him something to the contrary. Tell me if it is so and I will explain it to them. I have no object in deceiving you. I will tell you what I can do and what I cannot. I cannot give you the reserve you ask for, ten miles upstream and ten miles down. Wherever your villages, gardens, and timber lands are I will give you a reserve that will embrace all.
>
> [Emphasis added]

[25] After meeting with the Kitselas on October 6, 1891, Commissioner O'Reilly drafted Minutes of Decision which described the areas he recommended reserved for the Kitselas

Nation. He recommended six reserves, totaling 2910 acres, as follows:

1. IR No. 1 - 2110 acres
2. lR No. 2 - 240 acres
3. IR No. 3 - 90 acres
4. IR No. 4 - 130 acres
5. IR No. 5 - 323 acres
6. IR No. 6 - 17 acres

[26] Commissioner O'Reilly described IR No. 1 as follows:

> Kitselas Indians
> No. 1
>
> Kitselas, a reserve of two thousand, one hundred, and ten (2110) acres, situated at the Kitselas Cañon on the Skeena river.
>
> ...
>
> Ten (10) acres on the left bank of the Skeena river, at the mouth of the canon, on which the Hudson Bay Company's storehouse stands, is not included in this reservation. ...
>
> [Emphasis added]

[27] O'Reilly was accompanied by Ashdown Green, a surveyor. Green's notes include a sketch of the reserve described in the above Minute of Decision. The following extract from the Expert Report of Blair Smith, BCLS; CLS, describes the contents of the sketch:

> Green's filed notes are recorded in CLSR FBBC 4667. (Tab. 9) The pages are not numbered but the names of the Indian Bands visited are mentioned. His sketch of Kitselas IR 1 is easily recognized. In this sketch, Green notes that there are nine houses in the Kitselas village. The Kitselas village is shown on the left bank. Continuing south along the left bank, just south of the village is an old garden, the extent shown by a dashed line. Green notes the portage. Below the canyon, he notes two houses surrounded by a garden or clearing. The Hudson's Bay building (HBCo) is to the right of the houses on the sketch. Across the river, on the bank, there is a single house below the canyon, and approximately opposite the village is a house. Below the diagram is the note "10 acres to be exempted for Govt Res if necessary."
>
> [Emphasis added]

[28] Ashdown Green's sketch, apparently made while on location, does not delineate the 10.5 acres excluded from the area described in the Minute of Decision, but mentions it in the notes.

[29] On January 28, 1892, Commissioner O'Reilly wrote to F.G. Vernon, British Columbia's Chief Commissioner of Lands and Works, seeking the Province's approval of his recommended

reserve allotments and sketches:

> I have the honour to enclose for your information, and approval, minutes of decision and sketch of nine reserves defined during the past summer, for two bands of the Tsimpsean Indians, viz the Kitselas and Kitsumkaylum, who reside on the Skeena river about 80 and 66 miles above Essington respectively.
>
> There are no settlements in the neighbourhood of any of these reserves and should any such occur, the interests of the whites and the Indian are not likely to clash.
>
> I have omitted from Reserve No. 1 Kitselas ten acres on the left bank of the river immediately below the canon 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 have already erected a small storehouse thereon.
>
> The appended schedule will shew the Population, Acreage [etc.?] of the lands for which your approval is asked.

	Pop	No. of Res	Acreage
Kitselas	89	6	2910
Kitsumkaylum	70	3	1246

> I have the honour to be
> Sir
>
> Your obedient servant
>
> P. O'Reilly
> I.R.C.
>
> [Emphasis added]

[30] The sketch attached to this letter shows the 10.5 acres exclusion marked off. On February 4, 1892 Vernon informed O'Reilly of his approval of the Minute of Decision and sketch.

[31] On July 20, 1892, Commissioner O'Reilly wrote to the Deputy Superintendent General of Indian Affairs, L. Vankoughnet, to report on the allotment of reserves for the Kitselas First Nation:

> Sir.
>
> I have the honor to report for your information that on the 5th October last I commenced the allotment of reserves for the "Kitselas" Indians, a branch of the Tsimpsean tribe resident on the Skeena river, about sixty miles from its mouth.

> On that day I had a long interview with the Chief Sam Wise, a number of the band being present. He gave me the names, and localities of the places he wished to have reserved, all of which I subsequently visited, all after careful examination, I defined the six following reserves.
>
> 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.

[32] On August 1, 1892 R.H. Hall of the HBC wrote to Commissioner O'Reilly concerning the storehouse located on land within the external boundaries of the Kitselas IR No. 1:

> Dear Sir,
>
> I have just received a letter from our Mr. Clifford, Port Simpson, in regard to the plot of land at Kitsalas Cañon, on which the Company's warehouse stands. We would like to have a plan of that land not included in the Indian reserve, and if possible to obtain a title to, say an acre of land at the landing.
>
> The Dominion Government has voted a considerable sum of money for the improvement of navigation on Skeena River to be expended this winter at the Kitsalas Cañon, but the Indians claim that all the land on either side of the Kitsalas Cañon is theirs, and there is some talk of their interfering with the men we send there to do the blasting this winter. I mention this to you, but I presume I will have to ask the authorities to take action in this matter. I believe a simple letter from the Attorney General will be all that will be required.
>
> [Emphasis added]

[33] In 1893, Commissioner O'Reilly returned to the Skeena River to allot reserves for other Nations further upriver. On his return downriver, he visited the Kitselas Nation to allot new reserves and amend the allotment of IR No. 1. The Chiefs informed him of their wish to abandon their old village in the Kitselas Canyon (Gitsaex), provided they could exchange a portion of Kitselas Reserve No. 1 for an addition to Reserve No. 4. Commissioner O'Reilly accommodated that request, and increased Reserve No. 4 by 490 acres in exchange for the voluntary surrender of 640 acres from Reserve No. 1. A Minute of Decision was made to give effect to this exchange. On February 27, 1894, O'Reilly wrote to the Chief Commissioner of Lands and Works for the Province to advise him of these amendments. His letter included the following:

> I have thought it better to cancel the original Minute of Reserve No. I and to substitute therefore a new Minute, no alteration has however been made in the southern boundaries, and ten acres on the left bank of the Skeena immediately below the canon are omitted, as I believe it would prove a convenience to the public to have this land declared a government reserve.
>
> My reasons for not including these ten acres was reported to you in my letter on the subject 28th January, 1892.

[34] In May 1901, E.M. Skinner surveyed Kitselas IR No. 1. He noted that there was a "large Indian house" close to the HBC storehouse. This appears to be in the same general area as the houses noted by dots on the sketch by Green. The following day, a provincial land surveyor surveyed the land excluded from the allotment of Kitselas IR No. 1. This area, then known as Lot 113, comprised 10.5 acres. Lot 113 was landlocked within the boundaries of Kitselas IR No. 1, a "provisional reserve" (a categorization that has its origin in *Wewaykum* as the status of land reserved but not yet transferred from the Province to Canada).

3. Later Use of Lot 113

[35] The Province subdivided Lot 113 into 50 lots. Some were purchased by speculators. It remained undeveloped until 1907, when it became a service centre for workers employed in the construction of the railway. The work was completed by 1913, and the "boomtown" called Kitselas was abandoned. The lots reverted to the Province for non-payment of taxes. Lot 113 is now a provincial park.

4. Archeology

[36] Based on ethnographic information and field research in Kitselas Canyon, archaeologists have written that indigenous peoples first settled downstream of the Canyon at a place known as Tsunyow, then later at Gitaus. Ethnographic investigation would, as the science that describes human races and cultures, include oral history.There is a large gap in the archaeological record between approximately 500 A.D. and about 1750. From about 1750 until the late 1800s, the Kitselas inhabited the villages of Gitlaxdzawk and Gitsaex at the upper end of the canyon. These, they say, were the only villages in the Canyon that were occupied in historic times. The distinction in the academic literature between "pre-historic" and "historic" is based upon whether there is written evidence of the past, and is thus equivalent in this context to "pre-European arrival" and "post-European arrival."

[37] In 1968 an archaeologist, Louis Allaire, excavated at the Gitaus site.

[38] Allaire's work revealed evidence of the remains of an ancient village at Gitaus. The boundary of Lot 113 ran through the site. Allaire concluded from the stratigraphical data that the village of Gitaus was first occupied around 2000 - 1700 B.C. and went into decline by approximately 500 A.D.

5. Oral History

a) Isabelle McKee

[39] Isabelle McKee, a Kitselas elder, testified of the oral history of the Kitselas people. She received oral history from her uncle, David Mason. He died in 1997.

[40] The legends of the Kitselas refer to Gitaus as a village site. The Kitselas were called the people of the sandbar. As the population grew, some moved down river and established new villages along the river. During the summer months when the salmon returned upstream the people from the new villages followed the species upriver as far as Gitaus. There, they dried and took care of their winter needs. Some of the people would leave but others remained in Gitaus.

[41] The oral history does not say that Gitaus was abandoned “it was always referred to as Gitaus”.

[42] David Mason's grandfather, Richard Cecil had a house on the Gitaus site. The house belonged to Richard Cecil's great-grandmother. It was passed down through the family.

[43] Richard Cecil was a young man at the turn of the century. He lived in the house at Gitaus at that time. David Mason told her that an elderly lady, Kate Nesnaquelk, assumed to be Richard Cecil's grandmother, remained at Gitaus. Kate Nesnaquelk and Richard Cecil lived at Gitaus, possibly in the same house.

[44] These people resided at the Gitaus site before and after the arrival of the Hudson's Bay Company.

[45] Richard Cecil had a trap line in the area.

[46] Richard Cecil moved to Endudoon (the new village on land allotted by O'Reilly in 1893) where he built a house. This was around 1900. He moved there but maintained his hunting cabin at Gitaus. He hunted year round.

[47] The widow of Chief Kitselas, Kate, and the Cecils remained in the canyon after the people moved to Endudoon. This was not at the Gitsaex site, which was upriver.

[48] Gitsaex is a gravesite; during the epidemics people died so rapidly that the people could not keep up with the burials and the dead were buried in their own homes.

[49] The house used by Richard Cecil was a permanent house, used as a hunting cabin. There were no longer any people living at the canyon (apparently a reference to Gitsaex).

[50] The people still did their fishing and hunting out of the canyon after the move to Endudoon.

[51] The people at Gitaus and Gitsaex were from the same families as the people are all interrelated.

b) Wilfred Bennett

[52] Wilfred Bennett, a Kitselas elder, testified of the oral history of the Kitselas peoples.

[53] He learned of the oral history of the Kitselas people from Ralph Wright, who died in 2009 at age 73. Wright was the hereditary Chief for the Gispawedwada, the Killer Whale Tribe. His father, Walter Wright, was blind. Ralph became his eyes, and travelled with him to different Tsimshian communities where stories would be told of the Kitselas area.

[54] The fortress area, Gitlaxdzawk, had ten longhouses, one for each of the Chiefs of the Kitselas. They were of the raven, eagle, and killer whale crests. There was no laxkibu (wolf) houses there. They were across the river in Gitsaex.

[55] “Gitaus” means “people of the sandbar”. “Git” is “people”, “aus” is “sandbar”.

[56] There were five tribes that lived in the canyon area, with a winter population in the past of over six thousand people. When traders arrived they were required to pay a toll as they came

up or went down river. The Kitselas gave the Hudson's Bay Company permission to use land at Gitaus for a trading post. The Kitselas were to have the first chance of merchandise coming in, in trade for furs.

[57] A village called Tsunyow, on the right back of the river, had been filled up. A second village was established on the left bank at Gitaus.

[58] The area just below Gitaus was used for steamboats as it was a perfect location to dock. There was an aerial tram from Gitaus to Gitsaex. Merchandise was transported from Gitaus to Gitsaex. Gitaus was one of four winter villages of the Kitselas. The others were Tsunyow, Gitlaxdesauq, and Gitsaex. Gitsaex was the largest one. It is upriver from the canyon.

[59] Mr. Bennett agreed on cross-examination that when the water running through the canyon is high, it was necessary to portage from the lower part of the canyon to Gitsaex. It is impossible for a canoe to go through the canyon from downstream to upstream. He agreed that the Kitselas people have historically portaged from the lower part of the canyon to the upper part of the canyon. He agreed that it would also be impossible for a steamboat, a paddle wheeler, to go through the canyon if the water was too high.

[60] Gitaus was one area where they would "upload some of their merchandize, and if they were going to continue through the canyon, then yeah, they would aerial tram their goods over to Gitsaex". There is enough water by Gitaus where they moored.

[61] The Kitselas Nation portage was located at the sandy beach. The plan he was shown, the Ashdown Green sketch, shows a dotted line starting at the "sand beach". Mr. Bennett agreed that this is where the portage was located.

[62] Gitaus was not abandoned. The population grew, and the fortress area was the strategic area where the Chiefs built their longhouses. That is where they controlled the traffic up and down the river. The largest village, across the river, was Gitsaex.

6. Relevance of the Oral History Evidence

[63] In *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911, the introduction of oral history was considered:

> [37] Nonetheless, the present case requires us to clarify the general principles laid down in Van der Peet and Delgamuukw regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in Delgamuukw, the admission of ***oral histories*** represents a hollow recognition of the ***aboriginal perspective*** where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the ***aboriginal perspective*** is "given due weight by the courts" (para. 84).
>
> [Emphasis added]

[64] The Act provides for the receipt of oral history in Tribunal proceedings s. 13(1)(b).

[65] In the present matter the oral history is relevant to:

1. Kitselas occupation of the Gitaus site in days long past up to the 1890's and beyond.

2. The understanding of the Chiefs in requesting land of an extent that would include the site of Gitaus.

3. Canada's reliance on the absence of any objection by the Chiefs to the exclusion of the Gitaus site from IR No. 1.

7. Admissibility of Oral History

[66] Canada says that it first became aware of some of the evidence presented in support of the claim when oral history evidence was presented at the hearing. Canada also says that the oral history evidence was not included in the Claimant's specific claim submission to the Minister or its Declaration of claim.

[67] Canada states its opposition as follows:

> The Crown's position is that, to be properly within the jurisdiction of the Tribunal, an asserted fact of this nature should have been included in the original claim submission to the Minister. At the very least, such a wholly new asserted fact should have been pleaded in the Declaration of Claim.

[68] The question whether oral history evidence would be introduced was raised at the first Case Management Conference on December 16, 2011.

[69] At a Case Management Conference held on June 18, 2012, the Claimant, undertook to formally advise Canada of its intention regarding oral history no later than September 7, 2012. The Claimant advised that there would likely be two witnesses providing oral history evidence. The Parties were directed to discuss among themselves how to best proceed with notice of the content of the oral history and the means of cross-examination of oral history testimony.

[70] The Claimant was to report at a CMC scheduled for September 13, 2012, on their parties' discussion with respect to notice of the intended evidence and the protocol for the cross-examination of witnesses offering oral history testimony.

[71] Canada's CMC brief dated September 13, 2012 set out a proposed oral history protocol, which had been sent to the Claimant days prior. It was agreed that the Claimant would provide will-say statements by October 9th, 2012. Canada received the will-says on October 2, 2012.

[72] Canada did not object to the introduction of this evidence when it was tendered at the hearing.

[73] Pursuant to s 13(1)(b) of the *Act*, the Tribunal may accept any evidence that it sees fit unless inadmissible in a court by reason of any privilege under the law of evidence..

[74] The evidence which Canada claims does not fall within the jurisdiction of the Tribunal does not change the factual basis for the claim or introduce new grounds. It serves only to support the Claimant's position that the subject land ought to have been set aside as reserve in 1891. The statements made through oral history testimony are not the only evidence that the land was used in times long past and in 1891.

[75] In the course of pre-hearing case management the terms on which Canada would receive notice of the intended oral history evidence was established. There is no suggestion that the process was unfair or that Canada suffered prejudice in its response to the claim.

[76] The evidence will form part of the record.

8. Discussion and Findings

[77] From the creation of the JIRC to and including the appointment of O'Reilly as the sole

Commissioner, the Commission was required, when identifying land to be set apart as reserve, to have special regard to the habits, wants, and pursuits of the aboriginal Nations.

[78] In August 1880, O'Reilly was instructed to assure the Indians of the desire of the government to deal justly and liberally with them in the settlement of reserves. He was informed of the government's view that it was of paramount importance that nothing should be done to impair friendly relations between the government and the Indians in the settlement of the land question. He was therefore to interfere as little as possible with tribal arrangements and be 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 especially attached.

[79] O'Reilly was also instructed to take into account the claims of white settlers, "if any".

[80] Material questions of fact include the following:

1. Was there a village at Gitaus in 1891?

2. Did the land requested by the Chiefs include the Gitaus site?

3. If there was not a village at Gitaus, was the site occupied or used by Kitselas peoples in 1891?

4. Was O'Reilly's allotment of IR No. 1 based on his knowledge or understanding of the habits, wants and pursuits of the Kitselas peoples?

5. Were there, in connection with the area requested by the Chiefs, or the lesser area allotted, any claims of white settlers?

a) Gitaus Village

[81] Wilfred Bennett testified that Gitaus and the surrounding areas once supported a population of 6,000 people. He testified of Gitaus being established due to population growth in Tsunyow, a village on the opposite bank of the river. Later the population shifted to Gitsaex. He did not consider the Gitaus site abandoned.

[82] Isabel McKee did not consider Gitaus abandoned.

[83] Ethnographical and archaeological investigations indicate that Gitaus was no longer a village site long before European contact. From the perspective of these disciplines, it had been abandoned. From the aboriginal perspective, it continued to be the place called Gitaus, and thus was never "abandoned".

[84] The significance of the word "Gitaus" is its association with a place. That place is the sandbar. They are, in their presence in a territory, the people of the sandbar.

[85] As oral history is preserved by being passed from generation to generation, the Chiefs who met with O'Reilly in 1891 would have had the same knowledge of the place, Gitaus, and its significance to the identity of the Kitselas peoples, as the present generation.

[86] Although there were visible indications of the use of the former village site in 1891, it would not be perceived by O'Reilly as a village.

b) The Land Requested, and the Land Allotted

[87] The land the Chiefs requested extended ten miles in each direction from Gitsaex. The land allotted by O'Reilly's Minute of Decision extended two miles in one direction and three in the other. Both encompassed the Gitaus site, which was excluded.

c) Use and Occupation of Gitaus as at 1891

[88] There were dwellings at the Gitaus site when O'Reilly and Ashdown Green attended in 1891. Isabel McKee named people who resided there at the time.

[89] As Green's sketch notes the presence of buildings, they would have been seen by O'Reilly.

[90] Ashdown Green's sketch shows a portage. The portage was used by the Kitselas to transport canoes around the narrows of the canyon.

d) Claims of White Settlers

[91] There were no such claims in 1891.

[92] As rivers were the principal, perhaps only, mode of transportation in the region in 1891, the interests of settlers upriver would have been served by the presence of the landing and HBC storehouse. O'Reilly did not exclude the Gitaus site in anticipation of the use of the portage area to transport goods past the canyon. All of the land that had the potential for transport was allotted.

[93] There is no evidence that the HBC required more land than it used for the storehouse and landing. When it applied for title it requested one acre.

II. FIDUCIARY DUTY

A. Grounds under *Specific Claims Tribunal Act*

[94] The legal obligation claimed to have been breached by Canada rests on the existence of a fiduciary duty. The claimant says that this duty arose prior to implementation of the JIRC process of reserve creation. It is reflected in Article 13 of the *Terms of Union* and the terms of reference for the JIRC. Reliance is thus placed on the *Act*, s. 14(1)(c):

> 14(1) Subject to sections 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:
>
> ...
>
> (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;

[95] Canada says that the Crown did not have a fiduciary duty to the Kitselas First Nation in the reserve allotment process, and in particular with respect to the allotment of I.R. No.1 and the exclusion of Gitaus (later, Lot 113) from the reserve.

B. Factors Giving Rise to a Fiduciary Duty

[96] Canada's Memorandum of Fact and Law sets out, at para. 41, the elements of the test for the existence of fiduciary obligations:

> There are two basic elements in the test for the existence of fiduciary obligations in the Crown-Aboriginal context:
>
> (a) the identification of a cognizable Indian interest; and

> (b) an undertaking of discretionary control by the Crown in relation to that interest in a manner that invokes responsibility "in the nature of a private law duty."

[97] In *Wewaykum* Binnie J, for the court, discussed the creation of reserves in British Columbia, a process that "dragged on" from 1878 to 1938. The claimant relies of the following paragraph:

> [97] Here, as in Ross River, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries.

[98] The foregoing paragraph from *Wewaykum* must be considered in the context of the events pertinent to the reserves there in issue. Two reserves had been allotted by Minutes of Decision of the Reserve Commissioner, Peter O'Reilly. Both were allotted for the benefit of the aboriginal collectives who were occupying the land. Both reserves were transferred from the Province to Canada in 1938, by OIC 1036. Until the transfer they were, in the words of Binnie J., "provisional reserves". Long after the reserves were "created" for all legal purposes in 1938, the contesting Bands each claimed both reserves.

[99] Both bands based their claim on fiduciary duty. It was held that:

> [89] In the present case the reserve-creation process dragged on from about 1878 to 1928 [sic], a period of 50 years. From at least 1907 onwards, the Department treated the reserves as having come into existence, which, in terms of actual occupation, they had. <u>It cannot reasonably be considered that the Crown owed no fiduciary duty during this period to bands which had not only gone into occupation of provisional reserves, but were also entirely dependent on the Crown to see the reserve-creation process through to completion</u>.
>
> [Emphasis added]

[100] The conclusion that fiduciary duties could exist in the circumstances found in *Wewaykum* rested on an analysis starting with *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], in which the source of Indian title as a legal interest was discussed:

> [76] Thus in *Guerin* itself, where the Crown failed to carry out its mandate to negotiate on particular terms a lease of 162 acres of an existing Indian reserve to

> the Shaugnessy Heights Golf Club in suburban Vancouver, Dickson J. (as he then was) was able to distinguish the "political trust" cases as inapplicable in a passage that should be set out in its entirety (at pp. 378-79):
>
> > . . . Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council, supra; Tito v. Waddell (No. 2), supra*, and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
>
> [Emphasis added.]

[101] Binnie J. continues in para. 76 of *Wewaykum* to say:

> Dickson J. further pointed out that fiduciary duty was imposed on the Crown despite rather than because of its government functions, at p. 385:
>
> > As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.
>
> [Emphasis added]

[102] Binnie J. then turned, at para. 77, to explain the significance for the ultimate decision in *Wewaykum* of the observation of Dickson J., in *Guerin*, that:

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . . .

He explained that in *Guerin* Dickson J. was speaking of the Indian interest in an existing Indian reserve and a transaction that predated the *Constitution Act, 1982*, being Schedule B to the

Canada Act 1982 (UK), 1982, c 11.

[103] In *Wewaykum* at para. 79, Binnie J. explains that relief by way of fiduciary remedies is not limited to rights protected by s. 35 (Aboriginal rights, including title) or existing reserves:

> All members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights (*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
> >
> > (B. Slattery, "Understanding Aboriginal Rights" (1987), *66 Can. Bar Rev*. 727, at p. 753)
> >
> > [Emphasis added]

[104] The reference to "existing reserves" in para. 79 of *Wewaykum* means land that has been fully constituted as a reserve. In British Columbia, the final step in reserve creation was the transfer of proprietary title to Canada by Order in Council 1036, 1938 (*Wewaykum*, paras. 13-19).

[105] In *Wewaykum*, Binnie J observes, at para. 94, that the lands in question were "…non-s. 35(1) lands…". He nevertheless found at para. 97 for the existence of a fiduciary duty and stated the content of that duty:

> [94] Insofar as the appellant bands contend for a broad application of a fiduciary duty at the stage of reserve creation in non-s. 35(1) lands (as distinguished from their other arguments concerning existing reserves and reserve disposition), ...
>
> ...
>
> [97] Here, as in Ross River, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary duty to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with "ordinary" diligence in what it reasonably regarded as the best interest of the beneficiaries…

[Emphasis added]

[106] Binnie J. found that the appellant bands had established the grounds for the imposition of a fiduciary duty. This was not based on traditional occupation, but the fact of occupation of provisional reserves that were not within their traditional territories (*Wewaykum* at para. 89.

[107] Binnie J. then ties the preceding discussion in *Wewaykum* to the general requirements that ground a fiduciary relationship:

> [85] I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty", as discussed below.

[108] The task at hand, when called upon to make a determination whether fiduciary obligations are owed, is stated at para. 83 of *Wewaykum*:

> It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

[109] The particular obligation that is the subject matter of the present dispute is the obligation assumed by the Crown by Article 13 of the *Terms of Union.* Article 13 defines a specific obligation, assumed in the broader context of the fiduciary relationship that originated with the "historic powers and responsibility assumed by the Crown" in relation to Indian interests in land (*R. v Sparrow*, [1990] 1 SCR 1075 at p. 1108, 70 DLR (4th) 385, cited in *Wewaykum* at para. 78).

[110] As Binnie J explained in *Wewaykum*, fiduciary remedies are not limited to rights protected by s. 35 or existing reserves.

[111] The fiduciary duty exists to facilitate supervision of the high degree of discretionary control assumed by the Crown over the lives of aboriginal peoples (*Wewaykum* at para. 79). In this context, Article 13 expresses the unilateral undertaking that may, under s. 14(1)(c) of the *Act*, form a basis for breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands.

[112] The land in question here was not provisionally reserved. It fronts the Skeena River and is surrounded on three sides by land that was provisionally reserved, and is now a reserve. It is only accessible by land through the reserve. The land along the opposite bank was provisionally reserved as well, and is now a reserve.

[113] The questions in this proceeding before the Specific Claims Tribunal are:

1. Whether the Kitselas First Nation had a cognizable interest in the 10.5 acre parcel of land that O'Reilly did not include in the allotment of Kitselas IR No. 1; and

2. If so, did the Crown, Canada, assume discretionary control over that interest?

C. Cognizable Interests and Reserve Creation

1. Position of Canada

[114] In its memorandum, Canada submits:

1. For an Indian interest to be "cognizable" for the purposes of fiduciary law, it must be sufficiently specific; and

2. In addition to being sufficiently specific, the interest "must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement."

[115] Canada relies on *Alberta v Elder Advocates of Alberta Society*, [2011] 2 SCR 261, 2011 SCC 24 [*Elder Advocates*] at para. 51:

> Finally, it may be difficult to establish the requirement that the government power attacked affects a legal or significant practical interest, where the alleged fiduciary is the government. It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement.
>
> [Emphasis added]

[116] Canada also relies on the decision of the *Supreme Court of Canada in Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511[*Haida Nation*] . There, the court found that the asserted Aboriginal rights and title of the *Haida Nation* were

insufficiently specific to establish an interest for the purposes of fiduciary law.

2. *Elder Advocates*, Government Duties, Aboriginal Peoples and Lands

[117] This was a class action alleging that the Province of Alberta and Regional Health Authorities failed to ensure that accommodation charges levied to elderly residents of long term care facilities were used exclusively for that purpose. It was claimed that this constituted a breach of fiduciary duty. In its decision, the Supreme Court discussed the elements to be proven to establish fiduciary duties generally, and fiduciary duties of government in particular.

[118] On the elements generally, the court said, at para. 36:

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[119] Canada's position is that any government duties in relation to the allotment of reserves is governed by the following at para. 51:

> Finally, it may be difficult to establish the requirement that the government power attacked affects a legal or significant practical interest, where the alleged fiduciary is the government. It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. <u>The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement</u>.
>
> [Emphasis added]

[120] However, para. 51 follows the discussion in *Elder Advocates* of the unique nature of the fiduciary duty owed by the Crown in the aboriginal context. This duty is distinguishable from other relationships due to the *sui generis* nature of Indian title and powers assumed by the Crown:

> [39] In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court confirmed that the fiduciary duty owed by the Crown to Aboriginal peoples with respect to their lands is sui generis,at p. 1108:

> The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> Similarly, in *Wewaykum*, Binnie J. suggested that the fiduciary duty owed by the Crown to Aboriginal peoples is not restricted to instances where the facts raise "considerations 'in the nature of a private law duty'".
>
> [Emphasis added]

[121] The plaintiffs in *Elder Advocates* asserted that the elements grounding a fiduciary duty in Crown-Aboriginal relations should serve as a template for the duty of governments to citizens in other contexts. The court disposed of that argument at para. 40:

> The unique and historic nature of Crown-Aboriginal relations described in these cases negates the plaintiff class' assertion that they serve as a template for the duty of the government to citizens in other contexts. The same applies to the only other situation where a Crown fiduciary duty has been recognized — such as where the Crown acts as the public guardian and trustee.

[122] Under the heading (2) "Fiduciary Duties in the Government Context" it was held that no fiduciary duty is owed to the public as a whole. Although generally an individual determination is required to establish a fiduciary duty to a particular person or group, a duty can exist toward a class of persons. The court noted that, thus far, only the Crown's duty toward Aboriginal peoples in respect of lands held in trust for them has been recognized on a collective basis. (Elder Advocates at para. 50)

[123] The reference in para. 50 to the "Crown's duty toward Aboriginal peoples in respect of lands held in trust…" [emphasis added] is not a finding that fiduciary duties are owed only where an actual trust has been established, as in the case of a conditional surrender of a fully constituted Indian reserve (*Guerin*). Such a conclusion would be irreconcilable with the decision of the Supreme Court in *Wewaykum*, in which Binnie J., for the court, found that fiduciary duties could be owed to bands that occupied "provisional reserves" (i.e. not "existing" reserves), notwithstanding that the land was not within their traditional territories. This duty is not one of absolute loyalty, as in the case of implementation of the terms of a surrender of an established

reserve. (*Wewaykum* at para. 94)

[124] In the following paragraphs to the conclusion of the judgment, the discussion in Elder Advocates is directed to the required elements for a government fiduciary duty in relation to individuals, classes of persons, and groups. Throughout the decision, the court distinguishes between aboriginal peoples and other groups. *Elder Advocates* does not change the law, as found in *Wewaykum*, of fiduciary duty in relation to aboriginal peoples and lands.

[125] In conclusion, it is not necessary that the Kitselas First Nation base its claim to a cognizable interest on proof of a "pre-existing distinct and complete legal entitlement" to the land in question. It is, however, necessary to establish an interest that is contemplated by Article 13.

3. Undertaking of Discretionary Control by the Crown

[126] The history of reserve creation in British Columbia, and the principles governing the role of the Federal Crown prior to and following the process established to create reserves, is canvassed in *Wewaykum*:

> 1. When British Columbia joined Confederation in 1871, Article 13 of the *Terms of Union*, provided that "the charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government,…". Article 13 required that tracts of land reserved for the use and benefit of the Indians be conveyed "…by the Local Government to the Dominion Government in trust for the use and benefit of the Indians…" (para. 14)
>
> 2. The Federal Government could not unilaterally establish a reserve on the public lands of the province. Although the Federal Government had jurisdiction over "Indians, and lands reserved for Indians" under s. 91(24) of the Constitution Act 1867, Crown lands on which any reserve would have to be established remained provincial property. Hence, federal-provincial cooperation was required in the reserve creation process. (para. 15)

3. The degree of economic, social and proprietary control and discretion asserted by the Crown left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. Discretionary control is a basic ingredient in a fiduciary relationship: "The hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the others discretion." (para. 80)

4. The existence of a fiduciary duty facilitates supervision of the discretionary control assumed by the Crown over the lives of aboriginal peoples. Relief by way of fiduciary remedies is not limited to s. 35 rights or existing reserves. (para. 79)

5. 5. The fiduciary duty of the Crown could take hold prior to the final step in the reserve creation process, namely the enactment of Order in Council 1036, 1938.

[127] The Crown's intervention as the exclusive intermediary to deal with the province on the aboriginal peoples behalf took hold on British Columbia joining Confederation in 1871, and is evinced by the terms of Article 13. An overview of the exercise of the Crown's role as the exclusive intermediary to deal with the province on behalf of the aboriginal peoples up to the appointment of Commissioner O'Reilly is set out in *Wewaykum* at paras. 15-24. The historical documents that informed the findings of Binnie J. are in evidence in this proceeding before the Specific Claims Tribunal.

[128] In *Wewaykum*, the discretionary control of the Crown was over the ultimate "creation" of the reserves that had been allotted provisionally by the JIRC. The cognizable interest to the bands was based on occupation of the provisional reserves.

[129] If the Kitselas had a cognizable interest in the Gitaus site, the obligation assumed by the Crown under Article 13 of the *Terms of Union* would apply.

4. The Scope of the Duty, if Found to Exist

[130] The decisions in *Wewaykum* and *Elder Advocates* reveal differences between fiduciary duties of government that may be owed to persons vulnerable to the exercise of discretion in relation to "…a specific private law interest to which a person has a pre-existing distinct and complete legal entitlement", and, in the Aboriginal context, a cognizable interest not fully

established as a complete legal entitlement (*Elder Advocates* at para. 51). In the former, the character of the fiduciary undertaking must be found in evidence of a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary in relation to the specific legal interest at stake (*Elder Advocates* at para. 31). In the latter, Crown duties prior to reserve creation are as set out in the heading in *Wewaykum* that precedes para. 94, and the text of para. 94. There, it was held that:

> … the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In *Blueberry River* McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs.
>
> [Emphasis added]

[131] *Wewaykum* says that, in the exercise of the fiduciary duty, government could take account of its larger role:

> The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians. (para. 96)
>
> [Emphasis added.]

III. DID THE KITSELAS FIRST NATION HAVE A COGNIZABLE INTEREST IN THE PLACE IT KNEW AS GITAUS?

A. The Obligation or Interest in Dispute

[132] The duty is grounded in the assumption by the Crown "... of the high degree of discretionary control gradually assumed...over the lives of aboriginal peoples." (*Wewaykum* at para. 79)

[133] The public law duty does not exclude the creation of a fiduciary relationship. To find for this relationship, there must be found a cognizable Indian interest over which the Crown has undertaken discretionary control. (*Wewaykum* at para. 85)

[134] It is necessary to focus on the particular "obligation or interest that is the subject matter of the particular dispute." (*Wewaykum* at para. 83)

B. Recognition of Interests Based on Occupation

[135] Article 13 of the *Terms of Union*, and the factors which the Reserve Commissioners were to consider in their allotments, recognized the Indian interest in the ongoing occupation of land they used. This was the policy of the colony, which had set apart reserves for the Indian Nations in lands they used.

[136] The instructions provided to the Reserve Commissioners by executive orders of Canada and British Columbia are an expression of colonial policy carried forward on confederation:

> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments which contemplates a "liberal policy" being pursued towards the Indians, and in the case of each particular nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the White settlers.
>
> [Emphasis added]

[137] The direction above continued through the changes in the makeup of the Commission.

[138] The Joint Indian Reserve Commission was initially comprised of three commissioners. It was later agreed that the Commission as originally constituted be dissolved.

[139] The above change, and the later appointment of Gilbert Sproat as sole Reserve Commissioner, were approved by Executive Orders of both governments. A memorandum annexed to the Federal Order in Council dated March 7, 1878 stated, in part:

> By this means the continuity of the present Commission would be preserved and the Indians would have a guarantee that the same policy which has hitherto guided the Commission in dealing with their Reserves would be continued in the future.
>
> (ASOF Para 11, CBD, Tab 24) [Emphasis added]

[140] Commissioner Sproat resigned after two years. In 1880 the Governor in Council approved the appointment of Peter O'Reilly as Indian Reserve Commissioner for twelve months. The following year the Governor in Council extended Commission O'Reilly's position indefinitely.

[141] In August 1880 the Department of Indian Affairs provided instructions to Commission O'Reilly. The instructing letter included the following:

> In allotting Reserve Lands you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a liberal policy being pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to initiate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specifically 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 especially attached.
>
> [Emphasis added]

[142] Commissioner O'Reilly was directed to Commissioner Sproat's 1878 report of progress. In his report Commissioner Sproat stated in part:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> The next point is to interfere as little as the controlling necessity for settling up the country with white settlers permits, with the favourite resorts of the Indians, their old ways, their councils and gatherings and their intertribal traffic. This needs fine judgment, when everything around is in a state of transition ....
>
> [Emphasis added]

[143] The Indian interest in the land they used and occupied was recognized by the colonial authorities. On confederation, the colonial policy continued as a constitutional responsibility of Canada. The JIRC was not mandated to allot reserves out of thin air. Commissioners were to allot as reserves the land habitually used and occupied by the Indian Nations.

[144] The direction to the Commissioners, formalized by order of the Governor in Council, was a policy of recognition that the Indian Nations had, at a minimum, a substantial practical interest in land they habitually used. This was a cognizable interest.

[145] O'Reilly was satisfied that Kitselas had a sufficient interest in the land along the Skeena River that extended three miles South and two miles North of Gitsaex to warrant its allotment as a reserve. However, the interest of the Kitselas was based on use and occupation of the land, and did not depend on the exercise of O'Reilly's decision to make an allotment. The Crown recognized habitual land use as an interest to be affirmed by the creation of reserves. Where the evidence supports a finding of fact that the land in issue was habitually used, the Indian interest is cognizable. Here, O'Reilly's allotment of Kitselas IR No. 1 is evidence of the habitual use of the land, not the source of that interest.

C. Crown Discretion and Commissioner O'Reilly's Authority

[146] Commissioner O'Reilly was the central actor in the initial exercise of Crown discretion over the allotment of reserves. Although his decisions on the extent of land to be set apart as reserve would not take effect without the approval of the Chief Commissioner of Lands and Works for the province, a decision by Commissioner O'Reilly to recommend the allotment of land as reserve was the *sine qua non* of reserve creation. During his tenure as Sole Commission, and beyond, O'Reilly's recommendations determined what land requested by aboriginal peoples for their reserves would proceed further in the process of reserve creation.

[147] Commissioner O'Reilly's Minute of Decision to allot the Kitselas peoples land in the canyon took in an area of land on both sides of the Skeena River. The 10.5 acre parcel excluded from the allotment is within that land. Whether the entire area allotted by Commissioner O'Reilly to constitute Kitselas I.R. No. 1 was or was not ultimately conveyed by the province by Order in Council 1036, 1938, whatever was conveyed encircles Lot 113. If O'Reilly had not excluded this 10.5 acre parcel of land, there is no basis in the evidence that would support a finding that it would not form part of Kitselas I.R. No. 1 today. The fact that it is not is a direct consequence of O'Reilly's exclusion of the Gitaus site. The question is whether the non-inclusion of this land amounts to a breach of fiduciary duty.

D. Evidence of the Indian Interest

[148] In anticipation of meeting with Commissioner O'Reilly, Chief Samuel Wise and other Kitselas Chiefs wrote to Commissioner O'Reilly to request that a parcel of land be set aside for the Kitselas Nation. Chief Samuel Wise wrote the following:

September 29th 1891

Giatzilash Skeena River BC

To Mr. O'Reily the Judge

Dear Sir

The greater majority of Giatzilash people held general meeting on 29th of September 1891. On which I, (Samuel Wise) being present, And other chiefs and under the chiefs, before your arrival on your way down, on returning from your great work respecting the land to be reserved.

The words which you have said to me (Samuel Wise) before your return from your work you told me to be prepared at Giatzilash Village and Now we are prepared and say these few words.

We will be very glad if you will permit us to have as much land we desire to be reserved for us.

On which our forefathers have been working and got their living And we wish by the grace of the Queen to keep the land hereafter.

And we also; desire; mostly (that after your work respecting the land we wish to be reserved for us) to be at peace with others and no more to be deprived of the land of our own forefathers.

This is 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.

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

Yours Sincerely

Samuel Wise and the following Chiefs

William Niyashnagwaluk

Simon Gaum

David Niyashgudukshk

George Gabiltngan

William Shanakat

Heber Niyashharwaksh

William Niyashhak

(ASOF para. 19) [Emphasis added]

[149] The Chiefs' description of land they wanted reserved encompassed the Gitaus site.

[150] O'Reilly and the Chiefs met at the village of Gitsaex (referred to as Giatzilash in Chief Wise's September 29, 1891 letter). Gitsaex was located on the left bank of the Skeena River at the entrance to the canyon. This is the reference point for Chief Wise's request for a reserve

from a location on the upper side of the village (north) down to a reference point south of the village. The site of the former village of Gitaus was located in the area requested by the Chiefs. Gitaus was on the left side of the river, downstream (south) of Gitsaex.

[151] O'Reilly travelled the Skeena through the extent of the area the Chiefs asked be reserved. His diary entry dated October 5, 1891, says that he told Chief Wise that he "…cannot give you the reserve you asked for, ten miles upstream and ten miles down. Wherever your villages, gardens, and timberlands are I will give you a reserve that will embrace all."

[152] After due enquiries, O'Reilly allotted a reserve extending five miles along the Skeena River based on his own assessment of the habits, wants, and pursuits of the Kitselas in relation to land. This was an allotment based on his findings of Kitselas use of the land based on the results of his own enquiry. The oral history evidence presented on this claim and O'Reilly's findings support the existence of a cognizable interest in much of the land requested by the Chiefs.

[153] There is nothing to indicate that the 10.5 acres that were not included were used any less than the land "granted". If anything, this land was used intensively compared to much of the land that was reserved. There were buildings, a garden, and one end of a portage in the immediate area.

[154] O'Reilly did not make any distinction between the allotted and excluded areas based on an analysis of the habits, wants and pursuits of the Kitselas. He excluded the 10.5 acres as he thought it would serve as a "public" or "government" reserve, not because the habits, wants and pursuits of the Kitselas Nation did not extend to this land. The terms agreed on by the provincial and federal governments make no mention of the setting aside of "public" or "governmental" reserves as an exception from land habitually used by Indian Nations.

[155] The claimant has established, as of 1891 and 1893, a cognizable interest in the Gitaus site.

E. The Asserted Interest, And Aboriginal Title

[156] In the Claimant's Memorandum of Fact and Law, and in oral submissions, claimant's counsel referred to Chief Wise's request that the reserve take in the lands used by their

forefathers. This, in part, is advanced as a basis in the evidence for the existence of a cognizable interest in the land.

[157] Canada, in its Memorandum of Fact and Law, and in submissions by counsel, characterized the reference to land of the Kitselas peoples forefathers as a basis for finding a cognizable Indian interest based on aboriginal rights and title. Canada says:

1. Asserted aboriginal rights and title are insufficiently specific to give rise to cognizable interests for the purpose of fiduciary law, and

2. S. 15(1)(f) of the *Act* provides that a First Nation may not file with the tribunal a claim that "is based on, or alleges, aboriginal rights or title".

[158] For the first proposition, Canada relies on the decision in *Haida Nation*.

[159] In *Haida Nation*, remedies based on fiduciary duty were sought. Despite the extensive evidence before the court of use and occupation, this did not establish a sufficiently specific interest to ground a fiduciary duty.

[160] The outcome in *Haida Nation* is of no consequence in the matter before the Tribunal. The context for Chief Wise's reference to the land "on which our forefathers have been working and got their living" was in response to an enquiry that Commissioner O'Reilly was required to make in the discharge of his mandate. He was to enquire of the habits, wants and pursuits of the Kitselas peoples.

[161] Chief Wise reference to the land of his forefathers was an assertion of a known fact that supported the present use of the land by the Kitselas, the indigenous peoples of the canyon. Mr. Ashcroft's reference to land of "our forefathers" is advanced as evidence of use and occupation, past and present. A reference to relevant evidence of occupation does not, in the context of a claim advanced on the ground set out in s. 14(1)(c) of the *Act*, raise allegations of aboriginal rights as a basis for the claim.

[162] For the foregoing reasons, this claim is not barred by s. 15(1)(c) of the *Act*.

IV. WAS THERE, IN CONNECTION WITH THE ALLOTMENT OF KITSELAS IR NO. 1, A BREACH OF FIDUCIARY DUTY?

[163] The duty attached to the Crown's intervention in the present matter includes "obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary." (*Wewaykum* at para. 94).

A. By what Standard and the Actions of the Crown, as represented by O'Reilly, to be Measured?

[164] The task assigned to Commissioner O'Reilly was to ascertain "…accurately the requirements of the Indian Bands in that province (British Columbia) to whom lands had not been assigned by the last Commission and allotting suitable lands to them for tillage and grazing purposes…" (Order-in-Council 1334 appointing O'Reilly as Sole Commissioner).

[165] The above direction to O'Reilly incorporates the terms set out in the Executive Orders establishing the JIRC, and in particular:

> That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments which contemplates a "liberal policy" being pursued towards the Indians, and in the case of each particular nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the White settlers.
>
> [Emphasis added]

[166] In March, 1878, Gilbert Sproat was appointed Sole Commissioner by Order-in-Council, which said:

> By this means the continuity of the present Commission would be preserved and the Indians would have a guarantee that the same policy which has hitherto guided the Commission in dealing with their Reserves would be continued in the future.
>
> [Emphasis added]

[167] In August 1880 the Department of Indian Affairs instructed O'Reilly as follows:

> In allotting Reserve Lands you should be guided generally by the spirit of the Terms of Union between the Dominion and local Governments which contemplated a liberal policy pursued towards the Indians. You should have special regard to the habits, wants and pursuits of the Band, to the amount of

> territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of the Reserves as well as in all other matters,…
>
> [Emphasis added]

[168] Commissioner O'Reilly was referred to Sproat's 1878 report, in which the following sentence appears: "The first requirement is to leave the Indians in the old places to which they are attached." [Emphasis added]

[169] It is against the performance of the above requirements that Crown obligations of loyalty, good faith, disclosure, and acting reasonably and with diligence in regard to the best interests of the Indians, stand to be measured.

B. Did the Chiefs object to the non-inclusion of Gitaus?

[170] The evidence does not support a finding that O'Reilly was informed of the historical existence of a village site at Gitaus or the cultural significance of Gitaus.

[171] Canada argues that the Chiefs knew of the exclusion of the Gitaus site, but did not complain until the present claim was brought.

[172] This is not advanced as an equitable or technical defence based on delay, but as evidence supporting an inference that the Chiefs did not consider the site to be land that was theirs. If there is any merit to this argument, it would only be available if the Chiefs knew of the exclusion.

C. The Duty to Disclose

[173] The elements of fiduciary duty have been established. This includes a duty of full disclosure appropriate to the matter at hand (*Wewaykum* at para. 94).

[174] Albeit in a different context, there is authority that the burden of proof of disclosure lies with the fiduciary:

> The Burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at

> arm's length; that the cestui-que-trusts had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done (*Williams v Scott*, [1900] UKPC 27 (BAILII) at page 11, 1900 AC 499 (PC); CED (Ont 4th), vol 52, title 155 at §230).
>
> [Emphasis added]

D. The Evidence

[175] O'Reilly did know that the Kitselas wanted a parcel of land that included the site of the HBC storehouse and the surrounding land.

[176] On October 6, 1891, the day following O'Reilly's receipt of the request of the Kitselas Chiefs, he recorded the following:

> "also Village Res which commences about two miles above Village - includes all cañon and about three miles below, except about ten acres at HB Warehouse. When I had told the Chief the extent of the res. the interpreter said the people wanted …".
>
> [Emphasis added]

[177] It may be found on this evidence that O'Reilly told the Chief about the exclusion of the 10.5 acres. There is, however, evidence that supports the opposite conclusion: When the HBC wrote to O'Reilly on August 1, 1892, to request a grant of one acre of land, its representative attributed this request to claims by the Indians to the land fronting the river on both sides.

[178] What is clear is that the Chief was not given a plan of the reserve of the time of the allotment. In a letter dated June 4, 1900, the Indian Agent at "Menetlakahtla" forwarded the survey plan of Kitselas IR No. 1 to the Office of the Indian Reserve Commissioner in Victoria, and asked that the latter transmit the same to the Chief of the Band. O'Reilly's October 5, 1891 note reflects the assurance given to the Chiefs that a plan would be provided. It took nine years. Whether the Commissioner acted on this request is not known.

E. Oral History, and Probability of Objection

[179] The oral history evidence does not directly challenge the view of archaeologists and ethnographers that Gitaus was abandoned in or around 500 AD. The oral history offers a different perspective on "abandonment".

[180] Isabelle McKee and Wilfred Bennett knew of Gitaus from an oral history that reaches

back many centuries to a time when Gitaus was a large village with a name that expressed their identity as people of the sandbar. The Gitaus site would have been known to Chief Wise and the other Chiefs who met with Commissioner O'Reilly in 1891 as it is part of the oral history today. It would have been as significant to Kitselas self-identity then as it is at present.

[181] Chief Wise requested an area of land be set apart as reserve by reference to landmarks along the Skeena River. The Gitaus site is located within the area identified by Chief Wise with the request for a reserve. Chief Wise' reference to the land requested as belonging to their forefathers included Gitaus. If Chief Wise was told that this area was excluded, he would surely have objected.

F. Conclusion

[182] Irrespective of the *locus* of the burden of proof, the evidence, taken as a whole, does not support a finding that O'Reilly informed the Chiefs of the exclusion of the land in question from the allotment of IR No. 1.

[183] Of course, the Kitselas would have known of the Kitselas "boomtown" at Lot 113 between 1907 and 1913. By then, the exclusion of the site was an accomplished fact.

G. Consequence if the exclusion was disclosed

[184] Disclosure of the exclusion to the Chiefs, and the absence of objection, would not in any event establish a basis for a finding that the Kitselas had no cognizable interest in the land in question. On the whole of the evidence, including the oral history and O'Reilly's recognition of Kitselas use of the general area, their interest is clearly established.

H. Indian Use, and Claims of the White Settlers

[185] At the stage of identifying land to be set apart for reserve creation, "… the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non–Indians." (*Wewaykum*, para. 96).

[186] Article 4 of the Instructions to the Commissioners required that they take into account not only the habits, wants and pursuits of the Indian Nations in relation to land, but also to the claims of the White settlers.

[187] The reserve allotted by Minute of Decision dated October 6, 1891, and the July 20, 1892 Minute of Decision altering the reserve allotment, defined an area on both sides of the Skeena River. In the light of the instructions given to Commissioner O'Reilly, this decision must reflect his assessment of the habits, wants and pursuits of the Kitselas peoples.

[188] The Ashdown Green sketch and field notes record the presence of nine houses at Gitsaex and two houses surrounded by a garden or clearing in the area of the village formerly located at Gitaus. The sketch notes a portage between this area and Gitsaex. The evidence of Wilfred Bennett explains the need for the portage as canoes were, at times, unable to travel through the Canyon narrows.

[189] The oral history given by Isabelle McKee records the use of this land by Richard Cecil, his grandparents, and his great-grandmother. The evidence supports a finding that they, or some of them, resided at or kept residences at Gitaus.

[190] The excluded land within the outer boundaries of the reserve were not the subject of "claims of the White settlers." In a January 28, 1892 letter to the Province Chief Commissioner of Lands and Works, Commissioner O'Reilly said "there are no settlements in the neighborhood of any of these reserves and should any such occur, the interest of the Whites and the Indians are not likely to clash".

V. FIDUCIARY DUTY: SUMMARY AND CONCLUSION

[191] The colony of British Columbia recognized the practical need to set apart land for the exclusive use and occupation of the Aboriginal peoples.

[192] On Confederation, Canada assumed the primary role in the relationship between Aboriginal peoples and the Crown, as established by federal jurisdiction assigned by s. 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5.

[193] By Article 13 of the *Terms of Union*, the role of Canada as the sole authority over Aboriginal land interests and all others, including the Province, was confirmed.

[194] The terms governing the establishment of reserves in British Columbia and the process by which the work would be carried forward, was effected by executive orders of British

Columbia and Canada that created the Joint Indian Reserve Commission.

[195] The Commissioners were to be guided in determining the allotment of land as reserve by the pursuit of a "liberal policy" towards the Indians, "and in the case of each particular nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the White settlers." (Article 4, Memorandum attached to Provincial and Federal Executive Orders).

[196] The required "regard" to the "habits, wants and pursuits of such Nation" clearly refers to the habits, wants and pursuits in relation to land.

[197] The evidence establishes the use and occupation of the Gitaus site by the Kitselas peoples. This, in the context of Article 13 and the terms of operation of the Joint Indian Reserve Commission, was a cognizable interest.

[198] Federal jurisdiction, amplified by Article 13 of the *Terms of Union*, established discretionary authority in decisions over the definition and allotment of reserves by the Commissioners.

[199] The elements of the test for creation of Crown fiduciary duty are established.

[200] Commissioner O'Reilly was the vehicle by which federal discretion would be exercised over the establishment of reserves.

[201] O'Reilly made no distinction between the land allotted and the land excluded on the basis of the habits, wants and pursuits of the Kitselas peoples. The evidence of use and occupation of the Gitaus site was stronger than that of most if not all of the land that was allotted. His instructions left no latitude for an exercise of discretion contrary to the information he obtained on enquiry concerning Indian occupation, except where there were claims of settlers.

[202] There were no claims of white settlers.

[203] I conclude, based on the foregoing, that:

1. Commissioner O'Reilly failed to make full disclosure appropriate to the matter at hand by not telling the Chiefs of the exclusion of the 10.5 acre parcel in circumstances in which there was clear evidence of the then current use by Kitselas peoples of the area in question; and

2. the Crown, by the actions of its representative, Commissioner O'Reilly, failed to act reasonably and with diligence as regards the best interest of the Kitselas peoples in excluding land additional to the site of the HBC storehouse and river access from Kitselas Indian Reservation No.1.

VI. SPECIFIC CLAIMS TRIBUNAL ACT, S. 14(1)(c)

[204] The fiduciary relationship of aboriginal peoples and the Crown, the exclusive power of the Crown to intervene in relation to Provincial lands, and the commitment embodied in Article 13 to set apart reserves establishes the unilateral undertaking required to bring the claim within s. 14(1)(c) of the *Act*.

VII. FINDING

[205] The Kitselas First Nation has established a breach of legal obligation of the Crown due to the non-inclusion of land in excess of the requirements of the Hudson Bay Company (one acre) in Kitselas IR No. 1.

HARRY SLADE

Honourable Harry Slade,
Chairperson, Specific Claims Tribunal of Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20130219

File No.: SCT-7003-11

OTTAWA, ONTARIO February 19, 2013

PRESENT: Honourable Harry Slade

BETWEEN:

KITSELAS FIRST NATION

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Indian Affairs and Northern Development

Respondent

COUNSEL SHEET

TO:	**Counsel for the Claimant KITSELAS FIRST NATION** As represented by Stan H. Ashcroft Ashcroft & Company, Barristers & Solicitors
AND TO:	**Counsel for the Respondent** As represented by Rosemarie Schipizky and Chris Elsner Department of Justice