Federal Court of Appeal | Cour d'appel fédérale

Date: 20160229

Docket: A-168-14

Citation: 2016 FCA 63

CORAM: **GAUTHIER J.A.**
RYER J.A.
NEAR J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the Minister of Aboriginal Affairs and Northern Development Canada

Applicant

and

WILLIAMS LAKE INDIAN BAND

Respondent

and

COWICHAN TRIBES

Intervener

Heard at Vancouver, British Columbia, on May 11, 2015.

Judgment delivered at Ottawa, Ontario, on February 29, 2016.

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: GAUTHIER J.A.
RYER J.A.

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REASONS FOR JUDGMENT

NEAR J.A.

Introduction

[1] This is an application for judicial review of a decision of the Specific Claims Tribunal (the Tribunal) rendered by its Chairperson, the Honourable Harry Slade, on February 28, 2014 (2014 SCTC 3). In this decision, the Tribunal determined that the respondent, the Williams Lake Indian Band (the Band), had validly established specific claims against the applicant, the Crown in Right of Canada (Canada), under paragraphs 14(1)(*b*) and 14(1)(*c*) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (the Act).

[2] For the reasons that follow, I would allow the application.

Background

1. Specific Claims under the Act

[3] The Tribunal was established by the Act to decide the validity of First Nations' specific claims, and the compensation payable to First Nations for valid claims: Act, ss. 3, 6.

[4] A First Nation may file a specific claim with the Tribunal based on the grounds listed in subsection 14(1) of the Act. In this case, the Tribunal found that the Band had established valid

claims under paragraphs 14(1)(*b*) and 14(1)(*c*). Paragraph 14(1)(*b*) allows a First Nation to file a specific claim based on a breach by the Crown of a statutory legal obligation, whether under the *Indian Act*, R.S.C. 1985, c. I-5, or any other legislation "pertaining to Indians or lands reserved for Indians". Paragraph 14(1)(*c*) allows a First Nation to file a specific claim based on a breach by the Crown of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including fiduciary obligations arising from unilateral undertakings. These paragraphs read as follows:

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	14. (1) Sous réserve des articles 15 et 16, la première nation peut saisir le Tribunal d'une revendication fondée sur l'un ou l'autre des faits ci-après en vue d'être indemnisée des pertes en résultant :
…	[…]
(*b*) a breach of a legal obligation of the Crown under the Indian Act or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;	*b*) la violation d'une obligation légale de Sa Majesté découlant de la Loi sur les Indiens ou de tout autre texte législatif — relatif aux Indiens ou aux terres réservées pour les Indiens — du Canada ou d'une colonie de la Grande-Bretagne dont au moins une portion fait maintenant partie du Canada;
(*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;	*c*) la violation d'une obligation légale de Sa Majesté découlant de la fourniture ou de la non-fourniture de terres d'une réserve — notamment un engagement unilatéral donnant lieu à une obligation fiduciaire légale — ou de l'administration par Sa Majesté de terres d'une réserve, ou de l'administration par elle de l'argent des Indiens ou de tout autre élément

	d'actif de la première nation;
…	[…]

[5] Subsection 14(2) of the Act explains that, for specific claims under paragraphs 14(1)(*a*) to 14(1)(*c*), the term "the Crown" may include the Sovereign of Great Britain and its colonies. However, where a claim relates to a legal obligation that was to be performed in an area that was not at that time, but is now, within Canada's boundaries, "the Crown" will only mean the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became the responsibility of the Crown in right of Canada. Subsection 14(2) provides (emphasis added):

14. (2) For the purpose of applying paragraphs (1)(*a*) to (*c*) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies <u>to the extent that</u> the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.	14. (2) Pour l'application des alinéas (1)*a*) à *c*) à l'égard d'une obligation légale qui devait être exécutée sur un territoire situé à l'intérieur des limites actuelles du Canada avant l'entrée de ce territoire au sein du Canada, la mention de Sa Majesté vaut également mention du souverain de la Grande-Bretagne et de ses colonies, <u>dans la mesure où</u> cette obligation, ou toute responsabilité en découlant, a été imputée à Sa Majesté, ou aurait été imputée à celle-ci n'eût été les règles ou théories qui ont eu pour effet de limiter un recours ou de prescrire des droits contre elle en raison de l'écoulement du temps ou d'un retard.

2. Basic Facts

[6] The Tribunal set out in great detail the factual background of this case, and the facts material to this application are largely not in dispute. I will therefore only briefly summarize the salient details.

[7] The claims at issue concern events dating back to colonial times, before British Columbia joined Canada. The claims relate to the actions of the colony of British Columbia (the colony) and of Canada in relation to lands near Williams Lake, British Columbia.

[8] The Band is one of 17 communities of the Secwepemc (Shuswap) Nation. The Band traditionally occupied a large territory around Williams Lake, travelling throughout this territory and using it for different purposes depending on the season. For ease of reference, I adopt the Band's term "Village Lands" to refer to these lands which are described at paragraph 4 of the Tribunal's Reasons as including "Williams Creek, Scout Island, the Stampede Grounds, the downtown core of the City of Williams Lake, and a plateau north of the downtown core". No metes and bounds description of the Village Lands exists, as they were never marked off or surveyed.

[9] At the heart of the Band's claim are two parcels of land within the Village Lands totaling 1,960 acres and known as District Lots 71 and 72 (the Lots, or Lots 71 and 72). The Lots were surveyed and have therefore been clearly defined since about 1883. The Band filed a claim in respect of the Lots with the Tribunal alleging that the colony had failed to meet its legal

obligation to prevent settlers from pre-empting land on those Lots on which their settlements were located, and that Canada failed to meet its legal obligations to the Band once British Columbia joined Canada.

[10] The Band's claim is not a claim based on title to the Village Lands. The possession and occupation of the Village Lands only provide context to determine whether the land pre-empted on the Lots was part of an Indian settlement excluded from pre-emption under *Proclamation No. 15*.

a) Events Prior to 1871

[11] The Tribunal, beginning at paragraph 21 of its Reasons, detailed the evidence on the development by British Columbia of colonial policies on the creation of Indian reserves. This evidence included communications from as early as 1849 suggesting that lands traditionally used by Indians should be reserved.

[12] In 1858, the colony of British Columbia was established, and James Douglas was appointed its Governor. In February 1859, Douglas issued *Proclamation No. 13*. This Proclamation asserted the Crown's ownership in fee simple of "[a]ll of the lands in British Columbia, and all the Mines and minerals therein", and also provided that:

> It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown lands, and for such purposes as the Executive shall deem advisable.

[13] A communication from Douglas to E.B. Lytton, Secretary of State for the Colonies, dated March 14, 1859, included a proposed Indian reserve policy. Later that year, on October 1, 1859, Douglas issued a circular to the Magistrates and Gold Commissioners of British Columbia advising them of pending legislation that would allow settlers to record pre-emptions on unsurveyed Crown lands but specifying that certain lands, including Indian villages, would be excluded from settlement.

[14] On January 4, 1860, Douglas issued *Proclamation No. 15*, which was given the force of law on January 12, 1860. This law was issued to regulate the settlement of lands in mainland British Columbia and to set the terms under which settlers could record an interest in the as of yet unsurveyed lands of the colony: Reasons of the Tribunal at paras. 35-36. Section 1 prescribed and limited the lands available for pre-emption:

> That from after the date hereof British subjects and aliens who take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple) under the following conditions: …
>
> (Emphasis added.)

[15] Between April 1860 and May 1861, 680 acres of land within the Lots was pre-empted or purchased from the Crown: applicant's Memorandum of Fact and Law (MFL) at Appendix 3 (as amended at the hearing and agreed to by both parties). In May of 1861, the Gold Commissioner and Magistrate for Williams Lake, Phillip Nind, wrote to Douglas that "the available farming land has been pre-empted and purchased and it is probable that before the summer is over it will all be taken up". Nind sought instructions with respect to the marking of a reserve for the Band. Douglas responded that Nind should "mark out a Reserve of 400 or 500 acres for the use of the

Natives in whatever place they may wish to hold a section of land": AR Vol. 1, Tab 1a at 126, para. 4. Nind did not do this, for reasons that are unknown.

[16] On August 27, 1861, the *Pre-emption Consolidation Act* came into force, repealing *Proclamation No. 15*. It contained provisions relating to Indian settlements which were similar to those in *Proclamation No. 15*.

[17] Two further pieces of land situated in the Lots were pre-empted in November 1861 and in March 1862, bringing the total land pre-empted within the Lots to 1,000 acres. There is no evidence of any other pre-emptions in respect of the Lots.

b) Events Following British Columbia's 1871 Confederation with Canada

[18] In 1871, British Columbia became a Province of Canada pursuant to the *Terms of Union, 1871*, R.S.C. 1985, App II, No. 10 (the *Terms of Union*), a constitutional document. Article 1 of the *Terms of Union* provides, in part: "Canada shall be liable for the debts and liabilities of British Columbia existing at the time of Union".

[19] Article 13 of the *Terms of Union* provides:

> 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, 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.

[20] In 1876, a joint commission between Canada and British Columbia, called the Joint Indian Reserve Commission, was established to deal with the allotment of Indian Reserves. This commission was disbanded in 1878 before it could complete its work. It did not deal with the allotment of a reserve to the Band: AR Vol. 14, Tab O at 3762, para. 130.

[21] In November 1879, the Band's Chief wrote an open letter to the British Daily Colonist that was published with comments, claiming that his people were threatened with starvation because "white men have taken all the land and all the fish". The letter requested that the Commissioner (Gilbert Sproat) visit Williams Lake to allot land to the Band without further delay.

[22] In March 1881, Canada finalized the purchase of the Bates Estate, which the Band Chief referred to in his letter and which had come up for sale in January 1880.

[23] In June 1881, Peter O'Reilly, who had been Commissioner since July 1880, visited Williams Lake to move forward with the allotment of reserves to the Band. At that time, the Band consisted of 50 men, 38 women, 59 children, 211 horses and 39 cattle: AR Vol. 1, Tab 1a at 148.

[24] In June 1881, Commissioner O'Reilly allotted 14 reserves (the Allotment Lands) for the Williams Lake Indians totalling between 4,100 and 4,600 acres: Reasons at paras. 14, 15, 311,

313; applicant's MFL at paras. 1, 119, 129. The Allotment Lands included land from the Bates Estate and other public lands, and contained two streams and a small lake, as well as seven small graveyard reserves. Most of the graveyard reserves were located on or near Lots 71 and 72. Other than the gravesites, the Allotment Lands did not include any of the Village Lands.

3. Decision of the Tribunal

[25] The Tribunal determined that the Band had established specific claims based on events both before and after the colony of British Columbia joined Canada. The Tribunal found Canada liable under paragraph 14(1)(*b*) for breaches of legislation and fiduciary duty by the colony, and liable under paragraph 14(1)(*c*) for a breach of fiduciary duty by Canada.

[26] Proceedings before the Tribunal were bifurcated into liability and damages portions, and the damages portion is being held in abeyance pending the disposition of this application.

[27] I will discuss the Tribunal's reasons in more detail in my analysis.

Issues

[28] In my view, the issues before this Court are whether:

- there was a breach of legislation by the colony;
- there was a breach of fiduciary duty by the colony;

- if the above breaches occurred, they constitute valid claims under paragraph 14(1)(*b*) of the Act; and

- a valid claim under paragraph 14(1)(*c*) arising from a breach of fiduciary duty by Canada was established, and whether the subsequent actions of Canada in creating a reserve for the Band remedied any possible earlier breaches by the former colony.

[29] In my view, the determinative issue that this Court must decide is whether the actions of Canada subsequent to the colony of British Columbia entering Confederation pursuant to the *Terms of Union*, remedied any possible earlier breaches by the colony and in so doing fulfilled any possible fiduciary duty owed to the Band on the part of Canada.

Intervener Submissions

[30] The intervener Cowichan Tribes submits that the colony of British Columbia set apart Indian settlement lands as provisional Crown reserves in a manner sufficient to trigger a *sui generis* fiduciary duty in the sense set out in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*]. It argues that the steps taken by the colony in creating these reserves satisfy the four legal requirements to establish an Indian reserve set out in the Supreme Court of Canada decision *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 [*Ross River*]. The intervener states that the colony's failure to finalize Indian reserves constitutes a breach of a legal obligation within the meaning of paragraphs 14(1)(*b*) and (*c*) of the *Specific Claims Tribunal Act*. The Tribunal did not address the *Ross River* factors in any detail, nor is this Court required to do so. In my view, this issue should be left to another day and

to a record where this issue is clearly addressed. In oral argument, the intervener also argued that this Court should address the Tribunal's statement in *obiter* at paragraph 149 that the term "Indian Reserve" in *Proclamation No. 15* means "reserved" in the sense of colonial policy, not in the sense in *Ross River*. The parties confirmed at the hearing that it was not necessary to address this issue for the purpose of this appeal. I agree.

Standard of Review

[31] In this application, the standard of correctness applies to the Tribunal's findings on questions of law. The standard of reasonableness applies to all other findings: *Canada v. Kitselas First Nation*, 2014 FCA 150 at paras. 22, 35, 460 N.R. 185 [*Kitselas*]; *Lac La Ronge Indian Band v. Canada*, 2015 FCA 154 at para. 20, [2015] F.C.J. No. 813 (QL) [*Lac La Ronge*].

Analysis

1. Breach of Legislation

[32] The first ground upon which the Tribunal concluded that the Band had established a claim under paragraph 14(1)(*b*) was a breach by the colony of its legislation, namely *Proclamation No. 15*: Reasons at paras. 136, 154, 160.

[33] In reaching this conclusion, the Tribunal addressed two main issues: first, whether *Proclamation No. 15*, which establishes a pre-emption system enabling settlers as well as Indians

to acquire unsurveyed, unoccupied and unreserved lands, is "legislation pertaining to Indians or land pertaining to Indians" within the meaning of that phrase in paragraph 14(1)(*b*); second, whether a legal obligation under *Proclamation No. 15* had, in fact, been breached.

[34] On the first issue, the Tribunal found that *Proclamation No. 15* was indeed "legislation pertaining to Indians or land pertaining to Indians", because its legal effect was to protect certain categories of land, including Indian settlements, from pre-emption: Reasons at para. 152.

[35] The Tribunal held that, for the purposes of assessing a claim under paragraph 14(1)(*b*), it is not necessary that the legislation at issue pertain entirely to Indians or land reserved for Indians, so long as some part of it does: Reasons at para. 145. The relevant question, in the Tribunal's determination, is whether the legislation "relates or has reference to" Indians or land reserved for Indians: Reasons at para. 148.

[36] The Tribunal rejected Canada's argument that determining whether certain legislation falls within the ambit of paragraph 14(1)(*b*) requires a pith and substance analysis. Canada had argued that such an analysis was required because subsection 91(24) of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985 App II No. 5 [*Constitution Act, 1867*] also uses the phrase "legislation pertaining to Indians or land pertaining to Indians". The Tribunal held that the pith and substance analysis used in division of powers cases did not apply to its decision under paragraph 14(1)(*b*): Reasons at para. 145.

[37] On the second issue, the Tribunal concluded that the colony had breached *Proclamation No. 15*: Reasons at paras. 154, 160.

[38] The Tribunal noted that a number of pre-emptions took place in the Williams Lake area, including large portions of the Lots, beginning on April 28, 1860: Reasons at paras. 130-136. However, the Tribunal held that the Lots should have been protected from pre-emption under *Proclamation No. 15* because these lands were an "Indian settlement" within the meaning of that term in colonial policy and law: Reasons at paras. 114, 136.

[39] The Tribunal determined that "[t]he colonial plan for making land available for pre-emptions reflects the policy of protection of Indian settlements": Reasons at para. 115. The Tribunal also determined that this policy of protection—reflected in legislation, namely in *Proclamation No. 13* and *Proclamation No. 15*, and in directions given to colonial officials—would not be effective if it applied only to settlements demarcated by colonial officials: Reasons at para. 123. The Tribunal noted that *Proclamation No. 15* did not, on its face, require that land be marked out, surveyed, or formally designated in order to be protected: Reasons at para. 118.

[40] The Tribunal held that Nind, the "man on the ground" responsible for ensuring that Indian settlements were not pre-empted, was aware of the policy of protecting Indian settlements, and of the Band's presence on at least part of the Village Lands. Moreover, Nind was instructed to mark out 400 to 500 acres as reserved land for the Band: Reasons at paras. 124-127. Nonetheless, Nind did not determine which lands the Band wished to have reserved or call into question the legality of the pre-emptions that had taken place: Reasons at paras. 128, 159.

[41] The Tribunal noted that the objectives of *Proclamation No. 15* could not be met without taking steps to identify Indian settlements or challenging the pre-emptions that had already taken place. Nind, who had an obligation to carry out colonial policy, failed to do either. Accordingly, the colony breached *Proclamation No. 15*: Reasons at paras. 155-160.

[42] The Tribunal did not accept Canada's argument that there must be a breach of some positive legal obligation in order to make out a claim under paragraph 14(1)(*b*), and that *Proclamation No. 15* did not expressly place an obligation on the colony to ensure that lands claimed by pre-emption did not encroach on Indian settlements. The Tribunal held that so long as the colony was in breach of its legislation, liability results under paragraph 14(1)(*b*): Reasons at paras. 153-154.

[43] Canada submits that the Tribunal erred in finding that the pre-emptions that occurred on the Village Lands constituted a breach of *Proclamation No. 15* and that this breach constituted a valid claim under paragraph 14(1)(*b*) of the Act.

[44] Canada maintains its argument from the Tribunal proceedings that the colony did not breach colonial legislation because this legislation did not impose on it any positive legal obligations to the Band, such as a duty to investigate Indian settlements or to refuse pre-emption claims where such claims were made in respect of Indian settlements. Canada argues that any breaches of pre-emption legislation that may have occurred were breaches by settlers, for which the colony was not liable. Canada adds that the pre-emption legislation provided remedies to anyone claiming that a pre-emption was illegal.

[45] The Band submits that the Tribunal correctly and reasonably found that the colony had a duty, under its policies and laws, to protect and stake out Indian villages, settlements, and surrounding land for allotment as reserves, and to prevent the pre-emption of these lands. The Band submits that the Tribunal properly found that the objectives of the pre-emption legislation could not be achieved without the colony taking such measures.

[46] The Band argues that Canada's approach to this issue is inappropriately technical, and submits that the Tribunal properly considered the historical context in interpreting the legal obligation expressed by the pre-emption legislation. The Band submits that the colony breached its legal obligation to protect Indian settlements—an obligation derived from the pre-emption legislation, together with the colonial policy that had been expressed in correspondence, instructions to officials, and promises to Indians. In short, the Band submits that the colony did not meet its obligation to implement its law and policy on the ground.

[47] In my view, to adopt the Band's position would be to overextend the interpretation of the pre-emption legislation. It is true that statutory interpretation requires an examination of the law's text, context, and purpose: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 at para. 10, [2005] 2 S.C.R. 601. However, even if I accepted that one of the purposes of the pre-emption legislation was the protection of Indian settlements, it is questionable whether the legislation itself gives rise to a positive obligation towards the Band on the part of the colony to ensure that the provisions of the legislation were followed. In effect, the Band is asserting that a failure to enforce the provisions of the legislation against all those subject to the legislation amounts to a breach of the legislation itself by the colony. However, it is not necessary for me to

decide this issue, as even if I were to accept the Band's position in its entirety, my conclusion with respect to issue 4, namely that the subsequent actions of Canada remedied any possible breach by the colony, is determinative of this appeal.

2. Breach of Fiduciary Duty

[48] The second ground upon which the Tribunal found that the Band had established a claim under paragraph 14(1)(*b*) was a breach by the colony of a fiduciary duty.

[49] First, the Tribunal addressed whether a breach of fiduciary duty falls within the ambit of a claim under paragraph 14(1)(*b*), noting that Canada had argued that claims under paragraph 14(1)(*b*) are limited to breaches of statutory obligations: Reasons at paras. 161-175. Although the Tribunal does not appear to explicitly answer this question, given the outcome of this case, the Tribunal's conclusion—that a breach of fiduciary duty can indeed form the basis of a claim under paragraph 14(1)(*b*)—is evident.

[50] The Tribunal then began its analysis of fiduciary law. It noted that a fiduciary relationship between Aboriginal peoples and the Crown arises from the assertion of Crown sovereignty, citing *Wewaykum*. It determined that Crown sovereignty had been asserted in the present case, on the basis of *Proclamation No. 13* and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 45, 220 N.R. 161: Reasons at paras. 176, 183-185.

[51] The Tribunal acknowledged that not all aspects of a fiduciary relationship give rise to a fiduciary duty, and outlined the two circumstances in which such a duty may exist in the Aboriginal context, citing *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623 [*Manitoba Metis*]: Reasons at paras. 177, 181-182. In *Manitoba Metis*, the Supreme Court of Canada described these two circumstances as follows:

> [49] In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> [50] A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (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.
>
> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)
>
> …
>
> [51] As discussed, the first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

The first circumstance described above is sometimes referred to as a "*sui generis*" fiduciary duty. The second is sometimes referred to as a "general" or "*ad hoc*" fiduciary duty, and is not limited to the Aboriginal context.

[52] The Tribunal also engaged in a lengthy analysis concerning the honour of the Crown: Reasons at paras. 183-214. The Tribunal considered: (1) whether a breach of the honour of the Crown had occurred; and (2) whether such a breach could give rise to a claim under paragraph 14(1)(*b*). Despite concluding that the colony had breached its honourable obligations, the Tribunal declined to consider whether this breach amounted to a breach of a legal obligation within the meaning of paragraph 14(1)(*b*) because the Band's claim was valid on other grounds, i.e., a breach of legislation, as set out earlier: Reasons at paras. 210 and 213.

[53] Moving to the application of the fiduciary law, the Tribunal first considered the general fiduciary duty: Reasons at paras. 217-223. The Tribunal concluded that the colony "was bound as a fiduciary to put the Indian interest in their settlement lands ahead of the newcomers [*sic*] interest in acquiring rights of occupation to Crown land", and that it failed to meet this duty: Reasons at para. 224.

[54] The Tribunal determined that all of the factors giving rise to a general fiduciary duty were present:

- Colonial policy and law expressed an undertaking to act in the Indians' best interests by enforcing the statutory prohibitions of pre-emptions within Indian settlements, as evidenced by the promise of Governor Douglas to large groups of Indians at Cayoosh and Lytton that reserves would be created;

- The beneficiaries of this undertaking were the Indian groups of the region whose settlements had not been staked out, including the Band; and

- The Band had a substantial practical interest in their settlements that could be adversely affected by the exercise of discretionary control of the colony.

[55] Turning to the issue of breach, the Tribunal held that the Crown did not take "the most basic steps" required to protect the Village Lands from pre-emption or set aside pre-emptions unlawfully made: Reasons at para. 222. The Tribunal noted that in order for *Proclamation No. 15* to be effective, "staking out the boundaries of Indian settlements was a necessary antecedent": Reasons at para. 218.

[56] Next, the Tribunal concluded that the colony was also bound as a *sui generis* fiduciary to the Band, and that the colony breached its obligations under this duty: Reasons at paras. 224-235.

[57] In making this finding, the Tribunal relied on *Wewaykum*, where the Supreme Court held that a fiduciary duty—albeit a somewhat limited one—may exist in respect of Indian lands before the necessary steps are taken to create a "reserve" within the meaning of that term in the *Indian Act*, R.S.C. 1985, c. I-5. In *Wewaykum*, the Supreme Court held that this duty, which pertains to lands that have been "provisionally" reserved, imposes on the Crown the obligations of "loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries": at para. 86.

[58] The Tribunal found that these obligations attached to the Crown in respect of the Village Lands, because these lands were "provisionally" reserved in the manner contemplated in *Wewaykum*, and the two criteria from the test in *Manitoba Metis* had been met:

- The Band had a specific cognizable interest in the Village Lands; and
- The colony's pre-emption law was an exercise of discretionary control over these lands.

[59] The Tribunal determined that the "ordinary prudence" called for by this duty was an inquiry into the extent of the Band's settlement so that the colonial law would be effective in protecting the settlement from pre-emption. Because no such inquiry took place, the colony breached its fiduciary obligations: Reasons at paras. 234-235.

[60] The Tribunal rejected Canada's argument that the interest that the Band was asserting was actually a claim based in Aboriginal title, a matter outside of the Tribunal's jurisdiction: Reasons at paras. 236-239. The Tribunal held that the Band was relying on Indian occupation not as a means to make out a claim in Aboriginal title, but rather because such occupation is necessary to establish its specific claims, in a manner similar to the claimant in *Kitselas*.

[61] The Tribunal acknowledged that the Band's claim under paragraph 14(1)(*b*), as the Band had framed it, relied to some extent on Article 1 of the *Terms of Union*, and that Canada had argued that it was not appropriate to rely on this provision in trying to establish a colonial claim. However, the Tribunal held that it was not necessary to decide this issue: Reasons at paras. 240-243.

[62] Canada submits that the colony owed neither a *sui generis*, nor a general, fiduciary duty to the Band.

[63] On the issue of *sui generis* fiduciary duty, Canada submits that the Tribunal's conclusion as to what area constitutes the Village Lands is insufficiently specific to give rise to such a duty. It also argues that the evidence does not support the Tribunal's finding as to the scope of the Village Lands, which was that these lands comprised all of Lots 71 and 72, as well as "adjoining areas of indeterminate acreage": Reasons of the Tribunal at paras. 112, 114. Canada also alleges that the Tribunal failed to assess and weigh the oral history evidence, and failed to identify the oral history evidence upon which it relied.

[64] Canada further submits that the colony did not have discretionary control over the Band's interest in the Village Lands. It argues that the element of discretionary control is only made out where the Crown is administering lands on behalf of Indians. Canada contends that the Tribunal erred in finding that a *sui generis* fiduciary duty existed in a situation "well before" the circumstances in which this duty has been established in previous jurisprudence; for example: in the administration of surrendered reserve lands (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161); in the management of "provisionally approved reserves" (*Wewaykum*); or in the allotment of reserves (*Kitselas*).

[65] Canada submits that discretionary control was lacking in the present case because the colony was not the exclusive intermediary for dealing with challenges under the pre-emption legislation. The colony, Canada says, did not interpose itself between the Band and settlers, and

did not undertake to act in the Indians' best interests during Douglas' speeches at Cayoosh and Lytton. Rather, the pre-emption legislation provided for a grievance mechanism whereby parties could bring concerns about pre-emptions to a local magistrate. Canada notes that Douglas spoke about this grievance mechanism during his speeches, and alleges that the Tribunal failed to address the effect of this grievance mechanism in its analysis.

[66] On the issue of general fiduciary duty, Canada submits that the colony did not give an undertaking to act in the best interests of the Band, forsaking all other interests. Canada argues that the Band did not address this element of the test for establishing a general fiduciary duty in its submissions to the Tribunal, and moreover, that the Tribunal did not have any evidence based upon which it could conclude that the colony had made such an undertaking. Canada relies on its earlier submissions to support this point, and also submits that there was evidence before the Tribunal establishing that the colony was required to consider the competing interests of the Indians and the settlers.

[67] The Band submits that the Tribunal did not err in finding that the colony breached its fiduciary duty. The Band submits that the Tribunal correctly identified the legal principles and reasonably applied the facts to the law. The Band argues that the Tribunal did not err in its weighing or description of the evidence.

[68] The Band submits that the Tribunal did, in fact, set out the obligations arising out of the colony's fiduciary duty. Citing paragraphs 201, 204, 208, and 234 of the Tribunal's Reasons, the Band argues that these obligations were: to inquire into the lands the Band occupied; to

diligently and promptly mark out and set apart the Village Lands as reserves; and to resume or set aside the unlawful pre-emptions.

[69] The Band counters Canada's arguments about the grievance mechanism by submitting that the possibility of bringing a dispute to a magistrate does not obviate the need to ensure that legislation is being followed. Moreover, in the Band's submission, bringing a dispute to a magistrate was not a realistic possibility. It argues that: there was no local magistrate in Williams Lake except during Nind's stay; the grievance mechanism was designed to resolve disputes between settlers; and the Band lacked the legal, financial, and physical capacity to bring such a grievance.

[70] It may well be that a fiduciary relationship existed between the colony and the Band. However, not all obligations between parties in a fiduciary relationship are fiduciary in nature: *Wewaykum* at para. 92. The issue before this Court is whether the circumstances of this case gave rise to fiduciary obligations, and if so, whether these obligations were breached. In this case, it may be that the combination of *Proclamation No. 13* (the assertion of sovereignty), the policy pronouncements in Douglas' speeches at Cayoosh and Lytton, and the pre-emption legislation (*Proclamation No. 15*), point to a specific cognizable Aboriginal interest and discretionary control on the part of the colony sufficient to give rise to a *sui generis* fiduciary duty. However, just as in issue 1, it is not necessary for me to decide this issue, as even if I accepted the Band's position in its entirety, my conclusion with respect to issue 4, namely, that the subsequent action by Canada remedied any possible breach of an obligation owed by the colony, is determinative of this appeal.

3. Canada's Liability for any Breaches by the Former Colony

[71] The Tribunal's treatment of subsection 14(2), which occurs in its analysis of whether the colony breached a fiduciary duty to the Band, is limited to the following paragraphs:

> [161] Canada acknowledges that s 14(1)(*b*), read with s 14(2), makes it clear that pre-Confederation claims may be made, but argues that the causes of action are limited to breaches of statutory obligations.
>
> [162] Section 14(2) governs the application of s 14(1)(*b*) "...in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada." It provides that:
>
> > "...a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became - or would ... have become - the responsibility of the Crown in right of Canada."
>
> [163] This places the Crown (*SCTA*, s. 2: "Crown" means Her Majesty in right of Canada) in the same legal position as "the Sovereign of Great Britain and her colonies," but not for all potential liabilities of the Imperial Crown in the pre-Confederation era.
>
> [164] The legal obligations that "... became or would have become the responsibility of the Crown in right of Canada" are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach.

[72] The Tribunal then goes on to discuss whether the colony owed a fiduciary duty to the Band. The Tribunal returns to the issue of subsection 14(2) several paragraphs later, but simply asserts that Canada is responsible for a breach of fiduciary duty to the extent that such a duty exists:

> [174] The assertion of Crown title placed the Colony in a fiduciary relationship with the aboriginal inhabitants. The enactment of legislation in relation to acknowledged interests in land, here an interest based on the occupancy recognized and protected by the legislation, brings into effect the law that may apply where, as here, the fiduciary relationship is present. This is a legal

> obligation within the meaning of the term in s 14(2) when the factors necessary to ground a fiduciary duty are present.
>
> (Emphasis added.)

[73] Canada argues that if the Tribunal concluded that subsection 14(2) should be interpreted to mean that Canada became responsible for any breach of a legal obligation by a colony, this is an incorrect interpretation based on the wording of the provision. Canada submits that Article 1 of the *Terms of Union*, which the Tribunal declined to address, cannot be used to impose liability upon Canada for these types of legal obligations at Confederation, since Article 1 was limited to the imposition of monetary debts and liabilities.

[74] The Band submits that Canada is liable for breaches by the colony and that the Tribunal's decision is correct in this regard. It argues that paragraph 14(1)(*b*) specifically contemplates pre-Confederation breaches of legal obligations, and the Tribunal considered this fact. The Band submits that if the colony's breach of a legal obligation is that of legislation pertaining to Indians or land reserved for Indians, it is constitutionally sound to impose liability upon Canada for such breaches under subsection 91(24) of the *Constitution Act, 1867* and Article 13 of the *Terms of Union*. The Band argues that the Tribunal's interpretation does not mean that Canada will be responsible for all breaches by the colony.

[75] The Tribunal conducted a limited analysis of subsection 14(2) and in large measure it simply asserted that the provision is self-evident in concluding that any liability found on the part of the colony flows through to Canada. The Tribunal found that it was unnecessary to address Article 1 of the *Terms of Union*: Reasons of the Tribunal at para. 243, which on its face would

seem to me not to cover the type of liabilities at issue in this case. Further, the Band's arguments that liability is imposed upon Canada by virtue of subsection 91(24) of the *Constitution Act, 1867* or Article 13 of the *Terms of Union* are difficult to accept given that in this case the lands in question were not transferred by the colony of British Columbia under the *Terms of Union*. In any event, it is not necessary for me to decide this issue, which in my view is better left for another day. As discussed above, even if I accepted the Band's position in its entirety, it is my view that the Band's acceptance of the Allotment Lands must be taken as having remedied any possible breach by the colony.

4. Claim Against Canada under Paragraph 14(1)(c), and Whether the Subsequent Actions by Canada Remedied any Possible Earlier Breaches by the Former Colony

[76] The Tribunal stated that it was not strictly necessary to consider this claim, given that other valid claims had been established against Canada, and that paragraph 14(1)(*c*) was a separate and distinct ground for liability: Reasons at para. 245. It went on to consider the issue nonetheless, ultimately concluding that Canada owed to the Band, and breached, both general and *sui generis* fiduciary duties arising from its non-provision of reserve lands.

[77] The Tribunal found that following Confederation, subsection 91(24) of the *Constitution Act*, 1867 and Article 13 of the *Terms of Union* established Canada as the principal actor in the Crown-Aboriginal fiduciary relationship: Reasons at para. 271. It found that this fiduciary relationship began at the outset of the reserve creation process, engaging the honour of the Crown: Reasons at para. 314. The Tribunal concluded that the obligations owed by Canada arising out of the honour of the Crown in this relationship rose to the level of fiduciary duty.

[78] After reviewing the relevant evidence, the Tribunal determined that the colonial policy of the protection of Indian settlements established under Douglas continued in the colony up to Confederation: Reasons at para. 292. It found that the reference in Article 13 to "a policy as liberal as that hitherto pursued by the British Columbia Government" incorporated the colonial policies established by Douglas: Reasons at para. 294. Thus, the colonial policy adopted on a prospective basis by Canada under Article 13 of the *Terms of Union* included the protection of Indian settlements and the authority to move to set aside pre-emptions made contrary to provincial law: Reasons at paras. 289, 293.

[79] With respect to the *sui generis* fiduciary duty, the Tribunal found that both a cognizable interest and discretionary control were present. As to the former, the Tribunal concluded that the interest of the Band in the Village Lands was recognized in colonial policy, and remained cognizable after Confederation, even though the Band had been dispossessed of these lands, through Article 13 of the *Terms of Union*: Reasons at para. 317. As to the latter, the Tribunal concluded that federal jurisdiction, set out in Article 13 of the *Terms of Union* and subsection 91(24) of the *Constitution Act, 1867*, positioned Canada as "the exclusive intermediary between the Indian peoples and the Province in the reserve creation process", and thus, Canada exercised discretionary control: Reasons at paras. 264, 318.

[80] The Tribunal again concluded that the *sui generis* fiduciary duty was made out against Canada at least to the extent found in *Wewaykum*: Reasons at paras. 267, 319. That is, that the duties imposed upon it were, at a minimum, the "basic obligations" of loyalty, good faith, full disclosure, and acting with ordinary prudence with a view to the best interests of the Band.

[81] With respect to the general fiduciary duty, the Tribunal found that Canada had, through Article 13 of the *Terms of Union*, undertaken to adopt a policy in relation to reserves as liberal as that of the colony, and thus, had adopted the unilateral undertaking made by the colony: Reasons at para. 320.

[82] The Tribunal determined that Canada had breached these fiduciary duties. In setting out the duties placed upon Canada, the Tribunal found that the best interest of the Band was the allotment of the Village Lands as a reserve: Reasons at para. 322. The Tribunal acknowledged that Canada, unlike the colony, could not unilaterally allot a reserve: Reasons at paras. 320, 326. However, it stated that the standard that Canada had to meet as a fiduciary was informed by Article 13 of the *Terms of Union*, and that means of protecting Indian settlements were available: Reasons at paras. 324, 326.

[83] The Tribunal determined that the exercise of ordinary prudence demanded by the *sui generis* fiduciary duty would include taking measures to clear away the impediments to the allotment of a reserve at the Village Lands; alternatively, that these measures would be demanded by the higher duty associated with the general fiduciary duty that had been established: Reasons at para. 328. Such measures, in the Tribunal's determination, included "challenging unlawful pre-emptions where their existence prevented the allotment of reserves": Reasons at para. 328. The Tribunal held that there were several examples wherein members of the Joint Indian Reserve Commission took steps to set aside pre-emptions when it was later discovered that these pre-emptions affected Indian settlements: Reasons at paras. 334, 336.

[84] The Tribunal concluded that Canada did not meet the standards demanded by the honourable obligations and fiduciary duties placed upon them. Despite fully understanding the circumstances, federal officials failed to take the necessary actions: Reasons at para. 340.

[85] Finally, the Tribunal determined that the allotment of the Allotment Lands to the Band by Commissioner O'Reilly in 1881 did not remedy the breach of paragraph 14(1)(*c*): Reasons at paras. 341-343. It found that Canada's fiduciary duty to the Band was made out in respect of the Village Lands, to which the Band had a tangible, practical, and cultural connection. As a result, the Tribunal found that the consequences of the 1881 allotment of the Allotment Lands by Canada to the Band are only relevant to the compensation stage of this claim.

[86] Canada submits that the Tribunal failed to define the scope and content of the fiduciary duty owed by Canada post-Confederation, and reached an unreasonable conclusion in determining that Canada breached that duty: applicant's MFL at para. 88.

[87] Canada submits that, while in *Kitselas* this Court found that Article 13 of the *Terms of Union* could consist of a unilateral undertaking, the content of this undertaking is unclear in this case—there was no consistent understanding as to what Douglas' policies were: applicant's MFL at paras. 90-91. Canada argues that the evidence reveals many inconsistencies about what exactly the policy was in respect of the land to be allotted to the Band, and that the Tribunal erred in concluding that the colonial policy under Article 13 required the Crown to provide as reserves all of the land a First Nation desired: applicant's MFL at paras. 91-107.

[88] Canada submits that the Tribunal's analysis of what was in the best interests of the Band was done with the benefit of hindsight and without regard to the unique facts of this case: applicant's MFL at paras. 113-114. It argues that the analysis of the content of Canada's fiduciary duty did not take into consideration the context of post-Confederation times, when the Crown was dealing with conflicting demands. Canada submits that "by any reasonable measure", it met the standard of conduct required of it as a fiduciary: applicant's MFL at paras. 115-116. It also argues that the Tribunal substituted its own view of what was in the best interests of the Band for that of Chief William: applicant's MFL at para. 131.

[89] Finally, Canada submits that the Tribunal erred in finding that the granting of alternate lands was only relevant to the issue of compensation. It argues that this consideration is relevant in determining whether Canada breached its fiduciary duty: applicant's MFL at para. 132. In the alternative, it submits that if Canada did breach its fiduciary duties, it can only be found to have done so in respect of the lands within Lots 71 and 72 that had been pre-empted in 1881: applicant's MFL at para. 133.

[90] Canada also submits that the Tribunal misconstrued some of the evidence in coming to its conclusion on this issue: applicant's MFL at paras. 117-123. Finally, it insists upon the point that O'Reilly rode over the land with Chief William, who stated that he was satisfied and happy that their land question was now settled: appellant's MFL at para. 123.

[91] Canada emphasizes the fact that neither Canada, nor any of its agencies, had the legal or practical power to unilaterally set aside the pre-emptions: applicant's MFL at paras. 124-126.

With this in mind, argues Canada, the Crown acted in the Band's best interests by granting to it the Bates Estate in 1881 as well as the other substantial reserves. Canada submits that the land which it granted to the Band far exceeded the ten-acre formula, which, according to the colony, was the requirement under Article 13 of the *Terms of Union*: applicant's MFL at paras. 129-130. It also exceeds the 400 to 500 acres that Nind allegedly failed to set aside for the Band on the instructions of Douglas (AR Vol. 1, Tab 1a at 126, para. 4). Douglas, as the person who requested that Nind set aside that acreage, was well aware of the colony's land allotment practices.

[92] The Band submits that the Tribunal's decision on this issue contains no error. It argues that the Tribunal clearly defined the scope and content of Canada's fiduciary duties according to the correct legal principles, and outlined how these duties were breached: respondent's MFL at paras. 89, 95.

[93] The Band submits that the Tribunal's decision in this case is consistent with its earlier finding in *Kitselas*, that the Indians' interest in lands that they used and occupied was recognized by colonial authorities, and that the policy of recognizing this interest was Canada's constitutional responsibility following Confederation: respondent's MFL at para. 92. The Band submits that Canada's argument about the specific acreage to be allotted per Indian family is irrelevant because the Tribunal did not make any findings to this effect: respondent's MFL at para. 93. The Band emphasizes that the Tribunal's decision about the policy was not about acreage, but simply that Indian settlements were to be protected from pre-emption: respondent's MFL at paras. 93-94. The Band submits that it would be inappropriate for this Court to make any

finding on the issue of acreage, given that it was unnecessary for the Tribunal to do so for the purposes of the Band's claim: respondent's MFL at para. 94. The Band submits this even though Article 13 of the *Terms of Union* specifically refers to setting aside "…tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose".

[94] The Band submits that the Tribunal reasonably and correctly found that following Confederation, the Band still had a cognizable interest in the Village Lands, and that Canada, as the exclusive intermediary with the Province in relation to this interest, exercised discretionary control: respondent's MFL at para. 96. The Band argues that these findings are supported by the evidence: respondent's MFL at para. 97.

[95] The Band submits that the Tribunal did not err by ignoring the fact that Canada lacked the power to unilaterally set aside the pre-emptions, but rather acknowledged this fact and set out the ways in which the Crown could have nonetheless "breathed life" into the undertaking contained in Article 13 and its commitment to continue the colony's liberal policy: respondent's MFL at paras. 98-100. It also submits that the Tribunal's finding that the best interest of the Band was the allotment of the Village Lands as a reserve was supported by the evidence: respondent's MFL at para. 101.

[96] The Band submits that the Tribunal reasonably concluded that Canada breached its fiduciary duties to the Band. The Band's response to Canada's arguments about the granting of reserves in 1881 by O'Reilly is that Canada misconstrues the Band's claim as being about land

generally, when it is properly about the Village Lands, to which it has a deeply entrenched connection: respondent's MFL at paras. 103-109. The Band submits that after 1881, given that it was told that it could not interfere with "white men's rights", it ceased to plead for the return of the Village Lands, but that it filed its claim with the Minister in respect of these lands shortly after Canada agreed to address pre-Confederation claims: respondent's MFL at paras. 110-111. The Band submits that if the 1881 Allotment Lands have any relevance to this claim, it is only to the compensation stage, as found by the Tribunal: respondent's MFL at para. 112.

[97] In my view, the Tribunal's conclusion that Canada breached its fiduciary duty and honour of the Crown is based on two premises. First, the best interest of the Band, as beneficiary, was in the allotment of the Village Lands as a reserve. Second, although Canada had no power to void the sales that had taken place in respect of the 1,000 acres that had been pre-empted or sold prior to 1881, the Crown had to take steps to challenge those sales and/or pre-emptions so as to remove the impediments to the allocation of the reserves.

[98] Assuming, as I have said, that it was open to the Tribunal to conclude that Canada was the exclusive intermediary between the Band and the Province, and that Canada had a fiduciary duty at the pre-reserve stage, the Tribunal's finding that Canada breached its duty by failing to challenge the settlers' rights is flawed in several respects.

[99] The Tribunal made a bald statement that the best interest of the Band, as beneficiary, was that the Village Lands be allocated as a reserve: Reasons at para. 322. It did not explain how this could be so, and yet, in contrast, it is evident that contesting the validity of the pre-emptions and

sales of 1,000 acres of the Village Lands would have resulted in further delays in establishing the Band's reserve. This, at a time when the Band appeared to be in desperate need of a definite and prompt allocation of land: Reasons at para. 82; AR Vol. 6, Tab E 1a at 1721; AR Vol. 1, Tab 1a at 140-141; AR Vol. 14, Tab N1 at 3657, 3659, 3661.

[100] The evidence indicates that O'Reilly was willing to provide the Band with any public land (i.e., land which had not been sold to settlers) that it required to meet its needs: AR Vol. 1, Tab 1a at 149. The Band members, Chief William, and O'Reilly spent several days surveying the region. The Band ultimately selected thirteen parcels of land that it wanted, in addition to the Bates Estate (which will be discussed below). Besides addressing the Band's needs for farming, fishing, hay growing and pasturing, these parcels of land also included a rough mountain top that likely had significance to the Band (as O'Reilly could not see its practical use) as well as several burial sites: AR Vol. 1, Tab 1a at 151-152. The Tribunal did not explain why the Band's decision not to select any portion of Lots 71 and 72 that was still public (i.e., about half), aside from the burial grounds, should not be considered when defining the Band's best interests. In fact, if one does not use hindsight, this should be determinative of the Band's views on its best interests in respect of the public lands that remained available within the Lots.

[101] Similarly, there is no evidence that O'Reilly knew, or ought to have known in such circumstances, that it was in the Band's best interests to allocate as a reserve the public lands included in the Tribunal's description of the Village Lands—a description made more than a hundred years after the allocations. The Tribunal did not address this issue.

[102] The Band, as well as those who wrote on its behalf, asserted that all of its land in the area had been pre-empted by the settlers. However, there is no evidence of sales or pre-emptions other than those summarized in Appendix 3 as amended. The Band now states before us that an exact description of the Village Lands was not strictly necessary, as its claim only pertains to the portions of the Village Lands that were illegally pre-empted or sold. This may well be the case, but it does not explain the inconsistencies in the Tribunal's approach to the important question of the Band's best interests at the time.

[103] The Tribunal held that O'Reilly failed to uphold the honour of the Crown when he refused to allow the Band land that would interfere with "white men's rights": Reasons at paras. 331-332; 338-339. In my view, it cannot be said that there has been a breach of a fiduciary duty on the part of Canada simply because Commissioner O'Reilly sought to reconcile the reality that existed on the ground in 1881 when he was seeking to establish a reserve for the Band; namely, that certain parcels of land had been pre-empted by the "white man", and that despite repeated efforts to convince the Province of the urgent need to deal with the issue, it had not done so.

[104] In my opinion, it was an error on the part of the Tribunal to conclude that Commissioner O'Reilly was not allowed to consider those circumstances. Rather, any possible fiduciary duty that may have existed required that he act honourably and fairly in considering the needs and wishes of the Band in resolving the issue of a land base, including the issue of the pre-emptions that had occurred on Lots 71 and 72. As held in *Wewaykum*,

> Prior to reserve creation, … a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject

> matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.
>
> (At para. 86.)

[105] The evidence indicates that this duty was discharged. In my view, *Wewaykum* recognizes that a balancing of interests is required. Certainly, such balancing is not prohibited, even when—as the Tribunal held—the settlers' rights are open to challenge. The following statement from *Wewaykum* is apposite:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting.… 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.
>
> (At para. 96; citations omitted.)

[106] The Tribunal's error in legal principle in determining that Commissioner O'Reilly was not permitted to consider all the circumstances before him tainted its consideration of the facts that surrounded the creation of the reserve. Indeed, the Tribunal seized upon the statement made by O'Reilly in obviously incomplete notes that he would not interfere with "white men's rights" as evidence that he did not act in an honourable fashion towards the Band before the creation of the reserve: AR Vol. 1, Tab 1a at 149. In large measure, it is the only reason that the Tribunal gave for concluding that the actions of Canada in creating a reserve for the Band both breached its fiduciary duty to the Band and failed to remedy any possible liability that may accrue to Canada as a result. It seems to me that it would have been irresponsible of Commissioner O'Reilly not to consider the on-the-ground reality when exploring possible ways to resolve a

challenging situation that required a timely solution. It is obvious that O'Reilly and Canada concluded that the Province would not agree to void the sales that had already taken place. This explains why O'Reilly indicated that the land issue ought to be settled without interfering with the "white men's rights": See also similar comments as to the limit of his authority at AR Vol. 4, Tab 16a at 881 text at note 83, at 885 text at note 102.

[107] There is no evidence to suggest that Commissioner O'Reilly was merely a servant to the interests of the "white man", as the decision of the Tribunal implies. Rather, the evidence shows that:

- The problems regarding establishing a reserve for the Band and their plight generally were well known by the colony (and later the Province). Federal agents, as well as others, had brought to the colony's attention that it ought to deal with the pre-emptions and sales that had taken place before 1871: AR Vol. 1, Tab 1a at 143-144.

- The colony and later the Province were resistant to resolving the Band's claims. Canada actively sought more co-operation from the Province subsequent to Union in an attempt to resolve the Band's plight, but these efforts were largely to no avail: AR Vol. 1, Tab 1a at 143.

- Importantly, Canada grew impatient with this apparent intransigence on the part of the Province. It took the highly unusual step of purchasing a large tract of land known as the Bates Estate, following Mr. Bates' death, in order to establish the Allotment Lands for the Band. This quantity of land far exceeded any amount of land that may have resulted had the former colony acted upon its "liberal policy" as set out in Article 13 of the *Terms*

of Union. The quality of land, namely arable land suitable for cultivation, was, it seems, precisely what had been requested by the Band: AR Vol. 1, Tab 1a at 140; AR Vol. 14, Tab N1 at 3667-3669. Contrary to what the Band now argues, the Bates Estate was not "any land". Rather, it was adjacent to the other parcels of land the Band had selected and to which it was obviously attached.

- Indeed, in his letter to the British Colonist Daily, Chief William expressly refers to Mr. Bates' farm, indicating that members of his Band worked on this farm and that Mr. Bates had been a good friend: AR Vol. 1, Tab 1a at 140.

- Also of importance is the evidence that Commissioner O'Reilly specifically considered the request from the Band concerning Lots 71 and 72 and set aside burial sites, which the Band had requested: AR Vol. 1, Tab 1a at 152.

- In addition, there is evidence that Chief William was satisfied with the land purchased and the lands allocated as reserve lands by Commissioner O'Reilly and that he indicated this approval to Commissioner O'Reilly: AR Vol. 1, Tab 1a at 151, paras. 239-242.

[108] Given these circumstances, in my view, the Tribunal proceeded upon an erroneous legal principle: namely, that Commissioner O'Reilly should not have considered the reality that existed on the ground in relation to the lands in question when considering how to resolve the challenges facing the Band. A balancing of the competing interests was permitted at this pre-reserve stage. Indeed, counsel for the Band acknowledged at the hearing that Commissioner O'Reilly could consider the wider interests in fashioning a remedy. Counsel also acknowledged

that Canada did not owe a duty of specific performance when creating the reserve for the Band with respect to the lands within Lots 71 and 72 that had been pre-empted.

[109] Further, it was an error on the part of the Tribunal to conclude that the subsequent actions of Canada, in particular the purchase of the Bates Estate, did not remedy any possible breach of a fiduciary duty that it may have owed to the Band before 1871. The Tribunal summarized its finding in this regard by simply stating that this was a question related to compensation and not to liability. In my view, it is an error to characterize this as solely a matter of compensation. Rather, if the subsequent actions of Canada remedied any possible earlier breaches by the former colony, then there were no breaches which require compensation.

[110] Canada's fiduciary duty did not require it to purchase land in order to create a reserve. It did so only to remedy and definitively settle a situation that it did not create, and which, in its view, was unlikely to be redressed by the Province in a timely manner.

[111] O'Reilly was clear that Canada's intention was to remedy the mistakes of the colony. He did ask the Band to be "reasonable", noting that "[t]hey [Canada and the Band] must mutually assist in remedying the mistake": AR Vol. 1, Tab 1a at 149. The terms of *Proclamation No. 15* were known to all, including Chief William. Everyone concerned knew that the original pre-emptions were problematic. Chief William and the Band accepted what was proposed by O'Reilly (i.e., the Allotment Lands). It appears that Chief William "expressed himself satisfied and thankful that their land question [was] now settled": AR Vol. 1, Tab 1a at 151, paras. 239-242.

[112] If, as I believe, the subsequent actions of Canada remedied any possible breaches by the colony, then there remain no breaches that require compensation from Canada.

[113] It is also important to recognize that subsection 14(2) of the *Specific Claims Tribunal Act* does not provide a separate ground upon which to claim compensation with respect to the colony. Rather, subsection 14(2) provides that for the purposes of applying paragraphs 14(1)(*a*) to (*c*), a reference to the Crown includes the former colony and states that any liability relating to the former colony's breach or non-fulfillment of paragraphs 14(1)(*a*) to (*c*) exists only "to the extent that" it became the responsibility of the Crown in right of Canada. In this case, the subsequent actions of Canada through the allotment of the Allotment Lands in 1881, which were accepted by the Band, remedied any possible earlier breach by the former colony and thus no liability was established which could become the responsibility of the Crown in right of Canada.

[114] Put another way, there simply was no liability established. The Tribunal both proceeded upon a flawed principle and reached an unreasonable conclusion based on the facts of this case. Canada was required to act honourably in resolving the long-outstanding challenges of the Band and the evidence shows that Canada and Commissioner O'Reilly did so. As such, there was no breach of a fiduciary duty by Canada. In addition, the subsequent actions of Canada in establishing the reserve through the allotment of the Allotment Lands in 1881 for the Band remedied any possible earlier breaches by the former colony.

Summary and Disposition

[115] A court may, in limited cases, substitute its decision for that of an administrative decision maker. It may not do so lightly or arbitrarily, and it must have serious grounds for doing so (*Giguère v. Chambre des notaires du Québec*, 2004 SCC 1 at para. 66, [2004] 1 S.C.R. 3 [*Giguère*]). In *Giguère*, the Supreme Court held that "courts may…intervene in cases where, in light of the circumstances and the evidence in the record, only one interpretation or solution is possible, that is, where any other interpretation or solution would be unreasonable". For the reasons outlined throughout, it is my opinion that the conclusion I have arrived at is the only one possible.

[116] In *National Bank of Canada v. Lavoie*, 2014 FCA 268 at para. 33, 469 N.R. 206, this Court declined to substitute its own decision, noting that it did not have a transcript of the testimonies, and that the evidence before the Court stemmed solely from affidavits filed to "reconstruct" the evidence that was filed before the adjudicator. In contrast, here, the evidence pertaining to the key issues of whether there was a breach by Canada and whether the breach was remedied is documentary only. Further, the historic documentation at the centre of this case was thoroughly canvassed by the parties before us.

[117] For these reasons, in my view, this is one of the limited instances in which it is appropriate for this Court to substitute its own decision for that of the Tribunal.

[118] For the foregoing reasons, I would allow the application and set aside the decision of the Tribunal.

[119] As I conclude that:

a. Her Majesty the Queen in Right of Canada did not breach a legal obligation to the Williams Lake Indian Band; and

b. Her Majesty the Queen in Right of Canada is not liable for any possible breaches of legal obligation of the colony of British Columbia,

I would dismiss the specific claim brought pursuant to paragraphs 14(1)(*b*) and 14(1)(*c*) of the *Specific Claims Tribunal Act*. Each party shall bear its own costs before the Tribunal and before this Court.

"David G. Near"

J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
C. Michael Ryer J.A."

Appendix

Specific Claims Tribunal Act (S.C. 2008, c. 22)
Loi sur le Tribunal des revendications particulières (L.C. 2008, ch. 22)

Specific Claims	Revendications particulières
Grounds of a specific claim	Revendications admissibles
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:	14 (1) Sous réserve des articles 15 et 16, la première nation peut saisir le Tribunal d'une revendication fondée sur l'un ou l'autre des faits ci-après en vue d'être indemnisée des pertes en résultant :
(a) a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;	a) l'inexécution d'une obligation légale de Sa Majesté liée à la fourniture d'une terre ou de tout autre élément d'actif en vertu d'un traité ou de tout autre accord conclu entre la première nation et Sa Majesté;
(b) a breach of a legal obligation of the Crown under the Indian Act or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;	b) la violation d'une obligation légale de Sa Majesté découlant de la Loi sur les Indiens ou de tout autre texte législatif — relatif aux Indiens ou aux terres réservées pour les Indiens — du Canada ou d'une colonie de la Grande-Bretagne dont au moins une portion fait maintenant partie du Canada;
(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;	c) la violation d'une obligation légale de Sa Majesté découlant de la fourniture ou de la non-fourniture de terres d'une réserve — notamment un engagement unilatéral donnant lieu à une obligation fiduciaire légale — ou de l'administration par Sa Majesté de terres d'une réserve, ou de l'administration par elle de l'argent des Indiens ou de tout autre élément d'actif de la première nation;
(d) an illegal lease or disposition by the Crown of reserve lands;	d) la location ou la disposition, sans droit, par Sa Majesté, de terres d'une

réserve;

(e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or

e) l'absence de compensation adéquate pour la prise ou l'endommagement, en vertu d'un pouvoir légal, de terres d'une réserve par Sa Majesté ou un organisme fédéral;

(f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands.

f) la fraude, de la part d'un employé ou mandataire de Sa Majesté, relativement à l'acquisition, à la location ou à la disposition de terres d'une réserve.

Extended meaning of Crown — obligations

Période préconfédérative — obligation

(2) For the purpose of applying paragraphs (1)(a) to (c) in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

(2) Pour l'application des alinéas (1)a) à c) à l'égard d'une obligation légale qui devait être exécutée sur un territoire situé à l'intérieur des limites actuelles du Canada avant l'entrée de ce territoire au sein du Canada, la mention de Sa Majesté vaut également mention du souverain de la Grande-Bretagne et de ses colonies, dans la mesure où cette obligation, ou toute responsabilité en découlant, a été imputée à Sa Majesté, ou aurait été imputée à celle-ci n'eût été les règles ou théories qui ont eu pour effet de limiter un recours ou de prescrire des droits contre elle en raison de l'écoulement du temps ou d'un retard.

Extended meaning of Crown — illegal lease or disposition

Période préconfédérative — location ou disposition

(3) For the purpose of applying paragraph (1)(d) in respect of an illegal lease or disposition of reserve land located in an area within Canada's present boundaries before that area became part of Canada, a reference to the Crown includes the Sovereign of Great Britain and its

(3) Pour l'application de l'alinéa (1)d) à l'égard de la location ou de la disposition, sans droit, de terres d'une réserve se trouvant sur un territoire situé à l'intérieur des limites actuelles du Canada avant l'entrée de ce territoire au sein du Canada, la mention de Sa Majesté vaut également

colonies to the extent that liability for the illegal lease or disposition became — or would, apart from any rule or doctrine that had the effect of limiting claims or prescribing rights against the Crown because of passage of time or delay, have become — the responsibility of the Crown in right of Canada.

mention du souverain de la Grande-Bretagne et de ses colonies, dans la mesure où toute responsabilité découlant de la location ou de la disposition a été imputée à Sa Majesté ou aurait été imputée à celle-ci n'eût été les règles ou théories qui ont eu pour effet de limiter un recours ou de prescrire des droits contre elle en raison de l'écoulement du temps ou d'un retard.

Extended meaning of Crown — other

(4) For the purpose of applying paragraphs (1)(e) and (f) in respect of reserve lands located in an area within Canada's present boundaries, a reference to the Crown includes the Sovereign of Great Britain and its colonies for the period before that area became part of Canada.

Période préconfédérative — autres cas

(4) Pour l'application des alinéas (1)e) et f) à l'égard de terres d'une réserve se trouvant sur un territoire situé à l'intérieur des limites actuelles du Canada, la mention de Sa Majesté vaut également mention du souverain de la Grande-Bretagne et de ses colonies pour la période antérieure à l'entrée de ce territoire au sein du Canada.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

AN APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF THE SPECIFIC CLAIMS TRIBUNAL DATED FEBRUARY 28, 2014 (2014 SCTC 3)

DOCKET:	A-168-14
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DELEVLOPMENT CANADA v. WILLIAMS LAKE INDIAN BAND AND COWICHAN TRIBES (INTERVENER)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 11, 2015
REASONS FOR JUDGMENT BY:	NEAR J.A.
CONCURRED IN BY:	GAUTHIER J.A. RYER J.A.
DATED:	FEBRUARY 29, 2016

APPEARANCES:

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