

FILE NO.: SCT-7004-12
CITATION: 2015 SCTC 5
DATE: 20151019

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

BETWEEN:)
)
LAKE BABINE NATION)
) Maria Morellato Q.C. and Leah Pence, for
) the Claimant
Claimant)
)
- and -)
)
HER MAJESTY THE QUEEN IN RIGHT)
OF CANADA)
As represented by the Minister of Indian) Tanya Jorgenson and Michael Mladen, for
Affairs and Northern Development) the Respondent
)
)
Respondent)
)
)
)
) **HEARD:** October 15-16, 2014 and February
) 11-12, 2015

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Canada v Kitselas First Nation, 2014 FCA 150, [2014] 4 CNLR 6; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Canada*, 2014 SCTC 3; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Lac Seul First Nation v Canada*, 2009 FC 481, 348 FTR 258 (FCA); *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 14.

Indian Act, RSC 1927, c 98.

British Columbia Terms of Union, 1871, a 13.

Land Act, RSBC 1908, c 30.

Indian Affairs Settlement Act, SBC 1919, c 32.

British Columbia Indian Lands Settlement Act, SC 1920, c 51.

Constitution Act, 1867, s 91.

Authors Cited:

Black's Law Dictionary, 10th ed, *sub verbo* "cognizable."

Headnote

Aboriginal Law – Specific Claims – Specific Claims Tribunal Act – Fiduciary Duty – McKenna-McBride Commission – Reserve Creation – Provisional Reserves – Oral History – Use and Occupation – Cognizable Interest – Best Interests

This specific claim arises out of the failure of Government officials to establish certain lands located south of the Fulton River as a reserve for the Lake Babine Nation. A reserve was set apart on the north side of the river, but Lake Babine Nation contends that the land on the south was intended to form part of the reserve. The Claimant First Nation seeks compensation based on sub-section 14(1)(c) of the *Specific Claims Tribunal Act* for “breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands.”

The Claimant contends that it had a cognizable interest in the lands south of the river by virtue of long time use and occupation, and on the basis of the recognition of that interest by the Royal (McKenna-McBride) Commission. The Commission had directed that lands both north and south of the Fulton River be withheld from alienation pending final action of the Commission regarding the Claimant’s applications for reserve lands, but the north lot was covered by an application to purchase and the Commission’s 1916 final report ordered a reserve on the south lot only. Before the reserve was surveyed, the north lot reverted to the Province, and the surveyor was instructed to survey the north lot in the south’s stead. The Claimant contends that the Commission’s final report created a provisional reserve on the south lot for its use and benefit, and is also evidence of the Crown’s intention to provide lands on the north and south as a reserve. It submits that the Crown breached its fiduciary duty by failing to challenge the application to purchase that covered the north lot in 1916, by failing to ensure that a reserve was established over land on both sides of the Fulton River, by failing to challenge the survey of the north lands, and by failing to rectify the error of not including the south lot when it became aware of the mistake.

The Crown met its obligations here. There is no reliable evidence of residential occupation of the land south of the river between 1915 and 1927, and the Commission received no evidence of actual use of the south land beyond taking timber for dwellings. The Province and Canada acted in the best interests of the Claimant in creating a reserve north of the Fulton River, as that is where the members of the Nation had long established residences and access to the fishery. A successful challenge to the application to purchase would have yielded the same result as ultimately took place, namely the creation of a reserve where the Indians had long established residency.

It was neither intended nor contemplated that land on both sides of the Fulton River would be constituted as reserve land. The Commission had taken measures to ensure that the land to the north be available for a reserve if the application to purchase was abandoned. The north consequently became available, and the contingency of the south land was no longer required.

Held: The Crown did not breach its legal obligation to provide reserve lands to the Claimant.

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I. HISTORY

A. The Claim

[1] The Claim arises out of the failure of Government officials, including those representing the Crown, Canada, to establish as certain lands located to the immediate south of the Fulton River as a reserve. The Claimant First Nation seeks compensation based on sub-section 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA], for “breach of a legal obligation arising from the Crown’s provision or non-provision of reserve lands.”

[2] A reserve, situated on the north side of the river, was set apart for the use and benefit of the Hagwilget Tribe. The Hagwilget Tribe was later divided into subgroups for the purpose of federal administration under the *Indian Act*, RSC 1927, c 98. The Lake Babine Band is one such subgroup. As such, the existing reserve at the mouth of the Fulton River is held by Canada for its use and benefit. The Claim concerns land on the south side of the Fulton River (the “South Land”). It is this land that the Claimant says was intended to form part of the reserve, and that the failure to effect this was in breach of legal obligations of the Crown.

[3] The Lake Babine Nation submitted a specific claim to the Minister in June, 1997 alleging that the Crown breached its fiduciary obligations to the Lake Babine Nation due to its failure to protect Lot 1610A, Lot 1353 and the east half of Lot 1354, and establish the Lots as a reserve.

[4] The Minister notified the Lake Babine Nation in writing on May 25, 2011 of his decision rejecting the claim for negotiation.

B. The Evidence

1. Agreed Statement of Facts

[5] The Parties entered a comprehensive agreement on the facts related to the events surrounding the creation of a reserve where the Fulton River drains into Babine Lake. Although the agreed facts are set out to a level of detail that need not be reflected in reasons for decision, I have nevertheless incorporated much of the material as set out in the agreement. Some of the evidence review is verbatim from the agreed facts, some is summary.

2. Documentary Evidence

[6] The Common Book of Documents (CBD) lists 328 documents. The Parties filed supplementary lists comprising 37 items. The 1916 Report of the Royal Commission on Indian Affairs for the Province of British Columbia (the McKenna-McBride Report) was filed as a separate document. The documents are generally in support of the facts set out in the Agreed Statement of Facts (ASOF) and add considerable detail. Some documents relate to customary practices and protocols of the Claimant community.

3. Oral History and Recalled Events

[7] Warner Adam testified for the Claimant. He has been a member of the Claimant, the Lake Babine Nation from birth in 1965. Like his parents and grandparents, Mr. Adam grew up in the areas used and occupied by the Lake Babine peoples. He acquired knowledge of the traditions, governance and use of the land and resources through the teachings of elders, by personal communications, and through attendance and participation at feasts and potlatches.

[8] After completing high school Mr. Adam attended college to study business administration and, later, earned a certificate in administration of Aboriginal governments.

[9] Mr. Adam was employed in Band administration in various roles. In 1984-1985 he was employed by the Carrier Sekani Tribal Council as a researcher for a traditional land use study. In that capacity he interviewed elders about traditional land and resource use and governance. To that end he interviewed elders, including hereditary chiefs.

[10] In the clan system, hereditary chiefs have authority and responsibilities in relation to discrete areas within the lands considered the traditional territories of the indigenous group constituted by common language and culture. Today, the seating order and protocols of the group in the house reflect both the place of individuals in the traditional hierarchy and their connection with places in the territory. Their preparatory and ongoing work to achievement of these roles centres on the receipt and recollection of the tribal history within the family and the words spoken by chiefs, elders, and other respected persons at feasts and potlatches.

[11] Mr. Adam explained the division of territories among the four clans, sub-clans, and the responsibilities of the clan leaders. The land at issue is within the territory of the Bear Clan. He

described the area immediately to the north and south of the mouth of the Fulton River as “Tachet,” one of the five village sites currently occupied by the Lake Babine people. The area was known by him in his youth as Topley Landing.

[12] As a child, Mr. Adam visited Louise Michell, a friend and contemporary of his grandmother. Her cabin remains to this day, and adjacent there is a footbridge to an island at the mouth of the Fulton River. John Baptiste (Paddy) Leon had a house, smokehouse and fish cache on the island.

[13] There are, at present, individuals recognized as chiefs responsible for the village site, Tachet. They, in turn, are descended from Charlie Pice, who testified before the Commission in 1915, and his offspring, Rosie Leon and Lazalle Charlie.

[14] Mr. Adam named several families with ancestral connections to, and houses at Tachet, including Louise Michell, Lawrence Tom and Lazalle Charlie. Daniel Leon, a high chief of the Lake Babine people, had married into the local community at Tachet and resided there with his family.

[15] In 1984, at age 19, Mr. Adam interviewed Mary Williams and Lazalle Charlie, Charlie Pice’s son. They were interviewed in the Carrier language. This was in the course of his research on the traditions and use and occupation of the traditional territory. Both interviewees were in their 80s, and have since died. Transcripts of English language translations of the interviews are in evidence in the present matter.

[16] Mrs. Williams and Mr. Charlie spoke of traditional fishing methods practiced at Tachet and elsewhere in the territory. They recounted how settlers had depleted the fish and game that sustained them, and how interference with harvesting by government officials had affected their fishing.

[17] The Fulton River supports spawning of several species of fish, including salmon. The lands surrounding Tachet were hunting grounds.

[18] Mrs. Williams and Mr. Charlie spoke of their ancestral and personal association with the village, Tachet.

[19] Mrs. Williams said, in part:

How long have you lived here in Tachet?

What?

How many years have you lived here ?

For quite a long time, [s]ince I married my first husband[.] You know Madeline[']s dad? I must have moved here when I was fourteen years old, [a]nd I have been here ever since[.] My uncle Charlie C'o, used to live here before I did[.] [H]e was here looking after his parents when we moved here[.] It was the main reasons for coming here[.] All the way we lived right here nowhere else[.]

A long time ago did our ancestors use this land also?

Yes[.] Many years ago our people used all of this land, [b]ut as I told you before this old man, [m]y uncle Charlie C'o, he was the only one that was living here with his parents[.] They lived here all year round[.] They had a house near the shore of the Lake[.] [Exhibit 5 at tab10]

[20] Mrs. Williams's uncle was Charlie Pice, also known as Charlie C'o. As will be seen, Charlie Pice has a prominent place in the story of occupation of Tachet in the early 1900's.

[21] Mr. Adam believed Lazalle Charlie to be in his late 80's when interviewed in 1984. He would have been in his early 20's in 1917.

[22] Lazalle Charlie spoke of his understanding that, in 1917, a large reserve was promised in the vicinity of Tachet. He said:

I have been on this earth for many years, and I can recall my first memory, and this land that we live on now, we moved here in January 28, 1928 and before this my late father Charlie was here way before any one else, would you like to hear about this?

...

...my father's name was Charlie and bob Charlie is my brother also Jim Charlie and now you see Pierre Charlie he is here now he was raised in this land this was in 1917, when this became a reservation no one used a boat motor we only had paddles and this is how we travelled by rowing , there was a man named Mr Hyde him and this man Mr Loring they were Indian agents from Hazelton Mr Loring was an assistant agent and when they arrived in Topley landing by boat they rowed to this place this was in August 18th 1917, they met with my brother Bob Charlie at four mile and they talked about this Bob knew how to speak

english and they talked about making this reservation from the other side of the creek to four mile all of Topley landing five miles up towards the lake five miles and up four miles this reservation was to be eight miles square and the forestry people they made the reserve smaller that they agreed on, there was a man named Mr Moore that was working for the forestry, and it was him that started to harvest the timber that was on our reserve and the Indian agent Mr Loring met with this man and he told them not to do this and this reservation was too small not even 160 acres and look at all the people, they need to survive and work also whether it be with the fish or the timber this belongs to our people this is what I told this Indian Agent and this reservation was supposed to belong to our people does that not include the resources also, this is what I told this Indian agent and I am still on this land to this day...[Exhibit 5 at tab 11; emphasis added]

[23] On cross examination, Mr. Adam agreed that Mary Williams had said that “[m]y uncle, Charlie C’o (“Pice”), he was the only one that was living here with his parents...” (emphasis added). He also agreed that Lazalle Charlie had said “[t]his land that we live on now, we moved here on January 28th, 1928, and before this my late father Charlie was here way before anyone else” (emphasis added). There is conflicting evidence over the location of the “here” spoken of by Mary Williams and Lazalle Charlie. Was it land north of the Fulton River, or the South Land?

[24] More generally, the evidence of Warner Adam and the interviews of Mary Williams and Lazalle Charlie reveal the long time presence of the Hagwilget peoples along the western shore of Babine Lake, and seasonal use of the Fulton River to harvest fish, particularly during spawning. This location was the site of a village, Tachet.

[25] There was no allotment of a reserve at this location in the initial post-confederation round of reserve allotments, although in 1891 reserves were allotted elsewhere along Lake Babine for the Hagwilget Tribe.

4. The Fort Kilmaurs Journals

[26] In 1822 the Chief Trader of the Hudson’s Bay Company, William Brown, established Fort Kilmaurs at the northern end of Babine Lake. His journals refer to “Tatchy” as the first Babine village encountered when, on October 23, 1822, he camped on the western shore of Babine Lake. He described Tatchy as follows:

Of the Babines of the Lake

There are three villages on the banks of this Lake, which contain about two hundred and fifty souls...These three villages are as follows - Tatchy situated at the entrance of a small river on the south shore, about sixty miles from the Portage - This place was formerly the resort of a numerous band of Indians, but they have dwindled away of late years to four families, and a few stragglers who occasionally reside there - the salmon mount this River in great numbers and are killed with much less labour than at the fishery on the Babine River. [Exhibit 4 at tab 16; emphasis added]

[27] Brown notes trade in fish, marten and beaver with the occupants of the village over the next few years. The names of heads of families are recorded, and also the practice of seasonal travel from the village for hunting. The ancestry of present day members of the Lake Babine Nation, in particular the Bear Clan, can be traced back to persons named in the journals.

[28] Fort Kilmaurs was closed in 1891.

[29] Father A.G. Morice of the Oblates of Mary Immaculate identified "Tachek" on the southwestern shore of Babine Lake at the mouth of the Fulton River on a 1907 map.

[30] Neither Brown's description of the village in 1822, nor Morice's map, limit the village site to the north side of the Fulton River.

5. Reserves Established

[31] British Columbia entered into confederation in 1871 under terms and conditions set out in the *British Columbia Terms of Union, 1871*. Article 13 addresses Indians and Indian lands stating:

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. [ASOF at para 8]

[32] Reserve Commissioner Peter O'Reilly visited Babine Lake in 1891. He allotted 12 reserves for the Hagwilget Tribe toward the north end of Babine Lake. There was no allotment of a reserve at the mouth of the Fulton River.

[33] A Provincial record, a 1913 Pre-emptor's map, marks a small tract of land immediately south of the Fulton River as "Ind. Res" and a 1913 letter of the Provincial Surveyor General refers to a "blueprint" prepared by a surveyor, Gray, showing an "Indian Reserve on the North side of the Fulton River at the mouth." The blueprint has not been found.

[34] There is, despite the indications of a reserve on the above map and blueprint, no record of an intention on the part of Provincial or Federal officials to set aside land at the mouth of the Fulton River until 1915, when the McKenna-McBride Commission ordered that land on both sides of the river remain available in order that a reserve could be established.

[35] In 1916, a portion of the South Land, ungazetted Lot 1353, was set apart by the McKenna-McBride Commission for eventual transfer to Canada for the benefit of the "Hagwilget Tribe, Fort Babine Band." This land is the subject of the Claim. It later transpired that land on the North side, not the South, was transferred to Canada as reserve. The explanation for this change is found in the events affecting land designations and tenures in the region between 1916 and 1927.

[36] The Fort Babine Band and the Old Fort Band amalgamated in 1958 to form the Lake Babine Nation. No basis was advanced for differentiating between the two for the purposes of this Claim.

6. Settler's Land Applications

[37] In October 1909, James Cronin applied to purchase 640 acres of land north and south of the Fulton River, including the South Lands. A sketch of the land Cronin sought to purchase shows a square (80 chains by 80 chains) covering lands on either side of what is stated to be the "Fulton or Tachek River."

[38] As required by the *Land Act*, RSBC 1908, c 30 [*Land Act*], Cronin swore a Statutory Declaration stating, *inter alia*:

1. I...James Cronin, intend to apply for permission to purchase six hundred and forty acres of unoccupied and unsurveyed Crown lands (not being part of an Indian Settlement) situate in the vicinity of Babine Lake at the...Fulton or Tachek River. [CBD volume 1 at tabs 53-54; emphasis added]

[39] The bold portion above reflects the statutory bar to pre-emption of Indian Settlement lands.

[40] J. Brownlee, Provincial Surveyor, surveyed 340.2 acres North of the River, which he designated Lot 1610A. His field book sketch notes “Indian shacks” within the boundaries. A “Trail to Babine Lake” is also marked.

[41] Brownlee’s sketch of Lot 1610A showed that another settler John Davidson, had applied for some of the lands included in Cronin’s application south of the Fulton River, which Brownlee surveyed for Davidson on October 30 and 31, 1909 as Lot 1611A. The South Land, located adjacent to Lot 1611A, was part of the land that Cronin had applied to purchase; Brownlee excluded this parcel from the lands he surveyed for Cronin.

[42] In December 1909, Cronin pursued his application to purchase 640 acres located “near the mouth of Fulton River....” On February 14, 1910, the provincial land agent sent Cronin’s application to Victoria. Cronin received a Crown grant for Lot 1610A in 1917. The sketch attached to the grant made no note of the presence of “Indian shacks.”

7. Applications and Surveys

[43] In 1910, British Columbia Land Surveyor J.H. Gray surveyed three lots south of the Fulton River: Lot 1353 directly south of the Fulton River at Babine Lake, Lot 1354 adjacent to and immediately south of Lot 1353, and Lot 1355 adjacent to and east of Lot 1354 extending to the shore of Babine Lake. Lot 1353 was located immediately south of the Fulton River.

[44] The survey of Lot 1353 was rejected by the Surveyor General for British Columbia due to an irregularity in the boundary with surveyed Lot 1611A.

[45] The applications for Lots 1354 and 1355 were, as with Lot 1353, disallowed. In the result, the only land at the mouth of the Fulton River that remained the subject of an application to purchase (by Cronin), as of 1913, was Lot 1610A. The survey of Lot 1610A was published in the British Columbia Gazette in 1911. The surveys of Lots 1354 and 1355 were published in October, 1913.

[46] In summary, as of 1913 the land immediately north of the mouth of the Fulton River was subject to an application to purchase (by Cronin) of questionable validity, and other defined parcels south of the river were no longer burdened by applications for Crown grants.

[47] There was, in 1912, a major development in the tussle between the Province and Canada over the establishment of Indian reserves in British Columbia.

8. The McKenna-McBride Agreement, 1912

[48] Between 1876 and early in 1900, Canada and British Columbia had jointly identified land to be conveyed pursuant to the terms of Article 13 of British Columbia's Terms of Union, and the land, including other reserves for Lake Babine, had been set apart by the Province to prevent pre-emption by settlers. However, the Province refused to effect the transfer on the basis that the allotments were excessive. In the result, some 41 years after the joint commitment solemnly memorialized in Article 13, it was agreed that a Royal Commission would be established to make recommendations for the resolution of issues over lands to be transferred. The McKenna-McBride Agreement, dated September 24, 1912, provided:

1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so named shall select a fifth Commissioner, who shall be the Chairman of the Board.
2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
 - (a) ...
 - (b) At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved.

3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.
...
6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.
7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, ...
8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. [ASOF at para 12; emphasis added]

[49] By Dominion Order in Council dated November 27, 1912 and Provincial Order in Council dated December 18, 1912, the Federal and Provincial Governments approved the McKenna-McBride Agreement with one amendment, namely that the acts and proceedings of the Royal Commission were subject to the approval of the Provincial and Federal Governments. The Governments further agreed “to consider favourably the reports, whether final or interim, of the Commission with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose.”

9. Reserves Identified up to 1913

[50] The 1913 Schedule of Indian Reserves in the Dominion for the Babine and Upper Skeena Agency listed 16 reserves for the Hagwilget Tribe. These were allotted among the three Indian Bands which made up the Hagwilget Tribe, namely the Morricetown Band, the Old Fort Babine Band and the Fort Babine Band. None of the reserves listed were located at the confluence of the Fulton River with Babine Lake.

10. Commission Orders and Final Decisions

[51] On July 13, 1915, the Royal Commission held a hearing at Hazelton. The assembled Indians, including Chief William of the Fort Babine Tribe, Chief Michel of Old Fort Babine, Antoine Williams, Bob Charlie, and Charlie Pice provided evidence to the Royal Commission about the places where they lived. Charlie Pice also produced the 1913 Provincial Pre-emptor's map bearing the "Ind. Res" notation. Indian Agent R.E. Loring also attended. A transcript of this hearing provides as follows (with handwritten changes of unknown origin in square brackets):

ROYAL COMMISSION ON INDIAN AFFAIRS FOR THE PROVINCE OF
BRITISH COLUMBIA

MEETING AT HAZELTON, B.C. ON TUESDAY, JULY 13TH, 1915 WITH
THE BABINES, K[?]LDOES AND THE KISG[I]GA[S] BAND OF INDIANS

EMILE WILLIAMS IS SWORN TO ACT AS INTERPRETER,

MR COMMISSIONER MACDOWALL EXPLAINS TO THE ASSEMBLED
INDIANS THE

SCOPE AND POWERS OF THE Commission,.....

.....

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CHARLIE PICE IS CALLED AND SWORN:

Mr. Commissioner McKenna: Where do you live?

A. Tachet river.

Q. (Examining map) On this river there are two little lakes, now where do
you live?

A. I live where the Tachet [illegible] creek empties into the river.

Q. On which side of the creek do you live?

A. On the north side of the creek.

Q. Do you know the name of that lake?

A. Fulton lake.

Q. And there is a creek coming from Cmamian [Chapman] lake to Fulton
lake?

A. Yes.

(NOTE: Pre-emption map, Bulkley Sheet, 1913, reserve at junction of creek
flowing from Fulton lake to the Babine river south _not shown in
Schedule.)

Mr. Commissioner Macdowall: Who owns this map?

A. One of the Indians.

Q. Suppose we took this map down to Victoria with us, and we asked Mr. Loring to send you a duplicate of it, would that be alright?

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A. Yes.

Mr. Commissioner McKenna: Where do you live?

A. I live on the other side of the Fulton river, opposite to what is marked on the sheet (I. R.X).

Q. Do any of the Indians live on the other side?

A. No.

Q. What is that land like just opposite to where you live?

A. Hilly and lots of timber.

Q. Does this land (examining sheet) rise abruptly from the river?

A. Yes.

Q. What kind of timber is on it?

A. Spruce and black-pine.

Q. And there is no land there that you could cultivate?

A. No.

Q. Do you use the timber at all?

A. Yes.

Q. What do you use it for?

A. For firewood, lumber and also for building our houses.

Q. Do you get anything there for making canoes?

A. Yes.

Q. Do you get cedar there for making canoes?

A. Yes.

Q. And you live across the Fulton Creek?

A. Yes.

Q. How many people live there?

A. Eight men altogether.

Q. Are you a married man?

- A. Yes.
- Q. How many children have you[~~got?~~]
- A. Six children.
- Q. Does your father live there?
- A. Yes.
- Q. And your mother?
- A. Yes.
- Q. How many b[ro]thers and sisters?
- A. Four brothers and two sisters.

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- Q. How many brothers are married?
- A. One is married besides me.
- Q. How many children has he?
- A. Three children.
- Q. You said there were two sisters – are they all married?
- A. Yes.
- Q. How many children have they [?~~got?~~]
- A. One has four and the other has one.
- Q. How many houses have you there altogether?
- A. Three.
- Q. Is that your permanent home?
- A. Yes.
- Q. Do you grow any potatoes there?
- A. Yes, we have a garden there.
- Q. How ma[n]y gardens are there?
- A. Three.
- Q. Do you grow potatoes enough to keep you for the winter?
- A. Yes.
- Q. Have you any cattle or horses?
- A. I have no cattle, but I have horses.

- Q. How many horses have you [? get?]
- A. I have six horses.
- Q. Where do your horses pasture?
- A. Right where we live.
- Q. Do they live out in the winter?
- A. Yes.
- Q. You don't put up hay for them every winter?
- A. Yes, we put up hay for them in the winter.
- Q. Where do you cut that hay?
- A. Right here where we live, about two miles running northwest where the Fulton River empties into the Babine river.
- Q. Are your houses near the Fulton River?
- A. Yes, right at the very junction.
- Q. How much land do you use there?
- A. Altogether twenty acres.

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- Q. You cut hay farther up?
- A. Yes, about two miles from where we l[i]ve.
- Q. What is it?
- A. A swamp.
- Q. How big is the swamp?
- A. About fifteen acres.
- Q. How long have you been there?
- A. A long time ago my gran[d]father and father used to live there, and I have lived there ever[/]since.
- Q. Why did they put a reserve there for you across the river

(Examining map)?

- A. Because we asked for timber land there.
- Q. Why didn't you ask for a timber reserve on the north side of the Fulton river?
- A. I thought this land was mine because my grandfather and father used to live there, and I thought I owned it. This land I am living on I get fish and I hunt there and that is my home and I live there all the time.

- Q. Where do your children go to school?
- A. At Babine.
- Q. You tell Mr. Loring about that and he will show us when he comes down to Victoria.
- Q. Does any white man live there?
- A. No. [ASOF at para 18; emphasis in original]

[52] Between November 4 and November 12, 1915, the Royal Commission interviewed Indian Agent Loring at Victoria. The transcript of this interview provides as follows:

ROYAL COMMISSION ON INDIAN AFFAIRS FOR THE PROVINCE OF BRITISH COLUMBIA

MEETING WITH AGENT RE. LORING OF THE BABINE AGENCY AT THE BAND ROOM, VICTORIA, B.C. NOVEMBER 4TH, 1915

Witness is sworn by Mr. Commissioner MacDowall.

....

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THE CHAIRMAN: Now Application No. 84 – what about that?

Mr. Commissioner McKenna: Do you know of a timber reserve about ¼ of a [word deleted] section immediately south of the Fulton river, where it empties into Babine lake?

- A. No, I don't know of any.
- Q. You heard this evidence given by the Indian?
- A. Yes.
- Q. Had you made any further enquiries since this evidence was given?
- A. It could not be located – there was never any mention about a reserve being there.

The transcript includes the following note:

NOTE. Ashdown H. Green to look into this.

NOTE. The east half of Lot 1354 and the piece of land immediately north of Lot 1354 and the jut of land on the east end of Lot 1610A and that we will ask to be cut out of the Application to purchase on Lot 1610A. [ASOF at para 19; emphasis in original]

[53] On November 16, 1915, C.H. Gibbons, Secretary to the Royal Commission wrote to R.A. Renwick, B.C. Deputy Minister of Lands to advise that the Commission wanted the Provincial Department of Lands to withhold certain specified lands from alienation pending final action of the Commission “upon applications therefor[e] by or on behalf of Indians of the Babine Agency, including as follows with respect to Item No. 84: –E. ½. Lot No. 1354 and the Lot directly N. thereof; also the projection of land on the E. end of Lot 1610 a, said projection to be subtracted from the land of Lot 1610 a, covered by A. P.” These Lots covered some of the land on both sides of the Fulton River.

[54] On November 23, 1915, Renwick advised Commission Secretary Gibbons on the status of the identified parcels of lands, including:

Item No. 84 – E. ½. of Lot#...

The whole of Lot# 1610A is covered by an application to purchase in the name of Jas. Cronin, apparently in good standing.

And further, that “[n]o disposition will be made of the vacant lands mentioned above until such time as the Royal Commission on Indian Affairs has arrived at a final decision in the matter”. [ASOF at para 22]

[55] On November 23, 1915, Renwick informed the Provincial government agent at Fort Fraser Lands Registration District that the lands specified in the letter had been applied for on behalf of the Indians by the Commission, and the agent was instructed “in the event of any of the Applications to Purchase being abandoned, none of the Lots covered thereby nor any of the Lots vacant at the present will be available for any alienation until such time as the Royal Commission on Indian Affairs has rendered a final decision in the matter.” The lands specified in the letter included the following:

Range 5. Coast District

Lot #1353 – Ungazetted, vacant.

Lot# 1354 – East Half -- vacant.

Lot #1610A – A. to P. in the name of Jas. Cronin. [ASOF at para 23; emphasis in original]

[56] In summary, the Lots to be withheld from alienation by settlers' applications to purchase included land on both sides of the Fulton River and, in the event that Cronin's application for Lot 1610A was abandoned, it too would not be alienated pending a final decision of the Commission on the application for a reserve.

[57] Lot 1610A was the lot north of the river, where Charlie Pice and his family resided.

[58] Although Cronin was yet to receive a Crown grant for Lot 1610A, his application remained extant when Application No. 84 was finally considered by the Commission. Lot 1353 remained vacant.

[59] On May 22, 1916, Commission Secretary Gibbons provided a schedule of "Additional Lands Applications Babine Agency" to Deputy Minister Renwick to ask that he do all he could to "expedite clearance thereof." The schedule described Item No. 84 as follows: "'Reserve' (quotations in original) at the confluence with the Babine River of a creek flowing south out of Fulton Lake, shewn on Pre-emptors' Selection Map 1913, Bulkley Sheet, but not appearing as a Reserve in the Official Schedule, twenty (20) acres more or less, Ungazetted Lot #1353- Apparently vacant."

[60] On May 29, 1916, Renwick advised Gibbons that Application No. 84 Babine Agency "[c]overs Lot 1353, Range 5, Coast District which is apparently vacant." Lot 1354 was not mentioned in the response.

[61] The final report of the Royal Commission dated June 30, 1916 (the "Report") included a revised schedule entitled "Babine Agency- Additional Lands Applications." The description of the lands that were the subject of Application No. 84 associated with the Fort Babine Band provided as follows:

Land Applied for:

"Reserve" [quotations in original] at the confluence with the Babine River of a creek flowing south out of Fulton Lake, shewn on Pre-emptors' Selection Map 1913, Bulkley Sheet, but not appearing as a Reserve in the Official Schedule.

Purpose: Garden and General

[...]

Status of Land Desired:

Covered by Lot 1353, R. 5, Coast L.D., ungazetted, vacant and available. (See letter of Deputy Minister of Lands, 29/5/1916 on R.C. file 560A)

Decision of the Commission:

Allowed: Ungazetted Lot 1353, R. 5, Coast L.D., containing one hundred and five (105) acres more or less” [ASOF at para 26]

[62] The Report included a Minute of Decision, dated May 30, 1916, which provided as follows:

The Commission having under consideration Babine Agency Application No.84, of the Hagwilget Tribe, Fort Babine Band, for an alleged “Reserve” at the confluence with the Babine River of a creek flowing South out of Fulton Lake, location shewn on Pre-emptors’ Selection Map, 1913, Bulkley Sheet, but land not appearing as a Reserve in the Official Schedule of Indian Reserves, for Garden and general Reserve purposes, it was

ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Hagwilget Tribe, Fort Babine Band, ungazetted Lot No. Thirteen Hundred and Fifty –three (1353), Range Five (5), Coast Land District, containing an area of One Hundred and Twenty- eight (128) acres, more or less. [ASOF at para 27]

[63] The schedule of “New Reserves Babine Agency,” attached to the Report, listed the following for the Hagwilget Tribe, Fort Babine Band, under Application No. 84, referenced as Indian Reserve No. 25: “Description: At the confluence with the Babine River of a Creek flowing S. out of Fulton Lake, being ungazetted Lot 1353, R. 5, Coast Land District. Acreage: 128.00 more or less.”

[64] In early October, 1917, Cronin received a Crown Grant for Lot 1610A from the Province.

[65] On March 29, 1919, the Province enacted the *Indian Affairs Settlement Act*, SBC 1919, c 32, and on July 1, 1920, Canada passed the *British Columbia Indian Lands Settlement Act*, SC 1920, c 51. Both approved the Report, subject to any further review the Lieutenant Governor in Council of British Columbia and the Governor in Council of Canada may find necessary.

11. The Ditchburn-Clark Review

[66] Despite the full participation of the Province in the recommendations of the Commission, it remained unwilling to convey the land set apart for reserve, as altered by the Commission, to

Canada. This led to yet another round of review of the allotments that had been made jointly by provincial and federal officials.

[67] In 1919, W.E. Ditchburn, the Indian Commissioner for British Columbia on behalf of Canada (“Indian Commissioner Ditchburn”), and Major J.W. Clark on behalf of British Columbia were appointed to review the Report, which review took place between 1919 and 1923, and as a result of which there were no adjustments or alterations to the Commission’s decision regarding Babine Agency Additional Lands Application No. 84. This meant that the land at the mouth of the Fulton River intended for conveyance to Canada as a reserve of the Hagwilget Tribe was Lot 1353, the South Land.

12. The 1927 Survey: “Relocation” of Lot 1353

[68] The recommendations in the Report, as amended by Indian Commissioner Ditchburn and Clark, including the schedule of New Reserves for the Babine Agency attached to the Report, were approved by B.C. Order-in-Council No. 911 of July 26, 1923 and Dominion Order-in-Council No. 1265 of July 19, 1924, subject to the requirement that all new reserves were to be surveyed.

[69] All new reserves and the lines necessary to define the cut offs and the new boundaries of the reserves affected were to be surveyed by British Columbia Land Surveyors under the direction of the Dominion Government. The appointment of surveyors was subject to the approval of the Surveyor-General for the Province. The work was to be carried out under the provisions of the *Land Act*. The field notes and plans were subject to the approval of the Surveyor-General for the Province.

[70] Upon completion and acceptance of the surveys, the Province was to convey the scheduled land to the Dominion.

[71] Before instructions were given for the survey needed to implement Minute # 84 of the Commission, which allotted Lot 1353 as a reserve, a significant change occurred that affected the availability of the land north of the Fulton River where Charlie Pice and others had their homes. In January, 1927, Lot 1610A reverted to the Provincial Crown for nonpayment of taxes.

[72] In April, 1927, Department of Indian Affairs (“DIA”) Assistant Deputy Minister and Secretary, J.D. McLean, instructed the Province’s surveyor, BCLS V. Schjelderup, to survey, among other lands, “Application # 84, Reserve # 25, at the confluence with the Babine River of a creek flowing South out of Fulton Lake, being ungazetted Lot 1353, R. 5, Coast Land District, containing 128 acres, more or less.” The land Canada intended for survey was that located **south** of the Fulton River.

[73] McLean’s letter to Schjelderup was copied to J.W. Umbach, the Surveyor General of British Columbia and Indian Commissioner Ditchburn. McLean instructed that Schjelderup communicate with Ditchburn and Umbach to obtain specified information, in particular that “‘information concerning the exact location of the parcels to be surveyed, copies of sketches and also original field notes of adjoining reserves,’ are to be obtained from Indian Commissioner Ditchburn....”

[74] The new reserves were to be given provincial lot numbers which would be obtained from the Provincial Surveyor General. Schjelderup was to supply such plans and field notes as Surveyor General Umbach required to be filed with him. The plans and field notes, including copies of the same for DIA, were to be examined and approved by Umbach and, if approved, he would forward copies of the plans and field notes to DIA.

[75] Secretary McLean further instructed Schjelderup that he was “expected to employ local Indian labour when possible” and that “should occasion arise where the information you obtain from Victoria is not sufficiently definite to properly identify the parcels you are expected to survey, the Indian Agent [Edgar Hyde] should be consulted.”

[76] On May 21, 1927, Umbach told Schjelderup to survey Indian Reserve No. 25 on lands lying **north** of the Fulton River:

...I beg to advise you that in accordance with our interview it has been decided to cancel the survey of Lot 1610-A, Range 5, Coast District. It is understood that the area desired for the Indian Reserve is the easterly portion of the said Lot 1610-A, lying north of the river, and that you intend to survey the reserve as Lot 1353, Range 5, Coast District.

In view of the above I shall be glad if you will arrange to survey the remaining portion of the area formerly Lot 1610-A, into one or more parcels, with a separate lot number for each. [ASOF at para 39; emphasis added].

[77] The record does not reveal whether the provincial official, Umbach, discussed the change with the DIA's representative, Ditchburn, or whether the Province's surveyor discussed the change with Indian Agent Hyde. It is likely that Umbach and Ditchburn had discussed the opportunity afforded by the cancellation of Cronin's Application to Purchase, as DIA was to direct the surveyor, and Umbach's instructions to the surveyor did not come out of thin air.

[78] The surveyor was directed to consult with Indian Agent Hyde on the location to be surveyed. He may not have done so, as Hyde was left with the understanding that the South Land would be the location of the reserve.

[79] In early November, 1927, Schjelderup surveyed lands located north of the Fulton River at the confluence with Babine Lake. Schjelderup's field notes state that the survey was conducted "under instructions dated April 13, 1927." The lands were designated by Umbach as Lot 1353, Range 5, Coast District and comprised 116.2 acres. The "remarks" on the cover page of the field book note "Hagwilget Tribe, Fort Babine Band, IR 25, Lake Babine IR 25, Babine Agency, Application 84."

[80] The "Surveyor's Report on Examination of Lands" in the field book for the survey of the lands on the north side of the Fulton River states: "The Tachek Village is very old. At present there are three log cabins, two barns, two smoke houses (island) and some caches. About two acres cleared and partly cultivated. A little slough hay is generally cut in the swamps every summer."

[81] In short, on Umbach's instructions a survey was made of a portion of Lot 1610A comprised of 128 acres, which portion was assigned Lot 1353.

[82] On November 16, 1927, Schjelderup reported to Secretary McLean that he had completed the season's surveys.

[83] On November 24, 1927, Schjelderup wrote to Provincial Surveyor General Umbach, enclosing field notes of surveys for Lots 2173, 2174, 2175. He stated that the "Indians are very

anxious to obtain a parcel of land [along] the west boundary of Lot 2176.” Lot 2176 lay on the north side of the Fulton River.

[84] On February 9, 1928, Schjelderup provided duplicate copies of amended field notes for Lot 1353 to Surveyor General Umbach. The field notes had been amended in accordance with instructions from Umbach dated February 2, 1928 to show the island at the mouth of the Fulton River as part of Lot 1353.

[85] On or about April 30, 1928, Umbach advised DIA’s Assistant Deputy & Secretary A.F. MacKenzie that field notes covering Schjelderup’s survey work during the 1927 season had been received, examined and found in order, and that duplicate copies would now be sent to DIA. Receipt of the field books and plans by Schjelderup for work performed in 1927 was acknowledged by MacKenzie by letter dated May 14, 1927 to Umbach (the letter is misdated, it should read May 14, 1928).

[86] With the approval of the survey in 1928, the preparatory work for the transfer of the land designated as Indian Reserve No. 25 to Canada was complete.

[87] On July 29, 1938, under B.C. Order-in-Council 1036, the Province of British Columbia transferred administration and control of Indian reserve lands to Canada. The attached schedule for the Babine Agency describes Indian Reserve No. 25 for the Hagwilget Tribe, Fort Babine Band, as follows: “At the mouth of the Fulton River on Babine Lake, known as Lot 1353, Range 5, Coast District 116.20 acres.”

13. Occupation of Land South of Fulton River

a) 1915

[88] The McKenna-McBride Commissioners interviewed Charlie Pice in 1915. He testified that he and members of his family resided in three houses on land on the north side of the river. He kept horses there, and used around 20 acres of land. The south side of the river was unoccupied. The land south of the river was not cultivable.

b) 1928

[89] In 1928, having been told by the Indian Agent that a reserve located south of the Fulton River had been established for the Hagwilget Tribe, a member of the Tribe, Daniel Leon, built a house and other structures there. The Indian Agent's belief was well founded, as this was within the land described in Minute of Decision # 84 of the Commission. It seems that the Indian Agent was not aware that the lot formerly designated as Lot 1353, which the Commission had allotted, had been re-designated as situated north of the river.

[90] By letter dated September 4, 1931, Daniel Leon requested help from DIA. He advised that the Provincial Forest Department wanted him to move his house located at Topley Landing, south of the Fulton River. Leon wrote that the Hazelton Indian Agent had told him that Topley Landing was an Indian Reserve. He implored the DIA to help him prevent the removal of his house from the South Land.

[91] On September 24, 1931, G.C. Mortimer, the Indian Agent at Hazelton, advised Indian Commissioner Ditchburn that a "...controversy has arisen between the Indians as to which lots comprise the new reservation at the mouth of the Fulton River on the Babine Lake" and requested information about the lot to the south of the mouth of the Fulton River. The letter further states:

My reasons for drawing your attention to this matter are as follows: - In 1928 the late Agent, Mr. Hyde, instructed a few Indian families from Old Fort and Fort Babine to build their homes and clear the land on the lot immediately South of the mouth of the Fulton River which, he said, was Indian Reservation. This led to the building of good homes by three Indian families and also a small store.

During the month of July 1931 these three families of Indians have been advised by the Forestry Department of B. C. that the lot on which they have their homes is not Indian Reservation. If such is the case, then these Indians were wrongly instructed by the late Agent which is causing a feeling of unrest at the present time.

I may mention that Indian Reserve No. 25, Lot 1353 according to the small map above mentioned, is occupied by several Indian families. [ASOF at para 51; emphasis added]

[92] On September 30, 1931, Indian Commissioner Ditchburn advised Indian Agent Mortimer:

In reply I beg to say that there was no old reserve at Fulton River and I do not know why a map showing such a reserve colored in red should have been issued. The Royal Commission did set aside a reserve at Fulton River generally thought to be South of the River. When Mr. Surveyor Schjelderup went there he found several Indian families settled North of the Fulton River and surveyed 116 acres describing same as Lot 1353...

Recently Mr. Morris, Deputy Surveyor General, called at this office and pointed out that while there are some Indians residing on the lot now numbered 2173 South of Fulton River, the land which they are occupying is under lease of the Hudson's Bay Company and as long as the Company does not complain this Department cannot, of course, take any action in the matter. [ASOF at para 52]

[93] By letter dated October 15, 1931, the Director, Indian Lands and Timber provided Indian Agent Mortimer with the letter received from Daniel Leon and instructed Indian Agent Mortimer to provide a report.

[94] On October 22, 1931, Indian Agent Mortimer forwarded his letter and Indian Commissioner Ditchburn's response to the Secretary, DIA, in Ottawa. Indian Agent Mortimer advised that Daniel Leon and two other Indians were residing in houses on Lot 2173 at Topley Landing at the mouth of the Fulton River. Indian Agent Mortimer recommended to the Secretary that DIA purchase the land south of the Fulton River occupied by the Indians. The letter states:

I feel that the land occupied by the above mentioned Indian and two others, situate on the Souht (sic) bank of the Fulton river and given – apparently in error – by the late Indian Agent Hyde of this Agency, should be purchased by the Department so as to eliminate any hardships occasioned by the Indians at that point. I may say that little or no clearing of land has been done here but several well constructed houses and a small store have been built, the latter and a house: having been built by Daniel Leon. [ASOF at para 54]

[95] A.F. MacKenzie, Secretary, DIA in Ottawa advised Indian Agent Mortimer that DIA was informed that Lot 2173 was leased to the Hudson's Bay Company and therefore as long as that Company did not complain about the occupation of the lot by D.J. Leon and two other Indians it would not appear necessary for DIA to take any action. He further stated "[t]hese Indians should be notified, however, not to make any further improvements, as their reserve at that point is comprised of Lot 1353, North of the Fulton River and a small island at its mouth."

[96] Mortimer advised Secretary MacKenzie that Mr. Wm. Ware, Inspector of Hudson's Bay Fur Trading Posts for that part of British Columbia had assured him that the Hudson's Bay Company did not object to the occupation of Lot 2173 by Daniel Leon and his family, and that the Company would notify DIA if the Company terminated their lease so as to make any arrangements desired.

[97] On November 27, 1931, Secretary MacKenzie further instructed Indian Agent Mortimer to inform the Indians occupying Lot 2173 not to make any further improvements and inform the other Indians of the band that they must not take up their residence on Lot 2173.

[98] In the following years, the matter went back and forth between the Provincial Forester, Deputy Minister of Lands Cathcart and Indian Commissioner MacKay. MacKay asked the new Indian Agent, Mallinson, for a report.

[99] On May 30, 1940, Mallinson reported to Indian Commissioner MacKay about the Indians' historic and present use of the land south of the Fulton River and inquired whether it would be possible to obtain a portion of Lot 2173 which was occupied by the Indians "some 200 feet in length by 75 to 100 feet in depth" as a reserve.

[100] On June 6, 1940 MacKay wrote to Provincial Deputy Minister Cathcart with a review of the history of the Royal Commission's allotment, Schjelderup's survey of Indian Reserve No. 25, and the Indians' understanding of the lands that had been reserved for them. Indian Commissioner MacKay noted as the Indians occupied the ground in good faith and had made improvements of value, it would appear that the solution would be "...to set aside and survey sufficient...land to include the small area now occupied by them." In a memorandum from Provincial Surveyor General, F.C. Green, to the provincial Chief Forester dated October 2, 1940 with respect to the survey of Babine Indian Reserve No. 25, the following explanation was made:

In regard to the statements given in letter from Indian Commissioner D.M. MacKay, dated June 6, last, it is admitted that the area surveyed by Mr. Schjelderup for the above Indian Reserve [Indian Reserve No. 25, Babine Lake, Range 5, Coast District] did not strictly conform to the area described in tile application. In a number of instances, such as the present one, it was found that strict conformance with the description would leave out areas actually in occupation by the Indians, and it is considered that the instructions issued to the surveyor permitted changes to be made in such instances. In the present case, the

surveyor found that the Indians were occupying an area north of the river, and being Crown Land, he surveyed it in lieu of the area on the south side of the river. Copies of the field notes and plan of this survey were submitted to this Department, and also to the Department of Indian Affairs in 1928, and in due course, the survey was accepted without protest by either Department.

In view of all the circumstances it is respectfully suggested that the small area in occupation by the Indians should be sold to the Indian Department. The said area will require to be surveyed and taken out of the Provincial Forest. [ASOF at para 64; emphasis added]

[101] The Chief Forester rejected his colleague's sensible proposal. The DIA proposed the purchase of two acres on which the houses were located. This too was rejected.

[102] By letter dated July 12, 1944, Indian Commissioner MacKay wrote to Provincial Deputy Minister Cathcart and requested that DIA be granted a lease of the small area occupied by the Indians within the Provincial Forest Reserve at Topley Landing. This request was also rejected.

[103] On August 28, 1944 the Director of the Indian Affairs Branch (IAB) wrote to Indian Commissioner MacKay noting he had done everything that could be expected to make satisfactory arrangements for the care of the people residing on the South Lands, and that it appeared that the Province would neither rent nor sell the land, and would accept nothing short of the removal of the Indians at Topley Landing to the reserve north of the Fulton River. The Director's opinion was that IAB "should not undertake to remove these people until we are compelled to do so by the Province."

[104] Indian Commissioner MacKay recommended to IAB in Ottawa and Indian Agent Mallinson that, should the Department of Lands get to the point where they start to evict the Indians resident on Lot 2173, "we could, as a last resort, attempt stay of action under Section 48 of the B.C. Statute of Limitations...if we can show continuous possession by the present occupants and their ancestors for a period of sixty years." He instructed Indian Agent Mallinson to interview the Indians resident on Lot 2173 and others to secure evidence of the length of their occupation and possession of the site of their dwellings, and that of their ancestors, and to set this out in the form of a Statutory Declaration.

[105] On February 3, 1948 in correspondence to Indian Commissioner W.S. Arneil, Indian Agent J.V. Boys provided Statutory Declarations, signed and dated January 20, 1948, from some of the Indian residents at Topley Landing, namely Daniel Leon, Rosie Leon, John Baptiste (Paddy) Leon and Jim Charley, all of Old Fort [Babine] Band. These Statutory Declarations were made in support of the Leon's claims of continuous residence at that place for more than 60 years for the purposes of Section 48 of the B.C. Statute of Limitations.

[106] The Statutory Declarations attested to the declarant's residency at "Topley Landing" from long before 1928. However, no application was brought in the court, and the Province did not press further for the removal of the Leon family. Provincial death certificates record that Rosie Leon died at Topley Landing in 1963 and Daniel Leon died at Topley Landing in 1966.

14. Tachet, and Topley Landing

[107] The land south of the Fulton River became known as Topley Landing. When this occurred is not in evidence. It is obviously not a name in the Carrier language spoken by the Hagwilget Tribe.

[108] Warner Adam testified that "Tachet is the Babine pronunciation for Topley Landing."

15. Reliance on the 1948 Statutory Declarations

a) Claimant's Theory of the Case

[109] A basis on which the Claim is advanced relies on proof of a cognizable interest in the South Land at the time the Commission allotted Lot 1353 on May 30, 1916.

[110] The Claimant relies on the 1948 Statutory Declarations as proof of residential use of the South Land both before and after the 1916 Minute of Decision of the Commission allotting ungazetted Lot 1353 to the Hagwilget Tribe.

[111] The Claimant says that the declarations show that members lived on the South Land before the 1927 survey and the "re-allocation" of the designation of Lot 1353 to the north of the river. The Claimant argues that diligence on the part of DIA officials would have ensured that the Commission's allotment of land south of the river would have resulted in the transfer of the

land to Canada. The “re-allocation” of Lot 1353 was an error that DIA officials were aware of, but failed to perform their duty to correct.

[112] The Claimant also contends that residential use of the South Land in 1915-1916 supports the argument that the Commission intended that the Claimant have a reserve that included land on both sides of the river.

b) The 1948 Statutory Declarations

i. Rosie Leon

[113] Mrs. Leon was married to Daniel. She was 66 years of age. Mr. Hyde told her that the place where she lived was going to be made a reserve. She was born at Topley Landing and, although away at times, had lived there all her life. Her father, Charley, lived there before her, and died there on May 9, 1927.

ii. Daniel Leon

[114] Mr. Leon, age 75, was born at Topley Landing where his house still stands. A reserve had been promised. His father, Leon, lived there before him. Although away at times, he always had a residence there.

iii. Paddy Leon

[115] Mr. Leon, age 42, was born at Topley Landing where his parents, Rosie and Daniel now live, and has lived there all his life. He was brought up by his Grandfather, Charley, and Grandmother.

iv. Jim Charley

[116] Mr. Charley, age “over 43 years,” was born at Topley Landing where his father, Charley, and his mother had lived and died. Charley died on May 9, 1927.

C. Analysis of Evidence and Findings of Fact

1. Residences at Tachet, 1915-1927

[117] Charlie Pice was the father of Rosie Leon and Jim Charley. Both were born before 1900. They lived with their father and mother. Paddy Leon was born circa 1902. He was brought up by Charlie Pice.

[118] Charlie Pice testified before the Commission in 1915 that he and his family lived north of the Fulton River, and that the land south of the river was unoccupied. While Indian Agent Hyde and other DIA officials were interviewed by the Commission, there was no mention of residences to the south.

[119] By their own account, Rosie Leon, Jim Charley, and Paddy Leon lived, at the least in their early years, with Charlie Pice who, in 1915, lived north of the Fulton River. They too would have lived north of the Fulton River.

[120] It is possible that Charlie Pice moved with his family to Topley Landing sometime after June, 1915. It is more likely that his family moved after his death in May, 1927, which date corresponds with the time that Indian Agent Hyde encouraged Daniel Leon to build homes to the south of the river. Coincidentally, Lazalle Charlie, another son of Charlie Pice, told Warner Adams in the course of his 1984 interview that he moved to “Topley Landing” in January, 1928. It is likely that he was referring to the land south of the river, as that is the area the settlers called Topley Landing.

[121] The 1948 Statutory Declarations in support of the Leon’s claim that they had resided at Topley Landing (apparently meaning the land to the south of the river) from before 1915 and continued residing there to 1927 and beyond cannot be reconciled with the evidence that no-one lived south of the Fulton River in 1915. It also cannot be reconciled with their having lived with their father, Charlie Pice, whose testimony places them north of the river. Perhaps the deponents were referring to the longer period of Tribal occupation of the general area, or, taking account of Warner Adam’s evidence, had come to refer to Tachet as Topley Landing without distinction between the north and south sides of the Fulton River.

[122] The ungazetted lots south of the river were surveyed in 1927. The surveyor made no mention of dwellings on the land. His notes of survey of the land to the north mentions the dwellings there.

[123] I find that the evidence, considered in its entirety, does not support the Claimant's assertion of occupation of the South Lands between 1915 and 1927. The best evidence, Charlie Pice's testimony before the Commission, is to the contrary. There is evidence that these dwellings were built there in or after 1927.

2. Traditional Use and Occupation

[124] In the context of claims based on Crown duties related to the creation of reserves, habitual use and occupation of a tract of land by an indigenous group may satisfy the evidentiary threshold for a finding of a cognizable interest (*Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Williams Lake Indian Band v Her Majesty the Queen in Right of Canada*, 2014 SCTC 3 [*Williams Lake*]).

[125] Indigenous village sites and land in the immediate vicinity habitually used to support the village would not be defined with the precision of "modern" surveys. Such precision is not required to find a cognizable interest. To impose such a requirement would impose a test that could not be met, and fail to take account of indigenous practices and perspectives.

[126] The evidence of use and occupation in the present matter establishes that Tachet was a place at which Hagwilget peoples resided and relied on for a fishery and access to game. The Kilmaurs Journals corroborate the oral history for a period in the 1800's.

[127] The Kilmaurs Journals also reveal that the extent of use and occupancy of Tachet fluctuated, and that the use of the site was in decline in the 1820's.

[128] The traditions around the association of places with clans and chiefs did not of course vary with fluctuations in the actual use and occupancy of those places. Neither would the understanding of ownership interests in the territory at large. These, however, go to the question

of Aboriginal Title. The McKenna-McBride Commission was not established to address the title question.

[129] The Adam interviews of 1984 support a finding that Tachet was actively used for a fishery and access to game within the lifetime of the elders who were interviewed. They were then in their 80s. Their recollections reveal the impact of foreign settlement on their fishery and their ability to take game.

[130] However, the only evidence of a presence on the land at the time the McKenna-McBride Commission made its enquiry into the need to establish a reserve at the Tachet site was the 1915 testimony of Charlie Pice. To the extent the area north of the Fulton River was used for homes, it primarily afforded access to the fishery. The South Land was not inhabited, and the Commission received no evidence of actual use of the South Land beyond taking timber for dwellings for his extended family and canoes.

[131] Lazalle Charlie recalled being told by his brother that agents Hyde and Loring had spoken of an eight mile square reserve in the area of the Fulton River. The Commissioners interviewed Loring. There is no record that the Commission was made aware of such a reserve.

[132] Whatever interest the Hagwilget Tribe had based on traditional use and occupation would not have been apparent from the information provided to the Commission. Interests in the South Land grounded in traditional usage would not have been apparent to the Commission unless there was a site visit. Even if there had been, the Commission may have seen nothing as Charlie Pice said that the land was unoccupied.

3. The Allotment by the McKenna-McBride Commission

[133] The Claimant relies on the actions of the Commission in protecting land on both sides of the Fulton River from alienation as evincing an intention to allot land on both sides.

[134] The Respondent says that these steps were taken to ensure that some land remained available for allotment as reserve when the time came for a final decision, and to keep alive the possibility of allotting the land north of the river on which the Indians actually resided. The Respondent's view is, I find, the correct view.

[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 the executive orders of Canada and British Columbia in 1876 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. [November 5, 1875 Memorandum annexed to November 10, 1875 Dominion Order in Council, P.C. 1088; emphasis added]

[137] Section 2(b) of the McKenna-McBride Agreement provides:

At any place at which the Commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality, the Commissioners shall fix the quantity that ought to be added for the use of such Indians. And they may set aside land for any Band of Indians for whom land has not already been reserved. [ASOF at para 12]

[138] If the McKenna-McBride Commission was to have regard “...to the habits, wants and pursuits...” of the Hagwilget Tribe in identifying land to be set aside as reserve, they would be required to make enquiry of them. They did.

[139] The Commission was aware of the Cronin Application to Purchase Lot 1610A, which covered the land occupied by the Pice family. After receiving instructions from the Commission, the BC Deputy Minister advised the Provincial government agent at Fort Fraser Lands Registration District that the lands had been applied for on behalf of the Indians by the Royal Commission, and the agent was instructed “in the event of any of the Applications to Purchase being abandoned, none of the Lots covered thereby nor any of the Lots vacant at the present will be available for any alienation until such time as the Royal Commission on Indian Affairs has rendered a final decision in the matter.”

[140] At this stage of the Commission's analysis of the Indian need for land additional to land previously set aside as reserve, taking account of the fact that there were Hagwilget people residing in the immediate area, its instructions to protect available land (i.e. land not subject to Applications to Purchase) on both sides of the river does not necessarily reveal an intention to allot land on both sides.

[141] The direction to protect Lot 1610A if it became available does reveal an intention to allot a reserve on land where the people actually resided if it became available before a final decision was made. But the land did not become available until long after the Commission concluded its work.

[142] In the result, the Minute of Decision, dated May 30, 1916, provided:

The Commission having under consideration Babine Agency Application No.84, of the Hagwilget Tribe, Fort Babine Band, for an alleged "Reserve" at the confluence with the Babine River of a creek flowing South out of Fulton Lake, location shewn on Pre-emptors' Selection Map, 1913, Bulkley Sheet, but land not appearing as a Reserve in the Official Schedule of Indian Reserves, for Garden and general Reserve purposes, it was

ORDERED: That there be allowed under this Application and established and constituted a Reserve for the use and benefit of the applicant Hagwilget Tribe, Fort Babine Band, ungazetted Lot No. Thirteen Hundred and Fifty –three (1353), Range Five (5), Coast Land District, containing an area of One Hundred and Twenty- eight (128) acres, more or less. [ASOF at para 27]

[143] The acreage of the land allotted is stated: 128 acres. As there was more vacant land available, it is not likely that, if Lot 1610A was available, the Commission would have allotted both it **and** land to the south as this would double the stated acreage.

[144] My finding on this question does not affect the question whether the allotment of the South Land by Minute of Decision #84 created a cognizable interest at law, and resulted in Crown duties to the Claimant.

4. The "Relocation" of Lot 1353

[145] My finding above is reinforced by the actions of provincial and federal officials in the period following the Ditchburn-Clarke review of the Commission's allotments. Their actions

resulted in the creation of a reserve north of the river where the Indians resided. This reflects their understanding of the intentions of the Commission in protecting land in the area, and in particular Lot 1610A if it became vacant.

[146] It is apparent that the Umbach's instructions to survey the area north of the river were given as a result of Lot 1610A having become available. In his letter of May 21, 1927, he told Schjelderup to survey Indian Reserve No. 25 on lands lying **north** of the Fulton River: "...I beg to advise you that in accordance with our interview it has been decided to cancel the survey of Lot 1610-A, Range 5, Coast District. It is understood that the area desired for the Indian Reserve is the easterly portion of...Lot 1610-A, lying north of the river, and that you intend to survey the reserve as Lot 1353, Range 5, Coast District" (emphasis added).

[147] It is apparent that the subject of the "interview" above came about as a result of the termination of Cronin's Application to Purchase Lot 1610A, and in consequence the availability of the land for transfer to Canada as reserve. Umbach would have known that the members of the Tribe had their homes on the land north of the river. This would have also been known by officials of the DIA on the ground and their superiors. It would have been apparent from the records of the Commission that it would have allotted that land but for Cronin's Application to Purchase.

[148] The "Surveyor's Report on Examination of Lands" notes, with reference to the land north of the river, reveal that the occupants of Tachet wanted the land they lived on. He reported: "The Tachek Village is very old. At present there are three log cabins, two barns, two smoke houses (island) and some caches. About two acres cleared and partly cultivated. A little slough hay is generally cut in the swamps every summer." The occupants encountered by the surveyor said they wanted land on the north side.

[149] In conclusion, the creation of a reserve north of the river gave effect to the intention of the Commission in its Minute of Decision #84.

5. Designation of Surveyed Land as Lot 1353

[150] The re-designation of the land formerly within Lot 1610A as Lot 1353 brought the description of the land to be transferred to Canada into conformity with the description set out in the Commission's Minute of Decision #84 and the schedule to their Report:

Description: At the confluence with the Babine River of a Creek flowing S. out of Fulton Lake, being ungazetted Lot 1353, R. 5, Coast Land District.

Acreage: 128.00 more or less. [ASOF at para 28]

[151] This practical expedient ensured that the occupants of Tachet would have the land they wanted to be reserved.

II. ISSUES

A. Central Issue

[152] The Claimant argues that:

The central legal issue engaged in this Claim is whether Canada is in "breach of a legal obligation arising from the Crown's ...non-provision of reserve lands" under s. 14(1)(c) of the Act [SCTA]. [Claimant's Memorandum of Fact and Law at para 133]

B. The Breaches

[153] The particular breaches alleged are:

- 1) Failure to challenge the Cronin Application for a Crown Grant of Lot 1610A.
- 2) Failure to ensure that a reserve was established over land on both sides of the Fulton River.
- 3) Failure to challenge the 1927 survey and designation of Lot 1353 as located north of the Fulton River.
- 4) Failure to take steps to rectify the error in not including the land south of the Fulton River when the Province sought to remove Daniel Leon and family from Topley Landing.

III. THE LEGAL OBLIGATION

[154] The alleged obligation is grounded in fiduciary duty. A duty arises when, in the context of reserve creation, there is: (1) a specific or cognizable Aboriginal interest; and (2) a Crown undertaking of discretionary control over that interest (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 81-83, [2002] 4 SCR 245 [*Wewaykum*]; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 51, [2013] 1 SCR 623).

[155] In the reserve creation process, Canada constituted itself as the exclusive intermediary with the Province. It is Canada that has the constitutional responsibility for “Indians and Lands reserved for the Indians” under sub-section 91(24) of the *Constitution Act, 1867* and Canada who, under Article 13 of the *Terms of Union, 1871*, assumed the “charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit.”

[156] In a variety of situations, the courts have recognized that the Crown as a fiduciary must:

- (a) act only in the best interests of the beneficiary;
- (b) act with the utmost loyalty and care;
- (c) discharge its mandate in good faith;
- (d) provide full disclosure appropriate to the subject matter;
- (e) act in the manner of a man of ordinary prudence in managing his own affairs;
- (f) act with reasonable diligence in the beneficiary’s best interests; and
- (g) correct errors in the best interests of the beneficiary. [*Wewaykum* at paras 86-94; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 at para 104; *Lac Seul First Nation v Canada*, 2009 FC 481 at paras 23-24, 348 FTR 258 (FCA)]

IV. FIDUCIARY DUTIES AND THE FACTS

A. Failure to Challenge the Cronin Application for a Crown Grant of Lot 1610A and to Ensure a Reserve was Established on Both Sides of the Fulton River

[157] Issues 1 and 2 overlap, insofar as both rest on the premise that the Commission recognized the Indian interest in land lying on both sides of the Fulton River and acted to protect that interest by allotting land on both sides. The premise is not supported by the evidence.

[158] When Charlie Pice testified, he expressed a desire to have a timber reserve south of the river. He produced a Pre-emptor’s map from 1913 on which an area south of the river was

marked off and noted as “Ind. Res.” Pice said that the area south of the river was unoccupied. He said that he got fish from the land he lived on, which was on the north side of the river. He did not attribute to the area marked “Ind. Res” any need related to the fishery.

[159] The land south of the river was said to be hilly and timbered. He had asked for a timber reserve there. He used timber for houses and canoes. This was with reference to the area marked “Ind. Res” on the 1913 Pre-emptor’s map. Mr. Pice did not say who he had spoken with concerning a timber reserve. He was asked why he did not ask for a timber reserve north of the river. He said he thought the land to the north was already his.

[160] The land south of the river was not cultivable.

[161] Reserves had been set aside for the Hagwilget Tribe in 1891. There was no allotment at Fulton River. Enquiries of DIA officials revealed no knowledge of government action to mark off, much less establish, a reserve at the mouth of the Fulton River.

[162] The Commission recognized that the local place of residence of the tribe extended north from the river bank. It asked the Province to withhold from alienation the gazetted and vacant lots proximate to the river pending completion of its work. This was not in recognition of an Indian interest, as no such interest was apparent. No-one lived there. It did this to ensure that land would remain available pending the further work of the Commission.

[163] The land designated Lot 1610A, primarily north of the river, was where the Indians resided, but was subject to Cronin’s Application to purchase. The Commission had no direct authority to disallow the application. It did ask the Province to cut out from the Cronin Application a portion of Lot 1610A on the north side at the east (lakeshore) end and not allow the purchase of several lots, including vacant Lot 1353.

[164] The Deputy Minister of lands for the Province also told the land agent to withhold Lot 1610A from alienation if Cronin abandoned his Application to Purchase pending completion of the Commission’s report. This, in the circumstances, did not reveal an intention to allot land on both sides of the river.

[165] The Commission allowed Application No. 84, for Lot 1353, comprising 128 acres south of the Fulton River.

[166] As for the Claim based on the failure to challenge the Cronin application as in violation of the Provincial *Land Act*, a successful challenge would have yielded the same result as ultimately took place, namely the creation of a reserve where the Indians had long established residency.

B. Failure to Ensure that the Reserve Included the South Land

1. Cognizable Interest Based on Traditional Use and Occupation

[167] The Claimant maintains that it had a cognizable interest in land on the south bank of the Fulton river at all times prior and subsequent to the 1916 Minute of Decision #84, allotting Lot 1353 (as it then was) to the Hagwilget Tribe, Fort Babine Band. This relies in part on evidence of use and occupation of the land as within the traditional territory occupied by the Hagwilget peoples from time immemorial.

[168] The Claimant relies, in particular, on long time use and occupation of Tachet as a village located at the mouth of the Fulton River for access to the fishery, and a base from which hunting for game would take place, as evidence of a cognizable interest.

[169] Historical use of discrete parcels of land is relevant to the question of Crown obligations in relation to reserve creation. As noted above, the identification of such parcels of land does not require precise boundaries. Such evidence may support a finding of habitual use and occupation at the time that Crown obligations in relation to reserve creation arise.

[170] The question, however, is whether the traditional use of the land was apparent to the Crown officials and the Commission in place at the time of the decision whether to allot a reserve. In *Williams Lake* Commissioner O'Reilly, the sole member of the Joint Indian Reserve Commission established in 1876, knew that the land as issue had been occupied in fact by the Indians in the period immediately preceding the time at which a decision whether to allot a reserve was to be made. In *Williams Lake*, federal officials and O'Reilly knew and acknowledged that the Indians had habitually used the land as a village and food gathering place until they were ousted by settlers. In these circumstances, Crown obligations under the *Terms of*

Union, Article 13, were engaged. The Claimant's interest was cognizable in law as it was recognized in colonial and post confederation provincial laws barring pre-emption of Indian settlement lands. Recognition of the Indian interest in settlement lands was affirmed by the 1876 agreement establishing the Joint Indian Reserve Commission. The Commissioners were to set aside the land the Indians habitually used for their settlements.

[171] In the present matter, it would not have been apparent to Crown officials and the McKenna-McBride Commissioners that the land south of the Fulleton River was a village. There was no evidence before them of current or recent occupation of land south of the river. There were dwellings on the land to the north. The residents had access to the fishery. Their interest in both was ultimately protected.

2. Aboriginal Title and Cognizable Interest

[172] In the legal sense, cognizable means "capable of being known or recognized" [*Black's Law Dictionary*, 10th ed, *sub-verbo* "cognizable"].

[173] In the present matter a finding that evidence of historical traditional use and occupation alone established a cognizable interest at law and thus grounds a claim under the *SCTA* would amount to a finding of Crown duties based on Aboriginal title.

3. Discretionary Control

[174] The Crown continued to be the exclusive intermediary on the Indians behalf in 1916 and beyond, as the federal and provincial obligations under the *Terms of Union*, Article 13 continued in force.

[175] The evidence in the present matter does not establish the use and occupation of the South Land in 1916, or the recent ouster of the Indians from land habitually settled upon for village and other local uses. Their interest was not apparent, in the sense of being visible or otherwise known to the Commissioners. It is therefore not necessary to consider the second factor of discretionary control over the process of reserve creation.

C. Traditional Territories and Reserves

[176] Traditional use and occupation may have some bearing on Crown obligations in relation to the administration of reserves. This appeared to be a consideration in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], as the Supreme Court of Canada stated that the reserve that had been established was within the traditional territory of the Musqueam Band. This observation relates to the finding that the Indian interest in established reserves is the same as in aboriginal title lands.

[177] In *Wewaykum*, the Supreme Court of Canada mentioned that the “provisional” reserves at issue were not within the traditional tribal lands of the two *Indian Act* bands that claimed a reserve interest in the same provisional reserves. This did not seem to affect the analysis and findings on Crown duties in relation to provisional reserves.

[178] The evidence in the present matter establishes that Tachet is within the traditional territory of a cultural and linguistic group of which the Claimant is a part. As in *Wewaykum*, aboriginal title is not in issue. If in another forum the Hagwilget Tribe is found to have aboriginal title the question whether it also has a reserve may be moot, as the interest is the same (*Guerin*).

D. Crown Duties and Provisional Reserves

[179] The Claimant also relies on the 1916 Minute of Decision as a distinct basis for its claim of cognizable interest on the basis that the decision of the Commission established Lot 1353 as a provisional reserve. This draws on the finding in *Wewaykum* that Crown duties to Indians may exist where Provincial Crown land has been set apart for transfer to Canada as reserve, but not yet transferred. Land at this stage in the reserve creation process may be considered “provisional.” The Aboriginal group interested in the land may have a cognizable interest. Crown fiduciary duties will result where the Crown exercises discretionary control over the advancement of the reserve creation process to full reserve status.

[180] In order to address the Claimant’s argument on the application of fiduciary law I will assume that Lot 1353 as defined in Minute of Decision #84 was a provisional reserve in which the Claimant had a cognizable interest. I will also assume that the Crown had discretionary control over the advancement of the Claimant’s interest.

E. The Best Interests of the Claimant

[181] Assuming that the Crown owed fiduciary obligations to the Claimant in relation to the lands allotted by the Commission, the Crown had “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).

[182] The Crown met its obligations here. The Province and Canada acted in the best interests of the Claimant in creating a reserve north of the Fulton River, as that is where the members of the Hagwilget Tribe had long established residences and access to the fishery. In regard to the latter, the Island mid-stream at the mouth of the Fulton River was included in the Reserve.

[183] The Commission had taken measures to ensure that the land to the north be available for a reserve if the Cronin Application was abandoned. It was terminated and thus became available.

[184] It was not contemplated that land on both sides of the Fulton River would be constituted as reserve land.

[185] The South Land was allotted as the land to the north was not available in 1916 as the Province had allowed Cronin’s Application to Purchase. The north consequently became available, and the contingency of the South Land was no longer required.

[186] There is some evidence of disclosure of the change from the south to the north side. The surveyor spoke with some of the residents of the north side who wanted the land they were on reserved. If formal disclosure had been made to the First Nation there is no reason to think that the outcome would have been different.

[187] It is unfortunate that the Indian Agent, Mr. Hyde, misinformed Mr. Leon. This was not intended to mislead. When this error became known, senior officials of DIA took reasonable steps to secure the inhabited land south of the river. The Province was intransigent in refusing to make an accommodation. The DIA considered bringing an application to the Court, but did not do so. It is unlikely that a case could have been made out based on 60 years of occupation.

F. Failure to Rectify its Error

[188] It is unnecessary to consider the Claimant's fourth issue. The reservation of land north of the river instead of land south was deliberate, and not in error. There was no breach of Crown duty, and nothing to correct.

V. DISPOSITION

[189] The Crown, Canada, did not breach a legal obligation owed to the Claimant. The Claimant has not established a valid claim under the provisions of the *SCTA*.

HARRY SLADE

Honourable Harry Slade, Chairperson

**SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

Date: 20151019

File No.: SCT-7004-12

OTTAWA, ONTARIO October 19, 2015

PRESENT: Honourable Harry Slade

BETWEEN:

LAKE BABINE 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 LAKE BABINE NATION
As represented by Maria Morellato Q.C. and Leah Pence
Mandell Pinder LLP Barristers & Solicitors

AND TO: Counsel for the Respondent
As represented by Tanya Jorgenson and Michael Mladen
Department of Justice