Federal Court of Appeal  Cour d'appel fédérale

Date: 20210709

Docket: A-112-19

Citation: 2021 FCA 135

CORAM: **LASKIN J.A.**
LOCKE J.A.
LEBLANC J.A.

BETWEEN:

AHOUSAHT FIRST NATION

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

and

SPECIFIC CLAIMS TRIBUNAL

Intervener

Heard by online video conference hosted by the registry, on March 10 and 11, 2021.

Judgment delivered at Ottawa, Ontario, on July 9, 2021

REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	LASKIN J.A. LEBLANC J.A.

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REASONS FOR JUDGMENT

LOCKE J.A.

I. Background

[1] In June 1889, Commissioner Peter O'Reilly (O'Reilly) of the Joint Indian Reserve Commission (JIRC) set off by boat from the port of San Juan on the west coast of Vancouver Island northwest to the Clayoquot Sound area on a week-long trip during which he, with the assistance of Commission surveyor Ashdown Green (Green), laid out 29 Indian reserves. Some of these were for the applicant Ahousaht First Nation (Ahousaht). One, no. 15, was called Marktosis, and is located on the southeast shore of Flores Island. This reserve is hereinafter referred to as IR 15.

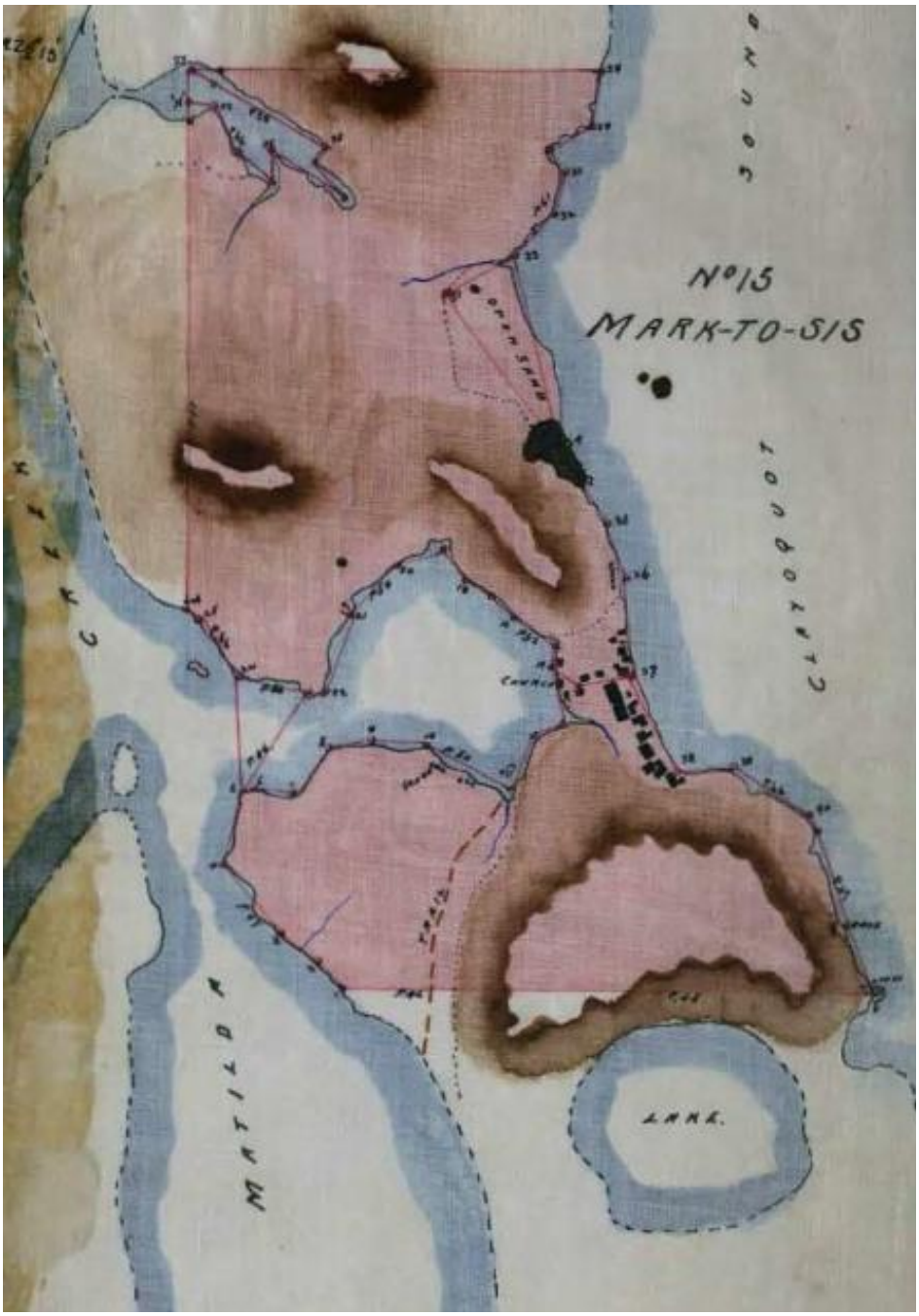
[2] IR 15 was laid out on June 22, 1889, a day that started out with heavy rain, but during which O'Reilly and Green laid out several reserves. Later, O'Reilly composed Minutes of Decision dated June 24, 1889 in which he defined the area of IR 15 as follows:

> Mark to sis, a reserve of two hundred and thirty (230) acres, situated on the southeast coast of Flores Island, Clayoquot Sound, and at the head of Matilda creek.
>
> Commencing at a Spruce tree, marked Indian Reserve, and running West sixty (60) chains, thence North eighty (80) chains, thence East to the seacoast, and thence following the shore in a southerly direction to the place of commencement.

[3] A rough sketch of the reserve made contemporaneously by Green looked like this:

[4] The bold word “Spruce” indicates the starting point for measuring the boundary of the reserve. This spruce, which was marked “Indian Reserve”, is also referred to as the Commissioner’s Tree. The two “x” marks near the Commissioner’s Tree indicate graves, as noted by the word appearing adjacent thereto. The word on the left side of the sketch is “Matilda”, indicating the name of the creek that enters the reserve. The series of dots on the thin piece of land indicates the village, and the word adjacent thereto is “church”, which was located at the “x” in the village.

[5] A more precise map prepared four years later as part of the formal survey of IR 15 (see below) showed the area of the reserve shaded in pink. The brown marks indicate elevation change.



[6] The dispute in this appeal concerns an area to the south of IR 15 originally known as aauuknuk and later called Lot 363. This is an area of about 140 acres to the south of, and contiguous with, the southern boundary of IR 15, which includes the lake shown in the map above. There is no dispute today that Lot 363 was part of the Ahousaht's land when the reserve was defined. However, there was doubt about this for many years. Lot 363 was not included in IR 15. It was provincial Crown land until 1904 when it was purchased by the Board of Trustees of the Presbyterian Church of Canada for use as a mission and school site. In 1953, title in Lot 363 was transferred to the United Church, which then sold off portions to a series of private owners. By 1995, MacMillan Bloedel, which was later acquired by Weyerhaeuser Company Limited (Weyerhaeuser), owned a portion of Lot 363. It acquired the remaining portion in 2000. In 2009, Lot 363 was set aside as an addition to IR 15, apparently with the consent of Weyerhaeuser.

[7] In 2002, the Ahousaht submitted a specific claim to the Minister of Indian Affairs and Northern Development (the Minister) alleging that Canada, through O'Reilly's actions, breached its fiduciary duty and duty of care to the Ahousaht in connection with the creation of IR 15. The Minister rejected this claim in 2009, though as indicated above, Lot 363 was added to IR 15.

[8] The Minister's rejection prompted the Ahousaht to file a Declaration of Claim with the Specific Claims Tribunal (SCT) in 2012. The primary ground for this Claim was paragraph 14(1)(*c*) of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, which provides for compensation to a First Nation for "a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands." The Ahousaht argued that the Crown breached its legal obligation to

them by failing to include Lot 363 as part of IR 15 when the reserve was originally laid out, and in failing to correct the error for as long as it did thereafter. The proceeding before the SCT resulted in the decision that has led to the present application for judicial review: 2019 SCTC 1, per Chairperson Harry Slade (the Decision).

II. Decision under Review

[9] The SCT found that O'Reilly's actions in connection with the creation of IR 15 did not breach Canada's fiduciary duty and duty of care to the Ahousaht. The SCT recognized that the Ahousaht routinely used Lot 363 at the time IR 15 was created, and that such uses were "cognizable". However, the SCT concluded that O'Reilly did not know of the Ahousaht's interest in Lot 363 when IR 15 was created, despite having acted with ordinary diligence in his efforts to accurately ascertain the Ahousaht's "habits, wants and pursuits."

[10] The JIRC under which O'Reilly worked was established in 1876, with the approval of Canada and British Columbia, to address the question of Indian land in British Columbia. Commissioners like O'Reilly were tasked to "visit … each Indian Nation … in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it." Commissioners were also instructed to:

> […] 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.

[11] Article 13 of the Terms of Union referred to in the above-quoted passage stated:

> 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.

[12] In *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 at para. 80 (*Williams Lake*), the Supreme Court of Canada ruled that the Crown's fiduciary duty in interests in land is grounded in land "capable of being known or recognized", i.e. cognizable.

[13] At paragraph 43 of the Decision, the SCT considered that the Crown's fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" (citing *Williams Lake* at para. 55). The SCT went on at paragraph 49 to state that ordinary diligence "imposes a standard of conduct on the Crown in its dealings with a beneficiary, thus requiring adequate inquiry by the Crown into the affected beneficiary's interests in land."

[14] As stated at paragraph 51 of the Decision, "the question in the present matter is not whether the Ahousaht had a cognizable interest, but whether it was apparent to Commissioner

O'Reilly or, if acting with ordinary diligence, would have been apparent to Commissioner O'Reilly."

[15] The SCT looked at the instructions that were given to O'Reilly concerning his work. Among other things, he was told the following upon receiving his Commission in 1880:

> The Government considers it of paramount importance that in the settlement of the land question, nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places and fishing stations occupied by them and to which they may be specially attached. Their fishing stations should be very clearly defined by you in your reports to the Dept. and distinctly explained to the Indians interested therein so as to avoid further future misunderstanding on this most important point. You should in making allotments of lands for reserves make no attempt to cause any violent or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.

[16] These same instructions also referred to an 1878 report of the previous Commissioner, G.M Sproat, which report contained further guidance. The SCT reproduced the following extracts therefrom at paragraph 119 of the Decision:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change.…
>
> The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.
>
> …

> …I am sorry, as a matter of historical truth, to have to say that the facts disclosed in several of my Field Minutes forwarded from different places are inconsistent with the fair and reasonable attention to Indian business which might have been expected from the British Columbia government in pre-confederation days, and which was enjoined upon the colonial authorities in repeated dispatches from the Home government.
>
> …
>
> It is almost unnecessary to say that the manners and customs of the native population must be understood before land reserves can be satisfactorily assigned for their use…. None of the rulers of British Columbia since Sir James Douglas left office seem to have appreciated this fact.…
>
> …
>
> I have solved several apparently insoluble problems this year by discovering, that what the Indians really wanted was not so much good ploughland, as some old "places of fun" up in the mountains or some place of fishing-resort where, at certain seasons, they assemble to fish, dig roots and race their horses.…
>
> …
>
> As a sample of what I mean by too "summary" procedure, I may mention that, in assigning a compact reserve in a district, proper arrangements do not, in all cases, seem to have been made to obtain the intelligent consent of the Indians to the change…

[17] The SCT also noted instructions to field surveyors involved in setting reserves (like Green) to point out, on the ground, the boundaries of the reserve to the chief and head men in order to permit the Commissioner to hear any objections.

[18] Citing *Williams Lake* at para. 55 and *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 at para. 97, the SCT defined the fiduciary duty on O'Reilly as follows:

> […] Prior to the acquisition of a "legal interest" in land that is subject to the reserve creation process, the Crown's sui generis fiduciary duty is "to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with 'ordinary' diligence in what it reasonably regard[s] as the best interest of the beneficiaries" […]

[19] The SCT noted that O'Reilly had indicated (in a letter to the Superintendent General of Indian Affairs (SGIA) dated March 5, 1890) that he had a long conversation with the "Chief" and many of his people in June 19, 1889. They discussed where the reserves should be situated, and O'Reilly invited them to accompany him to the relevant locations, either on his steamer or being towed in their canoes. He indicated that they gladly accepted. It is not clear whether the Chief identified here was Noukamis, then Chief of the Ahousaht. However, O'Reilly's diary indicates that on the day that he defined the boundaries of IR 15 (June 22, 1889) he had a long chat with Chief Noukamis.

[20] The SCT also found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village. This finding was based on two things. First, Chief Noukamis was aware of the importance to his people of securing their fishing stations and villages, and of his responsibility to ensure that this was done (see paragraph 181 of the Decision). Second, locating the southern boundary of IR 15 just south of burial sites located in a forested area would have required input from the Ahousaht (see paragraph 167 of the Decision).

[21] The SCT found that it was not clear how the starting point for the southern boundary of the reserve, the Commissioner's Tree, was chosen. It was not set at one obvious point, the outer limit of the village. It was set further south. The SCT found that there was no evidence for any distinction between the forested land just north and just south of the southern boundary, and concluded that it must have been set based on consultation with Chief Noukamis. The SCT also found that the location of the southern boundary just south of burial sites indicated that O'Reilly

was sensitive to the need to include them in the reserve and inquired as to their location (see paragraph 166 of the Decision).

[22] With regard to the lake located on Lot 363, not far from the southern boundary of the reserve, the SCT concluded that O'Reilly and Green were likely not aware of it. The SCT noted that (i) it was in a forested area, (ii) there was an area of elevated land between the lake and the Commissioner's Tree, and (iii) it was raining heavily the day the reserve was laid out (see paragraphs 168 and 170 of the Decision).

[23] The SCT also noted that there was no evidence that O'Reilly was told of the value of Lot 363 (see paragraph 174 of the Decision). The SCT concluded that the absence of notes by O'Reilly attributing fishery, timber or other values to Lot 363 (as had been made in respect of other reserves) strongly implied that O'Reilly was not informed of them (see paragraph 179 of the Decision).

[24] The SCT was aware that the Ahousaht were canoe builders. It also noted oral history that the Ahousaht attributed value to the timbered land on Lot 363. Nevertheless, the SCT concluded that any value such timber may have had was not for the construction of canoes (see paragraph 172 of the Decision).

[25] In his March 5, 1890 letter to the SGIA, O'Reilly described IR 15 as follows:

> No15. Mark-to-sis, contains two hundred, and thirty (230) acres. It is situated at the head of Matilda Creek, on the southeast shore of Flores Island. The village contains twenty eight (28) houses, a Roman Catholic church, and Mission house. It was once the principal village of the Ahousat (sic) tribe. These Indians are

> expert canoe builders, a large number were in course of construction at the time of my visit. The land is rocky, and of small value; a few potato patches at the rear of the village (aggregating perhaps ¼ acre) are cultivated, but there is little prospect of these being enlarged.

[26] The SCT concluded that the evidence did not establish that O'Reilly failed to exercise ordinary diligence (see paragraph 184 of the Decision). He made adequate inquiry, but was not informed of the particular value attributed to Lot 363 (see paragraph 203 of the Decision).

III. Issues

[27] The Ahousaht argue that the SCT erred in finding that O'Reilly met the requisite standard of care when he failed to include Lot 363 within IR 15.

[28] The Ahousaht also argue that they were denied procedural fairness when the judge who was expected to hear their claim before the SCT, Justice Larry Whelan, recused himself and was replaced by Chairperson Slade.

[29] The SCT itself makes submissions as an intervener on the issue of procedural fairness.

IV. Analysis

[30] The two issues identified above are addressed in the paragraphs below, starting with the issue of procedural fairness.

A. *Procedural Fairness*

(1) Standard of Review

[31] The standard of review on issues of procedural fairness is essentially correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 79. As stated in *Vidéotron Ltée v. Canada (Shared Services)*, 2019 FCA 307, 313 A.C.W.S. (3d) 299 at para. 12:

> Issues of procedural fairness are to be reviewed on a correctness standard. While it may be that "no standard of review is being applied" when a court considers issues of procedural fairness because the question is "whether the procedure was fair having regard to all the circumstances," this Court's review is "best reflected in the correctness standard" for such issues *(Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2018] F.C.J. No. 382 at para. 54).

(2) Factual Background

[32] Justice Whelan had conduct of the claim before the SCT for almost five years from June 2013 to June 2018. During this time, he:

A. Presided over numerous case management conferences;

B. Presided over an oral history hearing on July 12 and 13, 2016, and an expert evidence hearing on October 19 and 20, 2017;

C. Attended a site visit of IR 15 and Lot 363 on July 14, 2016; and

D. Conducted a mediation between the parties on April 17 to 19, 2018.

[33] As the mediation did not succeed in settling the Ahousaht's claim, a hearing to argue the validity of the claim (Validity Hearing) was scheduled for July 12 and 13, 2018.

[34] Of key importance to the Ahousaht's procedural fairness argument is the agreement that was reached between the parties governing the mediation (Mediation Agreement). In that agreement, the parties requested that Justice Whelan, who was to preside over the Validity Hearing, act as the mediator. The Mediation Agreement contemplated that, in the mediation, Justice Whelan would hear the parties' respective opening statements and arguments, and then share his impressions with the parties, first separately and then together, as to the strengths and weaknesses of their respective positions.

[35] The parties also agreed that, if the mediation did not resolve the matter of the validity of the claim, Justice Whelan should preside over the Validity Hearing despite his involvement in the mediation (see paragraph 11 of the Mediation Agreement). On the other hand, the parties apparently contemplated the possibility that Justice Whelan would not be able to do so. They agreed to waive the requirement that the person who hears must decide (see paragraph 12 of the Mediation Agreement), presumably so that evidence that had already been heard by Justice Whelan would not have to be repeated before another judge who might replace him. Moreover, the Mediation Agreement provides that, "[s]hould Justice Whelan, for any reason, be unavailable to preside over the continuation of Validity Hearing, the Parties agree that another member of the SCT, as the SCT Registry may determine, may preside over the Validity Hearing in his place" (see paragraph 16 of the Mediation Agreement). Finally, the parties agreed that the mediation as contemplated did not prejudice them or breach their right to procedural fairness in the Validity Hearing (see paragraph 19 of the Mediation Agreement).

[36] After having participated in the mediation, which turned out to be unsuccessful, Justice Whelan indicated to Chairperson Slade that, because of his involvement in the mediation (including possibly having signalled his view on the merits), he felt it would be inappropriate for him to preside over the Validity Hearing and decide the matter. Chairperson Slade then took over this role and advised the parties by Direction dated June 21, 2018.

[37] The Ahousaht expressed concern with the late replacement of the judge who had become familiar with the matter over several years by a judge with no prior involvement with the matter. The Ahousaht noted the express agreement of the parties that Justice Whelan could continue even if the mediation were unsuccessful. Chairperson Slade convened a case management conference to discuss how to proceed, and considered the Ahousaht's concerns. However, he indicated that he agreed with Justice Whelan that it would be inappropriate for the latter to continue in the matter following his involvement in the mediation.

[38] The Ahousaht argue that Justice Whelan's late withdrawal and replacement created a procedural unfairness that the SCT should have addressed in one of two ways. Either Justice Whelan could continue to preside despite his misgivings or, failing that, Chairperson Slade should have consulted with the parties as to whether he should undertake a site visit or re-hear some or all of the witnesses who had been heard by Justice Whelan.

(3) Assessment of Fairness

[39] I note first that the Ahousaht have pointed to nothing to indicate that they expressed any concerns before the SCT that the late replacement of the hearing judge would give rise to

procedural unfairness. The jurisprudence is well settled that an allegation of a violation of procedural fairness must be raised at the earliest practical opportunity: *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 455 N.R. 115 at para. 67; *Hennessey v. Canada*, 2016 FCA 180, 484 N.R. 77 at para. 20; *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320, 32 C.E.L.R. (4th) 18 at paras. 47-48. In my view, the Ahousaht failed in this respect. The concerns they expressed before Chairperson Slade about the replacement of Justice Whelan appear to have been more with regard to the efficiency of the process. They did not mention procedural fairness. If the Ahousaht had concerns about procedural fairness, they should have stated them explicitly when their other concerns were discussed.

[40] With regard to the argument that Chairperson Slade should have considered re-hearing evidence, I see no indication that the Ahousaht ever proposed such an approach. It would be difficult to fault Chairperson Slade for not having adopted that approach when the Ahousaht themselves did not raise it.

[41] Moreover, I agree entirely with Chairperson Slade that it would have been inappropriate for Justice Whelan to preside over the Validity Hearing and decide the matter despite his concern about possibly having signalled his views on the merits. It would have been inappropriate for Chairperson Slade to push Justice Whelan to ignore his misgivings. Doing so would likely also have been impractical; it would amount to asking a judge to do something that he considers unethical.

[42] I see nothing unfair in how the Validity Hearing was conducted and decided. The parties indicated clearly in the Mediation Agreement that they contemplated the possibility that Justice Whelan would not be able to continue in the matter if the mediation were unsuccessful. In addition, the parties' waiver of the requirement that the person who hears must decide suggests that they accepted the possibility that another judge might consider the evidence that had been heard by Justice Whelan. I repeat here the text of paragraph 16 of the Mediation Agreement, which provides that, "[s]hould Justice Whelan, for any reason, be unavailable to preside over the continuation of Validity Hearing, the Parties agree that another member of the SCT, as the SCT Registry may determine, may preside over the Validity Hearing in his place."

B. *Alleged Errors*

[43] The Ahousaht assert three errors regarding findings of fact by the SCT, each one relevant to the SCT's conclusion that O'Reilly met the standard of care by exercising ordinary diligence and making adequate inquiries. The alleged errors concern (i) the location of the Commissioner's Tree delineating the southern boundary of IR 15, (ii) the presence of Chief Noukamis at Marktosis when O'Reilly and Green were there, and (iii) whether O'Reilly was informed of the presence of the lake on Lot 363.

(1) Standard of Review

[44] The parties agree, and I concur, that the standard of review applicable to the alleged errors is reasonableness: *Williams Lake* at para 27.

[45] The reasonableness standard of review was discussed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*). Of key relevance to this Court's decision are the following aspects of the *Vavilov* decision:

A. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (para. 84);

B. To develop an understanding of the decision maker's reasoning process, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (para 99);

C. The burden is on the party challenging the decision to show that it is unreasonable (para. 100);

D. To be reasonable, a decision must be based on reasoning that is both rational and logical, though reasonableness review is not a line-by-line treasure hunt for error (para. 102);

E. A decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis; a decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (para. 103);

F. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise (para. 104); and

G. Absent exceptional circumstances, a reviewing court will not interfere with the tribunal's factual findings; the reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker (para. 125).

[46] In respect of all of the alleged errors, they concern inferences of fact that were drawn by the SCT based on the evidence. I address each of the issues below, but my overall conclusion is

that the inferences in question were open to the SCT, even though different inferences might also have been made. The SCT's inferences do not demonstrate any irrational chain of analysis or any logical fallacies.

(2) The Commissioner's Tree

[47] As indicated above, the SCT inferred that the Commissioner's Tree delineating the southern boundary was chosen based on consultation with Chief Noukamis, and in order to ensure that burial sites were included in the reserve. The basis for these inferences is discussed at paragraph 21 above.

[48] The Ahousaht note that the formal survey of IR 15 prepared four years later noted many more grave sites than those identified by Green. The Ahousaht also note that there was evidence of people being "buried" in trees south of the southern boundary. In my view, neither of these assertions impairs the inferences that the SCT drew from the evidence. The SCT was clearly aware of the practice of burial in trees (see paragraphs 67, 81 and 84 of the Decision), and there is no indication in the evidence that O'Reilly knew or should have known of any graves south of the southern boundary of IR 15.

[49] I am not convinced that the inferences the SCT drew with regard to the selection of the Commissioner's Tree were unreasonable.

(3) Presence of Chief Noukamis

[50] As discussed at paragraph 20 above, the SCT found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village. The Ahousaht argue that there is no evidentiary basis for this finding. Though O'Reilly's diary indicates that he met with Chief Noukamis earlier on the day that he visited Marktosis, it does not record that Chief Noukamis accompanied him there. The Ahousaht argue that this omission implies that Chief Noukamis was not present at Marktosis with O'Reilly, especially considering that O'Reilly did identify in his diary those who accompanied him to some other locations. The SCT acknowledged the lack of direct evidence of the presence of Chief Noukamis at Marktosis with O'Reilly (see paragraph 181 of the Decision), but drew inferences from the evidence despite this. The SCT was entitled to do that.

[51] The Ahousaht argue that there would be no reason for Chief Noukamis to travel to Marktosis, and that the implication from the evidence is that he did not accompany O'Reilly and Green there. I disagree. The SCT found that Chief Noukamis was present when O'Reilly and Green visited the Marktosis village, and explained the basis for this finding, including his responsibility as chief to be present. The Ahousaht do not dispute this responsibility. I am not convinced that this was an unreasonable finding, even though different findings might have been made, as suggested by the Ahousaht. It is not the role of this Court to reweigh the evidence.

[52] The Ahousaht question the reliability of some of the information provided by O'Reilly as to who he met and when during his June 1889 trip. They ask this Court to infer from a

comparison of O'Reilly's diary and his March 5, 1890 letter to the SGIA that he may have misremembered or embellished what he did. Once again, it is my view that the existence of such possible alternative findings do not lead to a conclusion that the SCT's findings were unreasonable.

[53] The Ahousaht also ask this Court to conclude that O'Reilly's comments give the impression that his invitation to members of the tribe to accompany him to the locations where the reserves would be laid out was considered by them more of an adventure or a lark than a serious attempt to gather information. Firstly, it is not the task of this Court to reach such conclusions. Rather, we focus on the SCT's reasons and consider whether they are flawed. In any case, I see no basis, other than speculation, for the conclusion that the Ahousaht urge here. Moreover, such a conclusion would conflict with the SCT's reasonable finding that the Ahousaht understood that the setting of reserves was an important matter.

(4) The Lake

[54] As noted in paragraph 22 above, the SCT concluded that O'Reilly and Green were likely not aware of the lake located on Lot 363 just south of the southern boundary of IR 15. The Ahousaht argue that O'Reilly and Green had a duty to traverse the southern boundary, and would have seen the lake if they had. They also argue that, had O'Reilly seen the lake, he would have understood its value to them as a source of fish, and would have included Lot 363 as part of IR 15.

[55] The Ahousaht offer little support for a duty to traverse the southern boundary, and I do not accept that the SCT erred in not finding a breach of the fiduciary duty to the Ahousaht in the failure of O'Reilly and/or Green to traverse the southern boundary of IR 15.

[56] The Ahousaht also argue that, even if O'Reilly was unaware of the lake when he visited Marktosis, he could not have claimed ignorance of it once he saw (and signed) the formal survey prepared a few years later. I accept that O'Reilly may have seen the lake on Lot 363 on the map in the formal survey, but I am not convinced that doing so would necessarily have required him to make further inquiries with a view to modifying the boundaries of IR 15. I am not convinced that the SCT erred in not including such a step as part of the fiduciary duty owed to the Ahousaht. The mere indication on the map of a body of water near the border of IR 15 would not, without more, indicate that either the body of water or the land surrounding it were necessarily of value to the Ahousaht. This is especially so in view of the SCT's reasonable finding that Chief Noukamis was present when O'Reilly visited Marktosis in order to indicate the lands the Ahousaht used.

[57] The Ahousaht make several arguments concerning evidence that would have been treated differently by Justice Whelan than by Chairperson Slade. Examples include (i) oral history concerning the suitability of timber on Lot 363 for canoes, and (ii) a visit to IR 15, which would have shown just how close the lake is to the southern boundary of IR 15. However, the SCT was clearly aware of this evidence. The oral history, which was provided by Elder Louis Frank Sr., was discussed in the Decision at paragraphs 55 to 62, and the value of the timber on Lot 363 was

discussed at paragraphs 171 to 175. I see nothing unreasonable in the SCT's treatment of the evidence.

[58] The proximity of the lake to IR 15 is clear from the evidence (the formal survey indicates that it was 3 chains – about 60 metres – from the southern boundary), and the SCT noted this at paragraph 171 of the Decision. More importantly, it is not clear to me how a site visit to see this proximity in person could have affected the outcome. The SCT's conclusion that O'Reilly and Green had not seen the lake was based on the distance and terrain from the Commissioner's Tree, not from the southern boundary of IR 15. In addition, it is not clear to me that a site visit in 2018 would have assisted Chairperson Slade to imagine what would have been apparent to a visitor in 1889.

V. Conclusions

[59] For the foregoing reasons, I find that there was no unfairness in the procedure before the SCT, and specifically with regard to the substitution of Chairperson Slade for Justice Whelan to hear and decide the Validity Hearing.

[60] It is also my view that the Decision was reasonable and without error.

[61] I would dismiss the present application for judicial review with costs.

"George R. Locke"
J.A.

"I agree.
J. B. Laskin J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-112-19
STYLE OF CAUSE:	AHOUSAHT FIRST NATION v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT AND SPECIFIC CLAIMS TRIBUNAL
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MARCH 10 AND 11, 2021
REASONS FOR JUDGMENT BY:	LOCKE J.A.
CONCURRED IN BY:	LASKIN J.A. LEBLANC J.A.
DATED:	JULY 9, 2021

APPEARANCES:

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