Federal Court of Appeal  Cour d'appel fédérale

Date: 20140605

Docket: A-107-13

Citation: 2014 FCA 150

CORAM: **SHARLOW J.A.**
STRATAS J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Appellant

and

KITSELAS FIRST NATION

Respondent

and

A COALITION OF FIRST NATIONS LED BY
THE UNION OF BRITISH COLUMBIA
INDIAN CHIEFS

Intervener

and

SPECIFIC CLAIMS TRIBUNAL

Intervener

Heard at Vancouver, British Columbia, on April 7 and 8, 2014.

Judgment delivered at Ottawa, Ontario, on June 5, 2014.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is a judicial review under section 28 of the *Federal Courts Act*, R.S.C. 1985 c. F-7 of a decision dated February 19, 2013, and cited as 2013 SCTC 1 (Reasons), by which the

Honourable Harry Slade (Judge), the Chairperson of the Specific Claims Tribunal, found that the Kitselas First Nation (Kitselas) had validly established a breach of a legal obligation of the Crown in Right of Canada (Canada) as a result of the non-inclusion of a 10.5 acre parcel of land in a reserve initially identified in 1891 and known as Kitselas I.R. No. 1.

[2] The principal submission of Canada is that the Judge erred in law by holding that Canada had a fiduciary duty at the reserve allotment stage. Canada also submits that the Judge made unreasonable determinations of fact and of mixed fact and law in reaching his decision. It further submits that the Judge erred in finding that Canada was solely liable for breaches of Canada's alleged duty with respect to the excluded land.

[3] For the reasons set out below, I would dismiss this judicial review application.

CONTEXT AND BACKGROUND

[4] The Judge provided an extensive review of the historical facts pertaining to the claim at issue in these proceedings, which need not be repeated in these reasons. A short summary of the most pertinent facts will suffice.

[5] The territory historically occupied by the Kitselas is along the Skeena River in British Columbia, upstream from Port Essington which is located near the mouth of the River.

[6] When British Columbia entered Confederation in 1871, the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10 addressed aboriginal matters in Article 13, which notably

provided for the appropriation of tracts of land to be conveyed from the provincial government to the federal government in trust for the use and benefit of the various aboriginal populations of the province.

[7] For that purpose, Canada and British Columbia established a Joint Indian Reserve Commission which was to visit each aboriginal nation in British Columbia to inquire into reserve allotments and to fix and determine separately for each nation the number, extent and locality of reserves taking into account their habits, wants, pursuits, and the amount of territory available in the region occupied by them, as well as the claims of the White settlers.

[8] In September 1891, the sole commissioner of the Joint Indian Reserve Commission was Mr. Peter O'Reilly. In September 1891, Commissioner O'Reilly traveled along the Skeena River to identify land to be set apart as reserves for the Kitselas and other aboriginal nations. Various exchanges and meetings between Commissioner O'Reilly and representatives of the Kitselas ensued, leading to a recommendation by the Commissioner to set aside six reserves for this First Nation, totaling 2910 acres, including Kitselas I.R. No. 1 comprising 2110 acres.

[9] Commissioner O'Reilly excluded from Kitselas IR No. 1 approximately 10 acres on the left bank of the Skeena River, on which a storehouse of the Hudson's Bay Company then stood. When he wrote to British Columbia's Chief Commissioner of Lands and Works on January 28, 1892 seeking approval of his recommended reserve allotments, Commissioner O'Reilly noted that "[t]here are no settlements in the neighborhood of any of these reserves and should any such

occur, the interest of the whites and the Indian are not likely to clash." He further explained the exclusion of approximately 10 acres from Kitselas I.R. No. 1 as follows:

> I have omitted from Reserve No. 1 Kitselas ten acres on the left bank of the river immediately below the [canyon] as I believe it would prove a convenience to the public to have this land declared a public reserve, and that you might think it advisable to act on my suggestion. The Hudsons Bay Company have already erected a small storehouse thereon.

[10] British Columbia and Canada eventually approved the reserves recommended by Commissioner O'Reilly. Once proposed reserve allotments were approved by both governments, they were deemed "provisionally approved" and withdrawn from inconsistent uses. Provisionally approved reserves, such as Kitselas I.R. No. 1, did not become legally established reserves within the meaning of the *Indian Act*, R.S.C. 1985 c. I-5, until July 29, 1938, when British Columbia transferred the administration and control of the lands to Canada.

[11] In 1901, the allotment for Kitselas I.R. No. 1 and the 10.5 acre exclusion were surveyed. The exclusion became known as Lot 113, which was bordered on all sides by Kitselas I.R. No. 1 except for the border marked by the riverbank.

[12] British Columbia subsequently subdivided Lot 113 into 50 lots. Some were purchased by speculators. The land remained undeveloped until 1907, when it became a service centre for workers employed in the construction of a railway. The work was completed in 1913, and the land was then abandoned. The subdivided lots eventually reverted to British Columbia for non-payment of taxes. The land comprising Lot 113 is now a provincial park.

[13] In the year 2000, the Kitselas submitted a claim to the Minister of Indian Affairs under Canada's policy concerning the resolution of so-called "specific" claims arising from Indian treaties and reserve lands. The Kitselas alleged that Canada had breached its fiduciary duty in connection with the exclusion of the 10.5 acres known as Lot 113 from Kitselas I.R. No. 1. The Minister did not accept the claim, and notified the Kitselas accordingly in 2009. As a result, the Kitselas commenced a proceeding under the then recently adopted *Specific Claims Tribunal Act*. S.C. 2008, c. 22 (*SCT Act*).

THE DECISION UNDER REVIEW

[14] Following an extensive review of the evidence, and after hearing witness testimony, including oral history, the Judge made the following important findings of fact:

> (a) The 10.5 acre area of land excluded from Kitselas I.R. No. 1 included the site of an ancient village of the Kitselas known as Gitaus, and though there were visible indications of the use of the former village site in 1891, it would not have been perceived by Commissioner O'Reilly as a village; however, from the aboriginal perspective, the site of the ancient Gitaus village would not have been abandoned by the Kitselas at the time Commissioner O'Reilly proceeded to make the reserve allocation, and that site was of significance to the identity of the Kitselas peoples: Reasons at paras. 81 to 87.
>
> (b) Indian dwellings were on the Gitaus site when Commissioner O'Reilly attended in 1891, and these would have been seen by him: Reasons at paras. 88 to 90.
>
> (c) There were no claims of White settlers over the excluded 10.5 acres, that land was not excluded in anticipation of the use of the land for transportation purposes, and the

Hudson's Bay Company required no more than 1 acre of land for its activities on the site: Reasons at paras. 91 to 93.

(d) There was no basis in the evidence to support a finding that the 10.5 acres would not form part of Kitselas I.R. No. 1 today if Commissioner O'Reilly had not excluded it: Reasons at para. 147.

[15] Relying principally on the analysis of Binnie J. in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 (*Wewaykum*), the Judge determined that the general requirements to establish a fiduciary duty were the identification of a cognizable Indian interest coupled with the Crown's discretionary control in relation thereto in a way sufficient to find a fiduciary duty: Reasons at paras. 107 to 113.

[16] While recognizing that the 10.5 acres that had been excluded from the reserve were not held in trust for the Kitselas, nor were they considered part of a "provisional reserve", the Judge nevertheless found that the Kitselas had a cognizable Indian interest in the excluded land on the basis that the land at issue was contemplated by Article 13 of the *British Columbia Terms of Union*. The Judge concluded that "[t]he Indian interest in the land they used and occupied was recognized by the colonial authorities", and "[on] confederation, the colonial policy continued as a constitutional responsibility of Canada": Reasons at paras. 143. The Judge thus found "that the Indian Nations had, at a minimum, a substantial practical interest in land they habitually used", and that "[t]his was a cognizable interest": Reasons at para. 144.

[17] With respect to the Crown's discretionary control in relation to the land at issue in a way sufficient to result in a fiduciary duty, the Judge concluded that there was no basis in the evidence that would support a finding that the 10.5 acres at issue would not have formed part of Kitselas I.R. No. 1 had Commissioner O'Reilly not made his recommendation to exclude it: Reasons at para. 147. In the Judge's view, "Commissioner O'Reilly was the vehicle by which federal discretion would be exercised over the establishment of reserves": Reasons at para. 200.

[18] Since the instructions to Commissioner O'Reilly were notably "to leave the Indians in the old places to which they are attached", the Judge concluded that it was against the performance of that requirement and the other instruction provided to him "that Crown obligations of loyalty, good faith, disclosure, and acting reasonably and with diligence in regard to the best interests of the Indians, stand to be measured": Reasons at paras. 168 and 169.

[19] The Judge also concluded that the evidence, taken as a whole, did not support a finding that Commissioner O'Reilly informed the Kitselas of the exclusion of the 10.5 acres from the reserve: Reasons at para. 182-183. Moreover, since no claims by White settlers had been made against the excluded land, the Judge further concluded that Commissioner O'Reilly had no authority to exclude the land from the reserve allotment once it was established that it was used and occupied by the Kitselas as an ancient settlement to which they were attached: Reasons at paras. 201-202.

[20] As a result, the Judge concluded that Canada, by the actions of Commissioner O'Reilly, failed to act reasonably and with diligence in regard to the best interests of the Kitselas in

excluding the concerned land from Kitselas I.R. No. 1, save with respect to the one acre site of the storehouse used by the Hudson's Bay Company: Reasons at para. 203 to 205.

THE ISSUES

[21] The issues identified by Canada as central to its judicial review application are the following:

(a) What standard of review is applicable?

(b) Did the Judge err by concluding that Canada had a fiduciary duty to the Kitselas in the reserve allotment process?

(c) If not, did the Judge err by finding that Canada breached its duty?

(d) If Canada breached its duty, did the Judge err by finding Canada solely responsible for any losses flowing from the breach?

STANDARD OF REVIEW

[22] There is no dispute that the findings of fact and of mixed fact and law of the Judge are to be reviewed under a standard of reasonableness. The parties disagree, however, as to the standard of review that applies to the findings of law made by the Judge in this case.

[23] The principal issues of law raised by Canada in its application are (1) whether the Judge incorrectly expanded cognizable Indian interests and the Crown's undertaking of discretionary control in order to find a fiduciary duty, and (2) if the duty exists, whether the Judge erred with respect to the division of liability between Canada and British Columbia stemming from that

duty. Canada submits that these substantive legal issues should be judicially reviewed on a standard of correctness.

[24] I need not address the standard of review with respect to the second issue since it does not arise in this case, as further discussed in the last section of these reasons. I agree, however, with Canada that the first issue is to be reviewed on a standard of correctness. My reasons for so concluding are the following.

[25] Several factors determine the appropriate standard of review, including the purpose of the *SCT Act*, the nature of the issue subject to review, the specialized expertise of the Specific Claims Tribunal, and the existence or absence of a privative clause: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 62 to 64 (*Dunsmuir*).

[26] The purpose of the *SCT Act* is to establish the Specific Claims Tribunal, comprised of a roster of superior court judges from across Canada, to decide issues of validity and compensation relating to the specific claims of First Nations identified in the legislation. The specific claims that are contemplated are principally those old historic claims that are generally precluded from adjudication before the superior courts in light of the passage of time. Prior to the establishment of the Specific Claims Tribunal, these claims were determined by the Minister without any binding and independent adjudication mechanism. The fundamental purpose of the *SCT Act* is therefore to allow such claims to now be adjudicated by independent superior court judges without consideration of any rule or doctrine that would have the effect of limiting claims or prescribing rights against Canada because of the passage of time or delay.

[27] There are two principal aspects to the mandate of a superior court judge acting under the *SCT Act*. First the judge must determine the validity of the claim: *SCT Act* section 14. Second, if the claim is deemed valid, the judge must then determine the appropriate level of compensation owed: *SCT Act* section 20.

[28] The validity of a claim must be determined in accordance with general legal principles, notably the principles of fiduciary law as applicable to the Crown-aboriginal relationship: paragraph 14(1)(*c*) of the *SCT Act*. The *SCT Act* does not establish a code of liability with respect to specific claims, which are rather adjudicated in accordance with the general principles of the federal common law pertaining to aboriginal matters.

[29] A superior court judge acting as a member of the Specific Claims Tribunal is not bound by any rule or doctrine that would limit claims or prescribe rights against the Crown because of the passage of time, and may act flexibly with respect to the receipt and acceptance of evidence, including accepting and considering oral history: *SCT Act* paragraph 13(1)(*b*) and section 19. Nevertheless, in determining the validity of a specific claim, a superior court judge acting as a member of the Specific Claims Tribunal must apply and interpret the law in the same manner as a judge of a superior court.

[30] The existence of a fiduciary duty and the rules to determine whether a specific claim is valid constitute substantive legal issues. There is no discrete administrative regime under the *SCT Act* to manage or to consider with respect to the validity of a claim, nor is there a need to balance competing policy considerations in rendering decisions, nor is there any discretionary

decision making authority at issue. Rather, the role of a superior court judge acting as a member of the Tribunal with respect to the validity of a specific claim is to apply similar legal rules as would be applied by any superior court.

[31] Certain administrative law decision-makers interpret the legal rules that courts apply, yet reviewing courts sometime nevertheless defer to them. For example, a labour arbitrator acting under a collective agreement and interpreting the general law of issue estoppel is entitled to deference: *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 [2011] 3 S.C.R. 616. In *Dunsmuir* at paragraph 54, the Supreme Court held that deference may "be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context." But here, as I have already noted, the Specific Claims Tribunal is to employ the exact same fiduciary law that courts use, without importing policy considerations or specialized appreciation into the mix.

[32] Another important factor affecting the standard of review is that the adjudications of the Specific Claims Tribunal are not protected by a strong privative clause: *SCT Act* section 34. This is a significant indication that its decisions on the existence of a fiduciary duty are not subject to deferential review.

[33] Further, claims involving the existence of a fiduciary duty are not exclusive to the Specific Claims Tribunal and are also adjudicated before the superior courts. Indeed, the *SCT Act* itself contemplates the possibility that proceedings may arise in the superior courts out of the

same or substantially the same facts: *SCT Act* subsection 15(3) and section 37. As noted by Rothstein J. in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 14, it would be inconsistent for a court to review a legal question on judicial review of an administrative tribunal on a deferential standard, while deciding the exact same legal question on a correctness standard on appeal from a decision at first instance.

[34] Indeed, it is most important that there be consistency in adjudications by the Specific Claims Tribunal and courts on issues regarding the fiduciary relationship between the Crown and aboriginal peoples and the circumstances in which that relationship entails fiduciary duties. These issues have deep underlying constitutional underpinnings stemming notably from the *Royal Proclamation, 1763*, paragraph 91(24) and section 109 of the *Constitution Act, 1867*, section 35 of the *Constitution Act, 1982*, and other constitutional instruments. For example, in the case at bar the Judge relied on a constitutional provision, Article 13 of the *British Columbia Terms of Union*, as part of his analysis leading to his finding that a fiduciary duty was incumbent on the Crown in the circumstances of this case. Inconsistency on such fundamental matters would be unseemly and give rise to significant practical consequences.

[35] For all these reasons, I conclude that correctness is the standard of review of the Specific Claims Tribunal's ruling on the question of law at issue in this case.

[36] Even if the standard of review were reasonableness, the range of reasonableness outcomes would be narrow. Constitutional norms and previously-decided cases related to the

Crown's fiduciary duty severely constrain the range of acceptable and defensible outcomes open to the Specific Claims Tribunal with respect to the legal issue at hand. Moreover, additional constraints are imposed by the underlying constitutional underpinnings and mandatory norms in this area.

DID THE JUDGE ERR BY CONCLUDING THAT CANADA HAD A FIDUCIARY DUTY TO THE KITSELAS IN THE RESERVE ALLOTMENT PROCESS?

[37] Canada submits that it had no fiduciary duty with respect to the 10.5 acres excluded from Kitselas I.R. No. 1. First, Canada argues that though the excluded land may have been habitually used by the Kitselas, "habitual use" alone is not a cognizable interest that may give rise to a fiduciary duty since it is insufficiently specific. Second, Canada further argues that it did not take discretionary control of the excluded land so as to give rise to any fiduciary duty.

[38] I do not accept these submissions for the reasons further set out below. In the specific factual context of these proceedings, I conclude that the Judge reached the appropriate legal conclusion with respect to the fiduciary duty owed in this case by Canada to the Kitselas.

[39] The doctrine of aboriginal rights arose from the assertion of Crown sovereignty over the aboriginal peoples of the territories now known as Canada. This doctrine limits the original sovereignty of aboriginal peoples by placing them under the ultimate control of the Crown. These limits, and the resulting discretion afforded to the Crown in managing its relationship with aboriginal peoples, have resulted in characterizing the relationship as fiduciary in nature. The fiduciary relationship implies political duties for Canada when dealing with aboriginal peoples. However, the relationship is not solely political.

[40] The fiduciary relationship also finds expression and recognition in the courts when reviewing government action affecting aboriginal peoples. The Supreme Court of Canada has thus recognized that the *sui generis* fiduciary relationship that binds the Crown and aboriginal peoples colours government actions with respect to aboriginal matters, notably with respect to the interpretation and application of undertakings, treaties and legislation relating to aboriginal peoples, including subsection 35(1) of the *Constitution Act, 1982*: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1108 (*Sparrow*); *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 9; *Ontario v. Dominion of Canada and Quebec: In Re Indian Claims* (1895), 25 S.C.R. 434 at pp. 534-535.

[41] In addition to serving as a guiding principle for courts, the fiduciary relationship can also lead in certain circumstances to judicially enforceable fiduciary duties on the Crown when it assumes or exercises a discretionary power over the rights or interests of aboriginal peoples. For example, in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (*Guerin*), the Supreme Court of Canada confirmed a lower court monetary award against Canada for mishandling land transactions involving the lease of reserve land. In so doing, it found that the Crown was subject to a judicially enforceable fiduciary duty in managing reserve lands. The Court found the origin of this enforceable duty in the historical relationship between the Crown and aboriginal peoples, coupled with the nature of aboriginal title and, in particular, with the proposition that the Aboriginal interest in land is inalienable except upon surrender to the Crown.

[42] However, the judicially enforceable fiduciary duties of the Crown are not limited to transactions involving reserve land. They can be found to exist "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another,

and that obligation carries with it a discretionary power": *Guerin* at p. 384. In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 49, referring to *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18.

[43] Though a judicially enforceable fiduciary duty does not arise in every facet of the relationship between the Crown and aboriginal peoples, the courts have found a fiduciary duty in varied circumstances. Of particular pertinence to these proceedings, in *Ross River Dena Council Band v. Canada*, 2002 SCC 54, [2002] 2 S.C.R. 816 (*Ross River*) at para. 68, LeBel J. recognized that the reserve creation process presumptively engages the Crown's fiduciary duty:

> It must be kept in mind that the process of reserve creation, like other aspects of its relationship with First Nations, requires that the Crown remain mindful of its fiduciary duties and of their impact on this procedure, and taking into consideration the *sui generis* nature of native land rights.

[44] As Binnie J. further noted in *Wewaykum* at para. 89, aboriginal peoples were "entirely dependent on the Crown to see the reserve-creation process through to completion." This is why the Crown was found to have a fiduciary duty in the reserve creation process described in that case even though the land at issue was not formally recognized as reserve land under the *Indian Act*, but was only "provisionally approved" under the reserve creation process which was applied in British Columbia.

[45] As noted by Binnie J. at para. 79 of *Wewaykum*, "[a]ll members of the Court accepted in *Ross River* that potential relief by way of fiduciary remedies is not limited to the s. 35 rights

(*Sparrow*) or existing reserves (*Guerin*). The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."

[46] *Wewaykum* concerned the scope of the fiduciary duty of the Crown in the process of the creation of Indian reserve lands in British Columbia out of an area which – contrary to the land at issue in this case - was not part of traditional tribal lands: *Wewaykum* at paras. 5 and 77. Binnie J. noted that the fiduciary relationship between the Crown and aboriginal peoples morphs into a fiduciary duty incumbent on the Crown where a cognizable Indian interest is at issue and the Crown undertakes discretionary control in relation thereto in a way that invokes responsibility in the nature of a private law duty: *Wewaykum* at para. 85. With those considerations in mind, Binnie J. concluded the following with respect to the Crown's fiduciary duty prior to reserve creation (at paragraph 86 of *Wewaykum*):

> Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* – which is subject to supervision by the courts exercising public law remedies. At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.

[47] Binnie J. further expanded on the fiduciary duty of the Crown prior to reserve creation at paras. 94 to 97 of *Wewaykum*. He reiterated that in addition to public law duties, the imposition of a fiduciary duty attaches to the Crown the obligations of loyalty, good faith, and full disclosure appropriate to the matter at hand, and of acting reasonably and with diligence in the best interest of the beneficiary. This results in opening access to an array of equitable remedies in cases where this duty is breached by the Crown.

[48] This is precisely the approach followed by the Judge in this case. Relying principally on the teachings of the Supreme Court of Canada in *Wewaykum*, the Judge found, at para. 111 of his Reasons, that the high degree of discretionary control assumed by the Crown over the lives of aboriginal peoples expressed in Article 13 of the *British Columbia Terms of Union* could, in appropriate circumstances, give rise to a fiduciary duty with respect to the provision or non-provision of reserve lands.

[49] In this respect, the Judge concluded that the Kitselas had, in the circumstances of this case, a sufficient cognizable interest in the 10.5 acres excluded from the reserve so as to trigger the fiduciary duty underlying Article 13, and that the unilateral undertaking of the Crown set out in that Article was itself sufficient to engage, with respect to the excluded land at issue in this case, the obligations of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the beneficiary. The Judge further found that a breach of such a duty could be dealt with by him under paragraph 14(1)(*c*) of the *SCT Act*:

> **14.** (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (*c*) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **14**. (1) Sous réserve des articles 15 et 16, la première nation peut saisir le Tribunal d'une revendication fondée sur l'un ou l'autre des faits ci-après en vue d'être indemnisée des pertes en résultant :
>
> *c*) la violation d'une obligation légale de Sa Majesté découlant de la fourniture ou de la non-fourniture de terres d'une réserve — notamment un engagement unilatéral donnant lieu à une obligation fiduciaire légale — ou de l'administration par Sa Majesté de terres d'une réserve, ou de l'administration par elle de l'argent des Indiens ou de tout autre

élément d'actif de la première nation;

[50] I discern no fundamental legal error in these findings of the Judge.

[51] In this case, the Judge appropriately had regard to the unique context of reserve creation history in British Columbia. Contrary to Ontario and most of Western Canada, reserve creation in British Columbia did not result from a treaty process, but rather from a unilateral undertaking of the Crown, notably set out in Article 13 of the *British Columbia Terms of Union* and in the various Crown instructions issued to implement that Article. As a result, there were no negotiations with aboriginal peoples to determine the parameters of the reserve allotment policy, and the actual allocation of land for reserve creation purposes was largely left to the discretion of Crown officials acting pursuant to the instructions they received.

[52] As the Judge found in this case, the instructions that governed the implementation of the unilateral Crown policy of reserve allocation in British Columbia clearly required the Crown officials responsible for the implementation of the policy to take into account and to have regard to the actual land uses of the various aboriginal nations for which the reserves were being created. This is notably reflected in the instructions given by the Department of Indian Affairs to Commissioner O'Reilly in 1880: "In allotting Reserve Lands […] [y]ou should have special regard to the habits, wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to claims of the White settlers (if any)": Reasons at para 15. In essence, as noted in Commissioner Sproat's report of 1878, "[t]he first requirement is to leave the Indians in the old places to which they are attached": Reasons at para. 16.

[53] In this case, the Judge found, as a matter of fact that: (1) the 10.5 acres excluded from Kitselas I.R. No. 1 included the site of an ancient village of the Kitselas known as Gitaus; (2) from the aboriginal perspective, this ancient village site had never been abandoned; (3) Indian dwellings were on the Gitaus site when Commissioner O'Reilly decided to exclude the land from the reserve; (4) there were no claims of White settlers over the excluded land; (5) the concerned land was not excluded in anticipation of the use of the land for public transportation purposes; and (6) had Commissioner O'Reilly recommended the inclusion of that land in the reserve, that recommendation would have subsequently been followed by both Canada and British Columbia.

[54] In the light of those findings of fact, I can find no error of law in the conclusion of the Judge that the Kitselas had a cognizable interest in the excluded land that gave rise to a fiduciary duty of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the Kitselas in determining whether to include or to exclude that land from Kitselas I.R. No. 1. The land at issue was clearly delineated and identifiable, and the cognizable interest in that land was its historic and contemporary use and occupation as a settlement by the Kitselas themselves, a land interest specifically contemplated by Article 13 of the *British Columbia Terms of Union* and by the Crown instructions issued to implement that Article.

DID THE JUDGE ERR BY FINDING THAT CANADA BREACHED ITS DUTY?

[55] As an alternative argument, Canada submits that even if it had a fiduciary duty toward the Kitselas with respect to the exclusion of the lands at issue from the reserve, the Judge erred in finding that it had breached this duty by (1) failing to disclose the exclusion of the 10.5 acres to

the Kitselas, and (2) failing to act reasonably and with diligence by excluding more than the one acre required by the Hudson's Bay Company for its storehouse.

[56] Canada acknowledges that its submissions attack the findings of fact made by the Judge, and that consequently a standard of reasonableness applies in judicially reviewing these findings in our Court. Canada therefore submits that the Judge's findings are unreasonable in that they fall outside a range of possible, acceptable outcomes which are defensible in respect to the facts and the law: *Dunsmuir* at para. 47.

(a) Failing to disclose the exclusion

[57] After an extensive review, the Judge concluded that the evidence, taken as a whole, did not support a finding that Commissioner O'Reilly informed the Kitselas of the exclusion of the land in issue from Kitselas I.R. No. 1: Reasons at para. 182. The Judge further concluded that had the exclusion been disclosed, the Kitselas would surely have objected: Reasons at para. 181.

[58] Canada submits that these conclusions are contrary to the evidence, and for this it relies on various documents reporting discussions between Commissioner O'Reilly and the Kitselas with respect to the extent of the reserve. I agree with the Judge that though these documents show discussions were held with respect to the overall extent of the reserve and its external boundaries, they do not establish a disclosure of the exclusion of the 10.5 acres, an exclusion which, as found by the Judge, the Kitselas would surely have objected to in the circumstances. In this regard, the Judge gave weight to the fact that the Kitselas themselves had informed the

Hudson's Bay Company in 1892 that the land at issue was part of their reserve, a fact that would be incompatible with Canada's submission that they knew of the exclusion: Reasons at para. 177.

[59] Canada also relies on a plan of the reserve sent to the local Indian Agent in 1903 showing the land at issue as excluded. Canada submits that the Judge erred at para. 178 of his reasons in concluding that the evidence did not show that this plan was in fact forwarded to the Kitselas. In Canada's view, the Judge should have "assumed that this was done": Canada's Memorandum at para. 103(4). I disagree. In light of the evidence before him, it was open to the Judge to assume the contrary. In the absence of any direct evidence on the issue, the Judge's conclusion falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

(b) Failing to act reasonably and with diligence

[60] Canada further submits that the Judge erred in finding that Commissioner O'Reilly failed to act reasonably and with diligence in excluding the 10.5 acres from Kitselas I.R. No. 1. Canada notably submits that the Judge erred in interpreting the Commissioner's mandate with respect to balancing the claims of White settlers with those of the Kitselas. In Canada's view, the Judge erred by limiting that mandate to ascertaining the existence of claims by White settlers, rather than being mindful of the larger interests of White settlers: Canada's Memorandum at para. 121.

[61] In Canada's view, while recognizing that there were no existing claims of White settlers, Commissioner O'Reilly nevertheless acted reasonably in excluding the 10.5 acres in light of the site's strategic importance for public transportation. As Canada puts it, "[i]n short, Lot 113 was

located at the best location to aid in bypassing or waiting to ascend the Canyon when it was impassable or too dangerous, as it often was": Canada's Memorandum at para. 137.

[62] The problem with Canada's submission is that (a) it ignores the Judge's finding that Commissioner O'Reilly had already excluded from the reserve all the land that had the potential for transportation, including the existing portage along the River: Reasons at para. 92; (b) Commissioner O'Reilly never specifically referred to the use of the excluded land for public transportation purposes as a reason to justify excluding it from the reserve: Reasons at para. 29; and (c) the excluded land was subsequently subdivided and sold by British Columbia to speculators: Reasons at para. 35. In light of this constellation of facts, it was reasonably open for the Judge to conclude that Commissioner O'Reilly did not exclude the 10.5 acres for public transportation purposes.

DID THE JUDGE ERR BY FINDING CANADA SOLELY RESPONSIBLE FOR ANY LOSSES FLOWING FROM THE BREACH?

[63] Finally, Canada submits that the Judge erred by finding it solely liable for the losses of the Kitselas resulting from the breach of the Crown's fiduciary duty with respect to the 10.5 acres excluded from the reserve.

[64] Canada argues that British Columbia also assumes a liability in this case, and that Canada's responsibilities with respect to any compensation owed to the Kitselas should be reduced accordingly. Canada relies for this purpose on paragraph 20(1)(*i*) of the Act:

20. (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,	**20**. (1) Lorsqu'il statue sur l'indemnité relative à une revendication particulière, le Tribunal :

(i) shall, if it finds that a third party caused or contributed to the acts or omissions referred to in subsection 14(1) or the loss arising from those acts or omissions, award compensation against the Crown only to the extent that the Crown is at fault for the loss.	i) dans le cas où il estime qu'un tiers est, en tout ou en partie, à l'origine des faits ou pertes mentionnés au paragraphe 14(1), n'accorde une indemnité à la charge de Sa Majesté que dans la mesure où ces pertes sont attribuables à la faute de celle-ci.
[Emphasis added]	[Je souligne]

[65] The difficulty with Canada's submission on this point stems from the bifurcation of the proceedings. Under the Judge's order of July 3, 2012, the issues of validity and compensation with respect to the claim were bifurcated, with the understanding that the issue of validity would first be determined separately from the issue of compensation. As a result, the Judge's findings in this case only concern the validity of the claim. The Judge's conclusion is set out as follows at paragraph 205 of the Reasons: "[t]he Kitselas First Nation has established a breach of legal obligation of the Crown due to the non-inclusion of land in excess of the requirements of the Hudson's Bay Company (one acre) in Kitselas I.R. No. 1."

[66] As is readily apparent from section 20 of the *SCT Act*, the issue of any potential third party liability that would reduce the compensation owed by Canada is determined as a matter related to compensation. In fact, the Judge made no final finding in his Reasons with respect to the potential liability of British Columbia affecting the compensation that would be eventually owed by Canada.

[67] The Judge notes at paragraphs 192 and 193 of his Reasons that Canada assumed the primary role in the relationship between aboriginal peoples and the Crown, and further assumed

sole responsibility over Aboriginal land interests in British Columbia under Article 13 of the *British Columbia Terms of Union*. However, those findings are in themselves uncontroversial and largely echo the findings of Binnie J. at paragraphs 93 and 97 of *Wewaykum*. They cannot form alone the basis for a finding with respect to the potential contribution of British Columbia (if any) to the breach which could affect the compensation owed by Canada. Rather, this is a matter to be dealt with at the compensation stage of the hearing pursuant to the Judge's bifurcation order.

CONCLUSION

[68] I would consequently dismiss the application, with costs in favour of the respondent. There should be no order for costs with respect to the interveners.

"Robert M. Mainville"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-107-13
(APPEAL FROM A DECISION OF THE HONOURABLE HARRY SLADE (JUDGE), CHAIRPERSON OF THE SPECIFIC CLAIMS TRIBUNAL, DATED FEBRUARY 19, 2013 (2013 SCTC 1))	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. KITSELAS FIRST NATION AND A COALITION OF FIRST NATIONS LED BY THE UNION OF BRITISH COLUMBIA INDIAN CHIEFS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 7 AND 8, 2014
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW, STRATAS JJ.A.
DATED:	JUNE 5, 2014

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