FILE NO.: SCT-2006-11
CITATION: 2016 SCTC 8
DATE: 20160520

OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
ATIKAMEKW D'OPITCIWAN FIRST NATION	)	Paul Dionne and Marie-Ève Dumont, for the Claimant
	)	
Claimant	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Éric Gingras, Dah Yoon Min and Ann Snow, for the Respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** From September 9 to 12, 2013, from January 13 to 24, 2014, from May 20 to 23, 2014, from March 17 to 26, 2015, from March 30 to April 1, 2015, from April 23 to 30, 2015, and May 11, 2015.

REASONS FOR DECISION

Honourable Johanne Mainville

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

Cases Cited:

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245; *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247.

Statutes and Regulations Cited:

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 1850, 13 & 14 Vict, c 42.
An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada, 1851, 14 & 15 Vict, c 106.
Specific Claims Tribunal Act, SC 2008, c 22, s 14.
The Constitution Act, 1867, 30 & 31 Vict, c 3, s 91.

Headnote:

The Claimant alleges that it did not receive the area to which it was entitled and is seeking compensation for the damage and inconvenience suffered as a result of this.

More specifically, the Claimant submits that the federal Crown breached or failed to honour its legal and fiduciary obligations by failing to apply the usual formula of 60 acres per family plus a 10% allocation of waste land in determining the area of the Opitciwan Reserve, and by failing to make any effort to do so at the time of the final survey, in 1943, when approximately 75 Atikamekw families were living in Opitciwan.

The Claimant alleges that the census taken at the time of the final survey was the main criterion used by the Department of Indian Affairs (the "DIA") to determine the area of Indian reserves and that some DIA officers believed that one had to be insistent to obtain an area that met this criterion.

The Claimant adds that, in 1943, conditions were favourable for the creation of a reserve containing 60 acres per family, which, given the population in 1943, amounted to 4,500 acres.

In the alternative, the Claimant alleges that the Crown breached its fiduciary duties by failing to make an effort to create a reserve of at least 3,000 acres in Opitciwan.

In the further alternative, the Claimant alleges that the Crown also breached its duty of ordinary prudence by failing to use the actual area in the plan of Mr. White, the federal surveyor, as the basis for the discussions with the Department of Lands and Forests on the area of the Opitciwan Indian Reserve.

The Claimant is seeking compensation for the value and the loss of use of the difference in area and for the unlawful occupation of a parcel of land within the reserve by the Hudson's Bay Company (the "HBC").

The Respondent is challenging the claim and asks that it be dismissed. According to the Respondent, the facts and law relied upon in support of the claim are insufficient to base on them a legal or fiduciary obligation on the part of the federal Crown with respect to the rights and interests claimed by the Claimant, or, where applicable, a breach of any such obligations. The Respondent further claims that the breaches of the federal Crown fall within the purview of the Province of Quebec. It also submits that there is no direct causal link between the federal Crown's actions and the alleged damage and that a fiduciary duty does not create a positive obligation to protect the rights and interests of Aboriginal groups from any interference by third parties.

Held: In decision 2016 SCTC 6 in File No. SCT-2004-11, the Tribunal found that the federal Crown was bound by a legal and fiduciary duty in the reserve creation process. A discussion of this issue can be found in that decision. In this matter, the question of the area of the reserve pertains to the lands of Opitciwan and goes to the heart of the reserve creation process.

The imposition of a fiduciary duty before the reserve was created attached to the federal Crown the obligations of loyalty, providing full disclosure and acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan, the beneficiaries.

The evidence establishes that the federal Crown breached its fiduciary duty, and, incidentally, its obligations of loyalty 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 Atikamekw of Opitciwan; in addition, it adopted a cavalier and careless attitude.

The federal Crown (1) failed to make a serious, sincere effort to obtain a 3,000-acre reserve despite undertaking to do so; (2) changed its position on the area of the reserve without informing the Atikamekw and without providing an explanation; (3) acted negligently in failing to verify the actual area of the plan prepared by its surveyor, Mr. White; and (4) failed to make a serious effort to obtain an area that was better suited to Opitciwan's growing population and that matched its own acres-per-family ratio, which it found to be fair and reasonable and in the best interest of the Atikamekw of Opitciwan.

For the reasons set out in decision 2016 SCTC 7 in File No. SCT-2005-11, the federal Crown also failed to honour its legal and fiduciary duties by allowing the HBC to establish itself in the reserve contrary to the wishes of the Atikamekw and without their being compensated.

In light of all the circumstances, the Claimant is entitled to compensation based on an area of 3,000 acres since the federal Crown made a clear undertaking to make an effort to obtain a 3,000-acre reserve, an undertaking that the First Nation expected it to honour. At the very least, the Crown should have acted in the best interests of the Atikamekw as part of the reserve creation process.

Now that the validity of the claim has been established, the Tribunal will, at the second stage, hear the evidence regarding the compensation to be awarded for the loss of value and use of the difference between the promised 3,000 acres and the 2,290 acres the Atikamekw obtained. For the reasons set out in decision 2016 SCTC 7 in File No. SCT-2005-11, evidence will also be heard regarding the area occupied by the HBC, contrary to the wishes of the Atikamekw and without their being compensated. The loss resulting from the HBC's unlawful occupation of the reserve between 1944 and 1958 is also recognized.

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I. INTRODUCTION

[1] This claim concerns the area of the Opitciwan Indian Reserve (previously known as Obidjuan or Obedjiwan) to which the Atikamekw of Opitciwan (previously known as the Têtes-de-boule of Kikendatch) allege to be entitled and which they allege not to have received, and, more specifically, the damage and inconvenience resulting from this.

[2] In a letter dated September 29, 2011, the Senior Assistant Deputy Minister of Indian Affairs informed the Claimant of the Minister's refusal to negotiate the specific claim concerning the [TRANSLATION] "insufficient provision of lands", which is at issue in this claim.

[3] In its Further Amended Declaration of Claim filed with the Specific Claims Tribunal (the "Tribunal"), the Claimant alleges that the federal Crown breached or failed to honour its fiduciary duties by failing to apply the usual formula of 60 acres per family plus a 10% allocation of waste land in determining the area of the Opitciwan Reserve, and by failing to make any effort to do so at the time of the final survey, in 1943, when approximately 75 Atikamekw families were living in Opitciwan.

[4] The Claimant alleges that the census taken at the time of the final survey was the main criterion used by the Department of Indian Affairs (the "DIA") to determine the area of Indian reserves and that some DIA officers believed that one had to be insistent to obtain an area that met this criterion.

[5] The Claimant adds that, in 1943, conditions were favourable for the creation of a reserve containing 60 acres per family which, given the population in 1943, amounted to 4,500 acres.

[6] In the alternative, the Claimant alleges that the Crown breached its fiduciary duties by failing to make an effort to create a reserve of at least 3,000 acres in Opitciwan.

[7] In the further alternative, the Claimant alleges that the Crown also breached its duty of ordinary prudence by failing to use the actual area in the plan of Mr. White, the federal surveyor, as the basis for the discussions with the Department of Lands and Forests (the "DLF") on the area of the Opitciwan Indian Reserve.

[8] Among other things, the Claimant is seeking

(a) compensation for the value of the difference

(i) between the area of 60 acres per family calculated in the final survey (totalling 4,500 acres) and the area of 2,290 acres they received; or

(ii) in the alternative, between the area of 3,000 acres and the area of 2,290 acres they received; or

(iii) in the further alternative, between the area of 2,760 acres that were actually surveyed in 1914 (according to the Respondent's expert surveyor, Mr. Groulx) and the area of 2,290 they received.

(b) compensation for the loss of use of this difference in area;

(c) compensation for the value of the difference between the 2,290-acre area provided and this area minus the area occupied by the Hudson's Bay Company (the "HBC");

(d) compensation for the loss of use of this difference in area; and

(e) compensation for the HBC's unlawful occupation of the reserve between 1944 and 1958.

[9] The Respondent is challenging the claim and asks that it be dismissed. At paragraphs 2 to 5 of its Memorandum of Fact and Law, it summarizes its position as follows:

> [TRANSLATION]
>
> 2. . . . the facts and law relied upon in support of the claim are an insufficient basis for a legal or fiduciary obligation on the part of the federal Crown with respect to the rights and interests claimed by the Claimant, or, where applicable, a breach of any such obligations.
>
> 3. The breaches the Respondent is alleged to have committed have to do with the Province of Quebec's deeds and actions in the exercise of the powers conferred on Her Majesty the Queen in Right of Quebec by the *Constitution Act, 1867*, deeds and actions over which the federal Crown has no control.

4. In short, there is no direct causal link between the federal Crown's actions and the alleged damage, if there was any.

5. A fiduciary duty does not go as far as creating a positive obligation to protect the rights and interests of Aboriginal groups from any interference by third parties.

[10] The evidence in this claim was filed jointly with File Nos. SCT-2004-11, SCT-2005-11 and SCT-2007-11.

[11] The facts, the law and other issues relevant to this matter were set out and analyzed in decision 2016 SCTC 6 in File No. SCT-2004-11. I will be referring to that decision for the purposes of the decision at hand.

[12] The claim was severed. This decision concerns the federal Crown's liability, if any. Regarding the damages claimed, they are discussed solely in order to establish them, where applicable, and the right to relief, as determined in decision 2016 SCTC 6 in File No. SCT-2004-11.

II. FACTS

A. Documentary evidence

[13] The facts were described in decision 2016 SCTC 6 in File No. SCT-2004-11. For a better understanding of this claim, a brief review of the more relevant facts will be useful.

[14] On August 10, 1850, the Legislative Assembly of United Canada enacted *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42 (the "1850 Act"). This statute was intended to prevent encroachments upon and injury to the lands appropriated to the use of the several tribes in Lower Canada and to defend their rights and privileges.

[15] On August 30, 1851, the Legislative Assembly of United Canada enacted *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act"), which provided that certain tracts of land not exceeding

230,000 acres could be described, surveyed and set out by orders in council and appropriated to and for the use of the "several Indian Tribes" in Lower Canada.

[16] On August 9, 1853, therefore, Order in Council 482 (the "1853 Order in Council") was made. It approved the schedule appended to it (the "Schedule"), apportioning the 230,000 acres of lands to 11 reserves. The Schedule indicated the location, area and beneficiaries of the planned reserves.

[17] The Schedule stipulated that the Têtes-de-boule (Atikamekw) would share 45,750 acres in Maniwaki with the Algonquins and the Nipissingues, and 16,000 acres in La Tuque with the Algonquins and the Abenakis of Bécancour (Joint Book of Documents ("JBD"), at tabs 30 and 31). The Schedule indicates 14,000 acres, but this was a mistake. The actual amount was 16,000 acres.

[18] In the 1880s, the distribution provided for in the 1853 Schedule was found to be unrealistic: some of the groups were incompatible and a number of tribes found the areas contemplated for the creation of their reserves to be too far away from their hunting grounds. This was the case for the Atikamekw, for example (JBD, at tab 55; Exhibit D-5).

[19] Faced with this situation, the DIA decided to redistribute the lands in some cases, thus creating reserves in different locations from those contemplated in the Schedule.

[20] In the process leading to the creation of each reserve, at least as far as the Atikamekw were concerned, the DIA always sought to find out the number of families wishing to settle there.

[21] Of the four Atikamekw bands, the Wemotaci, the Coucoucache, the Manawan and the Kikendatch (Opitciwan), the Kikendatch band was the most populous. In 1881, when the Saint-Maurice Indian chiefs at Wemotaci, Coucoucache and Kikendatch (Opitciwan) requested reserves at Wemotaci and Coucoucache, the DIA pressed the Rev. Fr. Guéguen to let it know the number of families wishing to settle there (JBD, at tab 37).

[22] In 1885, there were 5 families at Coucoucache, 8 at Wemotaci, 15 at Manawan and 30 at Kikendatch (Opitciwan).

[23] In 1892, in a report appending demographic data concerning the Indian tribes that were supposed to share the 16,000 acres set aside in the 1853 Schedule distributing the lands, Mr. Sinclair, a senior DIA official, informed the Deputy Minister of the DIA that he thought it best to grant approximately 75 acres to each family of four, or 19 acres to each person (JBD, at tab 55):

> The area of land appropriated for the joint use of all those Indians is 16,000 acres, which would give approximately 19 acres to each, probably 75 acres to a family of 4, and a distribution proportionate to the numbers would give the following areas to be included in each of the three Reserves, namely:
>
> Weymontachingue----------7,396 acres
> Coucoucache----------380 "
> For the Abenakis----------8,360 "

[24] A few years later, in 1895, the Wemotaci and Coucoucache Reserves were created, the first containing an area of about 7,400 acres, and the second, 380 acres. The Manawan Reserve was created in 1906 with an area of 1,906 acres for 74 people, hence about 100 acres per family of 4 (JBD, at tabs 70, 83 and 84; Exhibit D-36).

[25] During the process of creating the Manawan Reserve, the DIA noted that very few Atikamekw Indians of the Saint-Maurice, namely, 35 people in 1898, were occupying the Wemotaci Reserve. This led the DIA to consider reducing the Wemotaci Reserve in order to create the Manawan Reserve (JBD, at tabs 82 and 83). In the end, the Manawan Reserve was created, but without the Wemotaci Reserve being reduced.

[26] In 1898, the DIA listed 120 members of the Kikendatch (Opitciwan) Band (JBD, at tab 82).

[27] In 1908, Chief Awashish applied to the DIA for a reserve for his band at Kikendatch (JBD, at tab 97).

[28] In a letter dated August 22, 1908, the Assistant Deputy Superintendent of the DIA, Mr. McLean, asked Chief Awashish to provide him with the number of band members and the

name of the head of each family as soon as possible, adding that "On the receipt of this information an effort will be made to have a reserve laid out for you" (emphasis added; JBD, at tab 98).

[29] On August 1, 1909, Chief Awashish sent the DIA a list of the individuals belonging to the Atikamekw of Kikendatch Band (JBD, at tab 103).

[30] On September 10, 1909, taking into account a census of 151 people, Deputy Superintendent Pedley of the DIA wrote to Deputy Minister Taché of the DLF to find out whether the province was willing to grant an area of approximately 5,120 acres at Kikendatch or not more than 40 miles to the north of there for the Atikamekw of Kikendatch (Opitciwan) (JBD, at tab 104).

[31] In response to that letter, Deputy Minister Taché informed Mr. McLean of the DIA on October 5, 1909, that the requested area of 5,120 acres exceeded the quantity of 581 acres remaining of the 230,000 acres set apart for the Indians in Lower Canada (JBD, at tab 105).

[32] On December 8, 1909, Mr. McLean proposed to Deputy Minister Taché the purchase of a 3,000-acre tract of land a short distance north of Kikendatch, and asked whether the DLF would be interested in such a purchase and at what price (JBD, at tab 107).

[33] Considering that a population of 151 individuals had been documented, 3,000 acres meant allocating about 100 acres to each family of five.

[34] On March 16, 1910, Deputy Minister Taché replied that based on information obtained from a provincial surveyor, the Atikamekw of Wemotaci and Coucoucache were willing to surrender their reserves to move further north. Mr. Taché indicated that the DLF would be willing to agree to such an exchange, as the replacement lands could be located in the area of Kikendatch or further north on the Saint-Maurice (JBD, at tab 109). The DIA did not seek the opinion of the Atikamekw of Wemotaci and Coucoucache about this until September 27, 1912 (JBD, at tab 113).

[35] In about the summer of 1912, the HBC closed its Kikendatch post to open a new one at Lake Opitciwan. In an internal memorandum dated May 7, 1912, Inspector Parker of the DIA wrote that a majority of the Kikendatch (Opitciwan) were in favour of the move because the new post would be closer to their traditional hunting and trapping grounds (JBD, at tab 110). The same year, the Atikamekw began leaving Kikendatch to settle on the northern shore of Lake Opitciwan.

[36] On August 22, 1912, District Manager Wilson of the HBC wrote to the DIA on behalf of Chief Awashish, who wanted an update on the progress of the creation of a reserve at Opitciwan (JBD, at tab 113).

[37] On September 12, 1912, Mr. Wilson, at Mr. McLean's request, sent a list of 26 heads of family residing in Opitciwan at the time. He was of the opinion that no less than 60 acres of land should be allocated to each family, except for Chief Awashish, for whom he proposed an allocation of 75 acres. It can be inferred from another document in the record that Mr. Wilson had not yet visited Opitciwan as of that date (JBD, at tabs 111 and 114).

[38] In an internal memorandum dated October 5, 1912, Forest Inspector Chitty of the DIA noted, among other things, that according to Father Guinard, missionary to the Kikendatch Indians, about 40 families living in Kikendatch wished to move and obtain a reserve on the northern shore of Lake Opitciwan, about 1,200 feet from the HBC post (JBD, at tab 113).

[39] On October 7, 1912, Mr. Wilson wrote two letters to Mr. McLean of the DIA. In one, he informed the latter that the Atikamekw of Wemotaci and of Coucoucache did not wish to move to Kikendatch or further north. It appears from the letter that the idea for the move did not come from the Atikamekw, but rather from Father Guinard, who was opposed to the Wemotaci Reserve's proximity to the railroad track (JBD, at tab 115).

[40] In the other letter, Mr. Wilson informed Mr. McLean that he had visited the Opitciwan post since his previous letter and that several Indians wished to settle there. He added a second list of names of families wishing to settle there, indicating that each family would need 60 acres (JBD, at tab 114).

[41] On October 15, 1912, Assistant Secretary Stewart of the DIA informed the Deputy Minister of the DLF of the false rumour of the move desired by the Atikamekw of Wemotaci and Coucoucache and the fact that several Atikamekw families in Kikendatch wished to settle in Opitciwan. He reiterated the request to the DIA to obtain an area of 3,000 acres for the creation of a reserve at Opitciwan (JBD, at tab 116).

[42] On October 19, 1912, Mr. Girard, the DLF's Director of Surveys, asked the Minister whether he would consent to granting a tract of 3,000 acres for a reserve at Opitciwan and, if yes, whether it would be necessary to authorize by a legislative act the concession of 2,419 acres, representing the difference between the 3,000 acres sought and the 581 unused acres from the land bank already established by the 1851 Act, or whether an order in council would suffice (JBD, at tab 117).

[43] On October 22, 1912, Mr. Stewart of the DIA wrote to Mr. Wilson in response to his letter of October 7, 1912. He told him that an effort would be made to obtain a reserve of about 3,000 acres for those Atikamekw wishing to settle in Opitciwan (JBD, at tab 118).

[44] On November 4, 1912, Deputy Minister Dechêne of the DLF replied to the letter dated October 15, 1912, from Mr. Stewart of the DIA. He informed him that the DIA's request could not be considered for the moment because the Government of Quebec was studying the possibility of building a dam at the outlet of Lake Opitciwan, which it planned to use for water storage (JBD, at tab 119).

[45] On November 23, 1912, Mr. McLean of the DIA took note that the creation of a reserve at Opitciwan would not be considered, and concluded his letter as follows:

> I shall be obliged if you will be good enough to note the application for consideration at a future convenient date. [JBD, at tab 122]

[46] From 1909 to 1912, therefore, the discussions between the DIA and the DLF focussed on a 3,000-acre reserve.

[47] In 1914, under pressure from Chief Awashish, the DIA sent a surveyor, Mr. White, to Opitciwan to survey the future reserve. Mr. White specified on his plan and in his report that he

had surveyed an area of 2,290 acres. Furthermore, referring to a list prepared by Chief Awashish, Mr. White noted that the Opitciwan Band had 163 members (JBD, at tab 146; Exhibit D-18, at pp 18–20).

[48] As of this date, the discussions between the DIA and the DLF no longer concerned an area of 3,000 acres but one of 2,290 acres.

[49] On May 28, 1925, in a report addressed to the Deputy Minister of the DIA, Surveyor General Robertson of the DIA wrote that in 1914, Mr. White travelled to Opitciwan to survey the reserve, but that upon his arrival, he discovered that the public utility companies were in the process of raising the water level of the lakes. Lacking sufficient information to determine how much of the lakeshore would be affected by the rising water levels, Mr. White laid out land boundaries of a parcel which would be sufficient to cover the principal area occupied by the Indians, in order to protect merely their most important interests (JBD, at tab 251).

[50] At the time of the final survey, in March 1943, in a draft letter to Deputy Minister Bédard of the DLF to be signed by Deputy Minister Campbell of the DIA, the DIA indicated that, when the lands were selected by Surveyor White in 1914, there were 35 families making up a total population of 163 individuals. The DIA had estimated that each family would receive 60 acres and that 10 acres would be allocated as "waste land" (JBD, at tab 333).

[51] In a final letter to Deputy Minister Bédard of the DLF dated June 22, 1943, Deputy Minister Campbell of the DIA agreed to an area of 2,290 acres being granted for the Opitciwan Reserve (JBD, at tab 335).

[52] The reserve was eventually surveyed, and the Atikamekw of Opitciwan received a 2,290-acre reserve, including 2.6 acres for the needs of the HBC.

B. Expert evidence

1. Stéphanie Béreau

[53] Stéphanie Béreau was called as an expert witness by the Respondent.

[54] The Tribunal qualified her as a historian with expertise in the history of Quebec's Aboriginal peoples and their relations with the State. Her qualifications are described in File No. SCT-2005-11.

[55] For this claim, Ms. Béreau filed a report entitled *La question de la superficie dans la création des réserves au Québec (milieu du XIX^{e} – milieu du XX^{e} siècle*) (Exhibit D-5). This report has the following objectives:

(1) to determine from a historical point of view whether certain statutes contain provisions setting out a method for calculating the area of reserves created after 1851; and

(2) to determine whether a certain method of calculation was applied by colonial administrators to establish the size of reserves.

[56] In her report, Ms. Béreau stated that her research concerned the manner in which the area of the reserves created after the enactment of the 1851 Act could have been calculated. Looking at the matter chronologically, she attempted to define the policy that prevailed when the 1851 Act and the 1853 Schedule came into effect. Her analysis is based on both primary and secondary sources (Exhibit D-5, at p 4).

[57] In her preliminary remarks, she describes the limitations of her report:

> [TRANSLATION]
>
> 1. Our goal was not to document the context in which each of the reserves located on the territory of present-day Quebec was created nor to establish their date of creation, the area of the lands that were set apart or the number of Aboriginal families who were to live there. Therefore, no such systematic exercise was performed for the purposes of this report.
>
> 2. Neither did we attempt to perform a legal analysis of the statutory framework governing Aboriginal lands.
>
> 3. While our report does include several allusions to treaties concluded between Aboriginal groups and the federal government outside present-day Quebec, we did not refer to these treaties to compare the reserve creation context in Quebec with the context in which they were signed. We are well aware that these were two very different realities. Rather, these references are used to highlight the historical context in which the administrators tasked with

> creating the reserves developed. In the early 1850s, the manner in which certain treaties established the area of reserves according to the population of a band was, in fact, likely to have influenced how the authorities of Lower Canada thought about determining the size of a reserve. [Exhibit D-5, at pp 4–5]

[58] Ms. Béreau drew the following main conclusions:

> [TRANSLATION]
>
> a. From a historical perspective, we did not find any statutes with a provision stipulating how the area of a reserve should be calculated by Indian Affairs or Crown Lands agents.
> b. In the absence of a specific formula, therefore, reserve sizes were established by colonial administrators on a case-by-case basis. The variations in area granted for reserves between the mid-19th century and the mid-20th century confirm this.
> c. That is not to say that Indian Affairs and Crown Lands agents lacked "models" to help them quickly assess the size of a planned reserve.
> d. Among these "models", associating the number of acres to be set apart for a reserve with the number of individuals who would be living there (usually counted as the number of families) was a method that was used numerous times. When the lands were distributed under the 1853 Schedule, the multiplier that was most often used seems to have been 100 acres per family of five; however, our research indicates that this ratio was not used systematically. A number of other factors, such as the location of the future reserve, the planned use of the reserve lands (forestry or agriculture) or even the proximity of colonial development areas, could also be considered by colonial authorities and led public officials to apply other ratios that were either lower (25 or 60 acres per family) or higher (160 or 250 acres per family).
>
> Consequently, while the report points to a historical context where the use of the acres-per-family ratio was logical for Indian Affairs and Crown Lands officials, it also highlights the limitations of this ratio.
> e. The literature review establishes that, in practice, the Department of Indian Affairs and the Department of Crown Lands had to consider certain factors: demographic, economic (how the lands would be developed), socio-economic (whether the bands were nomadic or sedentary) and geographic (how close the lands were to areas of colonization).
> f. In short, how the area of a particular reserve was determined was the result of a combination of a variety of factors specific to the band destined to live there rather than of a standard applied indiscriminately to all communities. [Exhibit D-5, at pp 5–6]

[59] The report and testimony of Ms. Béreau are clear, relevant and credible, but will be analyzed within the limitations described therein and with regard to the evidence as a whole. The facts in this case take precedence over the general criteria that may be set out in a report.

2. Jean-Pierre Garneau

[60] Jean-Pierre Garneau was called as an expert by the Respondent. He was qualified by the Tribunal as an expert anthropologist specializing in the culture and history of the Aboriginal populations in Quebec north of the St. Lawrence River with experience in assessing the economic and sociological impacts of industrial projects on Aboriginal communities. His qualifications are described in decision 2016 SCTC 6 in File No. SCT-2004-11.

[61] Mr. Garneau filed a report entitled *Contre-expertise du Rapport de M. Jacques Frenette intitulé "Les Atikamekw d'Opitciwan (1880-1950): bilan de la littérature scientifique"* (Exhibit D-4). His mandate is described in File No. SCT-2004-11.

[62] Chapter 2 of his report entitled *La "provision territoriale" liée à la reserve d'Opitciwan* deals with the area of the reserve.

[63] According to Mr. Garneau, in 1892, when Mr. Sinclair established the ratio of 19 acres per person or 75 acres per family of four, he was not attempting to arrive at a particular area expressed in acres per person. He simply took an area of 16,000 acres and divided it by the number of Aboriginal persons that had been counted, thus obtaining a value (Exhibit D-4, at p 36).

[64] Mr. Garneau explained that in 1909, the DIA initially planned to give the Atikamekw of Kikendatch an area of 5,120 acres. At the time, the band was composed of 151 individuals, which would have meant 33.9 acres per person. It is unknown why the DIA was contemplating to grant so much acreage. However, this plan was quickly abandoned because the bank of 230,000 acres created by the 1851 Act was almost empty. Only 581 acres remained, and the province was refusing to make the area requested available to the federal Crown (Exhibit D-4, at p 41).

[65] Mr. Garneau continued by explaining that in December 1909, the DIA, which had taken note of this refusal, considered acquiring from the Province an area of 3,000 acres, which would have given each person about 20 acres, and applied to Deputy Minister Taché of the DLF to do so.

[66] However, between 1910 and 1912, the situation became confused when the possibility of the Atikamekw leaving Kikendatch and moving to Opitciwan was considered. Once the Atikamekw had chosen the new location, the DIA confirmed to the HBC that it wished to create a reserve of about 3,000 acres at Opitciwan. According to Mr. Garneau, an area of this size seems to have been the DIA's objective until 1914, when Mr. White was sent on site to survey the area (Exhibit D-4, at pp 41–42).

[67] In 1914, Mr. White delimited a 2,290-acre reserve at Opitciwan, 2,247 acres on the mainland and 43 acres on an island nearby. According to Mr. Garneau, the absence of documentation makes it impossible to understand why Mr. White surveyed an area of this size (Exhibit D-4, at p 43).

[68] Henceforth, the 2,290-acre area surveyed by Mr. White was the focus of the discussions between both levels of government and other stakeholders.

[69] Mr. Garneau also stated that, in 1943, during the discussions concerning the final survey, Deputy Minister Bédard of the DLF told the DIA that 2,290 acres was too much. On June 22, 1943, Deputy Minister Campbell of the DIA informed Mr. Bédard that he was prepared to accept 2,290 acres, despite the Atikamekw of Opitciwan population having increased since 1914 (Exhibit D-4, at p 45).

[70] Mr. Garneau concluded his chapter on the area of the reserve in the following manner:

> [TRANSLATION]
>
> The various areas contemplated over time, and especially the acre/person ratio, fluctuated with each proposal. Sometimes the ratio was 20 acres per person, other times is was higher, and occasionally it was lower. There is nothing to suggest that there was an absolute rule or, more specifically, a legally binding one.
>
> Regarding Opitciwan, the Province explicitly expressed its surprise in the early 1940s that such a large area would be granted to the Indians in this district [reference omitted], and the officials at Indian Affairs could not oblige the Province to allocate more than it wished. The Crown therefore had to take note that the Province clearly wanted to proceed quickly, but that asking for an area larger than 2,290 acres could jeopardize the agreement. The 2,290 acres eventually surveyed by Mr. Rinfret, and with which Deputy Minister Campbell claimed to be satisfied [reference omitted], were possibly the fairest compromise

> it had been possible to strike in this context, in order to ensure that the reserve was created. [Exhibit D-4, at p 47]

[71] Some of the aspects of Mr. Garneau's opposing expert opinion and testimony are useful and relevant; however, as indicated in decision 2016 SCTC 6 in File No. SCT-2004-11, Mr. Garneau has a certain tendency of wanting to corroborate the Respondent's position. The conclusions in his report must therefore be considered with care.

III. ISSUES

[72] The issues are the following:

(a) Did the federal Crown have a fiduciary duty to the Atikamekw of Opitciwan to ensure they were granted a specific area?

(b) If so, did the federal Crown breach its fiduciary duty?

(c) If so, which claims will be dealt with at the second stage?

IV. ANALYSIS

A. Did the federal Crown have a fiduciary duty to the Atikamekw of Opitciwan to ensure they were granted a specific area?

[73] Paragraphs 14(1)(b) and (c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA], provide as follows:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> . . .
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(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; . . .

[74] In decision 2016 SCTC 6 in File No. SCT-2004-11, my conclusions included the following:

(a) There were enough similarities between the reserve creation processes in British Columbia and Quebec for Opitciwan to be characterized as a "provisional reserve" for the period from 1914 to 1944.

(b) The legislative package made up of the 1850 and 1851 Acts and the 1853 Order in Council, considered in light of subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, formed the framework for the federal Crown's legal obligation to create reserves.

(c) The adoption of the 1853 Order in Council arising under the 1851 Act and approving the 1853 Schedule distributing the 230,000 acres of lands gave rise to an obligation on the part of the Crown to create reserves for the bands identified therein, since the areas mentioned in the Schedule had been "set apart" and "appropriated" to and for their use.

(d) This legal duty arose out of the launching of the reserve creation process.

(e) As for the Opitciwan Reserve, the process for its creation was launched in 1853 with the designation in the Schedule of the Atikamekw as beneficiaries of certain acres for the purposes of creating a reserve, further developed in 1908 and in 1912 with the application from Chief Awashish and the positive response from the DIA, crystallized in 1914 with the survey by Mr. White and completed with the creation of the reserve in January 1944 (see decision 2016 SCTC 7 in File No. SCT-2005-11 for the reserve's date of creation).

(f) Therefore, (1) by no later than 1914, the Atikamekw of Opitciwan had a cognizable and acknowledged Aboriginal interest in the Opitciwan lands forming the provisional reserve, and (2) the federal Crown had a discretionary power to ensure that the reserve creation process was implemented.

(g) These facts gave rise to a fiduciary obligation on the part of the federal Crown to the Atikamekw of Opitciwan. The evidence also demonstrates that the DIA constituted itself as the exclusive intermediary for the Atikamekw of Opitciwan with the Province of Quebec with respect to the lands from which their reserve was to be created.

(h) In accordance with the jurisprudence of the Supreme Court of Canada (*Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 86, 89, 94, 97, [2002] 4 SCR 245 [*Wewaykum*]), prior to the date of creation of the Opitciwan Reserve, so before January 14, 1944, the federal Crown's fiduciary duty included 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 beneficiaries of the obligation.

(i) The evidence establishes that the Crown failed to honour these obligations.

(j) As part of a reserve creation process, the acts performed by the federal Crown with respect to the lands occupied by the Atikamekw of Opitciwan in the "provisional reserve" were governed by the fiduciary relationship between them and the Crown.

(k) After the reserve was created, the scope of the Crown's fiduciary obligation expanded to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

[75] I concluded in decision 2016 SCTC 6 in File No. SCT-2004-11 that the federal Crown was bound by a fiduciary duty in the reserve creation process. In this matter, the question of the area of the reserve pertains to the lands of Opitciwan and goes to the heart of the reserve creation process.

[76] The imposition of a fiduciary duty before the reserve was created attached to the federal Crown the obligations of loyalty, providing full disclosure and acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan, the beneficiaries.

B. Did the federal Crown breach its fiduciary duty?

[77] Other than the instructions set out in the 1853 Schedule as to how the 230,000 acres should be distributed, there are no statutory or regulatory provisions to govern how the area to be allocated to the Aboriginal tribes listed in the Schedule should be determined.

[78] However, according to expert witness Ms. Béreau, public officials adopted the practice of estimating the area according to a ratio based on the number of acres per family or individuals destined to live on the reserve. According to Ms. Béreau, even though this practice could not be described as being a systematic one, it was applied often enough to be a recurrent one (transcript of the hearing, January 14, 2014, at p 102). Furthermore, the acres-per-family ratio developed on the basis of an acres-per-individual ratio, in addition to other factors.

[79] Ms. Béreau had the following to say on this subject:

> [TRANSLATION]
>
> Q . . . Could you tell us, summarize for us again, please, what guidelines, other than the acre- or area-per family ratio, you identified in your report?
>
> A In fact, it wasn't so much complementary as two types of approach. Since I spoke of a guideline, a policy governing the practice to be followed in balancing the area and the number of individuals, I see it as a framework, if you like, that guided public officials in calculating the area. And within that, other factors, such as location, could result in a different ratio in terms of numbers, but not necessarily because the formula was questionable.
>
> . . .
>
> Q I understand. So, they weren't different guidelines, but there were factors that could affect the acres-per-family or acres-per-individual ratio?
>
> A Yes, more like that, with the idea—and I specified this in . . . with the help of Elgin's remarks on the schedules—that this general area/population guideline is not . . . should not be seen as an absolute standard, . . . [transcript of the hearing, January 14, 2014, at pp 126–127].

[80] According to Ms. Béreau, other factors that could influence the area included the expected development of the reserve lands, the specific nature of the location of the planned reserve, the anticipated use of the reserve, the proximity of the reserve to colonial development areas, the band's lifestyle (whether it was sedentary or nomadic), the quality of the lands and the location chosen by the band itself (Exhibit D-5, at p 14).

[81] Ms. Béreau looked at the acres-per-family or acres-per-individual guideline in more detail. More specifically, she reviewed the 100-acre-, 50-acre- and 25-acre-per-family ratios, albeit acknowledging that there were even higher ratios. The 100-acre-per-family ratio was the most common ratio. Ms. Béreau found some cases where a multiplier of 50 to 60 acres per family was used, and she found two cases in Quebec where 25 acres were applied per family. She did not verify whether, every time she found a ratio, this ratio was actually applied. She concluded by saying that the standard number of individuals in a family was four to five (Exhibit D-5, at pp 15–19; transcript of the hearing, January 14, 2014, at pp 128–33).

[82] Ms. Béreau's report reveals that the family factor of the ratio was determined at the time of the survey since any delay in obtaining information on the number of families [TRANSLATION] "was likely to entail a delay in the creation of the reserve" (Exhibit D-9, at pp 21–22).

[83] According to Ms. Béreau, the 25-acres-per-family ratio was used frequently in Upper Canada; indeed, it was a standard in the Numbered Treaties. Ms. Béreau found only two instances where this ratio was used in Quebec, for the Mi'kmaq of Restigouche and the Iroquois of Kahnawake. In both cases, however, the ratio was used to expand existing reserves. She acknowledged that many more factors were considered when a reserve was enlarged than when one was created (transcript of the hearing, January 14, 2014, at pp 134–38).

[84] Ms. Béreau did not study the additional provision of waste land, which the DIA allocated as part of the reserves (transcript of the hearing, January 14, 2014, at pp 142–45).

[85] It appears from the evidence, therefore, that, in practice, the acres-per-family or acres-per-individual ratio was generally used as a guideline for determining the area to be distributed or allocated for reserves and that the ratio that was used most often was 100 acres per family of four or five or 20 acres per individual. Other factors were also taken into consideration, such as how the reserve lands would be developed, where the reserve would be established and how close it was to areas of development, and these factors could have an upward or downward effect on the multiplier. The Crown was not required to apply a specific ratio, even though, in fact, this was done repeatedly.

[86] So, what of the Opitciwan Reserve?

[87] From 1909 to 1912, the discussions between the DIA and the DLF focussed on the granting of a 3,000-acre area for the Opitciwan Reserve. The area sought by the DIA represented a ratio of about 100 acres per family of five, the population of Opitciwan being made up of about 31 families in 1912. The same ratio had been used to create the Manawan Reserve a few years earlier.

[88] On October 15, 1912, the DIA reiterated its request for 3,000 acres to the DLF's Deputy Minister, stating that 31 families had expressed their intention of settling there:

> It is desired to obtain for them at this point a reserve containing about three thousand acres. [JBD, at tab 116]

[89] On October 22, 1912, the DIA wrote to Mr. Wilson of the HBC in response to his letter of October 7, 1912, telling him that an effort would be made to obtain a reserve of about 3,000 acres (JBD, at tab 118).

[90] Contrary to the Respondent's argument, I find as a question of fact that it is more than likely that Chief Awashish was made aware of this undertaking to make an effort to obtain a reserve of 3,000 acres. The evidence reveals that the HBC's representative in Opitciwan acted as an intermediary between the DIA and the Atikamekw. Even though the DIA wrote to Mr. Wilson in October 1912, by which time the Atikamekw had probably returned to their hunting grounds, it is unlikely that Mr. Wilson would have kept this information to himself and not passed it on to Chief Awashish or the Band members. This was important information that specifically concerned the demands of the Atikamekw of Opitciwan and not the HBC.

[91] In any event, it is not necessary for the beneficiary in all cases to consent to the undertaking (*Galambos v Perez*, 2009 SCC 48 at para 66, [2009] 3 SCR 247). In addition, in the matter at bar, the undertaking was made as part of the reserve creation process in which the federal Crown had a fiduciary duty that required it to act in the best interest of the Atikamekw.

[92] Having said that, in 1914, DIA surveyor White travelled to Opitciwan to survey the reserve. He stated on his plan and in his report that he had surveyed 2,290 acres. After this

survey, the discussions stopped focussing on an area of 3,000 acres. Henceforth, all the letters between the federal Crown and the Government of Quebec spoke of 2,290 acres.

[93] The evidence reveals, however, that Mr. White merely surveyed a parcel of land "to cover the principal area occupied by the Indians, in order to protect merely their most important interests" (JBD, at tab 251) since he was unable to establish the shoreline or the high water mark that would result from the flooding. Mr. White's survey was therefore provisional.

[94] The facts in evidence clearly demonstrate that, contrary to its undertaking, the DIA did not make a serious, sincere effort to obtain a 3,000 acre reserve and thus betrayed the Atikamekw without any explanation or justification. In light of the DIA's undertaking to make an effort to obtain 3,000 acres, the DIA should have explained the sudden change in area.

[95] On February 9, 1943, Deputy Minister Bédard of the DLF informed the DIA that the DLF was prepared to recommend to the Executive Council the recognition of the Opitciwan Reserve that Mr. White had surveyed in 1914. He wrote, however, that, of the 2,290 acres surveyed by Mr. White, 542 had been flooded by the Gouin dam. Mr. Bédard noted that in 1939, the DIA had asked Mr. Rinfret to locate 542 acres to be added to the reserve. However, Mr. Bédard did not consider it necessary to make such a large tract of land available to the Atikamekw in that district (JBD, at tab 326).

[96] In response to the renewed action on the part of the Government of Quebec, Superintendent Allan of the DIA asked Mr. Peters, the Surveyor General of the DIA, to prepare a draft response to the letter from Deputy Minister Bédard of the DLF. Mr. Allan made the same request to Mr. White (JBD, at tab 330).

[97] In his draft letter dated March 31, 1943, on which Surveyor White was most likely consulted, Surveyor General Peters wrote as follows:

> With reference to the area of land required for this band, it may be noted that when the lands were selected in 1914 there were thirty-five families at that point with a total population of one hundred and sixty-three persons. It was estimated that <u>each family should have at least sixty acres</u> of arable land. A small allowance of 10 per cent was made for waste land and the parcels chosen contained 2290 acres.

. . .

> You will note that this department intends to purchase the land required for these Indians when the price has been agreed upon with your Government. It is thought that the area of 60 acres per family of arable land is not too great and the allowance of 10 per cent for wasteland and water is not excessive. [Emphasis added; JBD, at tab 333]

[98] In the margin of the draft letter, a handwritten note reads "75 x 60 = 4500 acres" (JBD, at tab 333).

[99] Also, in its draft letter of March 31, 1943, the DIA explained *a posteriori* that the 2,290 acres were attributable to the fact that when the lands were surveyed in 1914, the DIA had estimated that each family would receive 60 acres (instead of the usual 100 acres) and that 10 acres would be allocated as "waste land" (JBD, at tab 333). This explanation only emerged in 1943.

[100] In Deputy Minister Campbell's final letter in response to Deputy Minister Bédard's letter of February 9, 1943—not sent until June 22, 1943—the terms had changed. Among other things, Mr. Campbell noted that the issue of the Opitciwan Reserve had been left unresolved for about thirty years and that the Opitciwan population had grown to 75 families, or about 300 individuals.

[101] He also noted the following:

> During the years above mentioned the Indian population has greatly increased due partly to natural causes and partly to the absorption into that band of a related group Ope[m]iska. The Obidjuan Band as presently constituted now consists of approximately 75 families numbering close to 300 individuals.
>
> Their actual land requirements are however modest. While we would like to maintain the average acreage per family at about 60 acres we hesitate to ask you to increase the allotment for this band that has been tentatively agreed upon in earlier negotiations. If therefore we could obtain from you the equivalent of the original 2290 acres located above the ultimate high water mark contemplated as the future flood limit caused by the power development we would rest content. [Emphasis added; JBD, at tab 335]

[102] The Respondent argues that Deputy Minister Campbell's letter establishes that the DIA did make a serious effort to obtain a reserve for the Atikamekw. According to the Respondent, given that Deputy Minister Bédard of the DLF had expressed the opinion that an area of

2,290 acres exceeded the needs of the Atikamekw, this letter is a sign of the negotiating strategy the DIA adopted to ensure that the Atikamekw would obtain this area for their reserve.

[103] The Respondent further submits that this correspondence justifies its conduct given that

(a) the reserve creation process had been under way for over 30 years;

(b) the Atikamekw were impatient and wanted a reserve to be created without delay;

(c) the DIA had consulted the Atikamekw, who wished to obtain a reserve at this location as soon as possible and would content themselves with the area claimed by the DIA; and

(d) this requirement was consistent with previous requests which were not challenged by Quebec, except with regard to the reserve's exact location given that it was not known what impact the waters would have on the lands in question.

[104] First, I fail to see how the DIA's position in its letter of June 1943 represents a negotiating strategy. On the contrary, the DIA placed itself in a position of weakness with respect to the Government of Quebec.

[105] The explanations provided *a posteriori* indicate that the DIA changed its formula, going from 100 acres to 60 acres per family, despite its repeated undertaking to make an effort to obtain 3,000 acres. The 1943 letter suggests that each family was to receive a minimum of "at least" 60 acres per family, including acres of waste land. The 1943 minimum helps in understanding, to some extent, the letter from Mr. Robertson, who wrote that Mr. White had delimited a parcel of land "which would be sufficient to cover the principal area occupied by the Indians, in order to protect merely their most important interests". Indeed, in 1914, Mr. White mentioned that he had had some difficulties because of the bad weather and the late shipment of his instruments and that, upon arrival at Opitciwan, he had discovered that the public utility companies were in the process of raising the level of the lakes (JBD, at tab 146).

[106] Yet, in 1943, the federal Crown did not even respect this minimum. Nothing in the letter suggests that the DIA made a serious, sincere effort to convince the DLF of the reasonableness

of the 60-acres-per-family ratio based on the population in 1943. Moreover, contrary to the position the DIA expressed in its draft letter of March 1943, there was no longer any mention of the waste land acreage.

[107] The 60-acres-per-family ratio calculated on the basis of the 1943 population, namely, 75 families, results in 4,500 acres. The DIA was well aware of this since this figure appears as a handwritten note in the margin of the draft letter. This is a much larger area than the 3,000 acres envisaged at the outset.

[108] It appears from the evidence, therefore, that the DIA did not make a serious effort to acquire or obtain 3,000 acres, and even less so, 4,500 acres, even though it felt that 60 acres based on the population in 1943 plus 10 acres of waste land was a fair and reasonable ratio that was in the best interest of the Atikamekw.

[109] On the contrary, in 1943, the DIA undermined its own position by deciding to agree to 2,290 acres, which amounted to granting about 30 acres per family based on the 1943 population. Ms. Béreau, one of the expert witnesses, identified two cases in Quebec where the Aboriginal bands received about 25 acres per family. In both instances, however, this acreage was allocated to expand a reserve, not to create one.

[110] Second, the evidence reveals that no other factor but the acres-per-family ratio was considered for the area of the Opitciwan Reserve for the entire 37 years it took to create the reserve. The federal Crown's about-face in its letter of June 1943 clearly came at the expense of the Atikamekw of Opitciwan.

[111] Third, Deputy Minister Bédard's reluctance to agree to an area of 2,290 acres did not seem serious. In fact, in his letter of February 9, 1943, he asked whether an area of 2,290 acres had been surveyed by Mr. Rinfret, as discussed in 1939. Yet Mr. Bédard knew that Mr. Rinfret had been instructed to survey 2,290 acres in 1939, and the documentary evidence does not reveal any objection to this area on the part of Mr. Bédard or the DLF (JBD, at tabs 307 and 326).

[112] The Respondent argues that, at a meeting in August 1943, Mr. Boisvert of the DLF told Surveyor Rinfret that the reserve had to contain 2,000 acres, with which Mr. Rinfret disagreed.

The evidence shows that Mr. Rinfret and Mr. Boisvert met with Deputy Minister Bédard the following day and that the latter easily agreed to 2,290 acres.

[113] One cannot therefore infer from the comments made by Deputy Minister Bédard and Mr. Boisvert, who, presumably, did not wish to contradict his superior, that the Government of Quebec would have refused any request from the DIA for a larger area than 2,290 acres. In reality, the draft letter of March 1943 reveals that the DIA never made such a request.

[114] Fourth, the Atikamekw of Opitciwan wanted a reserve and had been applying for one since 1908. However, even if they were impatient to obtain one, the evidence does not show that they were happy with the area claimed by the DIA in 1943. There is no document indicating that the Atikamekw or their chief were happy about obtaining a 2,290-acre reserve.

[115] Lastly, at the hearing, the Respondent's expert witness, Surveyor Éric Groulx, stated that, according to his calculations, Mr. White did not survey an area of 2,290 acres in 1914, but one of 2,760 acres (Exhibit D-18, at pp 18–20). Mr. Groulx is convinced that his calculations are correct. He further testified about best surveying practices:

> [TRANSLATION]
>
> Before mapping an area, surveyors check the information to make sure . . . [that] it is correct and that there aren't any errors . . . so, before taking a figure, anyone who's professional would check whether the figure is accurate or close to the truth . . . [Transcript of the hearing, January 24, 2014, at pp 42–43]

[116] In light of best surveying practices and the fact that the DIA had a fiduciary duty, in 1914, the DIA should have checked the actual area of the plan prepared by its surveyor, Mr. White. By not making any verifications, the DIA acted negligently, thus allowing an error of almost 500 acres that was perpetuated until the reserve creation process was completed. In reality, the Atikamekw of Opitciwan received 2,290 acres, as also submitted by the Respondent.

[117] That is not all, however.

[118] Despite the fact that it maintains that the federal Crown and the Government of Quebec agreed on an area of 2,290 acres, in reality, and in light of the calculations of its expert, the Respondent took no measures on site to verify Mr. White's calculations.

[119] The Respondent argues that the Atikamekw knew that the area surveyed by Mr. White was 2,290 acres since the latter was accompanied by some Atikamekw when he carried out his survey.

[120] This explanation does not suggest that the Atikamekw were informed of the DIA's decision to move from 3,000 to 2,290 acres. On the one hand, the evidence reveals that the Atikamekw were illiterate, and except for a few, spoke neither French nor English; there is also no evidence that Mr. White spoke Atikamekw. On the other hand, the Atikamekw could not have known that the surveyed area was 2,290 acres, when, according to the Respondent's own expert witness, it was 2,760 acres.

[121] In short, I find that the evidence establishes that the federal Crown breached its fiduciary duty, and, incidentally, its obligations of loyalty 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 Atikamekw of Opitciwan; in addition, it adopted a cavalier and careless attitude

(a) by failing to make a serious, sincere effort to obtain a 3,000-acre reserve despite undertaking to do so;

(b) by changing its position on the area of the reserve without informing the Atikamekw and without providing an explanation;

(c) by acting negligently in failing to verify the actual area of the plan prepared by its surveyor, Mr. White; and

(d) by failing to make an effort to obtain an area that was better suited to Opitciwan's growing population and that matched its own acres-per-family ratio, which it found to be fair and reasonable.

[122] In light of all the circumstances, I find that the Claimant is entitled to compensation based on an area of 3,000 acres and not 4,500, for the following reasons:

(a) The federal Crown made a clear undertaking to make an effort to obtain a 3,000-acre reserve, an undertaking that the First Nation expected it to honour. At the very least, the Crown should have acted in the best interest of the Atikamekw as part of the reserve creation process.

(b) There is no evidence that the Atikamekw were told of the Crown's intention to apply a 60-acre-per-family ratio or of the Crown's undertaking to provide them with 60 acres per family based on the 1943 population.

(c) The evidence shows, moreover, that the population of Opitciwan also grew before 1943, with a related group, the Opemiska, integrating with the Atikamekw. Even though this group amounted to only eight or nine families, the federal Crown's duty under the 1853 Schedule was to create a reserve for the Atikamekw, and, in 1908, the federal Crown undertook to create a reserve for the Indians of Kikendatch (Opitciwan). The evidence does not suggest that the federal Crown undertook to create a reserve for any other groups that might join the Atikamekw of Opitciwan at a later date.

[123] In conclusion, the facts in evidence establish that the federal Crown breached its fiduciary duties by failing to make a serious effort to obtain a 3,000-acre reserve, contrary to its undertaking, and that it is entirely responsible for this breach.

[124] For the reasons set out in decision 2016 SCTC 7 in File No. SCT-2005-11, I also find that the federal Crown failed to honour its fiduciary duties by allowing the HBC to establish itself in the reserve contrary to the wishes of the Atikamekw and without their being compensated.

[125] There is no evidence to establish that the HBC obtained a licence of occupation between the reserve's date of creation and 1958. The HBC therefore occupied the reserve unlawfully from 1944 to 1958.

[126] As indicated in decision 2016 SCTC 7 in File No. SCT-2005-11, on January 22, 1958, under subsection 28(2) of the *Indian Act*, the DIA issued a one-year licence of occupation to the HBC in the Opitciwan Reserve, with the document stating, however, that the permit was valid

from June 1956 to May 1957 (JBD, at tab 379). The HBC did not have a permit in 1958, but it did have one as of 1959. I will deal with this ambiguity at the second stage.

[127] What is more, after the reserve was created, the scope of the Crown's fiduciary duty expanded to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.

C. Which claims will be dealt with at the second stage?

[128] At the second stage, the Tribunal will hear the evidence regarding the compensation to be awarded for the loss of value and use of the difference between the promised 3,000 acres and the 2,290 acres the Atikamekw obtained. It will also hear evidence on the area in the reserve occupied by the HBC.

[129] For the reasons set out in decision 2016 SCTC 7 in File No. SCT-2005-11, I also recognize as a loss entitling the Atikamekw to compensation the HBC's unlawful occupation of the reserve between 1944 and 1958.

V. DECISION

[130] For the reasons set out above, I find that the Respondent breached its legal and fiduciary obligations to the Claimant during the reserve creation process by failing to make a serious effort to obtain a 3,000-acre reserve, contrary to its undertaking.

[131] I also find that the federal Crown breached its fiduciary duty by allowing the HBC to establish itself in the reserve contrary to the wishes of the Atikamekw of Opitciwan and without their being compensated.

[132] I recognize the losses described at paragraphs 128 and 129 of this decision.

[133] I will determine the amount of the losses I have recognized at the second stage.

JOHANNE MAINVILLE

_____

Honourable Johanne Mainville

Certified translation
Johanna Kratz

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160520

File No.: SCT-2006-11

OTTAWA, ONTARIO, May 20, 2016

PRESENT: Honourable Johanne Mainville

BETWEEN:

ATIKAMEKW D'OPITCIWAN FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant**
As represented by Paul Dionne and Marie-Ève Dumont

AND TO: **Counsel for the Respondent**
As represented by Éric Gingras, Dah Yoon Min and Ann Snow