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SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION	)	David Knoll, for the Claimants
Claimants	)	
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	David Culleton and Lauri Miller, for the Respondent
Respondent	)	
	)	**HEARD:** November 26-27, 2013

Reasons for Decision

Honourable W.L. Whalen

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

Cases Cited

Referred to: *Calder v British Columbia (Attorney-General)*, [1973] SCR 313; *Guerin v The Queen*, [1984] 2 SCR 335, 12 DLR (4th) 321; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Lac Seul First Nation v Canada*, 2009 FC 481, 348 FTR 258 (FCA); *Custer v Hudson's Bay Co. Developments* (1982), [1983] 1 WWR 566, 141 DLR (3d) 722 (Sask CA); *Squamish Indian Band v Findlay* (1980), 109 DLR (3d) 747, [1981] 2 CNLR 58 (BCSC); *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD); *Point v Dibblee Construction Co*, [1934] 2 DLR 785, [1934] OWN 88 (Ont HC); *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372; *R v Anderson*, 2014 SCC 41, 458 NR 1; *Nelles v Ontario*, [1989] 2 SCR 170, 60 DLR (4th) 609; *Labrador Métis Nation v Canada (Attorney General)*, 2006 FCA 393, 277 DLR (4th) 60; *Ochapowace First Nation v Canada (Attorney General)*, 2009 FCA 124, [2009] 3 CNLR 242; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222; *Distribution Canada Inc v MNR*, [1993] 2 FC 26, 99 DLR (4th) 440; *Northern Lights Fitness Products Inc. v Canada (Minister of National Health and Welfare)* (1994), 75 FTR 111, [1994] FCJ No 319; *Attis v Canada (Minister of Health)*, 2008 ONCA 660, 93 OR (3d) 35; *Guidon v Ontario (Minister of Natural Resources)* (2006), 207 OAC 135, [2006] O.J. No. 303 (Ont Div Ct).

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I. INTRODUCTION

[1] The Claimants, the Lac La Ronge Band and the Montreal Lake Cree Nation, are located in Saskatchewan. Both are "First Nations" within the meaning of section 2(*a*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], by virtue of each being a "band" within the meaning of section 2(1) of the *Indian Act*, RSC 1985, c I-5 [*Indian Act, 1985*], as amended.

[2] Treaty Number 6 was signed in 1876, and approved by Order-in-Council P.C. 2554 on November 29, 1888. On February 11, 1889, the Claimants adhered to Treaty Number 6 as confirmed by Order-in-Council P.C. 895 on April 20, 1889. Pursuant to the Treaty, reserves were set apart for the Claimants, including Little Red Reserve 106A (the "Reserve") which was confirmed to the use of both bands on January 6, 1900. In August 2003, they jointly submitted a specific claim in respect of the harvesting of timber on the Reserve (the "Claim"). They allege that the Respondent permitted harvesting of timber by trespass. They further allege that the Crown: failed to prevent unlicensed harvesting; failed to prosecute the offending harvesters; and, failed to take enforcement measures available to it under the *Indian Act*, RSC 1886, c 43 [*Indian Act, 1886*]. The Claimants submit that in the circumstances these failures constituted a breach of fiduciary duty owed to them by the Crown.

[3] The Crown does not accept the validity of the Claim and argues that it fulfilled its fiduciary obligations to the Claimants having collected all outstanding amounts owed to the Claimants and taken every measure it was bound by law to undertake pursuant to its fiduciary duties in the circumstances. In these circumstances, the Crown says it had discretion to manage the asset and the conduct of its management role as a trustee. It also argued that the use of enforcement measures was in the realm of managerial or prosecutorial discretion and as such not subject to any fiduciary obligations. Therefore, the Crown submits that it has no outstanding lawful obligation owing to the Claimants.

[4] The Claim has been bifurcated into two phases: (1) validity; and, (2) compensation. A hearing was conducted before the Tribunal on November 26-27, 2013, on the validity question only, and these Reasons are in resolution of that issue.

II. **UNDERLYING ELIGIBILITY OF THE CLAIM**

[5] As First Nations under the *SCTA*, both Claimants are entitled to make the claim to the Tribunal provided all other preconditions have been met.

[6] On August 28, 2003, the Claimants jointly submitted a specific claim to the Minister of Indian Affairs and Northern Development ("the Minister"). The Minister accepted the claim for negotiation on December 15, 2006, but a negotiated settlement was never reached.

[7] Section 16(1) of the *SCTA* provides:

> **16.** (1) A First Nation may file a claim with the Tribunal only if the claim has been previously filed with the Minister and
>
> (*a*) the Minister has notified the First Nation in writing of his or her decision not to negotiate the claim, in whole or in part;
>
> (*b*) three years have elapsed after the day on which the claim was filed with the Minister and the Minister has not notified the First Nation in writing of his or her decision on whether to negotiate the claim;
>
> (*c*) in the course of negotiating the claim, the Minister consents in writing to the filing of the claim with the Tribunal; or
>
> (*d*) three years have elapsed after the day on which the Minister has notified the First Nation in writing of the Minister's decision to negotiate the claim, in whole or in part, and the claim has not been resolved by a final settlement agreement.

[8] As a transitional measure, section 42(1) of the *SCTA* deemed the commencement of the three-year time period referred to in section 16(1)(*b*) and (*d*), quoted above, to be the date that the *SCTA* came into force where a claim was accepted for negotiation before that date:

> **42**. (1) If a First Nation has submitted a claim based on any one or more of the grounds referred to in subsection 14(1) to the Minister before the day on which this Act comes into force containing the kind of information that would meet the minimum standard established under subsection 16(2), or if the claim is being negotiated on the day on which this Act comes into force, the claim is deemed to have been filed with the Minister in accordance with section 16, or the Minister

> is deemed to have decided to negotiate the claim and to have notified the First Nation in writing of that decision, as the case may be, on the day on which this Act comes into force.

[9] The *SCTA* came into force on October 16, 2008. The Declaration of Claim in this proceeding was filed with the Tribunal on December 8, 2011. The required three years had elapsed between the *SCTA*'s coming into force and the filing of the Declaration of Claim. Therefore, the Claim meets the time requirements of the *SCTA* and is properly before the Tribunal.

[10] The Claimants confirmed that they did not seek compensation in excess of the $150 million limit under section 20(1)(*a*) and (*b*) of the *SCTA*, which provides:

> **20.** (1) The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> (*a*) shall award monetary compensation only;
>
> (*b*) shall not, despite any other provision in this subsection, award total compensation in excess of $150 million;

[11] The Claim was brought on the basis of section 14(1)(*b*) and (*c*) of the *SCTA*, namely that there was:

> (*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;

[12] There was no dispute that these grounds were appropriate to the subject of the Claim.

[13] I therefore conclude that the Claimants have met all the necessary preconditions to bringing the Claim before the Tribunal.

III. THE ISSUES

[14] The Parties agree that the issues before the Tribunal are as follows:

(i) Did the Canada Territories Corporation ("CTC") or its subsidiary, Sturgeon Lake Lumber Company ("SLLC"), harvest timber on the Reserve between August 22, 1904, and April 5, 1910, without a licence in writing from the Superintendant General of Indian Affairs ("Superintendent General")?

(ii) If so, did the Crown owe a fiduciary duty to the Claimants to prevent unlicensed harvesting and to enforce the provisions of section 26 of the *Indian Act, 1886* as amended by SC 1890, c 29 with respect to any timber harvested from the Reserve between August 22, 1904, and April 5, 1910?

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

IV. THE CLAIM: MANAGEMENT OF THE CLAIMANTS' TIMBER ASSET

[15] As stated, the Claimants are parties to Treaty Number 6 signed in 1876, approved by Order-in-Council P.C. 2554 on November 29, 1888, adhered to by them on February 11, 1889 and confirmed by Order-in-Council P.C. 895 on April 20, 1889. The Reserve consisted of 56.5 square miles, surveyed in 1897, and confirmed by Order-in-Council 2710 on January 6, 1900.

[16] On January 16, 1904, the Claimants surrendered the merchantable spruce timber on the Reserve "in trust to Sell the same to such person or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people." Canada accepted this conditional surrender (the "Surrender") by Order-in-Council P.C. 2449 on February 12, 1904. In a letter to the Deputy Minister of Indian Affairs on April 14, 1904, Federal Timber Inspector George L. Chitty (Mr. Chitty) estimated that there were between one and a half million and three million foot board measure ("FBM") of standing spruce timber on the Reserve, and he reported that the

responsible Indian Agent's own estimate was approximately two and a half million FBM. In addition there was an unknown quantity of dead and fallen spruce timber. No evidence was presented to contradict the general accuracy of these estimates.

[17] On June 27, 1904, the Secretary of the Department of Indian Affairs, J.D. McLean (Mr. McLean) called for tenders covering "standing and lying spruce timber over nine inches in diameter at the stump" on the Reserve. The call provided that tenders should "state the bonus that will be paid in cash for this timber to be cut" and specified that the licence to the successful bidder was to cover a period of five years from May 1, 1904, subject to ground rents, renewal fees and Crown dues at regulated tariff rates, payable under sworn returns of measurement made by a qualified culler, certified by the foreman and provided to the Department of Indian Affairs (the "Department"). Each bid was to be accompanied by a cheque for 10% of the amount offered, which would be subject to forfeiture if the successful operator failed to carry out the undertaking.

[18] By the closing of tenders on August 19, 1904, two tenders had been received. CTC bid $5,500.00, which the Department accepted because it was the highest. On August 22, 1904, CTC was informed that its bid had been accepted and that upon payment of the balance, the Department would complete and send the necessary documents.

[19] From that point on, the Department became engaged in a long and arduous course of trying to get CTC to pay as required and to complete the necessary sworn returns. Except for a very brief period, CTC was always delinquent in making its payments and sworn returns, even beyond the five-year term, although under the Department's continued pressure it eventually made all the payments they requested for the timber it had cut, including interest. It also submitted returns, but they were often deficient. The Department complained about these irregularities, some of which it accepted in any event.

[20] CTC's subsidiary, SLLC, harvested a small amount of timber on the Reserve in 1905, although Canada was not aware of the relationship between the companies for some time. Otherwise, serious harvesting did not appear to commence until 1906 and

later. The large majority of it was cut without a licence being in place because of CTC's delinquencies in making the payments and submitting the sworn returns that were preconditions to a licence. Timber Licence No. 135 was eventually issued to SLLC sometime in February 1907. However, it was never renewed because the operator became delinquent again in fulfilling the required preconditions. Finally, by letter of April 23, 1909, SLLC was advised that Timber Licence No. 135 would not be renewed because the agreed five-year harvesting term had come to an end. At the time, SLLC was still behind in payments and information returns, although it eventually paid up by April 1910 and remitted returns acceptable to the Department. On learning that the licence would not be renewed, SLLC complained that there was still one million FBM on the Reserve that it had intended to harvest the next winter. According to the company's returns, it had harvested 2,452,344 FBM of timber from the Reserve between 1904 and 1910. Of this, 1,800 FBM was pine and 3,600 FBM was tamarack, which had been cut outside the terms of the licence and tender agreement because only merchantable spruce was to be harvested.

[21] The question raised by the Claimants was whether the way Canada had managed the sale and permitted cutting to go forward without a licence, and its failure to seize the "illegally cut" timber, to impose fines, or to take other enforcement measures available to it under the *Indian Act, 1886* and the *Regulations for the sale of Timber on Indian Lands in Ontario and Quebec*, enacted by Order-in-Council P.C. 1788 on September 15, 1888, extending to the entire country on April 28, 1896, by Order-in-Council 1457 (*ITR*) constituted a breach of fiduciary duty for which the Claimants are entitled to compensation. To fully understand the operator's conduct and the way in which Canada dealt with it, it is necessary to review the details of what occurred. To assess the question of fiduciary obligation in these circumstances and whether Canada met its obligation, it is also necessary to be aware of the relevant provisions of the *Indian Act, 1886* the *ITR*, and the applicable case law.

A. Statutory Scheme

[22] The period in which the events in this Claim took place were governed by the *Indian Act, 1886* as amended by: SC 1887, c 33; SC 1888, c 22; SC 1890 c 29; SC 1891,

c 30; SC 1894, c 32; SC 1895, c 35; SC 1898, c 34; and RSC 1906, c 81. The amendments did not have a meaningful effect on the main question raised. Therefore, in these Reasons, reference will be to the 1886 statute, which is the version presented by the Parties and upon which they based most of their submissions. When necessary, later amendments to the *Indian Act, 1886* will be discussed to respond to particular submissions made by the Parties in that respect.

[23] The terms "band" and "Indian" were defined in section 2(*d*) and (*h*) respectively of the *Indian Act, 1886*:

> (*d.*) The expression "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible;
>
> …
>
> (*h.*) The expression "Indian" means —
> *First*. Any male person of Indian blood reputed to belong to a particular band;
> *Secondly*. Any child of such person;
> *Thirdly*. Any woman who is or was lawfully married t [*sic*] such person;

[24] As legal occupants of the Reserve, there is no dispute that each of the Claimants was a "band" and that its members were "Indians" within the meaning of those sections. Section 2(*c*) of the *Indian Act, 1886* defined a "person" as "any individual other than an Indian."

[25] Section 21 of the *Indian Act, 1886*, as amended in 1894, limited the occupation and use of a reserve to "Indians" except by authority of the Superintendent General and rendered agreements made or entered into by an "Indian" with a "person" for the occupation or use of any portion of a reserve void:

> **21.** Every person, or Indian other than an Indian of the band, who, without the authority of the superintendent general, resides or hunts upon, occupies or uses any land or marsh, or who resides upon or occupies any road, or allowance for road, running through any reserve belonging to or occupied by such band, shall be liable, upon summary conviction, to imprisonment for a term not exceeding one month or to a penalty not exceeding ten dollars and not less than

> five dollars, with costs of prosecution, half of which penalty shall belong to the informer; and all deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.

[26] Section 38 of the *Indian Act, 1886* generally prohibited the sale, lease or alienation of a reserve unless it had been released or surrendered to the Crown by approval of a majority of the band's qualified electors through the process described in section 39:

> **38.** No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act….
>
> **39.** No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:—
>
> (*a.*) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;
>
> (*b.*) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.

[27] There is no dispute that the spruce timber on the Reserve had been properly surrendered or that the surrender had been accepted. The point in setting out sections 21, 38, and 39 is to demonstrate and highlight Canada's central role in establishing and administering the limitations and controls placed on the use and occupation of reserves, including their components. Legal title in reserves rested with the Crown. A band to whom a reserve had been dedicated had the right to occupy and enjoy the reserve, but how it did so was highly controlled by the Crown.

[28] It is evident that sections 21, 38, and 39 of the *Indian Act, 1886* focused on the occupation, use, and alienation of a "reserve," which was defined in section 2(*k*) of the *Indian Act*:

> (*k.*) The expression "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains a portion of the said reserve, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.

[29] Section 2(*m*) of the *Indian Act, 1886* defined "Indian lands":

> (*m.*) The expression "Indian lands" means any reserve or portion of a reserve which has been surrendered to the Crown;

[30] It is not disputed that the timber in question was on a reserve and that once surrendered it qualified as "Indian lands."

[31] Sections 54 through 68 of the *Indian Act, 1886* established a licensing system applicable to the harvesting of timber on a reserve by a non-Indian. Licences were to be granted by the Superintendent General. Every licence required a description of the land upon which the trees were to be cut and of the kind of trees. With a valid licence, the operator was authorized to enter upon the reserve and to have exclusive possession of it for the purpose of cutting the type of trees specified. The licence vested property in the trees when they were cut, upon the conditions and for the term covered by the licence. Licences were not to be granted for a term of more than twelve months and were subject to regulations passed under the *Indian Act, 1886*. At the expiration of a licence, the licensee was required to submit a sworn statement detailing what had been harvested during the term of the licence, failing which the licensee would be deemed to have cut without authority:

> **54.** The Superintendent General, or any officer or agent authorized by him to that effect, may grant licenses to cut trees on reserves and ungranted Indian lands, at such rates, and subject to such conditions, regulations and restrictions, as are, from time to time, established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situated.

> **55**. No license shall be so granted for a longer period than twelve months from the date thereof….
>
> **56.** Every license shall describe the lands upon which the trees may be cut, and the kind of trees which may be cut, and shall confer, for the time being, on the licensee the right to take and keep exclusive possession of the land so described, subject to such regulations as are made; and every license shall vest in the holder thereof all rights of property whatsoever in all trees of the kind specified, cut within the limits of the license, during the term thereof, whether such trees are cut by the authority of the holder of such license…
>
> **57.** Every person who obtains a license shall, at the expiration thereof, make to the officer or agent granting the same, or to the Superintendent General, a return of the number and kinds of trees cut, and of the quantity and description of saw-logs, or of the number and description of sticks of square or other timber, manufactured and carried away under such license; and such statement shall be sworn to by the holder of the license, or his agent, or by his foreman; and every person who refuses or neglects to furnish such statement, or who evades or attempts to evade any regulation made by the Governor in Council, shall be held to have cut without authority, and the timber or other product made shall be dealt with accordingly.

[32] The *ITR* provided further detail and direction, beyond that set out in the *Indian Act, 1886*, on the harvesting of timber on a reserve. Several of the *ITR* are worth noting for this Claim.

[33] Section 5 of the *ITR* provides that where a licence-holder complied with all existing regulations, the licensee could seek renewal of the licence:

> 5. License-holders who shall have complied with all existing regulations, shall be entitled to have their licenses renewed on application to the Superintendent in General of Indian Affairs.

[34] All timber licences expired on the 30th of April following their date of issue, and applications for renewal were to be made before July 1st. Failure to do so would result in *de facto* forfeiture of the right to harvest timber in the designated area ("berth") as set out in section 11 of the *ITR*:

> 11. All timber licenses are to expire on the 30th of April next after the date thereof, and all renewals are to be applied for before the 1st of July following the expiration of the last preceding license; in default whereof the berth or berths shall be treated as *de facto* forfeited.

[35] Section 12 of the *ITR* provides that licences were not to be renewed unless the defined limit had been "properly worked" over the term of the licence. This implied that the operator was to provide an advance-harvesting plan. If an operator did not work to plan, it had to give sufficient explanation under oath. Also, a licence could not be renewed unless all ground rents, dues, and other amounts payable under the expiring licence had been fully paid:

> 12. No renewal of any license shall be granted unless *the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath, and the same be satisfactory to the Superintendent General of Indian Affairs, for the non-working of the limit, and unless* or until the ground rent and all costs of survey, and all dues to the Crown on timber, saw-logs or other lumber cut under and by virtue of any license, other than the last preceding, shall have been first paid.

[36] Sections 13 and 14 of the *ITR* established a ground rent to be paid per square mile, payable in advance before issuing or renewing a licence, and dues on timber cut of $2.00 per FBM for tamarack, $1.00 per FBM for white or red pine, and $0.80 per FBM for hemlock:

> 13. All timber berths or limits shall be subject to an annual ground rent of $3 per square miles, payable in advance, before the issuing of any original license or renewal…
>
> 14. All timber, saw-logs, wood, or other lumber, cut under any license now in force, or under any license which may be hereafter granted, shall be subject to the following Crown dues, that is to say:
>
> TARIFF OF DUES
>
> Chargeable on Indian timber cut under license...
>
> 4. Tamarac…per M feet, board measure $2.00
> ...

> 6. Red and white pine….per M feet, board measure $1.00
> ...
>
> 8. Hemlock, spruce…per M feet, board measure $0.80

[37] Section 26 of the *ITR* set out the form of the licence to be issued in triplicate.

[38] The *Indian Act, 1886* and its *ITR* gave the Superintendent General or his agent powers to enforce and to impose penalties. Not all of those provisions will be referred to or discussed here. For purposes of supporting their respective positions in this Claim, the Parties focused on a few of the enforcement measures, which will be discussed.

[39] Sections 22, 22(2) as amended in 1891, 23, and 26 of the *Indian Act, 1886* dealt with trespass upon a reserve. Section 22 provided that where the Superintendent General or his representative received a complaint and was satisfied that a non-Indian was using or occupying a reserve without a licence, a warrant could be issued directing the person to stop using the reserve, and ultimately direct the person's removal from the reserve. Removal could be effected as though in execution of criminal process, with costs to be borne by the trespasser and recoverable by ordinary action or writ. Section 22 was as follows:

> **22.** If any person, or Indian other than an Indian of the band, without the license of the Superintendent General (which license he may at any time revoke), settles, resides or hunts upon, occupies, uses or causes or permits any cattle or other animals owned by him, or in his charge, to trespass on any such land or marsh, or fishes in any marsh, river, stream or creek on or running through a reserve, or settles, resides upon or occupies any such road, or allowance for road, on such reserve,—or if any Indian is illegally in possession of any land in a reserve—the Superintendent General, or such officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith—
>
> (*a*.) To remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same; or—
>
> (*b*.) To remove such cattle or other animals from such land or marsh; or—
>
> (*c*.) To cause such person or Indian to cease fishing in any marsh, river, stream or creek, as foresaid; or—

(*d.*) To notify such person or Indians to cease using, as aforesaid, the said lands, river, streams, creeks or marshes, roads or allowance for roads;

And such person shall accordingly remove or notify every such person or Indian, or remove such cattle or other animals, or cause such person or Indian to cease fishing, as aforesaid, and for that purpose shall have the same powers as in the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the person removed or notified, or who owns the cattle or other animals removed, or who has them in charge, and may be recovered from him as the costs in any ordinary action or suit, or if the trespasser is an Indian, such expenses may be deducted from his share of annuity and interest money, if any such are due to him.

2. Or any such person or Indian other than an Indian of the band may be required orally or in writing by an Indian agent, a chief of the band occupying the reserve, or a constable—

(*a.*) To remove (with his family, if any) from the land, marsh or road, or allowancef [*sic*] or road upon which he is or has so settled, or is residing or hunting, or which he so occupies; or—

(*b.*) To remove his cattle from such land or marsh; or—

(*c.*) To cease fishing in any such marsh, river, stream or creek as aforesaid; or—

(*d.*) To cease using as aforesaid any such land, river, stream, creek, marsh, road or allowance for road:

And any such person or Indian who fails to comply with such requirement, shall, upon summary conviction, be liable to a penalty of not less than five and not more than ten dollars for every day during which such failure continues, and in default of payment to be imprisoned for a term not exceeding three months.

[40] Under sections 23 and 24, where a trespasser returned to a reserve after having been directed to leave, or having been removed, the Superintendent General or his representative might issue a warrant to a sheriff to arrest the trespasser and bring him before "any stipendiary magistrate, police magistrate, justice of the peace, or Indian agent," who had authority to impose a jail term of 30 days for a first offence upon conviction and 30 days more for each additional offence. Sections 23 and 24 provided:

23. If any person or Indian, after he has been removed or notified as aforesaid, or after any cattle or other animals owned by him or in his charge have been removed, as aforesaid, returns to, settles, resides or hunts upon, or occupies or uses, as aforesaid, any of the said land, marsh or lots, or parts of lots, or causes or permits any cattle or other animals owned by him or in his charge, to return to any of the said land, marsh, or lots or parts of lots, or returns to any marsh, river, stream or creek on or running though a reserve, for the purpose of fishing therein,

> or settles or resides upon or occupies any of the said roads, allowances for roads, or lots or parts of lots, the Superintendent General, or any officer or person deputed and authorized, as aforesaid, upon view, or upon proof on oath made before him, or to his satisfaction, that the said person or Indian has returned to, settled, resided or hunted upon, or occupied or used, as aforesaid, any of the said lands, marshes, lots or parts of lots, or has returned to, settled or resided upon or occupied any of the said roads, or allowances for roads, or lots or parts of lots, or has caused or permitted any cattle or other animals owned by him, or in his charge, to return to any of the said land, marsh or lots or parts of lots, or has returned to any marsh, river, stream or creek, on or running through a reserve, for the purpose of fishing therein, shall direct and send his warrant, signed and sealed, to the sheriff of the proper county or district, or to any literate person therein; and if the said reserve is not situated within any county or district, then to any literate person, commanding him forthwith to arrest such person or Indian, and bring him before any stipendiary magistrate, police magistrate, justice of the peace, or Indian agent, who may, on conviction, commit him to the common gaol of the said county or district; or if there is no gaol in the said county or district, then to the gaol nearest to the said reserve in the Province or Territory, there to remain for the time ordered in such warrant, but which shall not exceed thirty days for the first offence, and thirty days additional for each subsequent offence.
>
> **24.** Such sheriff or other person shall accordingly arrest the said person or Indian, and deliver him to the gaoler or sheriff of the proper county, district, Province or Territory, who shall receive such person or Indian, and imprison him in the said gaol for the term aforesaid.

[41] Section 26 of the *Indian Act, 1886*, as amended in 1890, stated that if a non-Indian of the band cut timber on a reserve without a licence then that individual could be brought before the same judicial officers as in section 23, and upon conviction, be subject to a fine ranging from $4.00 to $20.00 per tree cut and carried away, with enforcement of the fine by seizure and sale if necessary, or even by imprisonment for non-payment. Penalties paid or collected under section 26 were to be credited to the Indians of the reserve in question:

> **26.** Every person, or Indian other than an Indian of the band to which the reserve belongs, who, without the license in writing of the Superintendent General, or of some officer or person deputed by him for that purpose, cuts, carries away, or removes from any of the said land, roads or allowances for roads, in the said reserve, any of the trees, saplings, shrubs, underwood, timber or hay thereon, or removes any of the stone, soil, minerals, metals or other valuables from the said land, roads or allowances for roads, shall, on conviction thereof

> before any stipendiary magistrate, police magistrate, or any two justices of the peace of Indian agent, incur—
>
> (*a*.) For every tree he cuts, carries away or removes, a penalty of twenty dollars;
>
> (*b*.) For cutting, carrying away or removing any of the saplings, shrubs, underwood, timber or hay, if under the value of one dollar, a penalty of four dollars; but if over the value of one dollar, a penalty of twenty dollars;
>
> (*c*.) For removing any of the stone, soil, minerals, metals or other valuables or other valuables aforesaid, a penalty of twenty dollars,—
>
> And the costs of prosecution in each case:
>
> 2. In default of immediate payment of the said penalties and costs, such magistrate, justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as he has authorized in that behalf, may issue a warrant, directed to any person or persons by him or them named therein, to levy the amount of the said penalties and costs by distress and sale of the goods and chattels of the person or Indian liable to pay the same; and similar proceedings may be had upon such warrant issued by the Superintendant General, or such other officer or person as aforesaid, as if it had been issued by the magistrate, justices of the peace or Indian agent, before whom the person was convicted; or such magistrate, or justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as aforesaid, without proceeding by distress and sale, may, upon non-payment of the said penalties and costs, order the person or Indian liable therefor to be imprisoned in the common gaol of the county or district in which the said reserve or any part thereof lies, for a term not exceeding thirty days, if the penalty does not exceed twenty dollars, or for a term not exceeding three months if the penalty exceeds twenty dollars:
>
> 3. If upon the return of any warrant for distress and sale, the amount thereof has not been made, or if any part of it remains unpaid, such magistrate, or justices of the peace, or Indian agent, or the Superintendent General, or such other officer or person as aforesaid, may commit the person in default to the common gaol, as aforesaid, for a term not exceeding thirty days, if the sum claimed upon the said warrant does not exceed twenty dollars, or for a term not exceeding three months if the sum exceeds twenty dollars;
>
> 4. All such penalties shall be paid to the Minister of Finance and Receiver General, and shall be disposed of for the use and benefit of the band of Indians for whose benefit the reserve is held, in such manner as the Governor in Council directs:

[42] Timber cut without payment of applicable “dues” were subject to seizure and sale, irrespective of any security given and wherever found. The term “dues” was not defined in the *Indian Act*. The *Oxford English Dictionary*, 2d ed, *sub verbo* "due" defines the term to mean "owing or payable as a debt or an obligation" or "an obligatory or legally

demandable payment." The *Black's Law Dictionary*, 10th ed, *sub verbo* "due" defines the term to mean "owing," "payable," or "constituting a debt." The power of seizure would therefore seem to apply to any outstanding amount payable under a licence, including the purchase price, stumpage tariffs, ground rent, and licence-issuing or renewal fees. Section 58 of the *Indian Act, 1886* provided:

> **58.** All trees cut, and the logs, timber or other product thereof, shall be liable for the payment of the dues thereon, so long as and wheresoever the same, or any part thereof, are found, whether in the original logs or manufactured into deals, boards or other stuff; and all officers or agents intrusted with the collection of such dues, may follow and seize and detain the same wherever they are found, until the dues are paid or secured.

[43] Sections 61 through 66 of the *Indian Act, 1886* gave the Superintendent General broad powers to seize timber that had been harvested on a reserve without authority (i.e. without a licence). Where the trees had been removed and disposed of so that they could not be seized, the operator was subject to a penalty of $3.00 for each tree proven cut plus costs and the Superintendent General could enforce collection in an ordinary civil court. The operator bore the burden of proving that it had authority to cut. Where an operator intermingled trees that had been cut without authority with other trees so they could not be identified, the Superintendent General could seize all of the trees. Trees seized could be sold. Where there had been seizure for non-payment of dues or penalty, proof of payment rested with the operator. Trees, timber, or other products seized because of unauthorized harvesting could be reclaimed by the operator through court process upon time-limited notice. The Superintendent General was authorized in the name of the Crown to call upon any assistance necessary for securing and protecting seized timber;

> **61.** If any person, without authority, cuts or employs or induces any other person to cut, or assists in cutting any trees of any kind on Indian lands, or removes or carries away, or employs, or induces or assists any other person to remove or carry away, any trees of any kind so cut from Indian lands, he shall not acquire any right to the trees so cut, or any claim to any remuneration for cutting or preparing the same for market, or conveying the same to or towards market; and when the trees, or logs or timber, or other product thereof, have been removed, so that the same cannot, in the opinion of the Superintendent General, conveniently be seized, he shall, in addition to the loss of his labor and

disbursements, incur a penalty of three dollars for each tree, rafting stuff excepted, which he is proved to have cut or caused to be cut or carried away; and such penalty shall be recoverable with costs, at the suit and in the name of the Superintendent General or resident agent, in any court having jurisdiction in civil matters to the amount of the penalty; and in all such cases it shall be incumbent on the person charged to prove his authority to cut; and the averment of the person seizing or prosecuting, that he is duly employed under the authority of this Act, shall be sufficient proof thereof, unless the defendant proves the contrary.

62. When the Superintendent General, or any officer or agent acting under him, receives satisfactory information,...that any trees have been cut without authority on Indian lands, describing where the trees, logs, timber or other product thereof are to be found, the Superintendent General, officer or agent, may seize, or cause to be seized, the same in Her Majesty's name, wheresover found, and place the same under proper custody, until the matter is decided by competent authority.

63. When the trees, timber, logs or other product thereof, so reported to have been cut without authority, on Indian lands, have been made up or intermingled with other trees, timber, logs or other product thereof, into a crib, dram or raft, or in any other manner, so that it is difficult to distinguish the trees, timber, logs or other product thereof, cut on reserves on reserves or Indian land, without license, from that with which it is made up or intermingled, the whole of the trees, timber, logs or other product thereof, so made up or intermingled, shall be held to have been cut without authority on Indian lands, and shall be seized, and forfeited, and sold, by the Superintendent General, or any other officer or agent acting under him, unless evidence satisfactory to him is adduced, showing the probable quantity not cut on Indian lands.

64. Every officer or person seizing trees, logs, timber or other product thereof, in the discharge of his duty under this Act, may, in the name of the Crown, call in any assistance necessary for securing and protecting the same.

65. Whenever any trees, logs, timber or other product thereof are seized for non-payment of Crown dues, or for any other cause of forfeiture, or whenever any prosecution is brought in respect of any penalty of forfeiture under this Act, and any question arises whether the said dues have been paid or whether the trees, logs, timber of other products were cut on lands other than any of the lands aforesaid, the burden of proving payment, or on what land the same were cut, as the case may be, shall lie on the owner or claimant and not on the officer who seizes the same, or the person who brings such prosecution.

66. All trees, logs, timber or other product thereof seized under this Act, shall be deemed to be condemned, unless the person from whom the same are seized,

> or the owner thereof, within one month from the day of the seizure, gives notice to the seizing officer or nearest officer or agent of the Superintendent General, that he claims or intends to claim the same: and in default of such notice, the officer or agent seizing shall report the circumstances to the Superintendent General, who may order the sale of the same by the said officer or agent.

[44] Section 28 of the *ITR* provided that all persons cutting timber on Indian lands without authority of licence "will be punished as the law provides." Section 29 stated that where timber was cut in trespass through error or in good faith the Superintendent General could impose penalties double, triple, or quadruple the ordinary dues under the tariff ("according to the circumstances") plus the costs of seizure and other related expenses.

> 28. All persons cutting timber on Indian lands or Reserve, without authority of license, will be punished as the law provides.
>
> Persons hindering any officer or agent of the Department of Indian Affairs in the discharge of his duty in seizing timber illegally cut, or taking away, or causing to be taken away, any timber seized under the Act, cap. 43, Revised Statutes, Canada, are guilty of felony. …
>
> 29. From and after the date of the passing of the present regulations, in cases of timber which although cut in trespass was so cut though error in good faith on Indian lands, by licentiates or other parties, it shall be lawful for the Superintendent General of Indian Affairs to exact in settlement of such wood goods a penalty equivalent to double, triple or quadruple the ordinary dues as established by tariff above, according to circumstances, besides costs of seizure and other expenses connected with all investigation into such trespasses.

[45] Again, net revenues from penalties and increased dues would be credited to the entitled band. Increased dues and penalties were a deterrent to trespassers and delinquent licensees and would also provide compensatory revenue to the affected band.

[46] The Respondent pointed out that section 117 of the *Indian Act, 1886* made every Indian Agent an *ex officio* Justice of the Peace with jurisdiction to try violations under the *Indian Act*. As a result, the Department's use of provisions involving arrest, conviction, and the imposition of penalties was a judicial function in the realm of public law and requiring prosecutorial discretion. Section 117 was as follows:

> **117.** Every Indian agent shall *be ex officio* a justice of the peace for the purposes of this Act, and shall have the power and authority of two justices of the peace, with jurisdiction wheresoever any violation of the provisions of this Act occurs, or wheresoever it is considered by him most conducive to the ends of justice that any violation aforesaid shall be tried.

B. Detailed Review of Management of the Timber Asset and Harvesting Process

1. Overview

[47] CTC and SLLC were consistently non-compliant when it came to making the payments and returns of information required under the terms of the tender and *ITR*. The Department pursued them constantly. Internal correspondence revealed that the Department had repeated concerns about the operator's conduct and more than once considered using enforcement measures. However, it made a decision not to terminate the relationship and persisted with written reminders and demands, eventually getting full payment (including interest) and a degree of reporting it was ready to accept.

[48] At the end of the fifth year, the Department refused to renew the licence, even though SLLC complained that it wanted one more year to be able to remove the estimated one million FBM of remaining timber. In order to assess the Claim, it is necessary to review the details of the transaction over the five years of dealings between the Department and the operator. The Claimants submitted that the Department's conduct of the transaction fell short, thereby resulting in a breach of fiduciary duty. More particularly, it contended that the Department's failure to use the enforcement provisions under the *Indian Act, 1886* and *ITR* (including seizing illegally cut timber, imposing penalties and increasing dues) constituted a breach of fiduciary duty. The Respondent countered that it had acted appropriately, and that it had exercised appropriate discretion within its authority. It also submitted that it could not be required to instigate many of the enforcement measures contained in the *Indian Act, 1886* and *ITR* because they involved prosecutorial discretion that was to be exercised independently by the Attorney General, not the Department. The Respondent took the position that it had a broad discretion in how it managed the sale and that it had exercised that discretion appropriately.

2. Detailed History

[49] By letter of August 22, 1904, Mr. McLean informed CTC that its tender and deposit cheque of $550.00 had been accepted. He asked for payment of the balance of $4,950.00 at which time "the necessary documents will be completed and transmitted to your address" (Common Book of Documents (CBD), filed February 12, 2013, Tab 10). Nearly seven months later, on March 3, 1905, Mr. Chitty informed the Deputy Minister that the balance of the purchase price had not yet been received. Mr. Chitty recommended checking further with the accountant and pointed out that under the terms of tender the deposit would be forfeited if the successful bidder's undertaking was not carried out. He was clearly concerned that CTC was not going to follow through (CBD, Tab 12).

[50] On March 9, 1905, Mr. McLean wrote again, reminding CTC that payment of the $4,950.00 balance of purchase price had not been received and that nothing further could happen until the payment was remitted (CBD, Tab 13). On May 3, 1905, Mr. Chitty wrote the Deputy Minister again seeking instructions because payment still had not been received (plus accrued interest of $200.00). He also stated it was possible that cutting was taking place on the Reserve without a licence (CBD, Tab 14).

[51] On May 6, 1905, Mr. McLean wrote Indian Agency Inspector Chisholm (Mr. Chisholm) asking for a report on whether any timber had been cut on the Reserve since the August 1904 date of sale. On June 12, 1905, Mr. Chisholm replied that he thought only "20 sticks" had been cut by SLLC in relation to the construction of a government building in Prince Albert. However, he said that he would be visiting the area in August and would inspect more closely (CBD, Tab 17). On June 20, 1905, Mr. Chitty reported this to the Deputy Minister and that Mr. Chisholm "will look carefully into the matter of trespass when he passes through that neighbourhood early in August" (CBD, Tab 18). Thus the Department was concerned that trespass cutting was going on. Mr. Chisholm did in fact visit the Reserve and by letter of September 8, 1905, reported that SLLC had cut "6 skids" the previous winter in addition to the 20 sticks earlier reported. He said that over the previous several months the company had been cutting on the Reserve to provide material for the construction of a Government building. Mr. Chisholm referred to SLLC

as the operator and reported that it intended to log the Reserve over the coming fall and winter (CBD, Tab 19).

[52] Accordingly, Mr. Chitty wrote the Deputy Minister informing him that timber was being cut without authority or full payment of the purchase price that was more than one year overdue. He asked whether the timber should be seized ("which is the usual practice") and further logging operations on the Reserve stopped (CBD, Tab 20). A marginal note on the letter advised Mr. Chitty to demand immediate payment from the company, inform it that timber cut without authority could be seized, and prevent further logging on the Reserve until instructed. On September 18, 1905, Assistant Secretary of the Department of Indian Affairs Stewart (Mr. Stewart) wrote Mr. Chisholm ordering him to stop the logging operation on the Reserve and to prevent the removal of timber from it (CBD, Tab 22). Not knowing CTC's address, Mr. Stewart had directed a letter to the company through someone he thought would know how to contact the company. He also directed Mr. Chisholm to send a copy of the letter to representatives of the company if he knew an address. The letter to be delivered stated that the logging taking place was "quite irregular and contrary to the provisions of the Timber Regulations," that it was subject to seizure, that further cutting would be prevented, and timber seized unless immediate payment of the balance of the purchase price plus interest was forthcoming (CBD, Tab 21).

[53] Mr. Chisholm reported that he had delivered the letter to Arthur J. Bell, Manager of SLLC (Mr. Bell), at "the local branch of" CTC and that Mr. Bell proposed to send a cheque for the balance (CBD, Tab 23). However, on February 9, 1906, Mr. Chitty noted that nothing more had been paid, resulting in another letter to CTC on February 12, 1906 demanding immediate payment (CBD, Tabs 26 and 27). On May 25, 1906, Mr. Chitty wrote the Deputy Minister that payment was still outstanding and that it might prove effective to advise the company that unless payment was received within one month the Department would have to consider cancelling the sale with forfeiture of the $550.00 deposit (CBD, Tab 28). On May 29, 1906, Mr. McLean wrote CTC advising that if payment of the outstanding balance plus interest was not paid within one month the Department would consider cancelling the sale and keeping the deposit (CBD, Tab 29).

By now, 21 months had passed since the awarding of the tender sale and CTC had still not paid the balance of the purchase price, the result of which meant that no licence had been issued.

[54] By letter of June 16, 1906, CTC wrote that it had received Mr. McLean's May, 1906, letter but not Mr. Pedley's letter of February 12, 1906. The company requested particulars of the balance owing, which Mr. McLean provided by letter of June 20, 1906, stating the outstanding balance was $4,950.00 and accrued interest of $458.38. Under cover of June 21, 1906, CTC submitted a draft for $4,950.00 and on June 23, 1906, another draft for $458.38 (CBD, Tabs 30 to 33). Mr. McLean replied on June 28, 1906, enclosing a copy of the *ITR* and a surety bond form. He specified that the ground rent was $3.00 per square mile and that a licence renewal fee of $4.00 would be payable. He also stated that before a licence could be issued it would be necessary to provide a sworn return of the measurements of logs cut. Tariffs would be payable as set out on page 10 of the *ITR* and the surety bond must be completed by two people for $1,500.00 each, thus totalling $3,000.00 (CBD, Tab 36). On July 16, 1906, CTC replied with a request that the licence be issued to SLLC, to which Mr. McLean responded on August 3, 1906, that CTC would first have to supply the requested sworn return of timber cut, pay the outstanding ground rent and licence fees of $508.50, pay the tariff dues on timber cut, pay a transfer fee of $2.00 per square mile (as per the *ITR*), and provide the completed surety bond (CBD, Tabs 37 and 38). Mr. Bell wrote back on August 30, 1906, requesting a reduction of the ground rent by 53 square miles because the timber being harvested was situated on less than three square miles of the Reserve (CBD, Tab 39). On September 10, 1906, the Department wrote back re-iterating the fees to be paid, the returns to be sworn confirming amounts cut, and denying the request for reduction of square mileage, which it stated was a matter of contract (CBD, Tab 42).

[55] On September 26, 1906, Mr. Bell swore a return which he "corrected" by a further sworn return on the same date stating that between August 22, 1904, and September 17, 1906, SLLC had cut 360 cubic feet of pine and 1,872 cubic feet of tamarack. He indicated that he had not employed a culler to measure the wood cut, although he submitted a signed but undated culler's return providing more detail about

the timber harvested and indicating outstanding dues of $15.47. He also delivered an affidavit sworn September 26, 1906, stating that SLLC had harvested a total of 5,240 FBM of timber in the past two years. These were submitted under cover of a letter dated October 10, 1906, which also requested that forms be sent to transfer the sale from CTC to SLLC (CBD, Tabs 47 to 50). The letter also contained a partially completed surety bond and a corrected information return. Mr. McLean responded by letter of October 17, 1906, outlining what was required to complete the transfer, including payment of specified amounts for dues, ground rents, licence fees and transfer fees. SLLC was told that a quitclaim deed would suffice to complete the transfer of interest (CBD, Tab 51).

[56] SLLC submitted a cheque for $15.62 for timber dues on October 22, 1906, and CTC submitted a draft of $629.50 to cover the ground rent up to April 27, 1907, the licence, licence renewal, and transfer fees. On November 27, 1906, SLLC submitted a surety bond and requested that the licence be issued (CBD, Tabs 53 to 55). SLLC wrote again on December 3, 1906, that it was presently logging the Reserve and that the "logs will be landed at our mill and the scalers reports will be available…at all times at our mill office" (CBD, Tab 56). On December 14, 1906, Mr. McLean wrote SLLC acknowledging receipt of the payment and surety bond but indicating that the licence could not issue until the quitclaim deed from CTC to SLLC had been received (CBD, Tab 57). The Department received a quitclaim deed under cover of January 3, 1907, but it was from the wrong company as transferor, which Mr. McLean advised by letter of January 8, 1907, must be corrected (CBD, Tabs 61 and 62). Sometime in February 1907, Deputy Superintendent General Pedley (Mr. Pedley) received the proper assignment document and Timber Licence No. 135 was issued in the same month (no copy exists).

[57] SLLC remitted a culler's return dated August 13, 1907, for the timber cut by the company on the Reserve in the 1906-1907 season (1,584,646 FBM), although the type of timber was not specified. The company also submitted payment of $1,632.70 as dues together with a return and declaration of scaler as to the accuracy of the returns submitted in September 1907. Although there was concern about the way in which SLLC had measured the logs, the Department accepted it. It also appeared that SLLC had overpaid on dues because of the measurement confusion (CBD, Tabs 64 to 70).

[58] On October 24, 1908, the Department informed SLLC that it had no authority to operate on the Reserve because it had failed to file returns for 1907-1908 swearing to what it had cut or justifying why it had not worked the limit, as the case might be. Also, ground rent and the licence renewal fees for 1908-1909 had not been paid. SLLC's manager replied by letter on October 30, 1908, that they had not worked the Reserve in the winter of 1907-1908 because they were "cleaning up" another reserve purchased from the Department. A cheque for $28.53 was enclosed for ground rent, which together with the earlier overpayment, SLLC suggested brought it up to date. Mr. Pedley replied on January 16, 1909, that the *ITR* required that the reason for not working the Reserve in any year must be provided under oath and that all ground rent and dues must be paid before a licence could be renewed. He requested that an explanatory affidavit be provided so the Department could consider renewal of the licence (CBD, Tabs 72, 73 and 84). Mr. Pedley's letter also observed:

> I have also to state that your operations on limit No. 101, under License No. 138, were unauthorized as the License expired on the 30th of April, 1907, and was not renewed, and double, triple or quadruple dues may be imposed in such cases on the timber cut. [Note: limit No. 101 was a different Reserve, supposedly the one SSLC had been "cleaning up".]

On February 11, 1909, SLLC provided an affidavit confirming that the reason for not working the Reserve was because it was completing cutting on a different reserve (CBD, Tabs 85 and 86).

[59] Mr. Chitty was concerned about SLLC's lack of co-operation and conduct in harvesting the other reserve, so in a letter to the Deputy Minister on February 19, 1909, he questioned whether the reason for not working the Reserve was sufficient and whether the licence should be renewed (CBD, Tab 87):

> Indian Reserve No. 101, is the one on which the Company have refused to send returns of timber out under their license; they have not paid the ground-rent or renewal fees for the past two years, and have been unlawfully operating the limit without authority of license.

> Under the circumstances, should the Company's application for renewal of license No. 135 for limit No. 106A, be granted, and is the reason assigned for non-working this limit; sufficient and satisfactory as provided in section 12 of the Timber Regulations?

[60] Mr. McLean informed SLLC by letter of April 23, 1909, that the term of the licence would end on April 30, 1909, and would not be renewed. Therefore, the company would have no further right to cut on the Reserve after that date. SLLC's manager wrote back on May 1, 1909, that he could not understand why there would be no renewal, that there was still one million FBM to take from the Reserve, and, that they had hoped to do it the next winter. Mr. McLean replied on May 8, 1909, that Timber Licence No. 135 was limited to a five-year term, which had expired on April 30, 1909, so SLLC had "no further right or claim to the timber remaining on the Reserve" (CBD, Tabs 89, 93 and 95).

[61] In May 1909, SLLC submitted culler's returns for 1908-1909 together with affidavits confirming the amount of timber cut on the Reserve over that period, and SLLC's manager stated that all the harvested timber was spruce. Mr. Chitty observed to the Deputy Minister on June 3, 1909, that the affidavits, although sworn, were not strictly to form under the *ITR* although these irregularities could probably be overlooked because the affidavits were sworn in good faith (CBD, Tabs 94, 96, 97, 98, and 100). Correspondence followed in March and early April 1910 correcting and finalizing the returns and amounts owing. On April 5, 1910, SLLC sent a cheque for $48.09, representing the balance of the $757.23 in timber dues for 1909-1910. By May 10, 1910, the Department seemed satisfied that the returns were sufficient, the amounts of timber cut had been properly quantified, and all outstanding amounts (including interest) had been paid.

[62] In summary, SLLC's returns indicated that 2,452,344 FBM in timber had been cut on the Reserve between 1904 and 1910 of which 2,446,944 FBM was spruce, 1,800 FBM was pine, and 3,600 FBM was tamarack. The pine and tamarack had been cut outside the terms of the licence.

C. The Law of Fiduciary Duty In Relations between Canada and Aboriginal Peoples

1. The Scope of the Fiduciary Duty

[63] The law of fiduciary duty in relations between Canada and Aboriginal peoples is complicated and has evolved over many years. The Parties' submissions in this Claim with respect to where a fiduciary duty existed and how it applied, were so disparate that it is necessary to survey the law and its development so that the Tribunal's understanding and application of it to the facts and circumstances at hand may clarify the analysis that follows.

[64] As already stated, the Claimants alleged that the Respondent had breached its fiduciary duty in the conduct of the sale of timber cut on the Reserve. The Respondent acknowledged that it had a fiduciary obligation in the management of the sale, but maintained that it had not breached its duty. Because of this admission, I conclude that there was no dispute that a fiduciary obligation existed in the context of the conditional surrender.

[65] The Respondent further denied, however, that its fiduciary obligation extended to the enforcement and penalty provisions available to it under the *Indian Act, 1886* and *ITR* when managing the harvesting of the timber. It took the position that these provisions were part of its management discretion or were protected by prosecutorial discretion. In contrast, in the Claimants' submission, these statutory enforcement powers were part of the administrative regime and should be included within the scope of fiduciary obligation in dealing with what it regarded as a recalcitrant operator. The Claimants emphasized that the Crown was managing a surrendered reserve interest and had a duty to protect that interest.

[66] I turn now to the general principles of fiduciary obligations. In *Calder v British Columbia (Attorney-General)*, [1973] SCR 313, [*Calder*], the Supreme Court of Canada recognized that the Indian interest in ancestral lands constituted a legal interest that predated European settlement, thereby raising rights that could not be treated merely as an act of grace and favour by the Crown.

[67] In *Guerin v The Queen*, [1984] 2 SCR 335, 12 DLR (4th) 321 [*Guerin*], the Supreme Court of Canada distinguished the "political trust" situation from the situation where Canada failed in its mandate to negotiate the terms of a lease under a formal surrender by the band for that purpose. The seminal distinction was stated by Dickson J. in *Guerin*:

> …Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council, supra: Tito v. Waddell (No. 2)*, supra, and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision. [emphasis added; at 378-79]

[68] Dickson J. further explained in *Guerin* that the Crown's obligation in the circumstances was neither the usual public law duty nor strictly a private law one, but rather a *sui generis* obligation in the nature of a private law duty:

> As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary. [at 385]

[69] In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25 [*Blueberry River*], the Supreme Court of Canada applied the fiduciary duty analysis in *Guerin*. The Blueberry River Band had entered into a numbered treaty with Canada under which a reserve was dedicated to its use. In 1940, it surrendered mineral rights on the reserve "in trust to lease

for its benefit." In 1945, it surrendered reserve land to assist with the settlement of World War II veterans. However, this surrender gave Canada the discretion to choose between selling or leasing the surrendered land. In disposing of Crown land, the established policy of the Department at the time was to retain the mineral rights and to lease or sell only the surface rights. The Crown sold the full fee simple interest in the land surrendered in 1945 and oil was later discovered on it. The Department could not account for the decision to sell the fee simple interest without retaining the mineral rights, and as a result, the Blueberry River Band was deprived of substantial potential revenue from royalties. McLachlin J. (as she then was) found that Canada had a fiduciary obligation to the Blueberry River Band even prior to the surrender of the land (*Blueberry River*, at para 35). It had a duty not only to ensure that the Blueberry River Band had consented to the surrender, but also to evaluate the surrender to ensure that it was not an exploitative bargain from the Blueberry River Band's perspective:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident -- a decision that constituted exploitation -- the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains. [at para 35]

[70] Speaking for the majority in *Blueberry River*, Gonthier J. agreed that the Crown was under a fiduciary duty to deal with the subject land in the best interests of the Blueberry River Band (at para 16). Gonthier J. acknowledged the "trust-like" principles recognized and developed in *Guerin*, but which he specifically refrained pronouncing

further upon. Agreeing that the Department was under a fiduciary duty to put the Blueberry River Band's interests first, he preferred to focus on the band's intentions, including its understanding in making the surrender, when assessing whether there had been a breach of fiduciary duty. He thus concluded that it was a "guiding principle that the decisions of aboriginal peoples should be honoured and respected" (*Blueberry River*, at para 14). Still, the pre-surrender circumstances of a surrender were of critical importance. The entire court agreed that the Crown had not given requisite scrutiny to the intentions and best interests of the Blueberry River Band.

[71] Quite apart from recognizing the Crown's fiduciary obligation as established in *Guerin*, the Supreme Court of Canada demonstrated in *Blueberry River* that the fiduciary obligation could exist prior to the Crown's acceptance of a surrender in relation to transactions that the Blueberry River Band was considering embarking upon through the surrender process.

[72] In the article, "Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since *Guerin*" (2013) 76 Saskatchewan Law Review 1, Senwung Luk observed at para 26:

> The obligations found in *Guerin* and *Blueberry River* are not entirely different from those imposed on relationships between real estate agents and their clients, outside of the Crown-Aboriginal context, or indeed upon any trustee-beneficiary relationship. The fiduciary's duty to be truthful in communications with beneficiaries and to use their discretion in a way that furthers the interests of a beneficiary are the basic building blocks of any trust relationship. Although a fuller analysis of *Blueberry River* will be made later in this paper, at this point it suffices to say that this case seems straightforwardly aligned with the logic in *Guerin*: the Crown is obliged to manage the process for surrendering reserve lands for the best interests of the Aboriginal community and to ensure their consent to it.

The Supreme Court of Canada had a further opportunity to review and explain fiduciary obligations in the Aboriginal context in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]. In *Wewaykum*, Binnie J. gave a useful and authoritative review of the development of the fiduciary relationship between Aboriginal peoples and the Crown. *Wewaykum* involved two bands derived from the Laich-kwil-tach

people, each of which had been in possession of a reserve since the end of the 19th century. Each claimed the other's reserve. However, the claims were not based on Aboriginal title or treaty, but rather on the Department's records made contemporaneously and referring to the allocation of the reserves. It was determined that each claim was founded on errors contained in the Department's records, so that in the end both claims were based on recording mistakes and therefore neither claim was successful.

[73] In *Wewaykum,* Binnie J. described *Guerin*, as a "watershed decision," before which the federal government's relationship with Aboriginal peoples was characterized as a "political trust" or a "trust in the higher sense." The flavour of the "political trust" perspective may be gathered from two cited cases:

> (i) *St. Catherines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577 where the Court described the Crown's obligation towards aboriginal people as a "sacred political obligation, in the execution of which the state must be free from judicial control."
>
> (ii) *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211 where the Court observed at p. 219: "The language of the statute [*Indian Act*] embodies the accepted view that these aborigenes are, in effect, wards of the State, whose care and welfare are a political trust of the highest obligation." [emphasis in original; at para 73]

[74] Binnie J. explained that *Guerin's* contribution was to recognize that the concept of political trust did not exhaust the legal character of "the multitude of relationships" between the Crown and Aboriginal peoples, and significantly too that the existence of a public law duty did not preclude obligations in the nature of a private law duty:

> The enduring contribution of *Guerin* was to recognize that the concept of political trust did not exhaust the potential legal character of the multitude of relationships between the Crown and aboriginal people. A quasi-proprietary interest (e.g. reserve land) could not be put on the same footing as a government benefits program. The latter will generally give rise to public law remedies only. The former raises considerations "in the nature of a private law duty" (*Guerin* at p. 385). Put another way, the existence of a public law duty does not exclude the possibility that the Crown undertook, in the discharge of that public law duty,

> obligations “in the nature of a private law duty” towards aboriginal peoples. [*Wewaykum*, at para 74]

[75] In *Wewaykum*, Binnie J. further observed that the Crown’s fiduciary obligation was broader in scope and origin than section 35 of the *Constitution Act, 1982* (UK), 1982, c 11:

> The "historic powers and responsibility assumed by the Crown" in relation to Indian rights, although spoken of in *Sparrow*, at p. 1108, as a "general guiding principle for s. 35(1)", is of broader importance. All 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. As Professor Slattery commented:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help. [at para 79]

[76] Binnie J. went even further in characterizing the importance and protective character of the Crown’s fiduciary obligation, relating it also to the honour of the Crown:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically… but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin*, *supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion”… Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown”… [*Wewaykum*, at para 80]

[77] That being said, Binnie J. held that the Crown’s fiduciary obligation to a particular Aboriginal entity “does not exist at large” but rather in relation to specific Aboriginal interests. He then attempted to give some definition to the limits and scope of

fiduciary obligations. Until *Wewaykum*, Binnie J. noted that "[f]iduciary protection accorded to Crown dealings with aboriginal interests in land (including reserve creation) has not to date been recognized by this Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982"* (*Wewaykum*, at para 81). In the cases involving Aboriginal interests in land, the fiduciary duty had been a *sui generis* duty in the nature of a private law duty, as in the surrender situations of *Guerin* and *Blueberry River*. In the circumstances of *Wewaykum*, Binnie J. further concluded that the Crown had fiduciary obligations during reserve creation, even though it also owed public law duties to the settlers involved at the time.

[78] He noted, however, that even where a fiduciary relationship exists between parties not all obligations between them will be fiduciary in nature. To clarify when fiduciary obligations may be engaged, Binnie J. emphasized that it is necessary to focus on the nature of the interest in question and to assess whether the Crown had assumed sufficient discretionary control to ground a fiduciary obligation:

> … I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals*, *supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation. [emphasis added; *Wewaykum*, at para 83]

[79] Binnie J. then pronounced the following legal principles:

> 1. The content of the Crown's fiduciary duty towards aboriginal peoples varies with the nature and importance of the interest sought to be protected. It does not provide a general indemnity.
>
> 2. 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.

> 3. Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation. [emphasis added; *Wewaykum*, at para 86]

[80] The third principle quoted above is of particular relevance here as this Claim deals with a reserve that, pursuant to Treaty Number 6, was at the time in question fully "created." With regard to the third principle, Binnie J. said this:

> The content of the fiduciary duty changes somewhat after reserve creation, at which time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. In *Guerin*, Dickson J. said the fiduciary "interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown" (p. 382). These dicta should not be read too narrowly. Dickson J. spoke of surrender because those were the facts of the *Guerin* case. As this Court recently held, expropriation of an existing reserve equally gives rise to a fiduciary duty: *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85. See also *Kruger v. The Queen*, [1986] 1 F.C. 3 (C.A.). [emphasis in original; *Wewaykum*, at para 98]

[81] The Supreme Court has thus established very clearly that the Crown will generally be subject to fiduciary obligations in the nature of private law duties when exercising discretionary control over a fully created reserve, including, *a fortiori*, a surrendered reserve interest: *Guerin*; *Blueberry River*; *Wewaykum*. The dual conditions of a cognizable interest and an act of discretion by the Crown imply a need to examine "whether or not the Crown ha[s] assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation" (*Wewaykum*, at para 83).

[82] The Claimants here seeks to include the enforcement and penalty measures in respect of timber available under the sections of the *Indian Act, 1886* and related ITR within the scope of the fiduciary obligations that Binnie J. described as attached to confirmed reserves (*Wewaykum*, at para 86). As a result, the Crown would have had a duty to make use of statutory enforcement and penalty provisions in respect of timber to protect the Claimants' reserve from unauthorized timber harvesting. While the Respondent recognized the post-surrender context of this Claim and admitted some degree of fiduciary obligation, the Respondent denied that these statutory enforcement and prosecutorial powers fell within the scope of its fiduciary obligations.

[83] The Respondent made several quite different arguments regarding why the scope of its fiduciary obligations in this Claim should exclude those statutory powers. In overview, the Respondent submitted that the Crown did not have a general fiduciary duty to protect reserve land from exploitation by third parties unlawfully on a reserve. In the Respondent's view this was because there was no statutory mechanism by which the Crown could remove trespassers, or if there was, it was limited to prosecutorial powers where the Crown must exercise prosecutorial discretion or enjoyed immunity for acts of a judicial nature.

[84] The Respondent further argued that because the *Indian Act* affords bands the right to take legal action against trespassers, the trespass provisions of the *Act* did not sufficiently cede power to the Crown or render a band peculiarly vulnerable to the Crown's discretion in the event of a trespass because the Claimants could have brought a trespass action themselves. Without discretionary Crown control and a corresponding vulnerability of a band, the Crown did not have a fiduciary duty extending to the duty to prosecute the operators.

[85] Finally, the Respondent argued that decisions regarding when and how to deploy resources toward enforcement were decisions of public policy and not subject to fiduciary obligations. Thus, while the Respondent admitted that it had a fiduciary obligation to the Claimants when managing the surrendered timber, the Respondent nevertheless presented several varying arguments in relation to why no fiduciary obligations existed to protect the reserve from trespass by such means as seizing timber, imposing fines or penalties, or pursuing convictions.

[86] In contrast, the Claimants submitted that the statutory regime for timber harvesting on reserves was designed to protect First Nations' reserve interests (citing *Lac Seul First Nation v Canada*, 2009 FC 481, 348 FTR 258 (FCA) [*Lac Seul*]), was administrative in nature, and included many powers that were readily available to and often used by the Superintendent General for the purpose of protecting First Nations' reserve interests. The Claimants further submitted that at the time in question they lacked the requisite possession due to their timber surrender and in any case, the *Indian Act* at

the time gave the Superintendent General alone the capacity to bring an action for trespass on a reserve, meaning that the Claimants were entirely vulnerable to the Crown to carry forward such an action. Thus, in the Claimant's view, the powers available to the Superintendent General, including powers to seize or impose penalties, ought to be considered within the scope of and subject to fiduciary obligations.

[87] As the Respondent's submissions raise several different bases in law for narrowing the scope of their fiduciary obligation, I will address each in turn in some detail to clarify the applicable law to this Claim.

a) The Extent of the Crown's Discretionary Control

[88] The Respondent's first argument addressed the extent to which the statutory regime gave the Department "control" over trespassers. The Respondent started with the current *Indian Act, 1985* characterizing section 28 as the "conventional way" in which the Crown now authorizes short-to-medium term use of reserve lands by third parties through the issuance of Ministerial permits. Absent such permission, any occupation or use of a reserve permitted by a band to a third party is void. The Respondent pointed out, however, that section 28 contains no mechanism permitting the Minister to order cessation of third party use where a permit has not been issued:

> **28.** (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

[89] The Respondent took the position that the same situation existed under section 21 of the *Indian Act, 1886* (quoted in paragraph 25 above), which it presented as "the earlier incarnation" of the current section 28 of the *Indian Act, 1985*. Although section 21 contemplated possible fines or imprisonment upon summary conviction, the Respondent

submitted that nothing in section 21 gave the Department control over third parties occupying or using reserve land without Ministerial approval. Without such a mechanism by which the Minister could exercise control over trespassers, the Respondent submitted that the Crown could not be fixed with a fiduciary duty to protect a reserve from illegal or exploitative incursions.

[90] Sections 21, as amended in 1894, and 22 of the *Indian Act, 1886*, have been quoted earlier (see paragraphs 25 and 39 above) but it is worth seeing them together in the context of the trespass question:

> **21.** Every person, or Indian other than an Indian in the band, who, without the authority of the superintendent general, resides or hunts upon, occupies or uses any land or marsh, or who resides upon or occupies any road, or allowance for road, running through any reserve belonging to or occupied by such band, shall be liable, upon summary conviction, to imprisonment for a term not exceeding one month or to a penalty not exceeding ten dollars and not less than five dollars, with costs of prosecution, half of which penalty shall belong to the informer; and all deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.
>
> **22.** If any person, or Indian other than an Indian of the band, without the license of the Superintendent General (which license he may at any time revoke), settles, resides or hunts upon, occupies, uses or … or settles, resides upon or occupies any such road, or allowance for road, on such reserve … the Superintendent General, or such officer or person as he thereunto deputes and authorizes, shall, on complaint made to him, and on proof of the fact to his satisfaction, issue his warrant, signed and sealed, directed to any literate person willing to act in the premises, commanding him forthwith—
>
> (*a*.) To remove from the said land, marsh or road, or allowance for road, every such person or Indian and his family, so settled, or who is residing or hunting upon, or occupying, or is illegally in possession of the same; or—
>
> …
>
> (*d.*) To notify such person or Indian to cease using, as aforesaid, the said lands, river, streams, creeks or marshes, roads or allowance for roads;
>
> And such person shall accordingly remove or notify every such person or Indian … and for that purpose shall have the same powers as in the execution of criminal process; and the expenses incurred in any such removal or notification shall be borne by the person removed or notified, … and may be recovered from him as the costs in any ordinary action or suit….

[91] The Respondent suggested that the same analysis applied to all other provisions of the *Indian Act, 1886*, that purported to give the Minister discretion to permit third parties to acquire rights in reserve lands, including section 54 of the *Indian Act, 1886* (quoted in paragraph 31 above), whereby the Superintendent General had discretion to grant licences to third parties for the purpose of cutting timber on a reserve. The Respondent submitted that nothing in section 54 (authority to grant a licence) gave the Superintendent General the authority to remove an unauthorized operator from a reserve. The Respondent submitted that the Superintendent General could give a non-band member access to a reserve through a licence, but he could not remove an unlicensed trespasser.

[92] While the Respondent emphasized its inability to control the behaviour of third parties, the principles of fiduciary obligation cited previously are grounded on the Crown's assumption of discretionary control over a cognizable interest, in this case the Claimants' surrendered timber. When the Crown accepted the Claimants' surrender and embarked on the tender process, the dual criteria from *Wewaykum* of a cognizable interest and undertaking of discretionary control invoking fiduciary obligations in the nature of private law duties were met.

[93] Even apart from the surrender, the *Indian Act* more broadly and timber management provisions specifically (reviewed under the subheading "Statutory Scheme" above) included extensive rules designed to control access to and protect reserves while also facilitating timber harvesting for the benefit of bands such as the Claimants. It is worth elaborating the nature of this regime further to demonstrate the extent of the Crown's discretionary control.

[94] Authority to grant the use or occupation of a reserve rested with the Crown through the reserve creation process and then under the provisions of the *Indian Act*, for example by issuing a licence to harvest timber on a reserve. The basic prohibition against occupation or use of a reserve by all but an "Indian of the band" was stated in section 21 of the *Indian Act, 1886*. It is noteworthy that section 21 was the first section in the *Act* under the heading "Trespassing On Reserves." There can be no doubt that the section's intent was to prohibit trespass on a reserve except by "an Indian of the band" for whom

the reserve was dedicated. The original version of section 21 in the *Indian Act, 1886* only contained this general prohibition and voided leases, contracts, and agreements made or permitting use or occupation of the reserve to anyone but a member of the qualifying band. The *Indian Act,* SC 1894, c 32, s 2 amended section 21 to include liability for imprisonment or monetary penalty upon summary conviction, as quoted above (see paragraph 25 above).

[95] Sections 22 and 23 authorized the Superintendent General to issue a warrant (upon receiving a complaint and upon satisfactory proof) directing a trespasser to end his trespass and to remove the trespasser if necessary "as in the execution of criminal process" and at the trespasser's expense (see paragraph 39 and 40 above). Section 22(2) was added in 1891 so that in addition to the Superintendent General's power to issue a warrant following a complaint in section 22(1), such unauthorized persons "may be required orally or in writing by an Indian agent, a chief of the band occupying the reserve, or a constable—(a) To remove…; or—(d) To cease using as aforesaid any such land…. And any such person or Indian who fails to comply with such requirement shall, upon summary conviction, be liable to a penalty…."

[96] If the trespasser persisted, sections 23, 24, and 25 of the *Indian Act, 1886* authorized the Superintendent General to issue a warrant for the arrest of the trespasser, who would be held in custody to appear before specified judicial officers and possibly imprisoned upon conviction.

[97] Section 26 of the *Indian Act, 1886* provided for enforcement measures against trespassers who removed trees, minerals, soil, stones, or any other valuable from a reserve without a licence from the Superintendent General. The trespasser could be liable for payment of a monetary penalty enforceable by the Superintendent General's warrant to levy execution. The trespasser could also face imprisonment upon conviction (see paragraph 41 above).

[98] Given the position of these sections immediately following the heading "Trespassing On Reserves" and the general limitation for use and occupation of reserves in section 21 of the *Indian Act, 1886,* there is little doubt that the powers given to the

Superintendent General were intended to be measures of enforcement against trespass, and therefore the means by which the policy of limited use and occupation of a reserve could be carried out.

[99] This host of controls on access, management instruments and tools of enforcement constituted sufficient discretionary control to bring the *Indian Act*'s measures aimed at preventing trespasses generally within the scope of fiduciary obligation, absent some other basis for exemption.

[100] These conclusions are consistent with Professor Slattery's comments (see paragraph 75 above) that the Crown's fiduciary obligations arising from the *Indian Act* and reserve system were born from the need to keep the peace in a military sense. The *Indian Act* and its reserve system were important matters of national public policy in the early days of Confederation. It was in the national interest. In my view, this strengthens the fiduciary quality of the enforcement measures contained in the *Indian Act* and entrusted to the discretion and use of the Superintendent General. This fiduciary quality of the enforcement measures are also consistent with McLachlin J.'s (as she then was) view that the *Indian Act* should be interpreted as striking a balance between protection and band autonomy. McLachlin J. concluded regarding surrenders: "the Indian Act's provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection" (see paragraph 69 above; also *Blueberry River*, at para 35).

[101] I am therefore not persuaded that as a matter of law, as the Respondent submits, the extensive timber management regime set out in the *Indian Act* and *ITR* of the day accorded the Superintendent General so little "control" or authority to exert protective influence over the conditionally surrendered portion of the Claimants' reserve that no fiduciary obligation could attach with respect to protecting reserves from trespassers. Any specific duties that may have been owed and the extent of any possible breaches will be elaborated later in this judgment. For the present, the issue is whether the *Indian Act*'s prohibition against unauthorized use of reserves and related enforcement measures afforded the Crown sufficient discretionary control over the surrendered timber such that those powers would fall within the scope of fiduciary duties. I conclude that they did and

therefore, the timber management regime's provisions regarding licensing and trespassers fall within the scope of the Crown's fiduciary duties owed to the Claimants, consistent with *Lac Seul*, unless another reason can be found for exemption.

b) Capacity to Bring Actions in Trespass and Vulnerability

[102] The Respondent further submitted that the Claimants were insufficiently vulnerable to the Crown when it came to bringing actions in trespass for the Crown to have any duty in this regard because the *Indian Act* did not remove this capacity and in fact specifically acknowledged a band's ability to pursue trespassers in civil actions.

[103] The Respondent referred to sections 30 and 31 of the current *Indian Act* and general principles relating to the law of trespass to argue that no duty to use the 1886 *Indian Act*'s statutory powers to prevent trespasses could arise. Referring to G.H.L. Fridman's, *The Law of Torts in Canada*, 2d ed (Toronto: Carswell, 2002) at 37-38, the Respondent submitted that incursion by an unauthorized third party onto a reserve would constitute an act of trespass, i.e. a direct and unauthorized interference or entry upon a reserve without the express or tacit permission of the person entitled to possession. Relying on *Custer v Hudson's Bay Co. Developments* (1982), [1983] 1 WWR 566 at paras 7-8, 141 DLR (3d) 722 (Sask CA) [*Custer*], and also *Squamish Indian Band v Findlay* (1980), 109 DLR (3d) 747 at paras 41, 45, 45,48, [1980] 2 CNLR 58 (BCSC) [*Squamish*], the Respondent argued that because the common law right to bring a civil suit for trespass accrued to the person in lawful possession of the land, and in the case of a reserve it was a band that had lawful possession (not the Crown), then it was the band that had the right to bring a civil suit for trespass.

[104] In advancing this argument, the Respondent also relied on sections 30 and 31 of the current *Indian Act, 1985*:

> **30.** A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.
>
> **31.** (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

(*a*) unlawfully in occupation or possession of,

(*b*) claiming adversely the right to occupation or possession of, or

(*c*) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

(2) An information exhibited under subsection (1) shall, for all purposes of the *Federal Courts Act*, be deemed to be a proceeding by the Crown within the meaning of that Act.

(3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

[105] The Respondent pointed out that section 30 of the *Indian Act, 1985* makes trespass on a reserve a summary offence punishable by fine or imprisonment. Section 31(1) and (2) give the Attorney General of Canada authority to bring a civil suit in trespass for the benefit of the band. However, section 31(3) of the *Act* preserves "any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band" (emphasis added). Rothstein J. discussed section 31(3) in *Fairford First Nation v Canada (Attorney General)* (1998), [1999] 2 FC 48, [1999] 2 CNLR 60 (FCTD) [*Fairford*], where he recognized that Indians and bands had the capacity to sue for tort, negligence, or any other interference with their interest in their land or any other statutory or common law right. They were therefore not without recourse in protecting their rights and interests. Section 31(3) preserved that right:

> That is not to say that the Fairford Band is without recourse or that, generally speaking, where a government's action interferes with the use and benefit of a reserve by an Indian band, a responsible government would not address questions of compensation. Subsection 31(3) of the *Indian Act* preserves for an Indian or Indian band the opportunity to bring an action against anyone interfering with their rights. See *Custer v. Hudson's Bay Co. Developments Ltd*. (1982), [1983] 1 W.W.R. 566 (Sask. C.A.). Section 31 states in part:
>
> 31.(1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been
>
> (a) unlawfully in occupation or possession of,
> (b) claiming adversely the right to occupation or possession of, or

(c) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought

.. . .

(3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

Except where the *Indian Act* imposes restrictions, Indians may sue for negligence, trespass, or I think, any other interference with their interest in their land or any other rights recognized by statute, common law or, indeed, the *Constitution*. It is this statutory acknowledgment that indicates the Indians are not, in the absence of surrender, vulnerable, at the mercy of the Crown's discretion[13] or without rights and remedies so that it is necessary for them to resort to fiduciary duty as a cause of action. In *Apsassin v. Canada (Department of Indian Affairs & Northern Development)* (1987), [1988] 3 F.C. 3 (Fed. T.D.), (reversed on appeal in *Apsassin, supra,*) Addy J. expressed this view in the following words. Nothing in the appeal decisions detract from his statement. At page 46 he stated:

> The *Indian Act* does impose certain restrictions on the actions and on the rights of status Indians. Except insofar as those specific restrictions might prevent them from acting freely, the Indians are not to be treated at law somehow as if they were not *sui juris* such as infants or persons incapable of managing their own affairs, which would cause some legally enforceable fiduciary duty to arise on the part of the Crown to protect them or to take action on their behalf. They are fully entitled to avail themselves of federal and provincial laws and of our judicial system as a whole to enforce their rights, as they are indeed doing in the case at bar. [emphasis added; at para 66]

[106] The Respondent therefore argued that the Crown's authority to bring a civil suit for trespass under section 31 of the *Indian Act, 1985* was not in the sole discretion of the Minister. Section 31(3) also preserved the right of an Indian or band to sue. Because of this alternate recourse, the remedy for trespass was not solely within the Minister's discretion and therefore the Minister did not have a fiduciary duty to exercise his authority to bring suit for the benefit of a band. The band could do so on its own. The Respondent submitted that:

> The same conclusion applies in respect to the trespass provisions contained in prior versions of the *Act*. Between 1886 and 1951 the trespass provisions of the Act were substantially the same. [Respondent's Brief of Law and Argument dated, October 30, 2013, at para 30]

I take the Respondent's reference to the "trespass provisions contained in the Act" to mean section 22 of the *Indian Act*, 1886, as amended in 1891 (see paragraph 39 above), and its subsequent incarnations.

[107] The history of the *Indian Act* is a long and complicated matter, to be sure. I am not satisfied that the Respondent has fully or accurately captured the situation as it applied when the timber in this Claim was being harvested.

[108] Firstly, as argued by the Claimants, the Claimants no longer had possession once they surrendered the timber. As discussed above, possession is a prerequisite for bringing an action in trespass. Secondly, even apart from possession, the Respondent relies on provisions of the modern *Indian Act* that did not exist at the time in question in this Claim. In brief, versions of the *Indian Act* prior to 1951 and related case law indicate that only the Crown could have brought a trespass action at the relevant time. As the matter is of some complexity I will address the Respondent's arguments in detail.

[109] The *Indian Act, 1886* contained no equivalent to sections 30 and 31 of the *Indian Act, 1985* and particularly subsection 31(3). There was no similar provision dealing with trespass *per se* in the *Indian Act, 1886*.

[110] The earliest precursor to section 31 of the current *Indian Act* did not exist until the 1909-1910 parliamentary session when Parliament enacted section 37A:

> **37A**. If the possession of any lands reserved or claimed to be reserved for the Indians is withheld, or if any such lands are adversely occupied or claimed by any person, or <u>if any trespass is committed thereon, the possession may be recovered for the Indians, or the conflicting claims may be adjudged and determined, or damages may be recovered, in an action at the suit of His Majesty</u> on behalf of the Indians, or of the band or tribe of Indians claiming possession or entitled to the declaration, relief or damages claimed.
> 2. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.

> 3. Any such action may be instituted by information of the Attorney General of Canada upon the instructions of the Superintendent General of Indian Affairs.
> 4. Nothing in this section shall impair, abridge or in anywise affect any existing remedy or mode of procedure provided for cases, or any of them, to which this section applies. [emphasis added; *Indian Act*, 1906, as amended in 1910]

[111] Section 37A received Royal Assent on May 4, 1910. The surrender in the present Claim was effective on February 12, 1904. The operator's bid was accepted on August 22, 1904. The licence issued in February 1907 was not renewed beyond April 30, 1907 and additionally, by letter of April 23, 1909, the operator was advised that no further cutting would be permitted on the Reserve after April 30, 1909 (see paragraphs 20 and 60 above). Therefore, section 37A was not in effect at any time during harvesting under this Claim or in the few months that the operator held a valid licence.

[112] It will be noted that the wording of section 37A spoke only to the Superintendent General's authority to sue. Possession might be recovered "for the Indians …in an action at the suit of His Majesty…" and the action was to be instituted "by information of the Attorney General... upon the instructions of the Superintendent General of Indian Affairs." Subsection 4 did not specify for whom the rights or remedies were preserved. Section 31(3) of the current *Indian Act, 1985* amended the provision with the words "or to an Indian or a band." Those words did not appear until section 31 of the *Indian Act,* SC 1951, c 29 [*Indian Act, 1951*], which came into force on September 4, 1951. As such, this option was not available to the Claimants at the relevant timeframe of the Claim.

[113] The case of *Point v Dibblee Construction Co,* [1934] 2 DLR 785, [1934] OWN 88 (Ont HC) [*Point*], ruled on the effect of the wording of section 37A, by which time the *Indian Act,* RSC 1927 c 98 [*Indian Act, 1927*] governed. Sections 34 and 35 of the *Indian Act, 1927* were essentially the same as sections 21 and 22 of the *Indian Act, 1886*. And section 39 of the *Indian Act, 1886* was identical to section 37A of the *Indian Act, 1927* as quoted above. In *Point,* a band on Cornwall Island in the St. Lawrence River had surrendered reserve land to the Crown to accommodate the building of a road and bridge across its land from Canada to the United States. Some pieces of land occupied by members of the band, including by the Plaintiff, Point, were included in the land

surrendered to the Crown for the building of the road. Although the Plaintiff had occupied the land and the band recognized his occupation, in fact he did not have the necessary location ticket. He sued for an injunction and damages on a number of grounds including trespass to his land. The court addressed all of the grounds of the claim and ruled as follows:

> …Were this not enough to dispose of the plaintiff's right to bring this action, the provisions of The Indian Act provide another reason. Sections 34, 35, 115 and 116 afford summary methods of dealing with persons who trespass on or occupy or use land in a reserve. The appropriate action is taken by the Superintendent General and not by the Indians or the band. The Superintendent General has, by sec. 4, the control and management of the lands and the property of Indians in Canada. Again, if possession of any lands reserved for the Indians is withheld or adversely occupied or claimed by any person, or if trespass is committed thereon, by sec. 39, the possession may be recovered for the Indians, or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians entitled to possession or the relief or damages. Such action may be instituted by information of the Attorney-General for Canada upon the instructions of the Superintendent General of Indian Affairs. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action. I think that subsec. 4 of sec. 39 merely preserves the existing remedies or modes of procedure available to the Superintendent General such, for example, as are afforded by secs. 34, 35, 65, 115 or 116. Section 65, which was mentioned during the course of the argument, refers only to Indian lands, that is, a reserve or portion of a reserve which has been surrendered to the Crown, and is not applicable here. The Statute having provided the remedies for the recovery of land in a reserve unlawfully taken, occupied or used by any person, which remedies are to be put in motion by the Superintendent General and no one else, a suit or action for that purpose by an Indian must necessarily be excluded. The right of the Crown to recover possession of lands is one incident to the control and management of lands reserved for Indians, given it by The British North America Act. *The King v. McMaster,* [1926] Ex. C.R. 68.
>
> It is true that sec. 106 of The Indian Act, R.S.C. 1927, ch. 98, gives Indians and non-treaty Indians "the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them". While a trespass to land is a tort or wrong inflicted upon the person entitled to the possession of the land, the section, when read with the whole Act, refers, I think, to a personal tort such as an assault. [emphasis added; at paras 43-44]

[114] Section 106 of *The Indian Act, 1927* referred to in *Point*, just quoted above provided:

> **106.** Indians and non-treaty Indians shall have the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them.
> 2. In any suit or action between Indians, or in any case of assault in which the offender is an Indian, no appeal shall lie from any judgment, order or conviction by any police magistrate, stipendiary magistrate, or two justices of the peace or an Indian agent, when the sum adjudged or the penalty imposed does not exceed ten dollars.

[115] The near equivalent provision of section 79 of the *Indian Act, 1886* provided:

> **79.** Indians and non-treaty Indians shall have the right to sue for debts due to them, or in respect of any tort or wrong inflicted upon them, or to compel the performance of obligations contracted with them ; but in any suit or action between Indians, or in any case of assault in which the offender is an Indian, no appeal shall lie from any judgment, order or conviction by any police magistrate, stipendiary magistrate, or two justices of the peace or an Indian agent, when the sum adjudged or the penalty imposed does not exceed ten dollars.

[116] In *Point*, the court interpreted section 106 to mean that "Indians" only had a right to sue for <u>personal</u> wrongs. This seems supported by the definition of "Indian" in section 2(*d*) of the *Indian Act, 1927* which referred to individuals as opposed to a collective or group (the wording was nearly identical in the *Indian Act, 1886*):

> *(d)* "Indian" means
>
> (i) any male person of Indian blood reputed to belong to a particular band,
> (ii) any child of such person,
> (iii) any woman who is or was lawfully married to such person;

[117] By contrast, the term "band" in section 2(*b*) of the 1927 *Act* (and nearly identical in the 1886 *Act*) referred to the broader group or collective:

> (*b*) "band" means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys

> for which the Government of Canada is responsible; and, when action is being taken by the band as such, means the band in council;

[118] Where there was a trespass on reserve lands, section 37A permitted the Attorney General of Canada (on instructions of the Superintendent General) to sue for relief on behalf of the "Indians, or of the band or tribe of Indians." When section 37A (refer to paragraphs 110 and 112 above) was eventually amended many years later (coming into force on September 4, 1951) so that subsection 3 included the word "band" as it is in the current *Act* (see paragraph 104 above), the effect was to remove the *Indian Act*'s restriction against bands bringing trespass actions, as had been held in *Point*, so that a band could also bring an action for trespass.

[119] This distinction and expanded application was first ruled upon in *Custer*:

> In order to better understand the section, it is useful to recall that trespass is essentially a violation of the right to possession, and not to ownership; generally speaking, therefore, it is only actionable at the suit of the person entitled to possession. Reserve lands, while vested in the Crown, in the right of Canada, are in the possession of the Band, or its members, and so it is only they, ordinarily, who may sue for trespass upon those lands. Viewed in that context, and bearing in mind the Crown's constitutional powers and duties in relation to Indians and the Lands Reserved for Indians, it is understandable why Parliament should want to enable the Crown to bring an action in trespass in relation to reserve lands without the section, the Crown may not have been entitled to do so.
>
> But the fact the Crown has been empowered to bring an action does not, in our opinion, preclude a band, or a member thereof, in possession of reserve lands, from commencing or maintaining an action in trespass in relation to such lands, independent of action by the Crown. We think that is made quite clear by subsection (3), which expressly preserves the rights and remedies of Indians and Indian Bands, with respect to claims against non-Indians for wrongful occupation or possession of reserve lands. [paras 7-8]

The Court was considering section 31 of the *Indian Act*, RSC 1970, c 1-6. A band's status to maintain a representative action for trespass was also recognized in *Squamish* at paras 45-48. In that case, a band wanted removal of an Indian who it thought was occupying reserve land without authority.

[120] Until section 31 became law in September 1951, permitting and preserving the right of a band to sue for trespass on a reserve, it would appear that a band did not have status to do so, and that only an individual "Indian" could sue and then only for personal wrongs such as the tort of trespass to the person (i.e. assault). Rothstein J. came to the same conclusion in *Fairford* (see paragraph 105 above). I conclude that until September 1951, only an individual member of a band could bring suit for trespass and only for a personal trespass or other personal wrong.

[121] For these reasons, the Respondent's argument that the Claimants could have brought an action in trespass themselves, were therefore not vulnerable to the Crown on this point, and consequently the scope of fiduciary obligation should not extend to protecting the reserve from trespass, cannot succeed.

c) Prosecutorial Discretion and Crown Immunity for Acts of a Judicial Nature

[122] The Respondent further sought to narrow the scope of fiduciary obligations with its submission that the enforcement and penalty provisions of the *Indian Act, 1886* were protected by prosecutorial discretion and the Crown's immunity for acts of a judicial nature.

[123] Section 26 of the *Indian Act, 1886* (see paragraph 41 above) contemplated penalties for unauthorized harvesting of timber upon a reserve. The penalties could be imposed "on conviction" as well as the costs "of prosecution." The Respondent argued that this language signified that the provision was quasi-criminal and that it invoked public law, not private law obligations. Therefore any proceeding under section 26 would engage prosecutorial discretion.

[124] The Respondent also submitted that the Crown was exempt from liability for any act done or omitted by a person while discharging responsibilities of a judicial nature, such as judges acting within their jurisdiction. The same immunity from tort has been extended to public prosecutors (Peter Hogg & Patrick Monahan, *Liability of the Crown*, 3d ed (Toronto: Carswell, 2000) at 122). By extension, the Superintendent General could not be sued for failure to use an enforcement provision of the *Indian Act, 1886* that was

protected by prosecutorial discretion. The Respondent submitted that prosecutorial discretion would also apply to section 23 of the *Indian Act, 1886* where a trespasser directed by a warrant issued under the section was removed from a reserve but returned to the reserve. The Superintendent General or his representative could initiate a complaint resulting in the returning trespasser being imprisoned upon conviction after being brought before a magistrate, justice of the peace, or an Indian Agent acting as a justice of the peace.

[125] The Respondent cited *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 [*Krieger*] and *R v Anderson*, 2014 SCC 41, 458 NR 1 [*Anderson*] to support the submission that the Attorney General had a very broad discretion in deciding to initiate or proceed with a prosecution when acting within his jurisdiction. In *Krieger*, an employee of the Attorney General for Alberta, was assigned to prosecute an accused for murder. Krieger delayed in disclosing DNA evidence taken from the scene and implicating someone other than the accused. Defence counsel complained of the delay to the Deputy Attorney General. The Attorney General conducted an investigation, concluded that the delay of disclosure was unjustified, reprimanded Krieger, and removed him from the case. Not satisfied with the result, the accused complained to the Law Society of Alberta, which commenced an investigation against the prosecutor for ethical misconduct. The Court held that the disclosure of evidence was a legal duty and not a matter of prosecutorial discretion. The prosecutor was not shielded by prosecutorial discretion. Therefore, and quite apart from the Attorney General's ability to discipline employees, the Law Society of Alberta had authority to govern the conduct of the legal profession in Alberta, including Crown prosecutors in these circumstances. The Court described the basic principles of prosecutorial discretion:

> 30. It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, at paras. 157-58 (dissenting on another point).
>
> 31. This side of the Attorney General's independence finds further form in the principle that courts will not interfere with his exercise of executive authority,

as reflected in the prosecutorial decision-making process. In *R. v. Power*, [1994] 1 S.C.R. 601, L'Heureux-Dubé J. said, at pp. 621-23:

> It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is in the domain of the executive ....
>
> Donna C. Morgan in "Controlling Prosecutorial Powers – Judicial Review, Abuse of Process and Section 7 of The Charter" (1986-87), 29 *Crim. L.Q.* 15, at pp. 20-21, probes the origins of prosecutorial powers:
>
> > Most [prosecutorial powers] derive ... from the royal prerogative, defined by Dicey as the residue of discretionary or arbitrary authority residing in the hands of the Crown at any given time. Prerogative powers are essentially those granted by the common law to the Crown that are not shared by the Crown's subjects. While executive action carried out under their aegis conforms with the rule of law, prerogative powers are subject to the supremacy of Parliament, since they may be curtailed or abolished by statute.
> >
> > ...
> >
> > In "Prosecutorial Discretion: A Reply to David Vanek" (1987-88), 30 *Crim. L.Q.* 378, at pp. 378-80, J. A. Ramsay expands on the rationale underlying judicial deference to prosecutorial discretion:
> >
> > ...
> >
> > It is fundamental to our system of justice that criminal proceedings be conducted in public before an independent and impartial tribunal. <u>If the court is to review the prosecutor's exercise of his discretion the court becomes a supervising prosecutor. It ceases to be an independent tribunal.</u> [emphasis in original; at paras 30-31]

[126] The Court therefore concluded in *Krieger*:

> "Prosecutorial discretion" is a term of art. It does not simply refer to any discretionary decision made - by a Crown prosecutor. <u>Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.</u> [emphasis added; para 43]

[127] The Supreme Court of Canada recently reaffirmed and clarified the principles of prosecutorial discretion in *Anderson*:

> Decisions by Crown prosecutors are either exercises of prosecutorial discretion or tactics and conduct before the court. Subsequent to this Court's decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, confusion has arisen as to what is meant by "prosecutorial discretion" and the law has become cloudy. In particular, the use of the word "core" in *Krieger* has led to a narrow definition of prosecutorial discretion. The present appeal provides an opportunity for clarification.
>
> "Prosecutorial discretion" is an expansive term. It covers all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Prosecutorial discretion is entitled to considerable deference. It must not be subjected to routine second-guessing by the courts. Judicial non-interference is a matter of principle based on the doctrine of separation of powers. In contrast, tactics and conduct before the court are governed by the inherent jurisdiction of the court to control its own processes. Deference is not owed to counsel who behave inappropriately in the courtroom, but a high degree of deference is accorded to the tactical decisions of counsel. Abuse of process is not a precondition for judicial intervention in relation to a party's tactics and conduct before the court.
>
> Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision. [Headnote]

[128] *Krieger* and *Anderson* thus illustrate that courts may only interfere with the Attorney General's exercise of prosecutorial discretion where there has been some abuse of process, flagrant impropriety, or malicious prosecution.

[129] The Respondent also observed that "the Supreme Court of Canada has noted that the Crown itself would remain absolutely immune since the decision on whether to prosecute was a decision of a 'judicial nature'" (Respondent's Brief of Law and Argument, paragraph 49). In *Nelles v Ontario*, [1989] 2 SCR 170 at para 5, 60 DLR (4th) 609 [*Nelles*], Lamer J. agreed that the decision to prosecute was "judicial" in nature in

that case. He also stated, however, that prosecutorial discretion was not subject to absolute immunity. Further in *Nelles* he held:

> …For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the *Charter*. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.
>
> There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution… [at paras 55-56]

It should be noted that the principles stated in *Nelles* were made in the context of a claim for malicious prosecution against the Attorney General, where "a motive that involves an abuse or perversion of the system" was an underlying requirement for success. There is no suggestion in the present Claim that the Superintendent General or his officials were motivated by malice or other high impropriety.

[130] Citing *Labrador Métis Nation v Canada (Attorney General)*, 2006 FCA 393 at para 4, 277 DLR (4th) 60 [*Labrador Métis*], the Respondent submitted that "...it is a constitutional principal that the Attorney General acts independently when making

decisions to prosecute, or to stay a prosecution, and that, save for the most exceptional circumstances, the Attorney General is accountable in these matters, not to the courts, but to Parliament."

[131] Similarly, prosecutorial discretion cannot be a matter of consultation, for example with a band as a part of a fiduciary obligation to consult. The exercise of a prosecutor's discretion should not become the subject of negotiation with interested parties (*Labrador Métis*, at para 30). *Krieger* also recognized the Attorney General's independence to exercise prosecutorial discretion as a constitutional imperative (quoted in paragraph 126 above).

[132] As a result of the principles reviewed, the Respondent submitted that a fiduciary duty requiring the Crown to take advantage of the penalty provisions of section 26 of the *Indian Act, 1886* (and by implication other such enforcement and penalty provisions) would undermine the Attorney General's exercise of discretion over prosecutions. Therefore, fiduciary obligations "in the nature of private law duties" should not extend to decisions to initiate prosecution under section 26 of the *Indian Act, 1886* or similar provisions. The Respondent concluded that the exercise of prosecutorial discretion is a public law duty that cannot ground a private law obligation of fiduciary duty. Otherwise, the Crown's independence and impartiality would be impaired.

[133] In contrast, the Claimants argued that the many enforcement powers of the *Indian Act, 1886*, including section 26, were better characterized as aimed at protecting reserves in an administrative and civil (as opposed to criminal) manner. The Claimants emphasized that the purpose of section 26 was to protect the *sui generis* interests of Indians on their reserves from third party intrusion. Any penalties accruing pursuant to section 26 are paid to the band and such determinations could be made by Indian Agents. The Claimants argued that these characteristics imply that section 26 is better characterized as a civil measure and not a criminal one. As such, the Claimants submitted that the Crown's decision-making pursuant to section 26 fell squarely within the Crown's fiduciary obligations.

[134] I am persuaded that prosecutorial discretion and Crown immunity for acts of a judicial nature are foundational principles of Canadian law and that prosecutorial decision-making will only be reviewable for abuse of process. But while it is true that *Ochapowace First Nation v Canada (Attorney General)*, 2009 FCA 124, [2009] 3 CNLR 242, [*Ochapowace*] and *Labrador Métis* applied the principle of prosecutorial discretion, those cases did not arise in analogous circumstances to this Claim. Surrendered reserve interests were not at stake. As discussed, *Wewaykum* and related cases indicate that the Crown's fiduciary relationship with Aboriginal peoples also involves foundational principles of Canadian law, engages the honour of the Crown and has constitutional dimensions. The Supreme Court of Canada has repeatedly stated that a high level of fiduciary obligation will be engaged when the Crown undertakes discretionary control over a surrendered reserve interest.

[135] In considering the Supreme Court of Canada's jurisprudence, I note that the Supreme Court of Canada has also acknowledged that in exceptional circumstances, some types of Crown decision-making may be exempt from fiduciary obligation or such obligations may be subject to modification due to inherent conflict between the Crown's "many hats" even though the Crown has discretionary control over a very significant Aboriginal interest. This was the situation in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 [*Ermineskin*], in which the Crown had discretionary control over the two First Nations' trust funds.

[136] In *Ermineskin*, the Samson Nation and Ermineskin Nation were signatories to Treaty Number 6, entered into in 1876. Oil and gas were discovered beneath the surface of two reserves, causing the band to surrender its interests in the oil and gas on those reserves so that the Crown could enter into arrangements with third parties to exploit it. Those arrangements had produced substantial returns which were held in the bands' trust accounts as provided in the *Indian Act*, bearing interest according to various regulatory provisions in force from time to time. The bands claimed that the Crown had breached its fiduciary obligation by failing to invest the funds. The Court rejected the bands' claim, holding as follows (*inter alia*):

> The Crown's position in the setting of the interest rate paid to the bands is also unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands' best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the public treasury financed by taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved.
>
> As Binnie J. stated in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96, "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands.
>
> The standard of care required of the Crown in administering the funds of the bands is that of "a man of ordinary prudence in managing his own affairs", *per* Dickson J. in *Fales*, at p. 315. However, because the Crown "can be no ordinary fiduciary", its obligation to act as a person of ordinary prudence in managing his or her own affairs is modified by relevant legislation and by the kinds of considerations outlined above. [at paras 129-131]

[137] Because such modification or exemption is exceptional and based on particular special circumstances, I conclude that it must be narrowly scoped when surrendered reserve interests are at stake. As discussed, the Supreme Court of Canada has been clear that fiduciary obligations relating to surrendered reserves expand to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation (*Wewaykum,* at para 86). I also conclude that the Crown's decisions on whether or not to prosecute an alleged trespasser pursuant to the *Indian Act*'s prohibitions in issue in this Claim, or decisions relating to how to conduct a prosecution once underway, will be protected by prosecutorial discretion. Prosecutorial powers lie outside the scope of fiduciary obligation and are subject to review only on the basis of abuse of process. No abuse of process has been suggested in this Claim.

[138] To be more specific with respect to the meaning of the statutory regime, I accept the Respondent's submission that in 1904-1910, Indian Agents at times exercised judicial authority: *Indian Act, 1886,* s 23, s 26 and s 117. However, they also exercised supervisory, monitoring and management functions. To use Binnie J.'s descriptive expression, both the Superintendent General and Indian Agents "wore many hats,"

undoubtedly of necessity given the geography and sparse settlement of the time. Many of the enforcement measures were not of a quasi-criminal nature – such as the warrant to remove a trespasser, giving notice to vacate, and seizure of timber cut without authority or seizure of intermingled timber cut with and without authority (*Indian Act, 1886,* first part of s 22(1), first part of s 22(2), s 58, s 62 and s 63). The use of these enforcement tools would be a matter of the Superintendent General's managerial discretion, not prosecutorial discretion. Also, where summary prosecution was available and could end up before an Indian Agent acting as a judicial officer, the Superintendent General had authority to deputize someone else as his representative or agent in initiating the measure (for example, as in sections 23 and 26 of the *Indian Act, 1886*). If it had been initiated by the Indian Agent, that person would surely not have also acted as a judicial officer on the same matter.

[139] Prosecutorial discretion will come into play when a matter is placed before a judicial officer or court, especially in criminal or quasi-criminal matters. In the context of the *Indian Act, 1886* it would come into play where the Crown was seeking summary conviction with the possibility of monetary penalty or imprisonment. As we have seen, such prosecutions were possible under the *Indian Act, 1886* although most of the enforcement measures were of a civil nature and might not even come before a judicial officer. Where a prosecution under the *Indian Act, 1886* was contemplated, I would expect that the Superintendent General (or someone on his behalf in the Department) would swear an information based on proper grounds and supported by evidence. This would be done as an administrative act and decision. However, when it reached the court, actual prosecution would be assumed by the Attorney General, his agent or a provincial prosecutor, who would enjoy full prosecutorial discretion in the actual conduct of the prosecution before the court. In my view there is not necessarily a conflict between the administration of the tools of enforcement, including summary conviction penalties, and prosecutorial discretion.

[140] The *Indian Act* and *ITR* thus provided a range of tools that could be deployed in a stepped manner of rising intensity and legal force. The initial "steps" were administrative measures designed to enable the Department to carry out its role in protecting bands'

reserve interests. Only when these measures proved ineffective would prosecution toward a summary conviction be considered. Thus, while I acknowledge that several types of discretion might come into play in employing an enforcement measure under the *Indian Act, 1886* and its *ITR*, including prosecutorial discretion, I do not regard the exercise of prosecutorial discretion as interfering with enforcement generally under the *Indian Act* where appropriate and necessary.

d) Administrative Discretion on Matters of Public Policy

[141] The Respondent further sought to narrow the scope of fiduciary obligations in this Claim with the submission that the enforcement and penalty provisions of the *Indian Act* and regulations were exempt because they involved the Minister's administrative discretion in the allocation of resources or targeting enforcement measures as a matter of public policy.

[142] The Respondent argued that the power to seize timber pursuant to section 62 of the *Indian Act, 1886* (see paragraph 43 above) was discretionary. While it was an available enforcement measure, the Minister (and his designates) had discretion over when to use it. As the Respondent put it, the Minister had general discretion in allocating resources for the enforcement of legislation and targeting enforcement mechanisms. The Respondent observed:

> …The structure of this claim is an attempt to characterize any imperfection in the operation of the laws and enforcement mechanisms as breaches of duty leading to an entitlement to damages. In effect, these allegations seek to impose, through tort law, an obligation to achieve particular results. Such an obligation is essentially foreign to tort law. [Respondent's Brief of Law and Argument, at para 58].

[143] As authority, the Respondent cited *Distribution Canada Inc v MNR*, [1993] 2 FC 26, 99 DLR (4th) 440 [*Distribution Canada*], where the Federal Court of Appeal discussed a Minister's discretion to enforce a law. In that case an organization representing Canadian grocers sought to compel the Minister of National Revenue to collect duties on the purchase of cross-border shoppers. The *Customs Tariff Act* provided that a duty "shall be levied, collected and paid" on groceries and certain other items

brought back from the U.S.A. to Canada by Canadian residents out of the country for less than 24 hours. However, the Minister had a policy not to collect revenues generally under $1.00 and under $5.00 where there were certain high volumes of traffic. The Court held in *Distribution Canada*:

> 27. There is no doubt that, as in the case of the Commissioner of Police, in *R. v. Metropolitan Police Commissioner: Ex parte Blackburn* the Minister "owe[s] the public a clear legal duty to enforce the law". This implies that he must take all reasonable means to enforce the provisions of the Act. The reasonableness of those measures requires the assessment of policy considerations which are outside the domain of the courts since they deal with the manner in which the law ought to be enforced. What the appellant claims, however, is that the Minister is not doing all he can. An example of a voluntary measure suggested by the appellant at the hearing, and not used by the Minister, consists in the installation of collection boxes into which monies equivalent to the duty owed would be thrown by shoppers as they cross the border returning home.
>
> 30. The result, in my view, becomes obvious. Only he who is charged with such public duty can determine how to utilize his resources. This is not a case where the Minister has turned his back on his duties, or where negligence or bad faith has been demonstrated. It is a case where the Minister has established difficulties in implementation and where he enjoys a discretion with which the law will not interfere. [emphasis added; at paras 27, 30]

[144] The Respondent referred to other authorities that recognized the same principle: *Northern Lights Fitness Products Inc. v Canada (Minister of National Health and Welfare)* (1994), 75 FTR 111, [1994] FCJ No 319; *Attis v Canada (Minister of Health)*, 2008 ONCA 660, 93 OR (3d) 35; *Guidon v Ontario (Minister of Natural Resources)* (2006), 207 OAC 135, [2006] O.J. No. 303 (Ont Div Ct).

[145] These authorities refer to the Crown's public law duties to the general population. They are distinguishable from circumstances in which the Crown has undertaken discretionary control over a First Nation's reserve interest, giving rise to distinct, *sui generis*, fiduciary obligations in the nature of private law duties: *Guerin*; *Blueberry River*; *Wewaykum*.

[146] I do not take issue with the principle quoted in the *Distribution Canada* case, or the other authorities cited for that matter. Indeed, I agree that the Superintendent General

and his Department had considerable discretion in whether and when to employ whatever enforcement measures were available under the *Indian Act* and the *ITR* in the efficient administration of an accepted surrender. However, while prosecutorial decisions are immunized by prosecutorial discretion when the matter reaches a court, the Crown's other administrative discretions were within the scope of fiduciary obligations. Concerns relating to the impact on the public purse may be better addressed through concepts such as reasonable diligence or acknowledgement of competing demands for public funds alongside existing fiduciary obligations, as in *Ermineskin*. I therefore conclude that the jurisprudence does not support excluding such administrative decisions altogether from the scope of fiduciary duty on this basis.

e) Summary of the Scope of Fiduciary Obligations

[147] In summary then, the Crown's fiduciary obligations to Aboriginal peoples do not exist in "general" or "at large." They are very fact driven, vary with the nature of the interest at stake, must be assessed according to the circumstances and are complicated by the fact that the fiduciary is a government. The Crown's obligations are "*sui generis*" and, in distinct contrast to public trust situations, are "in the nature of a private law duty" (*Wewaykum*, at para 74).

[148] In situations where a band surrenders lands from a reserve (including resources on or in the lands) upon terms that the Crown formally accepts, the cases are clear that the Crown bears a *sui generis* fiduciary duty to the band in its management of the surrendered asset. Again, the Crown's fiduciary duty is based on a cognizable Indian interest (usually land) where the Crown has assumed sole control in dealing with or managing that interest.

[149] The Supreme Court of Canada has been very clear that when the Crown undertakes discretionary control over a surrendered reserve, a very high level of fiduciary obligation will generally apply. In exceptional circumstances, fiduciary obligations that would otherwise attach will nevertheless have to be modified. Prosecutorial discretion and immunity for acts of a judicial nature are such exceptions. However, as discussed above, the administrative powers relating to protecting reserves and encouraging

compliance in the *Indian Act, 1886* involve no conflict with prosecutorial discretion and fell within the scope of fiduciary obligation as a matter of law. Having clarified the scope of fiduciary obligations in the circumstances of this Claim, the remainder of these Reasons address: (1) what precise duties and standard of care attached to the Superintendent General's administrative powers pursuant to the timber management regime; and, (2) whether any breaches of those duties occurred on the facts of this Claim.

2. The Nature of the Fiduciary Duties

[150] I turn now to the specific duties and standard of care owed by the Crown when managing the Claimants' surrendered timber.

[151] The Supreme Court of Canada has articulated a number of duties that apply when the Crown manages a surrendered asset. In *Wewaykum*, Binnie J. elaborated the strong fiduciary obligations that will typically be engaged when the Crown undertakes discretionary control over a fully created reserve:

> ...Once a reserve is created, the content of the Crown's fiduciary duty expands to include the protection and preservation of the band's quasi-proprietary interest in the reserve from exploitation.
>
> …
>
> It is in the sense of "exploitative bargain", I think, that the approach of Wilson J. in *Guerin* should be understood. Speaking for herself, Ritchie and McIntyre JJ., Wilson J. stated that prior to any disposition the Crown has "a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction" (p. 350). The "interests" to be protected from invasion or destruction, it should be emphasized, are legal interests, and the threat to their existence, as in *Guerin* itself, is the exploitative bargain (e.g. the lease with the Shaughnessy Heights Golf Club that in *Guerin* was found to be "unconscionable"). This is consistent with *Blueberry River* and *Lewis*. Wilson J.'s comments should be taken to mean that ordinary diligence must be used by the Crown to avoid invasion or destruction of the band's quasi-property interest by an exploitative bargain with third parties or, indeed, exploitation by the Crown itself. (Of course, there will also be cases dealing with the ordinary accountability by the Crown, as fiduciary, for its administrative control over the reserve and band assets.) [at paras 86, 100]

[152] “Ordinary accountability” in the above paragraph includes the usual private law trust duties that Binnie J. described as attaching to pre-reserve creation in *Wewaykum*, including:

> … the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries. [at para 86]

Binnie J. also included here the standard of care that had been stated in *Blueberry River*: "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'" (*Wewaykum* at para 94; *Blueberry River* at para 104).

[153] In *Blueberry River*, in addition to the question of whether the Department ought to have retained mineral rights in the surrendered reserve, there was also a question of whether the Department’s fiduciary obligation included the duty to use section 64 of the *Indian Act, 1927*, which gave the Superintendent General the power to cancel a sale or lease. Section 64 of the *Indian Act, 1927* was nearly identical in wording to section 46 of the *Indian Act, 1886* which provided:

> **46.** If the Superintendent General is satisfied that any purchaser or lessee of any Indian lands, or any assignee claiming under or through him, has been guilty of any fraud or imposition, or has violated any of the conditions of sale or lease, or if any such sale or lease has been made or issued in error or mistake, he may cancel such sale or lease, and resume the land therein mentioned, or dispose of it as if no sale or lease thereof had ever been made; and all such cancellations heretofore made by the Governor in Council, or by the Superintendent General, shall continue valid until altered. [emphasis added]

[154] McLachlin J. (as she then was) also found the fiduciary duty to require reasonable diligence in correcting an inadvertence, mistake, or misjudgement with respect to the beneficiary band’s interest when the Department became aware of the error, and to use such powers as were available to it to rectify the situation:

> In my view, the DIA was under a duty to use this power to rectify errors prejudicing the interests of the Indians as part of its ongoing fiduciary duty to the Indians. The fiduciary duty associated with the administration of Indian lands may have terminated with the sale of the lands in 1948. However, an ongoing

> fiduciary duty to act to correct error in the best interests of the Indians may be inferred from the exceptional nature of s. 64. That section gave the DIA the power to revoke erroneous grants of land, even as against *bona fide* purchasers. It is not unreasonable to infer that the enactors of the legislation intended the DIA to use that power in the best interests of the Indians. If s. 64 above is not enough to establish a fiduciary obligation to correct the error, it would certainly appear to do so, when read in the context of jurisprudence on fiduciary obligations. Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith*, *supra*, *per* Wilson J.; and *Hodgkinson v. Simms*, *supra*. Section 64 gave to DIA power to correct the error that had wrongly conveyed the Band's minerals to the DVLA. The Band itself had no such power; it was vulnerable. In these circumstances, a fiduciary duty to correct the error lies.
>
> The DIA's duty was the usual duty of a fiduciary to act with reasonable diligence with respect to the Indians' interest. Reasonable diligence required that the DIA move to correct the erroneous transfer when it came into possession of facts suggesting error and the potential value of the minerals that it had erroneously transferred [emphasis added; *Blueberry River,* at paras 115 and 116]

[155] *Blueberry River* is therefore authority for the proposition that the fiduciary obligation may require the Department to make use of available discretionary statutory powers to protect a First Nation’s reserve interest.

[156] Ordinary prudence and reasonable diligence do not require a trustee to be infallible or to guarantee a particular outcome, as Rothstein J. held in *Ermineskin*:

> There is no duty of a trustee at common law to guarantee against risk of loss to the trust corpus or that the corpus would increase. "Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs", *per* Dickson J. (as he then was) in *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. However, in *Fales*, Dickson J. observed, at p. 319, that "[a] trustee is not expected to be infallible nor is a trustee the guarantor of the safety of estate assets". [at para 57]

[157] Although the fiduciary is not required to be infallible, the beneficiary is entitled to loyalty and care:

> The Crown had discretion with respect to the terms on which it granted rights to exploit the minerals and with respect to the way in which it dealt with the royalties it received on the bands' behalf. It was obligated to exercise that discretion for the benefit of the bands who rendered themselves vulnerable by having ceded their power over the minerals to the Crown by reason of the Surrenders. The bands were entitled to expect that the Crown would exercise its discretionary power with loyalty and care. [*Ermineskin*, at para 69]

[158] In *Blueberry River*, McLachlin J. (as she then was) also found that the Crown had a duty to follow existing policy. McLachlin J. concluded that the Crown had a long-standing policy of reserving mineral rights when disposing of land, including in respect of earlier dispositions to veterans, and eventually even to reserves dedicated to bands (*Blueberry River*, at paras 99-100). The reason for reserving mineral rights was that they had proven to be a good source of revenue in themselves. McLachlin J. therefore reasoned that the Department ought to have reserved mineral rights on the surrendered land and for the same reason that it did on its own lands, and that the failure to do so constituted a breach of fiduciary duty:

> The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band. [at para 104]

[159] Speaking for the majority in *Blueberry River*, Gonthier J. agreed:

> …As my colleague McLachlin J. observes, the DIA had a long-standing policy, pre-dating the 1945 surrender, to reserve out mineral rights for the benefit of the aboriginal peoples when surrendered Indian lands were sold off. This policy was adopted precisely because reserving mineral rights was thought to be "conducive to the welfare" of aboriginal peoples in all cases. The existence and rationale of this policy (the wisdom of which, though obvious, is evidenced by the facts of this case) justifies the conclusion that the DIA was under a fiduciary duty to reserve, for the benefit of the Beaver Band, the mineral rights in I.R. 172 when it sold the surface rights to the DVLA in March 1948. In other words, the DIA should have continued to lease the mineral rights for the benefit of the Band as it

> had been doing since 1940. Its failure to do so can only be explained as "inadvertence" [at para18]

[160] Gonthier J. also agreed that the Crown's fiduciary obligation required it to correct errors or oversights and to use such powers as were within its means to do so. Failure to do so would constitute another breach:

> I agree with McLachlin J. that the breach of fiduciary duty committed by the DIA is not limited to the date when the mineral rights in I.R. 172 were sold to the DVLA. The DIA was under a duty to act in the best interests of the Beaver Band in all of its dealings with the mineral rights in I.R. 172, and as I noted above, this gave rise to a specific duty to lease those mineral rights for the benefit of the Band according to the terms of the 1945 agreement. So long as the DIA had the power, whether under the terms of the surrender instrument, or under the *Indian Act*, to reserve the mineral rights through a leasing arrangement, the DIA was under a fiduciary duty to exercise this power. Thus, like McLachlin J., I think that s. 64 of the Act is very significant, since it gave the DIA the power to revoke an erroneous sale or lease of Indian lands. Because the mineral rights in I.R. 172 were sold inadvertently, s. 64 provided the DIA with the power to reacquire the reserve lands, and thus afforded the DIA a "second chance" to effect a lease of the mineral rights.
>
> In her reasons, McLachlin J. amply demonstrates that between July 15, 1949 and August 9, 1949, the DIA became aware of two facts: (1) the mineral rights in I.R. 172 were potentially of considerable value; and (2) the mineral rights had been sold to the DVLA in 1948. It should also be recalled that the DIA had a long-standing policy of reserving mineral rights for the benefit of aboriginal peoples when selling Indian lands. Given these circumstances, it is rather astonishing that no action was taken by the DIA to determine how the mineral rights could have been sold to the DVLA. Little effort would have been required to detect the error that had occurred.
>
> As a fiduciary, the DIA was required to act with reasonable diligence. In my view, a reasonable person in the DIA's position would have realized by August 9, 1949 that an error had occurred, and would have exercised the s. 64 power to correct the error, reacquire the mineral rights, and effect a leasing arrangement for the benefit of the Band. That this was not done was a clear breach of the DIA's fiduciary duty to deal with I.R. 172 according to the best interests of the Band. [emphasis added; *Blueberry River*, at paras 20-22]

[161] In *Lac Seul,* O'Keefe J. also faced the question of whether the Crown should have followed or employed certain provisions in the *Indian Act, 1886* and its *ITR*. In this case,

the band had surrendered timber on its reserve to be sold by the Department in the usual way. Canada had accepted the surrender, put the timber up for tender, and entered into sale arrangements. However, the forester retained to value the timber made errors that the Crown did not correct although it ought to have noticed them and it had ample opportunity to do so.

[162] O'Keefe J. summarized the applicable standard of care and stated it more fully:

> The plaintiff, in its written submissions, at paragraph 18 stated:
>
> > Therefore, according to *Blueberry River*, when reserve land is surrendered in trust for private purposes, as a fiduciary the Crown must:
> >
> > a. Remember its role as trustee and act only in the best interests of the beneficiary;
> >
> > b. Exercise any enlarged rights and powers on behalf of the beneficiary;
> >
> > c. Have the utmost loyalty to the beneficiary;
> >
> > d. Intervene between the beneficiary and third parties who wish to make exploitative bargains;
> >
> > e. Act in the manner of a "man of ordinary prudence in managing his own affairs";
> >
> > f. Correct an error in the best interests of the beneficiary.
>
> Having reviewed *Blueberry River* above, I would slightly change a and c to read:
>
> > a. Remember its role as a trustee and act in the best interests of the beneficiary;
> >
> > c. Exercise the power with loyalty and care;
>
> Otherwise, I agree with the plaintiff's statement. [*Lac Seul*, at para 24]

[163] O'Keefe J. found that the failure to correct the errors constituted a breach of fiduciary duty owed to the band (*Lac Seul*, at paras 51, 58). He also detailed the Department's failure to comply with a variety of provisions under the *ITR* and held that

non-compliance constituted a breach of fiduciary duty because the provisions supported proper management of the timber under the Department's control:

> ...At paragraph 236 of the plaintiff"s written submissions, the plaintiff submits that Canada failed to meet the standards set out in the ITRs in the following respects:
>
> a. Failed to obtain security bonds from licensees in contradiction of s. 18 of the *Regulations*;
>
> b. Granted yearly license renewals despite the fact that license-holders often did not provide the proper paper work required by s. 12 of the *Regulations*;
>
> c. Allowed hazardous harvesting practices on the Reserve in contradiction of s. 22 of the *Regulations*;
>
> d. Allowed for timber dues to be sent in without a licensed scaler checking the amounts and kinds of timber cut, as well as allowing timber operators to neglect or mark their timber in contradiction to s. 23 and s. 10 of the 1923 *Timber Regulations*;
>
> e. Allowed license renewals regardless of dues [not] being paid on time in contradiction of s. 7 of the *Regulations*; and
>
> f. Allowed license renewals despite receiving repeatedly late applications for renewal in contravention of s. 8 of the *Regulations*.
>
> The evidence presented in this trial proves that these types of breaches did occur. The issue is whether this conduct amounts to breaches of the fiduciary duty owed to the Band by the Crown. I have come to the conclusion that these ITRs are in place to assist with the proper management of the timber limits after they have been tendered. By way of example, the requirement to mark the timber provides a way in which the timber taken from the Reserve can be identified. There was a problem in the present case as certain timber was not marked and as a result, it could not be determined whether it came from Reserve lands or from other lands.
>
> I have come to the conclusion that following the Regulations would allow for proper management of the timber limits after they were tendered. The Crown breached its fiduciary duty owed to the Band when it did not comply with the ITRs.
>
> At paragraph 290 of its written submissions, the plaintiff alleges that the defendant also breached its fiduciary duty to prudently manage the plaintiff's resources by:

> a. Not recovering the proper ground rent for the timber limit;
>
> b. Failing to make sure that the operator of the timber limit was working the limit;
>
> c. Failing to collect timber dues in a consistent manner;
>
> d. Failing to monitor or penalize the practices of license-holders.
>
> I have dealt with these matters previously but I would like to note the following in relation to d. The plaintiff's historical expert, James Morrison stated at paragraph 358 of his expert's report:
>
> > Timber scaler George Hynes sent the Department another letter on 4 May 1931, in response to the headquarters letter of 14 April which had only just reached him. Mr. Hynes argued that the kind of check scale he had just carried out was basically useless. The only way to ensure proper supervision of Indian Reserve timber, he said, was to scale every piece taken off by a licensee:
> >
> > ...
> >
> > I also wish to mention that what I think is a check scale will get you no where. In the first place who are you to check? There is only one right way to check scale on the woods operations carried out on the Indian Reserves, and that is to make a complete piece scale of everything taken out by the licensees. I consider that I did the work in a much shorter time than the Department of Lands & Forests Prov of Ontario would wish a scaler to do it in, but as the winter was beginning to show signs of a very early break up I had to work hard and at that work on Sundays to catch up with my scale. I regret indeed that the delay in sending in my report caused you to remind me, but I assure you the delay was unavoidable.
>
> I am satisfied that the Crown breached its fiduciary duty to the Band by failing to properly manage the timber limits once tendered. [at paras 72-74]

[164] In addition to the duties discussed so far, where the Crown has a fiduciary obligation to a band it also includes the duty to consult and to seek new instructions when the circumstances go beyond the original instructions of the First Nation: *Guerin*, at 388-389. Consultation is a function of the basic fiduciary duty of loyalty and full disclosure. It

is surely also a function of the "guiding principle" that the decisions of Aboriginal peoples should be honoured and respected as discussed in paragraph 70 above.

[165] Dickson J. identified the importance of consultation as a component of the Crown's fiduciary duty in *Guerin*:

> … When the promised lease proved impossible to obtain, the Crown, instead of proceeding to lease the land on different, unfavourable terms, should have returned to the Band to explain what had occurred and seek the Band's counsel on how to proceed. The existence of such unconscionability is the key to a conclusion that the Crown breached its fiduciary duty. Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.
>
> ...
>
> In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed the Band. It must make good the loss suffered in consequence. [emphasis added; 388-389]

[166] In *Fairford*, Rothstein J. acknowledged the Crown's fiduciary obligation to consult and commented on the scope of consultation required. Citing Lamer C.J. in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193, as authority, Rothstein J. held:

> … This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. [emphasis added; at para 198]

[167] *Fairford* involved a project by Manitoba to control flooding on the Fairford River. Manitoba had undertaken flood control works, but in doing so it had caused greater flooding on the adjacent band's reserve. As a result, Manitoba, the band, and Canada had entered into a three-way agreement to exchange reserve lands in the flood plain for other non-flooding land. However, Canada soon identified shortcomings in the proposal that it

believed would be improvident to the band, so it refused to ratify the agreement. Yet Canada did nothing for six or seven years because it could not decide what to do or how to rectify the situation. In all that time, it did not advise the band about its concerns or consult with it as to why the agreement was improvident or how it might be resolved. As a further part of the general flood control arrangement, the band had also lost eleven acres of land taken for a highway in 1960 but Canada had failed to transfer the land in issue or to collect payment until 1971. Rothstein J. found that Canada owed the band fiduciary duties relating to the compensation agreement and that it had breached its duties (paras 227, 230). In particular, Canada had failed to act with diligence in identifying the deficiencies in the proposed three-way agreement and in consulting with the band:

> The duty of a fiduciary relates to the discretion that is to be exercised. That must include assessing the merits of the agreement from the point of view of the Indian band. What Canada was required to do was to determine, in a timely manner, what, if anything, was improvident in the compensation agreement and advise the Fairford Band…
>
> ...
>
> Over this period I find that Canada was in breach of its fiduciary duty to the Fairford Band in failing to competently address the deficiencies of the compensation agreement in a timely manner and in failing to consult with the Band once the deficiencies should have been discovered to determine a course of action to be taken… [at paras 227, 230]

[168] In summary, the fiduciary duties that applied to the Crown's management of the Claimants' surrendered timber include:

- the duty to use ordinary diligence to preserve and protect the surrendered interest from exploitative bargains with third parties or exploitation by the Crown itself (*Wewaykum,* at para 86);
- "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" (*Wewaykum,* at paras 86 and 100);

- the duty to make appropriate use of discretionary statutory powers that were designed to protect bands' reserve interests (*Blueberry River*; *Lac Seul*);
- the duty to treat the surrendered asset with as much care as a man of ordinary prudence in managing his own affairs (*Blueberry River*);
- the duty to follow existing policies (*Blueberry River*);
- the duty to consult and seek instructions when circumstances go beyond what the surrendering First Nation agreed to (*Guerin*); and,
- finally, reasonable diligence in carrying out the above duties.

As the terms "reasonable diligence" and "ordinary prudence" imply, the fiduciary obligation does not require infallibility nor is the fiduciary required to guarantee a particular outcome (*Ermineskin*).

D. Final Analysis: Breaches of Fiduciary Duty

[169] In the end, this Claim is a classic surrender situation, as in *Guerin* and *Blueberry River*, where the Crown had sole control of a surrendered reserve and sole discretion in its use pursuant to the surrendering First Nation's instructions. I conclude additionally that the Crown had in fact undertaken discretionary control over the Claimants' reserve both through the imposition of the *Indian Act* and, in a further distinct way, through acceptance of the Claimants' timber surrender.

[170] As discussed, while the Respondent admitted that it owed the Claimants fiduciary obligations in the management and disposal of the surrendered timber, it also sought to narrow the scope of those obligations by denying an obligation to prevent trespasses and excluding certain types of Crown decision-making. As explained above, I am only persuaded that the prosecutorial powers in issue in this Claim should be excluded from the application of fiduciary obligations in the context of the actual conduct of the prosecution before a judicial official. In reaching this particular conclusion I want to be clear that I do not find there was any indication or evidence of a particular need or requirement to charge the operator in this case with a summary conviction offence or to prosecute same. The charging of summary offences was just one of the managerial tools

available to the Department in protecting surrendered assets and advancing the objective of the accepted surrender.

[171] The Respondent further submitted that it had met its obligations through the proper exercise of administrative discretion. It is now time to consider: (1) the precise meaning of the general duties and standard of care articulated in the preceding section given the factual context of this Claim; and, (2) whether the Crown's management of the Claimants' surrendered timber met or breached the duties owed to the Claimants.

[172] The facts are not significantly in dispute. The only licence issued to the operator was Timber Licence No. 135, which occurred sometime in February 1907 (see paragraph 56 above). Timber Licence No. 135 expired on April 30, 1907, according to Regulation 11 (see paragraph 34 above). This was confirmed in Mr. Pedley's letter of January 16, 1909, including that the licence had not been renewed at all after April 30, 1907, so that all operations on the Reserve before February 1907 and after April 30, 1907, were unauthorized (see paragraph 60 above). Therefore the operator only had a valid licence for three to four months of the entire period following acceptance of the tender.

[173] It is clear that the operator trespassed and was non-compliant in numerous ways which, for clarity, can be sufficiently summarized in overview as follows:

- The operator harvested trees on the Reserve in amounts agreed to by the Parties, at various times between 1904 and 1910 but had no licence except briefly in February to April of 1907.

- The returns submitted by the operator indicating what had been removed from the Reserve did not meet the statutory requirements.

- The operator repeatedly delayed submitting payments of all required types well beyond the timelines set out in the *Indian Act* and *ITR*.

- The operator harvested species that were not surrendered or tendered.

[174] Additionally, when the operations ceased some one million FBM of tendered timber remained standing.

[175] The central issue remaining in this Claim is whether the Crown's fiduciary obligations involved greater diligence than the Crown demonstrated when it came to: (a) protecting the Reserve from these trespasses; (b) otherwise pursuing improved compliance by the operator; and, (c) carrying out the intentions inherent in the Claimants' timber surrender, including the harvesting of and payment for the full timber volume surrendered. For the reasons that follow, I find: the Crown's fiduciary obligations did include reasonable diligence to protect the Reserve from trespass; the Crown had an obligation to accomplish the intentions of the Claimants' surrender; and, the Crown's permissive approach to the operator amounted to multiple breaches of its duties to the Claimants.

[176] I note that it is not the role of the Tribunal to determine which of the available statutory and regulatory tools the Crown ought to have pursued with greater diligence. In every case, as in this one, that will depend entirely on the circumstances. As long as the Crown exercises its discretion according to the standard of care of a fiduciary (i.e. with loyalty and good faith, providing information, and acting with the ordinary prudence of a man managing his own affairs) there can be no complaint. In the present Claim, however, the Department ought to have pursued compliance by the operator with greater diligence. Furthermore, the Respondent ought to have carried out the intentions of the Claimants inherent in their timber surrender or, if that proved unworkable, the Respondent ought to have consulted and sought further instructions from the Claimants.

[177] To elaborate the Crown's specific obligations in the circumstances, the *Indian Act* imposed, as discussed, detailed controls over the Claimants' use of their reserve and limits on their ability to protect it against unauthorized uses, while also granting numerous statutory powers to the Crown that were designed to control access to and protect reserves. These statutory powers were available for use by the Department. Having persuaded First Nations to submit to the reserve system, supposedly for their benefit and the mutual benefit of other Canadians, and having limited the ability of bands

to bring their own trespass actions, the Crown surely had a responsibility to use reasonable diligence and ordinary prudence to maintain the integrity of that system, and to protect the quasi-proprietary interests of bands, especially when the Crown possessed the only tools of enforcement. It was in the broader public interest that the Crown do so because the creation of the reserve system and the *Indian Act* were in themselves an important matter of national public policy. There could be no integrity to the reserve system if it was not protected from direct interference or intrusion of those not entitled to occupy or use reserves. I wish to be clear that in making these observations I am dealing with the context of the era, the limits of the *Indian Act* of the day, and circumstances of the present Claim.

[178] Considering the broad controls imposed by the *Indian Act, 1886* on Aboriginal peoples and reserve land, the powers and discretion left to the Crown under the *Act*, and the lack of remedial options available to bands, either as bands or individual members, I conclude that during the period in question the Crown had a fiduciary duty to the Claimants to use ordinary prudence and reasonable diligence to protect the Reserve from direct intrusion. A permissive approach to trespassers was not in the best interests of a First Nation. A trespass to a reserve would constitute exploitation of the interests of the band and its members who were entitled to the use and occupation of the reserve. The Crown had a duty to use ordinary prudence to preserve and protect the Claimants' reserve from exploitation (*Wewaykum*, at para 86).

[179] I conclude that this was true both before and after the Claimants' timber surrender. The Crown's duty to protect the Reserve from trespass deepened in the circumstances of this Claim because a formal surrender had been given by the Claimants. Section 38 of the *Indian Act, 1886* prohibited the sale or alienation of a reserve or portion of a reserve until it had been surrendered to the Crown by the process set out in section 39 (see paragraph 26 above). "Reserve" was defined in section 2(*k*) of the *Indian Act, 1886* to mean lands reserved by treaty or otherwise, including "all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein" (see paragraph 28 above). The trees surrendered in this Claim and the land it was on therefore satisfied the definition of a reserve. Once a reserve was surrendered, section 41 made it

clear that it was “held” by the Crown to be “managed” by the Crown. It is an agreed fact that by the time the operator in this Claim was on the Reserve and cutting timber, the surrendered portion of the Reserve was under the control and management of the Crown. At that point in time the Claimants were vulnerable to exploitation.

[180] Irrespective of the fact that SLLC only had a valid licence for a few months of the five years it harvested on the Reserve, it was there by colour of right under the tender agreement with the Crown. The Crown knew SLLC was on the Reserve cutting without a licence. The Crown chose a permissive management approach for reasons that were never really explained either through the documents produced or submissions, although I had the impression that the Department believed, or it was lulled into believing that the necessary paper work or payments were imminent. To say that the Department decided it was best to preserve the business relationship is a conclusion without explanation or justification. The Indian Agent in the area monitored the situation throughout the entire period and kept the Superintendent General and his officials informed. It is also clear that the Department intended that the cutting be licensed in the usual way and that its consistent intention was that there be licensing compliance. It repeatedly informed the operator what it had to do to be compliant. It is unreasonable and incredible to suggest that the Department consciously decided to by-pass the licensing regime.

[181] All the while the Superintendent General and Indian Agent had management and control of the surrendered Reserve. All the chief of the band could potentially do was to issue a notice pursuant to section 22(2). However, that was not a likely avenue in this case because by the time the cutting had started the Reserve was under the Department’s sole management and control. The Superintendent General also had sole authority to issue a warrant for removal of the operator as a trespasser, and to take such measures as were necessary to that end. It was the Superintendent General who made all the decisions on the harvesting process without informing or consulting the Claimants in any way. There is no evidence that the bands were aware of the operator’s presence or activities on the Reserve. All of the information on the project was with the Superintendent General.

[182] The Superintendent General (or a deputy or Indian Agent in some cases) had the following specific, non-prosecutorial powers available to pursue greater compliance by the operator and protect reserves:

- The power to cancel the sale and take the tender deposit in forfeiture for the operator's failure to make required outstanding payment of the sale price within a reasonable time (terms of the tender).

- The power to give notice to a trespasser to leave or stop “using” a reserve (*Indian Act*, section 22).

- Following a complaint (whether from inside or outside the Department) the power to issue a warrant for removal of a trespasser (*Indian Act*, section 23 and 24).

- The power to refuse to issue a licence (*Indian Act*, section 54).

- The power to refuse to renew a licence to a non-compliant licensee on the licence’s annual expiry date (*ITR*, section 12).

- The power to seize logs for which dues have not been paid (*Indian Act*, section 58).

- The power to seize logs thought to be harvested without authorization (or intermingled logs) until such matter could be decided by a competent authority (*Indian Act*, sections 62 and 63).

- The power to demand dues of two, three or four times the regular dues for trees cut in a trespass that occurred in good faith or in error (*ITR*, section 29).

- The power to lay an information (the carriage of which by the prosecuting officer would, however, be subject to prosecutorial discretion).

[183] These powers of enforcement, given to the Department by Parliament, were tools available to it two protect reserves and facilitate the management of timber operations in a manner consistent with the terms and conditions of a band’s timber surrender. Canadian

law now recognizes that the Crown had fiduciary obligations to stay within and make use of these types of statutory power. In *Lac Seul*, O'Keefe J. held that the timber provisions of the *Indian Act, 1886* and its *ITR* provided the Crown with a means of properly managing surrendered timber limits and a failure to comply with the *ITR* constituted a breach of fiduciary duty (*Lac Seul*, at paras 72-74; see paragraph 163 above). In *Blueberry River*, the Court decided that the Department could and should have applied section 64 of the *Indian Act, 1927* to cancel the agreement it had made, and the failure to do so constituted a breach of fiduciary duty (see paragraphs 154, 155 and 160 above). The Crown cannot ignore the provisions of the *Indian Act*. It does not have discretion to opt out of the *Indian Act* and its *ITR*. When circumstances required, it had a fiduciary duty to avail itself of the provisions of the *Indian Act* and *ITR* with diligence to properly manage the reserve in the best interests of the beneficiary band. In this case it did not rely on any of the measures available to require compliance by the operator.

[184] The Department also failed to follow its own policies. Indeed, the references in the documentation to seizure of timber, imposition of multiple dues, forfeiture of deposit, and cancellation of the sale indicated that the use of those particular enforcement measures were not unusual in similar circumstances. In *Blueberry River*, the existence of a general practice signalled an obligation to follow it. In the circumstances of this Claim, it appears to have been fairly normal procedure to seize timber cut without authority, take the tender deposit as forfeiture for failure to make the agreed payments within a reasonable time and cancel the sale. Delinquency in payment of the agreed tender price for twenty months or more was well outside a reasonable time line. Again, the Respondent ought to have acted diligently to correct the situation by making use of one or more of the enforcement measures available to it. This failure constituted a breach of fiduciary duty.

[185] Having reached these conclusions, I do not want to leave the impression that the Crown does not have a broad discretion on how to manage its fiduciary obligation. I agree with the Respondent that the Crown requires broad flexibility in the way it exercises its discretion and that it cannot have its hands tied, although it must still follow the scheme of the *Act* and *ITR* as I have discussed. Within that general framework,

however, the manner in which the Crown meets its obligation should be within its discretion. As noted in the introduction to these findings, in the present Claim it is not the role of the Tribunal to determine which of the available statutory and regulatory tools the Crown ought to have used with greater diligence. As long as the Crown exercises its discretion according to the standard of care of a fiduciary (i.e. with loyalty and good faith, providing information, and acting with the ordinary prudence of a man managing his own affairs) there can be no complaint.

[186] At the same time, the Respondent should have informed the Claimants of the difficulties encountered, the measures taken, and the course it proposed to follow if the operator did not remedy the situation in a timely way. In this way, the Respondent could have received the Claimants' feedback to better assess the Claimants' best interests and how it should proceed. The Respondent had a fiduciary obligation to keep the Claimants informed and to consult with them on issues having significant impact on the project (see paragraphs 164 to 167 above). In the initial stages of tender and acceptance of the tender that obligation probably consisted primarily of information. However, as harvesting progressed and the Department consistently encountered delays in the operator making the required payments and completing the necessary paper work, the Department should have informed the Claimants of the difficulties, recommended a course of action and sought the Claimants' views. The Department should also have consulted with the Claimants before it informed the operator at the end of the five years that it must stop cutting, even though there were more than one million FBM remaining to be harvested, and that the operator wanted to cut over the next year. Perhaps termination of the arrangement was appropriate, but the Department ought to have consulted the Claimants and informed them, recommending and justifying a course of action, weighing the likely consequences, and seeking the Claimants' views. It did not. This was another breach of fiduciary duty.

[187] In summary, the Department was required to manage the surrendered timber within the licensing framework of the *Indian Act, 1886* and its *ITR* and in a manner consistent with the above fiduciary duties. How precisely it did that was a matter of discretion, including the use of the considerable discretionary tools and authority it was

afforded under the *Indian Act* and *ITR*, but the Crown was nevertheless required to meet the high standard of care owed when managing a surrendered reserve interest.

[188] While I have so far focused on statutory powers available to the Department and that it ought to have pursued with greater diligence, the Crown also pursued another avenue that went beyond these statutory powers. Section 54 of the *Indian Act, 1886* stated that "the Superintendent General…may grant licenses to cut trees on reserves" (emphasis added). In my view, this wording gave the Superintendent General discretion to decide whether or not to grant a licence. In effect, by exercising that discretion the Superintendent General was deciding whether or not an operator could harvest trees on a reserve.

[189] Nowhere in section 54, or elsewhere in the *Indian Act, 1886* and *ITR*, was the Superintendent General given the discretion to permit harvesting to take place on a reserve without a licence. The scheme of the *Act* suggests the opposite. If harvesting was to be done on a reserve other than by bands or their members, it could only be done by an operator holding a valid licence. Only with a valid licence was the operator entitled "to take and keep exclusive possession of the land so described." Section 56 of the *Act* also gave the licensee vested property rights in trees cut under the terms of the licence (see paragraph 31 above). Nowhere were third party access and property rights available without a licence.

[190] The licence holder was subject to all the requirements of payment, information return, and other conditions imposed by the *Indian Act* and *ITR* discussed above. The trespasser was subject to the enforcement measures authorized by the *Indian Act*. Together, the licensing requirement and enforcement measures provided a comprehensive, integrated scheme.

[191] Having assumed a *sui generis* fiduciary relationship with the Claimants as a result of the surrender of the designated timber on the Reserve, the Department could not do what the *Indian Act, 1886* did not permit. It could not sanction a trespass, that is, a harvesting of timber on the Reserve without a licence. It was obligated to protect the Reserve and the timber on it. One must ask what purpose the licensing and related

provisions were for if it was otherwise? I therefore conclude that in the circumstances of this Claim, the Respondent could not ignore the licensing provisions of the *Indian Act*, and it should not have done so. One can understand and accept that there would be some leeway, but it should not have resulted in unlicensed cutting on-going for all but three or four months of the five-year relationship between the Department and operator in this Claim. By taking such a permissive management approach to the operator's prolonged harvesting without a licence, the Department was permitting a trespass. This was a breach of its fiduciary obligations to the Claimants.

[192] It is clear from the documents produced, that the Department intended and planned to issue a licence. This appeared to be its policy and aim from the start, and in fact it did issue a licence that had only a brief life. It also intended to renew the license if the requirements were met. For whatever reason, it did not enforce those requirements by the various means available to it. I do not accept that the Department exercised a discretion not to issue a licence. Rather I conclude that it was frustrated in achieving its licensing goal by the operator's endless delays and excuses, which the Department accepted for reasons never clearly explained.

[193] As I have determined, compliance with the *Indian Act, 1886's* licensing scheme was not an option or matter of Department discretion. As found in *Blueberry River*, the Department's fiduciary duty included an obligation to act diligently in correcting an inadvertence, mistake, or misjudgement when it became aware of the error, and to use such powers as were available to it to rectify the situation (see paragraphs 154 and 155 above). In the present situation, the Department was aware that cutting should not occur without the licence it hoped to issue. Throughout the nearly five years following acceptance of the tender, the Department was consistently attempting to get the operator to do the necessary paper work and to make the necessary payments that were pre-conditions to a licence being issued or renewed. On a number of occasions Departmental correspondence to the operator observed that a licence could not issue until the prescribed steps were taken and that cutting without a licence was unauthorized (for example, see paragraph 58 above). In fact, the Department's policy and goal was to issue a licence, but it did not do so. At a certain point, the Department should have acted diligently to correct

the situation by using one or more of the available enforcement measures. This failure to make use of available statutory powers with reasonable diligence constituted a breach of fiduciary duty. I do not suggest that the Department did not have the discretion to exercise some patience, but the operator's delays in this Claim went well beyond that threshold.

[194] On the evidence received, the Respondent also failed to sell all merchantable spruce on the Reserve as it undertook to do for the Claimants at the time of surrender. The Crown's permissive management approach and eventual abandonment of its efforts to get the operator under licence resulted in approximately one million FBM of surrendered and tendered timber being left standing. This constituted a failure of the Crown's undertaking. There was no evidence of any attempt to sell the remainder of the surrendered timber or any explanation of the merits of doing so one way or the other. It is difficult to regard this failure as a demonstration of a level of care equivalent to "a man of ordinary prudence in managing his own affairs." I conclude in the circumstances that this failure of undertaking constituted another breach of fiduciary duty.

[195] Less significantly in terms of timber volume, the operator also harvested relatively small amounts of timber other than spruce. This timber was cut outside the terms of the surrender. The operator had no authorization to harvest it and the Respondent had no authority to treat this timber as part of the tender. Absent proof (which was not offered) that this timber was cut for good reason, such as to provide road access, or because of some reason undiscoverable by the Department in a timely manner, this also constitutes a breach of fiduciary duty.

[196] The Claimants submitted that the Respondent should have used the revenue-producing enforcement tools, such as monetary penalties or multiplied dues. The Respondent considered its discretion to have been properly exercised in this regard. I do not agree with the Claimants' submission and no authority was given in support of the proposition. Given the scheme of the *Indian Act, 1886* its *ITR*, and the jurisprudence, I conclude that the primary purpose of the enforcement provisions was to protect a band's use and occupation of reserved lands. The Superintendent General's authority under the

Indian Act to impose monetary penalties and increased dues was created as a means of protecting against trespassers and managing licensed operations. The purpose was not to raise revenues for the bands. The revenue objective was achieved through the tendering process, rents, fees, and dues mandated by the *Indian Act*. I therefore decline to determine or declare which revenue producing enforcement provisions the Crown should have employed in the present Claim, if any. That was a matter within the discretion of the Crown in the exercise of its fiduciary duties, and depending on the circumstances of the particular time and context. However, if the Department had decided to use any of the revenue-producing measures, it would have been for the purpose of enforcement.

V. THE QUESTION OF LOSS

[197] The Respondent submitted that there had been no breach because there had been no loss. The Claimants were eventually paid for all the timber cut, including payment of all fees, dues, ground rents, and interest. It concerned me that there was no proven loss and that this first phase of hearing could end up being an academic exercise with great cost to all involved. However, it had been decided before my involvement that the process would be bifurcated into two phases, with the first phase considering only whether the Claim was valid – i.e. whether the Respondent had breached its fiduciary duty as alleged. The Tribunal and the Parties agreed that loss was not a question for consideration in the first hearing phase and that was how the Parties prepared and proceeded. It is possible to have one or more breaches of fiduciary obligation without a loss having been incurred. Loss is not a precondition to proof of a breach of fiduciary duty. A band may believe it has incurred a loss as a result of a breach of fiduciary duty, but it may not succeed in proving it. There is a risk that the first phase will not result in compensation in any event. On the other hand, a compensable loss may be proven if the Claim is valid. The question of compensation cannot be prejudged, and in the meantime, the costs of proof of loss are not incurred unnecessarily before validity has been determined. The purpose of bifurcation is to minimize the time and expense of the second phase if it will not be necessary. If no loss is proven, it will be possible to address the result through an award of costs.

VI. **CONCLUSION**

[198] For all these reasons, I therefore find that the Respondent breached its fiduciary obligation to the Claimants as alleged and detailed above.

[199] The Parties may address the question of costs and how to proceed to the second phase of hearing (compensation) through a Case Management Conference to be scheduled by the Registry.

W.L. WHALEN

Honourable W.L. Whalen

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140905

File No.: SCT-5002-11

OTTAWA, ONTARIO September 5, 2014

PRESENT: Honourable W.L. Whalen

BETWEEN:

LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION

Claimants

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 Claimants LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION**
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AND TO: **Counsel for the Respondent**
As represented by David Culleton and Lauri Miller
Department of Justice