FILE NO.: SCT-7006-12
CITATION: 2016 SCTC 3
DATE: 20160205

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
AKISQ'NUK FIRST NATION	)	
	)	Darwin Hanna, Adam Munnings and Katrina Harry, for the Claimant
Claimant	)	
	)	
– and –	)	
	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Christa Hook, Deborah McIntosh and Brett Nash, for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** September 23-25, 2014

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

Corrected version

NOTE: A Corrigendum was released by the Tribunal on February 23, 2016. The corrections have been incorporated in this document. This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Manitoba Métis Federation Inc v Canada (AG), 2013 SCC 14, [2013] 1 SCR 623; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 22.
British Columbia Terms of Union, 1871, a 11, 13.
Royal Proclamation, 1763.
Constitution Act, 1867, ss 91, 109.
British Columbia Indian Lands Settlement Act, SC 1920, c 51, Preamble, ss 2, 3.

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Robert E Cail, *Land, Man, and the Law, The Disposal of Crown Lands in British Columbia, 1871-1913* (The University of British Columbia, 1974).

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Headnote:

Aboriginal Law – Specific Claims – Specific Claims Tribunal Act – SCTA 14(1)(b) – SCTA 14(1)(c) – Reserve Creation – Fiduciary Duty – Honour of the Crown – Provisional Reserve – Cognizable Interest – Discretionary Control – Ordinary Diligence – Crown Undertakings – Article 13 of the British Columbia Terms of Union – Government Commitments to Aboriginal Peoples – Constitutional Promises – Interposition as Exclusive Intermediary – Express Forsaking of Other Interests – Duty to Correct

This specific claim arises out of the creation of Columbia Lake Indian Reserve No. 3 ("IR 3") for the Claimant Akisq'nuk First Nation. At issue are the Crown's fiduciary obligations to the Claimant during two distinct transactions. One concerns the "Survey Land" allotted by an Indian Reserve Commissioner in 1884 but not included in the reserve due to a change in survey points from those originally intended. The other concerns the exclusion of "Additional Land" for IR 3 that had been recommended by the federal-provincial Royal Commission on Indian Affairs, the McKenna-McBride Commission, due to rejection by the Province. The Claimant seeks compensation based on sub-sections 14(1)(*b*) and (*c*) of the *Specific Claims Tribunal Act*.

Owing to the historical origins of the obligation for the creation of reserves, the historical context for this Claim spans the period from British colonization of the territory that became known as Vancouver Island through to the 1938 transfer of Crown title to reserved land from the Province to Canada. The Tribunal consulted portions of published treatises by several well-qualified historians in addition to the historical documents introduced by the Parties to gain an understanding of the broader context. The historical record reveals a pattern of federal capitulation to the Province and the reconsideration of reserve allocations previously understood to be final. From the perspective of the Claimant, each allocation was final and could not be altered without their consent.

The Parties set out their arguments in the framework for fiduciary analysis offered by *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245. Crown obligations must be

considered in light of pronouncements of the Supreme Court of Canada subsequent to *Wewaykum*, and in light of the particular facts of this case. Thus the issues are considered in several different frameworks, all of which yield the same conclusion.

The Additional Land was adjacent to IR 3. The Commission's description allotting the addition clearly defined a parcel of land within the territory in actual use by the Claimant. The Claimant's interest in the Additional Land was thus cognizable. Once the land was set apart by the Commission as a provisional reserve, the Crown exercised discretionary control in the process of securing the transfer of the land to Canada as required by Article 13 of the *British Columbia Terms of Union*. The Crown had, at a minimum, a duty of ordinary diligence to pursue the interests of the Claimant in the transfer of the addition. A duty of ordinary diligence cannot be met by doing nothing. In the circumstances, the obvious recourse to resolve the disagreement with the Province over the addition was a reference to the Secretary of State for the Colonies, as mandated by Article 13. This was neither pursued nor considered.

Unlike in *Wewaykum*, there is no element of competition between bands in the present matter. The evidence lends no support to the existence of a need for the Crown to balance the interests of Indian and non-Indians in the process of reserve creation. The interest of non-Indian groups was represented by the Province and was taken into account in the processes of the commissions involved in reserve creation and the internal processes of the Province. On the 1916 delivery of the McKenna-McBride report, the Dominion was the exclusive intermediary on the Indians' behalf.

Subsequent decisions of the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 and *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623 reveal that fiduciary duties, where found to exist, have their origin in the precept that the Crown will act honourably. The fiduciary duty arises out of Crown honour where a constitutional promise relates to an Aboriginal interest. The question that arises out of an analysis of fiduciary obligations based on its sources is whether the Crown diligently advanced the Indian interest in the framing and implementation of Article 13. Diligence has a temporal aspect. Settlers were closing in on the territories that sustained the Indian population. Diligence also called for care in the identification

of land to be reserved as that used by the Indian group and of sufficient quantity and quality to provide for their needs.

The Dominion faced obstruction from the Province in fulfilling its fiduciary duty. However, diligent implementation of Article 13 called for the use of all available means to bring about closure. It also required an assessment of the reasonable needs of the Claimant. The historical record reveals missteps, an outright betrayal, and inaction when actions could have been taken to advance the identification and transfer of land for reserves. The Dominion did not act diligently to secure the Indian interest in lands set aside, provisionally, as reserve. In each instance of disagreement it caved in to the Province. The lack of diligence and broken promises cast dishonour on the Crown throughout much of the period from 1871 to 1938.

The Supreme Court of Canada also found that a clear, constitutionally-grounded government commitment to Aboriginal peoples may give rise to a fiduciary duty without an express forsaking of all other potentially affected interests. If there was an undertaking akin to one in the private sphere to Aboriginal peoples by clear government commitments, the requirements of an undertaking are met.

Article 13, as a term of the union of the former colony with the Dominion, has constitutional force. The effect of Article 13 was to interpose the federal Crown as the exclusive intermediary on behalf of the Indian population. The Crown had by its actions held out a promise to act in the interests of those for whose use and benefit it would hold land “in trust”. The promise was a unilateral undertaking, and in the circumstances akin to a private law duty. Even if a forsaking of all other interests is needed to establish duties associated with an undertaking, Article 13, in the circumstances, established just that.

In trust law, where a power is bestowed by a trust indenture, the trustee has a duty to consider whether to exercise the power conferred when warranted by the circumstances. Under either fiduciary analysis identified in *Manitoba Métis Federation*, the Crown had a duty to propose the referral of the disagreement between the Province and Dominion over the addition of the Additional Land to IR 3 to the Secretary of State for the Colonies as provided for in Article 13. It did not.

With regards to the Survey Land, the Claimant had a cognizable interest. The land originally allotted was habitually used and was identifiable, as described by metes and bounds. The Province had approved the allotment. The Crown had discretion over it.

The effect of the survey was known, as the surveyor reported the re-alignment of the survey lines to the Province, who would have informed the Dominion. The Indian Agent for the region testified before the Commission that this was an error. It was in the discretion of the Dominion to seek a correction. It did not.

Held: The Claimant Akisq'nuk First Nation has established a breach of legal obligation of the Crown with respect to both the Survey Land and the Additional Land.

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I. THE CLAIM

[1] This Claim arises out of the creation of Columbia Lake Indian Reserve No. 3 ("IR 3"). At issue are the Crown's ("Respondent") fiduciary obligations to the Akisq'nuk First Nation ("Claimant") during the reserve creation process, which for IR 3 occurred between the early 1880s and 1938.

[2] IR 3 lies along the east shore of Windermere Lake, formerly Upper Columbia Lake, in the Kootenay region of southeastern British Columbia. In the 1880s the Claimant, then known as the Columbia Lake Indian Band,[*] lived in the area, maintained cattle and horses and engaged in some agriculture. The Claimant asserts that land intended to form part of its reserve was excluded.

[3] The Claim arises out of two distinct transactions. One involves land allotted by Indian Reserve Commissioner Peter O'Reilly in 1884 but not included in the reserve due to a change in survey points from those originally intended ("Survey Issue"). The other arises out of the exclusion of land recommended for inclusion by the federal-provincial Royal Commission on Indian Affairs ("McKenna-McBride Commission", "Commission" or "MMC") in 1915 ("Additional Land Issue").

II. PROCEDURAL HISTORY

[4] The Claimant filed the instant Claim with the Specific Claims Branch of the Department of Indian Affairs and Northern Development in March 1999. On February 21, 2011, the Minister declined to accept this claim for negotiation.

[5] The Claimant filed its Declaration of Claim with the Tribunal on March 14, 2013. It submits that the Crown's alleged breaches of fiduciary duty fall within sub-sections 14(1)(*b*) and (*c*) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], which provides:

> **14**. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:

[*] A note on terminology: the terms Aboriginal, Indigenous and Indian are used in this Decision as appropriate in the context. The usage of the term "Indian" reflects its usage in the law and in history, but is not an endorsement of its usage in the present era.

…

> *(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;…

[6] The Respondent Canada filed its Response on June 6, 2013, denying all of Claimant's allegations of liability.

[7] On November 5, 2013 the Tribunal issued a notice to the Attorney General of British Columbia pursuant to section 22 of the *SCTA*. The Province did not take up this opportunity to intervene or become a party in the proceeding.

III. HISTORICAL OVERVIEW

[8] The history of reserve creation in British Columbia reaches back to the time of Imperial Britain's colonial expansion to the north-west coast of the continent.

[9] British colonial policy called for treating with Indigenous peoples in their numerous collectivities. One aspect of treaty making was the creation of reserves for the perpetual use and benefit of the peoples of the Indigenous Nations. Sir James Douglas, the Chief Factor of the Hudson's Bay Company and Governor of the Colony of Vancouver Island commenced the entry of treaties. This was abandoned before the colonization of the mainland in 1858. However the practice of allotting land to be set apart as reserve continued, and was guided by policies that were continued on paper, but not in practice, from Douglas' retirement in 1864 until Confederation and beyond.

[10] On Confederation, Canada assumed responsibility for "Indians, and Lands reserved for the Indians" in the Province. Provincial cooperation was required to set apart land for reserves, as Crown title was in the Province.

[11] The new Province and Canada became bound by the provisions of Article 13 of the *British Columbia Terms of Union*, 1871:

> The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[12] An issue over the quantity of land the Province was to transfer to the Dominion soon developed.

[13] In 1876, the Dominion and the Province created a Joint Indian Reserve Commission ("JIRC") with a mandate to "fix and determine" the location and size of reserves with all due speed. It would be eight years before reserves were allotted in the Kootenays. The Reserve Commissioner, Peter O'Reilly, arrived in the region on horseback in August 1884.

[14] O'Reilly spoke with settlers residing in the area and representatives of the Columbia Lake Band (now known as the Akisq'nuk First Nation, the Claimant). He subsequently issued a Minute of Decision, with a surveyor's sketch, allotting a reserve of approximately 8,320 acres to the Claimant. In September 1885, after over a year of correspondence in which Commissioner O'Reilly defended a challenge to the size of the proposed reserve, British Columbia's Chief Commissioner of Lands and Works ("CCLW") approved the allotment.

[15] The reserve was surveyed in September 1886. The surveyor noted and explained several deviations from the boundaries in O'Reilly's Minute of Decision, two of which excluded areas allotted by O'Reilly. These ground the Survey Issue. The surveyor's plans were ultimately approved by the provincial and federal governments. These establish the present boundaries of IR 3.

[16] The Province took exception to the transfer of some of the land allotted by the JIRC.

[17] In September 1912, in an attempt to "settle all differences" regarding reserves, the federal and provincial governments established the McKenna-McBride Commission to determine the needs of the bands (Indigenous groups as defined by the *Indian Act*), and recommend alterations and additions to reserve lands. In June 1916, after hearing from Chief Arbel, band members and the local Indian Agent, the MMC recommended the addition of a 2,960 acre parcel to IR 3.

[18] Canada supported the implementation of the MMC recommendations. The Province did not. In 1920 W.E. Ditchburn and Major J.W. Clark were appointed by Canada and British Columbia, respectively, to review the MMC recommendations.

[19] The addition allotted by the MMC in 1916 was a source of disagreement and the subject of much correspondence between provincial and federal officials. The federal representative, Ditchburn, defended the addition. The Province's representative, Clark, opposed. Both noted this disagreement in their final reports. Ultimately, the Province prevailed, and the version of the MMC report as amended by the Ditchburn-Clark review, which disallowed the addition, was approved by both levels of government.

[20] British Columbia conveyed the proprietary title to the land to Canada by Order-in-Council 1036/1938.

IV. HISTORICAL SCOPE OF THE CLAIM

[21] The present Claim, as it relates to both the Survey Land and the Additional Land, relies on equitable principles to bring the Claim within sub-section14(1)(*c*) of the *SCTA*:

> (*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...

[22] Equity grounds specific duties and remedies in circumstances in which one party is vulnerable to the exercise of another's discretion, the *sine qua non* of a fiduciary relationship.

[23] Where Indian interests are concerned, Crown obligations have become defined within a framework set out by the Supreme Court of Canada in *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis Federation*].

[24] Vulnerability alone does not result in a fiduciary duty:

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
> >
> > (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36) [*Manitoba Métis Federation*, at paras 49, 50]

[25] The Claimant argues that the evidence supports findings of fact which establish the existence and breach of fiduciary duties of the Crown in relation to its interest in the Additional Lands and the Survey Lands.

[26] The particular duties relied on by the Claimant are said to arise from a constitutional obligation, namely the creation of reserves as mandated by Article 13. The Supreme Court has established both the interpretive rule and the core duty required where the honour of the Crown is engaged:

> By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the

> Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it. [*Manitoba Métis Federation*, at para 75]

[27] The Additional Lands were allotted in March 1915, 44 years after Confederation. The process of reserve allotment in British Columbia commenced in the Colony of Vancouver Island in 1850. It was the policy of the Colony to treat with Indigenous groups. This was an aspect of British colonial policy as reflected in the *Royal Proclamation*, October 7, 1763.

[28] The same policy applied in Canada, and was given effect as foreign settlement moved west from central Canada. In both Canada and the Colony of British Columbia the treaties provided for the creation of reserves. Reserve allotments continued in the Colony after 1854, when treaty making ceased. Colonial policy on the quantity of land set apart as reserve affected both the new Province and the Dominion on Confederation.

[29] The historical context for this Claim thus spans the period from British colonization of the territory that became known as Vancouver Island through to the 1938 transfer of Crown title to reserved land from the Province to Canada. The starting point for analysis goes even further back, to the *Royal Proclamation*, wherein lies the foundation stone of the precept of the honour of the Crown and related Crown duties.

[30] The concluding event in the creation of reserves in British Columbia took place in 1938, 67 years after Confederation. The delay in resolving the issue over identifying land for transfer to the Dominion up to 1915, and beyond, is explained by the historical documents in evidence for the period from 1871 to 1938. These include the several agreements made between the Dominion and the Province, related executive orders, legislation, and correspondence.

[31] There is, however, more to the story than can be gleaned from formal agreements, legislation, and executive orders. These exist in the context of actions taken by both governments that resulted in agreements in 1876 and 1912, each of which was intended to finally determine the quantity of land to be established as reserve and held in trust by Canada for the Indian peoples of the Province. Both failed to do so. A third, entered in 1920, failed as well, but the report of the provincial representative in the process established by the third agreement, which deprived the Claimant of the Additional Land, was ultimately accepted by both governments.

The Claimant says that the circumstances surrounding the loss of this land amount to a breach of fiduciary duty.

[32] I have consulted portions of published treatises authored by well qualified historians to gain an understanding of the broader context in which the 1915 allotment of the Additional Land, and the 1923 disallowance took place:

> 1) Robert E Cail, *Land, Man, and the Law, The Disposal of Crown Lands in British Columbia, 1871-1913* (The University of British Columbia, 1974), Chapters 11-13 ("Cail").
>
> 2) Cole Harris, *Making Native Space, Colonialism, Resistance, and Reserves in British Columbia* (University of British Columbia Press, 2002), at 241-61 ("Harris").
>
> 3) E Brian Titley, *A Narrow Vision, Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (University of British Columbia Press, Vancouver 1969), Chapter 8.

[33] Together, these cover the period from colonization of the north-west coast of the continent from 1850 to Confederation, and beyond to 1938. Every author relied entirely on primary documents to create narratives describing the events during the time of reserve allotments in British Columbia. All referenced documents are from public archival records.

[34] I have also considered the Report of the Special Committees of the House of Commons on their Inquiry into the Claims of the Allied Indian Tribes of British Columbia, Session 1926-27. This Report canvasses events from the colonial period through to the allotment of reserves by the JIRC, the McKenna-McBride Commission, and the Ditchburn-Clark review. It includes a report and testimony by Duncan Campbell Scott, Superintendent of Indian Affairs.

[35] My discussion of pre-Confederation colonial policy is also based in part on historical events discussed in Canadian jurisprudence, including the decision of the Tribunal in *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 and the decision of the Federal Court of Appeal on judicial review (*Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6).

V. BACKGROUND

A. Colonial Policy, the *Royal Proclamation*, 1763

[36] Imperial colonial policy in relation to Indigenous peoples and their lands was re-affirmed by the *Royal Proclamation*. In short, the "[n]ations or Tribes of Indians...should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them...as their Hunting Grounds" (emphasis added).

[37] The *Royal Proclamation* forbade any Colonial Governor from issuing Patents "...upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians...". Also forbidden was the "...taking Possession of any of the Lands above reserved, without our especial leave..." (emphasis added).

1. The Dominion and the Numbered Treaties

[38] Federal practice under the authority of section 91(24), *Constitution Act*, 1867, was to make treaty with the Indigenous peoples as settlement moved west and Sir John A. MacDonald's vision of a trans-continental railway became realized.

[39] The creation of reserves out of the territories ceded by the numbered treaties was a treaty promise, and the invariable practice. The *per capita* acreage of reserves was represented by the government to be adequate to support the conversion of Indigenous peoples' economies to self sustenance through agriculture. For example, land reserved under Treaties No.1, 1871, No.2, 1871, and No.3, 1873, ranged in acreage from 160 to 640 acres per family of five (Cail at 197).

2. Treaties in the Colony of British Columbia

[40] Colonial policy in British Columbia conformed initially with the requirement of the *Royal Proclamation*, that the territories of the Indigenous Nations not be settled unless ceded to the Crown.

[41] Governor James Douglas made treaties with 14 Tribes in southern Vancouver Island between 1850 and 1854. These provided for the setting apart, as reserve, of portions of their territories. Due to the withdrawal of funds by the Imperial government the practice of treaty

making ended. However, Douglas continued to set apart land for reserves on Vancouver Island and the mainland.

3. Priority of Interests in the Colonial Period

[42] Between 1850 and 1854 Indigenous interests had, in theory and to some extent in actual practice, the priority called for by the *Royal Proclamation*.

[43] Of course immigration continued after 1854. The lands of Indigenous peoples were, contrary to the requirements of the *Royal Proclamation*, being occupied by settlers without the consent of the Indigenous Nations and Tribes that exercised possession in their accustomed manner.

[44] Some vestiges of the intention of the *Royal Proclamation* continued in practice. Although settlers could pre-empt unceded land, land in use as Indian settlements was exempt from pre-emption. To that extent the Indigenous interest was paramount over the interests of settlers. Douglas continued allotting reserves at places where Indigenous peoples were able to stake out their "...village sites, cultivated fields, and favourite places of resort...irrespective of the claims of settlers" (Harris at 42).

[45] As described by Harris at pages 30-44, colonial land policy under Douglas was "liberal" in the sense that it was directed to the survival of Indigenous people, at least while their anticipated assimilation into settler society progressed. An expansive view was taken of what might constitute village sites, fields and places of resort.

[46] Colonel Moody, Commander of the Royal Engineers, took direction from Douglas for implementation of his policies. This included, in 1859, a direction to Moody to reserve land "to the extent of several hundred acres round each village" (Harris at 34). Douglas' intention was to establish a land base for Indigenous collectives that would enable self-sufficiency in the transition to European ways.

[47] Small reserves were set apart up the Fraser Canyon, apparently contrary to Douglas' general instructions. Large reserves of arable land were marked out in the Okanagan and Thompson Valleys and in the Fraser Valley near Chilliwack.

[48] There was, during Douglas' tenure, no fixed formula for determining the acreage marked off for reserve.

[49] Douglas retired in April 1864. He was succeeded by Governor Seymour.

[50] Joseph Trutch, an engineer and businessman, became Chief Commissioner of Lands and Works in April 1864.

[51] After Douglas retired, Trutch's influence re-shaped the policies of the Colony in relation to land and Indigenous interests. The Colony categorically denied the existence of "...the title of the Indians in the fee of the public land..." (Cail at 184, sourced to Trutch, January 28, 1870, "Report on Indian Reserves," pp. 66-69).

[52] The focus of colonial policy would now be on making land of value in the introduced economy available for pre-emption by settlers. Within weeks of Douglas' departure, the Legislative Assembly of the Colony passed a resolution asserting that the interior reserves were "unnecessarily large" and were "seriously interfering with the development of the agricultural resources of the Colony" (Harris at 56).

[53] The Indigenous peoples had not taken to agriculture at a larger scale than cultivating potatoes for their own consumption. From the settler perspective the land was going to waste.

[54] The resolution was in accord with the view of Trutch, who set about to rescind the allotments of reserves in the Okanagan and Thompson Valleys and the lower Fraser Valley. This was explained to the Indigenous peoples at each village on the grounds that the officials assigned to mark off reserves had done so without legal authority (Harris at 57).

[55] Although land marked off as reserve remained exempt from pre-emption, the acreages were drastically reduced, with even smaller proportions of arable land within the allotted lands (Harris at 58). The land freed up was then opened for pre-emption. In the result, the creation of an adequate land base for the future self-sufficiency of Indigenous groups gave way to ensuring the availability of cultivable land for settlers.

[56] By the fall of 1867, surveyors were instructed to interfere as little as possible with land taken up by whites, and to retain such village sites and cultivated land "...as will amount in the

aggregate to ten acres of tillable land to each adult male in the tribe, together with a moderate amount of grazing land for those tribes which possess cattle and horses". The following summer this was tightened to "...ten acres of good land per family rather than ten acres of arable plus some pasture for each adult male" (Harris at 58).

[57] As of 1871, 76 reserves had been set apart by the Colony. Half had been surveyed, amounting to 28,437 acres. Many had not been gazetted, and many areas remote from any settlement had not been visited to establish reserves (Cail at 189-90).

[58] As for the Aboriginal title recognized by the *Royal Proclamation*, its existence was expressly denied in a memorandum prepared by Trutch and sent by despatch of January 29, 1870, to Earl Granville, Secretary of State for the Colonies (Cail at 182-83).

4. Confederation and Article 13

[59] The Imperial government initially favoured a hands-off approach concerning the resolution, after Confederation, of questions over Indian interests as between the Province and the Dominion. By despatch to Governor Musgrave on August 14, 1869, Earl Granville, Secretary of State for the Colonies, stated that "the Constitution of British Columbia will oblige the Governor to enter personally upon many questions — as the condition of the Indian tribes...with which, in the case of a negotiation between two Responsible Governments, he would not be found to concern himself". On Granville's instructions, Musgrave "purposely omitted any mention of [Indians] in the terms proposed to the Legislative Council…" (Cail at 186).

[60] No mention of Indians is made in the original resolutions of the British Columbia legislature as pertaining to Confederation. Article 13 was added later to effect a division of responsibility between the two governments (Cail at 186-87, Special Committee Report, at 4, 5).

[61] This was necessary as, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act*, 1867, Crown lands in British Columbia were retained as provincial property.

[62] Article 13 was settled on as follows:

> The charge of the Indians, and trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union. To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.

[63] As noted in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 16, [2002] 4 SCR 245 [*Wewaykum*]:

> Implementation of Article 13 therefore required a number of stages preliminary to the federal reserve-creation process described in *Ross River*. First of all, federally appointed Indian Reserve Commissioners undertook to define and survey the proposed reserves. Then the federal government and the provincial government, armed with the surveys, negotiated the size, location and number of reserves. Administration and control of such lands had then to be transferred ("conveyed" is the word used in Article 13) from the new Province of British Columbia to the federal government. The federal government would have to "set apart" the lands for the use and benefit of a band: *The Indian Act, 1876*, S.C. 1876, c. 18, s. 3(6); *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1) "reserve".

[64] It would be five years before the Province and Canada agreed on the terms of reference for the work of the Joint Indian Reserve Commission. In the meantime, the settler population increased and the Indian population continued to be decimated by disease.

B. Article 13 and the "Liberal" Policy of the Colony

[65] Article 13 called on the Dominion to pursue "...a policy as liberal as that hitherto pursued by the British Columbia Government...after the Union".

1. Federal Expectations, 1871

[66] The following conclusions are supported by Cail's detailed review of the contemporaneous documentary record:

1) Dominion officials had not, when the terms of Article 13 were established, informed themselves of the policy of the Colony on the acreage of reserve allotments.

2) To the Government of Canada the phrase "liberal policy" meant a land policy as liberal as it believed its own to be.

[67] The material from which the conclusions in the above paragraph are drawn is canvassed below.

[68] The Dominion received the information on the status of reserves as of 1871, but took no steps to advance the creation of reserves until the appointment in November 1872, of I. W. Powell as Superintendent of Indian Affairs in the Province (Cail at 190).

[69] A second Superintendent, James Lenihan, was appointed one year later.

[70] Powell was pressed by the Province's CCLW, Robert Beaven, to proceed at once to define reserves in the Chilcotin, where settlers were pre-empting land which the Indians considered their own. The same was occurring in the Alberni and Cowichan regions. Powell did not know how to proceed as he had not yet received instructions from Ottawa on the duties of his office (Cail at 192-93).

[71] In the meantime, pre-emption of land by individual settlers, in lots of 160 acres, and 320 acres east of the Cascade mountain range, proceeded apace.

[72] After reporting attempted pre-emptions of Indian land by white settlers, Powell received instructions from Ottawa to confer with the local government on the assignation to each family of "...a location of 80 acres of land of average quality,..." and to extend existing reserves and set apart new reserves on that basis. This was a formal direction established by Dominion Order-in-Council dated March 21, 1873. The text asserts: "...it is a matter of urgent importance to convince the Indians of that Province that the Dominion Government will do full justice to the rights of the Indian population," and to fulfil "...the just expectations of those Indians" (Cail at 194).

[73] Beaven responded by asking Powell to provide statistics concerning each individual in every family in the Province, the name and location of all Indian reserves claimed for the Tribes,

and the number of Indians living off reserve and acreage required. All this, for an estimated 28,500 Indians in the Province. Powell replied that there was no possible way of knowing any of this information (Cail at 195).

[74] The demand for statistics was one of several exchanges that Cail documents as revealing a design to frustrate Powell in his work (Cail at 194).

[75] In answer to the Dominion's direction to Powell to allocate 80 acres for each family of five, the Province proposed 20 acres for each family of five. This was advanced by an Executive Council Minute dated July 25, 1873. Powell would by then have known of the direction given in 1867 by Trutch to his surveyors to set apart no more than 10 acres per family. On being informed by the Executive Council Minute that 20 acres exceeded the amount of land allotted by the Colony per family for reserves prior to Confederation, Powell considered the Dominion bound to consent under Article 13 (Cail at 195).

[76] On March 1, 1874, David Laird, Minister of the Interior, in a memorandum to the federal cabinet, affirmed the lowering of the acreage from 80 to 20 (Cail at 196).

[77] It was not lost on the Indians of British Columbia that land reserved under Treaties No.1, 1871, No.2, 1871, and No.3, 1873, ranged in acreage from 160 to 640 acres per family of five (Cail at 197).

[78] There were rumblings of an Indian war in 1874. Powell opined that the only reason war had not broken out was that the Indians, divided into bands, were not sufficiently united (Special Committee Report, at 119).

[79] Federal action was swift in response to the enactment by the Province of the *Land Act*, 1874. The *Act* made no provision for Indian reserves or lands for that purpose. Fournier, Minister of Justice, disallowed it. In doing so, he referred to dissatisfaction among the Indians and the possibility of hostilities. He noted the requirement of the *Royal Proclamation* to meet the Indians in council and obtain surrenders of land as required for purposes of settlement, and the reference to "Indian territories" in the *Imperial Act* of 1849 providing for the administration of the Colony.

[80] Fournier also addressed the reservation in section 109 of the *Constitution Act*, 1867, from public lands in the Province, of "…any trust existing in respect thereof, and to any interest other than that of the province, in the same", and its relevance to Indian interests in land (Cail at 199).

[81] Laird, the Minister of the Interior, in response to Indian unrest in the Province, disavowed, as federal policy, the limit on land advanced by the Province as unjustified. Trutch of course relied on the strict letter of the *Terms of Union*. Article 13 referred to the "liberal" policy of the Colony, which was an allotment of 10 acres per family.

[82] In his memorandum of November 2, 1874, Laird characterized the Dominion government's dealings with the Province as being "...in a spirit of liberality far beyond what the strict terms of the agreement required...", and called on the Province to do the same (Cail at 199).

[83] The Dominion protested that it could not have been aware of the contrast between the Indian policy followed in Canada and that of the Colony until 1871, when Article 13 was drafted. The Province retorted that the 20 acres per family it had offered was liberally in excess of the 10 acres endorsed on the terms of Article 13. Clearly, the Dominion was not aware of the provincial colonial policy it had agreed to follow, and had assumed it to be as "liberal" as its own.

[84] I digress from the narrative to observe that the failure of the Dominion to enquire about the practices and policies of the Colony before committing itself and its wards to that policy reveals a lack of the diligence any reasonable person would expect in the circumstances.

[85] To continue, it seems that the Province was not cowed by Laird's rhetoric. Powell was told that the Province would not countenance the enlargement of existing reserves based on 20 acres for each family head. This would be applied only to new reserve allotments.

[86] And so on it went, back and forth, each blaming the other, until George Walkem, Attorney General for the Province, incorporated suggestions from Rev. William Duncan, who resided among the Tsimpsean of the Pacific north coast, in a proposal to resolve the impasse. This led to formal commitments from the Dominion and the Province.

[87] The Federal Order-in-Council dated November 10, 1875, in annex, provided:

1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly.

2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full [i]nquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.

…

4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. [emphasis added]

[88] The Executive Order of the Province dated January 6, 1876, provided:

1st. That the adjustment of the question be referred to three Commissioners; one to be appointed by the Dominion Government, one by this Government, and the third to be jointly named by the two Governments.

2nd. That the Commissioners shall meet as soon after their appointment as possible at Victoria, and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian nation (meaning by nation all Indian tribes speaking the same language) in British Columbia, and after full enquiry on the spot into all matters affecting the question, to fix and determine for each nation separately; the number extent and locality of the reserve or reserves to be allowed to it.

3rd. That in determining the extent of the reserves to be granted, no basis of acreage be fixed, but that each nation of Indians be dealt with separately.

4th. That the Commissioners shall be guided generally by the spirit of the British Columbia Terms of Union, which contemplates a liberal policy being pursued towards the Indians, and in the case of each nation, regard shall be had in the habits, wants and pursuits of such nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.

> 5th. That each reserve shall be held in trust for the use and benefit of the nation to which it has been allotted; and in the event of any material increase or decrease hereafter of the numbers of a nation occupying a reserve, such reserve shall be enlarged or diminished, as the case may be, so that it shall bear a fair proportion to the members of the nation occupying it. The extra land required for any reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the Province.
>
> …
>
> The Attorney-General remarks that all the proposals, except the first two, are virtually those made by this Government in their late Minute on the subject. With respect to the appointment of Commissioners, as suggested, instead of Agents, the Committee feel that, strictly speaking, the Province should not be responsible for any portion of the expense connected with the charge or management of Indian affairs, which are entrusted by the Terms of Union to the Dominion Government; but regarding a final settlement of the land question as most urgent and most important to the peace and prosperity of the Province, they are of opinion and advise that all the proposals, numbered one to seven inclusive, should be accepted.
>
> The Committee therefore request that if this Minute be approved, Your Excellency will be pleased to inform the Dominion Government that the above proposals have been assented to; and also to cause a copy thereof to be forwarded to the Right Honourable the Secretary of State for the Colonies.

2. The Joint Indian Reserve Commission

[89] Negotiations between Canada and British Columbia proceeded on how to give effect to the policy of setting aside lands for Indians as set out in Article 13 of the *Terms of Union*. In the result, Canada and British Columbia approved by Orders-in-Council the establishment of a Joint Indian Reserve Commission to address the Indian land question in British Columbia. The Memorandum (the "JIRC Agreement") attached to the Governor in Council's approval on November 10, 1875, excerpted above, provided, in part:

> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and Local Governments jointly.
>
> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient

> speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full [i]nquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.
>
> 3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
>
> 4. That the Commissioners shall be guided generally by the spirit of the terms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers.
>
> 5. That each Reserve shall be held in trust for the use and benefit of the Nation of Indians to which it has been allotted, and in the event of any material increase or decrease hereafter of the members of a Nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the Members of the Nation occupying it. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province. [emphasis added]

3. Comment

[90] Clause 5 of the JIRC Agreement was introduced by the Province. It covers existing reserves and reserves yet to be allotted. No like provision exists in the case of reserves established under the numbered treaties entered between Canada and the Indigenous peoples. It conformed with the objective of the Province to ensure that as much land as possible be available for pre-emption.

[91] Clause 5 also reflects the stand taken by the Province on the question of Aboriginal title. If no such title existed, land set apart as reserve would, from the colonists' perspective, naturally return to the government representing the settler's interests. If its inclusion was not opposed by the Dominion's officials it may be surmised that they shared the colonial perspective.

[92] Clauses 1-4, read with Article 13, cover all that needed to be done, and balance the interests of the Dominion (representing the Indian interest) and the Province. There was no apparent *quid pro quo* for the concession on reversionary interests.

4. The Commissioners

[93] In 1876 the Joint Indian Reserve Commission was made up of an appointee from each of the Province and Canada and a joint appointee, Gilbert Sproat. The JIRC thus constituted was dissolved in 1877. Sproat became the sole member in March 1878.

[94] Sproat reported his efforts to provide for the Indians in the railway belt along the proposed railway line. He then directed his efforts to Northern Vancouver Island. When this became known to provincial authorities the government attempted to prevent his adjustment of reserves upwards in that area as "impolitic" and for, in his words "...for reasons which I cannot surmise" (Cail at 216-17).

[95] Sproat resigned in March 1880.

[96] Peter O'Reilly was appointed Indian Reserve Commissioner in 1880 and served until his retirement in 1898.

[97] O'Reilly was instructed to take guidance from the liberal policy embodied in the *Terms of Union*, and as set out in the agreement establishing the JIRC:

> In allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being p[u]rsued towards the Indians. You should have special regard to the habits wants and pursuits of the Band, to the amount of territory in the country frequented by it, as well as to the claims of the white settlers (if any). [CBD at tab 14]

[98] The Order-in-Council appointing O'Reilly, OIC 1334 called on him to ascertain the requirements of the Indian bands to which land had not been assigned and allot "...suitable lands to them for tillage and grazing purposes".

[99] O'Reilly's allotments were subject to confirmation by the CCLW and the federal Indian Superintendent for the Province.

5. Allotment of IR 3

[100] The Indian presence in the Kootenay region was extensive. In 1886 Indian Commissioner Powell visited the area and noted that "[t]he Upper Kootenays inhabit all the region of the Upper Columbia Lakes as far as the Tobacco Plains [south of Cranbrook]".

[101] O'Reilly met with settlers and the Akisq'nuk in August 1884. He noted:

> …the habits of the Kootenay Indians have in the past been migratory, moving from place to place, at different seasons of the year as suited their pursuits and requirements…[Prior to my arrival] the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their cattle and horses in the most favoured spots. [CBD at tab 55]

[102] The extent of the land used for grazing was relatively new in the 1880s. Indian Agent A. W. Vowell reported that the Kootenay Indians "about three times a year used to repair in large hunting parties" across the Rockies in search of buffalo (CBD at tab 60). By 1883, they had "entirely abandoned their old custom of crossing the mountains in pursuit of game…[and] now depend for their sustenance chiefly on their cattle, and the game and fish they can secure on the Upper Kootenay and Upper Columbia Rivers" (CBD at tab 35). "Since the buffalo have failed the Kootenays try hard to increase the number of their cattle" (CBD at tab 43).

[103] On August 9, 1884, after meeting with the Akisq'nuk, Commissioner O'Reilly drafted Minutes of Decision for the allotment of lands which subsequently became IR 3, including a metes and bounds description of the allotted reserve lands as well as his sketch of his boundaries. The area was estimated at 8,320 acres.

[104] On September 2, 1885, Commissioner O'Reilly was informed that the CCLW had accepted the allotment of Indian reserves in the Kootenay District as described in his Minutes of Decisions and sketches.

[105] The reserve was surveyed in 1886-87, and was found to encompass 8,456 acres. However, the surveyor changed the boundaries along the eastern side from those set out in O'Reilly's metes and bounds description and sketch. The surveyor explained that this would remove mountainous land from the 1885 allotment and increase the size of the pasture land. The result was a reduction in the acreage along the eastern boundary.

6. Completion of the Work of the Commission; Outstanding Issues

[106] Commissioner O'Reilly retired in 1898. He was succeeded by Vowell, who continued as well in the role of Indian Commissioner.

[107] In 1908 the work of the Indian Reserve Commissioner ceased due to orders from R.G. Tatlow, CCLW under the McBride provincial government, citing the unsatisfactory state of affairs between the Dominion and the Province in relation to reserves. The Dominion had challenged the Province's claim to a reversionary interest in the allotted reserves, and the matter was being litigated.

[108] At the same time, a lawyer, Arthur O'Meara, represented the Allied Tribes in an effort to gain recognition of Aboriginal title. He, along with Indian leaders Peter Kelly, Haida Nation, and Andy Paull, Squamish Nation, were pressing Ottawa for a reference of the question Aboriginal title to the Privy Council and collaboration on a list of questions had commenced.

[109] In 1912, Premier McBride presented Ottawa with his concerns over challenges to the Province's claim of a reversionary interest and the "excessive" land allotted as reserve. Negotiations between the Province and the Dominion sought a solution to all three matters.

[110] J.A.J. McKenna, a DIA official, was appointed to investigate the matters of Aboriginal title, reversionary interest and reserve size, and to represent Canada in negotiations with the Province.

[111] McKenna studied the title question and engaged with McBride on his concern that a reference to the Courts could cast doubt on the validity of title to land in the Province. Negotiations on the subject were dropped, leaving the matters of reversion and reserve allotments.

[112] McKenna consulted with Indians throughout British Columbia and reported that a great source of dissatisfaction was the provincial reversionary interest in their lands stemming from Clause 5 of the JIRC Agreement:

> 5. That each Reserve shall be held in trust for the use and benefit of the Nation of Indians to which it has been allotted, and in the event of any material

> increase or decrease hereafter of the members of a Nation occupying a Reserve, such Reserve shall be enlarged or diminished as the case may be, so that it shall bear a fair proportion to the Members of the Nation occupying it. The extra land required for any Reserve shall be allotted from Crown Lands, and any land taken off a Reserve shall revert to the Province.

[113] McKenna recommended a Royal Commission comprised of members from both governments to settle the problems of the reversionary interest and reserve acreage.

[114] The attempt by the Allied Tribes to secure the agreement of the Dominion government to refer the question of Aboriginal title to the Privy Council continued. Negotiations broke down in November 1914, over the government's insistence on conditions, in the vein of "heads I win, tails you lose" that:

> 1) If the court upheld the claim of title, it would be surrendered in consideration of acceptance of the findings of the McKenna-McBride Commission, and
>
> 2) If it was decided that no title existed, "...the policy of the Dominion towards the Indians shall be governed by consideration of their interests and future development" (Special Committee Report).

C. Finality

[115] The history of reserve creation in British Columbia raises this question: When is "final" final?

1. The Joint Indian Reserve Commission

[116] To recap, in 1875-1876, under statutory authority, the governments of the Province and the Dominion passed Executive Orders by which they committed themselves to give effect to Article 13 by agreeing to establish a reserve commission (the JIRC) with the power "after full [i]nquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it" (emphasis added).

[117] This was in order to effect the "speedy and final adjustment of the Indian Reserve question in British Columbia..." (emphasis added).

[118] The term “final” requires no interpretation. The dictionary definition may serve as a reminder of its import; “2 conclusive, decisive, unalterable, putting an end to doubt” (*The Canadian Oxford Dictionary*, *sub verbo* “final”).

[119] The term “final”, however, for the purposes of the agreement establishing the JIRC, had a proviso: The allotments by the commission were subject to the approval of the Chief Commissioner of Lands and Works (CCLW) for the Province and the Deputy Superintendent of Indian Affairs. CCLW approval was sought on an ongoing basis by Commissioners in their work.

[120] By 1912 a schedule of reserves had been established. All had received the required approvals. The proviso had been satisfied. The finality called for by the agreement had, at least on paper, been achieved.

2. The McKenna-McBride Agreement

[121] Finality, however, was not in fact achieved. The Province, despite the allotments having been made by Commissioners it had appointed jointly with Canada, all of which were approved by its CCLW, balked. It was 1912. The settler population had increased after the powers of the JIRC were agreed upon in 1876. The Indian population had declined. White settlers, and their elected government (Indians were denied the vote), had their eyes on land the JIRC had set apart for the Indians.

[122] Some Indian groups had objected to the reversionary interest of the Province under paragraph 5 of the agreement that established the JIRC. The provincial right of reversion was disposed of. The Province and the Dominion constituted, by agreement (the “M-M Agreement” or “Agreement”), the McKenna-McBride Commission.

3. Comment

[123] Lest it be thought that by agreeing to establish another reserve commission the Dominion negotiators were consistently advancing the Indian interest in securing a land base, it will be recalled that:

1) The Dominion was complicit in the introduction of Clause 5, which provided for the erosion, in the present circumstance of dramatic decline in the Indian population, of the land base allotted by the Joint Indian Reserve Commission.

2) The Commissioners under the JIRC Agreement were mandated to settle the allotment of reserves with finality. The Indians had co-operated, having been assured by the appointee of the Province and the Dominion, the latter representing their interests, that the allotments would secure them on the land. But now the new Commission could recommend reductions.

3) In the 41 years of stalling and obstruction by the Province, the Dominion did not avail itself of the dispute resolution mechanism provided for in Article 13, namely a reference to the Secretary of State for the Colonies.

4. Finality, Round 2

[124] The finality intended by both governments on establishing the JIRC gave way to the power granting the Commission to recommend reductions and additions to reserves previously allotted. However, Indian groups occupied land allotted by the JIRC, and understood that their interest was secure. It was therefore provided that consent to reductions was required.

[125] The text:

> MEMORANDUM OF AN AGREEMENT ARRIVED AT BETWEEN J.A.J. McKENNA SPECIAL COMMISSIONER APPOINTED BY THE DOMINION GOVERNMENT TO INVESTIGATE THE CONDITION OF INDIAN AFFAIRS IN BRITISH COLUMBIA, AND THE HONOURABLE SIR RICHARD McBRIDE, AS PREMIER OF THE PROVINCE OF BRITISH COLUMBIA.
>
> WHEREAS it is desirable to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia, therefore the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia:—
>
> 1. A Commission shall be appointed as follows: Two Commissioners shall be named by the Dominion and two by the Province. The four Commissioners so

named shall select a fifth Commissioner, who shall be the Chairman of the Board.

2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:

(*a*) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality, the Reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the Commissioners think reasonably sufficient for the purposes of such Indians.

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

3. The Province shall take all such steps as are necessary to legally reserve the additional lands which the Commissioners shall apportion to any body of Indians in pursuance of the powers above set out.

4. The lands which the Commissioners shall determine are not necessary for the use of the Indians shall be subdivided and sold by the Province at public auction.

5. The net proceeds of all such sales shall be divided equally between the Province and the Dominion, and all moneys received by the Dominion under this Clause shall be held or used by the Dominion for the benefit of the Indians of British Columbia.

6. All expenses in connection with the Commission shall be shared by the Province and Dominion in equal proportions.

7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians, including a right to sell the said lands and fund or use the proceeds for the benefit of the Indians, subject only to a condition that in the event of any Indian tribe or band in British Columbia at some future time becoming extinct, then any lands within the territorial boundaries of the Province which have been conveyed to the Dominion as aforesaid for such tribe or band, and not sold or disposed of as hereinbefore mentioned, or any unexpended funds being the proceeds of any Indian Reserve in the Province of British Columbia, shall be conveyed or repaid to the Province.

> 8. Until the final report of the Commission is made, the Province shall withhold from pre-emption or sale any lands over which they have a disposing power and which have been heretofore applied for by the Dominion as additional Indian Reserves or which may during the sitting of the Commission, be specified by the Commissioners as lands which should be reserved for Indians. If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect.
>
> Signed in duplicate at Victoria, British Columbia, this 24th day of September, 1912. [emphasis added; CBD at tab 237]

[126] The terms are characterized as proposals: "...the parties above named, have, subject to the approval of the Governments of the Dominion and of the Province, agreed upon the following proposals as a final adjustment of all matters relating to Indian Affairs in the Province of British Columbia..." (emphasis added).

[127] The intent of the M-M Agreement is, however, clear. The Commission had the power to "adjust" acreages previously allotted. The Commission was empowered to "fix" the acreages to be added. The adjustments and additions ordered by the Commission were to be final and binding on the parties: "The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion..." (emphasis added).

[128] The use of the term "proposals" is not congruent with the powers conferred on the Commission. The characterization of the terms of the Agreement as "proposals", subject to the approval of both governments, is explained by the Executive Order authorizing the signatories to enter the Agreement:

> P.C. 3277.
>
> Certified copy of a Report of the Committee of the Privy Council, approved by His Royal Highness the Governor General on the 27th November, 1912.

……

The Committee of the Privy Council have had under consideration a report, dated the 26th October, 1912, from the Superintendent General of Indian Affairs, submitting an agreement entered into by Your Royal Highness's Special Commissioner and the Honourable the Prime Minister of British Columbia respecting Indian Reserves in that Province, together with a report of the Commissioner.

The Minister of Justice to whom the said report was referred, observes that the agreement contemplates the constitution of a commission with certain powers and confirmation of the proceedings of the commission by the two Governments;

That the statutory authority of Your Royal Highness in Council to constitute this commission is to be found in Part 1 of the Enquiries Act, Revised Statutes of Canada, 1906, Chapter 104, and it appears to the Minister that in view of the statutory provisions the proceedings of the commission must be subject to approval.

The Minister of Justice therefore advises that the approval of the agreement should be subject to a further provision which should be accepted by the Government of British Columbia before the agreement can become effective providing that notwithstanding anything in the agreement contained the note and proceedings of the Commission shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the reports whether final or interim, of the Commission with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commissions, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose.

The Committee, concurring, advise that a copy hereof approving of the agreement subject to the aforesaid modification be transmitted to the Lieutenant Governor of British Columbia for the information and approval of His Government.

The Committee further advise that, as the British Columbia Indian question has been the subject of communications from the Colonial Office, Your Royal Highness may be pleased to forward a copy of this minute to the Right Honourable the Secretary of State for the Colonies.

All of which is respectfully submitted for approval.

(Sgd.) Rodolphe Boudreau,

Clerk of the Privy Council [emphasis added; CBD at tab 236]

[129] Provincial OIC 1341 mirrors P.C. 3277:

> OIC 1341
>
> *To His Honour*
> *The Lieutenant-Governor in Council*:
>
> *The undersigned has the honour to recommend* that the memorandum of agreement arrived at between the Honourable the Premier and J.A.J. McKenna, Special Commissioner appointed by the Dominion Government to investigate the condition of Indian affairs in British Columbia, be approved subject to a provision that notwithstanding anything in the agreement contained the acts and proceedings of the Commission shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the reports, whether final or interim, of the Commission with a view to give effect, as far as reasonably may be, to the acts, proceedings and recommendations of the Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the agreement in accordance with its true intent and purpose.
>
> AND that a copy of this Minute, if approved, be transmitted to the Honourable the Minister of Justice, Ottawa. [emphasis added; CBD at tab 237]

[130] In short, the Minister of Justice advised the government to provide for government approval in order that it comply with the provisions of the *Enquiries Act*. This, in all the circumstances, was a matter of formality. The mutual intention of the parties was to accept the report of the Commission as the "final adjustment of all matters relating to Indian Affairs in the Province of British Columbia" (M-M Agreement, Preamble) in compliance with the constitutional obligations of both governments as set out in Article 13 of the *Terms of Union*, 1871.

[131] Both Executive Orders provided that the recommendations of the Commission would be executed in accordance with the "true purpose and intent" of the Agreement. This was "...to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian Affairs generally in the Province of British Columbia".

[132] As Article 13 provided for the resolution of disagreements by the Secretary of State for the Colonies, the Privy Council Order was remitted to that office. The office of the Secretary was notified that an agreement had been reached.

[133] But the recommendations of the Commission did not settle all the differences. The Commission presented its report in 1916. The Province took no steps to implement the recommendations. The Dominion took no action to force the Province's hand.

5. Proceedings of MMC, Reductions and Additions to Reserves

[134] It was the practice of the Commission, pending confirmation or adjustment of reserve allotments made by the JIRC, to direct that the allotted land and land being considered for addition to reserves be exempt from pre-emption by white settlers. The Provincial Lands Branch complied in the case of the addition to IR 3. Once an existing allotment was confirmed or a new allotment was made, the subject land would remain exempt from pre-emption.

[135] The Commission submitted its report in June 1916. It was not, however, made public until 1919.

[136] The report recommended fifty-five reductions, totalling 47,085 acres, valued between $1,247,000 and $1,522,000. A total of 484 new reserves were recommended, comprising 87,306 acres at a value of $444,838 (Harris at 244). This included land for bands that had not previously received allotments, and those that had.

6. The Additional Land

[137] The JIRC allotment of IR 3 was not ordered reduced by the Commission. On the contrary, the Akisq'nuk initially benefitted from the work of the Commission established by the M-M Agreement.

[138] The Commissioners met with the Akisq'nuk on September 21, 1914. A spokesman, Ignatius Eaglehead, testified of the band's reliance on hunting game to the east of the mountains after the disappearance of the buffalo on the Alberta side. Then seasonal hunting closures were imposed and his people were reduced to eating their horses and cattle. He asked for "...a little

more land for us and our stock...[t]hat is all that I want to ask you — to get more land for my stock" (CBD at tab 121).

[139] In March 1915, the Commissioners ordered the addition of 3,040 acres to IR 3 (later reduced to 2,960 acres).

[140] On April 10, 1915, the provincial Deputy Minister of Lands advised the McKenna-McBride Commission that the recommended parcel of land would not be disposed of until finally dealt with by the Commission. The land remained vacant and available on June 30, 1916, when the Commission released its final report. The report provided for the addition of 2,960 acres to IR 3.

[141] The Commission's description of the Additional Land clearly identifies the point of departure, distances and directional changes in the boundaries.

[142] It may be presumed that the allotment of Additional Land did not conflict with any existing application for pre-emption or Crown grant, as the existence of the same would have either prevented the allotment or been noted in the Minute of Decision ordering the addition. Following the new allotment, pre-emption was not permitted.

7. The Survey Land, and the Addition

[143] The Additional Land lay to the east of IR 3, and partially adjoined it at two places along its surveyed eastern boundary. After the survey of IR 3, but before the addition, land had been pre-empted adjacent and to the east of the eastern boundary of IR 3. The Additional Land shared its north, south and west boundaries with the pre-empted land. As the eastern boundary of the addition lay to the east of the pre-empted land, the latter was encircled by the addition (CBD at tab122).

[144] The loss of land that resulted from the disparity between O'Reilly's metes and bounds description and the lines drawn by the surveyor was known to the Indian Agent, R.L.T. Galbraith, who testified before the Commission in October 1914. He attributed the loss to "...a mistake…when the reserve was first laid out..." (CBD at tab 122). He identified available land for consideration by the Commission.

[145] Chief Arbel testified that much of IR 3 flooded when the river rose, and became swampland when the water receded. This was long known to the Province, as the CCLW requested a report from the surveyor, Ashdown Green, in August 1885, and was informed that 1,200 acres of the reserve was subject to flooding.

[146] The fact that the Akisq'nuk were using land to the east of the reserve to graze their stock, the loss of land due to the survey, and the lack of utility of much of the reserve all appeared to be factors in the decision of the Commission to allot an additional 2,960 acres.

[147] The Akisq'nuk did not ultimately receive the Additional Land allotted by the McKenna-McBride Commission. The addition was disallowed in the next round of the ongoing pursuit of consensus between the federal and provincial governments on land to be transferred under Article 13. The lack of resolve on the part of the Dominion to hold the Province to its commitments appeared first in relation to the allotments made by the JIRC. Then came the M-M Agreement, and the allotment of additional land to several Indian groups by the MMC. Then followed, once again, a review of allotments that both governments had agreed were to be final. The MMC's allotment of the Additional Land was disallowed by Clark, the Province's representative on the review.

[148] The apparent lack of resolve in the Dominion to hold the Province to its commitments in the JIRC Agreement led to the entry of the M-M Agreement. Crown honour was, however, preserved by the provision that allotted land would not be cut off without Indian consent.

8. Disposing of the Promised Consent to Reserve Reductions

[149] The legislative over-ride of the M-M Agreement requirement for consent did not affect any interest of the Akisq'nuk. It was, however, illustrative of the faithlessness of the Dominion by its most senior official, Duncan Campbell Scott. It was Scott who would later urge the acceptance of Clark's disallowance of the additional land allotted to several bands in the Kootenays by the MMC. This included the Additional Land.

[150] The M-M Agreement stipulated that land would not be taken from reserves previously allotted without consent, and so the Indians were promised when consulted about their needs. This promise would naturally have been understood by the Indians to apply in relation to land

newly allotted by the Commission, as the Commission was mandated to "finally" fix the land to be reserved and transferred to Canada.

[151] The Dominion was prepared to accept the McKenna-McBride Commission report. Provincial approval was not forthcoming. Soon after the Commission submitted its report, Duncan Campbell Scott, Deputy Superintendent of Indian Affairs, was told that the Province would probably approve the report promptly if the cut-offs could be effected without Indian consent (Harris at 248-49).

[152] Ditchburn, Chief Inspector of Indian Agencies, was in favour of the Superintendent being authorized to make cut-offs in order to achieve a settlement with the Province (Harris at 251).

[153] The Allied Tribes opposed implementation of the report when, in 1919, its contents became public. Its primary concern was over the potential impact of implementation of the report on Aboriginal title (Harris at 249).

[154] In 1919 the Province enacted legislation enabling the government to deal with the report. In 1920 Parliament did the same, with a provision that cut-offs could be made without surrender under the *Indian Act*.

> *British Columbia Indian Lands Settlement Act* S.C.1920, c.51
>
> Power given to Governor in Council to settle differences between Canada and B.C. with respect to Indian matters.
>
> 2. To the full extent to which the Governor in Council may consider it reasonable and expedient the Governor in Council may do, execute, and fulfil every act, deed, matter or thing necessary for the carrying out of the said Agreement between the Governments of the Dominion of Canada and the Province of British Columbia <u>according to its true intent</u>, and for giving effect to the report of the said Royal Commission, either in whole or in part, and for the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province.
>
> Power to order reductions or cutoffs from reserves without surrender by Indians.
>
> 3. For the purpose of adjusting, readjusting or confirming the reductions or cutoffs from reserves in accordance with the recommendations of the Royal Commission, the Governor in Council may order such reductions or cutoffs to be effected without surrenders of the same by the Indians, notwithstanding any

> provisions of the *Indian Act* to the contrary, and may carry on such further negotiations and enter into such further agreements with the Government of the Province of British Columbia as may be found necessary for a full and final adjustment of the differences between the said Governments. [emphasis added]

9. Comment on Disposal of Indian Consent

[155] The M-M Agreement called for the consent of the beneficiaries of a trust that, on the terms of the JIRC Agreement, came into existence upon allotment of land, as reserve, for the use and benefit of a particular Indian group.

[156] It would have been obvious to federal officials in 1912 that the Indian peoples would not readily, if ever, agree to relinquish land that, on the terms of the JIRC Agreement were allotted "finally", and which were to be held "in trust for the use and benefit of the Nation of Indians to which it had been allotted,…". One need not be a cynic to speculate that the requirement for consent was put in the M-M Agreement to gain the Indian's co-operation when discussing their needs with the M-M Commissioners.

10. True Intent and Purpose of the Agreement, and Government Prerogatives

[157] The preamble to the *British Columbia Indian Lands Settlement Act* refers to the M-M Agreement. It speaks of the objective to carry "...into execution the settlement provided for by the Agreement in accordance with its true intent and purpose", but only "as far as reasonably may be..." The preamble:

> WHEREAS by Memorandum of Agreement bearing date the twenty-fourth day of September, one thousand nine hundred and twelve, made between J.A.J. McKenna, Special Commissioner appointed by the Governor in Council to investigate the condition of Indian affairs in British Columbia, and the Honourable Sir Richard McBride as Premier of the Province of British Columbia, an Agreement was arrived at, subject to the approval of the Governments of the Dominion and of the Province, for the purpose of settling all differences between the said Governments respecting Indian lands and Indian affairs generally in the Province of British Columbia, and for the final adjustment of all matters relating thereto by the appointment of a Royal Commission for the purpose set out in the Agreement; and whereas by orders in council subsequently made by the respective Governments of the Dominion and the Province the said Agreement was approved, subject to the further provision that, notwithstanding anything in the said Agreement contained, the acts and proceedings of the Royal Commission

> shall be subject to the approval of the two Governments, and that the Governments agree to consider favourably the reports, whether final or interim, of the Royal Commission, with a view to give effect as far as reasonably may be to the acts, proceedings and recommendations of the Royal Commission, and to take all such steps and proceedings as may be reasonably necessary with the object of carrying into execution the settlement provided for by the Agreement in accordance with its true intent and purpose; and whereas a Royal Commission on Indian affairs for the Province of British Columbia was duly appointed for the purpose of carrying out the said Agreement; and whereas the said Royal Commission has since reported its recommendations as to lands reserved and to be reserved for Indians in the Province of British Columbia, and otherwise for the settling of all differences between the said Governments respecting Indian lands and Indian affairs generally in the said Province: Now, therefore, His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:… [emphasis added]

11. Comment on Shifting Purposes

[158] By entering the M-M Agreement, both governments established the mechanism by which to fix the quantity of land that the Province would grant to Canada (Article 13, "...and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted...") (emphasis added).

[159] The M-M Agreement called for the setting apart of such quantities of land as may be reasonably needed by the Indians. This is reflected in the power given the Commission to remove land previously allotted:

> 2. The Commission so appointed shall have power to adjust the acreage of Indian Reserves in British Columbia in the following manner:
>
> (a) At such places as the Commissioners are satisfied that more land is included in any particular Reserve as now defined than is reasonably required for the use of the Indians of that tribe or locality,…[emphasis added]

[160] The addition to IR 3 ordered by the Commission was based on its assessment, after due inquiry of the Indians and the Indian Agent, of what was reasonable for the Indians of that locality.

[161] The preamble to the *British Columbia Indian Lands Settlement Act* reveals that the requirement of reasonableness was no longer considered to refer to the needs of the Indians, but to the whim of the government in the exercise of its ability to accept or reject, in whole or in part,

the report of the Commission. This of course is not what the Indians were told when consulted on their needs by the Commissioners.

[162] Moreover, the federal government granted itself the power to remove land previously allotted by the JIRC without the consent of the Nation for which the reserve had been allotted. The promise made to the Indians to gain their co-operation with the Commission could be broken, ostensibly in order to give effect to the purpose and intent of the Agreement. In March 1919, the Province enacted the *Indian Affairs Settlement Act*. It has substantially the same effect as the federal *Act* of 1920.

[163] Both enactments provided for further negotiations between the parties to the Agreement over the land to be transferred to Canada for the use and benefit of the Indian peoples of British Columbia.

[164] The door was now wide open for what followed.

12. Finality, Round 3: Ditchburn Clark Review

[165] In April 1920, Premier Pattullo wrote to Prime Minister Meighen to propose a review of the McKenna-McBride report. He claimed that it contained errors, and asserted, regarding the provision of adequate lands for the Indians, that "...it was not the intention to place these lands at strategic locations, there to block white settlement and acquire speculative value" (Harris at 251).

[166] Pattullo proposed a two man review, and offered Major J.W. Clark, the Provincial Superintendent of Soldier Settlements, as his government's representative. The proposal was accepted. Indian Affairs appointed Ditchburn to represent Canada.

[167] Scott offered James Teit, an Indian, and ethnographer of the Interior Salish, a position as Ditchburn's assistant. Teit had served as Secretary to the Allied Tribes. After consultation with Indian leaders, Teit accepted.

[168] Ditchburn and Clark agreed to affirm the Commission's allotments in the Northern Agencies.

[169] The Stuart Lake Agency recommended the disallowance of the Commission's new reserve allotments. This pleased Ditchburn as it would "have the effect of showing the Provincial authorities that we are desirous of acting fairly and are only asking for what we deem to be reasonably necessary for the Indians" (Harris at 252).

[170] The southern interior was left to Teit, who consulted with tribal chiefs. He frequently reported that the interior Indians required more grazing lands. Ditchburn reported that he and Clark desired to go as far as possible in meeting Teit's views (Harris at 252).

[171] Teit fell ill in 1921, and died in October, 1922.

[172] The Province was unhappy about additions in the Kootenays. Ditchburn wrote that dealing with Clark was a matter of "…fighting every inch of the way to make a good showing" (Harris at 253).

[173] In mid 1922 the Province sent Clark, now the Minister of Immigration, to India for four months to encourage demobilized British officers to take up land in British Columbia (Harris at 253).

[174] On March 11, 1923, Ditchburn informed Scott that the additions in the Kootenays and Shuswap were refused by Clark. He considered this unjust. Estimates of the number of horses ranged up to 255, and cattle, 359. More grazing land was needed. He told Scott:

> Personally I feel that the attitude taken by the Grazing Commissioner is putting the Government of British Columbia in a position of breaking faith with regard to the agreement of 1912.
>
> …
>
> In the grazing country this is important both in the interests of whites and Indians for it is needless for me to say that the Indians will not take kindly to having taken away from them meadow lands which they have always been using and see these given to white stock-raisers.

[175] On March 27, 1923, Ditchburn reported to Scott:

> Hereunder will be found the results of our negotiations which Major Clark has recommended to the Minister:

> …
>
> Kootenay Agency
>
> …
>
> New Reserve No. 3A of 2960 acres for the Lower Columbia Lake Indians was disallowed as not reasonably required by the Indians and seriously militating against the white development. The proposed new reserve completely encircled Crown-granted lands.
>
> …
>
> The decisions with regard to these new reserves were taken by Major Clark on the recommendation of the Grazing Commissioner. Objection was taken by myself on the grounds that the additions were necessary for the reasonable requirements of the Indians and statistics were brought forward to bear out my argument. Major Clark, however, has recommended that a grazing commonage (not a reserve) for the joint use of the Shuswap and Lower Columbia Lake tribes be allowed by the Grazing Commissioner for the use of Indian stock only and free from all grazing fees. [emphasis added]

[176] On April 6, 1923, Pattullo informed Scott that, with the exception of the Kootenay and Shuswap additions:

> ...I am prepared, subject to ratification by the Lieutenant-Governor-in-Council, to confirm the report with the amendments, additions and deductions as recommended by Mr. Ditchburn and Major Clark upon your submitting a revised schedule of the confirmations, cut-offs and new reserves,...

[177] Scott wrote to Ditchburn:

> I urged very strongly on Mr. Patullo the desirability of granting us all the reserves on the supplementary list, and you will note the observations that he makes thereupon. I intend in my reply to Mr. Patullo to still further press for the allotment of these reserves, but neither the Minister nor myself think it advisable to delay the agreement on the Commission's Report for any subsequent arrangement that may be made with reference to these supplementary demands. [emphasis added]

[178] Scott's rationale for agreeing to the Province's modifications to the McKenna-McBride Commission's report may be gleaned from a briefing he prepared in October 1923 for Superintendent-General of Indian Affairs Charles Stewart:

> In spite of this vigorous protest from the Indians as to the acceptance of the report of the Royal Commission, I cannot, with a due sense of responsibility and having the best interests of these people at heart, recommend any other action but the adoption of the report. The Indians will receive in the aggregate a large acreage of reserve lands free from any vexatious claim of the Province, such as the so-called 'reversionary interest' has been in the past. *While it is true that in some districts it would have been more satisfactory if larger reserves could have been set aside for them, conditions peculiar to British Columbia rendered that almost impossible*…
>
> …
>
> If our Government refuses [illegible] consider the report of the Royal Commission and [illegible] to use the statutory power to confirm the [illegible] I am afraid the future welfare of the British Columbia Indians will be jeopardized. The report is the outcome of long negotiations between the Governments, of [illegible] ground examination into the needs of the Indians during which the evidence of Indians was taken and their advice and co-operation sought, and finally there was a resurvey of the whole report by officers of the Governments and representatives of the Indians. [emphasis in original; Respondent's Memorandum of Fact and Law, at para 106]

[179] Clark agreed to a large grazing commonage for Kootenay and Shuswap stock farmers. Ditchburn was satisfied, provided that the Province allowed the commonage in the Kootenays (Harris at 254).

[180] Apart from writing letters, federal officials took no measures to protect the allotment of the addition to IR 3. Scott committed himself and the Minister to approve the McKenna-McBride report on the basis that the additions be disallowed without any prior arrangement to ensure that grazing lands would subsequently become available.

[181] The grazing commonage never materialized.

13. Comment on Federal Capitulation

[182] Major Clark's responsibilities as Superintendent of Soldier Settlements would naturally dispose him to preserve the availability of land for settlement and use by settlers.

[183] There was no impediment to the Province making Crown grants encircling land allotted as reserve, which was inevitable.

[184] Ditchburn did not agree with Clark on the disallowance of the addition to IR 3. They filed separate reports. On July 25, 1923, the Province accepted the Commission's report, albeit amended as proposed by Clark. There was, therefore, a disagreement over the quantity of land to be "granted" by the Province under Article 13.

[185] Ditchburn reported the disagreement to his superior, Duncan Campbell Scott. There is no evidence in the record or reference in the literature to Scott having considered referring this or any previous disagreement over the quantity of land to be transferred for a decision by the Secretary of State for the Colonies, a remedy provided for by Article 13 of the *Terms of Union*, 1871.

14. Finality Achieved

[186] The Commission had released its report on June 30, 1916. Seven years later, on July 25, 1923, the government of the Province approved the report as amended by Clark to disallow the additions in the Kootenays.

[187] On July 19, 1924, the Governor in Council approved the amended McKenna-McBride Commission report. The additional acreage of 2,960 in the McKenna-McBride Commission's report was crossed out and described as "Disallowed".

[188] In the result, five of the Commission's smaller cut-offs were reversed. Twenty of the Commission's new reserves were disallowed, including three reserves of grazing land, 6,000 acres, in the Kootenays. Ditchburn had prevailed on Clark to preserve them, but Clark refused "...on the recommendation of the provincial grazing commissioner, who held that they would interfere with the grazing interests of white people" (Harris at 253-54).

VI. INDIGENOUS PERSPECTIVE

A. Reserves, and Traditional Use and Occupation

[189] Reserves were established in regions occupied by discrete Indigenous groups.

[190] The Kootenay Indians' long time presence in the region of the Province in which IR 3 was set apart in 1885, and added to in 1915, was recognized by government officials.

[191] A.S. Farwell (Stipendiary Judge in Kootenay region), in his "Report on the Kootenay Indians" dated December 31, 1883 said:

> …300 Indians consider the land along the Upper Kootenay River, from the boundary line at Tobacco Plains [south of Cranbrook] northward, to the Lower Columbia Lake [modern Windermere Lake], as theirs. The majority of these Upper Kootenays winter at St. Mary's Mission [near modern-day Cranbrook]. … In the immediate vicinity of the church and mission buildings, the Indians have erected fifty-five houses, which are occupied by their families during the winter. [Description of change in lifestyle now that buffalo extinct] The Indians since then have gradually accumulated small bands of cattle, and wintered them without material loss…[except in 1879-80]. The Upper Kootenays have entirely abandoned their old custom of crossing the mountains in pursuit of game, the buffalo having left their former haunts on the eastern slope of the mountains. The Indians now depend for their sustenance chiefly on their cattle, and the game and fish they can secure on the Upper Kootenay and Upper Columbia Rivers. These Indians at present own about 400 head of cattle and some 500 horses. The major part of their cattle have been wintered heretofore on the east side of the Columbia Lakes. This is a favourite grazing place of the Indians… [CBD at tab 35]

[192] O'Reilly noted, in 1884, that:

> the habits of the Kootenay Indians have in the past been migratory, moving from place to place, at different seasons of the year as suited their pursuits and requirements…[Prior to my arrival] the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their cattle and horses in the most favoured spots. [CBD at tab 55]

[193] In 1886, Indian Commissioner Powell visited the area and noted that "[T]he Upper Kootenays inhabit all the region of the Upper Columbia Lakes as far as the Tobacco Plains" [south of Cranbrook] (CBD at tab 89).

[194] Chief Arbel testified before the Commission in 1914. He spoke of his people's occupation of the region, and of incursions by white settlers. Judge Farwell had also made note of complaints about pre-emptions in his report.

B. Knowledge of the Law

[195] The operation of the *Indian Act* was extended to British Columbia in 1876. By 1914 the Indians in the Province had lived with it for 38 years. Reserves had been allotted from colonial

times through to the JIRC allotments of 1876 to the first complete schedule in 1912, then onward to the allotments by the McKenna-McBride Commission.

[196] Land allotted as reserve was believed to be subject to the *Indian Act*, and was in fact administered by federal officials from at least 1907 (*Wewaykum*, at para 89). The Indians would have believed that land could not be taken from their reserves without their consent by way of a surrender under the provisions of the *Act.*

[197] The Commissioners needed the co-operation of the Indians to complete their work. The drafters of the Agreement knew that the Indians were aware of the surrender requirement. Hence, the provision in the McKenna-McBride Agreement, paragraph 2(a), that land in excess of that "reasonably required" for their use would be removed only with their consent, "...as required by the Indian Act…" (CBD at tab 237).

[198] It may safely be inferred that it was the practice of the McKenna-McBride Commissioners to assure the Indians that land set apart by the JIRC would not be taken without their consent.

C. The Assurance of Finality

[199] The M-M Agreement provided for finality:

> 7. The lands comprised in the Reserves as finally fixed by the Commissioners aforesaid shall be conveyed by the Province to the Dominion with full power to the Dominion to deal with the said lands in such manner as they may deem best suited for the purposes of the Indians...[emphasis added; CBD at tab 237]

[200] This was the Akisq'nuk's second go-round with reserve commissioners. The JIRC had, after consulting with them, allotted a reserve, IR 3, in 1884.

[201] The Commission met with the Akisq'nuk (then known as the Columbia-Kootenay Band) on September 21, 1914. Chief Arbel and others spoke. The testimony of the Indian witnesses was transcribed. The opening address of the Chairman was not. It is recorded that "The Chairman addresses the assembled Indians as to the scope and purpose of the Commission" (CBD at tab 121).

[202] Chief Arbel opened with the words “I heard what you said about coming here to fix up about my lands...” (emphasis added; CBD at tab 121).

[203] The use of the term “fix” by Chief Arbel indicates that the Chairman used terms from the Agreement to explain the purpose of the Commission’s work. To “fix”, in ordinary usage, connotes finality. This is the general import of the conversation as transcribed.

[204] Chief Arbel and Ignatius Eaglehead told the Commissioners that they lacked sufficient grazing land on the reserve for their horses and cattle. Much of the land previously allotted was unsuitable for agriculture and grazing. Their stock grazed on land adjacent to the reserve.

[205] Chief Arbel expressed his trust and confidence that the Commissioners would grant the much needed additional land:

> You ought to know where there is government land and no one has taken it up yet. You see this valley here is narrow. You know yourself how a reserve ought to run and it is you that would have to give me some land on which to have my reserve. You said it is the Dominion Government that sent you out here. It is because he loves me and he is my father just as he is your father, and that is the reason he sends you out here and tells you to go and help the Indians as much as you can and see if you can straighten things that have been turned the other way. Now you are speaking the truth that you belong to the Government and I belong to the Government. [CBD at tab 121]

[206] There was unencumbered land available. The Commissioners ordered the addition of 3,040 acres to IR 3 (later reduced to 2,960 acres).

[207] The new land was being used by the Akisq’nuk before being added to the reserve, and now it was theirs alone.

[208] Chief Arbel and others present at the September 1914 meeting would have understood that the Commission’s decisions were final. They would naturally understand that land added by the Commissioners, like that allotted by the JIRC, would not later be taken without their consent. Finality, in relation to the Additional Land, would have been understood to mean that the land could not be taken without consent.

D. Knowledge of Disallowance of the Addition

[209] There is no evidence that the Akisq'nuk were informed that the addition was disallowed in July 1923, on the recommendation of Clark, and that the federal officials had capitulated to the will of the Province.

[210] On December 28, 1939, Chief Louie Arbel, a descendant of the Chief who addressed the Commission in 1914, wrote a letter to Indian Affairs Branch, Department of Mines and Resources, requesting a map of IR 3 and expressing concern about the "white man" taking Indian land:

> I would like you to send me the map of how my reserve is at Windermere down to Fairmont, B.C.
>
> The first white man that came to our country spoke to my father and the other Indians, they say "We take your country but you say what part you wanted to keep for the reserve, they [said] from Windermere Creek all ways to Fairmont Cr. ... [N]ow the white man comes say how the reserve is to-day, they are taking half of what the Indians own. Now there are lots of children grown ups with out land, married couple that don't know what to do earn their living ... no horses nothing at all ... now we have only one piece of land for living, pretty small too, for quite a number of lndians here. [emphasis added; CBD at tab 181]

[211] On March 8, 1943, Chief Michel wrote to Major Donald McKay, Indian Commissioner for British Columbia, calling for an investigation into timber cutting on lands adjacent to IR 3 that the Columbia Lake Indian Band, as it then was, believed belonged to them. The Chief also complained about the shortage of grazing lands, as follows:

> For many years this band has held that they had never surrendered any piece of their land, hence it is being upheld by all the lands adjoining the reserve still belong to the Columbia Lake Band...many years ago when this reserve was surveyed, the Indians were given to understanding that the line was to start at Windermere Creek and the southern end the Hot Spring near Fairmont was the other end. Straight across it was agreed that it was not to be fenced to taken up and such was to be for grazing purposes — cattle and horses... [emphasis added; ASOF at para 78]

[212] It is not clear whether these complaints relate to the reduction of the acreage of the reserve as allotted in 1884 by O'Reilly due to the surveyor's departure from the metes and bounds plan or the disallowed addition ordered by the McKenna-McBride Commission. The

December 1939, complaint refers to the "...white man...taking half of what the Indians own" (CBD at tab 181). The acreage added by the Commission was much larger than that lost due to the survey, which suggests that the concern included the latter.

[213] The March 1943 complaint says that the band "...never surrendered...all lands adjoining the reserve…" (CBD at tab 183). The reference to surrender recalls the promise of the Commissioners that its decisions on allotments were final.

VII. POSITIONS OF THE PARTIES

A. Claimant (First Nation)

[214] The Claimant relies on fiduciary duties as found in decisions of the Supreme Court of Canada, including *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, *Wewaykum, Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816, the decision of the Federal Court of Appeal on judicial review of the decision of the Tribunal in *Kitselas*; and, the Tribunal decision in *Kitselas*.

[215] The Claimant argues that the evidence in relation to both the Survey Issue and the Additional Land Issue establishes:

> 1) Its cognizable interest in the lands involved in both, and
>
> 2) Sufficient discretionary power in the Crown, Canada, to ground a duty to take all available measures to ensure that the lands were established as reserves under the *Indian Act*.

[216] The Claimant argues that the Crown was, in the circumstances, duty bound to refer the disagreement over the Additional Land to the Secretary of State for the Colonies for a decision, and neither did so nor considered doing so.

[217] The Claimant says the duty was breached, and compensation is due.

B. Respondent (Crown)

[218] The position of the Respondent is set out in paragraphs 13 to 20 and 53 of its Memorandum of Fact and Law. In summary:

1) Article 13 set out "in general terms" how reserves were to be established, and the provision for "conveyance" to Canada.

2) Federal-provincial co-operation was required, as:

> Federal-provincial cooperation was required in the reserve-creation process because, while the federal government had jurisdiction over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*, Crown lands in British Columbia, on which any reserve would have to be established, were retained as provincial property. Any unilateral attempt by the federal government to establish a reserve on the public lands of the province would be invalid: *Ontario Mining Co. v. Seybold* (1902), [1903] A.C. 73 (Ontario P.C.). Equally, the province had no jurisdiction to establish an Indian reserve within the meaning of the *Indian Act*, as to do so would invade exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians" [*Wewaykum*, at para 15]

3) The process of reserve creation in B.C. culminated on July 29, 1938, with the conveyance of land set apart and approved as reserves was transferred to Canada by Provincial OIC 1036.

4) The role of federal Crown intention in the creation of reserves is "critical", and in B.C. "included the culminating step" of the above transfer. As the transfer of neither parcel had taken place, the federal Crown could not have intended that either become a reserve.

5) The case law has articulated the concept of "provisional reserves" to describe land which had been allotted and surveyed and received provincial approval as such, but had not yet been transferred to Canada.

6) The land excluded from O'Reilly's 1884 metes and bounds description of IR 3 due to the 1886 survey was never approved for inclusion in the reserve by the Province.

7) The Additional Land recommended for addition to IR 3 by the McKenna-McBride Commission was never approved by the Province.

8) Hence, neither of the parcels of land in question became provisional reserves.

9) If the Claimant had a cognizable interest in the Additional Lands recommended by the Commission, Canada had little or no discretionary control "in relation to the Claimant's unproven interest ..." due to the role of the Province in creating reserves.

10) If there was a fiduciary duty in relation to the Additional Land, it fell away due to the duty on the Crown, in the interest of all the beneficiaries of reserve allotments, to bring closure on the quantity of land to be transferred to the Dominion.

VIII. ISSUES

[219] The issues:

1) What principles of fiduciary law apply to a determination of whether the Crown had fiduciary duties to the Claimant in relation to the Additional Land allotted by the Commission and the land omitted from the 1884 allotment?

2) If the applicable principles call for proof of the Claimant's cognizable interest and Crown discretionary control, has the Claimant met the test in relation to the Additional and/or the Survey Land?

3) Do the circumstances also call for the application of fiduciary duties based on an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty?

4) If "yes" to #2 and/or #3, did the Crown meet its fiduciary obligations to the Claimant?

IX. ANALYSIS

[220] The Parties have set out their arguments in the framework for fiduciary analysis offered by *Wewaykum*. Crown obligations must be considered in light of pronouncements of the Supreme Court of Canada subsequent to *Wewaykum*, and in light of the particular facts of this case. Thus the issues will be considered in several different frameworks, all of which yield the same conclusion.

A. *Wewaykum* and Fiduciary Duty

[221] The Respondent argues that the Additional Land was neither sufficiently described nor protected from pre-emption to come within the designation "provisional reserve" established by the decision of the Supreme Court in *Wewaykum*.

[222] The Minute of Decision allotting the Additional Land included a precise description of its boundaries. The Commission consulted with the Provincial Ministry of Lands with respect to its availability before ordering the land set apart as reserve. There were no pre-emptions within the Additional Land before its addition to IR 3 was disallowed by Clark.

[223] The Additional Land appears to have been a provisional reserve at the material time. It also satisfies the cognizable interest/discretionary control analysis from *Wewaykum*, as shown below.

1. Cognizable Interest

a) Recognition of Current Use

[224] The Respondent argues that the evidence does not support a finding that the Claimant had a cognizable interest in the IR 3 land excluded by the Survey or the Additional Land.

[225] The identification of Indian interests in land for the purposes of reserve creation in British Columbia is contextual.

[226] As documented at length above, despite non-recognition of Indigenous interests in land by later B.C. Governors and officials, on each occasion on which steps were taken to establish reserves in British Columbia between 1854 and 1907, the responsible government officials were to determine and allot, for each Indigenous group, their village sites and land habitually used.

[227] Colonial policy called for the creation of reserves at "Indian settlements" and associated lands from which Indigenous groups derived their sustenance. This policy continued after Confederation, but both the participants in the process of reserve allotment and the situation on the ground changed. Federal jurisdiction under section 91(24), *Constitution Act*, 1867, applied. Federal and provincial responsibilities in relation to reserves were set out in the *Terms of Union*, Article 13.

[228] The JIRC was directed by Article 4 of the JIRC Agreement to:

> ...be guided generally by the spirit of the terms of Union between the Dominion and the local Governments which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers…[emphasis added]

[229] The McKenna-McBride Commission, 1912, was to review the previous allotments to determine whether the allotments exceeded or were insufficient to satisfy that "...reasonably required for the use of the Indians of that tribe or locality..." and make adjustments it considered necessary.

[230] In 1915 the Commissioners consulted with the Akisq'nuk. They were told of the need for more land, and that they grazed their stock on land outside of the reserve allotted by O'Reilly in 1885. An addition of 2,960 acres was ordered. The Additional Land was described sufficiently to be shown on maps as a "new reserve". As the Additional Land was later "disallowed" by the Province it was never surveyed.

[231] O'Reilly, Judge Farwell, Fouget and Chief Arbel attested to the long time presence of the Kootenay Indians in the territory in which IR 3, and the addition, were allotted.

b) Prior Occupation

[232] The Claimant argues that the interest of the Claimant in the lands in issue should be determined by the application of principles set out by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

[233] It is not necessary to resort to the application of the test for proof of Aboriginal title to find a cognizable interest.

[234] It is mentioned in *Wewaykum* the provisional reserves in issue were not in the territory historically occupied by the contesting bands. The significance of prior use and occupation in relation to Crown duties concerning reserve creation is not explained in *Wewaykum*, yet the Court appears to have considered it a factor. In my opinion it is relevant to, but not in itself determinative of, the question whether a cognizable interest or a substantial practical interest has been established.

[235] Regardless, in the present matter there is ample evidence of long time use and occupation of the region by the Kootenay Indians.

[236] The Kootenay Indians were in the Columbia Lake area before the allotment of IR 3 by O'Reilly. In his words, "...the Indians claimed to be, and virtually were, in possession of the whole district, cultivating such portions as they pleased, and pasturing their cattle and horses in the most favoured spots" (CBD at tab 55).

[237] In 1927, Duncan Campbell Scott testified before the House of Commons' Joint Special Committee inquiry into the claims of the Allied Indian Tribes of British Columbia. He tabled his "Report on the British Columbia Indian Question". When asked by a committee member whether reserve land had been selected for the Indians he testified, "They were selected with great care by them, as lands being occupied and used by the Indians to which they had aboriginal title" (emphasis added).

[238] The acreage added to IR 3 by the McKenna-McBride Commission was, like the land allotted by O'Reilly, being used at the time of allotment.

c) Conclusion

[239] The Additional Land was adjacent to IR 3 as previously allotted. The Kootenay Indians used and occupied the territory when the Commission allotted the addition to IR 3. The description clearly defined a parcel of land within the territory in actual use by them. Their interest in the Additional Land was cognizable.

2. Discretionary Control

[240] The evidence reveals the involvement of the Crown in every step taken in the process of the creation of reserves in British Columbia after Confederation. Its involvement was in relation to the interest of the Indians being advanced by the creation of reserves. Prior usage of land was recognized as a factor in the exercise performed jointly with the Province to set apart land for reserves. Once land was set apart the Crown exercised a discretion throughout the steps taken to achieve the object of Article 13. In Justice Binnie's words, bands including the Claimant were "entirely dependent on the Crown to see the reserve-creation process through to completion" [*Wewaykum*, at para 89]. Although it lacked the jurisdiction to create reserves out of Provincial

Crown land, it had, at a minimum, a duty "...to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with ordinary diligence in what it reasonably regarded as the best interest of the beneficiaries" (emphasis added; *Wewaykum*, at para 97).

[241] The question now becomes: What action was required of the Crown to perform its duty, and was such action taken?

3. The Test of "Ordinary Diligence"

[242] The Claimant had a cognizable interest in the addition. The Crown exercised discretionary control in the process of securing the transfer of the land to Canada as required by Article 13. The Crown had, at a minimum, a duty of ordinary diligence. The beneficiary whose interest was directly engaged was the band now known as the Akisq'nuk First Nation, i.e., the Claimant. Its interest was in the addition being transferred to Canada along with the land allotted by O'Reilly. Canada should have been, at a minimum, ordinarily diligent in pursuing this interest.

[243] The Respondent argues that its obligation to finally settle the "Indian Land Question" in the interest of all "bands" that were allotted reserves over-rode any obligation it may have had to advance the interest of the Claimant by, for example, referring the matter to the Secretary of State for the Colonies for decision. There is, however, no evidence that this would be the result. There could not be, as the Dominion did not take this measure.

[244] The Respondent's theory rests on the proposition, drawn by inference, that measures taken to advance the Claimant's interest would have impeded the progress of or prevented the transfer which ultimately took place 14 years later.

[245] The treatises fill in the picture of the events of the past six decades. With this considered, the Respondent's argument has superficial merit. However, the argument does not stand up to a close examination. The inference suggested by the Crown is not the only reasonable inference from the evidence and the information contained in the treatises. It fails to take into account that the Province had achieved its primary objective, namely the removal of valuable land previously

allotted by the JIRC from land to be transferred to Canada. It would not have been in the Province's interest to generally re-open the land question.

4. Conclusion

[246] A duty of ordinary diligence cannot be met by doing nothing. In the circumstances, the obvious recourse to resolve the disagreement over the addition was a reference to the Secretary of State for the Colonies, as mandated by Article 13. This was neither pursued nor considered.

B. After *Wewaykum*

[247] The facts in the present matter raise the question whether the more onerous duty of loyalty, forsaking all other interests, may apply to the Crown prior to the Province's transfer to Canada of land allotted as reserve as required by the *Terms of Union*, Article 13.

[248] In *Wewaykum* it was held that duties associated with the assumption of discretionary control applied in relation to the provisional reserves claimed by each band as against the other. The duty was "...to act with respect to the interest of the aboriginal peoples with loyalty, good faith, full disclosure appropriate to the subject matter and with ordinary diligence in what it reasonably regarded as the best interest of the beneficiaries" (at para 97). The more onerous duty associated with "...an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty...forsaking...the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake" (*Guerin* at 383-84 and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 31, [2011] 2 SCR 261 cited in *Manitoba Métis Federation* at para 61) did not apply.

[249] The reason given for the application of the less onerous duty was that, prior to reserve creation, "…the Court cannot ignore the reality of the conflicting demands confronting the government, asserted both by the competing bands themselves and by non-Indians" (*Wewaykum*, at para 96).

1. Distinguishing Facts

[250] There is no element of competition between bands in the present matter.

[251] The evidence in the present matter lends no support to the existence of a need for the Crown, Canada, to balance the interests of Indians and non-Indians in the process of reserve creation. The interest of non-Indians was represented by the Province, which held the trump card as it could refuse to transfer land that Canada wanted for reserves. The Province was vigilant to the point of obstruction in ensuring that as little land as possible would be reserved.

[252] Settlers' interests were taken into account in the processes of the JIRC and the McKenna-McBride Commission and the internal processes of the Province. Allotments by the JIRC required the approval of the CCLW. Allotments by the McKenna-McBride Commission were made in consultation with the Province's Department of Lands. Upon the "final" allotment of land by either Commission the role of government as interlocutor on behalf of settlers in the process of reserve creation (assuming that the Dominion government ever had such a role) had been fulfilled.

2. Undertaking of Loyalty, Forsaking all Others

[253] On the 1916 delivery of the McKenna-McBride report, full account had been taken of all interests with the potential for conflict with the Indian interest in the conclusion of the reserve creation process. The Dominion was the exclusive intermediary on the Indians' behalf. Its duty, owed only to them, was to see the process through to a conclusion. The duty was, therefore, in the nature of a private law duty.

[254] Article 13 called for a referral to the Secretary of State for the Colonies in the event of disagreement over the quantity of land to be transferred. Ditchburn and Clark disagreed over the addition to IR 3 and additions benefitting other bands. The Crown did not consider advancing the Claimant's interest by means of this dispute resolution provision.

C. Honour of the Crown

[255] At the point of development of fiduciary law in *Wewaykum* the honour of the Crown had not yet emerged as a core precept in the Crown relationship with Aboriginal peoples:

> 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": *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), *per* MacKinnon A.C.J.O., at p. 367, leave to appeal refused, [1981] 2 S.C.R. xi; *Van der Peet,*

> *supra, per* Lamer C.J., at para. 24; *Marshall, supra*, at paras. 49-51. [emphasis added; *Wewaykum*, at para 80]

[256] Subsequent decisions of the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 and *Manitoba Métis Federation*, reveal that fiduciary duties, where found to exist, have their origin in the precept that the Crown will act honourably. The "association" of Crown honour and fiduciary duty is that the latter arise out of the former where a constitutional promise relates to an Aboriginal interest.

[257] In *Manitoba Métis Federation*, the Supreme Court of Canada set out:

1) The source of the honour of the Crown.

2) The factors required to be present to engage the honour of the Crown: constitutional obligation (promise) to an Aboriginal group.

3) Where engaged, the requirement that it be applied with concrete practices: duties called for by the particular circumstances.

4) Interpretive approach and diligent fulfilment.

5) The simple question.

[258] The findings:

1) The Source:

> The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. [*Manitoba Métis Federation*, at para 66]

2) When is it Engaged?

> The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been

found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in *Badger*:

> ...the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41] [*Manitoba Métis Federation,* at para 68]
>
> ...
>
> The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. [emphasis added; at para 72]

3) A Core Precept

> The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation,* at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. [*Manitoba Métis Federation,* at para 73]

4) Duties Flowing

> Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.
>
> By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it. [emphasis added; *Manitoba Métis Federation,* at paras 74, 75]

5) Fulfillment of the Duty

> The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation? [*Manitoba Métis Federation,* at para 83]

1. Reserve Creation: The Purpose and the Promise

[259] To recap ground covered above:

1) Crown “title” was in the Colony before Confederation and remained in the Province after.

2) The Colony was honour bound to conform to the requirements of the *Royal Proclamation*, but did not generally do so in opening much of Vancouver Island and the mainland to white settlement.

3) The Colony had, long before 1871, ceased implementing the requirement of the *Royal Proclamation* that the Indigenous interest in land be cleared in advance of settlement, and denied the existence of Aboriginal title. The Province followed suit.

4) Indigenous interests in land based on use and occupation could not be vindicated without the disinterested co-operation of the Crown. This was not forthcoming. What was available to Indigenous groups was the reserve. Crown duties in relation to land set apart in the process leading to the ultimate “creation” of reserves flow from the constitutional force of the *Terms of Union*, 1871, and the interposition of the Crown as the exclusive intermediary with the Province on their behalf.

5) Under the *Terms of Union*, 1871, Article 13, Canada assumed the responsibility as the exclusive intermediary with the Province in advancing the Indian interest in having Crown land in the Province set apart as reserve land (*Wewaykum*). This was done to fulfil an obligation that arose as a consequence of federal jurisdiction and Article 13, an enactment of constitutional force.

6) The creation of reserves was mutually intended by the Province and the Dominion. This vestige of colonial policy that called for resolution of the “land question” was also a practical necessity for, *inter alia*, the avoidance of an “Indian war”. It was grounded in federal and provincial policy, and a promise to the Indians.

2. Duty of Diligence

[260] This is the question posed by the Supreme Court of Canada in *Manitoba Métis Federation*:

> The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation? [at para 83]

[261] The Dominion could not unilaterally create a reserve out of land held by the Province. But did the Crown, Canada, diligently advance the Indian interest in the framing and implementation of Article 13?

[262] The fact that it took from 1871 to 1924, 53 years, to reach agreement on the quantity of land to be transferred in trust to the Dominion naturally arouses suspicion of a want of diligence in advancing the Indian interest. However, the Dominion faced obstruction from the Province by:

1) Stonewalling Powell by placing impossible demands, 1872-1875.

2) Refusing to accept the allotments made by the JIRC, despite being represented in a process that required consideration of the interests of immigrant settlers, and despite the fact that the JIRC allotments had been approved by the Chief Commissioner of Lands and Works.

3) Refusing to accept the 1916 report of the McKenna-McBride Commission, despite being represented in a process of shared decision making which took account of provincial concerns over the availability of land for white settlers.

4) Standing on the need for government approval of the report, despite the clear intention that the confirmations, reductions and additions were to be final.

3. Diligent Fulfillment

[263] In the circumstances of the time, "diligence" had a temporal aspect. The Indians had been denied a secure land base. Settlers were closing in on the territories that sustained them. Frustration with the taking up of long occupied land by white settlers was mounting. There were threats of war.

[264] Diligence also called for care in the identification of land to be reserved. It was accepted that land would be set apart at their habitual places, and would be sufficient in quantity and quality to provide for their reasonable needs.

a) Temporal Aspect

[265] The JIRC was formed, "with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia..." (emphasis added). The need to proceed with diligence was clear.

[266] At Confederation the Indigenous population was, by various accounts, between 70,000 and 100,000. It had declined by 1910 to 50,000, and by 1927 to 23,000. This would not have gone unnoticed by the Province, which refused in 1910 and again in 1922 to accept the reports of reserve commissions despite being equally represented in making decisions on allotments.

[267] In 1910 the Province refused to implement the allotments made by the JIRC. In 1912 the Dominion and the Province agreed to a review of previous allotments, and the McKenna-McBride Commission was formed.

[268] The Commission was established to effect a final adjustment of reserve allotments. Like the JIRC, it enquired into the local needs of Indian groups presently on the land.

[269] The Commission presented its report in 1916. No action was forthcoming. In 1920 the Province took exception, and was able to rely on the provisions of the Agreement that had been introduced on the advice of the Minister of Justice to ensure statutory compliance. The true intent of the McKenna-McBride Agreement had been frustrated.

[270] Four years passed, then another review. Finally, in 1925, fifty-four years after Confederation, a revised schedule of land set apart for reserves was prepared. Another thirteen years passed before the conveyance required by Article 13 and the limited protection of the *Indian Act* from erosion of the limited land base allowed to the original inhabitants.

[271] Diligent implementation of Article 13 called for the use of all available means to bring about closure.

b) Diligence as to Quality and Quantity

[272] Under Douglas, the policy of the Colony was to allot reserves taking in hundreds of acres around Indian settlements. During the reign of Trutch as CCLW, the policy allowed for 10 acres for each family of five. The Dominion's officials were not aware of the meagre allotments based

on colonial policy, and agreed to the continuation of the "liberal policy" of the Colony after Confederation.

[273] This lack of diligence on the part of the Dominion resulted in four decades of delay in reaching the agreement called for by Article 13. It was finally agreed in 1912 that there would be no fixed acreage *per capita*. The McKenna-McBride Commission was to determine the reasonable needs of each of the Indian groups at their various locations. The Kootenay Indians of the Columbia Lake were one such group. On an assessment of their needs, the Commission set apart an addition of 2,960 acres.

[274] Major Clark's rejection of the addition was not based on an assessment of the reasonable needs of the Indians. Ditchburn's approval took account of their reasonable needs as found by the Commission. They filed separate reports. Clark held firm. Ditchburn's boss, Duncan Campbell Scott, folded.

c) Diligent Fulfillment and the Crown, Canada

[275] The context in which the specific actions related to those lands was the history of reserve creation from 1850 to 1938. The evidence and the extracts from the treatises permit an informed analysis of the question whether the honour of the Crown was fulfilled in the implementation of the constitutional requirements of Article 13.

[276] There were missteps, an outright betrayal, and inaction when actions could have been taken to advance the identification and transfer of land for reserves:

> 1) Failure to ascertain the "liberal" policy of the Colony before agreeing in Article 13 to conform to it, with the resulting decades of conflict over the quantity of land to be transferred.
>
> 2) Permitting the inclusion of Article 5 of the Agreement establishing the JIRC, the provincial reversionary interest, thus providing the Province a free bargaining chip if it declined to accept the JIRC allotments and sought agreement on changes.
>
> 3) Inducing co-operation of the Indian groups in occupation of land allotted as reserve by the JIRC by promising that reductions would not be made based on recommendations

of the McKenna-McBride Commission without consent, then turning 180 degrees on its promise.

4) Accepting, without objection, that the formal legal requirement that the governments approve the report of the Commission left the Province free to demand a further review of allotments, which were plainly intended to be final.

5) Agreeing to a review of the report when the option of pursuing a decision by the Secretary of State for the Colonies to resolve the disagreement over implementation of the McKenna-McBride report existed.

6) Accepting the Province's choice of Major Clark without objection based on the conflict between his role in promoting immigration for the advancement of agriculture and his responsibility to take account of the reasonable needs of the Indians.

4. The Broken Promise

[277] The Claimant benefitted from the work of the McKenna-McBride Commission, which ordered the addition of a 2,960 acre parcel of land to IR 3. It is the later disallowance of this addition by Clark, and the failure of the Dominion to act, that grounds the present claim.

[278] The response of the Dominion to the disallowance continued its previously established course of conduct. It did not act diligently to secure the Indian interest in lands set aside, provisionally, as reserve. In each instance of disagreement it caved in to the Province. The prior conduct includes the betrayal of the groups for which the JIRC had allotted reserves by disposing of the need for their consent to reductions ordered by the McKenna-McBride Commission. The land allotted was occupied by specific Indian groups, and was in fact administered by a ministry of the Dominion government. This is a glaring example of bad faith.

[279] It makes no difference to the degree of federal culpability that the *Indian Act* did not apply at the time. This was not known until 2002, with the release of the decision of the Supreme Court of Canada in *Wewaykum*.

[280] There is no need to consider the treatises to take account of Crown conduct in eliminating the need for consent to reductions made by the McKenna-McBride Commission. The relevant documents are in the record.

[281] The requirement for consent applied to the McKenna-McBride reductions. If the surrender provisions of the *Indian Act* applied to the McKenna-McBride reductions, it would also be understood by the Akisq'nuk to apply in respect of additional land allotted by the Commission.

[282] The lack of diligence and broken promise discussed above cast dishonour on the Crown throughout much of the period from 1871 to 1938.

[283] My decision does not, however, rely on anything more than the evidence in the record, which is sufficient, considered in the context established by reference to the treatises, for an analysis of fiduciary obligations based on the sources of fiduciary duties explained in *Manitoba Métis Federation.*

D. Honour of the Crown and Fiduciary Duty

[284] Following on the discussion of Crown honour, the Supreme Court of Canada has elaborated on fiduciary duty based on undertakings made "...with respect to Aboriginal peoples...":

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the

> beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
>
> (*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36) [*Manitoba Métis Federation,* at paras 49, 50]

[285] In short, a clear, constitutionally-grounded government commitment to Aboriginal peoples may give rise to a fiduciary duty without an express forsaking of all other potentially affected interests.

[286] The Claimant has argued, in paragraph 75 of its Memorandum of Fact and Law, for the finding of fiduciary duty on this very basis.

[287] On the issue of fiduciary duty, the question in the present matter is whether there was an undertaking "...with respect to Aboriginal peoples by clear government commitments from the *Royal Proclamation* of 1763...to the *Constitution Act, 1982* and considerations akin to those found in the private sphere..." (*Elder Advocates*, at para 48). If so, the requirements of an undertaking are "met".

E. *Manitoba Métis Federation:* No Fiduciary Duty Found

[288] It is instructive with respect to the present matter to consider the reasons why, in *Manitoba Métis Federation*, no fiduciary duty was found. It was found that delay in the implementation of the *Manitoba Act*, amounted to a breach of Crown Honour. There was a failure of diligent fulfillment of a constitutional promise, but a remedy in equity was not available, as:

> The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal: it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 37. The key issue is thus whether the Métis *as a collective* had a specific or cognizable *Aboriginal* interest in the ss. 31 or 32 land. [emphasis in original; *Manitoba Métis Federation,* at para 53]

[289] In the present matter the Claimant's asserted interest in the Additional Land is the communal Aboriginal interest. The Indian interest in reserves is the same as the interest in Aboriginal title lands (*Guerin*, at 379).

[290] In *Manitoba Métis Federation*, the Court went on to consider whether the Crown was bound by fiduciary duties despite the finding that the interest asserted was not an Aboriginal interest.

[291] As the interest asserted in *Manitoba Métis Federation* was not Aboriginal in nature, the presence of an additional factor was required:

> The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31. [emphasis added; at para 61]

[292] The Court found:

> While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. [*Manitoba Métis Federation*, at para 62]

[293] Unlike section 31, there is nothing in Article 13 that called on the Dominion to take account of settler's interests. Unlike in Manitoba, Canada had no legal interest in the land. As between Canada and the Colony, title was in the latter. It was for the new Province, established in 1871, to allocate land for settlement. Opening of the land for settlement was entirely a matter for provincial discretion.

[294] While the question of Aboriginal title hung over the Colony, and after Confederation the Province, its existence was expressly denied. The Dominion did not, despite its recognition of the Aboriginal interest in land across the prairies, concern itself in the matter.

[295] The Province, like the Dominion, had obligations under the *Terms of Union* to give effect to the Indian interest. Article 13 established a constitutional obligation of the Province to convey land "...in trust for the use and benefit of the Indians on application of the Dominion Government;...". The concomitant obligation of the Dominion to hold the land in trust left no room for divided loyalty. The effect of Article 13 was to interpose the federal Crown as the exclusive intermediary on behalf of the Indians (*Wewaykum*, at para 93). If a forsaking of all other interests was needed to establish duties associated with an undertaking, Article 13, in the circumstances, established just that.

[296] In *Manitoba Métis Federation*, the Dominion interest in establishing a trans-continental railway militated against a finding of fiduciary duty. In British Columbia, however, the constitutional arrangement was set out in the *Terms of Union*, Article 11. The Province was to convey the necessary land, which became known as the "Railway Belt" to the Dominion, which it did. The Dominion was to build the railway. The federal Crown did not have to deal with the Province to create reserves in the Railway Belt as it held title to the land.

F. A Promise of Constitutional Force

[297] Article 13, as a term of the union of the former Colony with the Dominion, has constitutional force.

[298] Land appropriated for reserves was to be conveyed to Canada "...for the use and benefit of the Indians on application of the Dominion Government;...".

[299] The Crown was the exclusive intermediary with the Province. The Indian groups in British Columbia were "...entirely dependent on the Crown to see the reserve-creation process through to completion" (*Wewaykum*, at para 89). The Crown, Canada, had by its actions held out a promise to act in the interests of those for whose use and benefit it would hold land "in trust". Crown representation of the Indian interest was in fulfillment of a constitutional obligation.

[300] The promise was a unilateral undertaking, and in the circumstances akin to a private law duty. The Claimant is part of the Indian group entitled to the benefit of the undertaking.

X. THE ADDITIONAL LAND ISSUE

[301] In trust law, where a power is bestowed by a trust indenture, the trustee has a duty to consider whether to exercise the power conferred when warranted by the circumstances (see Donovan W M Waters, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 988-91). The circumstances envisioned by Article 13 – a dispute between the federal and provincial governments – arose time and again. There is no evidence that the Dominion considered referring disagreements with the Province to the Secretary of State for the Colonies.

[302] There is no apparent reason why, had this action been considered, it should or would not be pursued.

[303] It remained open to the Dominion to refer the disagreement over the Additional Land allotted to the Akisq'nuk and other bands to the Secretary of State for the Colonies up to July 19, 1924, the date of the Order-in-Council accepting the report of the Commission as amended. It is recorded in the Special Committee Report that "...Mr. Justice Newcombe, who was then Deputy Minister of Justice...", opined that the formal acceptance of the report on July 19, 1924, would "...exclude claims by either government for better or additional terms".

[304] There is nothing in Article 13 to suggest that the "Indian Land Question" had to be referred in its totality to the Secretary. To the contrary, Article 13 singles out "disagreements" for referral. The Dominion could have referred the matter of the addition of 2,960 acres of land to IR 3 to the Secretary while proceeding to "finalize" the transfer of the reserves over which there was no disagreement. There is nothing in the record or in the treatises to indicate that the Dominion government considered proposing this to the Province as a means to resolve the disagreement.

[305] On the application of fiduciary law via both avenues identified in *Manitoba Métis Federation* at paragraphs 49-50, I find that the Crown had a duty to propose the referral of the disagreement between Ditchburn and Clark over the addition of 2,960 acres of land to IR 3 to the Secretary of State for the Colonies as provided for in Article 13. Instead, the Dominion abdicated

its duty to the Claimant in favour of what may well have been an unnecessary political compromise.

[306] If it may be inferred from the course of dealings between the Dominion and provincial governments that the Province would not have agreed to refer the matter to the Secretary, the Dominion government could have done so independently.

[307] It is no answer that the Dominion, as fiduciary, may have considered the matter and decided not to proceed, or that the Secretary may not have resolved the disagreement in its favour. To allow the fiduciary the benefit of uncertainty would reward inaction in the face of a duty to act.

[308] Further, it will be recalled that Ditchburn was prepared to accept Clark's disallowance of the allotment of the Additional Lands on condition that a grazing commonage would be established for the Kootenay and Shuswap Indians, as promised by Clark. This never came to pass. The Dominion did not, and after July 19, 1924, could not, press the Province to fulfil this promise. This has not been advanced as a ground for the present Claim. It is mentioned here as it was conduct consistent with that over much of the period from 1871 to 1923.

XI. THE SURVEY ISSUE

[309] The land allotted by O'Reilly in 1885 was habitually used for stock raising and access to timber at the time. It was identifiable, as described by metes and bounds. The CCLW, though initially resistant, approved. The Claimant had a cognizable interest.

[310] The Crown had a discretion in relation to the allotted land. The effect of the 1887 survey was known, as the surveyor reported the re-alignment of the survey lines to the CCLW, who would have informed his Dominion counterpart. The Indian Agent knew that the surveyor's alteration of the boundaries resulted in a reduction in the area of the reserve, and testified before the Commission that this was an error.

[311] The land lost along the east side of the provisional reserve was in two parcels, totalling 960 acres. There was a gain of 219 acres to the south, for a net loss on the east of 741 acres. However, the acreage stated on O'Reilly's Minute of Decision was 8,320 acres, while the

surveyed area comprised 8,456 acres, for a net gain of 136 acres. This discrepancy is not explained by the evidence. Perhaps the calculation of acreage based on a survey is more accurate than if based on a metes and bounds description.

[312] The area lost was readily identifiable. The error could have easily been corrected.

[313] The re-alignment of the lines run by the surveyor was done in good faith in the belief that it would result in more grazing land in the reserve, which in fact it did. The surveyor reported that local members expressed satisfaction with the area bounded by the survey.

[314] The surveyor's conversation with band members did not signify official band approval of the boundary changes. Government officials knew of the error. It was in the discretion of the Dominion to seek a correction. It may be assumed that the Province would agree. Commissioner O'Reilly (JIRC), who allotted the reserve as defined by metes and bounds, was appointed jointly by the Dominion and the Province and the CCLW had approved the allotment.

[315] It must, however, be noted that it was at least partially on account of the reduction of the allotted land along the east side of the reserve as a result of the survey that the McKenna-McBride Commission ordered the addition. The Additional Land included 360 acres of the land "lost" due to the survey, plus another 2,600 acres.

[316] The potential for double recovery if compensation is based on the loss of land due to the survey and loss of the Additional Land is a matter to be addressed in the compensation phase of proceedings on the Claim.

XII. DISPOSITION

A. Additional Land

[317] The Claimant has established a breach of legal obligation within the meaning of sub-section 14(1)(*c*) of the *SCTA*. The claim is found valid.

B. Survey Land

[318] The Claimant has established a breach of legal obligation within the meaning of sub-section 14(1)(*c*) of the *SCTA*. The claim is found valid.

XIII. POST SCRIPT

[319] A historical footnote, of no effect on the findings above.

[320] In 1978, under the leadership of the late Chief George Watts of the Nuu-Chah-Nulth Nation and the late Chief Joe Mathias of the Squamish Nation, the 22 bands that lost land due to the acceptance by Canada of the recommendations of the McKenna-McBride Commission entered an agreement with the Province of British Columbia and Canada for the settlement of their claims. Land that remained with the Province was to be returned to the respective bands. Where land had passed into private hands, Canada was to pay compensation.

[321] All the claims were settled. The last took place in November 2008.

HARRY SLADE

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Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160205

File No.: SCT-7006-12

OTTAWA, ONTARIO February 5, 2016

PRESENT: Honourable Harry Slade

BETWEEN:

AKISQ'NUK FIRST NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant AKISQ'NUK FIRST NATION**
As represented by Darwin Hanna, Adam Munnings and Katrina Harry
Callison & Hanna, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Christa Hook, Deborah McIntosh and Brett Nash
Department of Justice