

PRÉCIS:
**HER MAJESTY THE QUEEN IN RIGHT OF CANADA and
KITSELAS FIRST NATION [2014 FCA 150]**

Procedural History

On April 7 and 8, 2014, the Federal Court of Appeal (the "Court") heard Canada's application for judicial review of the Specific Claim Tribunal's decision in [Kitselas First Nation v Her Majesty the Queen in Right of Canada](#) (SCT-7003-11), in which the Honourable Harry Slade (Judge), the Chairperson of the Specific Claims Tribunal, found that the Kitselas First Nation (Kitselas) had validly established a breach of a legal obligation of the Crown in Right of Canada (Canada) resulting from the non-inclusion of a 10.5 acre parcel of land in a reserve initially identified in 1891, and known as Kitselas Indian Reserve Number 1.

The Court issued its decision in [Her Majesty the Queen in Right of Canada and Kitselas First Nation, 2014 FCA 150](#) on June 5, 2014.

Canada's Application for Judicial Review

In its application for judicial review under section 28 of the [Federal Courts Act](#), R.S.C. 1985 c. F-7 Canada principally submitted that:

- (1) the Tribunal erred in law by holding that Canada had a fiduciary duty at the reserve allotment stage, the Judge having allegedly made unreasonable determinations of fact and of mixed fact and law in reaching his decision; and,
- (2) the Judge erred in finding that Canada was solely liable for breaches of Canada's alleged duty with respect to the excluded land.

Disposition

The Court dismissed the application with costs in favour of the Kitselas First Nation. The Court said that the Judge's conclusions, reviewable on a standard of correctness, were correct, and further ruled that his findings of mixed fact and law were reasonable. The Court said that,

- (1) in relation to Canada's first principal submission, the Judge was correct in concluding that Canada had a fiduciary duty at the reserve allotment stage, and that the Judge made reasonably defensible determinations of fact and mixed fact and law falling within the possible range of outcomes, in reaching his decision; and,
- (2) in relation to Canada's second principal submission, the question of whether any third party liability arises is to be dealt with at the second stage of the bifurcated proceedings (the compensation phase) and pursuant to the terms of section 20 of the [Specific Claims Tribunal Act](#) (SCTA).

Standard of Review

The Court decided that the applicable standard of review in relation to Canada's first principle submission is correctness because,

- (1) fiduciary law in this context requires the Tribunal to "employ the exact same fiduciary law that courts use, without importing policy considerations or specialized appreciation into the mix" (para 31);
- (2) adjudications of the Tribunal are not protected by a strong privative clause (para 32);
- (3) specific claims may also arise in the superior courts and thus rulings must be consistent (para 33 and 34); and,
- (4) the question under review contains "...deep underlying constitutional underpinnings stemming notably from the *Royal Proclamation, 1763*, paragraph 91(24) and section 109 of the [*Constitution Act, 1867*](#), section 35 of the [*Constitution Act, 1982*](#), and other constitutional instruments." (para 34)

The Court said that even if the applicable standard of review was reasonableness, the range of outcomes would be narrow:

...Constitutional norms and previously-decided cases related to the Crown's fiduciary duty severely constrain the range of acceptable and defensible outcomes open to the Specific Claims Tribunal with respect to the legal issue at hand. Moreover, additional constraints are imposed by the underlying constitutional underpinnings and mandatory norms in this area.
(para 36)

Analysis

Canada's First Submission: Did the Judge err in law by concluding that Canada had a fiduciary duty to the Kitselas First Nation in the reserve allotment process?

The Court rejected the Crown's argument that the excluded 10.5 acre parcel of land, although it may have been habitually used by the Kitselas, "habitual use" alone did not constitute a cognizable interest giving rise to a fiduciary duty since it is insufficiently specific.

Recognizing that the *sui generis* relationship between Aboriginal Peoples and the Crown is fiduciary in nature, and based on the principles enunciated in the *Guerin*, *Wewaykum* and the *Ross River Dena Council Band* decisions, the Court agreed that the Judge followed the correct approach in reaching his conclusion that the Crown owed a fiduciary duty to the Kitselas First Nation in the reserve creation process. The Court said,

...that the high degree of discretionary control assumed by the Crown over the lives of aboriginal peoples expressed in Article 13 of the *British Columbia Terms*

of Union could, in appropriate circumstances, give rise to a fiduciary duty with respect to the provision or non-provision of reserve lands. (para 48)

The Court further said that they could discern no fundamental legal error in the Judge's conclusion that,

...the Kitselas had, in the circumstances of this case, a sufficient cognizable interest in the 10.5 acres excluded from the reserve so as to trigger the fiduciary duty underlying Article 13, and that the unilateral undertaking of the Crown set out in that Article was itself sufficient to engage, with respect to the excluded land at issue in this case, the obligations of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the beneficiary. (para 49)

The Court also said that the Crown's unilateral undertaking in the reserve creation process, set out in Article 13 of the *British Columbia Terms of Union*, and in various Crown instructions issued to implement that Article, meant that there were no negotiations with Aboriginal Peoples to determine the parameters of the reserve allotment policy. The actual allocation of land for reserve creation purposes was left largely to the discretion of Crown officials acting pursuant to the instructions they received. This was done outside of Treaty-making which was the adopted practice in other locations in the Dominion. (para 51)

In light of the Judge's findings of fact, the Court said that the Judge's conclusion of law were correct. The Court confirmed that the Kitselas had a cognizable interest in the excluded land that gave rise to a fiduciary duty of loyalty, good faith, and full disclosure and of acting reasonably and with diligence in the best interest of the Kitselas in determining whether to include or to exclude that land from the reserve. (para 54)

In relation to the cognizable interest, the Court said:

The land at issue was clearly delineated and identifiable, and the cognizable interest in that land was its historic and contemporary use and occupation as a settlement by the Kitselas themselves, a land interest specifically contemplated by Article 13 of the *British Columbia Terms of Union* and by the Crown instructions issued to implement that Article. (para 54) (emphasis in original)

The Court agreed with the Judge in his interpretation of the evidence, reviewable on a standard of reasonableness, respecting whether the Crown had failed to disclose the exclusion of the 10.5 acre parcel, and that had the exclusion been disclosed, the Kitselas surely would have objected. The Court said that on the two submissions raised by Canada, and in the absence of any direct evidence, the Judge's conclusion fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. (paras 57-59)

The Court also agreed with the Judge that, in light of the constellation of evidence before him, which included the sale of the excluded lot to speculators, respecting his finding that the Crown failed to act reasonably and with diligence as described at paras 61-62 of the Court's decision,

"...it was reasonably open for the Judge to conclude that Commissioner O'Reilly did not exclude the 10.5 acres for public transportation purposes." (para 62)

Canada's Second Submission: Did the Judge err in finding that Canada was solely liable for breaches of Canada's alleged duty with respect to the excluded land?

The Court did not rule on the standard of review in relation to this question.

Canada argued that British Columbia assumes partial liability in this case and that Canada's responsibilities with respect to compensation owed to the Kitselas should be reduced accordingly. (para 64) The Court said that the Judge did not, in fact, make a ruling on the degree of liability attributable to the Crown in Right of Canada. (para 66) Specifically, the Court said that since proceedings had been ordered bifurcated into separate validity and compensation phases, the question of third party liability would be determined at the compensation phase, an approach which is consistent with section 20 of the *SCTA*.

Prepared by:

Alisa Lombard
Legal Counsel, Specific Claims Tribunal