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SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
WILLIAMS LAKE INDIAN BAND Claimant	Clarine Ostrove and Leah Pence, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Brian McLaughlin and Shelan Miller, for the Respondent
	HEARD: October 16 to 19, 2012 June 4 to 6, 2013, further written submissions Sept. 2013

REASONS FOR DECISION

Honourable Harry Slade

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

Cases Cited:

Ross River Dena Council Band v Canada, 2002 SCC 54, [2002] 2 SCR 816; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Manitoba Metis Federation v Canada*, 2013 SCC 14, [2013] 1 SCR 623; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Delgamuukw v British Columbia*, [1997] 3 SCR 101, 153 DLR (4th) 193; *Peepeekisis Band v Canada*, 2013 FCA 191, 232 ACWS (3d) 1; *Kitselas First Nation v HMQ in Right of Canada*, 2013 SCTC 1; *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *R v Jack*, [1980] 1 SCR 294; 100 DLR (3d) 193.

Statutes and Regulations Cited:

British Columbia Land Act, SBC 1875, c 3, s 50.

British Columbia Terms of Union, RSC 1985, App II, No 10.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 91 reprinted in RSC 1985, App II, No 5.

Indian Act, RSC 1952, c 149, s 18(1).

Royal Proclamation, 1763, RSC 1985, App II, No 1.

Specific Claims Tribunal Act, SC 2008, c 22, ss 14(1)(b), 14(1)(c), 14(2), 15(1)(f).

Catch Words

Aboriginal Law – Specific Claim – Legal Obligation – Reserve Creation – British Columbia – Fiduciary Obligation and duties – Indian Settlements – Honour of the Crown.

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I. HISTORICAL OVERVIEW

[1] This claim arises out of events dating back to colonial times in British Columbia. The issue in the claim arises out of the policy of the colony, and its actions, in relation to the establishment of reserves. The time span extends well into the post-colonial era, when Canada assumed responsibility for the advancement of reserve creation in the Province.

[2] The Williams Lake Indian Band ("Claimant") says that the Colony failed to meet a legal obligation to prevent settlers from pre-empting land on which their settlements were located. They say that Canada bore the primary legal responsibility for the allotment of reserves in British Columbia after Confederation, and also failed to meet its obligation to the Claimant.

[3] The claim is not based on aboriginal rights and title. However, a brief description of the Claimant's traditional use and occupation of land provides context. The Claimant is one of the 17 communities of the Secwepemc (Shuswap) Nation, which traditionally used and depended on a large territory. The Secwepemc people followed a seasonal round. The seasonal round involved settling in pit houses (known as "kickwillies") during the winter at key locations that allowed access to a variety of resources, and travelling throughout their territory to fish, hunt, and collect plants, roots and berries during the other seasons. The territory used by the Claimant included a large area that stretches west of the Fraser River, south beyond Sheep Creek, southeast towards Lac La Hache, east towards Horsefly, and north towards Soda Creek.

[4] The land that is the subject of this claim is at the foot of Williams Lake. The area includes Williams Creek, Scout Island, the Stampede Grounds, the downtown core of the City of Williams Lake, and a plateau north of the downtown core. This area is referred to in the Claimant's submissions as the "Village Lands."

[5] The allotment of reserves during the colonial period, and post-Confederation, took into account the then-present use of lands by distinct aboriginal collectives. In the colonial period, government policies called for the allotment of reserves where Indian settlements were located on Crown land. Under the laws then in force, settlers could register pre-emptions of Crown land. In the face of a growing settler population, laws were enacted to prevent the pre-emption of Indian settlements.

[6] The Claimant settled at several locations within the territory they traditionally used. The extent of occupation varied in the course of the annual seasonal round. Their population, like those of other Aboriginal collectives, was greatly reduced by smallpox and other introduced diseases. This also affected the extent of use of various areas of seasonal occupation.

[7] Gold Commissioner Nind was responsible for staking out Indian settlements. Where pre-emptions had encroached, measures were available to have them set aside. On May 4, 1861, Nind reported on the desperate circumstances of the Indians at Williams Lake due to the dearth of salmon in the Fraser River, and asked for instructions to "...mark out a reserve for Indians at Williams Lake." He noted that "...the greater portion of the available farming land had been pre-empted and purchased..."

[8] In June 1861, in furtherance of the colony's policy of reserve allotment, the Chief Commissioner of Lands and Works ordered Gold Commissioner Nind to "...mark out a reserve of 400 or 500 acres for the use of the Natives in whatever place they may wish to hold a section of land." Nind failed to do so. The evidence offers no direct explanation for Nind's failure to carry out his instructions.

[9] Between July and November, 1861, much of the land that the Claimant says were Village Lands was pre-empted by settlers. Pre-emption maps from 1883 set out six lots, each listing several pre-emptions for a total of approximately two thousand acres. Of these, the pre-emptions up to November 1861 took up approximately one half. The evidence does not establish with precision the acreage said to be within the Village Lands. The oral history evidence suggests an area larger than the land pre-empted up to 1883.

[10] On British Columbia joining Confederation, Canada assumed responsibility for dealing with the Province over the allotment of reserves. Canada and British Columbia agreed on a process for the allotment of reserves. The Joint Indian Reserve Commission ("JIRC") was established in 1876.

[11] Commissioners, appointed by Canada and the Province, were to allot reserves in areas habitually used by aboriginal collectives. O'Reilly was the sole Commissioner when reserves were allotted in Secwepmic territory.

[12] The failure of the authorities to set apart a reserve at Williams Lake became a matter of public controversy in 1880.

[13] Chief William complained to O'Reilly that their land had been pre-empted. O'Reilly refused to consider an allotment of their settlement land as it would interfere with the "white men's rights."

[14] On September 22, 1881, Commissioner O'Reilly reported to the Superintendent General of the Department of Indian Affairs that he had "handed over" to the Claimant a plot of land of "about 4100 acres," and two additional plots comprising 280 acres. The land allotted by Commissioner O'Reilly is at the head of the lake, not at the site of the settlement the Claimant says existed at the time of reserve allotments by the Colony.

[15] The schedule to OIC 1036, dated July 29, 1938, lists parcels of land transferred to Canada in trust for the use and benefit of the Claimant comprising, in the aggregate, 4,608.63

II. THE CLAIM

[16] The Claimant says that the colony of British Columbia was in a fiduciary relationship with the Williams Lake Indians from its inception in 1858, as the assertion of Crown title and sovereignty placed their traditional territories under the discretionary control of the colonial government.

[17] The Claimant does not, for the purposes of this proceeding, assert an interest in land on the basis of Aboriginal Title. The claim is grounded in the failure of the colony to act in the Band's interest by enforcing its own policies and laws; first, to protect the land where their settlement was located at the foot of Williams Lake from being pre-empted and second, to fail to recover for its benefit the land unlawfully pre-empted (*Specific Claims Tribunal Act*, SC 2008, c 22, s 14(1)(b) [*SCTA*]).

[18] The colony joined the Canadian Federation in 1871. The Claimant says that thereafter Canada failed to meet its responsibility to set apart the Village Lands as reserve (*SCTA*, ss 14(1)(c)).

III. ISSUES

A. Did the Williams Lake Indians have a village near the foot of Williams Lake, in the areas that became known as “Comer” and “Glendale” when the Colony of British Columbia was established in 1858?

B. If “yes,” did the village at Williams Lake qualify as an “Indian Settlement” under colonial policy?

C. If the village was an “Indian Settlement,” was it protected from pre-emption by colonial policy and law?

D. Did the pre-emptions contravene Colonial law?

E. Did the principle of the Honour of the Crown apply to the Colony in its relationship with Aboriginal peoples?

F. If “yes,” did the Crown (Colony) fail to act honourably when it did not stake out the settlement lands of the Williams Lake Indians?

G. Did the Crown (Colony) have fiduciary obligations to the Williams Lake Indians in relation to land on which they were settled?

H. If “yes,” did the Crown fail to meet its duty by not staking out the settlement lands, and resuming the pre-exemptions?

I. If “yes,” did the Crown (Colony) breach a legal obligation within the meaning of that term in s 14(1)(b) of the *Specific Claims Tribunal Act*?

J. If "yes," did Canada, upon confederation, become liable for the colonial breach as a "Liability" within the meaning of the term in Article 1 of the *Terms of Union*?

K. Did the principle of the Honour of the Crown apply to Canada in relation to the village lands of the Williams Lake Indians?

L. Did Canada have a fiduciary duty to the Williams Lake Indians to pursue the allotment of their settlement lands as a reserve?

M. If "yes," did Canada fail to act honourably and in breach of fiduciary duty in failing to take steps to clear the settlement lands of the Williams Lake Indians of the pre-emptions.

N. If "yes," did the Crown (Canada) breach a legal obligation within the meaning of that term in s 14(1)(c) of the *Specific Claims Tribunal Act*?

IV. DISPOSITION

[19] The Claim has been bifurcated into validity and compensation (if necessary) phases.

[20] I find that the validity of the claims made under s 14(1)(b) and ss 14(1)(c) of the *SCTA* have been established.

V. EVIDENCE, ANALYSIS AND CONLUCIONS

A. Colonial Policy and Indian Settlements

1. The Colonial Policy for the Creation of Reserves

[21] In 1849, the Imperial Government granted the colony of Vancouver Island to the Hudson's Bay Company. James Douglas, Chief Factor of the company on Vancouver Island, developed colonial policy toward the Indians under instructions from Archibald Barclay, the Secretary of the company in London. In September 1849, Douglas wrote to Barclay:

> Some arrangement should be made as soon as possible with the native Tribes for the purchase of their lands and I would recommend payment being made in the Shape of an annual allowance instead of the whole sum being given at one time; they will thus derive a permanent benefit from the sale of their lands and the Colony will have a degree of security from their future good behaviour. I would also strongly recommend, equally as a measure of justice, and from a regard to the future peace of the colony, that the Indians Fishere's [sic] Village Sities [sic] and Fields, should be reserved for their benefit and fully secured to them by law. [emphasis added]

[22] Barclay instructed Douglas:

> With respect to the rights of the natives you will have to confer with the Chiefs of the tribes on that subject, and in your negotiations with them you are to consider the natives as the rightful possessors of such Lands only as they occupied by cultivation, or had houses built on, at the time when the island came under the undivided sovereignty of Great Britain in 1846. All other land is to be regarded as waste, and applicable to the purpose of colonization. [emphasis added]

And:

> The Natives will be confirmed in the possession of their Lands as long as they occupy and cultivate them themselves.

[23] Douglas pursued a policy of entering into treaties with the Indian tribes on Vancouver Island, both as Chief Factor and, from May 1851, as Governor of the Colony of Vancouver Island. He concluded fourteen treaties with the Indian tribes at various locations on Vancouver Island. Each treaty provided that:

> Our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those that may follow us.

[24] After 1854, Douglas discontinued the policy of entering treaties. He continued the policy of reserving Indian villages and settlements.

[25] Douglas was appointed Governor of the Colony of British Columbia in September 1858. The colonial office provided instructions that instructed Douglas on matters of policy.

[26] On September 2, 1858, E.B. Lytton, Secretary of State for the Colonies, called on Douglas to ensure "the protection of Her Majesty's Government on behalf of these people. I readily repeat my earnest injunctions to you to endeavour to secure this object." Douglas replied that:

> I shall not fail to give the fullest effect to your instructions on that head, as soon as the present pressure of business has somewhat abated. I may, however, remark that the native Indian tribes are protected in all their interests to the utmost extent of our present means.

[27] In December 1858, Lytton asked Douglas to consider implementing a policy of settling natives permanently in villages. On March 14, 1859 Douglas advised Lytton that it was his intention to implement such a policy. He set out the highlights of his proposed Indian reserve policy:

> 7. The support of the Indians will thus, wherever land is valuable, be a matter of easy accomplishment, and in districts where the white population is small, and the land unproductive, the Indians may be left almost wholly to their own resources, and, as a joint means of earning their livelihood, to pursue unmolested their favorite calling of fishermen and hunters.

> 8. Anticipatory Reserves of Land for the benefit and support of the Indian Races, will be made for that purpose, in all the Districts of British Columbia inhabited by Native Tribes.
>
> Those reserves, should in all cases include cultivated fields, and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or value of the land. [emphasis added]

[28] On April 11, 1859, in Lytton's absence, Lord Carnarvon called upon Douglas to exercise "measures of liberality and justice." Carnarvon also said:

> Proofs are unhappily still too frequent of the neglect which Indians experience when the white man obtains possession of their country, and their claims to consideration are forgotten at the moment when equity most demands that the hand of the protector should be extended to help them. [emphasis added]

[29] In his February 5, 1859, address to the House of Assembly, Douglas said "the faith of the Government is pledged that their occupation shall not be disturbed."

[30] In February 1859, Douglas issued *Proclamation No. 13* which asserted the Crown's ownership in fee simple of "All the lands in British Columbia, and all the Mines and minerals therein." *Proclamation No. 13* also provided that:

> It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown lands, and for such purposes as the Executive shall deem advisable.

[31] On April 11, 1859, Carnarvon directed Douglas to exercise "measures of liberality and justice" acknowledging that:

> Proofs are unhappily still too frequent of the neglect which Indians experience when the white man obtains possession of their country, and their claims to consideration are forgotten at the moment when equity most demands that the hand of the protector should be extended to help them. [emphasis added]

[32] On May 20, 1859, Lord Carnarvon instructed Douglas to make "ample provision under the arrangements proposed for the future sustenance and improvement of the native tribes," while he should also "avoid checking at a future day the progress of the white colonist."

[33] On October 1, 1859, Douglas issued a circular to the Magistrates and Gold Commissioners of British Columbia to advise them of pending legislation by which he would

provide British subjects and those who swore allegiance to the Crown the opportunity to record pre-emptions on unsurveyed Crown lands. Douglas instructed that certain lands were excluded from settlement, including this:

> You will also cause to be reserved the sites of all Indian villages, and the land they have been accustomed to cultivate, to the extent of several hundred acres round such village for their special use and benefit.

[34] On October 7, 1859, Douglas instructed the Chief Commissioner of Land and Works, R.C. Moody, that:

> townsites, with the adjacent suburban and rural land, and also the sites of all Indian Villages and the land which they have been accustomed to cultivate to the extent of several hundred acres round each village have been reserved and are not to be subjected to the operation of the proposed pre-emption law. [emphasis added]

[35] On January 4, 1860, Douglas issued *Proclamation No. 15* to regulate the settlement of lands in mainland British Columbia and to set the terms under which settlers could record an interest in the as of yet unsurveyed lands of the Colony. Section 1 of the legislation prescribed and limited the lands available for pre-emption: "unoccupied and unreserved and unsurveyed land in British Columbia (not being the site of an existent or proposed town, auriferous land ... or an Indian Reserve or settlement..." (Emphasis added).

[36] In a dispatch to the Duke of Newcastle dated January 12, 1860, Douglas forwarded *Proclamation No. 15*, giving his previous instructions the force of law. He wrote:

> 8. The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements, and public rights whatsoever; the emigrant will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land ... while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.

[37] Douglas informed the Indians of the colonial policy. In a dispatch to the Duke of Newcastle in October 1860, Douglas described a recent trip that he had made to Cayoosh and Lytton, where he met with the Indians in both places. He advised that he explained to the Indians, in language consistent with the 1859 Circular and *Proclamation No. 15*, that:

> 35. I had an opportunity of communicating personally with the native Indian tribes, who assembled in great numbers at Cayoosh during my stay...
>
> I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony...
>
> The Indians mustered in great force during my stay at Lytton. My communications with them were to the same effect as to the native tribes who assembled at Cayoosh, and their gratitude, loyalty, and devotion were expressed in terms equally warm and earnest. [emphasis added]

[38] When, after Confederation, Canada and the Province were at odds on how to address the Indian land question, Indian Commissioner Powell sought Douglas' advice on the basis of acreage for reserves in the colony. Douglas' response dated October 14, 1874, set out that the Indians were to determine the location and extent of their Villages, and that reserves should include:

> The principle followed in all cases, was to leave the extent and selection of the land; entirely optional with the Indians, the surveying officers having instructions to meet their wishes in every particular and to include in such Reserve the permanent Village sites, the fishing stations and Burial grounds, cultivated lands and all the favourite resorts of the Tribe, and in short to include every piece of ground to which they had acquired an equitable title, through continuous occupation, tillage, or other investment of their labour.

[39] In summary, it was colonial policy to protect village sites and as much of the surrounding land as the Indians required to sustain themselves by not permitting their pre-emption.

2. The Rationale for the Colonial Policy: Immigration and the Threat of War

[40] In the early days of the Colony of British Columbia, Douglas turned his attention to the matter of the settlement of the vast tracts of unsurveyed Crown lands. By this time, miners were following the gold rush up the Fraser River deeper into the interior of British Columbia, and many were settling on unsurveyed lands. Urgent action was necessary to control settlement and to ensure that the places used and needed by the Indians were protected for their use and benefit – both as a matter of justice and to prevent the outbreak of an Indian war. As noted by Cole Harris, an historian and geographer from British Columbia, when “miners had first converged on

the Fraser, some chiefs had counselled war." (Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002) at 82).

[41] Alex P. McInnes' narrative describes miner Peter Dunlevy's account of an 1859 gathering of several Nations at Lac La Hache to discuss strategies to keep the miners out of their lands. In this account, several Chiefs argued for war, while the Band's Chief William counselled peace.

[42] Douglas' assurances to the Indians gathered at Cayoosh and Lytton were given at a time when the influx of immigrants up the Fraser River caused the Indian Tribes to consider war to protect their lands.

[43] The threat of war continued after confederation. The "Indian Land Question" remained unresolved.

[44] The delay in dealing with the Indian land question resulting from the impasse between Canada and the Province in the early years of B.C. entering Confederation resulted in a flood of complaints from and on behalf of the Indians. As noted by Harris:

> Behind all of this white critique, and essentially driving it, were the aggrieved and increasingly angry voices of Native people themselves, voices that were clear and consistent enough for those who, unlike the provincial government, were prepared to listen to them. They survive even yet in some of the many speeches, letters and petitions Native people addressed to the officials who, they had been told, were responsible for their welfare. The provincial government considered that Native protest was the work of outside agitators, particularly the missionaries, and perhaps in some cases it was. But missionaries could not have created the groundswell of discontent that washed over Native communities in the early 1870s. [Harris, *supra* at 81-82]

[45] Harris went on to note that:

> News about land policy moved rapidly in Native circles. Missionaries diffused information, but more came, Sproat said, from literate "half breeds" in Victoria who read newspapers to Natives who then relayed the information through Native networks of oral communication. Such news, he claimed, travelled faster than the post. By these means Native people had up-to-date information about land policies in the North-West and the adjacent American states, and had some sense of the Dominion-provincial argument about the Indian land question in British Columbia. [Harris, *supra* at 82]

[46] Among the missionaries writing to federal officials on behalf of the Indians was Father

Grandidier, then of the Okanagan Mission. In October 1874, a federal official, Lenihan, wrote to the Provincial Secretary of British Columbia, enclosing letters from two missionaries, including Father Grandidier's letter of August 28, 1874, which had been published in Victoria's *Standard* newspaper. Lenihan noted that "the information possessed by those gentlemen is derived from a long and close intercourse with the Indians of this Province, which entitles them to speak in their behalf." Father Grandidier spoke of the desperate condition of many Interior Indians, including at Williams Lake:

> The whites came, took land, fences it, and little by little hemmed the Indians in their small reservations. They leased the land that they did not buy and drove the cattle of the Indians from their old pasture land. Many of the reservations have been surveyed without their consent, and sometimes without having received notice of it, so that they would not expose their needs and their wishes. Their reservations have been repeatedly cut off smaller for the benefit of the whites, and the best and most useful part of them taken away till some tribes are corralled on a small piece of land, as at Canoe Creek or elsewhere, or even have not an inch of ground, as at Williams Lake. The natives have protested against those spoliations, from the beginning. They have complained bitterly of that treatment, but they have not obtained any redress. [emphasis added]

[47] The federal Minister of the Interior, David Laird, referred in his November, 1874, Memorandum to Father Grandidier's August, 1874, letter and spoke of the groundswell of native grievances that threatened the peace of the Province, noting the concern of Reserve Commissioner Powell that "[i]f there has not been an Indian War, it is not because there has been no injustice to the Indians, but because the Indians have not been sufficiently united."

3. Indicia of a "settlement"

[48] Douglas' policy recognized that the Indian collectives occupied various places throughout their seasonal round. All were to be set apart for their continued use.

[49] On May 14, 1862, Douglas approved proposed land acquisitions in Bute Inlet, provided that "they do not attach to lands at present or recently the site of Indian Villages or Fields" (emphasis added).

[50] In October 1864, the Acting Surveyor General for the Colony of Vancouver Island, the Acting Attorney General, and the Colonial Treasurer reported to the Acting Colonial Secretary on the results of their investigation into a pre-emption of lands claimed by the Indians of

Chemainus on Vancouver Island. They reported that the pre-emptor, Scott, had obtained permission from the Colony to settle the land in 1859 so long as the land was "not occupied at any time by Indians" (emphasis added). Their report sets out the official understanding of the meaning of "settlement:"

> We understand an Indian settlement to be not a permanent standing village but such a village or home as Indians are accustomed to have and it appears to be an understood custom with the Indians of this District as with many others to leave their homes or villages for months together taking their houses with them.
>
> It is asserted on one side that no settlement existed in 1859 on the portion now an Indian reserve but has sprung up since, and on the other side that the portion of land in question has always been an Indian settlement in the Indian sense of the word, a place which the Indians looked on as their Home which they from time to time inhabited and it is conceded that no inhabited houses actually stood on the spot when the land was taken up.
>
> This fact of an Indian settlement existing on the spot is one which we think can only be decided satisfactorily by the evidence of reliable Indians of the tribe or white men who have known the spot for some years and more particularly by a careful examination of the spot itself which to the eye of one experienced in Indian matters will we are told bear indisputable evidence of continued occupation and residence if such there ever were for any lengthened period of time even before 1859.
>
> We think that Scott must submit to be deprived of so much of his land as can be shown to come within what we consider to be the reasonable meaning of an "Indian Settlement" as explained above. [emphasis added]

[51] Douglas' consistent instructions to the Chief Commissioner of Lands and Works ("CCLW"), and to magistrates, gold commissioners, assistant land commissioners and surveyors were that Indian reserves should be marked out according to the wishes of the Indians and that in all cases Indian villages and the surrounding lands needed for their support should be included. On March 5, 1861, Charles Good, Colonial Secretary, instructed CCLW Moody to:

> ...take measures, so soon as may be practicable, for marking out distinctly the sites of the proposed Towns and the Indian Reserves, throughout the Colony.
>
> 2. The extent of the Indian Reserves to be defined as they may be severally pointed out by the Natives themselves. [emphasis added]

[52] Good also wrote to Cox, assistant land commissioner in the Okanagan, with these instructions:

> 7. You will receive instructions from the Chief Commissioner of Lands and Work to mark out the limits of the Indian Reserves according to the boundaries the inhabitants of each village and settlement may point out, which is to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.

[53] These instructions were given to CCLW Moody on March 4, 1862:

> The land about the Indian villages, which is in no case open to pre-empt should be marked upon the official maps as distinctly reserved to the extent of 300 acres or more around each village. [emphasis added]

[54] The instructions above spoke to the consequence of encroachment on lands not open for pre-emption:

> The sites of existent or proposed towns, auriferous lands, - Indian settlements - and lands declared to be reserved for public purposes, are not open to settlement under the Pre-emption Act, and if encroached upon may be resumed without compensation. [emphasis added]

[55] Colonial policy did not change during Douglas' tenure. At the time of his resignation in 1864, Douglas summarized his policy in an address to the Legislative Council of British Columbia:

> ...the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favorite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and forever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the Natives.

B. Did the Williams Lake Indians have a village near the foot of Williams Lake, in the areas that became known as "Comer" and "Glendale" when the Colony of British Columbia was established in 1858?

1. The Evidence

[56] The Williams Lake Indians occupied numerous sites in the early period of contact. An oral history witness, Kristy Palmantier testified:

> "Well, we had villages – our tribe was a very large tribe, lots of documentation under the Hudson Bay records. You know, we had another site on the other side here, over here by, it's called IR 5, by Chimney Creek, up in there, there was another village site. We had village sites at different places."

[57] In Volume VII of the Memoire of the American Museum of Natural History, the ethnographer, James Teit, discusses the ethnology of the indigenous peoples of southern British Columbia and Washington. Teit's investigations were part of the Jesup North Pacific Expedition, which occurred in or about 1909. This almost three (3) decades after the Williams Lake Indians were allotted reserves, including the reserve known as "Sugar Cane" (James Teit, "The Shuswap" (1909) 2:7 Memoir of the American Museum of Natural History: Jessup North Pacific Expedition at 458).

[58] Teit describes the Williams Lake Indians:

> Williams Lake or Sugar-Cane band, or "people of Skola/ten" (Williams Lake), or "people of Eka/kaike" (place near Williams Lake).

[59] Teit says, as for their present location, and former occupation of the area:

> In the Williams Lake valley, east of Fraser River, a short distance below the 150-mile post (from Lillooet), and about 140 miles north of Ashcroft. This was a large band. Formerly they lived in seven villages, and had, besides, other winter camps. They lived principally around Williams Lake, but some wintered along Fraser River down to near Chimney Creek, and others up the San José valley to Lac la Hache.
>
> They were almost exterminated by small-pox in 1862 or 1863. [emphasis added]

[60] The Respondent says that the village of the Williams Lake Indians was at Chimney Creek, some distance from the land in question.

[61] The Shuswap lived primarily in pit houses called kickwillies. There were many kickwillies at Chimney Creek. There is evidence of kickwillies at Glendale-Comer, but the area has not been extensively investigated.

[62] Both the Claimant and the Crown place great importance on the presence of a church constructed in the 1840s as evidence of the location of a settlement of the Williams Lake Indians in 1858 and the several following years.

[63] The Claimant relies on records kept by the first Catholic Mission, in particular the memoirs of Father Demers to establish the occupation of the "Village Lands" by the Williams Lake Indians.

[64] In letters to the Bishop of Quebec, Father Demers describes his work with the Atnans (Shuswap) peoples. He describes a visit to "Alexandria" and another unnamed location, where he asked the Indians to build churches. On January 5, 1843, he wrote:

> "I have told you, Monseigneur, a few words about a journey to the Atnans. It was only a preparation for a fuller mission that I was to make there presently. It was on January 3, 1843 that I left Alexandria, and, on the 5th, I was among my natives who saw me again with extraordinary demonstrations of joy. Their chapel was built, and a large fireplace permitted a fire to be made there. Unfortunately there were no windows, and I had to give several instructions in the icy January air. Finally we succeeded in securing some skins by way of panes and sashes, and there we were, comfortable, very comfortable. However, O vexatious disappointment, don't we see some miserable starved dogs begin to eat our windows...
>
> "The natives of this post have built houses for several years. The old chief has reserved his own for me, and had moved in with the young chief William. I was therefore in a house quiet worthy of my name, comfortable, appropriate, but without furniture.
>
> "Young Chief William, who had shown himself so generous and zealous for the building of the chapel, received an ample recompense through the enlightenment with which God illuminated his understanding, and the docility with which he yielded to the observance of the faith. The chapel which he constructed was 41 feet in length by 19 in width."

[65] The visits recorded by Father Demers reveal that he met with the "Atnans" in the late fall and winter. The Respondent says that he must have visited with the Atnans at Chimney Creek. This was the place where, according to Teit, some travelled from other villages to access the fall runs of salmon up the Fraser River, and where they spent the winter.

[66] The Respondent's view of the matter is supported by a memoire of Father Thomas, an Oblate Priest who attended at Williams Lake in 1897, and spent almost 60 years there. Father Thomas discusses Father Demers trip from Fort Vancouver North to "Fort Alexandria." Father Thomas says that:

> "If I mention that en route, and near Williams Lake, Father Demers spent a couple of days at Chimney Creek (likely October 10th and 11th) it is partly that I may give the origin of this name. During his visit to this place, he built a rough stone chimney in his hut and it was such a novelty that the nearby Creek was called Chimney Creek. Having told the local Shuswap Indians to build a small church and having promised to visit them on his return journey, he and the brigade set out for Fort Alexandria..."

[67] Father Thomas also recorded that:

> "He [Father Demers] instructed the Indians daily and, having told them to build a log church, he left for Chimney Creek, where, on November 21st, 1842, he began a sixteen-day Mission to the Shuswap Indians of this place and to some fellow tribesmen from Alkali Lake and Soda Creek. ...By January 3rd 1843, Father Demers was back at Chimney Creek where he found that a small church and a house for himself had been built. There was no window panes and parchment was used to fill the holes made for windows. During the night the dogs ate the parchment so that they had to be caught and kept from running loose. It was bitterly cold, that winter....At Chimney Creek a large cross was erected to commemorate the mission given by F. Demers. In about 1863 these Indians moved to Williams Lake, some settling at its outlet and other at Gomer's ranch. They took the cross with them." [emphasis added]

[68] The above passage is relied on not only for the location of the church at Chimney Creek, but also for the proposition that the Williams Lake Indians moved to Williams Lake "in about 1863." The reference to "Gomers Ranch" is likely a reference to the Comer Ranch, located on pre-empted land which later became Lot 72.

[69] The evidence does not reveal the source of the information that Father Thomas relied on to say that the Indians moved from Chimney Creek to Williams Lake "in about 1863."

[70] Presumably, Father Thomas had read the memoires of Father Demers. However, Thomas' assertion that Demers asked the Williams Lake Indians to construct a church at Chimney Creek is not borne out by Demers' memoirs, which do not reveal the location of the church.

[71] Some of the Williams Lake Indians had, by 1843, adopted the immigrant's methods of home construction. In his January 5, 1843 letter to the Bishop of Quebec, Father Demers noted that:

> "The natives of this post have built houses for several years. The old chief has reserved his own for me, and had moved in with the young chief William. I was therefore in a house quite worthy of my name, comfortable, appropriate, but without furniture."

[72] There were at least two houses in the area where the church was built. One belonged to the "old Chief" and the other to "young Chief William."

[73] The "young Chief William" referred to by Demers in his 1843 letter continued as Chief

of the Williams Lake Indians until his death from smallpox in 1862. He was succeeded by his son, the second Chief William, who carried out the responsibilities of Chief from 1862 until 1884 and again from 1888 to 1896.

[74] The record reveals numerous post-confederation affirmations by Government officials of the presence of Williams Lake Indians at Comer – Glendale at and before 1859.

[75] In November, 1879, Chief William wrote to a newspaper, the *British Colonist*, setting out the bands grievances. He stated:

> "I am an Indian chief and my people are threatened by starvation. The white men have taken all the land and all the fish. A vast country was ours. It is all gone. ...The land on which my people lived for five hundred years was taken by a white man; he has piles of wheat and herds of cattle. We have nothing – not an acre. Another white man has enclosed the graves in which the ashes of our fathers rest, and we may live to see their bones turned over by the plough."

[76] Having no reserve, the Williams Lake Indians resided on land owned by the Catholic Church at St. Joseph's Mission. Father Charles Grandidier was head of the Mission. On January 20, 1880, Grandidier wrote to John A. MacDonald, Superintendent General of Indian Affairs, as follows:

> A man named Davidson came early after 1859 to the father of the present Chief William and asked to be permitted to build a cabin and to cultivate a little garden on his land. The Chief offered no objection. Then this man Davidson had all the land occupied by the Indians recorded as a pre-emption claim. On that land was a little chapel build by the first Catholic Missionary, the late Bishop Demers of Victoria, and also the cabin of the Chief. The Chief was permitted to live in his cabin near the chapel, but the Indians were driven away. The Chief was offered twenty dollars by Davidson, but he refused to part with his father's land and rejected the money, as I have been told by the man who acted as Interpreter in this occasion. Shortly after the other parts of the valley were pre-empted by other parties, and the Indians were driven away to the top of the hills, where cultivation is out of the question. [emphasis added]

[77] Davidson was on the land in the Glendale-Comer area in 1861. This is in the area at the foot of the lake that later became known as Blocks 71 and 72.

[78] Grandidier refers in his letter to "the father of the present Chief William." Chief William (Wesemaist) died in 1862. His son, the second Chief William, was the chief when Grandidier was there. The Chief William who told Grandidier of Davidson's actions would have been the

second Chief William. It was his father, who Demers referred to as "the young Chief William," that offered his home to Demers in 1843.

[79] By Grandidier's account, Chief William resided at Glendale, where he was approached by Davidson. Although the evidence does not reveal the source of the information related by Grandidier, Chief William was likely the source, as the Williams Lake Indians resided at the Mission headed by Grandidier. Chief William undoubtedly knew where his father lived and that his father had dealings with Davidson. Moreover, Davidson's presence in the area was recorded by both Nind and Begbie in 1861.

[80] As for Thomas' statement that the Indians moved to Williams Lake in 1863, this could not have come from personal communications with Demers, who died in 1871.

[81] After confederation, Crown officials spoke of the Williams Lake Indians' occupation of the land taken over by Davidson, and later acquired by Pinchbeck. On March 7, 1879, Justice of the Peace William Laing-Meason wrote to reserve commission Sproat, stating:

> "At Williams Lake there is no Indian reserve and the Indians do not own a single acre of land. They are living on land belonging to the Catholic Mission at that place..."

[82] On April 21, 1879, Laing-Meason wrote again to Sproat, saying:

> The Chief of this tribe has just requested me in the most formal manner to write you and say,
>
> 1. That unless you come and give them land on or before two (2) months from date – we may look out for trouble.
>
> 2. That his tribe has nothing to eat in consequence of their having no land on which to raise crops.
>
> 3. That their horses and cattle have many of them died this winter because they had no place of their own on which to cut hay last summer.
>
> Their talk – I am well informed – is, that if proper land is not given to them <u>they will take by force the land which they used to own and which they used to cultivate and which was taken from them by pre-emption in 1861 (about). This land is situate at the foot of Williams Lake and is now owned by Mr. Pinchbeck. There are Indian houses to be seen on it at the present time.</u> [emphasis added]

[83] The Respondent also relies on the contents of a book written by Margaret Whitehead

entitled *Cariboo Mission: A History of the Oblates* (Victoria: Sono Nis Press, 1981), and Irene Stangoe's book, *Looking Back at the Cariboo-Chilcotin* (Surrey: Heritage House Publishing, 1997) as evidence that the church built at the direction of Father Demers was at Chimney Creek, and that the Williams Lake Indians moved to the Glendale and Comer areas in 1863. Both authors relied on Father Thomas' account.

[84] In an article published in the Tribune newspaper on August 24, 1996, Irene Stangoe reported on concerns raised by members of the Williams Lake Band that the development of a mobile home park in the Glendale area may destroy the remains of their ancestors. Stangoe said:

> There is indeed documented evidence that this area was once the site of an Indian Village where a small church was built in 1842. Later, it became the site of the first Williams Lake settlement.

[85] The contents of the Stangoe article do not, with respect to the location of the village and church, conform with the material relied on by the Respondent from Stangoe's book.

[86] Father Thomas was born in 1868, three years before Father Demers died. He arrived at St. Joseph's Mission in 1897. He wrote his memoire of St. Joseph's Mission around 1949 at the age of 81 years. The memoire was written from his notes and without the benefit of the *codex historicus* which had been lost. Father Thomas described his account not as a history but rather as a "personal memoire." He cited no documents or sources.

[87] There are discrepancies between Father Demers own account of his travels among the Shuswap and the account provided by Father Thomas.

[88] The Respondent also relies on the absence of any contemporaneous references to Indians at the foot of Williams Lake in notes made by Judge Begbie.

[89] Judge Begbie travelled from Lake Vert and arrived to a point near Davidson's on September 19, 1860. On September 20, Nind, Pinchbeck, and Begbie left for Quesnel Forks and points beyond. Begbie's purpose was to reconnoitre the gold fields of the Fraser River and Cariboo Mountains. Maps were prepared in 1860 based on his observations. Although he met Davidson at Williams Lake, he did not note the presence of any Indians there. He noted the presence of Indians at only one location some distance from Williams Lake.

[90] The maps prepared based on Begbie's observations do not, with one exception, identify the presence of Indians. It was not Begbie's purpose to make a record of Indian settlements.

[91] Another map of Williams Lake, prepared in or about 1875, shows "Indians" as being on the north shore of Williams Lake, halfway between the present locations of the Sugar Cane Reserve and the town of Williams Lake. By then, according to Grandidier, the Indians had been driven off the land occupied by Davidson.

[92] The 1875 map shows a building which appears to be labelled as "Old Indian Church" southeast of a reference to "Pinchbeck's." It was Pinchbeck who acquired the Davidson pre-emption in the Comer-Glendale area.

[93] The Respondent says that the appearance of the remains of a church on the 1875 map, and the absence of any such reference in the 1860 map, is consistent with Thomas' account that the Indians moved from Chimney Creek to Glendale in 1863. The Respondent says that the church must have been moved from Chimney Creek to Glendale.

[94] As the maps do not generally record structures on the land, they cannot support an inference that there was no church in the Glendale area in 1860. The presence of an old Indian church as shown on the 1875 map cannot, in these circumstances, give rise to an inference that the church shown was relocated from elsewhere.

[95] On March 5, 1861, Charles Good, acting Colonial Secretary, instructed the Chief Commissioner of Lands and Works to mark out the sites of "Indian Reserves" throughout the Colony. Further, the extent of the Indian Reserves was to be defined as pointed out by the Natives themselves.

[96] As noted above, Douglas had informed the "native Indian tribes" at Cayoosh and Lytton that:

> …the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields, and as much land in the vicinity of each as they could till, or was required for their support;....

[97] Nind was appointed magistrate and gold commissioner in July 1860. He was responsible for local implementation of the colonial policy. He established his headquarters in Williams Lake

several months later. Although there is no direct evidence that he was informed in advance of taking up his post of his responsibility to stake out Indian reserves where he found Indians in occupation, it may be assumed that he had been informed of this policy as it was an important aspect of his duties.

[98] Nind knew that the Williams Lake Indians inhabited land at the foot of the lake. In his May 4, 1861 report Nind said "The Indians here change their residence very frequently sometimes camping at the head of the lake, sometimes at the foot of it and sometimes around Mr. Davidson's and the Government house." The latter was in the Glendale-Comer area. Nind noted the presence of Indians at the foot of the lake. He did not record the presence of Indians at any other location.

[99] It was in the May 4, 1861 letter that Nind asked to be instructed to make a reserve for the Indians at Williams Lake. He expressed concern that, "The greater portion of the available farm land had been pre-empted and purchased and it is probable that before the summer is over it will all be taken up."

[100] Charles Good responded to Nind's letter on June 10, 1861. Good advised of his Excellency's desire that, "you will mark out a reserve of 400 or 500 acres for the use of the Natives in whatever place they may wish to hold a section of land." He added, "a Town Site may also be marked out at Williams Lake,..." (emphasis added).

[101] Nind did not act on Good's instructions. His letters reveal that the pre-emption of land in the area was proceeding apace. It is likely that he was referring to pre-emptions in the area where he encountered Indians at the foot of the lake. Pre-emptions were recorded in the area by Telford in April 1860 and by Davidson in December 1860. Davidson occupied and worked the land pre-empted by Telford.

[102] It was not until 1879 that Federal and Provincial authorities took notice of the failure thus far to allot a reserve for the Williams Lake Indians. This appears to have been prompted by Chief William's letter and Grandidier's protest on the Band's behalf. The correspondence in that and subsequent years reflects the understanding among federal and provincial officials that the Indians occupied land at Williams Lake and that the land had been pre-empted.

[103] O'Reilly was not the only post-confederation government official to recognize that the Williams Lake Indians had been displaced from their settlement. In 1879, Laing-Meason said "land which they used to own and which they used to cultivate and which was taken from them by pre-emption in 1861 (about). This land is situate at the foot of Williams Lake and is now owned by Mr. Pinchbeck. There are Indian houses to be seen on it at the present time" (emphasis added). In 1879, O'Reilly reserved seven graveyards "on the farm and within its enclosures." If their presence was apparent in 1879, it would have been apparent to Nind in 1860.

[104] In an affidavit sworn by William Pinchbeck on November 29, 1885, in support of his application for a Crown grant for Lots 71 and 72, he recorded the presence of Indians at Comer:

> In 1862 smallpox broke out among the Indians in Chilcotin and was very bad. When they took up Comer they were living near Indians who had been dying in the snow. These Indians lived in kickwillies. They would dig a hole in the ground out or choose a place where there was a natural hole, and put poles up for a roof and cover these with branches or matting, and had ladders down into them. There were many of them about here and the hollows can be seen still. There was a hole in the middle of the roof and the smoke came up through it. They would be from four to eight feet deep. For long after that they would come across the remains of Indians who had died in the snow, or sometimes a whole family would be found dead in their kickwillies. [emphasis added]

[105] This account suggests a migration to Comer after smallpox broke out. However, the oral history and Teit's report places the Williams Lake Indians at the foot of the lake as one of several occupied areas.

[106] The Seymour report speaks of the impact of introduced diseases on the Williams Lake Indians:

> Disease had ravaged the colony since the 1830s. Fever, malaria, measles and dysentery, affected both the First Nations and the white populations. The coup de grace, however, was the smallpox epidemic which began in 1862. It reduced the First Nation population by staggering numbers. Demographic estimates for the period 1835 to 1890 suggest an overall decline of as much as 66%. It is suggested that perhaps as much as 90% of this figure is attributable to deaths in the smallpox epidemics.

[107] As noted by Teit, the Williams Lake Indians settled at several locations. Chimney Creek was the site of a large village. Comer, apparently less populated, was another. The Williams Lake Indians were once a large tribe.

[108] There was evidence of Indian occupation at Comer and Glendale on Nind's arrival in October 1860. There were Indians present, there were kickwillies, and there would have been physical evidence of Indian houses and a chapel. There may not have been many Indians present when Nind arrived. The tribe had been diminished by introduced diseases by October 1860, and, as reported by the second Chief William to Grandidier, the Indians had been driven off the land in the area occupied by Davidson sometime after 1859.

[109] The oral history is that an area considerably larger than the pre-empted land was occupied for purposes that included dwellings and gathering of plants, berries and game. This includes the present location of the West Fraser mill, Boitanio Mall, a mobile home park, and the Comer Pub. Archaeological investigations have found evidence of Indian occupation.

2. Summary and Conclusion

[110] Nind's record and Chief Williams' communication with Father Grandidier have Davidson at the subject land in 1859. Grandidier was stationed at William's Lake in 1880, when he wrote about Chief William and the ouster of the Williams Lake Indians from the pre-empted land there. This is more reliable evidence than the writings of Father Thomas, who arrived in Williams Lake in 1897, and who makes no reference to having received information from any member of the tribe, much less the son of the first Chief William.

[111] Teit was an ethnographer. As a professional employed by a distinguished institution, his conclusions on the places of residence of the Williams Lake Indians carry greater weight than those expressed by Stangoe and Whitehead.

[112] According to the oral history the extent of land occupied in the area, and used for both residences and gathering berries and plants took in all of what became Lots 71 and 72, and adjoining areas of indeterminate acreage.

[113] In the late 1870's, O'Reilly and Laing-Meason acknowledged the Williams Lake Indians occupancy of the subject land. This and other evidence supports the claim of the Band that the church and Chief Williams home were located in the Glendale and Comer areas. This, I conclude, was the location of Father Demers visit, the church, and a place frequented by the Williams Lake Indians before 1858. They were driven off the land by pre-emptors, but remained

in the area of Glendale-Comer. There were visible signs of their occupation of the area. Nind knew of their places of habitation.

[114] I find that the area of land at Comer and Glendale that later comprised Lots 71 and 72 and an adjoining area, was an "Indian settlement" within the meaning of that term in *Proclamations No. 13* and *15.*

C. Did the pre-emptions at Comer-Glendale contravene Colonial law?

1. Indian Settlements and Pre-emptions

[115] The colonial plan for making land available for pre-emptions reflects the policy of protection of Indian settlements. *Proclamation No. 13* empowered the Executive to "reserve such portions of the unoccupied Crown lands, and for such purposes as the Executive shall deem advisable."

[116] Directions to the Chief Commissioner of Lands and Works, and to all magistrates and gold commissioners, specified that the sites of Indian villages and land the Indians were accustomed to "cultivate" were to be reserved.

[117] On January 4, 1860, Douglas issued *Proclamation No. 15.* Section 1 of the legislation limited the lands available for pre-emption, excluding:

> Unoccupied and unreserved and unsurveyed land in British Columbia (not being the site of an existent or proposed town, auriferous land … or an Indian reserve or settlement… [emphasis added]

[118] The Act did not, on its face, require that land exempted from pre-emption be marked out, surveyed, or formally designated to have the protection of the law. To impose such a requirement would expose those occupying settlements vulnerable to ouster by immigrants that had registered pre-emptions. As will be seen, this occurred in the case of the Williams Lake Indians.

[119] The effect of the "Act" was explained in a dispatch to the Duke of Newcastle dated January 12, 1860. Douglas forwarded *Proclamation No. 15,* which gave his previous instructions the force of law. He wrote:

> 8. The Act distinctly reserves, for the benefit of the Crown, all town sites, auriferous land, Indian settlements, and public rights whatsoever; the emigrant

> will, therefore, on the one hand, enjoy a perfect freedom of choice with respect to unappropriated land ... while the rights of the Crown are, on the other hand, fully protected, as the land will not be alienated nor title granted until after payment is received.

[120] These instructions were given to CCLW Moody on March 4, 1862:

> The land about the Indian villages, which is in no case open to pre-empt should be marked upon the official maps as distinctly reserved to the extent of 300 acres or more around each village. [emphasis added]

[121] The instructions above spoke to the consequence of encroachment on lands not open for pre-emption:

> The sites of existent or proposed towns, auriferous lands, - Indian settlements - and lands declared to be reserved for public purposes, are not open to settlement under the Pre-emption Act, and if encroached upon may be resumed without compensation. [emphasis added]

[122] An example of the consequence of a pre-emption that was found to encroach on an Indian settlement is set out in paragraph 49 of these reasons. The pre-emptor, Scott, was dispossessed of the land to the extent of the encroachment.

[123] The protection afforded to Indian settlements by the 1860 proclamation would not be effective if it applied only to those that had been marked off by colonial officials. There is no evidence that the Colony had identified and marked out all of the Indian settlements in British Columbia before *Proclamation No. 15* came into force. The evidence is to the contrary, as this remained to be undertaken after confederation. It was part of the mandate of the JIRC to identify lands habitually used by Indian tribes in order to set apart reserves.

[124] *Proclamations No. 13* and *No. 15* were in place when Nind was appointed Magistrate and Gold Commissioner for the Alexandria District in July 1860. As he was charged with the responsibility of giving effect to the colonial law and policy, he would have known of the proclamations.

[125] On May 4, 1861, Nind asked the Acting Colonial Secretary for instructions to reserve land at Williams Lake for the Indians. He knew the Indians were present "sometimes camping at the head of the lake sometimes at the foot of it and sometimes around Mr. Davidson's and the Government House."He said, "[t]he greater portion of the available farming land has been pre-

empted and purchased and it is probable that before the summer is over it will all be taken up" (emphasis added).

[126] In the instructions Nind was given on June 10, 1861, he was told to mark out a reserve "… for the use of the Natives in whatever place they may wish to hold a section of land" (emphasis added). The Chief Commissioner of Land and Works also told Nind that, as the Williams Lake area was unsurveyed, settlers could only pre-empt land under the legislation. The legislation prohibited pre-emption of Indian Settlements. Charles Good, on instructing Nind to mark off a reserve, said "His Excellency desires me to acquaint you that the land in your district not being included in any official survey cannot be conveyed by any deed of sale whatsoever;" and that "un-surveyed lands can only be pre-empted under the pre-emption Acts." Nind, as the man on the ground, was to ensure that Indian settlement lands not be pre-empted.

[127] Nind knew that the Williams Lake Indians "camped" at the foot of the lake. He considered their presence, despite being displaced by pre-emptors, sufficient to warrant a reserve of 400 to 500 acres.

[128] It is apparent that Nind did not determine from the Indians which lands they wished to have reserved or call into question the legality of the pre-emptions that took place from April 1860 up to his departure from Williams Lake.

[129] As there were Indians present at the foot of the lake, and Indian houses remained there as recently as 1879, it is a reasonable inference based on Nind's communication to the Chief Commissioner that he did not mark off a reserve as "… the available farming land has been pre-empted and purchased and it is probable that before the summer is over it will all be taken up."In effect, Nind turned Colonial policy and law on its head. The pre-emptions trumped the allotment of a reserves at places occupied by the Williams Lake Indians. The Glendale - Comer area at the foot of the lake was one such place. Another, although not the subject of this claim, may have been the large settlement at Chimney Creek where, according to Stangoe, land that became a "huge ranch" was pre-empted in the early 1860's.

2. The Williams Lake Pre-emptions

[130] In his October 17, 1860, report to the Acting Colonial Secretary from his post in

Williams Lake, Nind referred to land pre-empted by Davidson.

[131] Davidson had not in fact registered a pre-emption by the time Nind wrote his October 17, 1860 report. The first pre-emptions in the area were recorded on April 28, 1860. One pre-emption was in the name of Moses Dancerault. The other was in the name of John Telfer. Both pre-emptions took in 160 acres. Telfer "purchased" an additional 160 acres on July 1, 1861.

[132] It appears that Davidson occupied land in the area pre-empted by others in April 1860, or on land that had not yet been pre-empted. He had by then been there long enough to construct "a substantial and commodious log house," commence the construction of farm buildings, and take crops from the land.

[133] There was an active trade in pre-emptions. Telfer later sold his interests in both 160 acre parcels to Davidson. On September 23, 1861, Davidson sold 320 acres to Thomas Menefee and D.G. Moreland. Pinchbeck pre-empted a 160 acre parcel on March 28, 1862. Dancerault's interest was sold to Davidson on an unknown date. Davidson transferred his interest in that pre-empted property to Menefee and T.W. Woodward at an unknown date. In 1873, Pinchbeck purchased Menefee and Woodward's interests. There were other pre-emptions of the three lots that were within Block 71, and three within Block 72. Together the two blocks covered much of the Glendale and Comer areas.

[134] There is evidence that pre-emptions at Williams Lake contravened the requirements of the legislation ways unrelated to the prohibition related to Indian Settlements. Some settlers held multiple pre-emptions, some were not in continuous possession, some purported to sell their pre-emptions without having received certificates of improvement.

[135] Pinchbeck, the constable who accompanied Nind to Williams Lake in 1860, was eventually granted title to the land at Comer and Glendale that was later surveyed as Blocks 71 and 72. The fact of Indian presence on the land would have been as apparent to Pinchbeck as it was to Nind. He, like Nind, may be presumed to know the law governing pre-emptions.

3. Conclusion

[136] The pre-emptions contravened the provisions of *Proclamation No. 15*, as the land later

surveyed as Blocks 71 and 72 was part of an Indian settlement within the meaning of Colonial policy and Law.

[137] But does that result in a breach of a legal obligation of the Colony?

D. The *Specific Claims Tribunal Act*: Breach of Legal Obligation of a Colony

1. *Specific Claims Tribunal Act,* section 14(1)(b)

[138] A breach of legal obligation by a colony may ground a claim under the *SCTA*:

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

[139] The Claimant argues that the colony was in breach of the provisions of *Proclamation No. 15* that protected Indian Settlements from pre-emption. It is also argued that the failure of the colony to apply the proclamation was contrary to the honourable obligations of the Crown and a breach of fiduciary duty. The Claimant argues that these ground a claim under *SCTA*, s 14(1)(b).

[140] The Respondent agrees that the sub-section may result in Crown liability grounded in a breach by a colony of a legal obligation "under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for the Indians –," but that grounds alleging breach of fiduciary duty are not included.

[141] The Claimant did not refer specifically to the sub-section in its initial written submissions, but advised in response to a question from the Tribunal that the claim is grounded in both colonial and post Confederation breaches.

[142] The Respondent had addressed *SCTA*, s 14(1)(b) in its responsive submissions.

[143] At the request of the Tribunal, further submissions on the sub-section were filed on July 26 (Claimant), August 20 (Respondent) and September 20, 2013 (Claimant Reply).

[144] On the face of it, s 14(1)(b) of the *SCTA* can be a grounds for a specific claim when the

Claimant asserts a breach of a legal obligation of a colony under the *Indian Act* or other legislation "pertaining to Indians or land reserved for Indians -." The Respondent argues that the phrase "Indians or lands reserved for Indians" are taken from s 91(24) of the *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*] and, as such, the words invite an analysis of the pith and substance of the pre-emption legislation (*Proclamation No. 15*). The Respondent refers to the other exceptions in the proclamation to land available for pre-emption, i.e. "the site of an existent or proposed town..." etc., as illustrating that the pith and substance is not about Indians and land reserved for Indians.

[145] The pith and substance analysis is in play in division of powers cases where the question is whether provincial legislation trenches on a head of federal jurisdiction or vice-versa. Such is not the case in the present matter. The present question is whether the proclamations are legislation pertaining to Indians or land reserved for Indians. This includes legislation of which some part pertains to Indians or land reserved.

2. Construction of *Specific Claims Tribunal Act,* section 14(1)(b)

[146] The subsection:

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

[147] The construction of *SCTA*, s 14(1)(b) must take account of the words "pertaining to."

[148] The term "pertain" means to "relate or have reference to" and to "belong to as a part or appendage or accessory" (*The Canadian Oxford Dictionary*, 2d ed, *sub verbo* "pertain"). The question is whether *Proclamation No. 15* relates or has reference to Indians or land reserved for Indians. This is the text:

> Now, therefore, I, James Douglas, Governor of British Columbia, by virtue of the authority aforesaid, do proclaim, order and enact:- 1. That from after the date hereof British subjects and aliens who take the oath of allegiance to Her Majesty and Her successors, may acquire unoccupied and unreserved and unsurveyed

> Crown Lands in British Columbia (not being the site of an existent or proposed town, auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple) under the following conditions: [emphasis added]

[149] Here, the term "Indian Reserve" means reserved in the sense meant by Colonial policy. Its meaning is apparent from official documents that use the term. It is not used in the sense considered in *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*]. In *Ross River* the court dealt with a claim that an Indian Reserve had been established and came within the definition of that term in the *Indian Act*.

[150] The meaning of the terms "reserve" and "reserved" in colonial policy and legislation is revealed by *Proclamation No. 13*: "It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown lands, and for such purposes as the Executive shall deem advisable." (emphasis added). In Douglas' dispatch to Lytton he refers to "anticipatory reserves." On Oct. 7, 1859, Douglas advised the CCLW that "the sites of all Indian Villages and the land which they have been accustomed to cultivate to the extent of several hundred acres round each village have been reserved and are not to be subjected to the operation of the proposed pre-emption law." (emphasis added). By *Proclamation No. 15*, British subjects and aliens were permitted to "...acquire unoccupied and unreserved and unsurveyed Crown Lands in British Columbia (not being the site of an existent or proposed town, auriferous land available for mining purposes, or an Indian Reserve or settlement, in fee simple under the following conditions:" [emphasis added].

[151] Douglas is using the term "reserved" in its ordinary meaning, "set apart, destined for some use or fate" (*The Canadian Oxford Dictionary*, 2d ed, *sub verbo* "reserved").

[152] The legal effect of *Proclamation No. 15* was to exclude named categories of land from availability for pre-emption. Land in those categories was protected in order that specified existing and proposed uses could take place. Indian settlements were reserved from pre-emption under the Proclamation to allow for the continued Indian occupation of their village sites in accordance with the colonial policy of locating Indians in their villages. The proclamation is thus "legislation pertaining to Indians or land reserved for Indians," within the meaning of that phrase in s 14(1)(b) of the *SCTA*.

3. Did *Proclamation No. 15* Impose an Obligation on Colonial Officials?

[153] The Respondent says that *Proclamation No. 15* did not expressly place a duty on colonial officials to ensure that lands claimed by pre-emption did not encroach on Indian settlements. Hence the failure to do so is not a breach of a legal obligation under "any other legislation" within the meaning of s 14(1)(b). The Respondent says "it is not enough that legislation be part of a fact pattern giving rise to some other type of legal obligation, e.g. fiduciary duty." Absent a positive obligation it is said that there can be no breach.

[154] The Respondent's characterization of *Proclamation No. 15* as part of a "fact pattern" is incorrect. It is legislation, and if the Colony was in breach, s 14(1)(b) would result in Crown liability under the *SCTA*. The colony was in breach.

[155] It is self-evident that the Proclamation could not achieve the legislative objective if steps were not taken to identify Indian settlements in consultation with the Indians. The objective and the means by which it was to be achieved were clearly stated.

[156] The policy prior to the Proclamation was to engage the Indians in identifying their settlement lands. Colonial officials were issued instructions to the same effect. On March 5, 1861, Charles Good, Colonial Secretary, instructed CCLW Moody to:

> .. .take measures, so soon as may be practicable, for marking out distinctly the sites of the proposed Towns and the Indian Reserves, throughout the Colony.
>
> 2. <u>The extent of the Indian Reserves to be defined as they may be severally pointed out by the Natives themselves</u>. [emphasis added]

[157] Good also wrote to Cox, assistant land commissioner in the Okanagan, with these instructions:

> 7. You will receive instructions from the Chief Commissioner of Lands and Work to mark out the limits of the Indian Reserves according to the boundaries the inhabitants of each village and settlement may point out, which is to be the rule adopted in defining those reserves, and all persons should be cautioned not to intrude thereon.

[158] Nind, the magistrate, gold commission, and assistant land commission for the Alexandria District received similar instructions in June 1861 relating to "the Indians at Williams Lake:"

> His Excellency desires you will mark out a reserve of 400 or 500 acres for the use of the Natives in whatever place they may wish to hold a section of land. No survey is requisite nor anything beyond a distinct marking of the lines.

[159] As noted above, Nind failed to carry out the very instructions that he had requested, because pre-emptions had already taken place. Nind was there to implement the colonial policy on the ground. This was an obligation. Although he was reminded that existing pre-emptions could be resumed without compensation, nothing was done.

[160] The Colony was in breach of *Proclamation No. 15.* As this was legislation pertaining to Indians or lands reserved for Indians within the meaning of colonial policy and the Act, the Claimant has established grounds under s 14(1)(b) of the *SCTA*, for the specific claim.

E. Did the Crown fail to act Honourably and in breach of Fiduciary Duty in the Colonial Period?

1. Does section 14(1)(b) of the *Specific Claims Tribunal Act* apply to make the Crown (Canada) liable for Breach of Fiduciary Duty by Colony?

[161] Canada acknowledges that s 14(1)(b), read with s 14(2), makes it clear that pre-Confederation claims may be made, but argues that the causes of action are limited to breaches of statutory obligations.

[162] Section 14(2) governs the application of s 14(1)(b) "...in respect of any legal obligation that was to be performed in an area within Canada's present boundaries before that area became part of Canada." It provides that:

> "...a reference to the Crown includes the Sovereign of Great Britain and its colonies to the extent that the legal obligation or any liability relating to its breach or non-fulfilment became - or would ... have become - the responsibility of the Crown in right of Canada."

[163] This places the Crown (*SCTA*, s 2: "Crown" means Her Majesty in right of Canada) in the same legal position as "the Sovereign of Great Britain and her colonies," but not for all potential liabilities of the Imperial Crown in the pre-Confederation era.

[164] The legal obligations that "... became or would have become the responsibility of the Crown in right of Canada" are those that became obligations of Canada on confederation, and for which Canada would, if in the place of the colony, have been in breach.

[165] The essence of the Band's argument is that fiduciary duty is brought into play whenever a statute confers a discretionary power over an aboriginal interest. It is contended that *Proclamation No. 15* did just this.

[166] The question in the present matter is whether by policy, made law by *Proclamation No. 15,* the colony assumed an obligation to act for the benefit of Indians and retained a discretion over how it would discharge that obligation.

[167] If the Colony was not in breach of the express provisions of the proclamation as legislation "pertaining to Indians and land reserved for the Indians," the question remains whether it had a fiduciary duty, and whether that duty was breached.

[168] If the protection of Indian settlements under *Proclamation No. 15* depends on further actions by the Crown, for example marking out or surveying the settlement land, its operation is discretionary. Discretion is at the heart of fiduciary duty.

2. Legislation, and Fiduciary Duties at Common Law

[169] I have concluded that the colony was in breach of legislation pertaining to land reserved for the Indians. I will also consider the Claimant’s argument on fiduciary duty.

[170] In *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*] Dickson J, for the majority, set out several bases on which the Crown could become a fiduciary in its relations with Indians. The common element among them is discretionary control.

[171] In Guerin, the discretion that gave rise to the fiduciary duty was statutory. It was found in s 18(1) of the *Indian Act*, RSC 1952, c 149 which “...confers upon the Crown a broad discretion in dealing with surrendered land” (*Guerin, supra* at 385).

[172] The *Indian Act* was found to reflect the position of the Crown as the exclusive intermediary through which immigrants could acquire an interest in Indian Lands, a position established by the *Royal Proclamation* of 1763.

[173] Section 18(1) did not expressly constitute the Crown a fiduciary. It conferred a discretion which, at common law, established it as a fiduciary.

[174] The assertion of Crown title placed the Colony in a fiduciary relationship with the aboriginal inhabitants. The enactment of legislation in relation to acknowledged interests in land, here an interest based on the occupancy recognized and protected by the legislation, brings into effect the law that may apply where, as here, the fiduciary relationship is present. This is a legal obligation within the meaning of the term in s 14(2) when the factors necessary to ground a fiduciary duty are present.

[175] I note, parenthetically, that if the construction advanced by Canada is correct in law, the only claims grounded in fiduciary duty that the Tribunal may hear are those that arise out of the "provision or non-provision of reserve lands..." (*SCTA*, s 14(1)(c)) as this is the only reference in s 14 to fiduciary obligations. The Tribunal could not hear a *Guerin* like claim.

3. Fiduciary Relationship

[176] In *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Weywaykum*], Binnie J discussed the relationship between Aboriginal peoples and the Crown. The assertion of Crown sovereignty grounded a fiduciary relationship and imposed a standard of honourable dealings on the Crown:

> This sui generis relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclaimation*, 1763, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin, supra*, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." See also: *Lac Minerals Ltd. V. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, *per* Sopinka J., at pp. 599-600; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, *per* La Forest J., at p. 406; *Frame v. Smith*, [1987] 2 S.C.R. 99, *per* Wilson J., dissenting, at pp. 135-36. 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. [para 80]

[177] Not all aspects of the fiduciary relationship give rise to a fiduciary duty. To ascertain whether a duty exists requires consideration of the particular interest at stake:

> I offer no comment about the correctness of the disposition of these particular cases on the facts, none of which are before us for decision, but I think it desirable for the Court to affirm the principle, already mentioned, that not all obligations existing between the parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown had assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation. [emphasis added; *Wewaykum*, supra at para 83]

4. Honour of the Crown, and the Fiduciary Duty

[178] In *Manitoba Metis Federation v Canada*, 2013 SCC 14, [2013] 1 SCR 623[*Manitoba Metis Federation*], the Supreme Court of Canada expanded on the relationship between the honour of the Crown and fiduciary duty:

> 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, supra*, 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. The comments of Brian Slattery with respect to fiduciary duty resonate here:
>
> > The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.
>
> ("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753.) [emphasis added; para 66]

[179] In the present matter, the colonial government was mindful of the imminent risk of an uprising when promises were made to the Indians to protect their settlement lands.

[180] The honour of the Crown is a practical and concrete concept. It gives rise to a fiduciary duty where the Crown assumes discretionary control over specific Aboriginal interests:

> The government's duty to consult with Aboriginal peoples and accommodate their interest is grounded in the honour of the Crown. The honour of the Crown is

> always at stake in its dealings with Aboriginal peoples: see for example *R. V. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. V. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices. [Emphasis added]
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page 523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra,* at para. 31.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada,* [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. [*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 16-18, [2004] 3 SCR 511]

[181] The Court in *Manitoba Metis Federation* explained two circumstances in which a fiduciary duty may arise. The first circumstance arises where:

> The Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18. [para 51]

[182] The second circumstance articulated in *Manitoba Metis Federation* arises 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. [para 50]

5. Assertion of Crown Sovereignty in British Columbia

[183] British sovereignty was found in *Delgamuukw v British Columbia* to have been asserted in 1846 over the territory that later became the colony of British Columbia: ([1997] 3 SCR 101 at para 45, 153 DLR (4th) 193 [*Delgamuukw*], adopting the finding of the BCCA, at p 225, in Wallace J.A.'s concurring judgment).

[184] The colony of Vancouver Island was established by 1849, when it was granted to the Hudson's Bay Company by the Imperial Government. James Douglas was the Chief Factor of the Company. In 1858, Douglas was appointed Governor of the Colony of British Columbia.

[185] In February 1859, Douglas issued *Proclamation No. 13*, which asserted the Crown's ownership in fee simple of all the lands in British Columbia, and all the mines and minerals therein.

F. Was the Honour of the Crown Engaged in the Crown/Aboriginal Relationship in Colonial Times?

[186] The event that must be present to engage the honour of the Crown is the assertion of British Sovereignty: *Manitoba Metis Federation*, *supra* at para 9. That element is present here.

[187] The emphasis in *Manitoba Metis Federation* was on constitutional obligations:

> 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. [para 75]

[188] In *Manitoba Metis Federation*, the court was concerned with the legal effect of an explicit Constitutional promise to the Métis. However, it did not limit the requirement that the Crown act honourably to the fulfilment of Constitutional obligations:

> 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. Thus far, the honour of the Crown has been applied in at least four situations:
>
> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to The Case of *The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025,

> and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47. [para 73]

[189] Fiduciary duties in relation to Aboriginal interests derive from the honour of the Crown, but are not dependent on proof of s.35 rights or the existence of a reserve. They may arise prior to reserve creation:

> In *Ross River, supra*, the Court affirmed that "[a]lthough this is not at stake in the present appeal, it should not be forgotten that the exercise of this particular power [of reserve creation] remains subject to the fiduciary obligations of the Crown as well as to the constitutional rights and obligations which arise under s. 35 of the *Constitution Act, 1982*" (LeBel J., at para. 62). Further, "it must not be forgotten that the actions of the Crown with respect to the lands occupied by the Band will be governed by the fiduciary relationship which exists between the Crown and the Band.
>
> ...
>
> The issue, for present purposes, is to define the content of the fiduciary duty "with respect to the lands occupied by the Band" (Ross River, supra, at para. 77) at the reserve-creation stage insofar as is necessary for the disposition of these appeals.
>
> [*Wewaykum, supra* at paras 88, 90]

[190] The reference in paragraph 90 to "the reserve creation stage" is to a stage prior to the ultimate "creation" of a reserve. In the present matter, the proclamations protected Indian settlements from pre-emption. This was for the benefit of the Aboriginal collective in occupation. Colonial policy was to reserve their Village lands.

[191] The honour of the Crown may give rise to fiduciary duties (*Manitoba Metis Federation, supra* at paras 49, 50). A breach of Crown honour may, however, be found in the absence of a fiduciary duty. This is apparent from the outcome in *Manitoba Metis Federation*.

[192] The essence of acting honourably is to keep a promise:

> This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: *Badger; Haida Nation*, at para. 20. [*Manitoba Metis Federation, supra* at para 79]

[193] The promise must be made to an Aboriginal group, "The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group..." *(Manitoba Metis Federation, supra* at para 72).

[194] As noted above, the honour of the Crown goes back to the *Royal Proclamation, 1763*, RSC 1985, App II, No 1. The proclamation called for the settling of Indian interests in land in advance of occupation by settlers.

[195] Treaties were the means by which Crown sovereignty and prior Aboriginal occupation were reconciled. Treaties provided for reserves. The practice of treaty-making continued in the Colony of Vancouver Island under Douglas. It is a notorious fact that treaty-making was not continued throughout the Colony of British Columbia. Nonetheless, the practice of establishing reserves was continued.

[196] Reserve allotments were required by the colonial administration as directed by the Imperial government. The policy was made law by the proclamations. This established the promise. This was a promise made to the Indians of the colony. It was made to avoid an Indian war, and because it was, by the standards of the time, considered just. The policy was communicated by Douglas to the Indians at Cayoosh and Lytton in 1860.

[197] The establishment of reserves in the Colony and after confederation, Canada, was important for the foreign settlement of the land. Whether pursued within treaties or otherwise, reserve creation provided a measure of security to the growing settler population and recognized the practical interest of the Indians in their settlement lands. This was a substantial interest, described by Douglas as "equitable." In the context of the assertion by Great Britain of sovereignty over British Columbia, the law that gave effect to the proclamations committed the colony to exercise its sovereign jurisdiction in relation to the Indigenous peoples of the colony in a manner that recognized and gave effect, albeit limited, to their interests.

1. What was the Standard for Honourable Dealing with Aboriginal Peoples in the Colony?

[198] From the onset of Douglas' tenure as Chief Proctor of the Hudson's Bay Company on Vancouver Island and throughout his tenure as Governor of the Colony of British Columbia,

colonial policy called for the reservation of Indian Settlements. While the objective of the Crown was to grow the Colony by paving the way for newcomers to acquire land, the Indian interest in their settled lands was recognized and had precedence in both policy and the legislated system for land acquisition by pre-emption.

[199] In *Manitoba Metis Federation*, the Supreme Court of Canada said that the honour of the Crown is engaged in limited circumstances. Where it is engaged, the associated duty also depends on the circumstances.

> 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. [para 74]

[200] The Court spoke of the duties associated with the honour of the Crown, once 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 Metis Federation, supra* at para 75]

[201] The policy of reserving tracts of land for Indian occupation within lands over which the colony had asserted sovereignty was intended to advance the orderly and peaceful settlement of immigrants to the Colony, and as a matter of justice. To that extent the policy and the law had the same purpose as treaty-making, namely to reconcile an acknowledged Indian interest with crown sovereignty. In circumstances of an influx of settlers who would rely on their ability to pre-empt land, diligence would require the prompt staking out of Indian settlements and, where Indian settlement land was found to have been pre-empted, to exercise the power to resume.

2. Did the Crown (Colony) Meet Its Honourable Obligations to the Williams Lake Indians?

[202] All of the pre-emptions noted above were registered after *Proclamation No. 15* came into force.

[203] Nind did not stake out a reserve because much of the cultivable land in the area had been taken up by pre-emptors, and further pre-emptions would soon take up all of the cultivable land in the vicinity. Nind had the authority to set aside pre-emptions.

[204] It was Nind's responsibility as magistrate and gold Commissioner to inquire of the locations of Indian settlements in order that they may be staked out and set apart as reserves.

[205] Nind was headquartered on land that Davidson occupied after seeking Chief William's permission. If he was unaware of this, it would have been revealed upon inquiry as Chief William was the Chief at the time. He was required to make inquiries of the Indians concerning their occupied lands.

[206] Nind reported on May 4, 1861, that the Indians "camped" at the head of the lake, the foot of the lake, and "sometimes" around the Government house in the vicinity of the Davidson "pre-emption." He recorded the presence at that time of Indians at Williams Lake. There were Indian houses and other evidence of occupation in the area at that time.

[207] Nind was aware of their occupation of land at the foot of Williams Lake.

[208] Not a single Indian settlement of the Williams Lake Indians was staked out during Nind's short tenure, or subsequently in colonial times. Although he knew of the pre-exemptions, he did not exercise or seek to have exercised the power to resume.

[209] Nind was not replaced. Pre-emptions continued. As none of their settlement lands had been staked out, the Williams Lake Indians took refuge at St. Joseph's Mission. This was the circumstance throughout the remainder of the colonial period.

[210] The Colony failed to meet the applicable standard.

3. Is a Breach of Crown Honour a Breach of Legal Obligation Under section 14 of the *Specific Claims Tribunal Act*?

[211] In *Peepeekisis Band v Canada*, 2013 FCA 191, 232 ACWS (3d) 1 [*Peepeekisis*], Mainville JA considered the question whether a declaration was available where a Band claimed a breach of Crown honour in a claim concerning reserve land. he found that it is not, as the *SCTA* provided an alternative remedy:

> I need not however decide this issue since I am of the view that the principles set out in *Manitoba Métis* cannot extend to cases where an effective alternative dispute resolution mechanism is available to the plaintiffs. The majority in *Manitoba Métis* based their finding concerning the non-applicability of limitation

> statutes by emphasizing the goal of reconciliation recognized in section 35 of the *Constitution Act, 1982* (*Manitoba Métis* at paras. 140-141). The majority in that case also emphasized the fact that no other recourse was available to the plaintiffs, and that "declaratory relief may be the only way to give effect to the honour of the Crown" (*Manitoba Métis* at para. 143, [Emphasis added]). [para 59]
>
> In this case, there exists an alternative effective recourse giving effect to the honour of the Crown and allowing for the goal of reconciliation to be achieved. Indeed, by following the process set out in the *Specific Claims Tribunal Act*, S.C. 2008, c. 22, the appellants may now pursue their claim before the independent Specific Claims Tribunal composed of a roster of superior court judges. That Tribunal does not consider any rule or doctrine that would have the effect of limiting claims or prescribing rights against the Crown because of the passage of time or delay, and it may award monetary compensation up to $150 million with respect to a specific claim described in section 14 of the *Specific Claims Tribunal Act*. [emphasis added; para 60]
>
> The specific claims contemplated by the *Specific Claims Tribunal Act* include those arising from (a) a breach of a legal obligation of the Crown to provide lands or other assets under a treaty; (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; (*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 the Crown's administration of reserve lands, Indian moneys or other assets of a First Nation; (d) an illegal lease or disposition by the Crown of reserve lands; (e) a failure to provide adequate compensation for reserve lands taken or damaged by the Crown or any of its agencies under legal authority; or (f) fraud by employees or agents of the Crown in connection with the acquisition, leasing or disposition of reserve lands. [emphasis added; para 61]

[212] The present claim is based on the grounds in s 14(1)(b).

[213] The parties have, at the request of the Tribunal, and before the release of the decision in *Peepeekisis*, provided supplemental submissions on the question at hand. It is not, at this juncture, necessary to consider the question further as the claim is found valid on other grounds.

[214] The circumstances in which the honour of the Crown may result in the imposition of fiduciary duties is discussed above. The application of fiduciary law to the facts, as found, follows.

a) Unilateral Undertaking

[215] At paragraphs 240-242 of its written submissions, the Claimant summarizes the evidence on which it claims breaches of legal obligations of the Colony. Reference is made in paragraph

242 to its submissions on Crown fiduciary duty after Confederation. These submissions are said to apply "equally to the Crown's duties in colonial times."

[216] At paragraph 292 of its written submissions, the Claimant asserts unilateral undertakings as a basis for fiduciary duties.

[217] The honour of the Crown may, in some circumstances, give rise to a fiduciary duty. One such circumstance is where there has been an undertaking:

> **50** 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. [*Manitoba Metis Federation, supra* at para 50]

[218] It was colonial policy to stake out Indian settlements for allotment as reserves. This was necessary for the peaceful introduction of newcomers to the Colony. Allowing newcomers to pre-empt Crown land was integral to the colonial objective. *Proclamation No. 15* excluded Indian settlements from pre-emption. To be effective in achieving its purpose, staking out the boundaries of Indian settlements was a necessary antecedent.

[219] In the face of Indian unrest, Governor Douglas promised large groups of Indians at Cayoosh and Lytton that reserves would be created. This is evidence of the undertaking expressed in colonial policy and law to act in the Indian's best interests by enforcing the statutory prohibition of pre-emptions of land within their settlements.

[220] The beneficiaries of the undertaking were the Indian tribes of the region whose settlements had not been staked out. The Williams Lake Indians were one such Tribe.

[221] The interest of the Williams Lake Indians in their settlements was a substantial practical interest.

[222] The interests of the Williams Lake Indians was adversely affected by the exercise of the discretionary control of the colony. Gold Commissioner Nind was responsible for staking out

Indian settlements and sought instructions to mark off a reserve at Williams Lake, as he knew that the Indians settled there. He knew that pre-emptions had been registered in the area, and that the pre-emptions could be set aside. The Crown did not, in the case of the Williams Lake Indians, take the most basic steps required to protect their settlement lands from pre-emption or to set aside pre-emptions made contrary to law.

[223] The conditions set out in *Manitoba Metis Federation* are present. The Crown was bound as a fiduciary to put the Indian interest in their settlement lands ahead of the newcomers interest in acquiring rights of occupation to Crown land. It failed to meet the duty.

b) *Wewaykum:* Provisional Reserves and Fiduciary Duty

[224] In *Wewaykum,* the Supreme Court of Canada found that in circumstances in which land had been provisionally reserved pending the steps necessary to "create" a reserve, Crown fiduciary duties of "...loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" may be found to exist (*Wewaykum, supra* at para 93).

[225] The concept of the "provisional" reserve was introduced in *Wewaykum*. It was in relation to "provisional" reserves that the above fiduciary duties may exist where the putative beneficiary can establish a cognizable interest in land over which the Crown exercised discretionary control.

[226] Land habitually occupied by Indian collectives had been set apart by the joint actions of Canada and British Columbia after the establishment of the Joint Indian Commission in 1876 as reserve lands. These "reserves" were in fact administered by Canada under the *Indian Act*. The issues in *Wewaykum* were over reserves that had been set apart in this manner. They were found to be provisional as British Columbia had yet to transfer Crown title to Canada. This took place in 1938, after which the reserves were "created."

[227] The theory of Crown liability advanced by the bands in the case was premised on the "reserves" (each claimed the reserve occupied by the other) being, in law, reserves within the meaning of the term in the *Indian Act*. As such, both bands contended that the fiduciary duty of the Crown was trust like, as found by the Supreme Court of Canada in *Wewaykum:*

> The content of the fiduciary duty changes somewhat after reserve creation, at which the time the band has acquired a "legal interest" in its reserve, even if the reserve is created on non-s. 35(1) lands. [*Wewaykum, supra* at para 93]

[228] In *Wewaykum* the Supreme Court of Canada confirmed that upon reserve creation, the Crown's fiduciary obligation expands to include the protection and preservation of the Band's quasi-proprietary interest in the reserve from exploitation (*Wewaykum, supra* at paras 98-100).

[229] The court held that the reserves in issue had not been "created" as *Indian Act* reserves at the time of the alleged breaches of fiduciary duty. The legal impediment to reserve creation by Canada in the Province of British Columbia (until July, 1938) was that Crown title to land outside the railway belt remained in the Province. The land that was set apart for reserve could not come within the definition of "reserve" under the *Indian Act* as title remained with the Province. Hence, reserves that had been allotted had not been "created" in law. The reserves were "provisional" pending the transfer of Crown title to Canada.

[230] Notwithstanding that the *Indian Act* had no application to the reserves in question in *Wewaykum,* the potential for the more limited duties of "...loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries." was found to exist.

c) Were Indian Settlements “Provisional” in the Colonial Era?

[231] The Colony was not limited in its jurisdiction to create reserves. The Colony of British Columbia had the power to set apart reserves for Indian occupation as an incident of Crown sovereignty and Crown title.

[232] The colony's pre-emption law was an exercise of its power in relation to lands over which it asserted Crown title by *Proclamation No. 13*. It recognized the interest in occupancy of Indian settlement lands and protected that interest with *Proclamation No. 15*. This protection did not require the staking out the land or formalities to survey and "set apart" a reserve.

[233] I concluded that Indian settlement lands were "reserved" out of land available for pre-emption to protect the land from pre-emption. This would, at a minimum, attract the fiduciary duties that exist where a cognizable interest is under the discretionary control of the Crown. Further steps may have been required to "create," with finality, reserves for the use and benefit

of the Indian collectives that occupied the settlements, and to bring into play more onerous duties.

[234] The Williams Lake Indians were present at Comer-Glendale in 1860. Nind knew they "camped" there. There were "Indian houses" and other indications of a settlement. Ordinary prudence called for an inquiry into the extent of their settlement in order that the law would be effective to protect the land from pre-emption.

[235] The Crown did not satisfy its duty of ordinary prudence with a view to the best interests of the Williams Lake Indians.

G. Does the Claimant's Reliance on Occupation of the Village Lands make this a Claim of Aboriginal Title?

[236] The Respondent argues that the interest the Claimant asserts in the Village Lands is a claim based on Aboriginal Title, a matter outside of the jurisdiction of the Tribunal (*SCTA*, s 15(1)(f)).

[237] The Claimant relies on proof of occupation for the same purpose that was advanced in *Kitselas First Nation v HMQ in Right of Canada*, 2013 SCTC 1. There, proof of occupation was necessary to establish grounds for the claim based on s 14(1)(c) of the *SCTA*. It was relevant to the issue whether the land in question was habitually used at the time that the JIRC was required to take use of land into account in the exercise of its mandate to establish reserves in British Columbia.

[238] In the present matter, the recognition of the Indian interest in occupation by the Colony was based on the Indian presence at places where it served the Colonial interest to have them remain.

[239] The Claimant's reliance on occupation is necessary to establish grounds for the Claim, as colonial policy and law recognized occupancy as a basis for protection of Indian Settlements from pre-emption. It is the breach of colonial obligations that ground the claim. The fact that occupation is also one of the several elements of proof of Aboriginal Title does not make this a claim based on Aboriginal Title.

H. Section 14(1)(b) of the *Specific Claims Tribunal Act* and Article 1 of the *Terms of Union*

[240] The Claimant's argument rests to some extent on the fact (undisputed) that Canada did not, after confederation, take measures to have the pre-emptions set aside. The Claimant relies on Article 1 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*], as the source of a constitutional obligation to establish the settlement lands as reserve after the colony became a province of Canada. Article 1 of the *Terms of Union*, by which Canada assumed certain debts and liabilities of the Province on entering confederation, is said to include the liability of the colony for failure to apply and enforce the proclamations.

[241] In its primary written submissions the Respondent argues that the *SCTA* does not impose new legal obligations on Canada: "The Act is procedural, it provides how a claim may be heard and determined but, other than removing limitations and laches defences, does not extend the scope of Crown liability for historical claims" (Written Submissions of Canada, Jan. 18, 2013, para 247). This responds to the Claimant's reliance on Article 1 of the *Terms of Union*. The Respondent argues at paragraph 253 that "the legal issue of whether or not Canada assumed responsibility upon confederation is a matter of constitutional law, not a matter to be determined by an implication that might be drawn from section 14."

[242] As I understand the Respondent's position, it is that *SCTA*, s 14(2) does not expand the meaning of "legal obligation" in s 14(1)(b) to apply constitutional obligations of Canada where the claim is grounded in a breach of legal obligation of the colony. Whether or not this is correct, it has no bearing on whether the Claimant, as the Respondent says: "can file historic, pre-confederation claims pursuant to Section 14 of the Act as they could under the Specific Claims Policy" (para 258).

[243] A decision on the Claimants reliance on Article 1 of the *Terms of Union* is not required for the disposition of the claim.

VI. POST CONFEDERATION CLAIM

A. The Claim under section 14(1)(c) of the *Specific Claims Tribunal Act*

[244] The Claimant also relies on alleged breaches of fiduciary duty by Canada after

Confederation. This is advanced as a claim grounded in s 14(1)(c) of the *SCTA:*

> 14. (1) Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> (c) a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;

B. Is the Claim of a Post-Confederation Breach Moot?

[245] Canada is liable under s 14(1)(b) of the *SCTA* for the colonial breaches of legislation and fiduciary duty. As s 14(1)(c) of the *SCTA* is a separate and distinct ground for liability it is not, strictly speaking, necessary to consider whether a breach has been established.

[246] I will nevertheless consider the claim based on post-confederation events.

C. *British Columbia Terms of Union, 1871*

1. Article 1 of the *Terms of Union*

[247] The Claimant argues that Article 1 of the *Terms of Union*, establishes Canada's responsibility for the unfulfilled duty of the Colony to protect the Village Lands from pre-emption. Article 1 of the *Terms of Union* provides:

> Canada shall be liable for the debts and liabilities of British Columbia existing at the time of Union.

[248] It is not, for the same reason noted above, necessary to decide the issue raised by the Claimant's reliance on Article 1 of the *Terms of Union.*

2. Article 13 of the *Terms of Union* and Federal Jurisdiction

[249] The Claimant also relies on Article 13 of the *Terms of Union*:

> 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.

[250] The Claimant does not contend that lands that could not be pre-empted due to being sites of Indian settlements were, by the operation of Article 13 of the *Terms of Union*, "reserved" in the sense discussed in *Wewaykum*, i.e. "created" such as to bring them within the definition of "reserve" in the *Indian Act*.

[251] The Claimant does say that it is these lands that the Province had been in the practice of appropriating for the use and benefit of the Indians, and in that sense were "reserved." By this, it is said, Article 13 of the *Terms of Union* placed the "trusteeship and management" of the lands with the Dominion Government while Crown title remained with the Province. This, argues the Claimant, brings the lands within federal jurisdiction as lands "reserved for the Indians" under s 91(24) of the *Constitution Act, 1867*.

[252] The decision in *Wewaykum* turned in part on a finding that the lands in question were not reserves under the *Indian Act* at the time the cause of action arose. The decision does not deal with the argument advanced here by the Claimant, namely that land in which the colony recognized an Indian interest came under federal jurisdiction on confederation.

[253] A finding on the question raised by the Claimant over federal jurisdiction in relation to the subject lands is not required for the disposition of the claim on the grounds on which it is advanced, i.e. breach of fiduciary duty.

[254] A finding that Article 13 of the *Terms of Union* brings Indian settlement lands that were protected from pre-emption by colonial law under federal legislative jurisdiction (s 91(24)) is not a pre-condition to finding the existence of fiduciary duties. It is the fiduciary relationship of the Crown with aboriginal peoples that will in some circumstances result in fiduciary duties. The origin of the fiduciary relationship is discussed above.

3. Unilateral Undertaking

[255] It is argued further that "... Canada had assumed responsibility For Indians and Indian Lands by way of the *Terms of Union* and the *Constitution Act, 1867*, and made unilateral undertakings as to its responsibilities for the protection of Indian Lands."

[256] In *Guerin*, Dickson J found that a fiduciary duty of "utmost loyalty" may be grounded in a unilateral undertaking:

> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct. [page 384]

[257] And further, in *Guerin*, at page 336:

> Equity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal.

[258] I do not understand the Claimant to be asserting that, on confederation, the Crown duty of utmost loyalty could only be satisfied by the allotment of the Village Lands as a reserve. As provincial concurrence was needed, Canada lacked the power to unilaterally establish a reserve and thus could not be bound by duty to bring about that result. The Claimant says it could, however, have taken steps to set aside the pre-emptions and clear the way to the allotment of the Village Lands as reserve. Whether Canada had a duty to do so depends on the meaning of "a policy as liberal" in Article 13 of the *Terms of Union.*

[259] The Claimant points to both Article 13 of the *Terms of Union*, and *s 91(24)* of the *Constitution Act, 1867,* as unilateral undertakings from Canada to act within its powers in advancing the Indian interest in securing their settlements, as places of habitual use, as reserves. The same enactments are relied on as an assumption of discretionary control as the exclusive intermediary in dealings with the Province.

4. Discretionary Control

[260] A source of fiduciary duty contended for by the Claimant has it's basis in the presence of

two factors, discretionary control and cognizable interest. The Claimant relies on the decision in *Wewaykum, supra.*

[261] The Claimant points to both Article 13 of the *Terms of Union*, and *s 91(24)* of the *Constitution Act, 1867*, as unilateral assumptions by the Crown, Canada, of discretionary power over matters affecting aboriginal peoples. Fiduciary obligations are said to follow.

[262] In *Wewaykum*, the competing bands argued that the lands in question were reserves under the *Indian Act.* Each claimed that due to recording errors the reserves were wrongfully assigned to the other band. The remedies sought were based on alleged statutory breaches and, as in *Guerin,* fiduciary obligations that arise out of Crown discretion in administration of the *Act*.

[263] The significance of Article 13 of the *Terms of Union* to the question whether the Crown may be subject to fiduciary duties is set out in *Wewaykum, supra*:

> 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*, [1903] A.C. 73 (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". [emphasis added; para 15]
>
> 16 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". [emphasis added; para 16]

[264] Federal jurisdiction positioned the Crown, Canada, as the exclusive intermediary between the Indian peoples and the Province in the reserve creation process and constituted the Crown a fiduciary with defined, albeit limited, duties:

> Here, as in *Ross River*, the nature and importance of the appellant bands' interest in these lands prior to 1938, and the Crown's intervention as the exclusive intermediary to deal with others (including the province) on their behalf, imposed on the Crown a fiduciary 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, supra* at para 97]

[265] The content of the duty prior to reserve "creation" was found on these terms;

> Prior to reserve creation, the Crown exercises a public law function under the *Indian Act* -- which is subject to supervision by the courts exercising public law remedies. *At that stage a fiduciary relationship may also arise but, in that respect, the Crown's duty is limited to the basic obligations of loyalty, good faith in the discharge [page290] of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries.* [emphasis added; *Wewaykum, supra* at para 86]

[266] It was held that these duties were, in the circumstances, owed to a beneficiary that had no prior interest in the lands at issue:

> It is true that Dickson J. also noted, at p. 379, that for purposes of identifying a fiduciary duty:
>
> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases ... .
>
> However, he was speaking of disposition of the Indian band interest in an *existing* Indian reserve in a transaction that predated the *Constitution Act*, 1982. Here we are speaking of a government program to create reserves in what was not part of the "traditional tribal lands". [*Wewaykum, supra* at para 77]

[267] There is evidence in the present matter that the Village Lands are part of the Williams Lake Indians traditional tribal lands. The claim does not, however, assert aboriginal title. If the element of a cognizable interest is otherwise established, Crown duties in the matter of their village lands could be no less than those found in *Wewaykum*.

D. Honour of the Crown and Fiduciary Duty

[268] In *Manitoba Metis Federation* the Supreme Court of Canada tied fiduciary duties to aboriginal peoples to the overarching principle of the honour of the Crown. This is discussed above at paragraphs 177-181 above.

[269] The assertion of British sovereignty established the honour of the Crown as a legal principle in Canada.

[270] The standard of honourable dealing with aboriginal peoples is not uniform across all matters that arise in the Crown-aboriginal relationship. It depends on the circumstances (*Manitoba Metis Federation, supra* at paras 51-52).

[271] Section 91(24) jurisdiction, and Article 13 of the *Terms of Union*, established Crown, Canada, as the principal actor in the Crown-Aboriginal fiduciary relationship. The questions here are whether, on the facts, the honour of the Crown required Canada to take action to advance the Williams Lake Indians interest in the Village Lands, and whether that obligation rose to the level of fiduciary duty. The answer to both depends on the meaning of the phrase "a policy as liberal' in Article 13 of the *Terms of Union.*

1. A Policy as Liberal

[272] The Claimant argues that the obligations assumed by Canada under the Terms of Union are those reflected in the policies, in relation to reserves and settlements, of the former colony. These include the policy of protection of settlements from pre-emption, and recognition that settlements include seasonally occupied tracts of land. As for the process to identify settlement lands, the policy called for consultation with the Indians to identify settlement lands. The policy is said to inform the content of the Crown's duties.

[273] The Respondent argues that the policies of the colony changed under Joseph Trutch, when he became the CCLW on Douglas' retirement in April, 1864.

[274] On August 28, 1867, Trutch reported to the Acting Colonial Secretary on his perspective on the implementation of colonial policy under Douglas:

> The subject of reserving lands for the use of the Indian tribes does not appear to have been dealt with on any established system during Sir James Douglas' administration.
>
> The rights of Indians to hold lands were totally undefined, and whole matter seems to have been kept in abeyance, although the Land Proclamations specifically withheld from pre-emption all Indians reserves or settlements.

> No reserves of lands specifically for Indian purposes were made by official notice in the Gazette, and those Indian Reserves which were informally made seem to have been so reserved in furtherance of verbal instructions only from the Governor, as there are no written directions on this subject in the correspondence on record in this office.
>
> In many cases, indeed, lands intended by the Governor to be appropriated to the Indians were set apart for that purpose and made over to them on the ground by himself personally; but these were for the most part of small extent, chiefly potato gardens adjoining the various villages.
>
> Previous to 1864 very few Indian Reserves had been staked off, or in any way exactly defined.

[275] In the same report, Trutch explains his views on Indian claims to reserves:

> The Indians regard these extensive tracts of land as their individual property; but of by far the greater portion thereof they make no use whatever and are not likely to do so; and thus the land, much of which is either rich pasture or available for cultivation and greatly desired for immediate settlement, remains in an unproductive condition − is of no real value to the Indians and utterly unprofitable to the public interests...
>
> The Indians have really no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals.

[276] Trutch's actions were consistent with the views expressed in his report. He had in the previous year set out to dismantle a number of reserves that had been staked out in the Douglas era.

[277] In *Making Native Space,* Harris notes that after Douglas' retirement, Trutch controlled colonial land policy, including Indian land policy (Harris, *supra* at 45). He did not account to the Colonial office and did not pursue the "liberal humanitarianism" that informed the policies developed by Douglas with the Colonial office.

[278] In Chapter 3, "Ideology and Land Policy, 1864-1871," Harris canvasses the actions of the Colony up to confederation, culminating with a realization of earlier concerns expressed by Herman Merivale, the undersecretary at the Colonial office when the Colonies of Vancouver Island and British Columbia were established, that the system would become "A Native policy run by settlers." (Harris, *supra* at 69).

[279] The policy crafted by Douglas reflected the instructions he received from the Colonial office. Lytton, the Secretary of State for the Colonies, and Lord Carnarvon, approved the measures taken by Douglas to give effect to the recognition that the Indian peoples were to be protected in their occupation of their accustomed places. Trutch, although influential on the ground, was not in a position to change colonial policy. In any case, later events reveal that there was no change in policy during his tenure as CCLW for the colony.

[280] After confederation, Canada and the Province were at odds over the insistence of the Province that reserve size be based on a formula of 10 acres per family. Senior federal officials including Minister of the Interior David Laird and Powell, Indian Superintendent for the Province argued for more liberal allotments.

[281] In 1874, Powell enquired about the colonial policy under Governor Douglas. Douglas answered on Oct. 14, 1874.

> The principle followed in all cases, was to leave the extent and selection of the land; entirely optional with the Indians, the surveying officers having instructions to meet their wishes in every particular and to include in such Reserve the permanent Village sites, the fishing stations and Burial grounds, cultivated lands and all the favourite resorts of the Tribe, and in short to include every piece of ground to which they had acquired an equitable title, through continuous occupation, tillage, or other investment of their labour.

[282] As to whether there was a fixed acreage, Douglas said it was "never intended that they should be limited or restricted to the possession of 10 acres of land..."

[283] In 1874 the federal government disallowed the new provincial *Land Act* as it made no provision for reserving Indian or railway lands. The governments began to exchange positions on Indian reserve policy.

[284] Laird set out Canada's position in a memorandum dated Nov. 2, 1874. The focus was on the "liberal policy" in relation to the respective positions of Canada and the Province on the matter of acreage. He also referenced correspondence between Powell and provincial representatives, and also Father Grandidier's August 1874 letter, published in the *Standard*, in which he presented the concerns of the Williams Lake Indians. This did not touch on acreage, but rather the pre-emption of their settlement lands.

[285] Laird referred to Powell's advice that "if there has not been an Indian war, it is not because there has been no injustice to the Indians, but because the Indians have not been sufficiently united." The foremost complaint advanced by Laird was that the land they had settled upon and cultivated had been taken from them and pre-empted by the white settlers.

[286] Laird called on both governments to show a "spirit of liberality far beyond what the strict terms of the agreement required."

[287] In an August 17, 1875, memorandum, that was adopted by provincial OIC No. 1071 on August 18, 1875, George Walkem, Attorney General of British Columbia, refuted Laird's view that the Colonial policy "made a mockery of the claims" of the Indians. Walkem described the Colonial reserve policy during the Trutch era, between 1858 and 1871, as that set out by Douglas' in his 1874 response to Laird. The policy governing the reservation of land out of that available to settlers was:

> As an invariable rule they embraced the village sites, settlements, and cultivated lands of the Indians...
>
> To secure the Indians in peaceable possession of their property generally, the Colonial Legislature conferred upon the District Magistrates extensive powers (not even possessed by the Supreme Court) to remove and punish by fine, imprisonment or heavy damages and costs any person unlawfully "entering or occupying their Reserves or Settlements, or damaging their "improvements, crops, or cattle."

[288] Walkem referred to the duties of magistrates to protect the Indians "in all matters relating to their welfare." and allowed as how, "if their cultivated patches have been unjustly taken from them, the law provided a sure and speedy remedy..."

[289] The exchanges between Laird and Walkem reveal their understanding that the colonial policy adopted by Canada under Article 13 of the *Terms of Union* included the protection of Indian settlements and the authority to move to set aside pre-emptions made contrary to provincial law. Although it is plain on the record that this is the effect of Article 13 of the *Terms of Union*, the liberal construction of enactments affecting Indian interests called for by the Supreme Court of Canada applies to support this conclusion (*Nowegijick v The Queen*, [1983] 1 SCR 29 at 36, 144 DLR (3d) 193).

[290] The debate over the terms on which the governments would move forward on the land question was resolved with the advent of the JIRC, and the agreement on its mandate. This included:

> 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.

[291] The Province enacted the *British Columbia Land Act*, SBC 1875, c 3 s 50 [*The Land Act, 1875*] which, like the colonial law, exempted Indian settlements from lands available for pre-emption and established the means by which pre-emptions could be set aside.

[292] The foregoing reveals that the colonial policy of protection of Indian settlements established under Douglas continued in the colony up to confederation. Trutch did not change the policy, he simply did not, in his exercise of the powers as CCLW, enforce it. To the contrary, the evidence suggests that he contravened the policy.

2. Action Called for by Article 13 of the *Terms of Union*

[293] Article 13 of the *Terms of Union* speaks prospectively, and places obligations on Canada and the Province. The Province is to convey to Canada, from time to time, "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose." The reference to "that purpose" relates to the assumption by the Dominion Government of the trusteeship and management of the lands reserved for the use and benefit of the Indians.

[294] The reference to "a policy as liberal as that hitherto pursued by the British Columbia Government" incorporates the policies established by the Colony under Douglas.

[295] As Crown title remained with the Province, Canada could not act on the "policy as liberal" unless there was a concomitant obligation on the Province to appropriate tracts of land as had hitherto been its practice. It had been the practice of the colony to reserve Indian settlements out of the land available for pre-emption for the continued occupation of the Indians.

[296] The conflict between Canada and the Province over implementation of Article 13 of the *Terms of Union* was resolved by the 1876 Agreement that established the JIRC.

3. The Circumstances after Confederation

[297] The circumstances in British Columbia after confederation were in some respects the same as those in the colony. The threat of war remained and was known to be present in the territory of the Williams Lake Indians as a sub-group of the Secwepmic (Shuswap) peoples.

[298] After confederation, eight years passed before federal officials turned their attention to the plight of the Williams Lake Indians, although Father Grandidier had taken up their cause in 1871, and had pressed officials to take action in 1974. Chief William's letter was published in the British Colonist newspaper in 1879. Grandidier wrote to John A. MacDonald, Superintendent General of Indian Affairs, in 1880.

[299] It was not until 1876, with the establishment of the JIRC, that Canada and the Province came to terms on addressing the "Indian Lands Question." In the meantime, pre-emptions of the Village Lands continued.

[300] The agreement establishing the JIRC was approved by executive Orders of both Governments. The memorandum attached to the Governor in Council's approval dated November 10, 1876, provided, in part:

> 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.
>
> 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 inquiry 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....
>
> 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]

[301] In 1876, Gilbert Sproat was appointed to the JIRC by the governments of both the Province and Canada. Alexander Anderson was appointed by Canada, Archibald McKinley was appointed by the Province. Each member received instructions to set apart reserves in places the Indians inhabited.

[302] Sproat received his instructions from both governments. He was in contact with federal officials, including James Lenihan, Indian Superintendant for British Columbia. Lenihan reported to the Deputy Superintendent General of Indian Affairs. Sproat was also in direct communication with the Superintendent General of Indian Affairs.

[303] Sproat was aware of discontent among the Okanagan and Shuswap Indians over the slow pace of the governments in setting apart reserves. In October 1877, he reported to the Superintendent General on a pre-emption of land in the Okanagan in contravention of the provincial law protecting Indian settlements and reserves. The purported pre-emption had taken place in 1867. The JIRC declared the land vacant and turned it over to the Indians to "measure out justice according to the law."

[304] The JIRC was disbanded in 1878. Sproat continued as sole commissioner. His authority to allot reserves was subject to the approval of the CCLW for the province. Disputes could be referred to the British Columbia Supreme Court.

[305] On April 21, 1879, Justice of the Peace Laing-Meason reported to commissioner Sproat, regarding the Williams Lake Indians, that:

> The Chief of this tribe has just requested me in the most formal manner to write you and say,
>
> 4. That unless you come and give them land on or before two (2) months from date – we may look out for trouble.
>
> 5. That his tribe has nothing to eat in consequence of their having no land on which to raise crops.
>
> 6. That their horses and cattle have many of them died this winter because they had no place of their own on which to cut hay last summer.

> Their talk – I am well informed – is, that if proper land is not given to them they will take by force the land which they used to own and which they used to cultivate and which was taken from them by pre-emption in 1861 (about). This land is situate at the foot of Williams Lake and is now owned by Mr. Pinchbeck. There are Indian houses to be seen on it at the present time.

[306] In November, 1879. Lenihan brought Chief William's letter to the attention of Supt. General Vankoughnet. He noted that the land had been "acquired by a white settler."

[307] Sproat resigned in March, 1880. Peter O'Reilly, Trutch's son in law, was appointed as commissioner in July, 1880.

[308] O'Reilly was instructed to take guidance from the liberal policy embodied in the *Terms of Union*, and as set out in the 1876 agreement establishing the JIRC (the "1876 Agreement"):

> In allotting Reserve Lands 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 pursued 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).

[309] O'Reilly was also directed to Sproat's 1878 progress report, which said, in part:

> The first requirement is to leave the Indians in the old places to which they are attached. The people here so cling at present to these places that no advantage coming to them from residence elsewhere would reconcile them to the change. It is the plain truth that during last summer, I have had Indians kneeling to me with lamentations, and praying that if the Queen could not give them soil, she would give them stones or rocks in the old loved localities now possessed, or at least occupied, by white men. The British Columbian Indian thinks, in his way and in a degree, as much of a particular rock from which his family has caught fish from time immemorial as an Englishman thinks of the home that has come to him from his forefathers. This strong feeling which is well known, but the force of which I did not, until this year, fully appreciate, cannot be justly or safely disregarded.

[310] O'Reilly met with Chief William and other members of the community in June, 1881. He acknowledged that mistakes were made with the land, but advised that they cannot interfere with the white men's rights;

> ... the Government wishes to act justly by them, and considers them British subjects as much as the white men: that in early days mistakes were made with the land, the Indians were engaged otherwise, and did not care for the land, the consequence was the whites pre-empted it, that the Govt wish to remedy the

> mistake as far as possible& has purchased a large and valuable tract of land which I am about to hand over to them.
>
> ... with regard to white man's rights they cannot interfere, they need not ask for any land that has been sold by the Govt ...

[311] By minute of decision dated June 16, 1881, O'Reilly allotted 14 reserves for the Williams Lake Indians. These included seven graveyard sites at "... the farm purchased by Mr. Pinchbeck from the Provincial Government, and which at one time was occupied by the Indians, as is evident by the remains of old winter houses."

[312] Pinchbeck did not in fact obtain a crown grant to Blocks 71 and 72 until 1885.

[313] With the exception of the graveyard sites the allotted reserves were in the area of the head of the lake, ten miles from the village site. The area totalled approximately 4100 acres.

4. Honour of the Crown, and Fiduciary Duty

[314] The honour of the Crown applies in the present circumstances. The fiduciary relationship is engaged at the outset of the reserve creation process (*Ross River, supra*; *Wewaykum, supra*). Article 13 of the *Terms of Union* obligated Canada to pursue a policy as liberal as that which existed in the Colony. Colonial policy was to protect Indian settlements. In the event of an unlawful pre-emption, measures were available to resume the land without compensation.

[315] In *Manitoba Metis Federation* declaratory relief was granted based on a breach of honourable obligations of the Crown, although the circumstances did not establish fiduciary duties. However, fiduciary duties are inextricably bound with the Crown's honourable obligations:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. [*Haida, supra* at para 18]

[316] The Claimant argues that the circumstances after confederation establish Canada as a fiduciary.

[317] The Williams Lake Indians interest was recognized in colonial policy. it was cognizable

as it was land which they occupied and from which they, in close proximity to their dwelling places, sustained themselves. Their absence after confederation was due to ouster by settlers, contrary to colonial law. Their occupation and unlawful displacement was acknowledged by the federal officials assigned the responsibility of addressing the matter of reserve allotment under Article 13 of the *Terms of Union*. Although dispossessed, their interest remained cognizable.

[318] The Crown, Canada, was the exclusive intermediary with the Province in relation to their interests, and thus exercised discretionary control over advancement of their interests.

[319] The Crown owed, at a minimum, fiduciary duties of "...loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (*Wewaykum*, *supra* at para 93).

[320] Canada had, by the terms of Article 13 of the *Terms of Union*, undertaken, on the Indians behalf to adopt a policy in relation to reserves as liberal as that of the former colony. In doing so it assumed, with limits, the unilateral undertaking previously made by the colony. This had constitutional effect (*R v Jack*, [1980] 1 SCR 294, 100 DLR (3d) 193), and thus falls squarely within the category of obligations found in *Manitoba Metis Federation* to invoke the honour of the Crown and establish fiduciary obligations. Unlike the former colony, Canada lacked the power to unilaterally allot a reserve. It did, however, have the ability to make the policy effective by challenging the pre-emptions, and a duty to act diligently in the interest of the Williams Lake Indians.

5. Did the Crown Breach the Duty?

[321] The Crown obligation arose in relation to the land on which the Williams Lake Indians had their settlement, the Village Lands.

[322] The best interest of the Williams Lake Indians, as beneficiary, was in the allotment of the Village Lands as a reserve.

[323] In 1875, Laird, the Minister of the Interior, knowing of the displacement of the Williams Lake Indians, challenged Attorney General Walkem on the "liberal policy" of the colony.

Walkem re-iterated the policy that Douglas had implemented, which excluded Indian settlements from pre-emption and provided for "a sure and speedy remedy" if the Act was contravened.

[324] Canada was required by Article 13 of the *Terms of Union* to pursue a policy as liberal as that established by Douglas. This policy informs the standard to be met by Canada as a fiduciary.

[325] The 1876 Agreement did not prevent Canada from acting independently of the reserve commission to advance the Indian interest in establishing reserves. This was precisely what ultimately occurred with the acquisition by Canada of the Bates estate in 1881. The land was then allotted as a reserve by O'Reilly's minute of decision, and confirmed by the CCLW.

[326] Canada could not unilaterally create a reserve, but the means of protecting Indian settlements were, as Walkem had informed Laird, available.

[327] As noted above, Laird had specific notice of the circumstances around the pre-emption of the Williams Lake Indians' Village Lands. Federal officials knew that Davidson had occupied the land in advance of his or any other pre-emption. Nind's malfeasance would have been apparent on even a cursory investigation. He gave the pre-emptions priority over marking out a reserve for the Indians then present.

[328] In the circumstances, the exercise of ordinary prudence in advancing the "liberal policy" would include measures to clear away the impediment to the allotment of a reserve at the Village Lands. The *Land Act*, 1875, made provision for just that. If ordinary prudence did not call for these measures, the higher duty associated with a unilateral undertaking would. As Canada was to pursue a policy of reserving settlement lands it was duty bound to challenge unlawful pre-emptions where their existence prevented the allotment of reserves.

6. O’Reilly and Reserve Allotments

[329] As of 1878, the allotment of reserves was at O'Reilly's discretion.

[330] O'Reilly's allotments were subject to the joint approval of the Commissioner of Lands and Works for British Columbia and the Indian Superintendent for the Province. Any disagreement was to be referred to the Lieutenant Governor for final decision.

[331] O'Reilly made his position clear when he met with Chief William and members of the tribe. They would not be given the Village Lands, as there would be no interference with the "white men's rights." These "rights" were based on pre-emptions which O'Reilly himself characterized as "mistakes."

[332] Had Canada taken steps to set aside the pre-emptions and succeeded in doing so, there would have been no concern over the "white men's rights" that O'Reilly considered inviolable.

7. Fiduciary Duty and the Joint Indian Reserve Commission

[333] With the advent of the JIRC, reserve allotments were a matter for the Commissioners, then for sole Commissioner Sproat followed by O'Reilly. Their allotments, recorded as minutes of decision, remained subject to the approval of the CCLW for the Province and the Indian Superintendent for Canada.

[334] There are several examples of the Commissioners taking steps to set aside pre-emptions when it was later discovered that they affected Indian settlements. This recognized the continued force of the Colonial policy after confederation, and the federal obligation to pursue "a policy as liberal."

[335] Although the Province and Canada remained independent actors, they shared a common objective, and their actions were governed by Article 13 of the *Terms of Union* and the 1876 Agreement, the terms of which established the JIRC. This included the direction to take account of the Indian's "habits, wants and pursuits" in their allotments.

[336] Sproat knew of the circumstances of the Williams Lake Indians and their Village Lands. He took the matter up with provincial officials, but did not press it as he surmised that the province would decline to compensate Pinchbeck for the loss of his interest in the land. There is no evidence that federal officials pressed Sproat to take the actions he had taken elsewhere to set aside wrongful pre-emptions.

[337] Article 13 of the *Terms of Union* bound the Province to convey title to lands allotted as reserve to Canada. The land was to be identified in accordance with the policies of the former colony. It would be no less a failure to uphold the honour of the Crown for the Province to act

contrary to the intent of Article 13 of the *Terms of Union* and the 1876 Agreement than it would be for Canada.

[338] O'Reilly knew that the Williams Lake Indians settlement had been wrongfully pre-empted, and that they wanted it reserved. His refusal to countenance any interference with "white men's rights" in these circumstances was a breach of an honourable obligation, as the appointee of Canada and the Province, to act in good faith to achieve the objectives of Article 13 of the *Terms of Union* and the 1876 Agreement.

[339] The Commissioners were to take account of the interests of settlers when selecting land to be allotted as reserve. There were settlers on the Village Lands in 1881. Equity does not condone the unlawful acquisition of settlers' interests standing as an impediment to the performance of a fiduciary duty.

[340] Commissioners Sproat and O'Reilly failed to act in accord with the Crown's honourable obligations. Federal officials, knowing full well of the circumstances, failed for reasons set out above to fulfil Crown fiduciary duties.

8. Did the O'Reilly Allotments Remedy the Breach?

[341] O'Reilly recorded a minute of decision allotting the land acquired by Canada as reserve. The allotment was confirmed by the CCLW.

[342] The duties found above, and their breach, were in relation to the Village Lands. It was these lands with which the Williams Lake Indians had a tangible, practical and cultural connection. Colonial policy and law, continued on confederation as an obligation of Canada, recognized their connection with land they occupied. The breach was not remedied by the provision of alternate land.

[343] Questions over the consequence of the allotment of land for the Williams Lake Indians in 1881 for the determination of compensation are a matter for the compensation phase of the proceedings on the claim.

HARRY SLADE

Justice Harry Slade
Specific Claims Tribunal Canada

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20140228

File No.: SCT-7004-11

OTTAWA, ONTARIO February 28, 2014

PRESENT: Honourable Harry Slade

BETWEEN:

WILLIAMS LAKE INDIAN BAND

Claimant

and

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

Respondent

COUNSEL SHEET

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