FILE NO.: SCT-7002-13
CITATION: 2022 SCTC 6
DATE: 20221222

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
METLAKATLA INDIAN BAND Claimant	Peter Millerd, Robin Dean and Erica Stahl, for the Claimant
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	John Russell, Michael Mladen, Peri Smith and Isabel Jackson, for the Respondent
	HEARD: April 19–21, 2021, September 13–17, 2021, October 26–28, 2021, January 10–14, 2022, and January 18, 2022

REASONS FOR DECISION

Honourable William Grist

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

Cases Cited:

Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development), [1995] 4 SCR 344, 130 DLR (4th) 193; *Osoyoos Indian Band v Oliver (Town)*, 1999 BCCA 297; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746; *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, [2014] 2 SCR 633; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *R v Mohan*, 1994 SCC 80, [1994] 2 SCR 9; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Southwind v Canada*, 2021 SCC 28, 459 DLR (4th) 1; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada*, 2012 SCTC 3; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, ss 14, 16, 20.

Land Act, RSBC 1897, c 113, s 32.

Indian Act, RSC 1886, c 43, ss 38, 39, 40, 41.

Royal Proclamation of 1763

The National Transcontinental Railway Act, SC 1903, c 71, Schedule.

British Columbia Terms of Union, RSC 1985, App II, No 10, a 13.

Authors Cited:

Black's Law Dictionary, deluxe 10th ed, *sub verbo* "sui generis".

Black's Law Dictionary, revised 4th ed, *sub verbo* "*nemo dat quod non habet*".

Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice*, (Ottawa: 2018).

Appraisal Institute of Canada, *The Appraisal of Real Estate: Third Canadian Edition*, (British Columbia: University of British Columbia Real Estate Division, 2010).

Headnote:

Aboriginal Law – Specific Claim – Fiduciary Duty – Improvident Sale – Exploitative Bargain – Historical Market Value – Extrinsic Evidence – Interpretation of Surrender Documents

Overview

In 1906, the Claimant, the Metlakatla Indian Band (Metlakatla or the Band), surrendered approximately 14,000 acres of reserve lands to Canada which Canada subsequently conveyed by letters patent to the Grand Trunk Pacific Railway Company (GTP). The GTP wished to acquire the lands for the western terminus of its planned transcontinental railway and an associated townsite. On June 25, 1907, the letters patent were issued in respect of the surrendered lands, plus approximately 300 acres of additional reserve lands not included in the surrender, and transferred by Canada to the GTP for $7.50 per acre.

Metlakatla claimed that Canada breached its fiduciary obligations to Metlakatla by failing to act with loyalty and good faith toward the Band, by failing to disclose all relevant information to the Band, and by failing to prevent an improvident sale of the reserve lands.

Canada argued that it fulfilled its fiduciary duties to Metlakatla.

The Letters Patent—Boundaries Issue

The Claimant argued that the letters patent included three areas not included in the description of the lands in the surrender document. First, the transfer included an additional 313 acres of land as part of the parcel of letters patent lands located on the Tsimpsean Peninsula (the Mainland parcel). Second, the letters patent included eight small islands (islands identified as Nos. 1 to 8 in the letters patent) adjacent to Digby Island that were not included in the written surrender. Third, the letters patent included Lak-Anian and Lak-Wilgiapsh Islands, while the written surrender was ambiguous as to whether those islands were included.

Canada said that Metlakatla intended to surrender all of the lands described in the letters patent except Islands No. 1 and No. 2. Canada admitted that Metlakatla did not intend to surrender Islands No. 1 and No. 2.

Canada argued that extrinsic evidence should be relied upon to establish Metlakatla's intention and to interpret the surrender agreement.

The Tribunal did not agree. The surrender of reserve land is *sui generis,* and this "requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings" (emphasis added; *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development),* [1995] 4 SCR 344 at para 7, 130 DLR (4th) 193 [*Blueberry River*]). But the intention must be supported by cogent evidence.

The Tribunal held that because of the Crown's failure to conform with the surrender and its inclusion of land not within the description of the surrender, the Claim was valid under paragraphs 14(1)(c) and (d) of the *Specific Claims Tribunal Act*, SC 2008, c 22. The Tribunal held that specifically, the Crown breached a legal obligation to the Claimant in its administration of the Band's reserve lands and the illegal disposition of reserve lands by:

1. adding approximately 313 acres along the north boundary to the Mainland portion of the reserve to the letters patent, land transferred to the GTP on June 25, 1907, without having received a surrender to the Crown of this reserve land; and

2. similarly, transferring eight of ten islands to the GTP on June 25, 1907 (Islands Nos. 1 to 8), although they were not specifically surrendered to the Crown.

However, the Tribunal found that the Claim was not valid with regard to Lak-Anian and Lak-Wilgiapsh Islands: despite deficiencies in the surrender document, there was sufficient evidence in the document itself to show that Metlakatla intended to surrender these islands.

Fiduciary Duty—Improvident Sale Issue

The Claimant said that Canada breached its fiduciary duties of loyalty, good faith and full disclosure in its conduct in relation to the sale of the letters patent lands to the GTP and failed to prevent an exploitive bargain by way of a sale at significantly less than market value.

Canada said that Metlakatla was properly advised in the negotiations with the GTP and denied that the payment of $7.50 per acre for the reserve lands was improvident.

The Tribunal found that the Crown duties express in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, 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 interests of the Aboriginal beneficiaries, as admitted by the Parties, applied to the Crown from the onset of the introduction of the GTP agent, E. G. Russell, and the GTP proposal to acquire reserve lands, to acceptance of the surrender and arranging for the sale of the surrendered lands; and that terms of the surrender obliging Canada to dispose of the surrendered lands upon such terms as Canada deemed most conducive for the Band's welfare, were in place in Canada's dealings with respect to the sale of the surrendered lands to the GTP, along with the admitted duty to avoid an improvident bargain indicated in *Blueberry River*.

In the February 1-7, 1906, negotiations with Metlakatla, the GTP led the Band to believe that it was still considering three possible locations for its western terminus: Kaien Island (on the Band's reserve lands), Port Simpson, and Kitimat.

Prior to the negotiations with Metlakatla, Canada knew that the GTP was significantly committed to locating the Pacific terminus on Kaien Island. However, no prior notice or information relating to the intentions of the Grand Trunk Pacific Railway Company were given to the Band. Further, Canada did not disclose to the Band its own interest in supporting the construction and financing of the railway.

Canada made no effort to provide an opinion of what the Metlakatla's reserve lands were worth, or to advise the Band what the dynamics of the terminus location and land development might mean in assessing the land value.

Historical Market Value of the Letters Patent Lands (14,160 acres)

The Tribunal reviewed the evidence of appraisers for both Parties to determine the historical market value of the land transferred to the GTP by letters patent in 1907.

At the time of the surrender and sale, the Province of British Columbia asserted a reversionary interest in the surrendered lands. The Province's position was that the surrender signalled that the reserve lands were no longer necessary for the Band's purposes and that the lands should therefore revert to the Province. Regardless of whether or not the reversionary interest of the Province of British Columbia had a legal basis, the historical reality was that the GTP proceeded in its dealings with both the federal and provincial governments on the basis that the reversionary interest had a significant value.

The Tribunal assessed the historical market value of the 14,160 acres sold by Canada to the Grand Trunk Pacific Railway Company by letters patent as $546,915, less a 20% deduction based on the value of the reversionary interest claimed by the Province of British Columbia, resulting in a net historical market value of $437,532, or $31 per acre.

Conclusion on Fiduciary Duty—Improvident Sale Issue

The Tribunal found that:

1. the sale made by Canada of the surrendered lands was improvident at the sale price of $7.50 per acre;

2. no effort was taken by Canada to analyse and prevent this improvident sale and the failure by Canada to offer disclosure of material facts to the Band was a failure to act with loyalty and good faith towards the Band; and

3. Canada's subsequent sale of the surrendered lands was a breach of the obligation express in the surrender to dispose of the lands on terms deemed most conducive to the Band's welfare.

The Tribunal concluded that Canada breached its fiduciary duty in respect of each of the above (*Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Blueberry River*; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321).

The Tribunal found the Claim is valid under paragraphs 14(1)(c) and (d) of the *Specific Claims Tribunal Act*: "a breach of a legal obligation arising from the Crown's…administration of reserve lands" and "an illegal…disposition by the Crown of reserve lands".

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I. PROCEDURAL HISTORY OF THE CLAIM

[1] The Claimant, the Metlakatla Indian Band (Metlakatla or the Band), originally filed a claim with the Minister of Aboriginal Affairs and Northern Development on December 31, 2008. On May 29, 2009, the Claimant filed revised submissions with the Specific Claims Branch. The Specific Claims Branch notified the Claimant in writing on May 17, 2012, that the claim was not accepted for negotiation. The claim thus became eligible for filing with the Specific Claims Tribunal (Tribunal) pursuant to paragraph 16(1)(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*].

[2] The Claimant filed a Declaration of Claim with the Tribunal on July 11, 2013, and an Amended Declaration of Claim on April 7, 2021.

[3] The Respondent filed a Response to the Declaration of Claim with the Tribunal on September 17, 2013, and an Amended Response on February 26, 2021.

[4] The Claim was bifurcated by Order of the Tribunal dated January 18, 2019. The bifurcation Order was amended by Order of the Tribunal dated September 9, 2021. The amended bifurcation Order provided that Stage 1 of the proceeding would deal with the validity of the Claim and the market value of the Claimant's reserve lands at the time they were taken; Stage 2 would provide determinations regarding bringing forward historical loss values, loss of use values, and the total amount of compensation.

[5] Pursuant to a request made by the Kitsumkalum Indian Band (Kitsumkalum), a Notice pursuant to section 22 of the *SCTA* was sent to that Band on January 25, 2017.

[6] On March 27, 2017, Kitsumkalum filed a Notice of Application for Leave to Intervene (Application).

[7] The Parties and Kitsumkalum made written submissions regarding the Application. The Application was heard on October 19, 2017.

[8] On May 4, 2018, the Tribunal issued a decision and reasons denying the Application.

[9] The expert evidence hearing on validity was held by videoconference in three parts: April

19–21, 2021, September 13–17, 2021, and October 26–28, 2021.

[10] The oral submissions hearing on validity was held by videoconference in two parts: January 10–14, 2022 and January 18, 2022.

II. BACKGROUND

A. Background History

[11] The first non-Indigenous settlement on the Pacific Coast in the vicinity of present-day Prince Rupert, was Fort Simpson (later Port Simpson), a Hudson's Bay Company Fort (HBC Fort) founded in 1834. Fort Simpson was located on a protected harbour, below an inlet leading to the mouth of the Nass River. The fort was founded to take advantage of the fur trade, both from interior and coastal areas. Following the founding of the fort, a population of Tsimshian-speaking First Nations, perhaps 2,000 individuals, moved to the area surrounding the fort and founded a village (Agreed Statement of Facts (ASF) at para 4).

[12] As happened in other areas along the Pacific Coast, the Indigenous Peoples lost significant portions of their population through epidemics of disease, which revisited their areas beginning just before first contact and continued through the 19th century. In 1836, smallpox killed perhaps one-third of the Indigenous population at Fort Simpson (Supplementary ASF at para 8). In 1862, after a second major smallpox outbreak, William Duncan, an Anglican Missionary at Fort Simpson, estimated that "five hundred or one-fifth of the Tsimshian Indians at Port Simpson have fallen" (Supplemental ASF at para 11).

[13] That year, Duncan and a number of his congregation moved to Metlakatla, the old site of a Tsimshian village, approximately 40 km south of Port Simpson. Informal estimates suggest the remaining people at Fort Simpson numbered about 2,000, the initial population of Metlakatla being about 300. The population of Metlakatla grew to about 1,000 when in the mid 1880s Duncan developed differences with the Anglican Church, who took the step of locating a Bishop near the community. In turn, in 1887, Duncan left with the majority of the Metlakatla population to a location in Alaska (Supplemental ASF at para. 16).

[14] By 1894, the Department of Indian Affairs (Department or DIA) census recorded 158

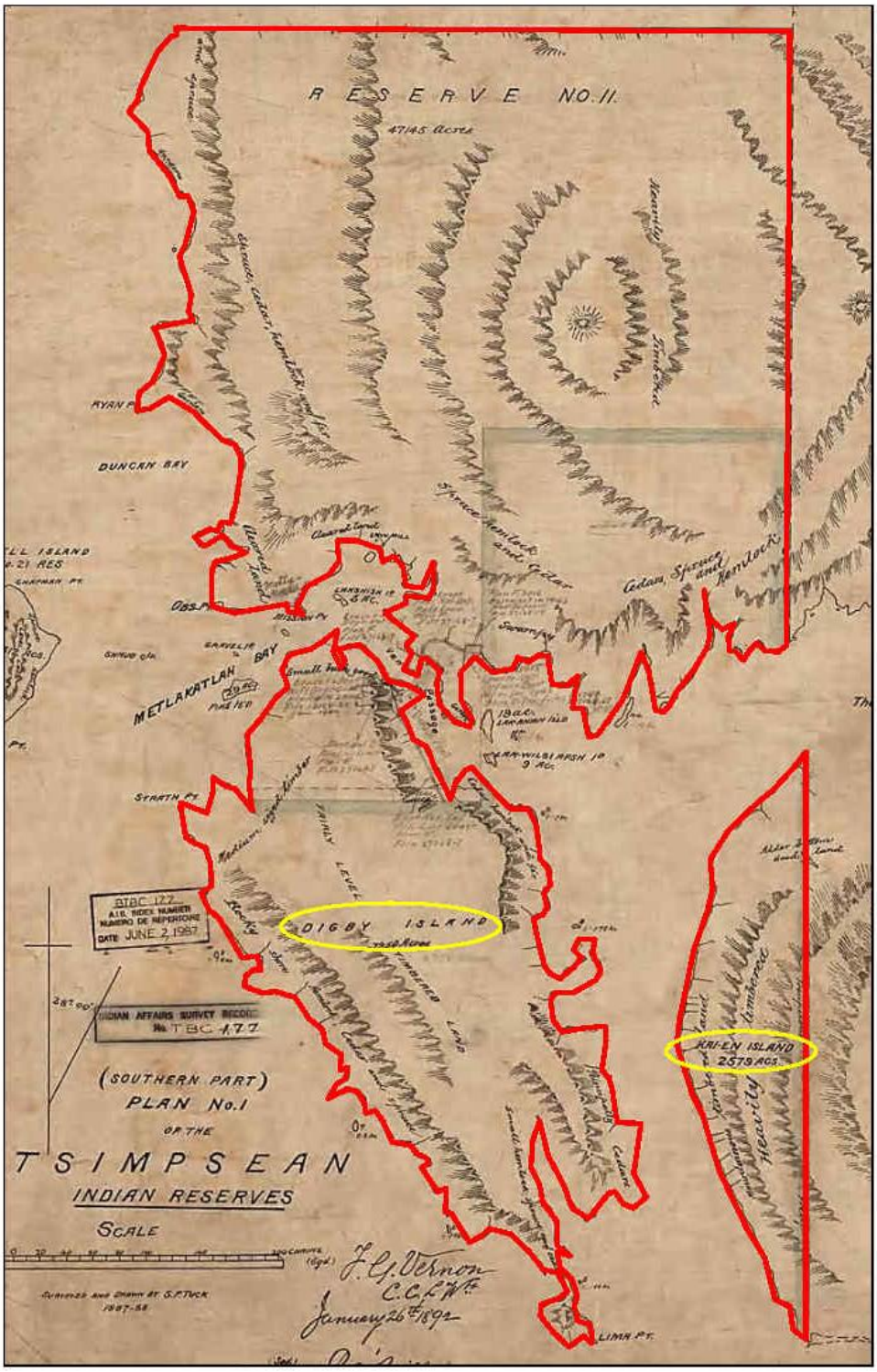
people living at Metlakatla, and 679 at Port Simpson (Supplemental ASF at para 17). In 1906, the DIA census recorded 198 individuals at Metlakatla, and 708 at Port Simpson (Supplementary ASF at para 18).

[15] In 1862–64, the colonial government declared reserves for the people living at Metlakatla, roughly within a 10-mile by 5-mile rectangular area around the village with a 2-acre reserve at the village itself, set out for the Church Missionary Society (Ex-50, Tab JBD-68).

[16] British Columbia joined confederation in 1871 and a process for identifying reserves to be held and administered by the federal government for First Nations people was put in place through the Joint Indian Reserve Commission, a responsibility that fell in 1881 to Peter O'Reilly as the sole commissioner (Ex-50, Tab JBD-118). He set a number of reserves for the Tsimshian people, in October 1881 (Ex-50, Tab JBD-123). Tsimpsean Indian Reserve No. 1 was the first, comprising 100 acres at Port Simpson to the east of the HBC Fort (Ex-50, Tab JBD-123). The largest was Tsimpsean Indian Reserve No. 2 (I.R. No. 2), which enclosed a large part of the Tsimpsean Peninsula, from the coastline west of Port Simpson, including the Indigenous village of Lax Kw'alaams, to the south to include Digby Island and a portion of Kaien Island, in total about 70,000 acres (Ex-50, Tab JBD-123).

[17] In 1892, O'Reilly divided Tsimpsean I.R. No. 2 into two parts, dedicating the southern portion of approximately 47,000 acres to Metlakatla, with the northern portion to be held by the Port Simpson Band (Lax Kw'alaams) (Ex-50, Tab JBD-155).

Portion of Tsimpsean I.R. No. 2 Allocated to Metlakatla by 1892 (Outlined in Red)
(Ex-12 at 23)



B. Grand Trunk Pacific Railway Company Land Acquisition 1904–1907

[18] In 1905, I.R. No. 2 remained as set by O'Reilly: the north portion dedicated to the Port Simpson (Lax Kw'alaams) Band and the south portion for the Metlakatla Band. The south portion included Digby Island and the western part of Kaien Island. To the east of the Bands' reserves, extending south to include most of Kaien Island, the land had been made a provincial government reserve in 1891, excluding the area from pre-emption or purchase by members of the public (Ex-21, Tab 110). Tuck Inlet (or Lima Harbour), which became Prince Rupert Harbour, was completely enclosed by the Mainland portion of the southern portion of I.R. No. 2 to the northwest, and the area of the southern portion of the reserve consisting of the western part of Kaien Island, Digby Island, and the government reserve to the east. There was no privately held land adjacent to the harbour.

[19] Beginning in early 1904, the provincial government was approached by a Victoria lawyer, Ernest Bodwell, acting on behalf of the Grand Trunk Pacific Railway Company (GTP or the Company), to secure the purchase of 10,000 acres from the land within the government reserve (ASF at para 67).

[20] On May 4, 1904, a provincial order in council was approved by the Lieutenant Governor, allowing the GTP to select and acquire 10,000 acres of the government reserve for the sale price of $10,000, on condition that the land was to be used for the terminus of the GTP railway, and a townsite to be established on the 10,000 acres (Ex-22, Tab 140).

[21] The subdivision of townsite lots on the 10,000 acres would have invoked section 32 of the *Land Act*, RSBC 1897, c 113 [*Land Act*], which required that one-quarter of any townsite lots to be created by subdivision would be re-conveyed to the provincial government (Ex-22, Tab 140).

[22] The order in council was not made public until the following year.

[23] In March 1905, the GTP paid $10,000 and the Province granted the land in three numbered lots: Lot 443, to the east of I.R. No. 2 on the north shore of Prince Rupert Harbour; Lot 251, on Kaien Island, immediately to the east of the portion of I.R. No. 2 on the Island; and Lot 444, further to the east (Ex-2, Tab 39). The grants also expressly included the *Land Act* requirement that one-

quarter of townsite lots to be created, be re-conveyed to the Province, and a further provision that one-quarter of waterfront blocks created, also be re-conveyed on subdivision (Ex-10). The Crown grants became public knowledge shortly thereafter following a Victoria *Daily Colonist* report on May 24, 1905 (Ex-24, Tab 157).

[24] On August 3, 1905, the GTP, by an indenture signed by the GTP president Charles Hays and ratified by the Company Board of Directors, formally committed to locate the terminus of the railroad on the 10,000 acres, with the work to commence before June 30, 1906 (Ex-50, Tab JBD-1023). The three land grants were registered in October 1908 (Amended ASF at para 75).

[25] The GTP plans to acquire land surrounding Prince Rupert Harbour also included acquiring substantial portions of I.R. No. 2. At the time Indian reserve land was administered by the federal government in accordance with the *Indian Act*, RSC 1886, c 43 [*Indian Act*, 1886], although the land was not transferred to the federal Crown by the Province until 1938, due to a long-standing dispute focussed on the Province's claim to a reversionary interest in reserve lands. The GTP first notified Canada (DIA) of its intention to acquire reserve lands in May 1904. It presented a sketch map of Prince Rupert Harbour outlining a 7,000-acre portion of the southern portion of I.R. No. 2 to the east of the Metlakatla village extending to the east boundary of the reserve, along the north shore of the harbour (Ex-22, Tabs 142 and 143).

[26] In April 1905, the GTP also gave the DIA notice of its intention to acquire Digby Island (7,950 acres) and the portion of the reserve on the west side of Kaien Island (2,519 acres) (Ex-50, Tabs JBD-190 and JBD-191).

[27] In November 1905, Deputy Superintendent General of Indian Affairs, Frank Pedley, wrote to George Morrow, Indian Agent for the Tsimpsean Agency, advising that the GTP had applied to secure reserve lands and informing him that "should Mr. E. G. Russell, the Grand Trunk Pacific Railway Company's representative, call upon, you with a view of discussing and taking up this matter with yourself and with the Indians, the department has no objection to this being done" (Ex-50, Tab JBD-213).

[28] Morrow subsequently gave an account of Russell contacting him in January 1906 and of Russell being invited to a Band Council meeting called by Morrow for January 31, 1906. At the

meeting, Russell presented a letter to Morrow, dated January 15, 1906, outlining the Company's intention to acquire reserve lands (Ex-24, Tab 170). The Band Council called a meeting of the membership of the Band to discuss the proposed purchase for the next day.

C. The Band Resolution

[29] Russell's January 15, 1906, letter attached a tracing map (Ex-1, Tab 5). The map was in two pieces. The westerly portion identified reserve land to a hand-drawn line, representing the east boundary of the reserve where it bordered the government reserve on the Mainland (Tsimpsean Peninsula), extending further south to indicate the eastern boundary of the Reserve on Kaien Island. The second piece of the map depicts the area to the east of the Reserve into the area of the government reserve. There appears to be a point of convergence indicated on each half, marked "A" (Map A), with arrows extending to the right edge of the first piece, and the left edge of the second piece, as if the pieces of the map should be joined at this point to give a sensible representation of the area. Because the two halves of the map are to a different scale the map distorts the relative location of features as one goes away from the point of convergence. The Parties have agreed the two halves of Map A were a later reproduction of that document and found in the Library and Archives Canada (ASF at para 105).

[30] Map A appears to have been a reproduction in two parts of the GTP Sketch Map of Lima Harbour sent to Canada in May 1905 (Ex-1, Tab 7). The coastline around and north of the Metlakatla village is badly drawn in the sketch map and is a poor depiction of the features of the coast leading north to Port Simpson, a coastline that likely was known to the people living at Metlakatla. If one were to project, say, the north boundary of the 7,000 acre Mainland portion the GTP wanted to acquire to the coast on the sketch map, to get an idea of how far the boundary was located in this direction, the intersection indicated on the sketch map would be well below Duncan Bay while a true projection of the north boundary of the Mainland portion would intersect with the coast at a point much further north.

[31] The first piece of Map A, as it relates to the Mainland (Tsimpsean Peninsula) portion of the Reserve, shows a dotted line, drawn west from the east boundary of the reserve, intersecting with a similar line that extends at a right-angle south to the shoreline of Venn Passage, just east of the Metlakatla village. A second line is drawn parallel to this line a distance to the east of the first

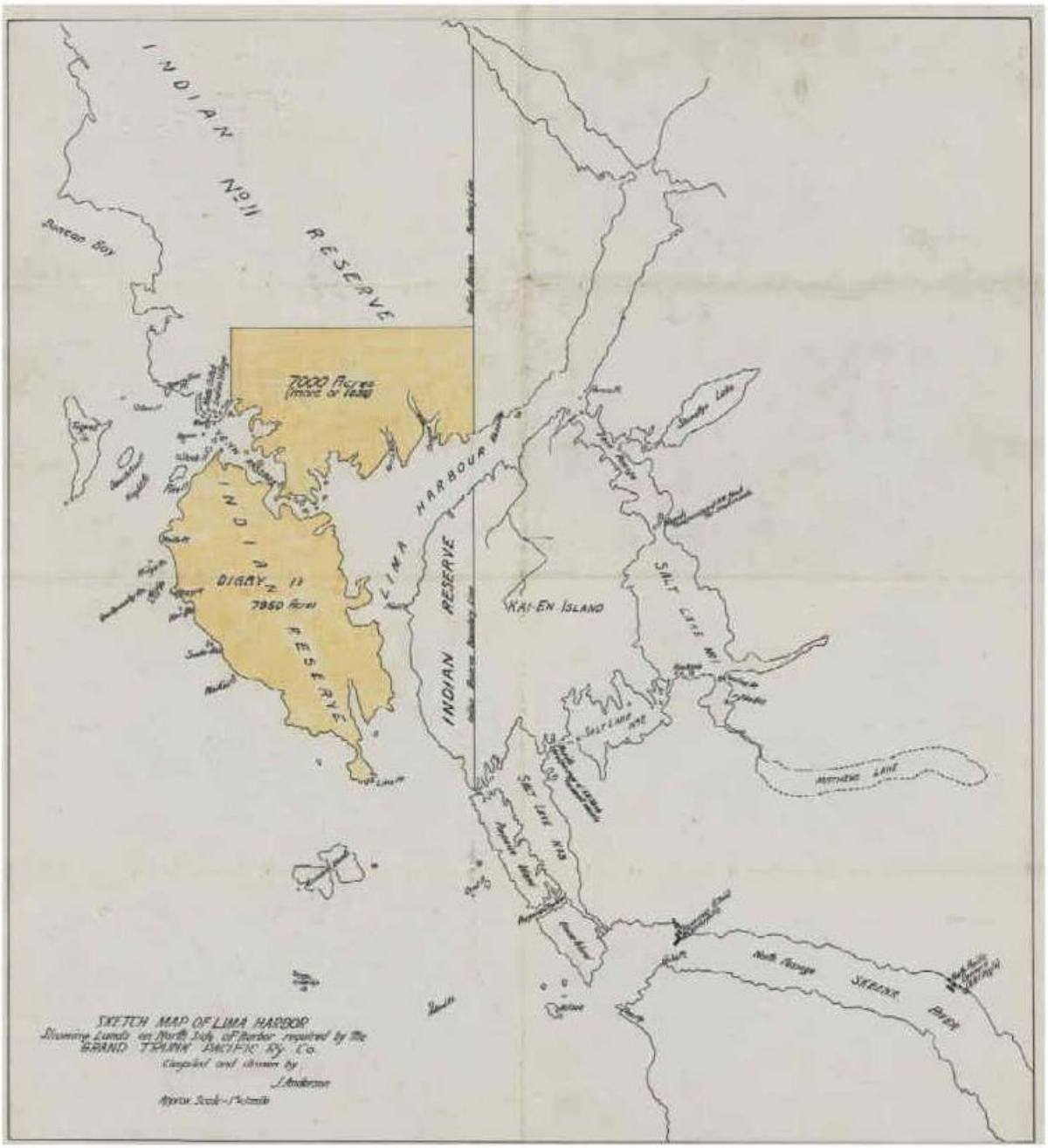
line.

[32] From the account of the Band meeting given by Indian Agent Morrow, the more westerly vertical line represents the west boundary of the parcel the GTP proposed to acquire from the Band. The Band refused to surrender to this western boundary, but agreed to surrender a smaller parcel, indicated by the line further to the east of the village. The Band also refused to surrender the north end of Digby Island (Ex-24, Tab 175).

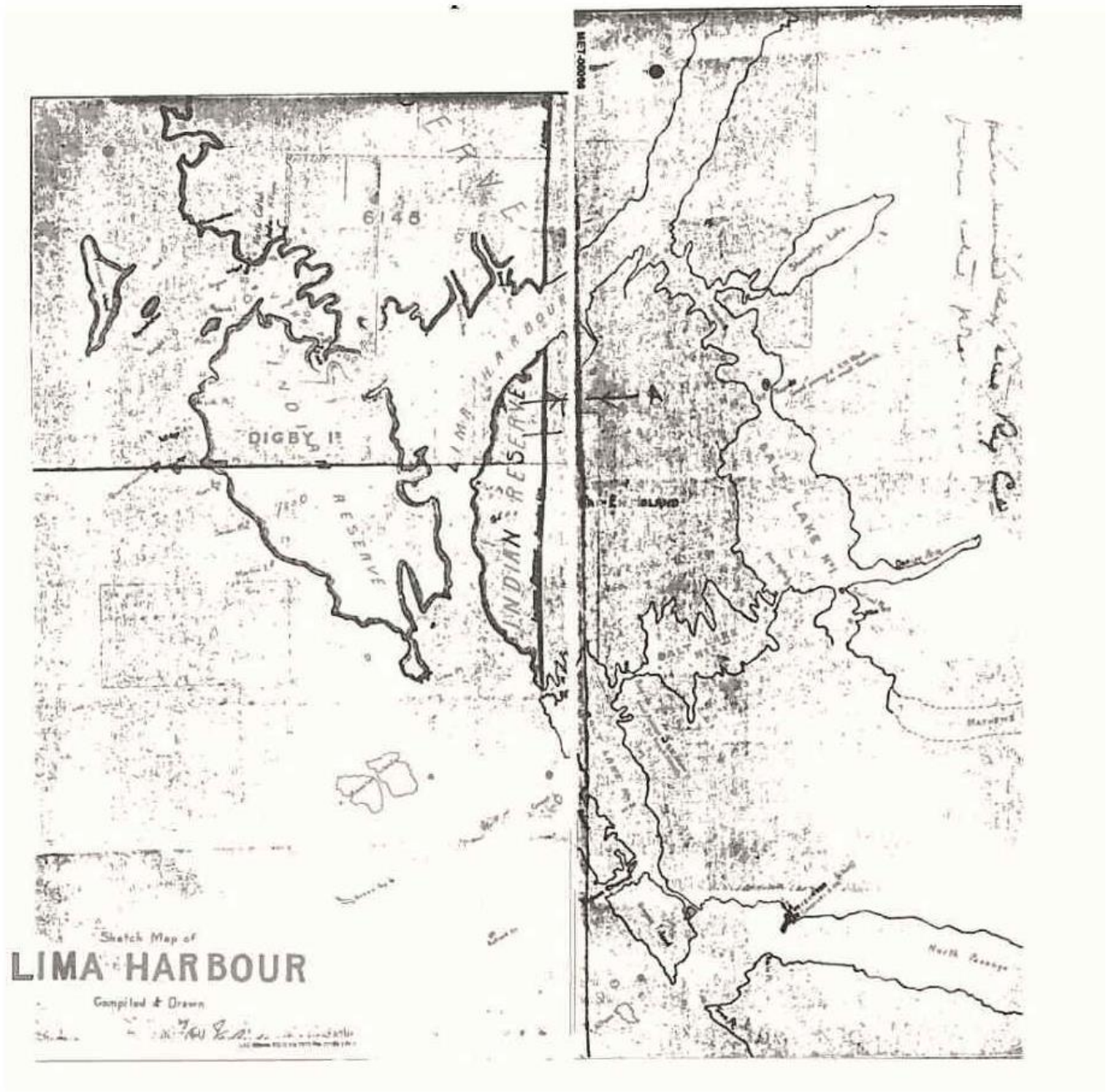
[33] There is no suggestion in the evidence that the two halves of Map A were different from what was actually presented to the Band. If this was due to some later copying of the two maps there are still serious discrepancies between the representation of the area on the combined Map A and other maps of the area from that time period, such as the sketch accompanying S. P. Tuck's 1887 survey of I.R. No. 2 and the insert of the GTP 1907 map showing the terminus area around Prince Rupert.

[34] A reproduction of the May 1905 GTP Sketch Map of Lima Harbour and Map A are provided on the next pages.

May 1905 GTP Sketch Map of Lima Harbour
(Ex-1, Tab 7)



Halves of Map A Joined at Point of Convergence
(Ex-1, Tab 5)



[35] Negotiations between Russell and the Band continued for six days, namely February 1 ,2, 3, 5, 6 and 7, excluding Sunday, February 4. In addition to most of the adult members of the Band, Indian Agent Morrow sat in through the negotiations and Bishop F. H. Du Vernet, the Anglican

Bishop resident in Metlakatla, witnessed the signing of the Band Resolution (Resolution) that resulted from the meetings (Ex-24, Tab 176). With the exception of the most westerly portion of the Mainland portion of the Reserve and the northern end of Digby Island, the Band agreed to surrender the area sought by the GTP along with the portion of the Reserve on the western edge of Kaien Island, contingent on the further terms of the Resolution.

[36] The negotiations turned to the terms of sale of the land to be surrendered acceptable to the Band on a subsequent sale by Canada to the GTP. Initially, Russell proposed a sale at $5 per acre. The Band countered at $10. Ultimately, when there appeared to be an impasse Russell proposed they split the difference at $7.50 per acre (Ex-24, Tab 176). The agreement was recorded as a handwritten Resolution of the Band prepared by Morrow, to surrender:

> … the following Metlakatla Indian Reservations on portions thereof, viz. Kaien Island, parts of Digby Island, and a portion of the Reserve on the Mainland [Tsimpsean Peninsula] bordering on Venn Passage, and Tucks Inlet as applied for by Mr. E.G. Russell, Agent of the Grand Trunk Pacific Railway, as per [his] letter dated January 15th 1906, addressed to [Indian Agent Morrow] and shown on plan or map marked A. Except certain portions on Digby Island and the Mainland retained as Indian Reserves. [Ex-24, Tab 172]

[37] A later typed recording of the Resolution found in the Band minute book, described the lands to be surrendered in greater detail:

> The Mainland portion bordering on Venn Passage and Tucks Inlet. Beginning at the Southern Post of the Eastern boundary line of the Mainland Indian reservation, thence running North about two (2) miles, thence West about two and three quarter (2¾) miles, to the point of intersection with a Western boundary line as hereinafter defined. (viz,) A line running North from the shore of the Mainland, which when extended South across Venn's Passage will be immediately to the West of the Islands of Lak-wilgiapsh, and Lak-anian, so that these Islands are included in the portion to be surrendered. Thence from this point of intersection as above defined, South to the shore of the Mainland, thence in an Easterly direction following the shore line to the point of commencement.
>
> On Digby Island, all land lying South of a line drawn East and West, which is determined by the high water mark at the head of the Bay on the East side of Digby Island, known as Sh-kgueak, and also the triangle of land, lying to the East of the line, which is determined by the extension South, to Digby Island of the North and South line, which lies immediately West of the Islands, of Lak-Wilgiapsh and Lak-anian … [Ex-1, Tab 1]

[38] The metes and bounds description of the land to be surrendered in the typed version of the Resolution was likely prepared by the GTP agent, Russell, and added to the resolution by Indian

Agent Morrow.

[39] The Resolution and an account of the negotiations with Russell were forwarded by Indian Agent Morrow to Frank Pedley, Deputy Superintendent General of Indian Affairs, on February 14, 1906 (Ex-2, Tab 43). On March 28, 1906, the Minister of the Interior and Superintendent General of Indian Affairs, Frank Oliver, forwarded a plan of the intended surrender and purchase to the Privy Council. This was attached to a subsequent order in council, dated April 2, 1906, showing the parcels superimposed on the reserve survey plan prepared by S. P. Tuck in 1887. The total area to be involved in the surrender and purchase was stated to be 13,519 acres "as shown on the accompanying plan" (Ex-50, Tab JBD-237).

[40] The letter from Morrow set out the terms which the Band had set for surrendering the portions of the Reserve:

1. payment of 50% of the purchase price in equal amounts to the adult Band members;

2. the balance to be held in trust at interest from which payments were to be made to coming-of-age Band members in a like amount as realized by adult members;

3. the interest to go to village improvements; and

4. $1,500 to be available to Band members as compensation for the loss of garden sites.

[41] The bargain was, in his view, an excellent one and although it was "not [within] the policy of the Department to pay money direct to the Indians, never-the-less in this case I trust the Department may be able to do so" (Ex-2, Tab 43). The *Indian Act* in fact restricted payment to Band members to 10% of the purchase price.

D. The Surrender

[42] In the months following the Resolution, the *Indian Act* was amended to allow a 50% payment to Band members (in this case 50% amounted to about $500 per member).

[43] On July 18, 1906, Pedley, the Deputy Superintendent General of Indian Affairs, wrote to

A. W. Vowell, the British Columbia Indian Superintendent, instructing Vowell to travel to Metlakatla, and "[f]rom the plans and descriptions contained in the correspondence … to prepare and fill in the necessary description of the land to be surrendered" (Ex-2, Tab 050). The copy of the surrender recorded with the Land Registry, Indian Affairs Branch, Department of Indian Affairs and Northern Development, at Ottawa, is dated August 17, 1906, received by the Registry, November 2, 1906, and recorded November 10, 1906 (Ex-2, Tab 51). The description of the land surrendered being part of the Mainland portion of the reservation is as follows:

> … a portion of the mainland reservation bordering on Tucks Inlet and Venn Passage as hereinafter described,
>
> Beginning at the Southern post of the Eastern boundary line of the Mainland Indian reservation, thence running North, ~~about~~ two (2) miles thence West about two and three quarters (2 ¾) miles to the point of intersection with a Western boundary line as hereinafter defined. (viz) A line running North from the Shore of the Mainland, which when extended South across Venn's Passage, will be immediately to the West of the Islands of Lak-Wilgiapsh, and Lak-Anian. So that these Islands are included in the portion to be surrendered,
>
> Thence from this point of intersection as above defined, South to the Shore of the Mainland. [T]hence in an Easterly direction following the Shore line to the point of commencement.

[44] The wording supplied by Vowell is almost exactly that used in the typed resolution with the DIA Ottawa Land Registry copy (Ex-2, Tab 58), having the word "about", in reference to the two-mile eastern boundary, crossed out as indicated above. Other surviving copies of the surrender do not have the indeterminant qualifier omitted, but the total acreage referred to in the surrender, 13,519 acres, is a calculation based on a two-mile dimension. Further, a statement of a distance in a formal description, should not use an indeterminate qualifier such as "about" or "more or less" unless it is clear that the distance is between two determined points and the uncertain distance is not being used in an attempt, of itself, to determine a distance (Ex-5 at 7–8). This rule of property description likely prompted the striking out of the word "about" in the DIA Land Registry (Ex-5 at 11).

[45] Prime Minister Wilfred Laurier submitted the surrender to the Governor General on September 7, 1906, commenting that the surrender of "13,519 acres" had been made "with a view to the land covered thereby being disposed of for the benefit of the band" and was "duly authorized, executed and attested in the manner required by the 39th Section of the Indian Act" (Ex-50, Tab JBD-293). The surrender was accepted by the Governor General on September 21, 1906, by Order

in Council 1906-1859 (Amended ASF at para 125).

[46] The two-mile dimension noted on Tuck's plan of the reserve as the distance along the eastern boundary of the Mainland portion of the land to be surrendered, which, along with the area of the Digby Island parcel and the Kaien Island parcel (the total area calculated from Tuck's plan) totaled the 13,519 acres referenced in these documents. A further indication that the length of the boundary accepted by the government was two miles is in the copy of the surrender kept in the DIA Land Registry which shows the word "about" stroked out.

[47] On Pedley's instructions, Vowell drafted the Resolution accompanying the surrender to limit payment from the 50% placed in trust after the direct payment to Band members, to payment of a lesser $200 payment to coming-of-age Band members to be made from interest earned from the deposit of the 50% placed in trust, and payment of any remaining interest for reserve improvements (Ex-2, Tabs 50 and 51).

E. The Narrative Until Execution of the Grand Trunk Pacific Letters Patent

[48] The acreage in the preamble of the surrender (13,519 acres) was modified in an accounting of the sale price forwarded to the GTP assistant solicitor, D'Arcy Tate, on October 26, 1906, adding to the acreage of the lands to be sold to the GTP by Canada, acreages assigned to the "L" Islands spoken of in the surrender, but also acreages of "Islets Numbered 1 to 8" which were not referenced in the surrender but included to represent the islands spoken of by Vowell in his reporting letter to Pedley dated August 25, 1906, in a paragraph which reads:

> I might state in further connection with this matter that by special request of Mr. Russell, who is interested on behalf of the Grand Trunk Pacific Railway Company, it was fully explained to the Indians that the surrender included all the islets immediately contiguous to that part of Digby Island described therein, to which they fully agreed. [Ex-2, Tab 55]

[49] The amended area was shown as follows (Ex-2, Tab 60):

Mainland	4,240	acres
Digby Island	6,700	acres
Kaien Island	2,579	acres
Lak-Anian Island	19	acres

Lak-Wilgiapsh Island	9	acres
Islets, numbered 1 to 8	20	acres
	13,567	acres

[50] Accordingly, the 13,567 acres referred to in subsequent documentation has its genesis in the 13,519 acres calculated from Tuck's original reserve survey map using the two-mile distance for the eastern boundary of the Mainland portion.

1. Barrow's Survey

[51] Following the August 16–17, 1906 surrender, the GTP instructed A. R. Barrow to prepare a survey outlining the Mainland portion of the surrendered lands. This December 1906–January 1907 survey (Ex-2, Tab 67), extended the eastern boundary beyond two miles to 11,482 feet, to meet the northwest corner of Lot 443, one of the three lots granted to the GTP as part of the 10,000 acres taken from the government reserve, a transfer negotiated in 1904, but not made public until 1905, and formalized by registration of the Crown grants in October 1905. Lot 443 had been surveyed by the GTP in 1904 (Ex-50, Tab JBD-177). The surveyor J. F. Ritchie had made errors in this survey and wrongly located the northwest corner of Lot 443 to the east of its proper location (Ex-2, Tab 38). This was noted by the British Columbia surveyor general, and Ritchie assured he would correct the placement, but apparently did not. In any event, Barrow proceeded to the proper location of the corner of Lot 443 in setting the boundaries of the Mainland parcel (Lot 1991) and noted the distance of the eastern boundary to this point to be the 11,482 feet distance noted above (Ex-2, Tab 67). Eleven thousand four hundred eighty-two (11,482) feet is 922 feet beyond two miles. Ritchie's misplaced corner indicated a similar distance, but to a point that was misplaced in direction.

[52] The survey of Lot 443 also set the north boundary a fraction off true west. This direction was adopted in the letters patent to continue the boundary without creating an angle between the north lot lines of Lot 443 and the adjoining north lot line of the Mainland parcel (Lot 1991). This change in direction caused the inclusion of perhaps a few acres more than what was described in the surrender, but the largest discrepancy in the acreage included in the subsequent letters patent to the GTP related to the 922-foot increase in the east boundary, projected west across the width of the parcel, creating a long, roughly rectangular, 313-acre addition along the north boundary.

2. Drafting the Letters Patent

[53] The first proposal for the wording of the land description to be used in the letters patent appears to have been prepared by the DIA chief surveyor, Samuel Bray. He described the east boundary of the Mainland portion as extending north from the shoreline for two miles. He then describes the north boundary as extending 230 chains east. This direction is in error and the north boundary should have been stated to be 230 chains west (Ex-2, Tab 65).

[54] The chief engineer of the GTP, B. B. Kelliher, commented on the description in a February 26, 1907, letter to Frank Morse, the Company vice president and general manager. Kelliher stated he was "p[ro]posing some radical changes in the description" (Ex-2, Tab 70). He went on to recommend that the description use the low-water mark as a boundary along the coastline, rather than the more commonly used high-water mark (Ex-2, Tab 66) which was the boundary used to set the reserve. Referencing the Mainland portion, he seems to mistake Bray's 230-chain distance for the northern boundary of the Mainland parcel as the proposal for the length of the eastern boundary. Two miles equal 160 chains or 10,560 feet. In any event, he proposes the eastern boundary extend to the northwest corner of Lot 443, a distance he states that is 11,482 feet, 922 feet beyond two miles. He also proposes the bearing of the north boundary be adjusted to conform to the bearing of the north boundary of Lot 443.

[55] The description was the subject of further adjustment and comment. In a Memorandum to the Deputy Minister, May 13, 1907, Bray said that "there appears to be no objection to adopting the North boundary of the tract on the main-land and also the East boundary on the said tract, as described in [Kelliher's] description" (Ex-2, Tab 77). He goes on to reject the extension of the shoreline to the low-water mark which would have been a purported transfer of shoreline beyond the mean high-water boundary of the reserve, and remarks that the line drawn by the Chief Engineer at the north boundary of the land to be transferred on Digby Island "does not conform with the surrender as it is about 970 feet to the North of the point indicated in the said surrender." He goes on to say that "[i]n order to be in a position to accept the survey and the description made by the said Chief Engineer, another surrender, would, in my opinion, require to be taken". This 970-foot extension of the Digby Island portion of the land to be transferred to the GTP, would indicate that, given the width of Digby Island at the north boundary is something less than 1,300

feet, the acreage involved in the proposed adjustment on Digby Island was less than that created by the extension of the Mainland north boundary, 922 feet beyond two miles to conform with the north boundary of Lot 443. This proposed extension of the land to be transferred on Digby Island did not proceed further and was not reflected in the letters patent issued to the GTP.

[56] On June 18, 1907, the GTP assigned its interest in the surrendered lands to the Grand Trunk Pacific Town and Development Company, an affiliate of GTP incorporated on August 3, 1906, to carry out purposes connected with the development of lands along the railway. On June 25, 1907, Canada issued letters patent to the Grand Trunk Pacific Town and Development Company in consideration for the payment of $106,200 ($7.50 per acre x 14,160 acres) (Amended ASF at paras 139–40). (Throughout these Reasons, the references to the GTP will include its subsidiary companies.)

F. The Text of the Letters Patent

[57] The letters patent issued by Canada June 25, 1907, described the land to be granted as:

> … all those parcels or tracts of land situate, lying and being in the Southern part of the Tsimpsean Indian Reserve Number Two, in the Coast District, in the Province of British Columbia in Our Dominion of Canada, composed of a portion of Digby Island, all that portion of Kaien Island lying within the limits of the said Reserve and a portion on the Main-land North of the said Kaien Island, together with Lakanian and Lakwilgiapsh Islands, and eight small Islands adjacent to Digby Island, and to the said Mainland. The said Islands comprising all the Islands adjacent to the above mentioned land which pertain to the said Indian Reserve and which may be described as follows:—
>
> FIRSTLY: Commencing at the point on the main land where the East boundary of the said Reserve strikes the water's edge of the channel between the said main land and Kaien Island; thence North along the said boundary eleven thousand four hundred and eighty-two feet [11,482'] to the North boundary of a lot numbered 443; thence S. 89° 40' 30" W. along the said North boundary of lot 443 produced Westerly fifteen thousand five hundred and thirty feet [15,530'] more or less to a line drawn North astronomically from low water mark at the extreme Westerly point of Lakanian Island; thence South along the said line twelve thousand and four hundred feet [12,400'] more or less to the water's edge of the Channel between the main land and Digby Island; thence Easterly following the sinuosities of the shore to the point of commencement containing approximately four thousand five hundred and ninety-two [4,592] acres of land be the same more or less.
>
> SECONDLY: Commencing at the water's edge on the North Easterly shore of Digby Island where a line drawn south astronomically from the aforesaid

low water mark at the extreme Westerly point of Lakanian Island strikes the same; thence south on the said line fifteen hundred and sixty-five feet [1,565'] more or less to a line drawn East astronomically from high water mark at the head of the large Bay at the North Easterly end of the said Digby Island, known as Sh-kgeauk Bay; thence West astronomically on the said line nineteen hundred feet [1,900'] more or less to the said Bay and again West astronomically on the said line produced eight thousand eight hundred feet [8,800'] more or less to where the said line first strikes the West shore of Digby Island; thence South Easterly, Northerly, Westerly, South Easterly and North Westerly following the sinuosities of the shore of the said Digby Island to the point of commencement, and containing Six thousand eight hundred and forty [6,840] acres of land be the same more or less.

THIRDLY; Commencing at the point on the North Westerly shore of Kaien Island where the East boundary of the said Indian Reserve strikes the water's edge; thence south along the said boundary twenty-eight thousand four hundred and forty-six feet [28,446'] more or less to the water's edge at the South Westerly shore of the said Kaien Island; thence North Westerly and North Easterly following the sinuosities of the shore to the point of Commencement, containing two thousand six hundred and eighty (2,680) acres of land, be the same more or less.

FOURTHLY; Ten Islands described approximately as follows:— Lakanian Island above mentioned lying between Digby Island and the main land containing nineteen [19] acres be the same more or less; Lakwilgiapsh Island situated south of Lakanian Island and distant about 460 feet therefrom, containing nine [9] acres be the same more or less. Island Number One, adjacent to the shore of the portion of land firstly described above containing ten [10] acres be the same more or less; Island Number Two, situated East of Lakanian Island and distant about 1000 feet therefrom, containing one [1] acre, be the same more or less; Islands Numbers Three and Four adjacent to the Easterly shore of Digby Island containing respectively one [1] acre and one acre and seventy-five hundredths [1.75] of an acre, be the same more or less; Island Number Five adjacent to the Eastern shore of the Peninsula at the South end of Digby Island, containing one-half [0.5] of an acre be the same more or less; and finally Islands Numbers Six, Seven and Eight adjacent to the south westerly shore of Digby Island, containing respectively one acre and seventy-five hundredths [1.75] of an acre, two acres and half [2.5] an acre, and one acre and half [1.5] an acre be the same more or less reserving from the lands firstly above described an area not exceeding five per cent for roads and the right of the Crown to lay out roads where necessary; together with all rights to the foreshores and rights of access to the water which may pertain to the lands above described. [Ex-2, Tab 91]

III. THE BOUNDARY ISSUES

A. Introduction

[58] The Claimant's position is that the letters patent expanded on the description of the surrendered lands to include three material discrepancies:

(a) In the Letters Patent, the northern boundary of the parcel of land located on the Tsimpsean Peninsula (the "Mainland Parcel") is located farther north and aligned [placed] differently from the northern boundary of the Mainland Parcel described in the Written Surrender, resulting in an increase in the size of that parcel of 313 acres;

(b) The Letters Patent include eight small islands (or islets) adjacent to Digby Island, which are not included in the Written Surrender; and

(c) The Letters Patent include Lakanian and Lakwilgiapsh Islands, while the Written Surrender is ambiguous as to whether those islands are included in the lands surrendered... [Claimant's Written Submissions at para 361]

B. Boundary Issue No. 1—the Mainland Parcel

[59] The total acreage described in the letters patent is 14,160 acres (Ex-2, Tab 91), as compared to the acreage stated in the surrender, 13,519 acres (Ex-2, Tab 58; 13,567, with inclusion of the island acreages). The 4,592 acres shown for the Mainland parcel in the letters patent is an increase of 352 acres from 4,240 acres as was calculated from Tuck's early survey. Barrow's more recent survey would be expected to show a measure of difference but most of this discrepancy is accounted for by the additional 313 acres added to the parcel by setting the northern boundary coincident with the northern boundary of Lot 443, 922 feet beyond the two miles indicated in the surrender (Ex-5 at 12–13 (expert report of Blair Smith, British Columbia and Canada land surveyor submitted by the Claimant (Smith Report)).

[60] The acreages indicated in the letters patent used more recent survey information than Tuck's initial survey of the reserve and the Kaien Island acreage in the letters patent, is 101 acres more than the acreage used in the surrender. The Digby Island acreage is 140 acres more than stated in the surrender. The deviations from the stated acreage in the surrender, in respect of the Kaien Island parcel and the Digby Island parcel, are 2.1% and 3.8%, respectively. The acreage stipulated in the letters patent in respect of the Mainland parcel, was 352 acres more than that indicated in the surrender, or a difference of 7.6%.

[61] I note that acreages are a computed value and although they can be computed accurately when boundaries are artificial (e.g., straight lines between known points), "[t]here may be some question about the overall acreage of a parcel of land where a boundary follows … a natural boundary" (Ex-5 at 8 (Smith Report)).

[62] In the case of the Digby Island parcel, a greater proportion of the perimeter is a natural boundary (the high-water mark around the island's perimeter) than the Mainland parcel, and could be expected to result in a more pronounced difference in area between the two surveys. The Mainland portion has artificial boundaries on three sides and the markedly larger deviation in the areas stated for the Mainland portion helps confirm that the 313 acres on the north boundary was an addition to the land identified at the surrender stage of the transaction and added to the calculated acreage when the description was prepared for the letters patent.

C. Boundary Issue No. 2—Lak-Anian and Lak-Wilgiapsh Islands

[63] The issue relating to inclusion of Lak-Anian and Lak-Wilgiapsh Islands (the "L" Islands) in the letters patent relates to the sufficiency of the description of the "L" Islands in the surrender document as compared with the proper description indicated in the letters patent.

[64] The deficiencies in the surrender description from the perspective of proper survey practice in describing parcels of land is indicated in the Smith Report. In his report, Blair Smith gives a definition of a description of land: "[i]t is the best statement that responsible conveyancers can articulate in words and diagrams to describe the actual parcel" (Ex-5 at 6, citing *Survey Law in Canada*, Carswell, 1989, at para 4.92).

[65] Descriptions are commonly composed of two parts, a preamble and the body of the description. The preamble identifies the parcels of land to be described; the body of the description describes the boundaries of those parcels (Ex-5 at 6).

[66] In the case of the description in the surrender document the preamble includes reference to the Kaien Island, the Digby Island, and the Mainland portions of the reserve, without reference to the "L" Islands or the eight other small islands (islets) included in the letters patent. The body of the description sets out the boundaries of these three parcels, and includes reference to the "L" Islands, firstly, in describing a north-south line used to define the west boundary of the Mainland portion, and part of the north boundary of the Digby Island parcel. The line is described in the surrender as follows: "[a] line running North from the Shore of the Mainland, which when extended South across Venn's Passage, will be immediately to the West of [the 'L' Islands]" (Ex-2, Tab 58).

[67] The surrender reference to the "L" Islands in this description of the north-south line, however, continues with this sentence: "... so that these Islands are included in the portion to be surrendered."

[68] The "L" Islands are offshore, closest to the Mainland parcel, but the Mainland parcel perimeter is described by boundaries set on the Mainland and these islands are not within this perimeter. The "L" Islands might have been properly included if the "L" Islands were indicated in the preamble as a separate parcel to be conveyed. The words "so that these Islands are included" would likely have sufficiently, although not elegantly, paired with the preamble. The question that arises is whether this error in description in the surrender acts to fail to properly include the Islands in the surrender to the Crown, and the subsequent inclusion in the letters patent.

D. Boundary Issue No. 3—the Numbered Islands

[69] The surrender refers to the "L" Islands, as above described, but does not include mention of the eight other islands described in the letters patent (the numbered Islands, Islands No. 1 to 8). These islands are described as follows:

> Island Number One, adjacent to [the Mainland parcel] containing ten acres be the same more or less; Island Number Two, situated East of Lakanian Island … [followed by descriptions of Islands Three to Eight as adjacent to Digby Island]. [Ex-2, Tab 91]

[70] Although Islands No. 1 to 8 are not referred to in the surrender, Canada says a reporting letter from A. W. Vowell, the British Columbia Indian Superintendent who took the surrender and forwarded it to Frank Pedley, Deputy Superintendent General of Indian Affairs, indicates an intention to surrender six of eight of these islands. He reported that:

> I might state in further connection with this matter that by special request of Mr. Russell, who is interested on behalf of the Grand Trunk Pacific Railway Company, it was fully explained to the Indians that the surrender included all the islets immediately contiguous to that part of Digby Island described therein, to which they fully agreed. [Ex-2, Tab 55]

[71] The report by Vowell is proposed by Canada to be sufficient evidence to indicate the surrender of Islands No. 3 to 8, to justify the conveyance by the letters patent. Canada concedes that Islands No. 1 and No. 2 are some distance away from Digby Island and in fact much closer to the Mainland parcel, and that Vowell's report cannot be taken as an expression of intent that these

islands be surrendered.

[72] I note the following:

1. There is no reference in the surrender document to islands other than Kaien Island, Digby Island, and the "L" Islands.

2. The meaning of Vowell's reference to islands being "islets immediately contiguous to … Digby Island" is difficult to understand. Contiguous generally means 'adjoining', and is not a gradable noun, and islands are by definition separate. Some dictionary references allow a meaning of the word to express "in close proximity". But what is to be made of immediately contiguous? Further, Vowell does not indicate the number of islets that should be included and an examination of Digby Island reveals more than eight islets.

3. The first two of the eight islands are by admission of Canada not within the description given by Vowell.

E. The Claimant's Position

[73] The Claimant says that the principles of boundary interpretation set out in the survey report of Blair Smith (Smith Report) should be applied to determine with precision, the land surrendered to the Crown by way of the surrender executed August 17, 1906. Specifically, the description of the east boundary of the Mainland parcel as extending "about two (2) miles" from the shoreline of Prince Rupert Harbour to the northeast corner of the parcel, is an inappropriate use of a word such as "about", or "more or less", which should only be used as an item of information by way of an approximate distance between two fixed points otherwise determined in the description. Accordingly, "about two (2) miles", has to be read as limiting the distance to no more than two miles. Otherwise, the distance has no useful limit in determining the boundary (Ex-5 at 9).

[74] The Claimant also says that there is no reasonable basis to conclude the map produced by the GTP representative, Russell, in the negotiations made any reference to the lot line of the then newly created Lot 443 as a determining feature of the length of the eastern boundary of the Mainland parcel (Claimant's Written Submissions at para 422).

[75] In respect of the "L" Islands, the Claimant says the failure to follow the principles of description in referring to the "L" Islands in the surrender, should result in exclusion of these Islands from the lands to be transferred. Specifically (Claimant's Written Submissions at para 438):

1. the preamble does not characterize the islands as a separate parcel;

2. the description of the Mainland is complete and the description of the perimeter does not include the islands; and

3. the reference to the islands implies they are to be included in the Mainland parcel, although as islands, they are separate from that parcel.

[76] Lastly, Islands No. 1 to 8, which are included in the letters patent, are not mentioned in the surrender and the extrinsic evidence in Superintendent Vowell's letter of the willingness to surrender islands immediately contiguous to Digby Island should not be accepted as determining this aspect of the surrender.

F. The Respondent's Position

[77] Canada argues that the Tribunal "must look to the intention of the parties to the surrender to discern what they intended to surrender", and that "Metlakatla intended to surrender the entire Mainland Parcel as described in the Letters Patent, as well as Lakanian and Lakwilgiapsh Islands [the "L" Islands] and Islands Numbered 3 to 8" (Respondent's Written Submissions at para 389). Canada's position contains an admission that Metlakatla did not intend to surrender islands numbered 1 and 2.

[78] Canada cites the decision of Gonthier J. in *Blueberry River Indian Band v Canada (Department of Indian Affairs & Northern Development),* [1995] 4 SCR 344 at paras 6–7, 130 DLR (4th) 193 [*Blueberry River*]:

> ... principles of common law property are not helpful in the context of this case. Since Indian title in reserves is *sui-generis*, it would be most unfortunate if the technical land transfer requirements embodied in the common law were to frustrate the intention of the parties, and in particular the Band … the Band's members' intention should be given legal effect.

> …[i]t is therefore preferable to rely on the understanding and intention of the Band members … as opposed to concluding that regardless of their intention… technical land transfer rules and procedures rendered the … surrender ... null and void … In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui-generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.

[79] Canada also refers to the decision of Newbury J.A. (*Osoyoos Indian Band v Oliver (Town)*, 1999 BCCA 297 at para 93), quoted by the Supreme Court of Canada in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 44, [2001] 3 SCR 746 [*Osoyoos*], to argue:

> ... "**a non-technical approach may be justified**" even in the context of expropriation, and that form should generally not be permitted to "**trump substance**" whenever Indian interests may be affected. [emphasis in original; Respondent's Written Submissions at para 393]

[80] Canada says the tracing map marked "A", and the text of the letter from Vowell to Pedley reporting that it was explained to the Band, and agreed, that "all the islets immediately contiguous to that part of Digby Island" were included in the surrender is reliable extrinsic evidence to establish Metlakatla's intention and should be considered in interpreting the surrender agreement, as was done in the evidence and report of David Hardwicke, titled "On the Question of Intent: A report on various issues arising from the August 17, 1906 Written Surrender of certain S ½ Tsimpsean Indian Reserve No. 2 lands", dated July 19, 2018 (Respondent's Written Submissions at para 413; Ex-7 at 24).

[81] Further, Canada says the admission of evidence of surrounding circumstances in interpreting intent, as in *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, [2014] 2 SCR 633, indicates the two sources, the map marked "A" and Vowell's letter, can be drawn on to determine the terms of the surrender.

G. The Expert Evidence

[82] There are many points of difference in the evidence of Blair Smith and David Hardwicke, expert surveyors. Blair Smith presented evidence for the Claimant, and David Hardwicke was called by Canada. Their evidence had bearing on issues relating to the discipline involved in property description when drafting legal documents pertaining to parcels of land, and the associated interpretation of descriptions contained in such documents.

[83] The lands ultimately conveyed to the GTP by way of the letters patent, were first described in the handwritten minute of the Metlakatla Resolution, recorded by Indian Agent Morrow, February 7, 1906 (Ex-2, Tab 42). The motion was apparently re-drafted, typed, and certified by Indian Agent Morrow, following the first handwritten record, likely with the assistance of the land agent for the GTP, E. G. Russell (Ex-2, Tab 43).

[84] The next relevant description was drafted for the formal surrender taken by way of the procedure indicated in section 39 of the *Indian Act*, 1886 (Ex-2, Tab 58). This was prepared by the British Columbia Indian Superintendent, A. W. Vowell, who adopted essentially the same description as was used in the typed copy of the Resolution. He set out the description on a printed form designed for a section 39 surrender, and travelled to Metlakatla to be present at a meeting of most of the adult members of the Band on August 16 and 17, 1906. He took the signatures of the Band members present, and had the declarations accompanying the surrender sworn before a stipendiary magistrate. It is this document that requires the most significant focus in interpreting what was surrendered, compared to what was subsequently conveyed by the letters patent.

H. Discussion

[85] The three challenges founding the Claimant's position in relation to the boundary issue, relate to:

1. whether the Mainland portion of the reserve described in the letters patent included land adjacent to the north boundary of the parcel, not included in the surrender;

2. whether the "L" Islands were included in the surrender; and

3. whether the small islands, numbered 3 to 8, were surrendered.

[86] The letters patent land survey descriptions clearly follow the traditional rules of construction, without suggestion of ambiguity. The preamble identifies the four general areas, and locates the parcels using the more technical descriptions of the individual parcel boundaries. The boundaries describe the perimeters with precision, from point to point, closing each perimeter at the point of origin.

[87] In the case of the surrender, the text does not follow these strictures. The Mainland parcel

description of the east boundary has an indeterminate length—about two miles—and is not supplemented by reference to a fixed point (such as the northwest corner of Lot 443), or an annexed sketch settling the distance.

[88] The text references to the "L" Islands implies they are included in the Mainland parcel, which they are not, lying offshore and outside of the perimeter description of the Mainland parcel.

[89] The text of the surrender makes no mention of the small islands, numbered 3 to 8.

[90] Canada, in response to these deficiencies in the text, argues that the words of the surrender can be supplemented by extrinsic evidence of the surrounding circumstances of the Band's intention, which is said to have included the intention to set the most northerly point of the eastern boundary at the northwest corner of Lot 443, already acquired from the provincial land reserve (Respondent's Written Submissions at para 408). The assertion is that this was made clear by the references to the sketch Map A in the February 1–7, 1906, negotiations with the Band members. With reference to the "L" Islands, Canada says the words "so that these Islands are included in the portion to be surrendered", are determinative of their inclusion in the surrender notwithstanding the difficulties in the formalities of the description (Respondent's Written Submissions at para 473).

I. Surrender of Reserve Lands

[91] Sections 38–41 of the *Indian Act*, 1886, provide:

> **38.** No reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Act.
>
> **39.** No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions: —
>
> > (*a*.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;

> (*b*.) The fact that such release or surrender has been assented to by the band at such council or meeting, shall be certified on oath before some judge of a superior, county or district court, or stipendiary magistrate, by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some one of the chiefs or principal men present thereat and entitled to vote; and when such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal. 43 V., c.28, s. 37.
>
> **40.** Nothing in this Act shall confirm any release or surrender which, but for this Act, would have been invalid; and no release or surrender of any reserve, or portion of a reserve, to any person other than Her Majesty, shall be valid. 43 V., c. 28, s. 39.
>
> **41.** All Indian lands, which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act. 43 V., c. 28, s. 40.

[92] These sections make it clear that a surrender taken by way of the procedure indicated in the *Indian Act* is a formal transfer to the Crown to be certified on oath by the Superintendent General or his representative and a representative of the band to be "submitted to the Governor in Council for acceptance or refusal".

1. The Crown Duty on Receipt of a Surrender

[93] The title to reserve lands is *sui generis*, or, "[o]f its own kind or class" (*Black's Law Dictionary*, deluxe 10th ed, *sub verbo* "sui generis").

[94] Dickson J. in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, commented on the nature of the title to reserve lands and the Crown's role when acting for the band under the statutory provisions for surrender at page 382:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians'

> interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

[95] And at pages 383 and 384:

> The purpose of this surrender requirement [pursuant to the Royal Proclamation of 1763] is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians…." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, 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." Earlier, at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the matter in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

[96] In *Osoyoos*, at paragraphs 43–46, the significance of a surrender is marked by:

1. the *sui generis* or singular nature of the communal holding of reserve lands;

2. the fact that reserve lands cannot be unilaterally added to or replaced; and

3. the First Nations' interest in reserve lands is more than a fungible commodity, "[t]he aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land."

[97] In *Osoyoos*, consideration of these factors led to the following:

> Land may be removed from a reserve with the participation of the Crown, which owes a fiduciary duty to the band … Fiduciaries are held to a high standard of diligence. For this reason, as well as by reason of the foregoing principles, it follows that a clear and plain intention must be present in order to conclude that land has been removed from a reserve. [para 47]

2. Interpretation of the Surrender

[98] Construction of the surrender begins with the text of the surrender document. However, the Supreme Court of Canada has made clear that a surrender of reserve land is a transfer of a title of its own kind or class, and the "technical land transfer requirements embodied in the common law" should not "frustrate the intention of the parties" (*Blueberry River* at para 6). Indigenous peoples have a *sui generis* interest in their reserves (*Blueberry River*, per McLachlin J., at para 91). This "requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings" (emphasis added; *Blueberry River*, per Gonthier J., at para 7). Therefore, a valid construction of a surrender in this context is one that accords with Gonthier J.'s true purpose doctrine.

[99] In *Blueberry River*, the common law "technical land transfer requirements" identified by Gonthier J. was the fact that, at common law, an earlier 1940 surrender of subsurface rights would have prevented the intended surrender of all rights to the reserve lands in 1945. Gonthier J. found that it was preferable to "rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures [unrelated to the 1940 surrender] rendered the 1945 surrender of mineral rights null and void" (*Blueberry River* at para 7). Gonthier J. went on in *Blueberry River* to ultimately find for the Band in that the surrender was for the purpose of selling or leasing the land, and in the circumstances, the provident exercise of discretion would have been to retain and lease the subsurface rights

[100] Gonthier J. wrote for the 4-3 majority. In the minority decision, McLachlin J. found for the Band in that the 1940 surrender of subsurface rights had severed these rights, so that the 1945 surrender was inoperative in transferring the already transferred interest: *nemo dat quod non habet* ("he who hath not cannot give", *Black's Law Dictionary*, revised 4th ed, *sub verbo* "*nemo dat quod non habet*") was the common law doctrine McLachlin J. relied on to exclude subsurface rights from the 1945 transfer, and was also the common law restriction Gonthier J. avoided to give full

effect to the 1945 surrender.

[101] Gonthier J. went on to add this caveat (*Blueberry River* at para 14): "… I would be reluctant to give effect to this surrender variation if I thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."

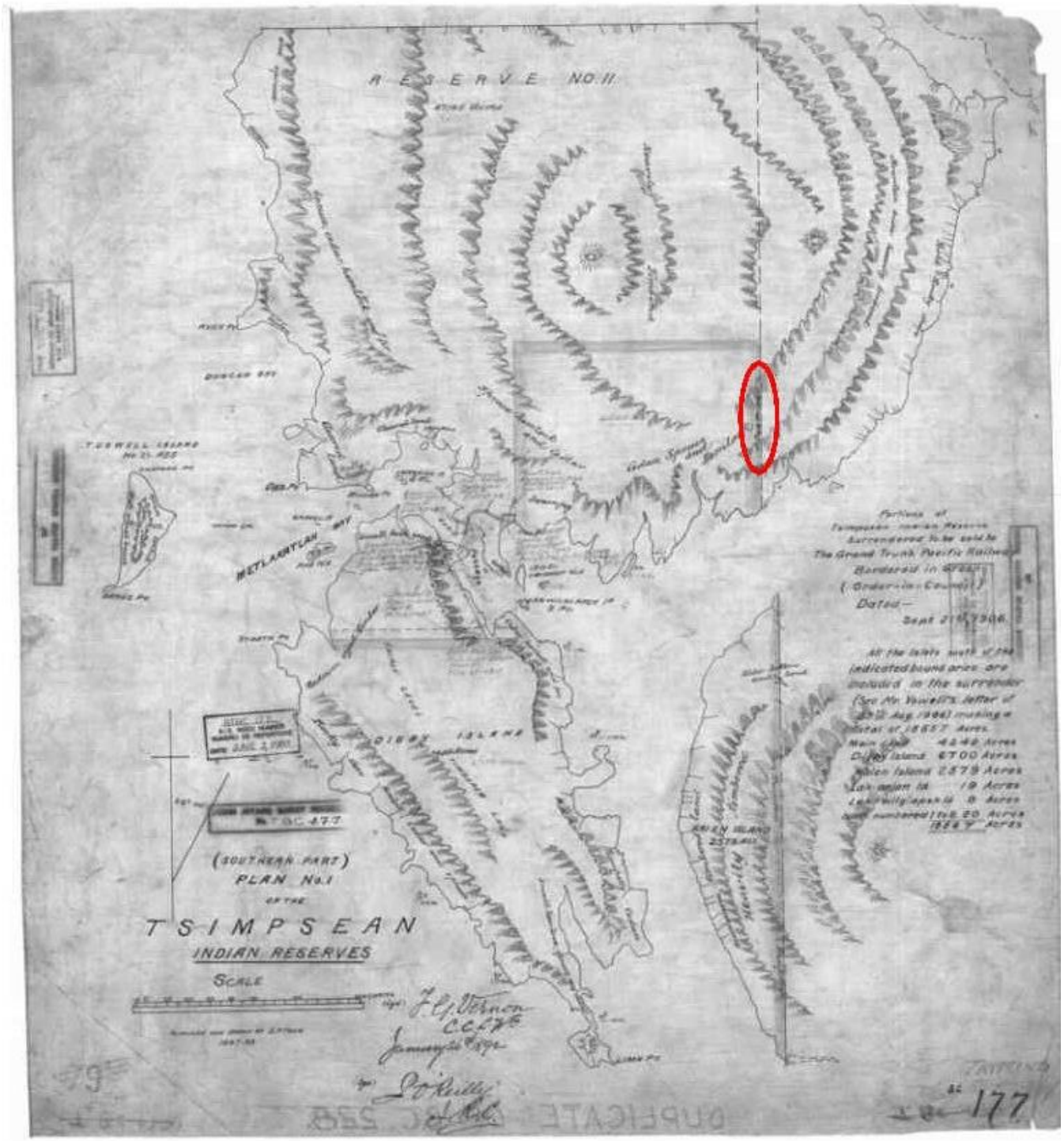
[102] I note that in the present case, the Respondent has not put forward a case of a common law requirement of property law frustrating the intention of the parties to the surrender, such as the *nemo dat* principle that would have otherwise frustrated the intended 1945 surrender in *Blueberry River*. Rather, the Respondent says the deficiencies in description in the surrender, in the case of the Mainland parcel and the "L" Islands, and the non-inclusion in reference to the islands numbered 1 to 8 in addition to the "L" islands in the letters patent should be supplemented by consideration of the extrinsic evidence it puts forward by way of Map A and Superintendent Vowell's letter, which the Respondent says establishes the parties' true intention, except in respect of Islands No. 1 and No. 2 of the eight. The Crown agrees that the parties' "true intention" cannot be gathered in respect of islands No. 1 and No. 2 identified in the letters patent, from this material. This is an exercise in determining intention that goes beyond a commonplace construction of the text of the conveyance, and based on Gonthier J.'s instruction to "go beyond the usual restrictions imposed by the common law" and give effect to a surrender's "true purpose," the Respondent encourages the Tribunal to consider this extrinsic evidence.

[103] Going so far as to examine the evidence of intention in this light, I note the following:

1. The evidence in relation to the north boundary of the Mainland portion does not establish an intention to join the north boundary of Lot 443. Map A is an unreliable document and cannot support this conclusion. The deficiencies in the joining of the two halves, and the inaccuracy in what it presents have been noted. The map makes no reference to Lot 443, the boundaries of which would have been unfamiliar in any event. The argument that the light and incomplete tracing line extending to the east of the north boundary of the Mainland parcel indicates a fixed point at the northeast corner of the parcel that coincides with the northwest corner of Lot 443,

is unconvincing. If it were so, why wouldn't the lot designation, Lot 443, have been noted?

Further, the evidence is that the distance of two miles was adopted as the particular of the length of the boundary by both the DIA and the GTP. The DIA Land Registry struck the modifier "about" from the registered surrender in the copy kept in the Land Registry and the depiction on Tuck's reserve survey plan stipulated two miles (Ex-5, Enclosure 3, red circle showing "Two Miles" added). See following map. chief surveyor Bray's first draft of the letters patent adopts the two-mile distance and a map produced by the GTP in 1906 shows a step down from the north boundary of Lot 443 to the north boundary of the Mainland parcel (Ex-5, Enclosure 11).


RESERVE NO. 11
(SOUTHERN PART)
PLAN No. 1
OF THE
TSIMPSEAN
INDIAN RESERVES
SCALE
177

1907 Map of Tsimpsean Peninsula produced by the GTP

(Ex-5 (Smith Report), Enclosure 11)

2. Islands No. 3 to 8 of the islands other than the "L" islands, are not specifically referred to in the surrender at all. Vowell's letter does make reference to islands "immediately contiguous" to Digby Island but the first two of these islands subsequently listed in the letters patent are near the Mainland portion and not in close proximity to Digby Island. There are more than six other islands in close proximity to Digby Island and Vowell does not specifically identify the six others included in the letters patent. I do not find Vowell's assurance of intention in this regard cogent evidence of inclusion of six specific islands and find it would be unsafe to rely on it to support the inclusion of the six of the eight islands listed in the letters patent Canada argues should be included.

3. However, in my view, the intention to include the "L" Islands in the surrender is sufficiently clear to support their inclusion in the letters patent. This is sufficiently established by the words of the surrender itself, and not as a result of considering extrinsic evidence. In fact, there is no extrinsic evidence offered in respect of their inclusion in the surrender. The strictures of land description are not followed in the surrender description, but there is sufficient meaning in "so that these islands are included in the proportion to be surrendered" to overcome the deficiency in drafting practice identified by Blair Smith, and support the "L" Islands subsequent inclusion in the letters patent on a construction of the meaning of the words of the surrender alone.

3. *Blueberry River*

[104] The authority of the law expressed in *Blueberry River* has to be understood in context. There are distinguishing features of *Blueberry River* from the facts of this case. There, the majority found that the intention to convey full title was clear from the wording of the surrender conveyance and extrinsic evidence and that the full extent of the surrender would have been frustrated by the *nemo dat* doctrine. Here, there are deficiencies in the words of the surrender and the extrinsic evidence does not provide a probable basis for a clear expression of Band understanding and intention.

4. The Hardwicke Opinion of Intention

[105] The decision whether extrinsic evidence is appropriate in a particular case and whether the court should rely on such evidence, is ordinarily a function of the court. David Hardwicke's conclusions on intent expressed in his July 19, 2018, report are predicated on his instruction from counsel to provide his opinions "as an expert surveyor, as to what was the true understanding and intention of Metlakatla to [the] surrender" (emphasis in original; Ex-7 at 6), and Hardwicke purports to analyse the evidence to offer an opinion on this true understanding and intention.

[106] In the reply report prepared by Blair Smith on July 19, 2018, he offers a different opinion (Ex-6 at 4): "In my opinion, surveyors do not possess special knowledge, training, or expertise to determine the true understanding and intention of a First Nation in a surrender of land using the 'Gonthier legal test' described at pp. 5-6 of the Hardwicke Report. Determining the true understanding and intention of the party of an authorized boundary line is beyond the scope of a land surveyor's role." I agree. Understanding the influence of legal authority and determining a factor such as intention, which will reference both construction of a document and determining what can be drawn from extraneous evidence, is the province of the court. Except in cases where an expert's technical knowledge which is likely outside the court's experience can assist in forming a correct judgment, expert evidence should not be accepted (*R v Mohan*, 1994 SCC 80, [1994] 2 SCR 9).

[107] Questions of intent are particularly within the experience of the Tribunal, and here where it is focused on what a lay group of Band members may have appreciated, either as reported in Vowell's letter, or from a sketch map as presented by E. G. Russell during the February 1–7, 1906, negotiations, there is little surveyors can offer based on their technical knowledge. David Hardwicke went on in his report to offer an interpretation of a comment in Vowell's handwriting, badly faded and stroked out, on the surviving copy of Map A. I appreciate Hardwicke was attempting to offer what he thought he could as a result of familiarity with descriptions of land, and that he might aid in offering some insight, but in so doing his opinion conflicted with an expert in handwriting analysis; all ultimately to no end, as by either view of what was written there were no words offered of significant technical meaning and, by either version, the comment was incomprehensible. Restraint was lacking in his offerings of opinion.

5. Canada's Fiduciary Duty on Surrender

[108] The Crown argues that the 1892 reserve, I.R. No. 2, was provisional until the reserve was actually conveyed to Canada after the 1938 settlement of the Province's claimed reversionary interest and transfer of reserve lands in British Columbia to the federal government, and was not subject to the *Indian Act* (Respondent's Written Submissions at para 566).

[109] The Crown's actions were inconsistent with this argument. The Crown consistently acted as if the *Indian Act* applied to the surrender of the reserve lands. The Crown administered the Reserve as part of the Tsimpsean Agency and informed the Indian Agent that the Department would have no objection to the GTP representative "taking up this matter with yourself and with the Indians", leading to the negotiations held on February 1–7, 1906. The surrender procedure accorded with the *Indian Act* in the same way as other surrenders of reserve land in other provinces. However, it is not necessary to rely on the *Indian Act* to find a fiduciary obligation on the Crown to deal with surrendered Indian lands in such a way as to prevent the Indians from being exploited. This fiduciary obligation originated well before the first *Indian Act*, and is described in the *Royal Proclamation* of 1763.

[110] As described at paragraph 94 of these Reasons, in *Guerin*, Dickson J. noted that the *sui generis* interest in Indian lands "gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians." Dickson J. added:

> The nature of the Indians' interest [in land] is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

[111] Dickson J. also stated at page 383 that the purpose of the surrender requirement pursuant to the *Royal Proclamation* of 1763:

> ... is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.

(This issue is discussed further at paragraph 197 of these Reasons.)

J. Conclusion re Letters Patent—Boundary Issues

[112] Because of the Crown's failure to conform with the surrender and its inclusion of land not within the description of the surrender, I find that the Claim is valid under paragraphs 14(1)(c) and (d) of the *SCTA*. Specifically, the Crown breached a legal obligation to the Claimant in its administration of the Band's Reserve lands and the illegal disposition of Reserve lands by:

1. Adding approximately 313 acres along the North boundary to the Mainland portion of the Reserve to the letters patent, land transferred to the GTP on June 25, 1907, without having received a Surrender to the Crown of this reserve land; and

2. Similarly, transferring eight of ten islands to the GTP on June 25, 1907 (islands identified as numbers 1 to 8 in the letters patent), although they were not specifically surrendered to the Crown.

[113] However, I find that the Claim is not valid with regard to Lak-Anian and Lak-Wilgiapsh Islands: despite deficiencies in the surrender document, there is sufficient evidence in the document itself to show that Metlakatla intended to surrender these islands.

IV. THE BREACH OF FIDUCIARY DUTY—IMPROVIDENT SALE ISSUE

[114] The Claimant says that Canada breached its fiduciary duties of loyalty, good faith, and full disclosure in its conduct in relation to the sale of the letters patent land to the GTP and failed to prevent an exploitive bargain by way of a sale at significantly less than market value.

[115] The following narrative makes reference to much of the material referred to in the letters patent-boundaries issue which is also useful in presenting the facts relating to the breach of fiduciary duty–improvident sale issue.

A. The Creation of the Grand Trunk Pacific Railway

[116] The Grand Trunk Railway dates to 1852. On March 31, 1903, the Grand Trunk Pacific Railway Company was incorporated to construct a transcontinental railway with a terminus on the Pacific Coast. The first transcontinental railway was the Canadian Pacific Railway (CPR), completed in 1885. The Pacific terminus of the CPR was chosen to be Port Moody, and later

Vancouver (Ex-12 at 147), but in the process various mountain passes and terminus locations were surveyed and considered. Notable amongst these were Port Simpson and Kitimat (Ex-12 at 122–24). From the time of construction of the CPR, a market developed fueled by speculation that land in proximity to the CPR stations or terminus locations, and later those of various other proposed railway projects, would dramatically increase in value.

[117] In the case of Port Simpson, 40 kilometres north of Prince Rupert, the site had been a location of a Hudson's Bay Company Fort since 1834. It was an early centre of North Pacific trade and had attracted about 2,000 people of Tsimshian ancestry, who lived around the fort during the period it was most active. The HBC Fort and the village site that became Lax Kw'alaams, was located on the south shore of Port Simpson, adjacent to what became the north portion of Tsimpsean I.R. No. 2. The harbour at Port Simpson was suitable for a terminus of the GTP, but in the course of years of land speculation, the land to the east of Indian Reserve No. 1, the HBC Fort, and land around the harbour, were in the hands of private individuals. A similar situation of private ownership of harbour lands existed at Kitimat.

[118] In 1891, a British Columbia government reserve was declared in the area reserving from alienation "all vacant Crown Land which is situated on the Tsimpsean Peninsula and which lies to the North of a line drawn due West from the head of Work Channel" (Ex-21, Tab 110). This government reserve, along with the roughly contemporaneous creation of the two parts of Tsimpsean I.R. No. 2 made unavailable the land south of Port Simpson, along the Tsimpsean Peninsula, including Kaien Island and Digby Island, from acquisition by private individuals. The entrance to Prince Rupert Harbour, and the harbour itself (then Lima Harbour or Tuck Inlet) was entirely within the boundaries of the southern portion of Tsimpsean I.R. No. 2 and the government reserve.

[119] Negotiations between the Government of Canada and principals of the soon-to-be incorporated GTP, led to an agreement July 29, 1903, which provided that the government would construct the eastern portion of the railway, with the Company to construct the western part to the Pacific (ASF at para 53). The government was to guarantee payments under GTP bonds issued to finance the construction of the western portion and grant the GTP any lands vested in Canada required for the western construction (see schedule of *The National Transcontinental Railway Act,*

SC 1903, c 71; Ex-50, Tab JBD-960).

B. The Pacific Terminus

[120] During 1903, an American railway contractor, Peter Larsen, met with a Victoria businessman, James Anderson, to discuss acquiring possible sites for the western terminus (Ex-24, Tab 179; Amended ASF at para 62). Anderson travelled to the area. He attempted to acquire written options to purchase lands at Port Simpson but found the asking price, $60 to $120 per acre, to be too high (Ex-24, Tab 179 (testimony before the Kaien Island inquiry at pages cxxvi-l, clxiv-v and clxv-vi); Amended ASF at para 62). On a second trip in December 1903, he concluded Prince Rupert Harbour (then Lima Harbour or Tuck Inlet) was the most suitable location for the terminus.

[121] Anderson and Larsen instructed a Victoria lawyer, Ernest Bodwell, to assist in acquiring land in the harbour area protected from alienation by the 1891 government reserve. Bodwell approached the British Columbia government proposing that the terminus be located on land within the government reserve on Tuck Inlet, and that the Province transfer to his clients a 10,000-acre parcel of the government reserve at a price of $1 per acre. He pointed out that locating the terminus on Tuck Inlet within the government reserve avoided the prospect that the terminus might be located on the southern portion of Tsimpsean I.R. No. 2, say on Digby Island, land that was administered by the federal government for the Metlakatla Band. Locating the terminus at Prince Rupert Harbour also avoided locations at Port Simpson and Kitimat, land which was in private hands and the sale of which would not benefit the British Columbia government (Amended ASF at para 67).

[122] On April 30, 1904, Provincial Chief Commissioner of Lands and Works, R. F. Green, recommended acceptance of Bodwell's proposal on two conditions:

1. the lands be used only for the western terminus; and

2. the work on the terminus must proceed in short order (Ex-22, Tab-140; Amended ASF at para 68).

[123] On May 4, 1904, an order in council was approved by the Lieutenant Governor in Council for British Columbia (Cabinet) granting Bodwell, as agent for the GTP, the right to select 10,000

acres most suitable for the railway terminus, for the price of $10,000. The grant was made subject to provisions similar to section 32 of the *Land Act*, RSBC 1897 c. 133, requiring reconveyance of 25% of any subdivided townsite lots to the Province.

[124] Bodwell was not to dispose of the land, except for the purposes of establishing the terminus and the associated townsite (Ex-22, Tab-140; Amended ASF at para 69).

[125] On March 6, 1905, Frank Morse, general manager of the GTP, signed an indenture approving of the terms associated with the 10,000-acre transfer, and on March 10, 1905, $10,000 was paid by the GTP and the Crown grant issued. The parcels were identified as Lots 251 (located on Kaien Island), Lot 444 (east of Prince Rupert Harbour), and Lot 443 (adjacent to the eastern boundary of the Mainland portion of the southern portion of Tsimpsean I.R. No. 2). The grant also expressly provided that one-quarter of any future town lots to be created, were to be conveyed to the Province, and the Province retained the right to have re-conveyed one-quarter of any land not divided into town lots or waterfront blocks (Amended ASF at paras 71–73).

[126] In securing agreement in respect of the 10,000 acres selected from the government reserve, throughout the land acquisition, Bodwell appears to work closely with the GTP in addition to his relationship with Larsen and Anderson. Questions arose in the British Columbia legislature about the conveyance and an inquiry was held beginning in February 1906 to determine if there were any improper payments associated with the acquisition of the 10,000 acres (Ex-24, Tab 179). The government members of the commission concluded there were none (Ex-24, Tab 180, at para 22).

[127] The May 4, 1904, order in council, granting the right to purchase the 10,000 acres, did not become public knowledge until May 1905 (Ex-24, Tab 157).

[128] Almost contemporaneous with the acquisition of the government reserve lands, the GTP indicated it wanted to acquire Indian reserve lands in addition to the 10,000 acres of government reserve. In a May 26, 1904 letter to Deputy Superintendent General of Indian Affairs, Frank Pedley, GTP second vice president William Wainwright, (Ex-22, Tab 141), indicates an interest in acquiring reserve land which he describes as required should the Company decide to locate the terminus at Port Simpson, but the sketch he attaches is likely a May 20, 1904 sketch, indicating the land required is the westerly portion of Kaien Island at the entrance to Prince Rupert Harbour

(Ex-50, Tab JBD-164). A later August 12, 1904, GTP plan shows two terminus sites, one on the northern portion of Tsimpsean Indian Reserve No. 2, just below the Lax Kw'alaams village, near Port Simpson, and the second, on the west side of Kaien Island on the southern portion of Tsimpsean Indian Reserve No. 2 (Ex-22, Tab 143). The plan was submitted to the federal Minister of Railways, in charge of approving railway infrastructure, but was not approved as two terminus sites were not reasonably necessary and the plan appears to be a contingency plan for a possible terminus at either location **(**Ex-50, Tab JBD-173**)**. This was the last indication in the documentary evidence that the GTP was advancing a proposal to the DIA in regard of a site on the northern portion of Tsimpsean Indian Reserve No. 2 (Port Simpson).

[129] Although there are references in later material to Port Simpson, the Port Simpson reserve, etc., these are general references naming the most recognizable place name and the context or other associated documents indicate the relevant area is the harbour area that became Prince Rupert Harbour. In Pedley's letter to Morrow, he informed that the GTP had applied for land in the "Port Simpson, Digby [Island] and Kaien Island reserves" (Ex-50, Tab JBD-213). There were no Port Simpson, Digby Island and Kaien Island reserves. The GTP was interested in acquiring land around Prince Rupert Harbour under the incorrectly named "Port Simpson, Digby [Island] and Kaien Island reserves." This land was in reality all within the south portion of Tsimpsean Indian Reserve No. 2.

[130] On March 9, 1905, Morse wrote to the Premier, Richard McBride, proposing a bill that would grant the GTP a number of concessions:

1. a right-of-way for the railway across the Province;

2. 15,000 acres for each mile of railway line;

3. a 30-year exemption from provincial taxation;

4. the right to take stone timber and gravel from provincial lands; and

5. an exemption from section 32 of the *Land Act* (25% transfer back to the Province) in respect of any town sites created on granted lands.

[131] In return the GTP would, *inter alia,* commence construction from its Pacific terminus, east to the Rocky Mountains. McBride declined the proposal. This appears to be the first approach for a comprehensive arrangement with the Province accommodating the construction of the railway (Ex-50, Tab JBD-993).

[132] With respect to the Pacific terminus, on February 21, 1905, Bodwell and Lawson, acting for the GTP, wrote to the provincial Chief Commissioner for Lands and Works (CCLW) advising that Indian reserve lands adjoining Lot 251 on Kaien Island, were necessary for "the railway yards, coal docks, etc." (Ex-50, Tab JBD-175). He proposed that on acquiring the Band's interest in the reserve lands from Canada the Province should convey the required lands to the Company, retaining a one-quarter interest in the lands. His letter states:

> You know that the Indian title must be first extinguished. The Company will be obliged to deal with the Government of Canada on that subject … it seems to us fair to suggest that the [British Columbia] Government, after the Indian title is extinguished, should convey that portion of the lands required by the Company and should retain a one-quarter interest in those lands.

[133] This proposal is similar to what would have been required on obtaining land from the Province under the *Land Act*, but without the requirement of a per-acre payment.

[134] On March 17, 1905, Premier McBride wrote to Morse to inform him that no disposition of (formerly) reserve lands could be made until "the Dominion Government removes the Indians from the reserve, or from that portion thereof with which it is intended to deal" (Ex-24, Tab 165). He goes on to state that the provincial government was willing, should the GTP satisfy the CCLW that the land is necessary for railway purposes, that no disposition of the land would be made without offering the Company the opportunity to purchase it.

[135] The GTP appears to discontinue its approach to the provincial government at this point and to concentrate on securing Indian reserve land. In April 1905, Wainwright again wrote to Pedley about an application to be made to also acquire Digby Island, across from Kaien Island, asking that the land not be otherwise dealt with until the application was made (Ex-24, Tab 154).

[136] Ultimately, on November 28, 1905, Pedley wrote to Indian Agent Morrow, advising that the GTP had made applications to secure part or all of the lands in the Port Simpson, Digby, and Kaien Island reserves (in reality the south portion of Tsimpsean I.R No. 2), and that consent of the

Indians was likely necessary. The text of the letter goes on to advise:

> ... should Mr. E.G. Russell, the [GTP] Railway Company's representative, call upon you, with a view of discussing and taking up this matter with yourself and with the Indians, the department has no objection to this being done. [Ex-50, Tab JBD-213].

[137] Russell contacted Morrow in late January 1906, and presented a letter addressed to Morrow, dated January 15, 1906. The letter stated that the GTP:

> ... having before it the locations of Kittemat, Kai-En Island and Port Simpson, the management has decided that to use Kai-En Island they would require Digby Island containing some 7,800 acres, a block on the Tsimpsean Peninsula running along Venn Passage containing some 6,145 acres, and that part of Kai-En Island in the Indian Reserve containing some 2,590 acres, making a total of 16,535 acres more or less, See a Tracing map attached.
>
> I would be glad to learn from you the best possible terms on which the Metlakatla Indians would agree to surrender their rights in these portions of their Reserves. [Ex-24, Tab 170]

[138] Morrow presented the proposal to the Metlakatla Council on January 31, 1906 (Ex-24, Tab 175). They called a meeting of the Band membership for the next day, February 1, 1906. Morrow's report to Pedley, dated February 14, 1906, gave an account of the meetings with Russell over the six days of negotiations until a consensus was reached. In respect of the land they would agree to surrender, the Band members decided:

1. that they would retain the north end of Digby Island, used as a garden location and burial site but otherwise surrender the rest of Digby Island;

2. that they would retain a portion of the Mainland parcel sought by the GTP (retaining a block of the reserve closest to the Metlakatla village) but otherwise surrender the Mainland parcel to a north boundary of "about two miles"; and

3. to surrender all of the portion of the reserve on Kaien Island.

[139] Russell first offered $5 per acre to be paid for the surrendered lands which the Band rejected. The Band then proposed $10 which Russell said was out of the question, as the GTP had purchased the townsite on Kaien Island from the provincial government for $1 per acre. There appeared to be an impasse until finally agreement was reached when the Band accepted an offer

to split the difference at $7.50 per acre, if the Company agreed to accept the land they were willing to surrender. Russell agreed to this proposal.

[140] Morrow reported that the Band then took up the question of disposition of the amount to be realized from the sale of the land to be surrendered. The Band stipulated that they would agree to the surrender of the land if the DIA would consent to one-half of the amount to be received to be equally divided among the Band members over the age of 21 years, and the balance to be put at interest by the Department for the Band and a like sum paid out to younger Band members as they attained the age of 21 years, with the interest earned on the balance going to reserve repairs, maintenance and improvements. Morrow estimated that the individual payments to the Band members, roughly 100 of whom would be entitled, would be approximately $500. Further agreement was reached with Russell that $1,500 would be advanced to the Department to reimburse individual Band members for gardens they kept on the land to be surrendered (Ex-24, Tab 175).

[141] The handwritten resolution, marked "C" in Morrow's reporting letter, prepared by Morrow and signed by the male Band members present, recites that the meeting of the Band assembled to consider the advisability of surrendering:

> ... Kaien Island, parts of Digby Island and a portion of the Reserve on the Mainland bordering on Venn Passage, and Tucks Inlet, as applied for by Mr. E.G. Russell … as per letter dated January 15th 1906 … and shown on plans and map marked A, except certain portions on Digby Island and the Mainland retained as Indian Reserve [does] approve of surrendering to [His Majesty the King Edward VII] the said lands, provided satisfactory arrangements … regarding price, which is agreed on, viz, $7.50 per acre, and satisfactory settlements for individual claims for gardens etc, … and also that satisfactory arrangements can be made with the [DIA] … as to the appropriation of the amount realized by the sale of said lands … [Ex-2, Tab 42]

[142] The Resolution goes on to recite the distribution of one-half of the proceeds to "Metlakatla Indian men, and women of the full age of twenty one years", and the further provisions for those to attain the age of 21 years and the payment of interest for community use.

[143] The Resolution is signed by 36 of the male members of the Band, whose signatures were witnessed by Indian Agent Morrow and Bishop Du Vernet, of the Anglican Church Diocese.

[144] The subsequent typed Resolution prepared by Morrow describing the lands to be

surrendered was meant to provide in a more formal fashion the metes and bounds description of the lands to be transferred (Ex-1, Tab 1). It was attached and marked "B" in Morrow's report to Pedley. He also attached the Map A from Russell's January 15, 1906, letter and the separate Resolution listing the payments to be made to compensate for gardens within the surrendered area (Ex-1, Tab 5; Ex-2, Tab 42).

C. The Narrative from the February 7, 1906, Resolution to the Surrender

[145] The Resolution relating to the proposed surrender of the reserve lands for the sale to the GTP, stirred a long-standing dispute involving the federal and provincial governments. Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10, was a section of the Terms of Union adopted by the provincial and dominion governments on British Columbia joining Confederation in 1871. Article 13 provided:

> 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 ... 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 …

[146] The provincial government deemed that the interest to be conveyed to the Dominion to be held in trust, was limited to the use and benefit of the reserve lands and the legal title to the lands remained with the Province and should the Reserve lands no longer be necessary for the purposes of the Band, the beneficial interest would revert to the Province. In the Province's view, a surrender under the *Indian Act* operated to concede that the reserve lands were no longer necessary for the Band's purposes and the reversionary interest should immediately take effect (Ex-24, Tab 232).

[147] This position referenced terms of a federal-provincial agreement reached in 1876, setting up a joint commission (the Joint Indian Reserve Commission) to establish reserves throughout the new Province which was empowered to add to reserves or reclaim reserve land if deemed no longer necessary for Band purposes.

[148] The Province's claim to a reversionary interest was known to the federal government, and after receipt of the Metlakatla Resolutions, Frank Oliver, Superintendent General of Indian Affairs, in a report to the Governor General in Council advised that:

> ... it will be necessary to obtain from the Indians a surrender in accordance with the provisions of the Indian Act; but, before submitting the question of surrender to the Indians, it is considered advisable to ask the British Columbia Government to waive its claim to any reversionary interest it may have in the land under the agreement come to between the Province of British Columbia and the Dominion in 1876 as regards the setting aside of reserves for the Indians in that province. [Ex-24, Tab 186]

[149] Oliver went on to highlight that it was in the public interest of both governments that:

> ... the [GTP] should be allowed to acquire this land for terminal purposes, thereby affording a great benefit to both the Dominion and the Provinces generally, as well as enhancing the value of the lands adjacent thereto, and in the vicinity thereof, and of the remaining portion of the reserve (comprising an area of about 16,000 acres) to such an extent as to realize a sum equal to or greater than the present value of the reserve as now constituted ... [Ex-24, Tab 186]

[150] He recommended the provincial government should be approached to obtain its consent to "waiving any reversionary interest the Province may claim" (Ex-24, Tab 186).

[151] This action was taken by way of a minute of the Privy Council, dated April 2, 1906, conveyed to the provincial government. The provincial reply came by way of a communication stating the British Columbia Executive Council's position that the provincial "Government cannot favourably consider the … suggestion" (Ex-24, Tab 198).

[152] The GTP remained committed to the agreement set out in the Resolution. In a letter from Frank Morse to the GTP assistant solicitor, D'Arcy Tate, June 27, 1907, he stated:

> I place the greatest importance and value upon the Agreement that Mr. Russell has with the Indians, and which was made with the consent of the Government, i.e. we were told we might proceed and make the best arrangement possible. I do not want the advantage that we have gained in this respect lost, by the Agreement being cancelled, and the Government sending their representative to negotiate with the Indians, for the reason that we have had one experience of this kind, at Fort William, where it cost us over $200,000 more than it really should. [Ex-24, Tab 202]

[153] The Fort William reference is a comment relating to 1,600 acres of reserve land at Fort William acquired for a railyard on Lake Superior. In that case the DIA appointed the Surveyor General to set a value for the land, ultimately sold for $244,574, or approximately $90/acre, excluding improvements (Ex-12 at 110, 150).

[154] Tate, the GTP assistant solicitor, advised in a letter dated July 16, 1906, that it was

inadvisable to close the agreement with the Dominion government "until we have arranged with the Province of British Columbia for a relinquishment of their claims in respect of the lands" (Ex-24, Tab 207).

[155] Despite this advice, the GTP decided to proceed. In Tate's July 17, 1906, letter to Deputy Superintendent General, Frank Pedley, he stated the Company is prepared to accept a patent:

> ... the patent to be issued and accepted without recourse against the Dominion in case of the establishment of any claim in respect of a reversionary interest in the Indian Reserves in question by the Province of British Columbia. You will therefore kindly instruct Mr. Superintendent Vowell of Victoria to proceed to Metlakatla and obtain from the Indians the necessary surrender in accordance with our previous arrangement. [Ex-24, Tab 208]

[156] On July 18, 1906, Pedley wrote a letter of instruction to Vowell to proceed to Metlakatla to take a surrender of the reserve lands comprising about 13,519 acres in accord with the plans and descriptions contained in the earlier DIA correspondence (Ex-2, Tab 50). Pedley notes that the earlier agreements (Resolutions) stipulated 50 percent of the proceeds should be paid to the Band members in cash, but at the time the *Indian Act* only allowed for payments of 10 percent directly to Band members. He said that in the present session (of Parliament) this had been amended to allow a 50 percent direct payment, but that the remaining 50 percent could not be dedicated as the Resolution intended, and only interest on the 50 percent balance could be guaranteed for the purposes of payment to Band members as they became of age and payment of reserve improvements (Ex-2, Tab 50).

[157] The surrender and Resolutions taken by Vowell on August 16 and 17, 1906, used the land description from the typed version of the earlier resolution and a new resolution was taken for distribution of the proceeds which conformed to Pedley's instructions (Ex-2, Tab 51).

[158] As earlier described, the further dealings with the GTP resulted in the ultimate expanded description contained in the letters patent issued June 25, 1907 (Ex-2, Tab 91).

[159] This left only the Province's reversionary claim unresolved.

D. Settling the Province's Reversionary Claim

[160] In the early effort to deal with the Province's reversionary claim above described, Bodwell

and Lawson, on behalf of the GTP wrote to the provincial CCLW on February 21, 1905, in respect of land needed for the terminal location on Kaien Island to be acquired from the reserve lands, saying that they had conferred with Morse "and it seems to us fair to suggest that the [British Columbia] Government, after the Indian title is extinguished, should convey that portion of the lands required by the Company and should retain a one-quarter interest in those lands" (Ex-50, Tab JBD-175).

[161] In March 1907, the Province attempted to take possession of the reserve lands on Kaien Island as having reverted to the Province through the surrender accepted by the DIA (Ex-50, Tab JBD-462). In a March 26, 1907, telegram from Morse to Premier Richard McBride, Morse picked up on the unresolved issue of the reversionary interest. He informed the Premier that work in developing the townsite made it necessary to clear title to the reserve lands on Kaien Island and he inquired if the Province was willing to discuss the matter (Ex-50, Tab JBD-374).

[162] McBride replied on March 27, 1907 (ASF at para 183), informing that British Columbia would not concede title to the reserve lands, and further that British Columbia would not concede that the transfer of the reserve lands had any connection to the agreement involving the GTP and the Province regarding the townsite (Ex-50, Tab JBD-376). This was a likely reference to the assurance in the agreement to purchase the 10,000 acres from the provincial government reserve, that the terminal would be located on the 10,000 acres purchased by the GTP, and the fact that this assurance conflicted with the position of the GTP that they needed additional reserve lands for this purpose. On March 28, 1907, Morse advised McBride in a further telegram, that the reserve land was "[e]ssential to complete development of plans for model terminal city" and asking again for discussions and "on receipt of [a] favorable reply will immediately arrange for [a] conference with a view to final settlement" (Ex-50, Tab JBD-378).

[163] The reply is not in the record, but on April 6, 1907, Morse thanked McBride for a message the previous day informing that the government was prepared to discuss, on a without-prejudice basis, "disposing to us of your reversionary rights in indian reservation which are necessary to us in order to fully develop our plans" (Ex-50, Tab JBD-382).

[164] This prefaced a Montreal meeting between Morse and McBride who was travelling on to England. In a letter to McBride the day they were to meet, April 17, 1907, Morse states that the

GTP does not challenge the Province's reversionary rights, and the Company's desire was "to negotiate with you … with the view of purchasing them ... in order to include this land in our Prince Rupert lay-out and provide for the future development" (Ex-50, Tab JBD-384).

[165] In a July 2, 1907, letter to W. Wainwright, GTP second vice president, who was taking over the Prince Rupert development, Morse related that after the Province had tried to take possession of the Kaien Island reserve land in March 1907, an agreement was reached with McBride at the April 17th meeting but that the provincial cabinet refused to ratify the terms, and instead made a counter-proposal which Morse found unacceptable. He stated that the Province owned:

> ... but a reversionary interest in the Metlakatla Reserve. In fact, it is only for the necessity of securing the right to immediate possession of the land and the uninterrupted prosecution of our work that we were willing to concede a certain interest on the part of the Province and to pay them for this ... [Ex-50, Tab JBD-462; I have concluded the author was Morse as a result of the reference to the exchange of telegrams and the meeting in Montreal].

[166] It is clear that Morse found the additional terms proposed by the cabinet to be unacceptable. He found the new British Columbia position to amount to "a most inconsistent and extortionate claim" and he was lobbying McBride to abide by their earlier agreement.

[167] The next record of this negotiation is an August 7, 1907 telegram, from McBride to Charles Hays, the GTP president, stating that the full cabinet "finally concludes [the] offer" (Ex-50, Tab JBD-467). The terms he relates are:

1. to divide waterfront lots in respect of reserve lands into blocks, one-third of which to be taken by the Province;

2. the government to retain a one-half interest in all other lands;

3. the GTP to pay $2.50 (per acre; see ASF at para 194) for the whole tract;

4. the GTP to complete townsite surveys;

5. the GTP to commence railroad construction, from Prince Rupert to the Railroad Summit; and

6. the GTP to purchase all supplies (for this construction) in British Columbia markets.

[168] The above terms are construed from the truncated language of the telegram which is unclear as to what waterfront land or other lands were being referred to, but it seems clear that at least a framework for an offer was proposed along these lines.

[169] An article in the Prince Rupert Empire, dated January 11, 1908, noted that GTP second vice president Wainwright was in Victoria to "bring about a settlement of existing differences between the G.T.P. and the McBride government over the 13,000 and odd acres of land the railway purchased from the Indians" (Ex-50, Tab JBD-499).

[170] Finally, on February 29, 1908, a comprehensive agreement was reached, which subsequently was set out in Bill No. 74, an *Act respecting the Grand Trunk Pacific Railway*, March 7, 1908 (Ex-24, Tab 257).

[171] The recital in the statute stated that the lands acquired by the GTP "are necessary for the terminal arrangements of the Company, and it has been made to appear to the Government that the work of construction of the said railway through the Province cannot be proceeded with until such terminal arrangements have been concluded and the land necessary therefor[e] secured by the Company". The agreement ratified by the statute contained the following terms:

1. the Province is to sell its interest in the letters patent lands for the price of $2.50 per acre, and is to have re-conveyed to it, one-quarter of all subdivided lots and blocks;

2. the townsite of Prince Rupert, not less than 2,000 acres, is to be surveyed and set out in a plan to be approved by the Province;

3. the Province agrees to grant the Company a 100-foot right-of-way for the railway across Crown lands in British Columbia;

4. the Company was to have the right to take stone, timber, gravel, and other material necessary for the construction of the railway from vacant Crown lands;

5. the Province was to grant to the Company any vacant Crown lands necessary for sidings, stations, embankments, bridges, etc.;

6. the Company was to be exempt from tax under section 6 of the BC *Railway Assessment Act*, for a period of 10 years; and

7. the railway was to commence construction from Prince Rupert and continue to the eastern boundary of the Province, and purchase materials in the Province if terms were equally favourable as elsewhere and pay for labor at rates otherwise comparable.

[172] This agreement appears to be the conclusion to the original proposal made by Morse to McBride on March 9, 1905, and with this agreement in place, the GTP was now in a position to develop the terminus and townsite at Prince Rupert and to begin construction of the railroad across the Province.

E. The Claimant's Position, Breach of Fiduciary Duty—Improvident Sale

[173] The Band says that Canada's conduct in relation to the surrender was to facilitate the GTP acquisition of the lands, rather than to safeguard the interests of the Band. The Claimant says Canada was committed to the construction of the railroad and GTP's success in securing the lands it wanted for the western terminus at a low acquisition price (Claimant's Written Submissions at para 240).

[174] The Claimant says that Canada viewed the railway as being in the public interest, was a partner in the construction of the railway, and was financially exposed as guarantor of GTP bonds (Claimant's Written Submissions at para 244).

[175] The Band says Canada facilitated the GTP's contact with the Band to acquire the reserve lands, but did nothing to inform the Band of the GTP's interest in the Reserve, assist in determining the market value of the lands, or advise how to deal with the Company (Claimant's Written Submissions at paras 246, 249).

[176] The Claimant notes that the lands acquired by the company for the most part were not

required for the operation of the railway, but were part of the GTP's land acquisition for the purpose of development and resale in order to profit from the enhanced value to be realized from the location of the terminus (Claimant's Written Submissions at para 251). Lastly, the Claimant argues that the $7.50 per acre price was improvident and Canada failed to prevent exploitation of the Band in consenting to the surrender and facilitating the sale to the GTP (Claimant's Written Submissions at paras 275–76).

F. The Respondent's Position, Breach of Fiduciary Duty—Improvident Sale

[177] Canada argues that the surrender of Tsimpsean I.R. No. 2 was prior to the 1938 order in council (OIC 1036), which transferred title to reserve lands from British Columbia to Canada, and accordingly the Reserve was a provisional reserve, as indicated in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]. Canada says the surrender provisions under the *Indian Act* were not required, and that its obligations to the Band were limited (Respondent's Written Submissions at paras 15, 17).

[178] Canada says that it was not in a position to ignore public interest demands in respect of the railway, and that it met all relevant fiduciary standards and its duty to the Band (Respondent's Written Submissions at paras 22–23).

[179] Canada argues that the Band was properly advised, in that the letter from Deputy Superintendent General Pedley to Indian Agent Morrow, dated November 28, 1905, gave the information that the GTP had filed applications with DIA to secure reserve lands (Respondent's Written Submissions at para 108).

[180] Further, that Indian Agent Morrow and Bishop Du Vernet were present at the negotiations to assist the Band members (Respondent's Written Submissions at para 456).

[181] Canada disputes that the payment of $7.50 per acre was improvident (Respondent's Written Submissions at paras 162–63) and says that Canada was under no obligation to refuse the surrender, or to renegotiate the proposed sale. Canada argues the sale price was at market value in light of comparable sales data (Respondent's Written Submissions at para 188) and the fact that the Province of British Columbia challenged the title to the land, asserting a reversionary interest

that would have disentitled the federal government from conveying the land to the GTP (Respondent's Written Submissions at para 80). Further, that it was not a reasonable certainty that the terminus would be on Kaien Island and that other locations were reasonable alternatives (Respondent's Written Submissions at paras 26, 28).

[182] Canada says that as fiduciary its obligation was to ensure that the terms chosen for the surrender were "not unreasonable" and that "Canada was not required as a fiduciary to deliver a particular result" (Respondent's Written Submissions at paras 155, 161).

G. The Fiduciary Duty in Respect of British Columbia Reserve Lands, Pre-1938

[183] The early history of colonial reserves set up to protect Tsimshian territory from alienation served both colonial and First Nations purposes. The Tsimshian people were the dominant population and a key element in the operation of the HBC's Fort Simpson outpost, the major commercial enterprise in the area. The colonial reserves had the effect of:

1. satisfying the Tsimshian First Nations people that their traditional territories would continue to be assured to them; and

2. serving the colonial government's interest in not being challenged by aggressive resistance, which posed a threat to the few non-Indigenous occupants of the territory.

[184] During the more formal period of reserve creation following British Columbia joining Confederation in 1871, the previous Tsimshian colonial reserves were brought into the process of creating reserves intended to be administered by the federal government on behalf of the bands, in accordance with the obligations set out in Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10.

[185] Because of the division of the larger Tsimshian coastal population into the two communities, Lax Kw'alaams at Port Simpson and Metlakatla at Venn's Passage at the entrance to Prince Rupert Harbour, the larger Tsimpsean I.R. No. 2 was split roughly in half, with the southern portion dedicated to Metlakatla. I.R. No. 2 was set out by the Royal Commission on Indian Affairs Commissioner, O'Reilly, ratified by the provincial CCLW and surveyed with the

surveys being accepted, again by the CCLW (Ex-50, Tab JBD-153). This was as far as title to reserve lands could be assured in light of the continuing dispute between the federal and provincial government relating to the Province's claim to a reversionary interest and its entitlement to assume complete title to reserve lands, should the lands be deemed no longer necessary for the use and benefit of the First Nation.

[186] This dispute persisted until 1938, when British Columbia OIC 1036 determined the Province should only resume title if the particular Band became extinct. In other respects, the order in council provided that title to reserves was to be conveyed to the federal government to be administered in accord with the *Indian Act.*

[187] The federal duty to the First Nations in British Columbia during the period of "provisional" reserves, lands dedicated in accordance with the federal–provincial reserve creation process, for which title was not transferred from British Columbia to Canada, with title being retained by the Province until 1938 in accord with its claim to a reversionary interest, was recognized in *Wewaykum*. The federal role was found to be more extensive than that of fulfilling a public law obligation to participate in reserve creation. It extended in the circumstances of *Wewaykum* to duties to fulfil "the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (*Wewaykum* at para 86). The actions of the Crown in the circumstances giving rise to *Wewaykum* were in distributing reserve lands dedicated to two bands which shared a similar heritage. The reserve in question had already been allocated from British Columbia Crown lands and neither band had a history of traditional occupation of the site in question. In these circumstances, the duties of the federal Crown to the bands were as above indicated.

[188] In *Wewaykum*, the court found that the Crown's fiduciary obligations applied when a "cognizable Indian interest" was identifiable and that the content of the Crown's fiduciary duty varied with the nature and importance of the interest to be protected (paras 85–86). Before 1938, the Crown's fiduciary role in administering reserves was "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", and after 1938 the higher

preserve and protect duty inherent in the *Indian Act* came into effect on receipt of full title to the reserve lands (*Wewaykum* at para 104).

[189] In this case, both Canada and the Claimant have accepted that the lower "ordinary prudence" standard 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" applied to the south portion of Tsimpsean Indian Reserve No. 2, dedicated to Metlakatla at the time of the surrender (Claimant's Written Submissions at para 238; Respondent's Written Submissions at para 151). (At paragraph 151 of its submissions, Canada also recognizes, citing *Southwind v Canada*, 2021 SCC 28 at para 64, 459 DLR (4th) 1, that in the context of a surrender, the standard of care of a fiduciary requires, among other things, "that the Crown protect against improvident bargains".)

[190] In the present case, the Claimant says the federal Crown had the duties outlined in *Wewaykum* and, with respect to the surrender, the Crown had the duty to "exercise ordinary diligence to prevent an exploitative bargain", in its participation in the narrative starting with facilitating the original meeting with the GTP agent, Russell; drafting and accepting the surrender; and conveying the lands surrendered, along with additional land, to the railway company (Claimant's Written Submissions at para 238).

[191] Canada's position, at paragraph 17 of its Written Submissions, is that "[w]hen parts of the 1892 Provisional Reserve were surrendered for the GTP in 1906, a surrender under the *Indian Act* was not required for those lands because the lands were not yet an *Indian Act* reserve", and because in Canada's submissions, the surrender provisions of the *Indian Act* were suspended "to allow the process of reserve creation to take place."

[192] It is difficult to understand how a suspension of such provisions could aid reserve creation to take place, but more significantly, Canada, in the decades leading up to OIC 1036, had assumed its constitutional role of responsibility for Indians and Indian lands in British Columbia, essentially in the same manner as in other provinces. Canada took on the role of requiring a surrender in this case and instituted the process it deemed necessary for the surrender and sale of the lands. The process it adopted was to follow the procedures of the *Indian Act* and the printed surrender taken from the Band expressly transferred the subject lands "in trust to dispose of the same to such person

or persons, and upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people" (Ex-2, Tab 51).

[193] Yet Canada submits that the process of surrender to the Crown under the provisions of the August 17 document drafted by Canada, was a process limited or suspended in its effect in the circumstances of a provisional reserve and suggests it had limited responsibility to the Band in the GTP acquisition of reserve lands. Such a submission in light of the express provision in the surrender is in conflict with fair dealing required by the Honour of the Crown (*Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 32, [2004] 3 SCR 511; *Osoyoos Indian Band v Her Majesty the Queen in Right of Canada,* 2012 SCTC 3 at para 110). The honour of the Crown is always at stake in Crown dealings with Indigenous peoples (*R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324). The Crown has an obligation to act honourably in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties (*Haida Nation v British Columbia (Minister of Forests),* [2004] SCC 73 at para 17, [2004] 3 SCR 511). I reject the assertion that the provision to dispose of the surrendered lands upon such terms as Canada "may deem most conducive to our welfare and that of our people" was not effective during Canada's dealings with respect to the sale of the surrendered lands to the GTP. The Tribunal will assume that "the Crown intended to fulfil its promises" (*R v Badger*, [1996] 1 SCR 771 at para 47, 133 DLR (4th) 324).

[194] I find the Crown duties express in *Wewaykum* 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 interests of the aboriginal beneficiaries, as admitted by the Parties applied to the Crown from the onset of the introduction of the GTP agent Russell and the GTP proposal to acquire reserve lands, to acceptance of the surrender and arranging for the sale of the surrendered lands; and that terms of the surrender obliging Canada to dispose of the surrendered lands upon such terms as Canada deemed most conducive for the Band's welfare, were in place in Canada's dealings with respect to the sale of the surrendered lands to the GTP, along with the admitted duty to avoid an improvident bargain indicated in *Blueberry River.*

H. The Providence of the Sale

[195] In *Blueberry River,* McLachlin J. stated, at paragraphs 33 and 35, in a minority concurring

opinion that has been widely cited:

> The first issue is whether the *Indian Act* imposed a duty on the Crown to refuse the Band's surrender of its reserve. The answer to this question is found in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, where the majority of this Court, *per* Dickson J. (as he then was), held that the duty on the Crown with respect to surrender of Indian lands was founded on preventing exploitative bargains.
>
> …
>
> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation. As Dickson J. characterized it in *Guerin* (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident — a decision that constituted exploitation — the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.

[196] Also from *Blueberry River*, the standard of care for the Crown as fiduciary is expressed as being that of a person "of ordinary prudence in managing [their] own affairs" (para 104, citing *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at 315).

[197] *Blueberry River* is a post 1938 case that makes reference to the *Indian Act* procedures in place at the time of the surrender and subsequent sale of the bands' reserves. The fiduciary obligation to protect from an improvident dealing, however, as earlier discussed, dates to the *Royal Proclamation* of 1763, as Dickson J.'s comments in *Guerin*, at pages 383 and 384, show:

> The purpose of this surrender requirement [pursuant to the Royal Proclamation of 1763] is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians…." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests

> in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one. Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7, 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." Earlier at p. 4, he puts the point in the following way:
>
> > [Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the matter in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

I. Reserve Lands as a Fungible Commodity

[198] Reserve land is generally not to be treated as a fungible commodity. In *Osoyoos*, Iacobucci J. noted at paragraphs 45 and 46:

> Second, it follows from the *sui generis* nature of the aboriginal interest in reserve land and the definition of "reserve" in the *Indian Act* that an Indian band cannot unilaterally add to or replace reserve lands. The intervention of the Crown is required. In this respect, reserve land does not fit neatly within the traditional rationale that underlies the process of compulsory takings in exchange for compensation in the amount of the market value of the land plus expenses. The assumption that the person from whom the land is taken can use the compensation received to purchase replacement property fails to take into account in this context the effect of reducing the size of the reserve and the potential failure to acquire reserve privileges with respect to any off-reserve land that may thereafter be acquired.
>
> Third, it is clear that an aboriginal interest in land is more than just a fungible commodity. The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. This view flows from the fact that the legal justification for the inalienability of aboriginal interests in land is partly a function of the common law principle that settlers in colonies must derive their title from Crown grant, and partly a function of the general policy "to ensure that Indians are not dispossessed of their entitlements": see *Delgamuukw*, *supra*, at paras. 129-31, *per* Lamer C.J.; *Mitchell*, *supra*, at p. 133.

[199] In this case both Canada and the Band regarded the reserve lands as a commodity for sale to the GTP. In Canada's case this suited its public role in supporting the creation of the

transcontinental railway. For the adult Band members, they were given the opportunity to profit from the eventual sale proceeds of lands they may have considered less important to their cultural heritage and to put the payment to needed improvements of their homes and village.

[200] The Claimant does not advance a case referencing the treatment of reserve lands as an article of sale, but I think it has to be remembered that such a sale was not a matter of usual business in the administration of reserve lands. Reserve lands are generally inalienable except upon surrender to the Crown (*Guerin* at para 384) and are not generally for sale.

J. Discussion

[201] Canada's role in the surrender of the 14,000 acres of I.R. No. 2 was a conflicted one. The federal government of the day was supportive of the development of the second transcontinental railway and its efforts to find a terminal on the Pacific Coast. Canada was also directly involved in the development of the railway in its commitment to building the eastern portion and Canada's support for the railway funding by guarantees of the GTP bonds (Ex-50, Tab JBD-960).

[202] The GTP, for its part, recognized that large-scale government grants were no longer available to finance railway construction, and its business plan relied heavily on securing land without paying a premium for its acquisition, and profiting on the increase in value realized as a result of the acquired lands' location in relation to railway stations, yards, and terminals (Ex-12 at 6–7).

[203] The GTP's plan, as it applied to the Pacific terminus, was to secure at the lowest price sufficient land to accommodate its operational infrastructure, but also a terminal townsite: land which would be developed and sold at a significant profit on location of the terminal (Ex-12 at 6–7). The physical characteristics of the area had to be suitable for the trackage, rail yards, and wharf facilities, but the land requirements in this regard were modest. The rail yards and wharf facility requirements were in the order of 1,600 acres (Ex-50, Tab JBD-169), land which could be expropriated if approved for railway purposes by the Ministry of Railways. The total of lands acquired from the Band and the provincial government reserve was 24,000 acres, far beyond railway requirements. The land was acquired to accommodate the planned development of townsite real estate. To put the area secured in perspective, the area of the present city of Prince

Rupert is approximately 16,000 acres and as a further comparison, the area of the City of Vancouver is approximately 28,400 acres. The 24,000 acres assembled by the GTP was far more than the company might expect to develop and much of the terrain would have been unsuitable for development in any event. What it did provide, however, was a perimeter excluding private development of land to compete with the company's enterprises by way of townsite and industrial development.

[204] Canada knew from the approaches the GTP made during 1905 that the railway was significantly committed to locating the Pacific terminus on Kaien Island. The 1904 agreement regarding the 10,000 acres from the provincial government reserve became public knowledge in 1905 (ASF at paras 69–72, 98; Ex-24, Tab 157). This land acquisition was by way of transfer of three parcels surrounding the eastern end of Prince Rupert Harbour (Ex-50, Tab JBD-991). The I.R. No. 2 lands on Kaien Island, Digby Island, and the Mainland portion were just to the west of the land acquired from the Province. A term of the acquisition was that the terminus was to be located on the land secured. The 1904 plan submitted to the Minister of Railways indicated that the Kaien Island rail yards and port facilities were to be partially located on the portion of I.R. No. 2, on the coastline of the northwest portion of Kaien Island adjacent to land acquired by the GTP from the Province (Ex-22, Tab 140). This area of I.R. No. 2 was suitable as a location for the terminal infrastructure and was later described by general manager Morse, in his telegram to Premier McBride, as "[e]ssential to complete development of plans for model terminal city" (Ex-50, Tab JBD-378). An April 6, 1905, letter, from Morse to Frank Pedley, Deputy Superintendent General of Indian Affairs, acknowledges receipt of a blueprint of Digby Island and part of Kaien Island, provided by the Department, indicating the GTP interest in these areas of the southern portion of Tsimpsean I.R. No. 2 (Ex-50, Tab JBD-186). A further letter from GTP second vice president Wainwright to Pedley, dated April 20, 1905, gives notice of an additional application to include Digby Island (Ex-50, Tab JBD-190) and a memorandum to the Minister from Pedley, dated August 3, 1905, informs that a tracing had been filed by the GTP, showing lands the Company wanted "should they decide upon Port Simpson as the Pacific coast terminus" (Ex-50, Tab JBD-202). In the context of the memorandum and the previous correspondence, the reference to Port Simpson is a general reference and the actual lands being a spoken of are the portions of the southern portion of Tsimpsean I.R. No. 2 surrounding Prince Rupert Harbour. Pedley says on page

2 of the memorandum that "[t]he blue prints attached hereto show the positions of Digby and Kaien Islands, the former containing 7,950 acres and the latter, that is the reserve portion thereof, containing 2,519 acres. The smaller blue print shows the relative position of those Islands to the Indian Reserve at Port Simpson" (Ex-50, Tab JBD-202). Again, the reference to Port Simpson is a general reference and the lands being spoken of are those surrounding Prince Rupert Harbour.

[205] The knowledge of the GTP plan to acquire land at Prince Rupert Harbour predated the November 28, 1905, letter to Indian Agent Morrow and Pedley's instruction "should Mr. E. G Russell, the Grand Trunk Pacific Railway Company's representative, call upon you, with a view of discussing and taking up this matter with yourself and with the Indians, the department has no objection to this being done" (Ex-50, Tab JBD-213). I note that no prior notice or information relating to the intentions of the company were given to the Band, nor was Canada's interest in seeing that the railway was completed, disclosed. Further, no information was available to the Band to contest Russell's statement in his January 15, 1906, letter implying there were viable alternatives at Port Simpson and Kitimat.

K. The February 7, 1906, Band Resolution

[206] The Resolution recorded by Morrow relating to the meetings between the Band and Russell, February 1–7, 1906, presented other problems than the description of the lands to be surrendered. In a memorandum to the Minister by Pedley dated March 24, 1906, he identified that the direct payment to the members of the Band and the Resolution's requirement that other monies be dedicated to make coming-of-age payments to young Band members and infrastructure improvements, was contrary to the provisions of the *Indian Act*, and that the Province's claim to a reversionary interest stood in the way of a transfer of the lands to the GTP. In the memorandum, Pedley advises:

> One of the terms of the agreement was that one-half of the purchase money received should be paid in cash to the Indians of the full age of 21 years and upwards entitled to receive the same, in equal amounts, and that the balance be placed on interest and held to the credit of the Metlakatla Band by the Department and as each boy and girl entitled to receive same arrived at the age of 21 years they would receive a like amount and that the interest accruing from the balance held by the Department would be paid annually through the Indian Agent for needed municipal repairs, maintenance and improvement.

> The Agent in his report states that he considers the bargain an excellent one and while he is aware that it is not the policy of the Department to pay money direct to the Indians, nevertheless, in this case, he trusts the Department may be able to do so as the people would use every dollar received to the best of advantage in improving and furnishing their homes and any balance unused would be as well taken care of by them as by the whites.
>
> We are met on the outset, however, by the Statute which limits the cash payment to the Indians of the proceeds of a sale to 10%. It is not clear that the statutory restriction was considered or placed before the Indians at the time of the negotiations.
>
> There is a further question to be dealt with, namely, the claim of the British Columbia Government to the reversionary interest in the Reserves of that Province, these lands included. [Ex-50, Tab JBD-1093]

[207] The options that Pedley saw as appropriate to the circumstances, were to obtain parliamentary authority, likely by way of an amendment to the *Indian Act*, or to approach the Band a second time to secure the surrender at the same price, but with payment of only 10% of the sale price in cash to the Band members, which would accord with the *Indian Act*, 1886. He also suggested that the Province might be asked to waive its reversionary claim in light of the public advantage to be realized through securing the building of the railway, and if they were not willing to do so, to make some sort of arrangement whereby the funds realized from the sale to the GTP be "[left] available for the Indians until such time as the matter may be finally settled." The text of his memorandum in this regard is as follows:

> It will be impossible for us to make this cash payment to the Indians without parliamentary authority and if such is not obtainable they might be approached and the true state of the facts set before them, with a request to modify the terms in that regard so as to conform to the Statute.
>
> It has been suggested and I think should be considered that the British Columbia Government might be asked to waive its claim to the reversion in this property in view of the recognized importance of securing suitable terminal facilities for the Railway Company and if the Province is not willing to do this then to make such an arrangement as will leave the funds available for the Indians until such time as the matter may be finally settled.
>
> I would recommend that the negotiations be re-opened with the Indians with a view of securing from them a surrender of the lands sought for at the price agreed upon and of the sum realized 10% to be paid to them in cash, and that when the surrender is obtained negotiations be opened up with the Province of British Columbia with a view of reaching a settlement whereby the Company can receive an unclouded title.

[208] The Minister of the Interior and Superintendent General of Indian Affairs, Frank Oliver, took up Pedley's suggestion that the Province be approached to forgo their claim to a reversionary interest by way of a letter, dated March 28, 1906, recommending to the Privy Council that there be a communication to the provincial government asking that its claimed reversionary interest be waived (Ex-24, Tab 186). This was done, but the Province summarily refused the request (Ex-50, Tab JBD-1112).

[209] On May 28, 1906, a GTP official wrote to Frank Oliver referring to the resolution passed by the Band as a "provisional agreement" and stating:

> ... I am aware that the payments to be made to the Indians are in excess of those allowed by the Indian Act. It may be, however, that the agreement can be given effect to in some other way. We are willing to comply with all reasonable requirements of the Depart[ment] for the purpose of carrying out the sale in question. We have already had considerable correspondence and interviews on this subject and I think that possibly it is now in such shape that we can arrive at a satisfactory agreement even without the concurrence of the Province. [Ex-50, Tab JBD-250]

[210] As indicated in this letter, the GTP was attempting to keep the agreement alive. In Morse's June 27, 1906, letter to the Company solicitor, Tate, he instructed that the Company representative, Russell, should be included in any conferences with the Minister in the matter, with the comments:

> I place the greatest importance and value upon the Agreement that Mr. Russell has with the Indians, and which was made with the consent of the Government, i.e. we were told we might proceed and make the best arrangement possible. I do not want the advantage that we have gained in this respect lost, by the Agreement being cancelled, and the Government sending their representative to negotiate with the Indians, for the reason that we have had one experience of this kind, at Fort William, where it cost us over $200,000 more than it really should. [Ex-24, Tab 202]

[211] On July 14, 1906, the acting Deputy Superintendent General of Indian Affairs filed a memorandum, noting that no action should be taken on the surrender of Digby and Kaien Islands until there were further instructions (Ex-50, Tab JBD-270). At this point Canada was concerned about the GTP taking recourse against the Crown should the land be transferred and the Province continue to obstruct the company from receiving good title. Ultimately the GTP solicitor, Tate, provided a letter, dated July 17, 1906, informing that the Company was prepared to accept a patent for the lands "without recourse against the Dominion in case of the establishment of any claim in respect of a reversionary interest in the Indian Reserves in question by the Province of British

Columbia" (Ex-24, Tab 208). D'Arcy Tate asks in this letter that Pedley "kindly instruct Mr. Superintendent Vowell of Victoria to proceed to Metlakatla and obtain from the Indians the necessary surrender in accordance with our previous arrangement."

[212] This prompted a letter dated the next day, from Pedley to Vowell, to proceed to Metlakatla and obtain the surrender. Pedley states (Ex-2, Tab 50): "I may state that the Department is prepared to pay at the rate of $7.50 per acre for the land and to compensate the individual owners of gardens in a sum not less than $1500.00." Pedley also notes that the Band Resolution was contingent on 50% of the proceeds to be paid to the Band members in cash and that the remaining 50% be distributed in the manner indicated in the resolution. He refers to the 10% provision in the *Indian Act* but says, that "[d]uring the present session, however, an amendment has been made increasing the amount that can be paid to 50% of the proceeds of the sale, which may be paid direct to the Indians."

[213] He goes on to say the Department is prepared to advance the 50% of the proceeds to the Band members but that the other provisions in the Band Resolution in relation to payments to younger members as they become of age, and payments to improvements, would have to be amended so that the remaining 50% is placed in the Band's trust account. Pedley also included a cheque for $10,000, to be distributed amongst the Band members as a partial payment. I note that Pedley's assurances are that the Department will pay for $7.50 per acre and that a partial payment was provided for immediate distribution. Vowell took the surrender in the form already described in these reasons. He did not make a partial payment as he thought this was not required.

[214] Through this time leading up to the surrender on August 16 and 17, 1906, and in the developments leading to the letters patent on June 25, 1907, it has to be noted that Canada acts as an intermediary in advancing the GTP interests in acquiring the land the GTP wants for development purposes in:

1. directly approaching the provincial government to waive their claim to a reversionary interest;

2. designing how the Resolution could be given effect, to the point of assuring the $7.50 per acre payment and fronting $10,000; and

3. including land not properly surrendered in the letters patent.

[215] No effort is made to provide an opinion of what the land was worth, as was done at Fort William as well as in the *Guerin* and *Blueberry River* decisions, or to advise the Band what the dynamics of the terminus location and land development might mean in assessing the land value, and any prospects of taking a percentage share in lots to be created, as was done by the Province.

[216] The negotiations to settle the land to be transferred by way of the letters patent continued until the letters patent were issued June 25, 1907, the cash payment to Band members of $500 having been made on June 19, 1907 (Ex-2, Tab 89).

L. The Appraisal Reports

[217] Two property appraisal reports were entered into evidence. The first report (Ex-12), submitted by the Claimant, was from Kent-Macpherson, with expert evidence in support given by one of its two authors, Allan Koebel (Koebel Report or Kent-Macpherson Report). The second report (Ex-37), submitted by the Respondent, was from Land Ethic Consulting Ltd. presented by its author, John Peebles, also an expert in land appraisals (Peebles Report or LEC Report).

M. The Market Value Assessments

[218] Evaluation of the market value of the letters patent lands presents a challenging task. The 14,000 plus acres conveyed to the GTP, was a sale of a parcel of the size far beyond that previously seen on the northwest coast and perhaps is the largest parcel acquired in that area to the present time.

[219] The use the lands were to serve also put the sale in a different context from the few sales of land not associated with railway speculation. Speculative land purchases in the area had been evident from the 1880s, when options for the Pacific terminus for the CPR were being considered (Ex-12 at 124). A second transcontinental line was proposed at the turn-of-the-century and a provincial charter for a local railway to serve the Ominica mining sites with the terminus at Kitimat was granted in 1900 (Ex-12 at 124). The last railway was also never constructed and the Company was acquired by the GTP in its effort to construct the western portion of its transcontinental railway (Ex-12 at 124).

[220] Port Simpson and Kitimat were early contenders as terminal sites. Most of the land suitable for a terminus was in private hands at these two locations as a result of earlier speculative purchases. Land at Prince Rupert Harbour (then Lima Harbour; Tuck Inlet) was not privately owned. To the east it was enclosed by a provincial land reserve and the western portion was within the southern portion of Tsimpsean I.R. No. 2. (Ex-12 at 124).

[221] All three locations were physically capable of being a terminus. There were distinctions. Kitimat was slightly closer by rail to the mountain passes. Prince Rupert was next and Port Simpson slightly further. Conversely, the distances by sea to Asia rank the three in reverse order. Both Prince Rupert Harbour and Kitimat are fjord-like locations that would ultimately become deep-water ports, but were challenging areas in that they had limited anchorages. In Port Simpson's case it was located closest to Alaska, which was referred to as a negative factor (Ex-12 at 122), but all of these were marginal differences and all three were protected locations and were capable of being a terminal location.

Map Showing Locations of Port Simpson, Kitimat, and Present Day Prince Rupert Area Designated by a Red Arrow Marked "Subject" (Ex-12 at 123)

[222] The methodology adopted in the appraisal reports had similar characteristics, but the data employed by the appraisers was significantly different. Both appraisers identified the appraisal approach appropriate as the direct comparison approach (Ex-12 at 105–06; Ex-37 at 88). Allan Koebel identified the need to reach to more distant locations (and more expansive time periods) in forming an opinion:

> Given that the subject is assumed to have comprised vacant land as of the valuation date, the Direct Comparison Approach is the only relevant valuation method. The Direct Comparison Approach is most commonly used and is most readily accepted as the preferred method used to value unimproved land such as the *Letters Patent Lands*.
>
> The Direct Comparison Approach requires an analysis and comparison of similar properties to the subject which have sold relatively concurrent to the dates of appraisal under similar economic conditions. The Direct Comparison Approach is the preferred method of estimating the market value of land because it reflects

> typical buyer and seller reactions as expressed by the principle of substitution [footnote omitted], which states:
>
> > **[W]hen several similar or commensurate commodities, goods or services are available, the one with the lowest price attracts the greatest demand and widest distribution. This principle assumes rational, prudent market behaviour with no undue cost due to delay…The value of property tends to be set by the price that would be paid to acquire a substitute property of similar utility and desirability within a reasonable amount of time**.
>
> In this instance, the principle of substitution creates a unique challenge for the valuation in that it is virtually impossible to find a comparable or similar property to the *Letters Patent Lands*, particularly for use as a potential terminus location. The physical attributes that made the *Letters Patent Lands* desirable as a terminus location (i.e. deep harbour, sheltered location, etc.) are not common to other lands in the area. Furthermore, other local sales of large tracts of land for use as a terminus/port location were simply non-existent. Therefore, research for sales of comparable lands for direct comparison has been expanded beyond Prince Rupert. [bold in original; emphasis added; Ex-12 at 105–06]

[223] Allan Koebel identified the relevant appraisal date as being August 17, 1906, the date of the surrender to Canada. Other dates to be considered are September 21, 1906, the date the surrender was accepted by Canada and June 25, 1907, the date of the issue of the letters patent to the GTP (the valuation date indicated by paragraph 20(1)(e) of the *SCTA* is the date the lands were "taken"), but Allan Koebel indicated no identifiable change in the value over the span of time from the surrender to the letters patent conveyance. John Peebles identified February 17, 1906, as the date it became known through a *Victoria Daily Times* newspaper report that Metlakatla had resolved to surrender the lands for sale, resulting in a change in the market. Allan Koebel found the market had changed before February 1906 and said that "[i]t is illogical to suggest that sales recorded after the February 17, 1906 newspaper article should not be used for comparative purposes, as suggested by the LEC Report, '*since market conditions had changed dramatically with the* [earlier] *Times Colonist reporting*'" (emphasis in original; Ex-13 at 12).

[224] John Peebles identified the direct comparison approach as appropriate, and at page 20 of his November 27, 2019 report (Ex-37), he identified the relevant appraisal date as February 7, 1906, just prior to the market change he said corresponded to the newspaper report of the initial Band Resolution (Ex-37 at 20, 88). Peebles expanded the "market area" within which "market indicators, such as property sales" would be considered, to "include the entire North Coast to

broaden the availability of sales data and better understand market conditions circa 1906" (Ex-37 at 89). He also considered sales "before or slightly after the February 1906 valuation date" (Ex-37 at 21) in the area just south of Prince Rupert, but warned against the use of post February 17, 1906, data as amounting to a hindsight comparison. At page 21, he contrasted the differences in data selection as below:

Appraisal Task	**LEC Report [Peebles Report]**	**KM Report [Koebel Report]**
Reliance Documents (e.g., market data) - Equitable Compensation	Reliance on indicators of value before or slightly after the February 1906 valuation date.	Reliance on indicators of value 2-3 years after the August 1906 valuation date.
	Did not rely on GTP sales of partially developed & surveyed Townsite Lands for undeveloped Letters Patent Lands.	Reliance on GTP sales of partially developed & surveyed Townsite Lands for undeveloped Letters Patent Lands.
	Did not rely on GTP purchases of Townsite Lands in communities in Vancouver, Fort George, Hazelton & eastern Canada given differences in market conditions, location, political influences, etc.	Reliance on GTP purchases of Townsite Lands in communities in Vancouver, Hazelton, Fort George & eastern Canada. KM did not recognize or reconcile differences in market conditions, conditions of sale, location, or political influences.

[225] Both appraisers speak to whether the sale of the three areas of the southern portion of Tsimpsean I.R. No. 2 (western part of Kaien Island, three quarters of Digby Island, and the Mainland portion) was a market value sale. Both cite the Appraisal Institute of Canada definition of a market value sale:

> The most probable price which a property should bring in a competitive and open market as of the specified date under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. [Ex-35, Tab 623 (Appraisal Institute of Canada, *Canadian Uniform Standards of Professional Appraisal Practice*, (Ottawa: 2018) at 76); Ex-12 at 16 (Koebel Report); Ex-37 at 31 (Peebles Report)]

[226] The Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP) definition states that this definition [of a market value sale] may be expanded by adding these words:

> Implicit in this definition are the consummation of a sale as of the specified date and the passing of title from seller to buyer under conditions whereby:

> • buyer and seller are typically motivated;
>
> • both parties are well informed or well advised, and acting in what they consider their best interests;
>
> • a reasonable time is allowed for exposure in the open market;
>
> • payment is made in terms of cash in Canadian dollars or in terms of financial arrangements comparable thereto; and
>
> • "The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale." [Ex-35, Tab 623; cited by both expert appraisers (Ex-12 at 16 (Koebel Report) and Ex-37 at 31(Peebles Report))]

[227] John Peebles identifies the buyer and seller in his analysis as the GTP and the Metlakatla Band and the applicable date for valuation, February 7, 1906, the date of the original Band Resolution (Ex-37 at 78–79).

[228] Allan Koebel identifies the seller as Canada and the date for the retrospective estimate of market value being the date of the formal surrender, August 17, 1906 (Ex-12 at 18, 116). The difference in date is quite significant in John Peebles' view because as he identified in his November 27, 2019, report:

> Once news of the GTP purchase of ± 14,160 acres of Reserve land was made public in a February 17, 1906 Times Colonist [*Victoria Daily Times*] article, speculation reached a pinnacle in the general area associated with Tuck's Inlet (precursor of Prince Rupert Harbour). [Ex-37 at 46]

[229] This public knowledge in John Peebles' view, changed the market, a change he viewed as weighing against considering subsequent sales in determining if there was adequate compensation paid by the GTP. Peebles says:

> Sales recorded after 1906 were not adopted for the valuation analysis in *Part II Compensation for Surrendered Lands* since market conditions had changed dramatically with the Times Colonist [*Victoria Daily Times*] reporting. [Ex-37 at 46]

[230] In Allan Koebel's report, he identified the principle of anticipation as being relevant. He found it to be well established by August 1906 that the terminal would be at Kaien Island and:

> In real estate markets, the current value of a property is usually not based on its historical prices or the cost of its creation; rather, value is based on the market participants' perceptions of the future benefits of acquisition. [Ex-33, Tab 577 (Appraisal Institute of Canada, *The Appraisal of Real Estate: Third Canadian*

> *Edition*, (British Columbia: University of British Columbia Real Estate Division, 2010) at 3.3); Ex-12 at 115]

[231] Allan Koebel says further:

> As a potential seller in a marketplace where it is not only known that there is demand for your land (i.e. Tsimpsean IR #2), but also that a proposed development on adjacent/surrounding land will generate additional value to your property, the knowledge of these factors has a direct and positive impact on the market value of your property. As applied to the *Letters Patent Lands*, anticipation of the future value of the Reserve upon the development of the Grand Trunk Pacific western terminus would have a significant positive impact on its market value at the time of surrender.
>
> That the Grand Trunk Pacific planned to locate its terminus and townsite adjacent to, and on the Tsimpsean IR # 2 lands that it was asking to be surrendered, would have a positive impact on its value in the marketplace. This is similar to the previously proposed terminus locations of Port Simpson and Kitimat, where speculators who purchased lands in these areas placed a premium price on them, believing there was demand for the lands as a terminus and townsite (see Section 7.4.1). A similar result also occurred for the CPR terminus at Vancouver (see Section 7.4.5). [Ex-12 at 115–16]

[232] And that:

> … the definitions of market value reflect the conditions of a fair sale, with both buyer and seller each acting prudently and knowledgeably and being fully informed. The knowledge that Canada had, representing the interests of Metlakatla in the lands as the 'seller', regarding the plans of the [GTP] to locate its western terminus on the *Letters Patent Lands* and land adjacent thereto, should have had a significant impact on their bargaining power, hence the value of the land. [Ex-12 at 116]

N. Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP) Conditions of a Market Value Sale

1. Were the Buyer and Seller Typically Motivated?

[233] John Peebles considers the characteristics inherent in a market value sale in his analysis of what he characterizes as a sale by Metlakatla to the GTP. He identified the rejection of the initial offer of five dollars per acre and the fact the Band declined to sell all the land the GTP wanted to purchase as indicating the Band was under no pressure to sell and were typically motivated to sell lands that were "excess to the needs of the community" (Ex-37, at pp 79–80).

[234] The "typically motivated sale" in this case, using Peebles' analysis of who should be

designated as buyer and seller, was a sale by adult Band members who had a beneficial interest in a *sui generis* title held pursuant to a fiduciary relationship with Canada, in return for direct compensation to them of 50% of the sale price (a direct payment not accommodated by the *Indian Act* at that time) (Ex-50, Tab JBD-1093), with further provisions of the sale meant to benefit coming-of-age younger Band members and provide village improvements, which in further developments of the sale had to be resiled from (Ex-2, Tab 58). I do not agree with John Peebles that this can be viewed as a typically motivated sale, at least on the Band's part.

2. Was Metlakatla Well Informed and Advised?

[235] The second characteristic of a market value sale is that both parties are well informed or well advised. John Peebles says the Band was advised by Bishop Du Vernet and Indian Agent Morrow. Both were present but other than the *Victoria Daily Times*' article, which has a number of inaccuracies, there is no other mention of their respective roles (Ex-50, Tab JBD-1078). The Bishop's attendance was not at the request of Canada. He resided at Metlakatla and would have been an important member of the community, but his supposed role as an advisor is not clear. He had knowledge of some of the developments in the siting of the Pacific terminus and wrote an article in the *Globe* dated August 16, 1905, in which he described the area and the entrance to Tuck Inlet from the Pacific. He wrote it was a "safe to say" prospect that Kaien Island would become the terminus. He viewed this development positively as aiding in the settlement of the northwest coast and noted:

> As serious injury is often done to a new country by foolish land speculation, made by ignorant investors, it may be well to note that so far as Ka[i]en Island is concerned there is absolutely no room for private speculation. The Dominion Government controls the western point of Ka[i]en Island and the whole of Digby Island as an Indian reserve. … The Grand Trunk Pacific Railway Company indirectly through an official has control of 10,000 acres, which embraces all the level land on Ka[i]en Island not Indian reserve, and some good land on the opposite side of Tuck's Inlet. … Speculating in town lots which are on the side of some steep mountain or on some rocky islets miles away from an[y] possible city will not help but retard the development of our country. [Ex-2, Tab 40]

[236] These views indicate the Bishop, if he did take on the role of advising the Band, would not have recommended a price that reflected the increased speculative value or pursuit of a sharing of development profits.

[237] In the case of Indian Agent Morrow, his instructions from Pedley were that if Russell presented himself to "tak[e] up this matter with yourself and with the Indians, the department has no objection" (Ex-50, Tab JBD-213).

[238] Morrow, in his February 14, 1906, reporting letter to Pedley, says he read Russell's letter to the Band and "informed them fully as to what Mr Russell wished to sec[ure for his] company" (Ex-2, Tab 43). He also says he agreed with the Band's decision that the north end of Digby Island be retained. He then describes the other terms with respect to land to be included and the price to be paid, and details that if the Department consented to a direct payment of 50% to the individual Band members, and the other conditions relating to the other 50% already described, the Band would agree to the surrender. He says he considered the bargain an excellent one and though it was not the Department policy to pay money directly to Band members, he said "I trust the Department may be able to do so."

[239] Morrow's account does not say he advised the Band on the value of the land and it could not have been lost on him that the Department was interested in facilitating the sale, as in fact happened in the later drafting of the surrender and the steps taken to amend the *Indian Act*. Further, the deal he found to be an excellent one was not the arrangement set out in the Resolution accompanying the formal surrender (Ex-2, Tab 51). I find that John Peebles and Canada's assertion that the Band was well informed to be without convincing substance.

[240] One other point to note from Morrow's letter is in his description of the back-and-forth on price. Morrow said that the Band's first offer to Russell was $10 per acre. He then said that Russell replied that this was out of the question and that the Company had purchased from of the provincial government "the townsite on Kai[en] Island for ($[1].00) one dollar per acre" (Ex-2, Tab 43). Left out in this and known to Canada, but perhaps not known to Morrow, is the fact that the Province also secured one-quarter of the townsite lots, which proved considerably more lucrative than the one dollar per acre nominal price.

[241] I note that that the *Victoria Daily Times* report of the negotiations states that "Mr. Russell at first offered $5 per acre" and that "[t]he Indians demanded double that amount" (Ex-50, Tab JBD-1078). The accounts are not necessarily inconsistent, Morrow may have omitted the opening offer, and the newspaper may have included it to add dramatic effect. I think it likely Russell

opened with the five-dollar offer and Morrow picked up the account with the Band's response putting forward $10 per acre.

[242] John Peebles also says the Band was well advised of the Province's reversionary claim. The evidence does not support this and neither the Bishop's *Globe* article nor Morrow's report make any reference to the issue (Ex-2, Tab 40).

[243] The Band was presented with the offer without being informed of the commitment of the GTP to Kaien Island, or assistance in responding to the GTP's opening offer. The introductory letter presented by Russell stated that the time was coming for the company to commence work on the Pacific Coast and that it had "the locations of kittemat, kai-En Island and Port Simpson" before it (Ex-24, Tab 170). In fact, the GTP, as known to Canada, was already heavily committed to Prince Rupert Harbour. In order to deal with the prospective sale, the Band needed Canada to provide disclosure of material facts and advice in dealing with the proposal.

[244] GTP general manager, Morse, referred to the subsequent agreement as "made with the consent of the Government, i.e., we were told we might proceed and make the best arrangement possible" (Ex-24, Tab 202). Morse's view that the Government of Canada consented to the company making the best deal it could with the Band has substance in the marked failure to disclose and to take any measures to prevent an improvident bargain. In this, Canada failed to act with loyalty and good faith in its discharge of its fiduciary duty to the Band.

3. The Further Characteristics of a Market Value Sale

[245] The three remaining characteristics of a market value sale are:

> • a reasonable time is allowed for exposure in the open market;
>
> • payment is made in terms of cash in Canadian dollars or in terms of financial arrangements comparable thereto; and
>
> • "The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

[246] There was no exposure of the reserve property to the open market, consistent with Canada supporting only one sale—to the GTP to support its business plan—and although payment to the

adult members of the Band was to be in Canadian dollars, it was to be 50% of what was received in circumstances where the maximum payment under the *Indian Act* was 10%, and the payment was complicated by further terms stipulated by the Band to benefit coming of age members and funding for village improvements.

[247] As matters turned out these terms of a prospective sale were modified by Canada to better conform with *Indian Act* requirements, but however they are recognized payment was complicated and not normal consideration for the property sold.

O. Discussion on Date of Valuation

[248] John Peebles relied on the February 7, 1906, date for valuation. However, the actual sale was after the August 17, 1906 date of the surrender and Canada's acceptance of the surrender on September 21, 1906 (Ex-2, Tab 58), and assumption of the role of conducting a sale "upon such terms as the Government of the Dominion of Canada may deem most conducive to our welfare" (Ex-24, Tab 212 (the August 17, 1906 surrender)), and the further obligation to avoid an improvident bargain (*Blueberry River*). The benefits to Band members under the new Band Resolution had by this time changed, all of which indicates that August 17, 1906, the date the surrender terms were settled, is a more appropriate date for historical valuation of the subject lands (Ex-2, Tab 58).

[249] Lastly as previously noted, under paragraph 20(1)(e) of the *SCTA*, the Tribunal is to use the market value of lands <u>at the time they were taken</u> in determining compensation for reserve lands taken under legal authority, and for which inadequate compensation was paid.

[250] The entire wording of paragraph 20(1)(e) is as follows:

> **Basis and limitations for decision on compensation**
>
> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> ...
>
> (e) shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid; ...

[251] Notably, paragraph 20(1)(e) does not refer to the date the lands were "surrendered", but the date they were taken. The lands would have continued to be reserve lands until the date the surrender was accepted approximately one month after the surrender was signed. Of the two valuation dates, August 17, 1906, is closer to the date the lands were "taken" as provided in paragraph 20(1)(e) of the *SCTA* and Allan Koebel's focus on that date is more relevant to the issue.

P. Discussion on Market Value Assessments

[252] I find Allan Koebel's opinions on market value inclusive of the effect of anticipation more persuasive. I find John Peebles' report misguided in several respects. First the seller in this transaction is not Metlakatla, Canada took on the role of selling the I.R. No. 2 lands after taking a formal surrender executed by the Band on August 17, 1906, assuming an obligation to act in a manner most conducive to the Band's welfare and an obligation to protect the Band from an improvident sale.

[253] Further, I cannot conclude the negotiations leading to the February 7, 1906, Resolution indicate a market value sale. The Band was put in the position of negotiating the resolution price without any prior notice of the GTP interest in acquiring reserve lands for the terminus and without the benefit of Canada's knowledge of the GTP commitment to the Kaien Island terminus. There was no effort taken to provide an informed opinion of the value of the land as was done at Fort William (*Blueberry River*; *Guerin*). The *Victoria Daily Times* newspaper report of the negotiations and the Band's willingness to surrender reserve lands correctly reported that "[t]he agreement and an account of the negotiations will be sent immediately to Ottawa to be approved or rejected by the Indian department" indicating the government's role in accepting or rejecting the proposal to surrender, and the newspaper article also noted that "[t]he land is very valuable as being so close to the ten thousand acres already purchased by the railway company from the government" (Ex-50, Tab JBD-1078).

[254] This newspaper report may have had an effect on the land market somewhat as described by John Peebles, months before the acceptance of the surrender, changing what had been a market where the highest uses of land had been seen as limited settlement and resource development, primarily relating to the fishing industry, to a market attracting speculative interest in the terminus, and the townsite location (Ex-37 at 42–43), but I think it more likely that, as Allan Koebel says, it

was well known that Kaien Island was the planned site, and the knowledge had "a direct and positive impact on the market value of [the] property" (Ex-12 at 115). However, the obligation to avoid an improvident sale arose on receipt of the surrender, when each of the appraisers indicates the market had changed from the original uses. The fact that Kaien Island was the planned site was not presented to the Band at any point leading to the surrender, or during the time until payment was made and the letters patent were granted.

[255] The process leading to the sale proceeded through the subsequent amendment of the *Indian Act* to accommodate a direct payment of 50% to Band members on July 13, 1906, the taking of new Resolutions to accommodate other *Indian Act* restrictions on August 17, 1906 (Amended ASF at paras 116, 118), and ultimately after the surrender was accepted on September 21, 1906, through the negotiations dealing with the land description, leading to the letters patent granted July 25, 1907. Through this, the sufficiency of the price the Band accepted in the February 1–7, 1906 negotiations should have been assessed in light of the likely effect the terminus choice would have on the market, and the possible advantage of a provision to take back an interest in developed lands, as was done in other railway acquisitions of townsite lands, and by the Province, should have been considered by Canada. As stated by Allan Koebel:

> ... Canada would need to consider the anticipated future value of the Reserve when agreeing upon the price for surrender. [Ex-12 at 116]

[256] Koebel outlined what the per acre value of the land might look like if Metlakatla received the same deal the Province did for its reversionary interest:

> Had Metlakatla secured the same agreement as the Province, being $2.50 per acre (13,567 acres × $2.50 per acre = $33,918) plus one quarter of the townsite lots (1,628 acres × 0.25 = 407 acres) at 1907 land values (407 acres × $1,950 per acre = $793,650), the total value for the *Letters Patent Lands* would be equal to $827,568 ($33,918 + $793,650) or **$61 per acre** ($827,568 ÷ 13,567 acres). [emphasis in original; Ex-12 at 152]

[257] Canada was in a conflicted position and acted to advance the public interest in promoting the second transcontinental railway, seeing to its completion and success, and was heavily invested in the outcome. It nonetheless remained in a fiduciary relationship to the Band, which at a minimum required loyalty, good faith and "full disclosure appropriate to the subject matter" (emphasis added); to the standard of care of ordinary prudence with a view to the best interests of the aboriginal beneficiaries (*Wewaykum* at para 86), and had assumed the obligation in the

surrender to sell upon terms most conducive to the Band's welfare, and the similar obligation to avoid an exploitative or improvident sale (*Blueberry River*).

[258] A person of ordinary prudence in managing their own affairs would have at least taken time to consider whether the price was market value and whether other options may have been more profitable, before accepting the terms of the modified surrender and advancing directly to settling what lands were to be described in the sale (*Blueberry River* at para 104).

Q. Dr. Binnema's Historical Critique

[259] The Respondent provided an expert report on the historical aspects of Allan Koebel's work written by historian Dr. Theodore Binnema (Ex-48). Dr. Binnema was qualified as an expert in both history and historiography, able to offer opinion evidence on whether the Koebel Report cites historical material correctly (Hearing Transcript, October 28, 2021, at 22). Before turning to the work of the appraisers, I will discuss the evidence of Dr. Binnema.

[260] Dr. Binnema's evidence is essentially one-sided. He only offers comment on the Kent-Macpherson Report presented by Allan Koebel and does not consider the report introduced by John Peebles. Both valuation reports choose the same methodology and present a similar historical narrative but the essential differences result from the sales data the appraisers introduced into their analysis and the stipulation of the relevant date of valuation. It is of limited assistance to critique one without also considering the approach of the other.

[261] Dr. Binnema makes a number of criticisms of Allan Koebel's use of historical evidence, chief among them that Koebel's opinion "relies very heavily on books and articles published by Dr. Frank Leonard", who Dr. Binnema says Allan Koebel has misinterpreted (Ex-48 at 5). Dr. Leonard is a historian and the author of *A Thousand Blunders: The Grand Trunk Pacific Railway and Northern British Columbia,* a business history of the GTP published by the University of Chicago Press. In Dr. Binnema's view the statement in the Kent-Macpherson Report "that Kaien Island was the most suitable, or even the only suitable, location for the Pacific terminus for the GTP … contradicts the historical evidence and the historical opinion of Dr. Leonard" (Ex-48 at 10). Dr. Binnema goes further, saying that Mr. Koebel's five geographical characteristics of suitability were not actually assessed by Koebel but rather, he singularly focussed on "low cost of

land" at the site as being what attracted the GTP (Ex-48 at 9).

[262] This misrepresents Koebel's analysis. Allan Koebel did not conclude, as Dr. Binnema interprets, that Kaien Island was "the most suitable, or even the only suitable location" based on geographical characteristics, Koebel states that "[t]here were several physical attributes" which made the location "suitable as a terminus location for the Grand Trunk Pacific railway" (Ex-12 at 103). But Koebel concludes, as does Dr. Leonard, that the physical characteristics were not determinative in choosing the location. Each of the three locations, Port Simpson, Kaien Island, and Kitimat had features that might be argued to be superior, and it may have been that, as Dr. Binnema reports, "Dr. Leonard's historical opinion was that Kaien Island was, from a practical standpoint, probably inferior to Kitim[at] and Port Simpson" (Ex-48 at 8), however, the fact is that each of the authors, Dr. Leonard and Allan Koebel, moved on in their analysis from these physical differences—the locations were each assessed under the fifth characteristic as "clearly physically possible" (Ex-48 at 7, 10), as proved by the perspective of time, to conclude that what truly determined the GTP decision was, as stated by Dr. Leonard, "the cost of land at Kaien Island explains why the terminus was located there" (Ex-48 at 8). And from Allan Koebel:

> The plan was to "obtain the townsites at no greater price per acre and so give the town company the profit that the growth of the towns along the line would eventually produce in the increased value of the land and especially at the towns." [footnote omitted] This became an important element in the selection and acquisition of the western terminus site on Kaien Island, including the Subject Lands, as uninhabited Crown land and Indian Reserves (for which it could secure complete control) could be very profitable to the company. [Ex-12 at 6–7]

And:

> With the 10,000 acres of Crown Land already secured by the Grand Trunk Pacific [from the Province] … the *Letters Patent Lands* could be developed in conjunction with the adjacent lands, as a terminus location and townsite that would generate significant revenue. [Ex-12 at 104]

[263] There are additional inaccuracies in Dr. Binnema's report. At page 11, Dr. Binnema takes issue with the statement in the Kent-Macpherson Report cited above: "... the Subject Lands, as uninhabited Crown land and Indian reserves … could be very profitable to the company." Dr. Binnema contrasts this with Dr. Leonard's statement that "even if the terminus property had realized the company's wildly speculative estimate, the return would not have covered the GTP

expenditure for its line across the entire province or even for the west end alone" (Ex-37 at 11–12).

[264] Dr. Leonard does not identify the "wildly speculative estimate" he refers to, but the 1907 prospectus estimate of the value of developed GTP townsite lots was $1,950 per acre. The first sales of the GTP developed townsite lots sales, in October 1909, yielded $5,590 per acre and a total return of $1.9 million. The second sale of the GTP developed lots in November 1911 yielded $13,325 per acre and a total return of $597,660. Dr. Leonard does not provide an analysis of the profitability of the sales and Allan Koebel has set out an analysis of the subsequent marketing of the land in his report. Dr. Leonard's conclusion that the profits could not have been enough to finance the future construction, maintenance, and operation of the railway, and so ultimately was a blunder, may still be sound but the Company prospectus does not appear to have been wildly speculative, and the sales themselves as identified by Allan Koebel, were significantly profitable for the Company, exceeding what the Company had actually paid in the land acquisition and development of the lots by a healthy margin.

[265] Further, Dr. Binnema's opinions venture beyond the scope of his expertise. He suggests that for Allan Koebel's report to be reliable, he should have conducted "more research into archival sources, particularly archival sources related to the negotiations that led to the sale of Tsimpsean IR #2" (Ex-48, at 16). Koebel's report is a product of Koebel's area of expertise: land valuation. Both Allan Koebel and the Respondent's valuation expert, John Peebles, agree that information on negotiations is not particularly an important aspect of valuing land. Both valuation experts agreed that the direct comparison approach was required to determine the market value of I.R. No. 2 at the relevant date for valuation (Ex-12 at 105–06; Ex-37 at 88). By insisting that further research was necessary into the negotiations for Koebel's report to be "reliable", Dr. Binnema goes beyond the scope of his expertise. Further, Dr. Binnema does not offer any unconsidered archival material that might be relevant. There has been significant effort in the presentation of evidence before the Tribunal to gather what is available to construct the narrative before, during, and after the February 1–7 meetings at Metlakatla and I am satisfied that I have seen what is available.

[266] Lastly, Dr. Binnema offers opinions that the Band "would have anticipated that by making a sale… near their village, they would experience future employment opportunities…and might

expect that the value of their remaining lands would increase" (Ex-48 at 18). This is speculation and outside of what the evidence would suggest. The people who moved to Metlakatla left the only non-Indigenous settlement in the area, at Fort Simpson, to settle at Metlakatla away from the negative influences perceived as associated with their previous location, and the Band expressly reserved lands to themselves that separated their village from the lands the GTP wanted to acquire. Further, an increase in the value of the remaining reserve lands is of little significance in that reserve lands are generally inalienable and are not for sale. Next, Dr. Binnema suggests in respect of the British Columbia reversionary claim that "it seems improbable to me that, because of the risks associated with British Columbia's claim, any knowledgeable and prudent buyer would be willing to pay the same price per acre of Indian reserve land as it was to pay for land without those associated risks" (Ex-48 at 20). The statement offers an opinion beyond Dr. Binnema's expertise, similar to that he himself acknowledges when he says "[a]s a historian, I do not have the expertise to estimate how much less the GTP was willing to pay" (Ex-48 at 19–20). The critique is offered under a heading criticizing the Kent-Macpherson Report, contending that the authors did not consider how the claim to a reversionary interest affected the negotiations for the land. Valuing the reversionary interest was outside of the terms of reference outlined in the report, however, the report did recognize the claim was a significant factor in determining market value. Further, there is no record of the reversionary interest arising as an element of the February 1–7, 1906, negotiations. The January 15, 1906, letter from Russell proposing the sale makes no reference to it, nor does the report from Indian Agent Morrow, nor is it mentioned in the subsequent *Victoria Daily Colonist* newspaper report. The reversionary interest came into play once the Province refused Canada's request it relinquish its claim and has to be considered when comparing the negotiated price as compared to the market value of the land in the particular circumstances of the provincial government wanting the railway to be constructed to the British Columbia coast terminus, but at the same time wanting to preserve its legal position in respect of the reversionary claim.

[267] For the foregoing reasons, I have given little weight to the evidence offered by Dr. Binnema.

R. 1906 Fee Simple Market Value

[268] Both appraisers turned to other sales to conduct their direct comparison approach, and both also assessed the lands involved in a highest and best use analysis of different areas of the land transfer.

[269] Allan Koebel considered a portion of Kaien Island to have higher utility—townsite/port lands (1,200 acres), and set the value at $250 per acre. Koebel considered the rest of Kaien Island to be lower utility—sharply sloping/high elevation bench lands (1,480 acres), and set the value of this portion at $15 per acre (Ex-12 at 160). Digby Island, the Tsimpsean Peninsula (Mainland portion), and the smaller islands were assessed on a common per acre basis ($30).

[270] Koebel estimated the market value of the land on a fee simple basis as of August 17, 1906, with no deduction of value assigned to the provincial reversionary claim. His conclusion (Ex-12 at 162) was as presented below:

AREA	**ESTIMATED VALUE**
Kaien Island	$322,200
Digby Island	$205,200
Mainland	$137,760
Lak-Anian Island, Lak-Wilgiapsh Island and Islands No. 1 to 8	$1,440
Total	$666,600 rounded to $667,000

[271] Based on these values Koebel estimates the total per acre value of the 14,160 acres set out in the letters patent at $47 per acre (Ex-12 at 162).

[272] John Peebles' report is a response to questions put to him by the Respondent in its initial instructions. The date to be adopted for valuation of the lands was suggested to be February 7, 1906. The first and focal question put to him for analysis was:

> *a) determine whether the agreed rate of $7.50 an acre was fair or adequate compensation for Metlakatla's agreement to surrender the surrendered Indian reserve lands, at the time it was agreed by Metlakatla and GTP on February 7, 1906*. [emphasis in original; Ex-37 at 25]

[273] John Peebles first estimated the February 7, 1906, market value on an unencumbered fee

simple basis (Ex-37 at 86). Peebles divided the Kaien Island lands into "Townsite Development" land and "Limited no Land Capability", allocating the respective acreages in similar fashion as Allan Koebel. He valued the Kaien Island townsite development land (1,240 acres) at $100 per acre and the Kaien Island 'limited no land capability' land at $1 per acre (1,440 acres). He also provided an estimate of value for the two land classifications he recognized on each of the Mainland portion and the Digby Island properties as follows: $10 per acre for land having "Limited Settlement and Riparian Use[s]" and $1 per acre for 'no land capability' land (Ex-37 at 113–14). Peebles divided Digby Island into 3,979 acres of "Limited settlement & Riparian Uses" land, and 2,861 acres of "No Land Capability" land (Ex-37 at 115). For the Mainland portion, Peebles divided the land into 2,700 acres of "Limited settlement & Riparian Uses" land and 1,830 acres of "No Land Capability" land (Ex-37 at 115). He valued Lak-Anian Island, Lak-Wilgiapsh Island and Island No. 1 at $20 per acre and the rest of the islands at $20 per island.

[274] He assigned different acreages for the Mainland portion than did Allan Koebel (4,530 acres v. 4,592 acres), and the various islands and islets, resulting in a different total acreage than the historical area presentation (14,083.39 acres v. 14,160 acres stipulated in the letters patent) (Ex-37 at 115). This perhaps conforms to more modern survey information.

[275] If presented in a similar format as used by Allan Koebel, the estimated values were (Ex-37 at 115):

AREA	**ESTIMATED VALUE**
Kaien Island	$125,440
Digby Island	$42,651
Mainland	$28,830
Lak-Anian Island, Lak-Wilgiapsh Island and Islands No. 1 to 8	$626
Total	$197,547 rounded to $197,600

[276] By either total acreage the per acre value rounds to $14 per acre (Ex-37 at 116).

S. Deduction for the Reversionary Interest

[277] John Peebles then values the effect on market value presented by the Province's claim to a

reversionary interest. He finds there should be a 20%–30% deduction from the $14 per acre ($9.80-$11.20) (Ex-37 at 128).

[278] The ultimate question put to John Peebles is at page 131 of his report: "[w]as $7.50 an acre fair or adequate compensation for the Surrendered Land as of February 7, 1906?" Peebles offered the opinion that the $7.50 received, was at the lower end of a range of tolerance for equitable compensation of the surrendered lands. He said the range of tolerance was associated with the limitations of the data circa 1906 and that "I recognize that the Tribunal will determine the Equitable Compensation for the Surrendered Lands" (Ex-37 at 131).

[279] In his evidence, John Peebles could not give parameters of this allowance for a range of tolerance or state where specifically $7.50 fell in this range.

[280] In response to questioning from the Tribunal at the expert evidence hearing, John Peebles said that "there's no specific calculation that leads me to the percentage range" (Hearing Transcript, September 17, 2021, at 12).

[281] Presumably, the range of tolerance has a positive side to it and this too he had difficulty quantifying. Ultimately as I think John Peebles conceded, the question put to him was a question too far and any range of tolerance is a question for the Tribunal to determine.

T. Analysis of the Fee Simple Market Value

[282] Turning back to consideration of the fee simple valuation of the letters patent lands ($14 per acre—John Peebles; $47 per acre—Allan Koebel), I have noted the six-month difference in the valuation date. In Peebles' case he was directed to a February 7, 1906, date in the Respondent's reference questions (Ex-37 at 25). He states there was a significant change in the market when the Band's willingness to surrender the large tracts of reserve land for sale became known and later data should be avoided as hindsight (Ex-37 at 229). He also considered that as of February 7, 1906, the terminal site was yet to be determined and the GTP "was still considering all options" (Ex-37 at 81).

[283] Allan Koebel concluded that at the valuation date he used, August 17, 1906, Canada had knowledge that:

- the GTP had selected Kaien Island for its terminus (and townsite) location,

- the GTP wanted part of the Reserve as part of its terminus location, and

- the GTP was committed to this location for its terminus[.] [Ex-12 at 116]

[284] Canada argues that there was no reasonable certainty Kaien Island would be the terminus for the GTP railroad and that Allan Koebel's conclusion was incorrect and Port Simpson was a reasonable alternative location for the terminus (Respondent's Written Submissions at para 239).

[285] Newspaper accounts prior to February 7, 1906, referred to the likely location of the terminus. These appear to be founded on speculation with most reporting Kaien Island was the likely location, but inconsistent views were reported within the media. Just months before the *Victoria Daily Times* article, February 17, 1906, (erroneously headlined as: GTP Purchases Additional Land) (Ex-24, Tab 176), the *Victoria Daily Colonist* published an article citing an interview with a Vancouver land market speculator that discredited Kaien Island as the terminus location (Ex-52, Tab JBD-1031). The actions of the GTP as known to the two governments, however, do not support the theory that the most likely alternative, Port Simpson, was regarded as a prospective terminus. The prominent advantage Prince Rupert Harbour offered was the very large tracts of lands surrounding the location, lands the GTP felt would be less expensive to acquire and which allowed the Company control of terminus and townsite development, along with distancing the project from any competing private developments.

[286] The first step taken by the GTP was to secure the 10,000-acre grant from the provincial government reserve. This was in place May 4, 1904, contingent on the Company locating the terminus on the lands chosen from the government reserve (Ex-22, Tab 140). The $10,000 price for the land was paid and the Crown grant issued March 10, 1905 (Ex-50, Tab JBD-991; Ex-10). Morse, the GTP general manager, certified that the Company approved of the terms and conditions of the grant on March 6, 1905 (Ex-50, Tab JBD-1112) and Charles Hays, the GTP president, formally certified that the location of the western terminus would be on the granted lands on August 3, 1905 (Ex-50, Tab JBD-1023). If there was any change in the terminus location from Prince Rupert Harbour the price paid would have been forfeit and the Company no doubt would have compromised its dealings with the provincial government, who would not have profited from sales of land at Port Simpson.

[287] The only GTP document showing planning relating to a terminus site at Port Simpson was the August 12, 1904, plan submitted to the Federal Ministry of Railways showing dual 1,600-acre terminus sites, one on Kaien Island and the more northerly site south of the Lax Kw'alaams village and Port Simpson Harbour on the west side of the north portion of I.R. No. 2, allocated to the Lax Kw'alaams Band (Ex-22, Tab 143). The plan was rejected because two railway terminus sites could not be justified (Ex-50, Tab JBD-173). Following this, GTP communications with Canada were focused on the areas surrounding Prince Rupert Harbour.

[288] As already indicated, some of the correspondence refers to the area that became Prince Rupert Harbour as Port Simpson or I.R. No. 2 as the Port Simpson reserve, Port Simpson being the more recognizable place name in the area, but the context or associated documents indicate the area around Prince Rupert Harbour was the subject of the communication.

[289] Should the GTP have pursued a location at or near Port Simpson, the land around the harbour was in private hands (Ex-24, Tab 179, at clxv) and acquiring reserve lands would have had to have been through the more numerous Lax Kw'alaams Band, whose village site would have been compromised by the proposed terminus (Supplemental ASF at para 18). This would likely have been a more difficult agreement to secure. There is no evidence that the Lax Kw'alaams Band were ever approached by the GTP.

[290] These facts support Allan Koebel's assessment that the GTP preferred and had committed to Prince Rupert Harbour, all prior to the date the GTP first approached the Band early in 1906.

U. Discussion of the Appraisal Data

1. Allan Koebel's Evidence

a) Kaien Island—Higher Utility Lands

[291] In the case of the Koebel Report, in analysing the value of the highest utility lands on Kaien Island (1,200 acres), Allan Koebel uses five sets of data:

1. the 1907 GTP prospectus indicating the GTP's expected return on subdivided townsite lands, along with 1907 market sales of land east of Prince Rupert, these

being sales of the closest land to the townsite in private hands after the GTP had acquired the letters patent lands (Ex-12 at 116–19, 158);

2. the price of land acquired by the GTP at Fort George (later Prince George) in 1909–1912, a GTP station site in an area having a more open market (Ex-12 at 135–41, 158);

3. the price of acquisition of a GTP rail yard at Fort William, Ontario, in 1905 (Ex-12 at 150–51, 158);

4. evidence given by James Anderson who was instrumental in acquiring the 10,000 acres from the provincial government reserve given to the Metlakatla inquiry in 1905. His evidence was that the price of land privately held at Port Simpson prior to the 1904 government reserve acquisition was $60–$200 per acre (Ex-12 at 22, 158); and

5. the price paid for the land acquisition at New/South Hazelton, a proposed GTP station site in 1910–1911 (Ex-12 at 142–45, 158).

[292] While the data described in items 2, 3, and 5 relate to sites distant from the Pacific Coast terminus and townsite, Allan Koebel finds parallels in the effect on land prices of the anticipation of the improvements attributable to the coming location of railway stations, work yards, and in this case, the Pacific terminus location and townsite (Ex-12 at 121).

[293] Item 1, the 1907 GTP prospectus, indicated a value of the 1,200-acre Kaien Island property of the greatest utility to be $1,950 per acre. Allan Koebel identified the 1907 GTP prospectus as reflecting "extreme upper limit values" as they were the Company's estimate of land values. These values were given little weight in the final analysis (Ex-12 at 158). The 1907 prospectus value in fact was lower than what was realized by the first sale of Kaien Island lots on May 25, 1909, which yielded a return of more than $5,000 per acre. The two later auctions of Kaien Island lots in 1911 and 1912 yielded substantially more than the auction in 1909. These yields were approximately $13,000 and $55,000 per acre respectively (Ex-12 at 120–21).

[294] The prices realized at the three auctions likely reflected a booming land market and

occurred after the lots were actually laid out, along with roads and services, but nonetheless illustrate the market value increases that could be realized in association with a terminus and townsite location.

[295] On examining the upper and lower limits of the prices considered in items 2 to 5 ($50 and $313) he valued the Kaien Island Higher Utility Townsite/Port Lands of 1,200 acres at $250 per acre for a total of $300,000 (Ex-12 at 160).

[296] Allan Koebel analyses the other lower value classifications of land on Kaien Island, Digby Island, the Mainland, and the islands and islets, which descriptions in each case are found below.

b) Kaien Island—Lower Utility Lands

[297] For the Kaien Island Lower Utility–Steeply Sloping/High Elevation Bench Lands, Koebel estimated a per acre value of $15 per acre (Ex-12 at 159–60).

c) Digby Island and the Surrounding Islands/Islets

[298] Allan Koebel noted that "[t]he portion of the *Letters Patent Lands* located on Digby Island comprises primarily flat, easily developable lands, close to the main townsite and port" (Ex-12 at 161). Koebel considered five comparable sales ranging in value from $15 to $90 per acre, and concluded, based on the limited access and large parcel size that the value of the Digby Island lands should be at the lower end of the range, at $30 per acre (Ex-12 at 160–61).

[299] He noted that the surrounding islands/islets provided little utility, and that "[t]hese parcels would likely be sold in conjunction with the parent parcel" (Ex-12 at 161). As a result, he also applied his estimated value of the Digby Island lands at $30 per acre to the surrounding islands and islets.

d) Mainland Portion

[300] Allan Koebel also estimated the value of the Mainland portion of the letters patent lands at $30 per acre. He noted that these lands comprise "forested lands of various topography, close to the main townsite and port" (Ex-12 at 161). He said these lands were higher value than the Lower Utility Kaien Island lands as they had development potential due to their location on the harbour

across from Kaien Island, all of which suggested a similar value to Digby Island (Ex-12 at 161–62).

2. John Peebles' Evidence

[301] In John Peebles' case, he warns against the use of hindsight data. He cites page 78 (Practice Note 18.11.2) of CUSPAP:

> *18.11.2 In preparing a retrospective valuation, hindsight or after-the-fact evidence should not be used unless the subsequent data is consistent with data as of the effective date.* [emphasis in original; Ex-37 at 91]

[302] He then comments:

> Earlier in this report it was reported that during the years leading up to February 7, 1906, land speculation contributed to a spike in sales prices for lands located near one of the three widely known options for the terminus of the GTP. After February 7, 1906, the Times Colonist [*Victoria Daily Times*] reporting of the purchase of 14,160 acres of Tsimpsean IR 2 (the Surrender Lands) by the GTP, property sales prices continued to increase as it became more likely that Kaien Island would be the terminus of the GTP.
>
> Hindsight speculative land sales have been reviewed and given limited weight in the valuation of the Surrendered Lands given the material change in market conditions. [Ex-37 at 91–92]

[303] Peebles states:

> AIC CUSPAP Practice Note 18.11.2, cited earlier, stated that it is acceptable to use hindsight market data when this information is consistent with market conditions at the valuation date. [Ex-37 at 92]

[304] Peebles adopts what he refers to as a "qualitative weighting process" in light of the limited pre-1906 sales and the 1906 sales data he views as appropriate notwithstanding they are sales after February 7, 1906, and represent hindsight sales data (Ex-37 at 92). Peebles says at page 112 of his report:

> In my opinion, in the years leading up to February 6, 1906, sales prices for speculative Townsite properties were in the order of $50.00 to $100.00+ per acre with considerable variation in negotiated prices.

[305] Based on these values, he valued the portion of the Kaien Island lands with favourable potential for townsite development at $100 per acre, or $124,000 in total (Ex-37 at 112).

[306] Valuing the "Limited no Land Capability (Mountainous Terrain)[,] No Riparian access" land on Kaien Island, he adopts $1 per acre, or $1,440 in total (Ex-37 at 115).

[307] Peebles considered that a portion of the Tsimpsean Peninsula (Mainland) and a portion of Digby Island constituted lands with limited settlement and riparian uses. For these lands, Peebles gave the most weight to five sales indices (all sales between March and October 1906). He adopted a base rate of $10 to $15 per acre, and concluded a unit value of $10 per acre, at the low end of the value range, to account for the size differential between the lands in question here and the comparable sales (Ex-37 at 112–13).

[308] John Peebles considered that Lak-Anian Island, Lak-Wilgiapsh Island, and Island No. 1 had "some capability for limited settlement and related riparian uses" and that therefore a unit value of $20 per acre was appropriate (Ex-37 at 113; Hearing Transcript, September 17, 2021, at 160).

[309] Peebles observed that Islands No. 2 to 8 are about two acres or less in size, with "no potential for settlement use and few alternative uses, other than shellfish gathering" (Ex-37 at 113). He considered that the islands would likely be purchased on a site basis, rather than a value per acre, and therefore he assigned a site value of $20 for each of these islands.

[310] The different estimates of utility of the Kaien Island lands are illustrative of the separate classifications of land again used by John Peebles when he presents differences in value in respect of the other letters patent lands.

[311] Allan Koebel's response to John Peebles' reluctance to use sales data following February 17, 1906, is as follows:

> It is illogical to suggest that sales recorded after the February 17, 1906 newspaper article should not be used for comparative purposes, as suggested by the LEC Report, "*since market conditions had changed dramatically with the Times Colonist* [*Victoria Daily Times*] *reporting*". It was well known before this date that the GTP had struck a deal with the province for 10,000 acres on Kaien Island that was to become the terminus location. To suggest that this knowledge did not incite speculation in the market, yet the surrender of lands within Tsimpsean IR #2 caused speculation to "*reach a pinnacle*", does not make sense. The LEC Report acknowledged speculation both before and after the date of the surrender, but the evidence does not support that the surrender so fundamentally changed the market

> that it would have made any sales after that point unreliable market data for comparative purposes. [emphasis in original; Ex-13 at 12]

[312] In testimony, Koebel explained that hindsight data can be used as long as it is in "similar market circumstances" and that the "subsequent data is consistent with data as of the effective date" (Hearing Transcript, September 14, 2021, at 88, 100–01). His full explanation on this point is as follows:

> Again, hindsight I would -- I have to clarify that term particularly in relation to sales in other areas. So, for example, the Fort George townsite sale and the Hazelton townsite sales occurred at the time that the GTP was entering the market. So was that after the GTP was entering the market in Kaien Island? Yes. But, again, it was similar market circumstances where the GTP was entering the market at those dates. So if it's hindsight data, it doesn't provide knowledge as to the value of the *Letters Patent Lands* based on the sales of those similar lands in 1913. It's a different area under similar market circumstances. [Hearing Transcript, September 14, 2021, at 87–88]

3. Analysis

[313] The approach taken by John Peebles may be appropriate in valuing land in accord with more stable markets, markets that review the land as having had a reasonably consistent highest use over time and which will continue to determine value into the future but that in the dynamic situation presented by locating the railroad terminus and townsite on land that otherwise presented few uses and modest value. I view the principle of anticipation to be an important aspect of setting value. This, however, should only extend to that portion of the letters patent lands that would have been recognized by those in the market as having development potential. Much of the 14,000 acres acquired from I.R. No. 2 would not have been recognized as having this potential. For example, roughly 1,200 acres of Kaien Island would be developable land, 1,480 acres was not useable land. Most of the Digby Island and the Mainland portion would also not have attracted much by way of speculative interest. Except in the areas Peebles identified as having Limited settlement and Riparian Uses, the difficult terrain and distance from the townsite would have discouraged most reasonable investors. Using Peebles' acreages associated with limited settlement and riparian uses and Koebel's value per acre for the Digby Island and Mainland portion, and assessing Peebles' No Land Capability areas at a nominal $5 per acre, Koebel's estimates of value for these two areas (Digby Island and Mainland portion) can be adjusted as follows:

	Digby Island	Mainland Portion
Limited settlement/riparian use@ $30 per acre	3,979 acres-$119,370	2,700 acres-$81,000
No Land Capability @ $5 per acre	2,861 acres-$14,305	1,830 acres-$9,150
Total value	$133,675	$90,150

(I have chosen a nominal $5 per acre for the No Land Capability areas rather than $1 per acre assessed by Peebles because although the land was similar to land that could be bought from the province for $1 elsewhere, there was no $1 land available near Prince Rupert and the proximity to Prince Rupert would have added to the value.)

[314] Of the Islands only three (the "L" Islands and Island No. 1) had any significant acreage and I assess the value of the acreage of these three at 25 acres x $30 = $750. I use John Peebles' value of the remaining islands at $20 a piece.

[315] This adjusts Allan Koebel's fee simple valuation as follows:

Kaien Island (2,680 acres)	$322,200
Digby Island (6,840 acres)	$133,675
Mainland Portion (4,592 acres)	$90,150
"L" Islands and Island No. 1 (25 acres)	$750
Islands No. 2 to 8 at $20 each	$140
Total	$546,915

4. Valuing the Reversionary Interest

[316] The last issue remaining is consideration of the effect of the Province's claim to a reversionary interest would have had on an otherwise market value sale of the letters patent lands.

[317] John Peebles took this step in response to the question put to him at paragraph e) of his instructions:

> *e) explain the impact that the provincial Crown's full reversionary interest had on the value of the lands that Metlakatla agreed to surrender*[.] [emphasis in original; Ex-37 at 26]

[318] In coming to grips with this part of the assessment, Peebles analyses the February 29, 1908, agreement between the GTP and the Province ultimately settling payment to the Province in return for the provincial Crown grant of the letters patent lands, and the general issues related to trackage right-of-way and accommodation of railroad infrastructure across the railways traverse of the Province, use of natural resources on Crown lands, forgiveness of provincial railway taxes, and the GTP agreement to construct the railway from the Pacific terminus. After reference to the February 29, 1908, agreement, Peebles goes on to state:

> The challenge is to estimate the compensation that reasonable parties would have negotiated to extinguish the Province's reversionary interest in the Surrendered Lands as of February 7, 1906, or two years prior to the agreement between the Province, GTP, and Townsite Company, given the information that was available to all parties at this date. [Ex-37 at 122–23]

[319] Allan Koebel describes the issue in a similar way:

> Regardless of whether or not this reversionary interest had a justifiable legal basis at the time, the historic reality is that the GTP proceeded in its dealings with both the Federal and Provincial Government on the basis that a reversionary interest could be established, and that its bearing on the market value of the Subject Lands was significant. [Ex-12 at 114]

[320] To put it in short, the ultimate payment for disposition of the provincial claim, as was done in the February 29, 1908, agreement, needed to be estimated on the basis of what price could have been expected for resolution of the provincial claim, as was done in 1908, given what was known to the Parties in 1906. Obviously a complicated exercise.

[321] John Peebles goes on to recognize the Province's motivation towards completion of the railway. He says:

> ... the Province had an interest in the successful completion of the GTP project and had an expectation of tax revenues, and other benefits accruing from development of the Surrendered Lands, similar to a partner in a development enterprise [Ex-37 at 123).

[322] Peebles refers to the letter from GTP solicitor Bodwell to the provincial CCLW, R. F. Green, on February 21, 1905, (Ex-50, Tab JBD-175) as indicating the Company assessed the reversionary claim as equal to a 25% interest in the surrendered lands.

[323] This is an overstatement in my view. The Bodwell reference to a 25% interest was only to

the portion of "the railway yards, coal docks, etc." planned for reserve lands on Kaien Island. Shortly after Bodwell's letter, GTP General Manager Morse wrote to Premier, McBride, on March 22, 1905, referring to the whole of the Indian reserve lands (from the context, on Kaien Island) and stated:

> The only reason, if I understand correctly, that the Indian Reserve was not included in the original Crown grant [the 10,000 acres from the government reserve], was you deemed it desirable to treat the Government lands and Indian Reserve separately, but that you expected to be able, at the same net cost, to give us title to both. [Ex-24, Tab 151]

[324] GTP general manager Morse's March 22, 1905, letter also refers to settling with the Province for its reversionary claim to the large tract of I.R. No. 2 the GTP wanted to acquire on terms comparable to acquisition of the government reserve lands: one dollar per acre with a 25% reconveyance of subdivided lots (Ex-24, Tab 151).

[325] One dollar per acre with an obligation to return 25% of subdivided lots is a less costly proposition than satisfying a 25% overall interest, in that subdivision was only an immediate prospect in respect of a portion of the lands and probably inappropriate for the bulk of the lands transferred by the letters patent.

[326] John Peebles in estimating the impact of the reversionary claim on market value focuses on valuing the reversionary claim as if it were a percentage interest in the fee simple title. This approach, however, is not a very accurate representation of the Province's claim. It was not a claim to a percentage of the title. It was a claim to a full reversionary interest triggered by the surrender, and pressing this claim had obvious political consequences. The Province, like Canada, valued the transportation link and the advantages to provincial Crown lands of the terminus location at Prince Rupert Harbour. It was interested in the railway being built and as Peebles says, had a role "similar to a partner in a development enterprise."

[327] Peebles says:

> ... based on my judgement and experience, and the 1905 offer made by the GTP to the Province [by Bodwell], the parties would have negotiated compensation for release of the reversionary interest as a percentage of land value of the Surrendered Land taking into account lands with different land capability. [Ex-37 at 126]

[328] Peebles found that the probable compensation for this was 20% to 30% of the

unencumbered value of the surrendered lands (Ex-37 at 126). Peebles noted in testimony that "there wasn't a lot of information to base my judgment on so there's a measure of uncertainty associated with that" (Hearing Transcript, September 17, 2021, at 2). Peebles acknowledged in his report that "[t]here was no directly comparable market data available to identify the value of the Province's reversionary interest, as of February 7, 1906" and "[i]t was necessary to rely on indirect indicators of value and reasoning to arrive at an estimate of value for the reversionary interest" (Ex-37 at 17).

[329] As already indicated, this was a unique land acquisition, an agreement heavily loaded with political considerations relating to the public advantages of construction of the railway and creating a terminus at Prince Rupert Harbour.

[330] Further, the 1908 agreement was not single-purpose and the provincial reversionary claim was not specifically referred to. The agreement to Crown grant the letters patent lands did not take the form identified by John Peebles as "tied to the unencumbered value – possibly as a percentage or lump-sum amount" (Ex-37 at 126). It more closely resembled a provincial *Land Act* sale of second class Crown land which would be at $2.50 per acre with a right to have reconveyed 25% of any future-subdivided lots, but under the 1908 agreement with a deferral of the per acre payment until the GTP actually called for individual Crown grants. This was a similar structure to what GTP general manager Morse thought should have been the arrangement in 1905, with the per acre price increased from $1 to $2.50, but again in the context of a general agreement that had considerable value to the company in its other terms.

[331] The 1908 agreement with the provincial government did not take the form of a price stipulated on the basis of different land capability and value. The payment was $2.50 per acre "to be paid from time to time as Crown Grants are received by the [GTP], and to re-convey to the Province one-fourth of all lots and blocks into which the said lands shall be subdivided" (Ex-24, Tab 254). Peebles refers to this as an agreement "to pay the Province a fee of $2.50 per acre, over time" (Ex-37 at 121). It would be better said that this was an agreement to pay $2.50 per acre upon development, with the commitment to develop stipulated in the 1908 agreement being restricted to the "not less than 2000 acre" townsite the GTP was to immediately undertake (Ex-24, Tab 257). Much of the letters patent lands were not suitable for development, and Crown grants of the various

locations the company might want to develop might be delayed for a considerable time until the development were to occur, or otherwise not incurred in respect of land unsuitable for this use. An example was the Crown grant of approximately 813.75 acres in 1909 to accommodate the planned townsite of Prince Rupert which extended onto the north end of the Kaien Island portion of I.R. No. 2. This land was transferred by Crown grant and the payment received was $2,034.75 ($2.50 per acre) (Ex-49, Appendix C-5 (Crown Grant to DL 1992 (Northern Part)). The rest of the former I.R. No. 2 lands would remain as Crown land until further arrangements were made for Crown grants.

[332] Second, the letters patent lands that the Province agreed to convey had added to them the below-high-water-mark blocks likely useful for waterfront development. John Peebles does not offer a value to the GTP of these additional blocks included in the lands made available by the Province (Ex-24, Tab 241).

[333] Third, as already indicated, the 1908 agreement has the multiple terms of a comprehensive agreement for construction of the railway across the Province including terms of considerable value to the GTP (Ex-24, Tab 257).

[334] The significance of the provincial reversionary claim, however, cannot be disregarded. It may have been subsumed as part of the overall agreement for construction of the railway, but in 1906 after the Province refused to relinquish the claim, it was a troublesome feature impeding the development of the terminus and townsite.

[335] Both Allan Koebel and John Peebles agree that the reversionary interest had a downward pressure on market value.

[336] Allan Koebel refers to the Minister of the Interior and Superintendent General of Indian Affairs Frank Oliver's statement during a House of Commons Debate in Ottawa on January 25, 1907, that the low price per acre obtained for the Metlakatla reserve lands was due to the provincial reversionary interest (Ex-12 at 112). In Koebel's report, he comments that "its bearing on the market value of the Subject Lands was significant" (Ex-12 at 114). He also notes that "[t]he Provincial claim to a reversionary interest in Tsimpsean IR #2 is … essential to understanding the historical valuation of the *Letters Patent Lands*" (emphasis in original; Ex-12 at 114). His

instructions did not lead to a valuation but in my view the description presented by the unresolved claim was as Koebel says, significant.

[337] However, I find John Peebles' 20%–30% deduction in per acre value to be unsupported at the higher level by the circumstances existing in 1906. I find that a 20% deduction in market value more in conformity with the fact that at the time the GTP did not view the Province's claim as having substance; in fact Morse referred to it as extortionate, and the company had received some assurance that provincial cooperation could be attained for a similar price as was paid for government reserve lands (Ex-50, Tab JBD-462). Additional to this, both parties were motivated to find a settlement and the terms of the 1908 agreement itself were on a larger view advantageous to the GTP and a positive political step for the Province in coming to terms allowing construction of the railway.

V. CONCLUSION

[338] On the evidence placed before the Tribunal I have assessed the fee simple historical market value of the 14,160 acres of the southern portion of I.R. No. 2 allocated to the Metlakatla Band, sold by Canada to the Grand Trunk Pacific Railway Company by letters patent dated June 25, 1907, as follows:

Kaien Island (2,680 acres)	$322,200
Digby Island (6,840 acres)	$133,675
Mainland Portion (4,530 acres)	$90,150
"L" Islands and Island No. 1 (25 acres)	$750
Islands No. 2 to 8 at $20 each	$140
Total	$546,915

[339] This value less a 20% deduction for the impairment of value to be attributed to the claim of the Province of British Columbia to a reversionary interest in the lands ($109,383), sets the historical market value at the time of the taking of the reserve lands at $437,532 and rounds to a per acre net value (using a total acreage of 14,160 acres as set in the letters patent) of $31.

[340] I find:

1. the measure of difference in value establishes that the sale made by Canada of the surrendered lands was improvident at the sale price of $7.50 per acre;

2. no effort was taken by Canada to analyse and prevent this improvident sale and the failure by Canada to offer disclosure of material facts to the Band was a breach of fiduciary duty and a failure to act with loyalty and good faith towards the Band; and

3. Canada's subsequent sale of the surrendered lands was a breach of the obligation express in the surrender to dispose of the lands on terms deemed most conducive to the Band's welfare.

[341] I find the Claim is valid under paragraphs 14(1)(c) and (d) of the *SCTA*: "a breach of a legal obligation arising from the Crown's…administration of reserve lands" and "an illegal…disposition by the Crown of reserve lands".

[342] Of the 14,160 acres included in the letters patent, only 13,567 acres were surrendered by Metlakatla. I leave it to the Parties to consider whether the loss of the unsurrendered lands requires further elements of compensation in the total assessment, and to bring forward the historical loss to present day value.

[343] The Parties may apply to the Tribunal for resolution of compensation if they are unable to agree.

WILLIAM GRIST

Honourable William Grist

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20221222

File No.: SCT-7002-13

OTTAWA, ONTARIO December 22, 2022

PRESENT: Honourable William Grist

BETWEEN:

METLAKATLA INDIAN BAND

Claimant

and

HIS MAJESTY THE KING IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant METLAKATLA INDIAN BAND**
As represented by Peter Millerd, Robin Dean and Erica Stahl
Mandell Pinder LLP

AND TO: **Counsel for the Respondent**
As represented by John Russell, Michael Mladen, Peri Smith and Isabel Jackson
Department of Justice