FILE NO.: SCT-2001-12
CITATION: 2016 SCTC 10
DATE: 20160520

OFFICIAL TRANSLATION

SPECIFIC CLAIMS TRIBUNAL
TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	)	
	)	
MICMAC DE GESPEG NATION	)	Benoît Champoux and David Boisvert, for the Claimant
Claimant	)	
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development	)	Dah Yoon Min, Marie-Emmanuelle Laplante and Éric Gingras, for the Respondent
Respondent	)	
	)	**HEARD:** From January 14 to 21, 2015, and from April 8 to 10, 2015.

REASONS FOR DECISION

Honourable Johanne Mainville

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

Cases Cited:

Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada, 2016 SCTC 6; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193; *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2, 137 DLR (3rd) 558; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816.

Statutes and Regulations Cited:

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

An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada, 1851, 14 & 15 Vict, c 106.

The Constitution Act, 1867, 30 & 31 Vict, c 3, s 111.

An Act for the better protection of the Lands and Property of the Indians in Lower Canada, 1850, 13 & 14 Vict, c 42.

An Act for the relief of certain Landholders in the District of Gaspé, 1847, 10 & 11 Vict, c 30.

The Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

Headnote:

This claim involves the enactment and implementation of *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act"), on the basis of which the Micmac de Gespeg Nation alleges that it should have had reserve lands allocated to it, and the damage and inconvenience resulting from this omission.

The Claimant argues that, when the 1851 Act was enacted, the government had not established a plan for how the 230,000 acres of lands set apart for the future use of the Indians in Lower Canada should be allocated, giving it a great deal of latitude in implementing the statute.

According to the Claimant, the cornerstone of the colonial authorities' civilization program that was developed over the three decades leading up to the enactment of the 1851 Act was the settlement of nomadic populations. It adds that an analysis of the intent of the colonial authorities shows that the objective of the 1851 Act was to grant reserve lands to poor, nomadic Indian tribes. The authorities also had discretion in the implementation of the 1851 Act, and the Commissioner of Crown Lands had full discretion to set apart lands and designate them as reserves. Therefore, it argues, the enactment and implementation of the 1851 Act created a fiduciary duty owed by the Crown to the poor, nomadic tribes existing at the time.

The Claimant alleges that the Mi'kmaq have had an ongoing and continuous presence in the Gaspé Bay area since time immemorial, that the colonial authorities knew or ought to have known of this presence and that the group lived in acute poverty. Accordingly, the Crown had a fiduciary duty to allocate reserve lands to the Mi'kmaq in Gaspé or the surrounding area.

According to the Claimant, in its implementation of the 1851 Act, the Crown breached its fiduciary duty to the Mi'kmaq of Gespeg in that it (1) allocated reserve lands in a manner inconsistent with the objective of the 1851 Act (cognizable interest); (2) breached its obligation to provide full disclosure and (3) breached its obligation to act with loyalty and ordinary prudence with a view to the best interest of the beneficiaries, namely, the Mi'kmaq of Gespeg.

The Respondent alleges that the Claimant is criticizing the distribution by order in council of lands for the benefit of Indian tribes in Lower Canada. This is a legislative function

requiring a balancing of opposing interests of the various members of the population, including those of other Indian tribes. Where the government acts in the exercise of its legislative functions, courts have consistently held that a fiduciary duty does not arise.

The Respondent also alleges that the 1851 Act does not give rise to a fiduciary duty for the Crown. The right that the Claimant is attempting to establish, if it even exists, which is denied, has no legal existence independent of the 1851 Act. It is a right that flows exclusively from legislative and executive powers, which cannot give rise to a fiduciary duty. Moreover, the power in the 1851 Act is a purely discretionary power, not the discretionary power of fiduciary law as described in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, and *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, which involved a particular situation created by the mechanism of surrendering lands to the Crown, which was acting as an intermediary.

The Respondent also argues that the Claimant has not established a specific, collective Indian right to the lands it is claiming.

Finally, the Respondent submits that consequences or breaches of any fiduciary duties of the authorities of the Province of Canada prior to Confederation are not among the "Debts and Liabilities" assumed by Canada in 1867 (*Constitution Act, 1867*, 30 & 31 Vict, c 3).

Held: The Claimant has failed to demonstrate that the Crown had an enforceable fiduciary duty arising from the 1851 Act and its implementation to create for the Mi'kmaq a reserve in Gaspé or in the surrounding area.

The historical analysis and the evidence show that the distribution schedule approved by the 1853 Order in Council is consistent with the objectives of the 1851 Act, namely, the allocation of lands to poor, nomadic communities and to settled Indians.

The 1851 Act did not, in and of itself, give rise to a fiduciary duty to allocate lands to Aboriginal communities. It provided that tracts of lands not exceeding 230,000 acres could, under orders in council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands.

In adopting the 1853 Order in Council and the attached schedule, the Crown exercised the power conferred on it by the 1851 Act. The Crown therefore recognized that the tribes mentioned in the schedule had a specific Aboriginal interest in the creation of reserves at the locations and with the areas mentioned in the schedule. It thereby unilaterally undertook to create reserves for the benefit of the Indian tribes for whom lands had been set apart and appropriated. This undertaking and recognition gave rise to a fiduciary duty owed by the Crown to the beneficiaries mentioned in the schedule.

The 1853 schedule set apart and appropriated 9,600 acres to and for the use of the Mi'kmaq in Restigouche. The distribution schedule does not indicate that only the Mi'kmaq of Restigouche are entitled to a reserve, but rather that 9,600 acres were set apart in Restigouche and appropriated to and for the use of the Mi'kmaq. There is no evidence in the record demonstrating that the Restigouche Reserve was created solely taking into account the Mi'kmaq of Restigouche or for them exclusively.

Once the 1853 Order in Council was adopted, the Crown was bound by it, the 1850 Act (*An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42) and the 1851 Act to create a 9,600-acre reserve in Restigouche for the Mi'kmaq. Moreover, the evidence shows that the Mi'kmaq of Gespeg as a community, tribe or group did not apply to the governmental authorities to obtain collective land rights in Gaspé or the surrounding area at the time of the 1851 Act and the 1853 Order in Council. The evidence also shows that the Crown never undertook to create a reserve for the Mi'kmaq of Gaspé or the Gaspé region.

TABLE OF CONTENTS

I. INTRODUCTION 8

II. FACTS 10

A. The lay evidence and oral history 11

1. Chief Claude Jeannotte 11

2. Nicole Jeannotte 12

3. Elder William Jérôme 12

B. The expert evidence 14

1. Joan Holmes 14

(a) Qualifications 14

(b) Expert report 14

2. Alain Beaulieu 18

(a) Qualifications 18

(b) Expert report 19

3. Stéphanie Béreau 21

(a) Qualifications 21

(b) Expert report 22

III. OBJECTION TAKEN UNDER RESERVE 23

IV. LAW 24

A. The *Specific Claims Tribunal Act* 24

B. The honour of the Crown 25

C. The general principles of the fiduciary duty 26

V. ISSUES 27

VI. ANALYSIS 28

A. Was the 1853 distribution schedule consistent with the objectives of the 1851 Act? 28

1. The positions of the parties 28

2. The 1850 Act 30

3. The 1851 Act 31

4. The 1853 distribution schedule 33

B. Did the 1851 Act give rise to a legal or fiduciary duty requiring the Respondent to create reserves for the poorest Aboriginal tribes? 38

C. Has the Claimant established the existence of a legal or fiduciary duty to create a reserve for the Mi'kmaq of Gespeg? 41

VII. CONCLUSIONS 45

VIII. DECISION 46

I. INTRODUCTION

[1] This claim involves the failure of the federal Crown to provide reserve lands to the Mi'kmaq of Gespeg.

[2] In a letter dated April 11, 2012, the Senior Assistant Deputy Minister of Indian Affairs informed the Claimant of the Minister's refusal to negotiate the specific claim that constitutes this Declaration of Claim.

[3] In its Further Amended Declaration of Claim, the Claimant alleges that the federal Crown breached or failed to honour its fiduciary duties.

[4] The Claimant is basing its Further Amended Declaration of Claim on paragraphs 14(a), (b) and (c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 (the "SCTA"), and alleges the following:

(a) The *Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act"), created a fiduciary duty owed by the colonial authorities to Aboriginal tribes living in miserable conditions.

(b) The objective of the 1851 Act was to set apart reserve lands for the poorest communities in Lower Canada.

(c) The Mi'kmaq of Gespeg held a cognizable interest under the 1851 Act in that it gave the poor, nomadic Indian tribes residing in Lower Canada a right to receive both reserve lands and financial assistance.

(d) The colonial authorities breached their fiduciary duty towards the Mi'kmaq of Gespeg in that they ought to have known that a Mi'kmaq tribe was occupying lands in the Gaspé Bay region when the 1851 Act was enacted and that it was a tribe living in poverty.

(e) Therefore, the Crown, in implementing the 1851 Act, breached its fiduciary duty to the Mi'kmaq of Gaspé Bay in that it

- allocated the reserve lands in a manner inconsistent with the objective of this statute;

- breached its obligation to provide full disclosure; and

- breached its obligation to act with loyalty and ordinary prudence with a view to the best interest of the beneficiary, namely, the Mi'kmaq of Gaspé Bay.

[5] At paragraph 35 of its Further Amended Declaration of Claim, the Claimant makes the following claims:

(a) compensation for the lands that the Mi'kmaq of Gespeg never received, including for the loss of use of this land as of 1853;

(b) interest;

(c) a declaration to the effect that the Mi'kmaq of Gespeg were eligible for the distribution of lands described in the 1851 Act; and

(d) any other remedy that the Specific Claims Tribunal (the "Tribunal") may consider just.

[6] The Respondent challenges and denies the merits of the claim on the following grounds:

(a) The federal Crown is not bound by any legal duty that could arise from the facts in this case, given that the 1851 Act does not give rise to any fiduciary duty.

(b) Where the government acts in the exercise of its legislative functions, courts have consistently held that a fiduciary duty does not arise.

(c) The federal Crown is not bound by any legal duty to compensate the Claimant in any way whatsoever as a result of the facts set out in the claim.

(d) In any event, the consequences of a breach of any fiduciary duties of the authorities of the Province of Canada prior to Confederation are not among the "Debts and

Liabilities" assumed by Canada in 1867 (*Constitution Act, 1867*, 30 & 31 Vict, c 3, s 111).

(e) Even if the Tribunal were to find that the federal Crown had breached a fiduciary duty, the Crown cannot unilaterally create a reserve, so the circumstances of this case cannot give rise to damages against Canada.

[7] At the outset of the procedures, the parties requested that an order be issued to sever the claim into two stages.

[8] On January 8, 2013, Justice Geoffroy issued an order severing the claim into two stages, which reads in part as follows:

> [TRANSLATION]
>
> [2] <u>At the first stage</u>, the Tribunal will determine the validity of the claim by proceeding with the hearing and rendering a decision on the subject.
>
> [3] Without prejudice to either party's interpretation of the expression "validity of the specific claim" contained in Rule 10 of the *Rules of Practice and Procedure*, a decision on the validity of the claim will include a determination of whether or not the Claimant suffered a compensable injury in the context of this claim.
>
> [4] <u>At the second stage, if necessary</u>, the Tribunal will determine the amount of compensation to grant to the Claimant in the context of this claim by proceeding with the hearing and rendering a decision on the subject.
>
> [Emphasis in original]

II. FACTS

[9] On August 10, 1850, the Legislative Assembly of United Canada enacted *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, 1850, 13 & 14 Vict, c 42 (the "1850 Act"). This statute was intended to prevent encroachments upon and injury to the lands appropriated to the use of the several tribes in Lower Canada and to defend their rights and privileges.

[10] On August 30, 1851, the Legislative Assembly of United Canada enacted the 1851 Act, which provided that certain tracts of land not exceeding 230,000 acres could be described,

surveyed and set out by orders in council and appropriated to and for the use of the “several Indian Tribes” in Lower Canada.

[11] On August 9, 1853, Order in Council 482 (the “1853 Order in Council”) was made pursuant to the 1851 Act. The order approved a schedule dated June 8, 1853, apportioning the 230,000 acres of lands over 11 reserves. The schedule also indicated the location, area and beneficiaries of the reserves.

[12] I will revisit the 1850 and 1851 Acts and the 1853 Order in Council.

[13] The Micmac de Gespeg Nation never received any reserve lands. However, it was recognized as an Indian band in 1973 (Order in Council No. P.C. 1973-3571) and currently has about 700 members in Gaspé, Montréal and other cities and towns.

A. The lay evidence and oral history

1. Chief Claude Jeannotte

[14] Chief Claude Jeannotte was called as an ordinary witness to introduce Elder William Jérôme and explain what he represents to the Micmac de Gespeg Nation.

[15] Claude Jeannotte has been Chief of the Micmac de Gespeg Nation since 2008. He was Acting Chief from 2006 to 2008. He testified that the Micmac de Gespeg Nation currently has about 700 status members under the *Indian Act*, RSC 1985, c I-5. Based on its own code of membership, however, the Nation has 815 members.

[16] About 300 of the members live in the City of Gaspé sector, while the others are mainly dispersed over the territory between Ottawa and Drummondville.

[17] Chief Jeannotte stated that the roots of the Gespeg community have progressively weakened and much of its historical and traditional knowledge has been lost as a result of the fact that the Crown never allocated a reserve to the Mi’kmaq of Gespeg. However, since the early 2000s, thanks to the knowledge and expertise of Elder Jérôme of Gesgapegiag, the

Mi'kmaq of Gespeg have been gradually taking control of their destiny and reconnecting with their history, culture, language and traditions.

2. Nicole Jeannotte

[18] Nicole Jeannotte was also called as an ordinary witness to introduce Elder William Jérôme and explain what he represents to the Micmac de Gespeg Nation.

[19] Ms. Jeannotte is a member of the Mi'kmaq community of Gespeg. She testified as the person responsible for culture, traditions and the transmission of teachings within her community. These teachings of the culture shared by the entire Mi'kmaq Nation were transmitted to her by Elder Jérôme, who then recognized Ms. Jeannotte as a [TRANSLATION] "tradition bearer", a position she has held since 2000.

[20] The witness testified that her role was to conduct the purification ceremonies and transmit knowledge of Mi'kmaq indigenous medicine and traditional drumming, songs and dances. Teaching oral history does not fall within the mandate of a tradition bearer. Ms. Jeannotte specified that an elder is a person of a certain age and that a tradition bearer is not necessarily an elder.

3. Elder William Jérôme

[21] William Jérôme is a member of the Mi'kmaq community of Gesgapegiag, where he has always lived. He teaches Mi'kmaq culture and traditions at the school in his community. His mother was born in Listuguj and his father in Gesgapegiag. His great-grandmother is said to have lived in Gespeg before moving to Listuguj and later Gesgapegiag, but he does not know precisely where.

[22] Mr. Jérôme testified that he had started to become interested in and learn Mi'kmaq culture and traditions about 18 years earlier. He was taught in Listuguj, Nova Scotia, New Brunswick, Maine and Labrador. According to him, there is no difference between the oral traditions of the three Mi'kmaq communities of the Gaspé Peninsula.

[23] Since 2000, Mr. Jérôme has been travelling regularly to Gespeg to teach the traditions and conduct ceremonies. He states that the spirits of his ancestors have a very strong presence in Gaspé Bay "because this is where my people started, our people, Mi'kmaq people". According to the teachings the witness received from his elders, when the Euro-Canadians took their lands, the Mi'kmaq were forced out of Gespeg, and they slowly moved towards Gesgapegiag, Listuguj and New Brunswick in an effort to preserve their language and culture. Other "Gespeg people just moved around . . . this area" and lived a little "all over the place".

[24] When asked about the meaning of Gespeg, Mr. Jérôme replied as follows:

> Q . . . can you explain to us a little more in details what does Gespeg represent to the Micmac nation?
>
> A It's their land, Gespegewagi. That represents the Restigouche people, Gesgapegiag people and the people in Gaspé.
>
> . . .
>
> A According to some of the teachings that I received, now the elders would talk about that. Everything started from Gespeg, the Micmac people started from Gespeg and they moved slowly to Gesgapegiag and Lestiguj and the New Brunswick, some of the places in New Brunswick but there are always Mi'kmaq people in Gespeg. It doesn't mean that everybody moved away but that's where some of the people started. Like I was saying my grandmother, I don't know what year she moved or her parents moved to Lestiguj then they came to Gesgapegiag. I couldn't tell you the year but according to them we're all Mi'kmaq people were always in Gespeg.
>
> Q Ok. And when you say Gespeg, where is it exactly?
>
> A To me Gespegewagi, it's all around the peninsula up to Rimouski. And if (inaudible) because they call it Gespegewagi, that means it's the territory of the Mi'kmaq people, we were here. And they would talk about some of the places like over here where the land ends, that's where they were. Some would go around with their canoes the St-Lawrence River and stay in Rimouski for a while and then they would cross the woods and go to Lestiguj and Gesgapegiag and these are places.
>
> Q But you mentioned earlier that for you here it's not Gaspé it's Gespeg.
>
> A Yeah Gespeg.
>
> Q So is there a difference we have to make between Gespeg and Gesgapegiag?

A No. It’s almost the same. To me Gespegewagi includes Gaspé, Gesgapegiag and Restigouche.

[Transcript of the hearing, January 14, 2015, at pp 146, 153–54]

B. The expert evidence

1. Joan Holmes

(a) Qualifications

[25] Joan Holmes was called as an expert witness by the Claimant. She was qualified by the Tribunal as an expert research consultant on issues concerning relations between the Crown and Aboriginal peoples in Canada.

[26] Joan Holmes holds a BA in Anthropology from the University of Winnipeg and an MA in Northern and Native Issues from the Institute of Canadian Studies at Carleton University in Ottawa. Since 1983, she has been president of the research firm Joan Holmes & Associates Inc., specializing in research on relations between Aboriginal peoples and the Crown.

[27] She has acted as an expert witness in several Aboriginal files before the federal and provincial courts and has conducted many interviews with elders for this purpose. She has given many conference presentations and written several articles on Aboriginal issues.

(b) Expert report

[28] In September 2013, Ms. Holmes produced a report entitled *Micmacs of Gespeg - Failure to Provide Land under the 1851 Lower Canada Legislation, Historical Report (Amended)* (Exhibit P-1).

[29] She describes her principal findings as follows:

> This report presents a brief overview history of the Micmacs of Gespeg and examines the questions of why they were not provided with land under the 1851 Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada. That legislation allowed for reserves to be created for First Nations in the Province of Quebec.

> The Mi'kmaq of Gespeg have a documented history of settlement around Gaspé Bay. Two of their members had 100-acre lots acknowledged by the 1819 Gaspé Land Board, and government surveyors described their settlement in 1833, 1841, and 1843/44. Furthermore, census records (1861, 1871, 1881) and a family head list (1875) show the settlement persisted. It is likely that at least some of the families who settled at Gaspé Bay were amongst those who had received sporadic presents from the British Crown at Quebec City in the early 1800s; however, there is no indication that they received presents on a regular basis. Nothing in the written records indicates that they were well-acquainted with Indian Department officials and no services appear to have been rendered to them, though a letter from the Indian Department was hand-delivered to one member of the community in 1833.
>
> While the Crown was generally aware that there were several groups of Mi'kmaq on the Gaspé Peninsula, government officials were most familiar with the communities at Restigouche and Maria. The group at Restigouche in Mann Township had their claim recognized by the Gaspé Land Commission and obtained additional land under the 1851 land grant. Maria, now known as Gesgapegiag, had land purchased by Order in Council beginning in 1940. While there is no clear indication why the Micmacs of Gespeg did not receive any land, sparse records associated with the legislation suggest that the land was given only to those who had been in prior contact with the Crown regarding land grants and with whom the Crown was already involved through the regular distribution of presents and the support of religious personnel.
>
> Unlike many other recognized Indian Act bands that were overlooked in the 1851 distribution of lands, the Micmacs of Gespeg did not receive any reserve in subsequent years.
>
> [Exhibit P-1, at pp 63–64]

[30] More specifically, she states that the objective of her report was to determine whether a Mi'kmaq community existed around Gaspé Bay and supply any documentation relating to such a presence in that sector. Although there is little documentation to this effect, Ms. Holmes concludes that from the time of first contact with the Europeans, the Mi'kmaq Nation was living on the eastern point of the Gaspé Peninsula, around Gaspé Bay, and that this presence was continuous.

[31] As early as the beginning of the 17th century, Jesuit missionaries indicated the presence of the [TRANSLATION] "Savages of Gaspé" who had set up their camp around the harbour in Gaspé Bay. This presence was confirmed by Samuel de Champlain in 1632, and again in 1691 by Récollet missionaries who had visited the Mi'kmaq who had camps at Gaspé Bay and Percé.

[32] In the early 19th century, members of the Mi'kmaq Nation were still present around Gaspé, Percé and Douglastown, as evidenced by the parish registers at the time.

[33] In 1819, the colonial authorities established the Gaspé Land Board in order to hear the claims of the local inhabitants and determine the validity of their land titles in the Gaspé region. Two Indians claimed lots situated in Gaspé Bay, and their claims were declared to be valid by the members of the Gaspé Land Board. In 1820, the same members officially registered the number of Mi'kmaq residing on the Gaspé Peninsula: 24 Indians residing in Gaspé and the surrounding area, 8 more Indians residing in the area of Douglastown (for a total of 32 Indians residing in that region), 3 Indians in Bonaventure, 41 in New Richmond and 194 in Restigouche and the surrounding area.

[34] In 1828, Governor Dalhousie received a petition from the [TRANSLATION] "Indians of the Mi'kmaq tribe with wives and families". This petition related to the distribution of presents and was signed by four men, some of whom resided in the Gaspé Bay region.

[35] In 1831, Lieutenant Colonel Richard Henry Bonnycastle accompanied Governor General Aylmer on his visit to the eastern part of the country, including the Gaspé Bay region. He explicitly mentions in his notes the presence of 13 Mi'kmaq families inhabiting the northern shore of the southwestern branch of Gaspé Bay. Lieutenant Colonel Bonnycastle, who had visited the communities of Restigouche and New Richmond not long before, declared that the Mi'kmaq families were completely isolated from the rest of the Nation. He also noted that the priest in Percé did not allow the Mi'kmaq children to attend his school, the only accessible school in the area. During that visit, the Mi'kmaq of Gespeg presented the Governor General with a petition asking that they be included in the annual distribution of presents.

[36] In 1833, another petition relating to presents was submitted to the colonial authorities by the "Gaspé Indians". A response to that petition was drafted by Louis Juchereau Duchesnay, on which was written, "Copy to Gaspé Indians 5 August 1833".

[37] In the fall of 1833, Lieutenant Frederick Baddeley and Mr. Everington took part in an exploratory expedition to determine whether the lower Gaspé district was suitable for

colonization and agricultural development. Lieutenant Baddeley began exploring from Restigouche, where he hired two local Indians, before proceeding toward Grand River, by which way he travelled northward. Mr. Everington hired three Indians in Gaspé Bay and travelled on the Gaspé River (now York River) before heading overland towards the Little Cascapedia River to the south, hoping eventually to meet Lieutenant Baddeley en route. Upon his arrival in Gaspé, Mr. Everington gave Mi'kmaq Indian Joseph Basque a letter from the Department of Indians in Québec regarding the annual presents.

[38] Following this exploration, Lieutenant Baddeley noted that the Indians hired in Restigouche were unfamiliar with the territory near Gaspé and Grand River, while the three guides hired by Mr. Everington at Gaspé Bay had detailed, in-depth knowledge of the interior of that region. Mr. Everington also reported in his journal that the Mi'kmaq were established in Gaspé Bay and that they hunted in the interior of the territory.

[39] In 1833–34, the parish registers of Percé indicated the presence of several Aboriginal families in the Gaspé area, often identified in the registers as [TRANSLATION] "Indians of Gaspé". Several of the family names recorded in the registers can also be found in subsequent censuses.

[40] In 1836, the colonial authorities established a Committee of the Executive Council of Lower Canada, whose primary objective was to recommend ways to reduce the costs associated with the distribution of presents to the Indians of Canada and to establish a plan for its management. In their findings, the Committee members struggled to define with precision the Mi'kmaq presence on the Gaspé Peninsula. They separated them into three categories: the Mi'kmaq of Restigouche, those from [TRANSLATION] "elsewhere in the Gaspé District" and the nomadic Mi'kmaq. The Committee's report indicated that the Mi'kmaq did not hold lands and were considered to be among the poorest. The Committee members recommended that the nomadic Mi'kmaq tribes retain their right to annual presents. In exchange, however, they would have to settle and begin cultivating the land.

[41] In 1842, a second commission of inquiry, the Bagot Commission, was established. Its role was to review the management of the "Indian Department". In 1845, the Bagot Commission Report recognized that the colonial authorities had very little information about the Mi'kmaq of

the Gaspé Peninsula in general and that the so-called [TRANSLATION] "wandering" tribes lived in a state of abject poverty. The Secretary of Indian Affairs, Colonel Napier, also stated at the time that the colonial authorities possessed only scant information about the Mi'kmaq of the Gaspé Peninsula.

[42] In 1843 and 1844, Sir William Edmond Logan led two geological exploration expeditions in the Gaspé Bay area. For his 1843 expedition, Mr. Logan hired John Basque, a Mi'kmaq residing in Sandy Beach in the Gaspé Bay region. He turned out to be very familiar with the region's resources and the Mi'kmaq population. For his 1844 expedition, Mr. Logan hired five Indians with excellent knowledge of the Gaspé Bay area.

[43] In 1847, the Legislative Assembly of Lower Canada enacted *An Act for the relief of certain Landholders in the District of Gaspé*, 1847, 10 & 11 Vict, c 30, the objective of which was to grant 100 acres of land to any persons able to establish that they had in fact occupied a tract of land in the district before 1828. In 1849 and 1859, claims under this statute mentioned the presence of Mi'kmaq in the Gaspé Bay area.

2. Alain Beaulieu

(a) Qualifications

[44] Alain Beaulieu was called as an expert witness by the Crown. He was qualified by the Tribunal as an expert in the history of Aboriginal peoples in Quebec and their relations with the State.

[45] Dr. Beaulieu holds a BA, MA and PhD in History from Laval University. His MA thesis dealt with the Jesuits and the nomadic Aboriginal peoples (1632–1642), while his doctoral thesis dealt with the history of relations between the Iroquois and the French in the "Heroic Age" of New France (1600–1660).

[46] Alain Beaulieu has been a professor in the Department of History at the University of Quebec at Montréal since 1999 and an associate professor since 2003. He also held the Canada

Research Chair on the Aboriginal Land Question at the University of Quebec at Montréal from 2004 to 2014.

[47] Dr. Beaulieu has acted as a consultant on Aboriginal issues for the Department of Indian Affairs and Northern Development on several occasions, as well as for the Department of Revenue. He has authored or co-authored several publications. He has assisted with several exhibits and articles for museums. Finally, he has appeared several times as an expert witness before the courts.

(b) Expert report

[48] Dr. Beaulieu was asked to produce a historical expert report that would shed light on the Crown's intent in enacting the 1851 Act, which provided that tracts of lands not exceeding 230,000 acres could be described, surveyed and set out for the creation of reserves for several Indian tribes in Lower Canada. The purpose of the report was to provide an overview of the background and factors that led to the statute's enactment.

[49] The sources used by Dr. Beaulieu came from the British colonial archives, primarily from the RG10 series, which contains several records relating to the administration of Indian affairs, as well as certain published documents, such as reports from commissions of inquiry established in the 19th century to review the administration of Indian affairs.

[50] Dr. Beaulieu provided the following historical summary:

> [TRANSLATION]
>
> This report seeks to inform, from a historical perspective, the intent of the colonial government in enacting the 1851 Act, which set apart 230,000 acres of lands for the creation of Indian reserves within the borders of what was then Lower Canada. This statute was in response to a series of petitions from Aboriginal communities living in southern Quebec, whose hunting grounds were shrinking in the face of rapid colonial expansion in the early 19th century.
>
> The responses from the colonial authorities to these petitions were formed by a particular context, that of the new Indian policy put in place in the first half of the 19th century, which emphasized the civilizing of Indians. In the eyes of metropolitan and colonial administrators, colonial expansion left only one possible course open to the Aboriginal peoples: to survive, they would have to abandon their traditional way of life and integrate with the [TRANSLATION]

"world of the Whites". This policy oriented the decisions of the colonial authorities. It nevertheless took several decades for the idea of creating new reserves to develop, given conflicting views within the colonial administration as to how these lands should be granted.

The political roadblocks began to clear around this issue in the late 1840s, when the British Government granted responsible government to United Canada. This resulted in greater political autonomy for the colony, which quickly enacted two legislative measures that would pave the way for the creation of new Indian reserves in Quebec: *An Act for the better protection of the Lands and Property of the Indians in Lower Canada* (1850) and *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada* (1851).

[Exhibit D-2, at pp 3–4]

[51] Dr. Beaulieu summarized the main points of his report as follows:

[TRANSLATION]

- In Lower Canada, the economic and demographic development of the first half of the 19th century had major consequences for the living conditions of Aboriginal people, making a way of life based on hunting and fishing increasingly precarious.
- The problems created by colonial expansion drew protests from Aboriginal communities in southern Quebec, prompting some to ask that lands be granted to them so that they could settle permanently and develop an agricultural way of life.
- Lands already granted to certain Aboriginal communities in the St. Lawrence Valley were also affected by the demographic growth of the colony, highlighting the need to better protect them against encroachment.
- These lands [earmarked for Aboriginal settlement] had to allow for a transition to a sedentary lifestyle and the adoption of agriculture rather than the pursuit of traditional hunting activities.
- Although a consensus was quickly reached regarding the desirability of such land grants, opinions about the form they should take were quite divergent in colonial administrative circles.
- The recommendations of the Committee of the Executive Council in 1837 marked a turning point in the attitude towards these land grants; the idea that they would be granted collectively and in sectors not too far from colonization areas in order to benefit from both governmental protection and the example of white settlers was an important step.
- Even though these recommendations were approved by London, the colony continued to have major doubts about the suitability of such a measure, and it was not until after the granting of responsible government to the colony of

> United Canada that the project of setting apart lands for the settlement of certain Aboriginal communities in Lower Canada truly got under way.
>
> – Before enacting a statute providing for the setting apart of lands for the use of Indians, the colonial authorities began, in 1850, by enacting a statute for the better protection of those they had already granted, mainly under the French regime, to certain communities in the St. Lawrence Valley.
>
> – The first statute established rules for managing these lands, which were placed under the direct administration of the colonial government, through a new "Indian Lands Commissioner".
>
> – The 1850 Act provided that these provisions would be applicable to any new lands set apart for the Indians in Lower Canada, in a provision that foreshadowed the legislation of the following year, setting apart 230,000 acres of lands "for the use and benefit of Several Indian Tribes" in the colony.
>
> – The [1851 Act] remained vague about the identity of the Indians who would benefit from the measure and the terms and conditions for the allocation of the lands so set apart, giving the colonial government a significant degree of latitude with respect to the implementation of the policy.
>
> [Exhibit D-2, at pp 14, 25, 29]

3. Stéphanie Béreau

(a) Qualifications

[52] Stéphanie Béreau was called as an expert witness by the Respondent. The Tribunal qualified her as a historian specializing in the history of Aboriginal peoples in Quebec and their relations with the State.

[53] Ms. Béreau studied history at Sorbonne University (Paris IV). She obtained a Master's degree there in 1997 and a Diplôme d'Études Approfondies [a post-graduate diploma] in 1998. She then pursued doctoral studies at the European University Institute in Florence. Her thesis, on modern history, was defended there in November 2006.

[54] Since 2005, she has been working full time as a history consultant. She has delivered several research reports on Aboriginal peoples in Quebec to provincial and federal departments as well as private organizations such as museums and publishing houses. She has authored several articles, a book and some conference proceedings.

(b) Expert report

[55] Ms. Béreau was asked to produce a historical expert report analyzing the development of distribution schedules leading up to the adoption of the final schedule in 1853.

[56] She produced a report entitled *Les cédules de distribution des terres mises de côté par la loi de 1851 (1852-1853)* (Exhibit D-4).

[57] Her research is on the development of the plan for distributing the lands set apart by the 1851 Act. She focused exclusively on the territory of present-day Quebec and covered the period from the 1840s to the 1850s to gain an in-depth understanding of how the 1853 distribution schedule was developed.

[58] Her objective was not to document the creation process for each reserve in the territory of present-day Quebec. Nor does her research claim to provide a legal analysis of the legislative framework governing the Aboriginal land question.

[59] She summarized the main points of her report as follows:

> [TRANSLATION]
>
> My research on the development of the 1853 schedule leads me to conclude that after the enactment of the 1851 Act, the government had not established a plan for determining how the 230,000 acres set apart for the use and benefit of several Indian tribes in Lower Canada should be allocated.
>
> Two preliminary schedules had to be adopted (in July 1852 and January 1853) before a final schedule was definitively adopted in the summer of 1853.
>
> The plan for the final allocation was not chosen randomly:
>
> (1) Colonial officials sought to propose the allocation of lands to the poorest communities, whether they were nomadic or sedentary.
> (2) They attempted to propose solutions to specific territorial problems, such as those faced by the Malicites or the Mi'kmaq of Restigouche.
> (3) They finally tried, insofar as possible, to propose to the tribes locations that might be suitable to them.
>
> The way in which these schedules were developed shows that the colonial authorities had a desire to be accommodating. Insofar as possible, they tried to choose locations that would be considered suitable by both the Aboriginal communities and the populations that would be living near the future reserves:

> one of the government's key objectives was to avoid having tensions arise.
>
> [Exhibit D-4, at pp 4–5]

[60] Ms. Béreau also produced a second report entitled *Les expéditions de Logan en Gaspésie en 1843-1844* (Exhibit D-5). The purpose of this report was to respond to certain specific points that the Claimant's witnesses had been asked to address regarding the expeditions of William Edmond Logan in the Gaspé Peninsula.

[61] The objectives of her mandate were therefore as follows:

1. to explain who William Edmond Logan was;
2. to determine what his duties were when he travelled to the Gaspé region in the 1840s; and
3. to specify, if possible, the mandate given to Mr. Logan and hence the purpose of his expeditions.

[62] Since this point was not discussed by the parties during their arguments, there is no need to dwell on it.

III. OBJECTION TAKEN UNDER RESERVE

[63] The claimant sought to produce Exhibit 392 (tab 392 of the Joint Book of Documents (the "JBD")), namely, the response dated April 11, 2012, of the Senior Assistant Deputy Minister refusing to negotiate the claim.

[64] The Respondent objected to the production of that letter. It argued that the letter was protected by litigation privilege, that it was not relevant to the dispute and that, in the alternative, it was protected by settlement privilege.

[65] The objection was taken under reserve. The time has come to make a decision.

[66] The objection is dismissed. The letter is not protected by litigation privilege because its objective is to set out the reasons for which the Minister is refusing to negotiate the claim. The

Minister's refusal constitutes one of the essential conditions enumerated in section 16 of the SCTA for a party to be able to file a claim with the Tribunal. Moreover, the Respondent specifically refers to this letter at paragraph 1 of its Response to the Claimant's Declaration of Claim. The letter is therefore all the more relevant.

[67] The letter is not protected by settlement privilege, since the Respondent is not looking to settle. On the contrary, the purpose of the letter is to inform the Claimant that the Respondent will not enter into settlement negotiations.

[68] That said, the filing of this letter in evidence has no bearing on my ultimate decision.

IV. LAW

A. The *Specific Claims Tribunal Act*

[69] The Claimant is basing its Further Amended Declaration of Claim on paragraphs 14(1)(a), (b) and (c) of the SCTA, which read as follows:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> **(a)** a failure to fulfil a legal obligation of the Crown to provide lands or other assets under a treaty or another agreement between the First Nation and the Crown;
>
> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation — pertaining to Indians or lands reserved for Indians — of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation; . . . .

[70] In *Atikamekw d'Opitciwan First Nation v Her Majesty the Queen in Right of Canada*, 2016 SCTC 6 [*Atikamekw SCT-2004-11*], rendered today, I described the applicable principles governing fiduciary law. This decision also deals with the implementation of the 1851 Act. I will review these principles here.

B. The honour of the Crown

[71] The doctrine of Aboriginal rights arose from the assertion of Crown sovereignty over Aboriginal peoples (*Canada v Kitselas First Nation*, 2014 FCA 150 at para 39, [2014] 4 CNLR 6 [*Kitselas* FCA]). This assertion and the Crown's control of land and resources that were formerly in the control of these peoples gave rise to an obligation that the Crown act honourably in its dealings with them (*Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [*Manitoba Metis Federation*]).

[72] The honour of the Crown, a principle enshrined in section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, is always at stake in its dealings with Aboriginal people (*R v Badger*, [1996] 1 SCR 771 at para 41, 133 DLR (4th) 324). The ultimate purpose of the principle is "the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty" (*Manitoba Metis Federation,* at para 66).

[73] The honour of the Crown "speaks to *how* obligations that attract it must be fulfilled" (emphasis in original; *Manitoba Metis Federation*, at para 73). This principle "gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest" (*Manitoba Metis Federation*, at para 73; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18, [2004] 3 SCR 511 [*Haida Nation*]; *Wewaykum Indian Band v Canada*, 2002 SCC 79 at paras 79, 81, [2002] 4 SCR 245 [*Wewaykum*]).

[74] The Honour of the Crown requires the Crown to fulfill its obligations, to act diligently and to endeavor to ensure that its obligations are fulfilled (*Manitoba Metis Federation*, at paras 79–80). A "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise" (*Manitoba Metis Federation*, at para 82). Nor, however, "does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts" (*Manitoba Metis Federation*, at para 82).

[75] Finally, as noted by the Supreme Court of Canada in *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at p 131, 71 DLR (4th) 193:

> [At least since the signing of the Royal Proclamation of 1763], the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base.

C. The general principles of the fiduciary duty

[76] The Crown's assertion of its sovereignty over the land occupied by Aboriginal peoples also gave rise to an obligation to treat Aboriginal peoples fairly and honourably and to protect them from exploitation, a duty characterized as "fiduciary" (*Mitchell v MNR*, 2001 SCC 33 at para 9, [2001] 1 SCR 911).

[77] The limits imposed on the original sovereignty of Aboriginal peoples and the resulting discretion afforded to the Crown in managing its relationship with Aboriginal peoples have resulted in characterizing the relationship as fiduciary in nature (*Kitselas* FCA, at para 39).

[78] The fiduciary duty "is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples" (*Wewaykum*, at para 79).

[79] In addition to the fact that the fiduciary relationship implies political duties for Canada when dealing with Aboriginal peoples, the Supreme Court of Canada has also recognized that this relationship is *sui generis* in nature, colouring government actions with respect to Aboriginal matters, and may also give rise to fiduciary duties that are judicially enforceable on the Crown (*Kitselas* FCA, at para 40).

[80] Judicially enforceable fiduciary duties are not limited to transactions involving reserve lands. They can be found to exist "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power" (*Kitselas* FCA, at para 42, citing *Guerin v R*, [1984] 2 SCR 335 at p 384, 13 DLR (4th) 321).

[81] A fiduciary duty requires the fiduciary "to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person" (*Manitoba Metis Federation*, at para 47, citing *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at pp 646–47, 61 DLR (4th) 14).

[82] In *Manitoba Metis Federation*, at para 49 (citing *Haida Nation*, at para 18, and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36, [2011] 2 SCR 261 [*Elder Advocates*]), the Supreme Court of Canada identified two ways in which an enforceable fiduciary duty may arise.

[83] First, in the Aboriginal context, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Thus, where there exists a specific or cognizable Aboriginal interest and a Crown undertaking of discretionary control over that interest, a fiduciary duty may arise.

[84] Second, the Supreme Court of Canada wrote at para 36 of *Elder Advocates* that an *ad hoc* fiduciary duty may also arise when all the following conditions are met:

1. an undertaking by the fiduciary to act in the best interests of the beneficiary;

2. a defined person or class of persons vulnerable to a fiduciary's control; and

3. a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[85] The Claimant argues that the *ad hoc* fiduciary duty does not apply in this case. Because this is an Aboriginal context, the Claimant submits that the applicable fiduciary duty is that which arises as a result of the Crown assuming discretionary control over specific Aboriginal interests.

V. ISSUES

[86] The issues may be summarized as follows:

(a) Was the 1853 distribution schedule consistent with the objectives of the 1851 Act?

(b) Did the 1851 Act give rise to a legal or fiduciary duty requiring the Respondent to create reserves for the poorest Aboriginal tribes?

(c) Has the Claimant established the existence of a legal or fiduciary duty to create a reserve for the Mi'kmaq of Gespeg?

(d) If so, did the Respondent breach its legal or fiduciary duty to the Mi'kmaq of Gespeg?

(e) If so, did the Respondent's breaches cause compensable harm to the Micmac de Gespeg Nation?

VI. ANALYSIS

A. Was the 1853 distribution schedule consistent with the objectives of the 1851 Act?

1. The positions of the parties

[87] The Claimant argues that the 1851 Act created a cognizable interest of the nomadic Indian tribes in Lower Canada living in miserable conditions in receiving reserve lands and financial assistance. In its view, the 1853 distribution schedule was not consistent with the objectives of the 1851 Act, in that lands were allocated to settled Indians, while the objective of the 1851 Act was to set apart and appropriate lands to and for the use of Indian tribes living in poverty.

[88] The Claimant submits that the cornerstone of the colonial authorities' civilization program that was developed over the three decades leading up to the enactment of the 1851 Act was the settlement of nomadic populations and the practice of agriculture (Claimant's Memorandum of Fact and Law, at para 148; transcript of the hearing, January 21, 2015, at p 26, lines 23–25, and at p 27, lines 1–8).

[89] The Claimant submits that during the years leading up to the enactment of the 1851 Act, various commissions and committees considered the means to be implemented to promote the sedentation of nomadic tribes. While each promoted different approaches, there is evidence that the so-called wandering, that is, nomadic, tribes were poorer and more destitute than the settled tribes of the St. Lawrence Valley. When the bill regarding the setting apart of lands was introduced, the Commissioner of Crown Lands indicated that the Indian tribes in Lower Canada were in a state of distress. Faced with this finding, Lord Elgin, the then Governor General of the Colony of Lower Canada, sent a message to the Legislative Assembly recommending that they be allocated lands and financial assistance (Claimant's Memorandum of Fact and Law, at paras 150–58; Exhibit P-1, at pp 13–42; Exhibit D-2, at pp 15, 18, 20, 22; transcript of the hearing, January 19, 2015, at pp 118–19; transcript of the hearing, January 21, 2015, at pp 49, 73–74).

[90] Moreover, a few months before the enactment of the 1851 Act, Indian Affairs Superintendent Robert Bruce shared this concern and recommended that the setting aside of lands benefit the poorest communities in the province. At the time, it was understood that the poorest and most destitute Indian communities were the nomadic populations (Claimant's Memorandum of Fact and Law, at paras 159–61; Exhibit D-4, at pp 20, 23).

[91] In its Memorandum of Fact and Law, the Claimant writes:

> [TRANSLATION]
>
> 162. It is therefore clear that the philanthropic element of attempting to improve the living conditions of Aboriginal peoples is fundamental and relates to the will to enact legislation that will provide the government with the means to act to relieve Aboriginal populations and promote their integration [citation omitted].
>
> 163. It therefore appears that the Government of Lower Canada recognized that the miserable conditions in which certain nomadic Aboriginal tribes were living at the time needed to be addressed by granting reserve lands and financial assistance to promote their development through their civilization and settlement and by having them learn to cultivate the land.

[92] The Respondent challenges this position and argues that the Claimant is criticizing the distribution by order in council of lands for the benefit of Indian tribes in Lower Canada. This is a legislative function requiring a balancing of opposing interests of the various members of the

population, including those of other Indian tribes. The Respondent adds that it is established law that, where the government acts in the exercise of its legislative functions, a fiduciary duty does not arise.

[93] The Respondent also alleges that the 1851 Act does not give rise to a fiduciary duty for the Crown. The right that the Claimant is attempting to establish, if it even exists, which is denied, has no legal existence independent of the 1851 Act. It is a right that flows exclusively from legislative and executive powers, which cannot give rise to a fiduciary duty. Moreover, the power in the 1851 Act is a purely discretionary power, not the discretionary power of fiduciary law as described in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321, and *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, which involved a particular situation created by the mechanism of surrendering lands to the Crown, which was acting as an intermediary.

[94] Finally, the Respondent argues that breaches of any fiduciary duties of the authorities of the Province of Canada prior to Confederation are not among the "Debts and Liabilities" assumed by Canada in 1867 (*Constitution Act, 1867*, 30 & 31 Vict, c 3).

[95] What are the merits of these arguments?

2. The 1850 Act

[96] On August 10, 1850, the Parliament of United Canada enacted the 1850 Act.

[97] The objective of the 1850 Act was as follows:

> . . . to make better provision for preventing encroachments upon and injury to the lands appropriated to the use of the several Tribes and Bodies of Indians in Lower Canada, and for the defence of their rights and privileges: . . . .

[98] The 1850 Act provided that the lands set apart for the Indian tribes would be "held by the Crown in trust" for "the benefit of any such Tribe or Body of Indians".

[99] For this purpose, the 1850 Act provided for the appointment of a "Commissioner of Indian Lands for Lower Canada", to whom it granted extensive land management powers:

> . . . it is hereby enacted by the authority of the same, That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any Tribe or Body of Indians, shall be and are hereby vested, in trust for such Tribe or Body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such Tribe or Body . . . .

[100] The 1850 Act also provided that the Commissioner and his successors would be entitled to receive and recover the rents, issues and profits of the lands set apart or appropriated for the tribes or bodies of Indians in Lower Canada and could exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property, which were to be held in trust for or for the benefit of such tribes or bodies of Indians.

[101] Thus, one of the objectives of the 1850 Act was to provide better protection for the lands already granted to certain Aboriginal communities in the St. Lawrence Valley. Its provisions were also applicable to any new lands set apart or appropriated for Aboriginal communities in Lower Canada. It did not cover all lands with respect to which a tribe or body of Indians might have a claim, only those set apart or appropriated to or for the use of a specific tribe.

[102] The 1850 Act also set out the first criteria for establishing Indian identity to be able to determine who would be entitled to settle on the reserve lands. Beyond a few general criteria, the 1850 Act did not specify how many acres would be set apart, which Indian tribes would benefit or how the lands would be distributed.

3. The 1851 Act

[103] The following year, on August 30, 1851, the Parliament of United Canada enacted the 1851 Act, which provided the following:

> . . . That tracts of Land in Lower Canada, not exceeding in the whole two hundred and thirty thousand Acres, may, under orders in Council to be made in thatbehalf [*sic*], be described, surveyed and set out by the Commissioner of Crown Lands, and such tracts of Land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian Tribes in Lower Canada, for which they shall be respectively directed to be set apart in any order in Council, to be made as aforesaid, ...
>
> [Emphasis added]

[104] The 1851 Act also provided for the yearly payment out of the Consolidated Revenue Fund of a sum of money to be distributed among certain Indian tribes in Lower Canada by the Superintendent General of Indian Affairs, in such proportions and in such manner as the Governor General in Council could from time to time direct.

[105] However, the 1851 Act did not indicate how the 230,000 acres of lands or the money were to be distributed. Nor did it indicate for which tribes the lands were to be set aside and appropriated.

[106] According to Dr. Beaulieu, several elements need to be considered in analyzing the 1851 Act (transcript of the hearing, January 21, 2015, at pp 25–28):

- First, the 1851 Act was one step in a long historical process; as early as the 1820s, certain Aboriginal tribes had made specific applications for the creation of reserve lands.

- Second, the 1851 Act was a reaction to a series of applications from Aboriginal communities, mainly in the form of petitions, and part of its objective was to respond to these.

- Third, the response of the colonial authorities corresponded to a great extent to the new Indian policy and its focus on civilization, which included the sedentation of nomadic tribes. Until 1815–20, the British policy focused mainly on the use of Aboriginal peoples for military purposes.

- Fourth, the colonial administrators had divergent points of view regarding the creation of reserves.

[107] Dr. Beaulieu stated that the tribes that seemed to be hardest hit by colonization were the nomadic populations (transcript of the hearing, January 21, 2015, at p 49). The Algonquins and the Nipissingues were those who petitioned the most often and who regularly protested encroachments on their hunting grounds. Starting in the 1830s, more and more of their petitions

were requests for lands on which they could settle (transcript of the hearing, January 21, 2015, at pp 49–55).

[108] According to Dr. Beaulieu, several petitions came from settled Indians, namely, those in the St. Lawrence Valley. He added that the already settled populations were also experiencing territorial pressure on their hunting grounds, and on the lands that had been granted to them for settlement by the French regime. In his view, this was another reality that would lead to the formalization of a reserve policy (Exhibit D-2, at pp 8–9, 13).

[109] Ms. Béreau, on the other hand, notes that the settled tribes were the non-nomadic populations with villages available to them, mainly throughout the St. Lawrence Valley. Although these populations continued to consider hunting and fishing important, these activities were no longer central to their way of life (transcript of the hearing, January 21, 2015, at p 185).

[110] Finally, the evidence demonstrates that the 1851 Act provides for a fund to respond to very concrete needs and mitigate the poverty of certain Aboriginal communities (transcript of the hearing, January 21, 2015, at p 79).

[111] It therefore appears clearly from the evidence that the objective of the 1851 Act was to grant acres for the creation of reserves for both poor, nomadic Aboriginal communities and settled communities and that the funds were earmarked for assisting those living in poverty.

4. The 1853 distribution schedule

[112] After the enactment of the 1851 Act, governmental authorities sought to determine how the lands should be distributed.

[113] According to Ms. Béreau, the state of knowledge about the Aboriginal populations influenced the development of the distribution schedules (transcript of the hearing, January 21, 2015, at p 120).

[114] Ms. Béreau stated that her research demonstrated that the distribution schedules were developed at the highest levels of the State, with the intervention of three major political figures, namely, the Governor, Lord Elgin; the Civil Secretary to the Governor who also acted as

Superintendent General, Robert Bruce; and the Commissioner of Crown Lands, John Rolph, later replaced by Colonel Napier. The schedule was initially developed by the Department of Crown Lands, then sent to the Civil Secretary, who forwarded it to Lord Elgin, who essentially held a veto power. Lord Elgin then issued his comments, which were redirected to the Department of Crown Lands, which, in principle, complied with them (Exhibit D-4, at pp 7–9; transcript of the hearing, January 21, 2015, at pp 111, 134–35).

[115] Ms. Béreau added that, whenever possible, the colonial authorities tried to grant lands in the locations requested by the Aboriginal communities in their petitions where there were no obstacles to doing so, such as the presence of colonists, colonial development, etc. (transcript of the hearing, January 21, 2015, at pp 160–62). However, there was no initial consultation with the Aboriginal populations. Nor were they consulted about the specific number of acres to be granted. However, at the time, because the intention was to settle Aboriginal communities, a ratio of 100 acres per family was considered (transcript of the hearing, January 21, 2015, at pp 187–88).

[116] Therefore, Ms. Béreau explained, the schedule was the solution proposed by the colonial authorities to what they understood to be the situation based on the knowledge available to them (transcript of the hearing, January 21, 2015, at p 142).

[117] Two initial distribution schedules were established between the summer of 1852 and the spring of 1853, before a final schedule was adopted in August 1853 (Exhibit D-4, at p 7).

[118] The first distribution schedule, drafted in July 1852, mentioned that 228,210 acres of lands had to be allocated among six reserves and identified the Aboriginal nations that were to benefit, namely:

> [TRANSLATION]
>
> Lake Temiscaming (Blanche River) 69,120 acres Algonquins, Iroquois, Nipissingues and Outaouais
>
> River Désert 46,000 acres Algonquins, Nipissingues and Têtes-de-boule
>
> Peribonka River 23,040 acres Montagnais (of Lake St. John)

> Outardes River 76,800 acres Montagnais of Tadoussac, Ilets-Jérémie, Godbout and Sept-Îles
>
> Viger 3,650 acres Amalicites
>
> Mann [Restigouche] 9,600 acres Micmacs de Restigouche
>
> [Exhibit D-4, at p 9]

[119] Ms. Béreau indicated that after reviewing the first schedule, the Governor Lord Elgin felt that it would be premature to grant the entire 230,000 acres before the nomadic nations had been more fully converted to agriculture. He thought it would be more appropriate to distribute 30,000 or 40,000 acres to the settled Indians:

> The progress of cultivation & settlement will be necessarily slow on those destined for the uncivilized & wandering Tribes and until the success of the experiment has been tested the appropriation of very extensive tracts for that purpose would seem to be premature [citation omitted].
>
> [Exhibit D-4, at p 10]

[120] According to Ms. Béreau, if the primary objective of the first schedule developed by the Department of Crown Lands was to help the nomadic populations in particular, the presence on the list of certain communities such as the Malicites and the Mi'kmaq of Restigouche also illustrate the second objective, which was the desire to try to resolve more specific territorial problems, as these two communities were partly settled (transcript of the hearing, January 21, 2015, at p 137). The same was true for the Iroquois, who were also classified as settled Indians (transcript of the hearing, January 21, 2015, at p 183).

[121] For Ms. Béreau, this first schedule therefore had a dual objective: on the one hand, helping nomadic populations, which were the poorest populations, as part of the civilization policy, and on the other hand, addressing more specific territorial problems (transcript of the hearing, January 21, 2015, at pp 140–41).

[122] Shortly after receiving Lord Elgin's comments, the Department of Crown Lands drafted a second allocation plan. Although it is dated January 29, 1853, it was not sent to Civil Secretary Bruce until February 9. In the accompanying letter, Commissioner Rolph wrote that he had taken Governor Lord Elgin's comments into account:

> I have the honor to transmit you . . . the herewith inclosed schedule . . . which schedule I have had the honor of preparing . . . having in view that the distribution should meet the benevolent intentions of His Excellency as well towards the wandering & nomadic tribes as towards the poorer classes of Indian families settled in the seignories of Becancour St Francis & Sillery situate [*sic*] on the St Lawrence [citation omitted].
>
> [Exhibit D-4, at pp 10-11]

[123] Therefore, a little over 40,000 acres that had originally been allocated to nomadic tribes were clawed back for distribution among the settled tribes.

[124] The new list received by Lord Elgin in 1853 provided for a total of 230,000 acres and was amended as follows:

> [TRANSLATION]
>
> Lake Temiscaming 38,400 acres Algonquins, Nipissingues and Outaouais
>
> Maniwaki or River Désert 45,750 acres Algonquins, Iroquois and Têtes-de-Boule
>
> Doncaster 16,000 acres Iroquois of Caughnawaga and St. Regis
>
> La Tuque 16,000 acres Abenakis, Algonquins and Têtes-de-boule
>
> Rocmont 9,600 acres Hurons
>
> Viger 3,650 acres Amalicites
>
> Mann [Restigouche] 9,600 acres, Micmac
>
> Peribonka 16,000 acres Montagnais of Lake St. John
>
> Metabetchouan 4,000 acres Montagnais of Lake St. John
>
> Manicouagan 70,000 acres Montagnais of Tadoussac, Papinachois and other nomadic tribes of the King's Posts.
>
> [Exhibit D-4, at p 11]

[125] Upon receiving the second proposed schedule, Lord Elgin sent three comments that would lead to the drafting of the final schedule. The first was about the beneficiaries of the future Maniwaki Reserve. Lord Elgin wanted to allocate that reserve to nations that he considered more homogeneous, namely, the Algonquins, the Têtes-de-boule (Atikamekw), the Nipissingues and the Outaouais. His second comment was about the Abenakis of Bécancour, whom he believed should be included in the schedule because of their difficult circumstances. His final comment was about the Doncaster Reserve, which he wished to see attributed to the Iroquois of

Kahnawake and of the Lake of Two Mountains, since he felt that their need was greater than that of the Iroquois of St. Regis.

[126] On June 8, 1853, the definitive distribution list was completed and sent to Superintendent Bruce. This list allocated the 230,000 acres of lands set apart by the 1851 Act as follows:

> [TRANSLATION]
>
> Lake Temiscaming 38,400 acres Algonquins Nipissingues and Outaouais
>
> Maniwaki or River Désert 45,750 acres Algonquins, Nipissingues and Têtes-de-boule
>
> Coleraine 2,000 acres Abenakis of Bécancour
>
> Doncaster 16,000 acres Iroquois of Caughnawaga and Two Mountains
>
> La Tuque 14,000 acres Abenakis of Bécancour, Algonquins and Têtes-de-boule
>
> Rocmont 9,600 acres Hurons of Lorette
>
> Viger 3,650 acres Amalicites
>
> Peribonka River 16,000 acres Montagnais of Lake St. John
>
> Metabetchouan River 4,000 acres Montagnais of Lake St. John
>
> Manicouagan 70,000 acres Montagnais of Tadoussac, Papinachois and other nomadic tribes of the King's Posts
>
> Mann [Restigouche] 9,600 acres Micmac.
>
> [Exhibit D-4, at p 13]

[127] On August 9, 1853, the schedule was submitted to the Executive Council, which recommended its adoption. An order in council was made.

[128] The 1853 Order in Council to which the distribution schedule was attached established the power to grant the 230,000 acres of lands referred to in the 1851 Act. The creation of 11 reserves for an indicated total of 230,000 acres was mentioned, as well as the area of the reserves, the planned location and the beneficiaries. Although the 1851 Act provided for the possibility of adopting several orders in council for allocating the 230,000 acres among the Indian tribes, only one order in council was in fact made.

[129] In light of this historical analysis, I cannot accept the Claimant's position that the colonial authorities allocated the reserve lands in a manner inconsistent with the objective of the 1851 Act.

[130] I therefore conclude from the evidence that the distribution schedule approved by the 1853 Order in Council is consistent with the objectives of the 1851 Act, namely, the allocation of lands to poor, nomadic communities and to settled Indians.

B. Did the 1851 Act give rise to a legal or fiduciary duty requiring the Respondent to create reserves for the poorest Aboriginal tribes?

[131] In its Memorandum of Fact and Law, the Claimant submits the following:

> [TRANSLATION]
>
> 179. Although the colonial authorities had full discretion to set apart lands and consecrate them as reserves, they were not authorized to distribute such lands randomly.
>
> 180. As we have mentioned, lands were to be set apart for the benefit of the nomadic Aboriginal tribes in Lower Canada living in miserable conditions.
>
> 181. These findings show that the enactment and implementation of the 1851 Act created a fiduciary duty owed by the Crown to the poor, nomadic Aboriginal tribes existing at the time.

[132] According to the Supreme Court of Canada, "[t]he fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests" (*Wewaykum*, at para 81).

[133] The relationship between the Aboriginal peoples and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations (*Manitoba Metis Federation*, at para 48).

[134] The sole cognizable Aboriginal interest identified by the Claimant is the [TRANSLATION] "creation" by the 1851 Act, [TRANSLATION] "for the benefit of the nomadic Aboriginal tribes in Lower Canada living in miserable conditions", of a [TRANSLATION] "cognizable Aboriginal interest in receiving reserve lands and financial assistance".

[135] Thus, for the Claimant, the 1851 Act can be described as the source of the interest of the poor, nomadic tribes. In other words, the cognizable interest of the nomadic Aboriginal tribes owes its existence to the 1851 Act.

[136] The 1851 Act did not, in and of itself, create any cognizable interests. However, the enactment of that statute and the 1853 Order in Council approving the schedule gave effect to the rights of the Aboriginal communities named in the schedule to receive reserve lands in accordance with the instructions set out in it.

[137] First, the 1851 Act provided that tracts of land not exceeding 230,000 acres could, under orders in council, be described, surveyed and set out by the Commissioner of Crown Lands and appropriated to and for the use of the several Indian tribes in Lower Canada. On the sole basis of the 1851 Act, neither the Crown nor the Commissioner has a duty to set apart specific tracts of land for the use and benefit of a particular band.

[138] Second, the evidence shows that the objectives of the 1851 Act included protecting poor, nomadic tribes and also resolving the encroachments suffered by the settled Aboriginal communities. To the extent that the Crown exercised the powers granted to it by the 1851 Act, it had to take into account the Act's objectives in so doing.

[139] Third, as I concluded above, the way in which the colonial authorities decided to grant the reserve lands in the distribution schedule and the funds did not rely on considerations that were irrelevant or extraneous to the 1851 Act. In fact, the distribution described in the 1853 schedule was based more on policy considerations. It is well established that courts should not interfere with the general policy considerations motivating executive decisions, nor can they decide what is advisable and what is not in the absence of abuse of jurisdiction or a challenge based on the *Canadian Charter of Rights and Freedoms*, which are not present here (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at p 8, 137 DLR (3rd) 558).

[140] Fourth, nothing in the 1851 Act or even in the spirit of that statute required the colonial authorities to consult all of the poor, nomadic communities in order to grant them specific reserves. In this respect, the letter dated June 24, 1852, from Superintendent Bruce to the

Commissioner of Crown Lands regarding the proposed distribution and in which he writes ". . . I will place myself in communication with the Indians on the subject" may be interpreted in various ways.

[141] In this case, the evidence does not support a conclusion that this undertaking must be interpreted as necessarily meaning that Mr. Bruce was promising to communicate systematically with every Aboriginal group in Lower Canada. Given the historical context, it is more likely that Mr. Bruce was undertaking to communicate with those Aboriginal groups who were lobbying for a reserve, such as the Algonquins and the Nipissingues.

[142] <u>Fifth</u>, as I indicated in *Atikamekw SCT-2004-11*, in adopting the 1853 Order in Council, the Crown undertook to create reserves in accordance with the instructions set out in the schedule attached to the Order in Council. It therefore had to act consistently with those instructions. The adoption of the Order in Council thus confirmed the <u>setting apart</u> and <u>appropriation</u> for the use and benefit of the listed Indian tribes of a certain number of acres in the locations indicated.

[143] Therefore, during the colonial period, by way of the 1850 and 1851 Acts and the 1853 Order in Council, the Crown unilaterally undertook to create reserves for the Indian tribes listed in the distribution schedule, at the proposed locations, and to allocate the number of acres indicated. The tribes listed in the schedule were therefore entitled to receive the quantities of land established therein, as these had been "appropriated" to and for their use. From that moment, the Crown had a duty to finalize the reserve creation process that it had started, which required, among other things, that the lands be selected and surveyed.

[144] However, this did not mean that the Crown could not subsequently undertake to provide for a specific band a reserve at a location other than that initially proposed in the schedule (see e.g. *Atikamekw SCT-2004-11*). Again, the existence of a cognizable Aboriginal interest and an undertaking from the Crown in this respect need to be identified, which has not been done in this case.

[145] In conclusion, I find that the 1851 Act did not, in and of itself, give rise to a fiduciary duty owed by the Crown to the Indian tribes to create reserves. It provided that tracts of land not exceeding 230,000 acres could, under orders in council to be made in that behalf, be described, surveyed and set out by the Commissioner of Crown Lands.

[146] In adopting the 1853 Order in Council and the attached schedule, the Crown exercised the power conferred on it by the 1851 Act. The Crown therefore recognized that the tribes mentioned in the schedule had a specific Aboriginal interest in the creation of reserves at the locations and with the areas mentioned in the schedule. It thereby unilaterally undertook to create reserves for the benefit of the Indian tribes for whom lands had been set apart and appropriated. This undertaking and recognition gave rise to a fiduciary duty owed by the Crown to the beneficiaries mentioned in the schedule, including the Mi'kmaq.

C. Has the Claimant established the existence of a legal or fiduciary duty to create a reserve for the Mi'kmaq of Gespeg?

[147] To establish the existence of a cognizable Indian interest, the Claimant provided evidence to demonstrate that the Mi'kmaq had had an ongoing and continuous presence in the Gaspé Bay area since time immemorial. In its Memorandum of Fact and Law, the Claimant wrote the following:

> [TRANSLATION]
>
> 182. Considering the ongoing and continuous presence of the Mi'kmaq in the Gaspé Bay area since time immemorial, that the colonial authorities knew or ought to have known about this presence and that the latter were able to determine, at that time, that the tribes of the Gaspé Peninsula were in a situation of acute poverty, we are of the view that the Crown had a fiduciary duty to grant reserve lands to this nomadic Aboriginal tribe in particular.
>
> 279. In light of the evidence that clearly establishes on a balance of probabilities that the Mi'kmaq had an ongoing and continuous presence in the Gaspé Bay region, that the colonial authorities knew or ought to have known about this presence and that the latter had been in a position to determine that, at that time, the nomadic tribes of the Gaspé Peninsula had been in a situation of acute poverty, we are of the view that the Mi'kmaq of Gaspé Bay have a specific and cognizable interest under the 1851 Act.

[148] In this respect, expert witness Ms. Holmes concludes the second section of her report as follows:

> This section has demonstrated that a distinct community of Mi'kmaq was settled around Gaspé Bay from the early contact period. They were specifically noted in the *Jesuit Relations* in the 1660s and the Recollet established a mission in their area in 1673. Two Mi'kmaq, Jean Janot Claude and Jean Janot dit Papoulouet, had their land claims recognized on the South West Branch of Gaspé Bay by the Gaspé Land Board in 1819. Government-sponsored explorers described Mi'kmaq settled at Gaspé and their use / knowledge of the local area in the 1830s and 1840s, and Sir Bonnycastle described a Mi'kmaq settlement of 13 families at that location in 1841. A review of the 1861 census has located a concentration of eight Mi'kmaq families (50 individuals) in the District of Gaspé Bay South. The following year, two of the family heads on that census list petitioned for government assistance for their fishery and land for agriculture. The Micmacs of Gaspé Bay were described by their local priest as consisting of 17 families in 1875. Various Indian Affaires reports acknowledge this community from the late 1860s onward and they began receiving some limited assistance beginning in that period; however, they were never granted any reserve land.
>
> [Exhibit P-1, at p 41]

[149] The Respondent is challenging these conclusions, submitting, beyond its legal arguments regarding the scope of the 1851 Act, that the Claimant has failed to demonstrate the continued presence of the Mi'kmaq in a sufficiently precise location during the years 1851–53 and that Ms. Holmes admitted that they would travel over great distances from Gaspé to as far as Rimouski. In the Respondent's view, the Claimant has not established a specific, collective Indian right to the lands it is claiming.

[150] In this case, the documentary evidence and the expert report and testimony of Ms. Holmes demonstrated that there were indeed Mi'kmaq Indians and families present in the Gaspé region, that individual Mi'kmaq sought tracts of land there (JBD, at tabs 218, 219 and 281), that the Mi'kmaq had been identified by the Gaspé Land Board (JBD, at tab 224), that petitions had been submitted by the Mi'kmaq in the region to the colonial authorities seeking inclusion in the distribution of the yearly presents (JBD, at tabs 227, 244, 255 and 262), that the colonial authorities had noted that the Mi'kmaq of that region did not have any lands and that they considered them to be among the poorest of the populations (JBD, at tab 260).

[151] The evidence includes a petition dated May 31, 1862, from J.B. Basque and others to the National Assembly, which was reported as follows:

> Pursuant to the Order of the Day, the following Petitions were read : —

> Of *J. B. Basque* and others, *Micmac* Indians of *Gaspé Basin ;* praying that they may be allowed to catch Salmon with spears, and that the Government may grant them free titles to their lands, and for other purposes.
>
> [Emphasis in original; JBD, at tab 327]

[152] A few days later, on June 2, 1862, another petition was presented by Jean-Baptiste Samson and other Mi'kmaq Indians of Gaspé Bay, which was reported as follows:

> Of *Jean Baptiste Samson* and others, Micmac Indians of *Gaspé Basin* ; praying for the amendment of the *Lower Canada* Fishery Act ; also praying for a free grant of certain lands now in their occupation, and also for aid to sow said lands.
>
> [Emphasis in original; JBD, at tab 328]

[153] Also, in 1875, the Reverend Bolduc applied to obtain a school in the Mi'kmaq village near Gaspé, in response to which officials from Indian Affairs told him that the Indians belonged in Maria or Restigouche, or else in other Mi'kmaq reserves in New Brunswick.

[154] Even if I were to accept the Claimant's arguments that (1) the Mi'kmaq of Gespeg have occupied the Gaspé Bay area in an ongoing and continuous manner since time immemorial; (2) the colonial authorities knew or ought to have known of this presence; and (3) the authorities were in a position to determine that the tribes of the Gaspé Peninsula were in a situation of acute poverty at that time, it does not necessarily follow that the Crown was bound by a fiduciary duty arising from the 1851 Act to allocate reserve lands specifically to the Micmac de Gespeg Nation in the Gaspé region or the surrounding area because they were poor.

[155] First, as determined in the preceding section, the 1851 Act does not in itself create a fiduciary duty to allocate lands to Aboriginal communities.

[156] Second, the schedule approved by the 1853 Order in Council set apart and appropriated 9,600 acres to and for the use of the Mi'kmaq in Restigouche. The distribution schedule does not indicate that only the Mi'kmaq of Restigouche are entitled to a reserve, but rather that 9,600 acres were set apart in Restigouche and appropriated to and for the use of the Mi'kmaq Indians.

[157] Therefore, once the 1853 Order in Council had been adopted, the Crown was bound by it and the 1850 and 1851 Acts to create a 9,600-acre reserve in Restigouche for the Mi'kmaq.

[158] There is no evidence in the record demonstrating that the Restigouche Reserve was created solely taking into account the Mi'kmaq of Restigouche or for them exclusively. On the contrary, in a letter dated January 12, 1853, the Superintendent General of Indian Affairs, Mr. Bruce, wrote the following:

> The reserves at Viger [and] Restigouche will unquestionably prove of great service to the Amalicites & Micmac Indians.
>
> [JBD, at tab 302]

[159] The evidence in the record also indicates that the Restigouche Reserve was also meant to serve those Mi'kmaq who were living in poverty.

[160] Moreover, the evidence does not show that the Mi'kmaq of Gespeg as a community, tribe or group applied to the governmental authorities to obtain collective land rights at the time of the 1851 Act or the 1853 Order in Council. Some Mi'kmaq from the Gaspé region sent petitions to obtain presents or seeking to have individual lots recognized by the Gaspé Land Board. With regard to the petitions by J.B. Basque and Jean Baptiste Samson to the Legislative Assembly, Ms. Holmes wrote the following:

> . . . J.B. Basque and Jean Baptiste Samson petitioned the Legislative Assembly and Council on behalf of themselves and other Micmac of Gaspé Basin seeking amendments to the *Lower Canada Fishery Act* and asking for land and assistance in farming [citations omitted]. . . . All of the individuals in these two households were identified as Indian, and both households included young men other than the husband, wife, and children. They were the two largest households in the 1861 census, which suggests they may have been the most influential in the Mi'kmaq community.
>
> [Exhibit P-1, at p 38]

[161] In addition, as was stated by Justice LeBel in *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 60, [2002] 2 SCR 816:

> The setting apart and appropriating of land is not the entire matter; the Crown must also manifest an intent to make the land so set apart a reserve.

[162] In this case, the evidence shows that neither the colonial authorities nor the federal Crown manifested an intent or undertook to create a reserve in or around Gaspé for the Mi'kmaq of Gespeg at the time.

[163] I find based on the facts in this case that the Claimant has failed to demonstrate the existence of a legal or fiduciary duty owed by the Crown to the Mi'kmaq of Gespeg regarding the granting of reserve lands.

[164] In light of the foregoing, there is no need to address the remaining issues.

[165] Despite my finding that the Crown has no legal or fiduciary duty to the Mi'kmaq of Gespeg regarding the granting of reserve lands, this does not mean that there is no political obligation to do so. However, if such an obligation does exist, it is not within the jurisdiction of the courts.

VII. CONCLUSIONS

[166] The 1853 distribution schedule respects the intent and spirit of the 1851 Act. The 1851 Act did not, in and of itself, impose on the colonial authorities or the Crown a fiduciary duty to create reserves or to create them solely for the benefit of poor Aboriginal tribes, in the locations they desired.

[167] Moreover, the Claimant has failed to demonstrate that the Crown had a fiduciary duty to create for the Mi'kmaq of Gespeg a reserve on the Gaspé Peninsula or elsewhere in the region.

[168] The 1853 schedule provides for a reserve in Restigouche for the Mi'kmaq as a whole. The evidence does not establish on a balance of probabilities that the Mi'kmaq of Gespeg as a community, tribe or group applied to the colonial authorities to obtain collective land rights at the time of the 1851 Act and 1853 Order in Council. Furthermore, the evidence establishes the absence of an undertaking or intention by the Crown to create a reserve for the Mi'kmaq in the Gaspé region or the surrounding area.

VIII. DECISION

[169] For the foregoing reasons, I find that the Claimant has failed to demonstrate the existence, and accordingly the breach by the colonial authorities or the Crown, of a legal or fiduciary duty under paragraphs 14(1)(a), (b) and (c) of the SCTA. The claim is therefore unfounded.

JOHANNE MAINVILLE

Honourable Johanne Mainville

Certified translation
Francie Gow

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160520

File No.: SCT-2001-12

OTTAWA, ONTARIO May 20, 2016

PRESENT: Honourable Johanne Mainville

BETWEEN:

MICMAC DE GESPEG NATION

Claimant

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant**
As represented by Benoît Champoux and David Boisvert

AND TO: **Counsel for the Respondent**
As represented by Dah Yoon Min, Marie-Emmanuelle Laplante and Éric Gingras