FILE NO.: SCT-7001-14
CITATION: 2017 SCTC 4
DATE: 20171128

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
TOBACCO PLAINS INDIAN BAND Claimant	Darwin Hanna and Mary Mollineaux, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Kelly Keenan and Ainslie Harvey, for the Respondent
	HEARD: January 31, 2017 and May 30-31, 2017

REASONS FOR DECISION

Honourable Barry MacDougall

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

Cases Cited:

Ross River Dena Council Band v Canada, 2002 SCC 54, [2002] 2 SCR 816; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Nowegijick v R*, [1983] 1 SCR 29, 144 DLR (3d) 193; *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193; *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Manitoba Métis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22 ss 2, 14, 20, 22.

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

Constitution Act, 1867.

Indian Act, RSC 1906, c 81, ss 24, 46.

Expropriation Act, RSC 1906, 52 V, c 13, s 3.

Water Act, RSBC 1948, c 361.

Headnote:

Aboriginal law – reserve lands – provisional reserves – takings – fiduciary duty – minimal impairment – adequate compensation – consultation – legal authority

The Claim relates to two parcels of land taken from the Tobacco Plains Indian Reserve No. 2 (IR 2) by the Department of Indian Affairs (DIA) in 1915 for use by the Department of Customs (DOC).

The first parcel, comprising 2.97 acres, was taken for a Customs house and garden. The Tobacco Plains Indian Band (the Claimant or TPIB or the Band) alleged that the Respondent breached statutory and fiduciary duties by failing to: (a) minimally impair the Claimant's interest in the parcel; (b) properly value and obtain adequate compensation for the parcel; and, (c) consult with and obtain the Claimant's consent on the amount of compensation. The historical compensation paid was $150.00 in 1915 dollars. The Parties agreed that the historical value was actually $208.00 in 1915 dollars.

The second parcel is a strip of land across IR 2 that was taken for a water pipeline and ditch to service the same Customs house. The Respondent admitted that it breached its fiduciary duty to the Claimant by failing to provide any compensation for the use of this second parcel from 1918 to 1970.

At the time of the taking, British Columbia retained administrative control over the underlying proprietary interest in IR 2. Yet, the technical questions of whether the land in issue had been formally confirmed as a reserve, and whether it was subject to the *Indian Act* are not the keys to the question of what fiduciary duties were owed in the particular circumstances of this Claim (apart from whether any statutory duties were owed).

The Claimant has established that the Respondent was a fiduciary and did breach the expected standard of conduct owed as a fiduciary in respect of the protection of the Claimant's significant and cognizable interest in its reserve, even if it was *provisional*. Regarding what specific duties were owed and their content in the circumstances, the most controversial was the alleged duty to impair IR 2 as minimally as possible when carrying out the taking.

The concepts which underlay the Supreme Court of Canada's recognition of a duty of minimal impairment in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, [2001] 3 SCR 746 [*Osoyoos*], also apply to the Claimant's cognizable interest in the disputed land in this Claim even if it is considered *provisional*. If provisional, the Claimant interest in IR 2 was *sui generis*; traditional, common law property principles do not always fit well when considering provisional or confirmed reserves; the Claimant could not unilaterally add to or replace land lost from IR 2; and, the Claimant's cognizable interest in IR 2 was "more than just a fungible commodity". The land was within the larger traditional territory of the Claimant and was occupied at the time of

taking; if provisional, the allotment recognized the Claimant's substantive interest; and, other than the disputed taking, IR 2's boundaries remained unchanged throughout the reserve creation process.

In *Osoyoos*, the Supreme Court was concerned with minimizing inconsistency between, and reconciling, the Crown's public and fiduciary duties. Because fiduciary duties applied during reserve creation, this concern also exists when the Crown removes land from a *provisional* reserve to serve a competing public purpose.

The general description of the Crown's fiduciary duties applicable to a *provisional* reserve 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 Indian Band v Canada*, 2002 SCC 79 at paras 86, 94, [2002] 4 SCR 245), would, in the context of an expropriation of part of the reserve in these circumstances, include an obligation on the Crown to approve only the minimum expropriation needed to achieve the required public purpose.

The Crown cannot shirk its fiduciary duty, where it exists, by invoking competing interests. In an expropriation, this applies to stage two of the *Osoyoos* analysis. In this Claim, that includes "competing" federal government departments, with different duties to advance; i.e., the DIA to the Band and the DOC to the public. The First Nation had a practical, real and legal (i.e. cognizable) interest in IR 2, whether *provisional* or confirmed, which required reconciliation with the competing public or national interest in a Customs house, meaning that the interest be impaired to the least extent possible.

The DIA did not seriously consider its fiduciary duty or make any reasonable efforts to satisfy the Crown's "minimal impairment" obligation to the Band. The Crown's fiduciary duty to the Band was therefore breached.

Additionally, the evidence clearly demonstrates that the Crown failed in each of the several descriptives of what was required of the Crown acting as fiduciary when it came to the Crown's duty to see that the Band receive proper compensation for the taking of the Customs land.

The Crown failed to conduct itself with either loyalty or with good faith. It failed to provide full disclosure, appropriate to the matter at hand and failed to act in what it reasonably and with diligence should have regarded as the best interest of the beneficiary. The DIA officials were more interested in satisfying the apparent wishes of the DOC to take the time and effort required to fulfill their fiduciary duties to the Band.

The McKenna-McBride Commission process resulted in Interim Report No. 52, which recommended proper compensation. The Governor in Council's approval of the Customs house taking was conditional on payment of adequate compensation. The Crown's failure to fulfill its fiduciary duties and the failure to pay adequate compensation result in a finding that the taking of the Customs land did not occur "under legal authority".

When the DIA paid compensation in 1915, it paid 90% to Chief Paul and 10% to the Claimant. The Claimant's interest was communal, and Chief Paul had no formal, individual interest. This was a further breach of Canada's fiduciary duties to the Claimant.

Because the Claimant has established a valid claim under paragraph 14(1)(c) of the *Specific Claims Tribunal Act*, SC 2008, c 22, and has also established that the taking occurred without legal authority, there is no need to determine whether the *Indian Act* applied or reserve creation was completed prior to Order-in-Council 1036-1938.

TABLE OF CONTENTS

I. OVERVIEW

[1] The Tobacco Plains Indian Band (the Claimant or TPIB or Band, including its predecessor at the time of the events of this Claim) is part of the Ktunaxa Nation. The Claim relates to two parcels of land that the Indian Reserve Commission allotted to the Claimant's predecessor in 1884 as part of Tobacco Plains Indian Reserve No. 2 (IR 2). In 1915 the Governor in Council accepted the recommendation of the Royal Commission on Indian Affairs (RCIA, also known as the McKenna-McBride Commission) and approved the taking of these parcels for use by the Department of Customs (DOC).

[2] The first parcel was taken for the Roosville Customs house (the Customs Land). This parcel of 2.97 acres is located in southeastern British Columbia where today's Highway 93 crosses the Canada-United States border. The Claimant alleged that the Respondent breached statutory and fiduciary duties by failing to: (a) minimally impair the Claimant's interest in the parcel; (b) properly value and obtain adequate compensation for the parcel; and, (c) consult with and obtain the Claimant's consent on the amount of compensation. The historical compensation paid was $150.00 in 1915 dollars. The Parties have agreed that the historical value of the 2.97 acre parcel was actually $208.00 in 1915 dollars.

[3] The second parcel was a strip of land across IR 2 that was taken for a water pipeline and ditch (the Water Right-of-Way Land) to service the same Customs house. The Respondent admitted that it breached its fiduciary duty to the Claimant by failing to obtain any compensation for the use of the Water Right-of-Way Land from 1918 to 1970.

[4] The Parties agreed to bifurcate this Claim into validity and compensation stages. These Reasons for Decision address the validity of the Claim relating to the Customs Land. The historical value of the Water Right-of-Way Land will be dealt with at a separate hearing, and all other outstanding compensation-related issues will be dealt with at the compensation stage, if necessary.

II. PROCEDURAL HISTORY AND CONDITIONS PRECEDENT

[5] The Claimant is a First Nation within the meaning of the subsection 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. The Respondent agreed that this Claim met the

criteria for filing at the Specific Claims Tribunal (the Tribunal).

[6] The Claimant submitted this Claim to the Minister of Indian Affairs and Northern Development on November 25, 2010. On October 28, 2013, the Minister notified the Claimant of his decision to partially accept the Claim in relation to Canada's failure to obtain compensation for the Water Right-of-Way Land from 1918 to 1970. The Minister decided not to negotiate the other allegations in the claim.

[7] The Claimant filed its Declaration of Claim at the Tribunal on April 29, 2014. The Respondent requested an extension of 95 days to file its Response, the Claimant consented, and the Tribunal approved.

[8] On January 30, 2015, with the consent of the Parties, the Tribunal ordered bifurcation of the proceedings on validity and compensation, and ordered that the adequacy of historical compensation would be determined in the validity phase.

[9] The Claimant agreed to the Respondent's letter to the Tribunal dated January 30, 2015, confirming the following:

> …the nature of the [Respondent's] acknowledged breach of duty in that part of the claim pertaining to the right-of-way that supplied water to the Roosville Customs house...
>
> …may be characterized as follows: that Canada breached its fiduciary duty to the Band by failing to obtain compensation for the lands on the reserve used for a pipeline or ditch from 1918 to 1970.

[10] On February 2, 2015 the Tribunal provided the Attorney General of British Columbia with a notice pursuant to section 22 of the *SCTA*, based on paragraph 55 of Canada's Response:

> In the event that Canada is found liable for any damages for an alleged breach of duty in connection with the Customs Lands Claim then the provincial Crown also caused or contributed to the acts or omissions relied on by the Tobacco Plains Indian Band under s 14 (1) of the *Act*, or to the loss arising from those acts or omissions, and Canada pleads and relies on s 20 (1) (i) of the *Act*.

[11] The Parties did not agree on the historical value of the Water Right-of-Way Land. On January 17, 2017, the Tribunal endorsed that expert evidence regarding the Water Right-of-Way Land need not be brought at the validity stage and the historical value of the Water Right-of-Way

Land could be decided at the compensation stage.

[12] On January 23, 2017, the Respondent filed an Amended Response in which it agreed that "Canada breached its fiduciary duty by failing to properly value the 2.97 acre parcel" and that this parcel "should have been valued at $208 in 1915" (at para 6).

[13] The Parties agreed on an oral history protocol and an oral history evidence hearing was held in Cranbrook, British Columbia, on January 31, 2017. Oral submissions were heard May 30-31, 2017 in Cranbrook.

III. ORAL HISTORY AND DIRECT EVIDENCE

[14] The Chief of the TPIB, Mary Mahseelah, explained that the Ktunaxa Nation includes five communities in Canada and two in the United States. Chief Mahseelah described the Ktunaxa Nation's traditional territory as extending west toward the Okanagan, east into Alberta, and south into Montana. For some time after the establishment of the Canada-United States border, the Ktunaxa people crossed freely; later the border divided families. The Ktunaxa Nation used to gather at Edwards Lake, at the northern end of IR 2, at the end of summer for a Big Village celebration. Chief Mahseelah also described how, for berries and planted gardens grown on IR 2, people used to dig their own irrigation. Chief Mahseelah's great grandfather had a homestead just south of the United States border, and a horse and buggy trail passed close to where today the duty free shop is located at the Roosville border crossing.

[15] Mr. Tom Phillips is the land and economic development officer for the Claimant, having retired from Tribal Council in 2014. Over the years he has been involved with the Elders Working Group and the preservation of traditional knowledge. Mr. Phillips described the Ktunaxa Nation's traditional territory as being located on both sides of the Rockies and down to Yellowstone National Park. He emphasized the importance of the vicinity around IR 2 to the TPIB and the significance of water and different types of land, noting the limited availability of agricultural land. He also described an extensive trail network in the area of IR 2, and agreed that a wagon road went through the general area in the later part of the 19th century. Mr. Phillips also described the traditional practice of controlled burning to enhance the habitat for game, livestock, and berries, and to keep travel corridors open.

[16] Mr. Phillips explained that by the time the reserves were being set aside for the Ktunaxa people, most of the best agricultural land had already been taken up by settlers. Mr. Phillips stated that prior to the creation of IR 2, a local settler, Michael Phillips, had the best land, "right where Chief David had his…little settlement", and Michael Phillips' sons had homesteads at "the best land around…on the -- north of the border" (Hearing Transcript, January 31, 2017, at 96–97). Mr. Phillips stated that Michael Phillips is his ancestor.

[17] Mr. Phillips indicated that the place where the existing village is now located was "basically the only place where there was good land that hadn't already been taken up…and most of the land…except for a couple of spots, is really high, dry benchland. So it's not good for growing anything" (Hearing Transcript, January 31, 2017, at 97–98). IR 2 had only a few places to grow hay. Mr. Phillips emphasized that the land taken for the Customs house was prime land and such land was rare on IR 2. The Ktunaxa people could not buy or pre-empt agricultural land to replace what they had lost from their reserve: "…once it's gone it's gone" (Hearing Transcript, January 31, 2017, at 113).

IV. FACTS

[18] The Parties provided an Agreed Statement of Facts (ASOF) that was of great assistance to the Tribunal. Where the below differs from the ASOF, the findings herein prevail.

[19] When British Columbia joined the Confederation in 1871, the land in issue in this claim had not been the subject of a treaty. Article 13 of the *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*], provided that:

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

Thus, Canada and British Columbia had to co-operate to allot and create reserves.

[20] When British Columbia and Canada established the first Joint Indian Reserve Commission in 1876, its mandate included:

> 2. That the said Commissioners shall as soon as practicable after their appointment meet at Victoria and make arrangements to visit, with all convenient speed, in such order as may be found desirable, each Indian Nation (meaning by Nation all Indian tribes speaking the same language) in British Columbia and after full enquiry on the spot, into all matters affecting the question, to fix and determine for each Nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it.
>
> 3. That in determining the extent of the Reserves to be granted to the Indians of British Columbia no basis of acreage be fixed for the Indians of that Province as a whole, but that each Nation of Indians of the same language be dealt with separately.
>
> 4. That the Commissioners shall be guided generally by the spirit of the [T]erms of Union between the Dominion and the Local Governments, which contemplates a "liberal policy" being pursued towards the Indians; and in the case of each particular Nation regard shall be had to the habits, wants and pursuits of such Nation, to the amount of territory available in the region occupied by them, and to the claims of the white settlers. [Memorandum attached to PC 1875-1088; Common Book of Documents (CBD), Vol 1, Tab 6]

[21] In 1880, the provincial and federal Crowns appointed Peter O'Reilly as the sole Commissioner for the Indian Reserve Commission (PC 1880-1334). The two governments modified O'Reilly's mandate slightly from the mandate of the Joint Indian Reserve Commission's. O'Reilly's allotments were subject to confirmation by the provincial Chief Commissioner of Lands and Works (CCLW) and the federal Indian Superintendent for British Columbia. PC 1880-1334 further stated that, failing agreement, O'Reilly's allotments should be referred to the Lieutenant Governor of British Columbia.

[22] O'Reilly allotted IR 2, comprising 10,560 acres, by Minute of Decision on July 18, 1884. E.M. Skinner surveyed IR 2 for the DIA in 1886. British Columbia's CCLW approved the allotment on June 10, 1887.

[23] Nevertheless, a conflict simmered between the federal and British Columbia governments over reserves, with the province delaying conveyance of administration and control of its

underlying proprietary title to land that had been allotted for reserves, including IR 2.

[24] By 1912, the federal and provincial governments had not resolved their differences over reserves and they established the RCIA to "settle all differences between the Governments of the Dominion and the Province respecting Indian [L]ands and Indian Affairs generally" (McKenna-McBride Agreement; CBD, Vol 1, Tab 73). The Parties agreed that the McKenna-McBride Agreement:

> …proposed that the lands comprised in the Indian reserves as "finally fixed" by the RCIA would be conveyed by the provincial Crown to Canada with full power to Canada to "deal with the said lands". Section 8 of the McKenna-McBride Agreement provided, in part, that:
>
> > If during the period prior to the Commissioners making their final report it shall be ascertained by either Government that any lands being part of an Indian Reserve are required for right-of-way or other railway purposes, or for any Dominion or Provincial or Municipal Public Work or purpose, the matter shall be referred to the Commissioners who shall thereupon dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect. [ASOF at para 15]

[25] Although Canada and British Columbia approved the McKenna-McBride Agreement, the approving Orders-in-Council also provided that the acts and proceedings of the RCIA were subject to the approval of Canada and British Columbia (PC 1912-3277 and Order-in-Council (OIC) 1912-1341). The two Crowns also agreed to "consider favourably the reports, whether final or interim, of the RCIA, with a view to give effect, 'as far as reasonably may be, to the acts, proceedings and recommendations' of the RCIA" (ASOF at para 16).

A. The Customs Land

[26] The land taken for the Roosville Customs House was the subject of an Interim Report made by the RCIA. On September 10, 1914, the Commissioner of DOC, John McDougald, inquired to the Department of Indian Affairs (DIA) whether it would object to a customs building on IR 2. McDougald asked for tracing of all trails in the vicinity.

[27] On September 15, 1914, the DIA sent the tracing and asked: (a) that the DOC indicate the position and size of the required parcel; (b) whether the DOC wished to purchase or lease the

land, noting that the "Indians" would have to be compensated; and, (c) that the DOC have the land surveyed and forward the tracing, stating that "[a]s soon as this plan is received showing the lands desired the matter will be referred to our Indian Agent for report" (CBD, Vol 1, Tab 97). This letter also stated that "[y]ou will have power to expropriate the land required, under Section 46 of the Indian Act".

[28] The British Columbia and Dominion Land Surveyor, A. Cummings, surveyed the 2.97 acre parcel on September 25, 1914. On October 5, 1914, the DOC applied to the DIA to expropriate the 2.97 acre parcel. Eight days later the DIA sent a plan of the desired land to the RCIA and asked that the RCIA "take action in this matter at as early a date as possible" (CBD, Vol 1, Tab 102).

[29] On October 15, 1914, J.D. McLean, Assistant Deputy and Secretary at the DIA, asked the Inspector of Indian Agencies, A. Megraw, to examine the parcel for the purpose of erecting a Customs house. Secretary McLean also advised Inspector Megraw to consult with the "Indian Council" and endeavour to obtain its concurrence on a valuation (CBD, Vol 1, Tab 103).

[30] On October 20, 1914, the RCIA issued Interim Report No. 52 on the matter. The RCIA noted the application from DOC for the 2.97 acre parcel and made its recommendation based:

> …upon consideration of the said application and examination of the plan submitted therewith, and it appearing therefrom that the said land is required by such Department of Customs of Canada for such purpose. [CBD Vol 1, Tab 104]

[31] Interim Report No. 52 recommended that:

> …subject to such compliance with the requirements of the law and <u>subject also to the conditions that proper compensation be made to the Indians</u>, permission be given to the said Department of Customs of Canada to enter upon the said Tobacco Plains Indian Reserve No. 2…and to acquire the said 2.97 acres for the purpose of erecting a Customs Building thereon… [emphasis added; CBD, Vol 1, Tab 104]

[32] About a month later, on November 24, 1914, Inspector Megraw reported to the Deputy Superintendent General of Indian Affairs, Duncan Scott, that he had visited and examined the site but was unable to see any of the "Indians" as they were hunting and unlikely to return until mid-December (CBD, Vol 1, Tab 112). Inspector Megraw gave a report on December 5, 1914

that valued the 2.97 parcel at $150.00 and advised that he had made a careful inspection of it.

[33] At the time, the Chief at Tobacco Plains was Chief Paul David, known as Chief Paul. He held this position from 1893 until 1948. Inspector Megraw's December 5, 1914 report further advised that Chief Paul "can be got to agree to the generous valuation of $150.00" (CBD, Vol 1, Tab 114).

[34] The DIA's Chief Surveyor, S. Bray, advised Deputy Superintendent Scott that the "Indians'" consent was:

> …not necessary in this case as the land is required for a public purpose. In similar cases the consent of the Indians' is required as a matter of policy.
>
> The sum offered appears to be a fair one. I think the Indians' consent may be omitted… [CBD, Vol 1, Tab 115]

[35] On December 22, 1914, Secretary McLean telegrammed Inspector Megraw, saying that the "Indians' consent was desirable but not necessary" and asking Megraw to inform Chief Paul that "the valuation [of his land] ha[d] been approved" (CBD, Vol 1, Tab 116). On December 26, 1914, the DOC's Commissioner, McDougald, processed a cheque for $150.00 in favour of the DIA in payment for the 2.97 acre parcel.

[36] On January 16, 1915, the Governor in Council authorised the sale with PC 1915-114, which acknowledged the McKenna-McBride Agreement and the RCIA's Interim Report No. 52 recommendation. Reflecting the McKenna-McBride Agreement, PC 1912-3277 and OIC 1912-1341, the Governor in Council authorized the sale subject to the consent of the Lieutenant Governor of British Columbia and "subject also to the condition that proper compensation be made to the Indians" (PC 1915-114; CBD, Vol 1, Tab 120).

[37] A week later, on January 22, 1915, Inspector Megraw reported that the Indian Agent, R. Galbraith, had met with Chief Paul, who had:

> …complained about the survey having been made without giving him notice, but when it was explained to him that he was away when the surveyor went there, and that a liberal valuation of $150.00 had been placed on the land, he expressed his willingness to concur. [CBD, Vol 1, Tab 121]

[38] On February 1, 1915, Chief Surveyor Bray recommended to Deputy Superintendent Scott

that the DIA should distribute 90% to Chief Paul and 10% to the credit of the Claimant "in accordance with former practice" and in recognition of Chief Paul's "interest in the land" (CBD, Vol 1, Tab 123).

[39] On February 9, 1915, Secretary McLean informed the DOC's Commissioner, McDougald that the DOC could take possession of the 2.97 acre parcel.

[40] The RCIA issued a Minute of Decision on March 24, 1915 showing the acreage of IR 2 reduced by 2.97 acres. The RCIA's final report confirmed the new acreage, excluding the 2.97 acre parcel, as being 10,557.03 acres, and the final report was approved, with amendments not consequential here, by PC 1924-1265 and OIC 1923-911.

[41] The Parties agreed that the Lieutenant Governor of British Columbia approved the sale of the 2.97 acre parcel to the DOC "no later than" OIC 1923-911 (ASOF at para 37). On July 29, 1938, British Columbia transferred underlying title to the 2.97 acre parcel and IR 2, less that parcel, to Canada pursuant to OIC1036-1938 (ASOF at para 49).

B. The Water Right-of-Way Land

[42] On October 22, 1917, the DOC received a Conditional Water Licence from British Columbia to take 500 gallons of water per day from a spring on IR 2 for year round domestic use. The DOC applied to the DIA in November 1917 to run a pipeline from the spring to the Customs officer's house on the Customs Land. The Customs Officer, G. Dingsdale, initially indicated a strip 18 inches wide and 141 feet long (November 22, 1917 sketch for the Acting Collector of Customs, H. Nicholson).

[43] On November 26, 1917, Secretary McLean informed Agent Galbraith that the Conditional Water Licence had been issued. He asked Agent Galbraith to report on the matter and "if there are no special objections you should state on what terms permission may be given to lay and maintain the necessary ditch and pipe line" (CBD, Vol 2, Tab 149). He also asked Agent Galbraith to "bring this matter to the attention of the Indian Council and endeavour to obtain their assent to your views" (CBD, Vol 2, Tab 149).

[44] On November 27, 1917, Acting Collector of Customs Nicholson applied for a longer

strip that was 18 inches wide and 170 feet long.

[45] On January 31, 1918, Agent Galbraith reported to Secretary McLean that he had attempted to speak with Chief Paul in November 1917 but he was away from the community. Agent Galbraith instead advised Chief Paul's brother that the amount of water granted would not materially affect the supply to Chief Paul's ranch because Officer Dingsdale's family was small and his garden "of no great extent" (CBD, Vol 2, Tab 152; ASOF at para 44). Five hundred gallons a day would not "interfere very much with Chief Paul's rights" and the construction would not do much damage to Chief Paul, who was not using the land "for garden purposes at present" (CBD, Vol 2, Tab 152; ASOF at para 44). The work would not occur before spring. Agent Galbraith hoped to see Chief Paul before then and obtain his consent. Agent Galbraith further advised:

> What should be done is to impress upon the Customs Officer that no water should be allowed to go to waste as it is required for irrigation purposes on Chief Paul's garden and ranch, as was [directly] shown during the past summer which was very hot. [CBD, Vol, 2, Tab 152; ASOF at para 44]

[46] On June 17, 1918 Agent Galbraith reported to Secretary McLean that he had looked over the proposed pipeline and found it could do no injury to Chief Paul's land, which had not been cultivated in years and was used as yard and pasture. He had tried again to speak with Chief Paul but Chief Paul was again away from the community. Agent Galbraith reported that Chief Paul:

> …wants all the water he can get for irrigation, but I noticed that he does not conserve what he has so as to use it to the best advantage.
>
> I fear he is under the impression that he is loosing [losing] something that belongs to him and that he should have some compensation. I gathered this from his brother's remarks but as I explained to him the quantity of water required by the Customs people is so small, I don't see that the question should be considered. [CBD, Vol 2, Tab 157; ASOF at para 45]

[47] Agent Galbraith intended a visit to Chief Paul the following week to discuss the matter "as I [Agent Galbraith] do not want any misunderstanding or friction as to his [Chief Paul's] rights" (CBD, Vol 2, Tab 157; ASOF at para 45).

[48] By June 26, 1918, the DOC had laid the pipeline and built a small ditch to irrigate the Customs house garden. On that day Agent Galbraith reported to the DIA that the construction

had done no damage to IR 2 and the quantity of water used could be easily spared. Chief Paul and his brother had assisted Officer Dingsdale with the task and in Agent Galbraith's opinion, the matter was "closed satisfactorily" (CBD, Vol 2, Tab 158; ASOF at para 46).

[49] On July 4, 1918, Secretary McLean advised Acting Collector of Customs Nicholson of Agent Galbraith's report and stated that "[i]n view of the Agent's report I have to say that the pipe line may be continued in operation during the pleasure of the Superintendent General" (CBD, Vol 2, Tab 159; ASOF at para 47).

[50] On December 14, 1925, Conditional Water Licence 2778 was replaced by Final Water Licence 4968. This licence had a precedence date of November 5, 1915, named Gordon Creek as the source, and enabled the DOC to divert 500 gallons per day for year-round domestic use. The DOC abandoned this licence in 1970.

[51] The Claimant has never received compensation for the Water Right-of-Way Land for the period 1918 to 1970, when it was abandoned.

V. ISSUES

[52] The Parties agreed to the issues as follows, with some minor wording changes for conciseness:

1. What was the legal status of the Customs Land at the time of the taking in 1915?

2. Did the Respondent take the Customs Land with lawful authority?

3. Did the Respondent owe the Claimant a legal obligation with respect to the taking of the Customs Land in 1915, including (a) a statutory duty; or, (b) a fiduciary duty?

4. If so, what was the scope of the legal obligation:

    a. To obtain Claimant's consent to the taking;

    b. To value the Customs Land adequately;

    c. To pay the Claimant adequate compensation; and,

d. To minimally impair any interest of the Claimant in the Customs Land.

5. Did the Respondent breach a legal obligation owed to the Claimant with respect to the Customs Land taking?

VI. POSITIONS OF THE PARTIES

A. The Claimant

[53] In overview, the Claimant submitted that the Respondent breached statutory and fiduciary duties when it failed to: consult with and obtain the Claimant's consent regarding the Customs Land taking and amount of compensation; and, obtain compensation for the Water Right-of-Way Land from 1918 to 1970; minimally impair the Claimant's interest in the Customs Land; and, properly value that land and obtain adequate compensation for the Customs Land (Claimant's Memorandum of Fact and Law (CMFL) at paras 5, 7, 119, 131). The Claimant presented alternative arguments to support the alleged breaches of statutory and fiduciary duties, including all of the following grounds under the *SCTA*: paragraph 14(1)(b) (breach of legislation); paragraph 14(1)(c) (breach of a legal obligation arising from the Crown's provision, non-provision, or administration of reserve lands); paragraph 14(1)(d) (illegal disposition); and, paragraph 14(1)(e) (inadequate compensation for reserve lands taken or damaged under legal authority).

1. Application of the *Indian Act*

[54] The Claimant submitted that at the time of the taking IR 2 was: "[l]ands reserved for the Indians" within the meaning of section 91(24) of the *Constitution Act*, 1867 (CMFL at para 80); a "reserve" within the meaning of Article 13 of the 1871 Terms of Union (Claimant's Reply (Reply) at para 5); and, a "reserve" within the meaning of the *Indian Act*, RSC 1906, c 81 [*Indian Act*, 1906] (CMFL at heading PART III.A; Reply at para 19).

[55] The Claimant cited *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 67, [2002] 2 SCR 816 [*Ross River*] for the test for reserve creation (CMFL at para 71). The Claimant submitted that prior to the taking: (1) agents with sufficient authority to bind the Crown possessed the required intention to create IR 2; (2) steps had been taken to set apart IR 2; and, (3)

the Claimant was using IR 2 (CMFL at paras 71–79). In the Claimant's view, the mandate and process of the Indian Reserve Commission transferred administration and control of IR 2 to the federal government; formal conveyance of administration and control over the underlying proprietary title which remained in the province was not necessary, as the federal government exercised *de facto* administrative control over the reserve (Reply at para 33). Commissioner O'Reilly was also required to "leave the Indians in the old places to which they are attached" (emphasis in original; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 at para 168; CMFL at para 77). The Claimant submitted that after O'Reilly's allotment in 1884, or latest by the provincial CCLW's approval in 1887, no further steps were required to create IR 2 (CMFL at paras 73, 79, 89). The Claimant's cognizable interest in IR 2 as a fully constituted Indian reserve had "crystallized" (CMFL at para 80).

[56] The Claimant noted that section 2(a) of the McKenna-McBride Agreement treated lands with IR 2's status as if reserved. The Respondent referred to IR 2 as a "reserve" in correspondence and administered IR 2 as if it was a "reserve", including significantly when it authorized the Customs Land taking with PC 1915-114, which stated that the Governor in Council was exercising the authority provided by section 46 of the *Indian Act* (CMFL at paras 87–88). In the Claimant's submission, the Respondent in fact exercised its power of administration over IR 2 (Reply at para 29).

[57] Alternatively, the Claimant says that IR 2 was a "provisional reserve" at the time of taking, and that the *Indian Act* nevertheless applied to it (CMFL at para 95; Reply at para 5). The Claimant distinguished the conclusion in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*], that OIC 1036-1938 finally created the reserves at issue in that case on the basis that: (1) a surveyor made the allotment that rooted the Wewaikai Indian Band's claim, not Commissioner O'Reilly; (2) the dispute was between two competing bands, both claiming the reserve as theirs; (3) the surveyor had authority to mark off land from incompatible uses by settlers but not to allot as between bands; and, (4) the finding that 1938 was the date of reserve creation was *obiter dicta* (CMFL at paras 100–03). The Claimant also questioned the significance of provincial co-operation in this Claim, because it involves self-dealing by Canada, unlike *Wewaykum* (Reply at paras 10, 21).

[58] The Claimant cited *Gosnell v Minister of Lands (BC) and Attorney General (Canada)*, in which the British Columbia Supreme Court said: "[t]hese reserves, segregated under the Terms of Union, I think were well reserved without any formal notice in the Gazette" (26 February 1912 (BCSC) [*Gosnell*]; aff'd 24 June 1912 (BCCA); dismissed 7 March 1913 (SCC), all unreported; quoted in *Squamish Indian Band v Canada*, 2001 FCT 480 at para 418 [*Mathias*]; CMFL at para 82). In *Canadian Pacific Ltd v Matsqui Indian Band,* [2000] 1 CNLR 21 (CA), Robertson J. implicitly recognized that the *Indian Act* applied to the reserves in issue while also accepting that OIC 1036-1938 legally constituted them (CMFL at para 105). This decision pre-dates *Wewaykum.*

[59] Finally, the Claimant submitted that the meaning of "reserve" for the purposes of the *Indian Act* should be interpreted according to the principles in *Nowegijick v R*, [1983] 1 SCR 29, 144 DLR (3d) 193 [*Nowegijick*], and *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85, 71 DLR (4th) 193 [*Mitchell*] (CMFL at para 86; Reply at paras 22–24), and in light of the Claimant's understanding of the concept at the time, which would have been that "O'Reilly's allotment of I.R. 2 created a reserve for their use and benefit". In the Claimant's view, this interpretation is "consistent with the honour of the Crown" (Reply at para 25). The Claimant further asserted that its predecessor would have thought that, upon O'Reilly's allotment, IR 2 could not be taken away from them without a surrender or consent (CMFL at para 109).

2. Alleged statutory breaches: necessity and compensation

[60] The Claimant submitted that section 46 of the *Indian Act*, 1906, required the consent of the Governor in Council and that compensation would be paid to the "the Indians of the band" (CMFL at paras 114–17). The entity seeking the taking required legislation empowering it to take the land, and such legislation had to be followed unless the Governor in Council provided otherwise. The Governor in Council approved the taking of the Customs Land on "condition that proper compensation be made to the Indians" (PC 1915-114; CMFL at para 118; CBD, Vol 1, Tab 120). The Claimant submitted that proper compensation would have required consultation with the TPIB "in order for the Band to hire its own independent appraiser". Inspector Megraw's "unqualified" opinion was inadequate (CMFL at para 120).

[61] In the Claimant's view, the taking afforded the DOC the administration and use of the

land taken, but not fee simple (CMFL at paras 114–15). The takings power incorporated via the *Indian Act*, 1906, section 46, was the *Expropriation Act*, RSC 1906, 52 V, c 13, section 3(b). A taking under section 46 of the *Indian Act* could be "of the lands or **interest therein**" (emphasis in original; CMFL at para 114). Section 3(b) limited takings to only the land considered "necessary" by the Minister (CMFL at para 122). In *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at paras 61–62, [2001] 3 SCR 746 [*Osoyoos*], the Supreme Court found that similar language limited the Crown to taking only the land reasonably required, and the *Indian Act* did not permit an "end run" around this limitation (CMFL at paras 129–30). The Claimant submitted that the Customs house taking was similarly limited by the *Indian Act* and *Expropriation Act* (CMFL at para 131). There was no evidence to indicate that the taking of the fee simple interest in the 2.97 acres was necessary and no evidence that the DIA considered whether another off-reserve location was more suitable or equally suitable (CMFL at para 134).

[62] Additionally, the DIA did not question whether a smaller parcel would have been adequate. The Customs house had a small footprint, and the land used for the Customs Officers' garden was not necessary for the Customs house (CMFL at para 136). The DIA also did not consider any lease or permit-based option, although this approach was taken at Semiahmoo Indian Reserve and Matsqui Indian Reserve when land was taken for Customs purposes, and the consent of the First Nations involved was obtained. The Claimant further submitted that the Respondent ought to have sought a surrender instead of relying on a taking (Reply at para 30).

[63] The Claimant also said that if the Customs Land ceases to be required for a customs facility, the Customs Land must revert to reserve land (Reply at para 54).

3. Claimant's submissions on fiduciary obligations

[64] The Claimant submitted that the Respondent assumed unilateral discretionary control of the Claimant's specific Indigenous interest via Article 13, Terms of Union and section 91(24) of the *Constitution Act*, 1867, triggering fiduciary obligations (CMFL at para 151). Section 91(24) afforded unilateral "power and discretion to allot and protect reserves for the benefit of Indians", and the *Indian Act* afforded unilateral discretion to allot and administer IR 2 (CMFL at paras 152–53).

[65] In the Claimant's view it had a cognizable interest in IR 2 as allotted by Commissioner O'Reilly in 1884 and surveyed in 1886. The boundaries of IR 2 remained unchanged from the 1886 survey until the taking (Reply at para 18). The federal government obtained administration and control with Commissioner O'Reilly's allotment in 1884, based on the mandate and process of the Indian Reserve Commission (Reply at para 33). The taking was particularly unilateral because a federal department sought the land (Reply at para 38).

[66] In the Claimant's view the scope of the duty included: acting in a manner consistent with "that of a man of ordinary prudence in managing his own affairs"; acting in the best interests of the Claimant; exercising loyalty and care; going beyond the role of honest referee; and, putting the Claimant's interests ahead of the public duty to establish a Customs house (CMFL at paras 155–62, citing *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paras 40–41, 60, 63, [1996] 2 CNLR 25 [*Blueberry River*]; *Wewaykum* at para 104). *Wewaykum* recognized that with respect to *provisional* reserves, the Crown may owe the duties of loyalty, good faith, full disclosure and due diligence (CMFL at para 164). The Claimant asserted it was also owed the duty of minimal impairment, protection, and preservation due to Canada's role as exclusive intermediary, the Claimant's dependence, and the Claimant's vulnerability to Canada's discretion when deciding the extent of land taken and terms of tenure provided to the DOC (CMFL at paras 166–69, 181–92). In particular, Canada had the power to grant a lesser interest (Reply at para 39).

[67] The Claimant also submitted that, if IR 2 was a reserve within the meaning of the *Indian Act* at the time of the taking, then *Wewaykum* recognized that after a reserve is created the duty expands to preservation and protection (CMFL at para 170).

[68] In the circumstances of this Claim, the Claimant submitted that the Crown breached the following specific obligations:

a. The duty to pay adequate compensation to the TPIB, including duties to: seek the best possible price; obtain a proper appraisal; pay compensation for improvements; consult with the TPIB so that they could hire an independent appraiser; compensate for loss of use with rent; and, pay "at least 90%" of the compensation to the TPIB as the interest holder, not Chief Paul (CMFL at paras 172–180, 224).

b. The duty to minimally impair the TPIB's interest in IR 2, including the duties to: consider using a permit and lease to meet the needs of the DOC; consider seeking a surrender and lease arrangement; and, provide the Customs Land as reserve lands and include a reversionary interest in favour of the TPIB (CMFL at paras 181, 189, 208, 224).

c. The duties of full disclosure and consultation, including an effort to seek the TPIB's consent to the taking, the interest taken, and the amount of compensation (CMFL at paras 194, 224).

[69] The Respondent admitted that the 1915 compensation for the Customs Land ought to have been $208.00 instead of $150.00. The Claimant further asserted that the Respondent's efforts to consult were insufficient and that it was a breach of fiduciary duty to pay 90% of the $150.00 to Chief Paul, who did not hold a location ticket and whose interest was limited to use and occupation (CMFL at paras 178–80, 217). The Claimant held the "full cognizable interest" in its communally allotted reserve (CMFL at para 216). Evidentiary difficulties relating to consultation efforts should not assist the Respondent, because the self-dealing aspects of the breaches indicate that the evidentiary burden rests on the Respondent (Reply at paras 48–52).

[70] The Respondent ought to have ensured that the public interest in the Customs use did not supersede the Claimant's interest in IR 2 (CMFL at para 192). The Claimant also asserted that the honour of the Crown required no taking without consent (CMFL at para 193), and that fiduciary obligations required, at minimum, an effort to obtain consent (CMFL at para 194). The informed consent of the Claimant, through a referendum, was not sought (CMFL at para 196). Instead, the DIA dealt with Chief Paul, who was away from IR 2 at important times in the winter of the taking, 1914-1915.

[71] To connect these submissions to the *SCTA*, the Claimant alleged that: the statutory and/or fiduciary breaches rendered the disposition of the Customs house land illegal (*SCTA*, paragraph 14(1)(b) and/or (d)). The Respondent breached statutory and/or fiduciary duties in its administration of the Customs Land and overreach as concerned the taking of the Customs house (*SCTA*, paragraph 14(1)(c)), either by taking a full interest (if the taking was unnecessary), or by not minimally impairing the interest taken (e.g. via a lease, permit or reversion; CMFL at para

224).

[72] Finally, the Claimant submitted that if the taking was otherwise legal, the compensation was inadequate (*SCTA*, paragraph 14(1)(e)). The Respondent ought to have consulted with the Claimant, achieved a proper valuation, considered compensation for loss of use and rent-based compensation, and paid the Claimant at least 90% of the total compensation. Instead, 90% was wrongly paid to Chief Paul.

B. The Respondent

[73] The Respondent submitted that IR 2 was a *provisional* reserve at the time of taking and not subject to the *Indian Act* (*Wewaykum*; *Canada v Kitselas First Nation*, 2014 FCA 150 at para 10, [2014] 4 CNLR 6; Respondent's Memorandum of Fact and Law (RMFL) at paras 2, 26). The taking occurred before British Columbia transferred administration and control of the Customs Land to Canada by OIC 1036-1938.

[74] The Respondent submitted that the taking occurred under legal authority through the authority of the RCIA. Section 8 of the McKenna-McBride Agreement provided that if either the federal or provincial government needed land for a public purpose, the matter would be referred to the RCIA for consideration and recommendation in an Interim Report (RMFL at para 13). The DIA followed this procedure with respect to the Customs Land (RMFL at para 15). The RCIA recommended that the Customs Land should be removed from IR 2. Both Crowns approved the RCIA Final Report and PC 1915-114, in authorizing the sale of the Customs Land to the DOC, acknowledged the RCIA's recommendation. British Columbia approved the transfer of the 2.97 acres to Canada with OIC 911-1923 and transferred administration and control of IR 2 to Canada via OIC 1936-1938.

[75] The *Ross River* test for reserve creation focuses on action and intention (RMFL at para 29). In *Wewaykum* at paragraph 51, the Supreme Court of Canada concluded that "[a]n intention to create a reserve in 1907 on land that might be withdrawn from the federal-provincial package at any time prior to such agreement being concluded cannot reasonably be attributed to the federal Crown" (RMFL at para 34).

[76] The Respondent distinguished *Gosnell* by asserting that in that case the petitioner sought

to pre-empt land set aside by the Joint Indian Reserve Commission. The court said the petitioner could not pre-empt the land, but did not decide the date of reserve creation, nor can *Gosnell* supplant *Wewaykum*'s findings regarding BC OIC 1036-1938, which are not *obiter dicta* (RMFL at paras 36–37).

[77] The Respondent noted the importance of the particular factual context for reserve creation (RMFL at para 38). The factual context indicated that reserve creation was unfinished and disputed until British Columbia conveyed its administration and control of the land forming IR 2 to Canada in 1938 (RMFL at paras 38–42). Section 8 of the McKenna-McBride Agreement provided the mechanism for withdrawal of the Customs house land from the *provisional* IR 2, which the two governments followed. Canada's OIC approving the RCIA's Interim Report No. 52 referred to section 46 of the *Indian Act*, but this reflected the "confusion in the early years regarding the precise nature of the federal interest under section 91(24)" (*Wewaykum* at para 51; RMFL at para 50).

[78] The Respondent denied that any legal or evidentiary ambiguity exists that should be interpreted generously through an application of the principles in *Nowegijick* and *Mitchell* (RMFL at para 54). Reserve creation is a question of fact and law, not statutory or treaty interpretation. The Customs Land was not part of a reserve within the meaning of the *Indian Act* when it was withdrawn from the *provisional* IR 2 (RMFL at para 55). The Respondent removed the Customs house land from the *provisional* IR 2 under legal authority, following the procedure agreed by both governments under the McKenna-McBride Agreement. The DIA obtained the recommended approval of the RCIA and British Columbia's consent (RMFL at para 59).

[79] The Respondent also submitted that no fiduciary obligations had been breached except as admitted. Fiduciary obligations are situation specific, and not all aspects of the relationship between the Crown and Aboriginal peoples give rise to fiduciary obligations (RMFL at para 62). The two ways that fiduciary obligations arise are set out in *Manitoba Métis Federation Inc v Canada (AG),* 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis Federation*]. The *sui generis* fiduciary duty, founded on the honour of the Crown and arising from the Crown's assumption of sovereignty, is at issue here (RMFL at para 67). These elements must be present: a cognizable Aboriginal interest; and, an undertaking of discretionary control by Canada in relation to that

interest that invokes responsibility in the nature of a private law duty (RMFL at para 66, citing *Wewaykum* at para 85 and *Manitoba Métis Federation* at para 51). The fiduciary obligations that arise in relation to *provisional* reserves are "limited to 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" (RMFL at para 69, citing *Wewaykum* at para 86).

[80] The Claimant improperly attempted to extend the concept of minimal impairment to a *provisional* reserve, and then use it to imply Canada was required to obtain a surrender rather than pursue expropriation of the Customs Land (RMFL at para 70). Canada's duty regarding the *provisional* IR 2 did not include an obligation to minimally impair the TPIB's interest. In any case, the DOC reasonably required the full interest and the full 2.97 acres (RMFL at para 71). No duty to choose surrender over expropriation existed.

[81] Canada lacked unilateral discretionary control because of the *provisional* status of IR 2. Canada cannot have had an obligation to take a lesser interest when this was not in its exclusive power (RMFL at para 74, citing *Wewaykum*). Competing interests asserted by Aboriginal groups and non-Aboriginals had to be considered; consequently, Canada did not have a "responsibility in the nature of a private law duty" of minimal impairment (RMFL at paras 77–79, citing *Wewaykum* at para 85). In *Osoyoos*, the duty of minimal impairment arose with respect to a fully created reserve, via specific language in the provincial *Water Act*, RSBC 1948, c 361 [*Water Act*] and because of the poor evidentiary record (RMFL at paras 82–83). The McKenna-McBride Agreement contained no similar language, and "much more" information is available in this Claim. Finally, the two step process described in *Osoyoos*, in which public need is assessed in the first step, and minimal impairment duties arise in the second step, is unworkable when Canada lacks exclusive discretionary control over the land in issue (RMFL at para 84). Taking a lesser interest was neither practically nor legally feasible.

[82] In any case, the DOC reasonably required a full interest in the 2.97 acres for several reasons: (1) to avoid jurisdictional conflict with British Columbia; (2) because its need was permanent; and, (3) because exclusivity was an important component of the customs use (RMFL at paras 86–88). The location was required because that was where existing travel routes crossed

the international boundary, and because natural and artificial impediments existed on either side (RMFL at para 89). The parcel was small and "well-chosen", as Inspector Megraw noted at the time. It included an elevated area for viewing the region and 1.0 acres for gardens to support the staff. IR 2 had other, significant areas of arable land (RMFL at para 93). The Customs Land did not include all of Chief Paul's land (RMFL at para 93).

[83] The Respondent submitted that the surrender provision of the *Indian Act* did not apply to the *provisional* IR 2, and in any case it had been suspended by the Privy Council on December 15, 1876 (RMFL at para 95). Instead, Canada was obliged to follow the RCIA process, and it did so. Finally, surrenders are voluntary, so a duty to obtain one could not be imposed (RMFL at para 97).

[84] The Respondent also submitted that paying 90% of the compensation funds to Chief Paul was consistent with contemporaneous policy, the *Indian Act*, and expropriation statutes that aim to compensate affected parties. Canada properly balanced the interests of TPIB and Chief Paul, meeting the duties articulated in *Wewaykum* (RMFL at para 98).

[85] The DIA, Chief Paul and members of the predecessor to the Claimant recognized that Chief Paul "owned and occupied" the Customs Land and had made improvements (RMFL at para 99). Although Chief Paul held no formal recognition of an interest in the Customs Land, at the time the Claimant and the Crown understood his interest to be akin to that of a location ticket holder (RMFL at para 101). The Respondent submitted that this was a circumstance in which substance should be favoured over form (RMFL at para 101, citing *Wewaykum* at para 43).

[86] Also, section 24 of the *Indian Act*, 1906 provided:

> Every Indian and every non-treaty Indian, in the province of…British Columbia…who had, previously to the selection of a reserve, possession of and who has made permanent improvements on a plot of land which upon such selection becomes included in, or surrounded by, a reserve, shall have the same privileges, in respect of such plot, as an Indian enjoys who holds under a location title.

[87] The Respondent submitted that Chief Paul inherited the land from his father. Unlike the situation in *Joe v Findlay et al*, (1981) 26 BCLR 376, 122 DLR (3d) 377 (CA), Chief Paul was not a squatter (RMFL at paras 103–04).

[88] Chief Paul received 90% of the 1915 compensation because he was the most affected. The Claimant received 10% in reflection of its underlying interest, and consistent with the policy underlying the *Indian Act*, sections 21 and 46(3) (RMFL at paras 105–06, also citing *Boyer v Canada*, [1986] 4 CNLR 53 (FCA), leave to appeal refused, regarding locatee's rights). The Respondent said that the general rule is that the person in possession should receive compensation for the taking, and "[n]o valid reason exists for treating an Aboriginal person in possession of land in a provisional reserve context any differently" (RMFL at para 109). The 90/10 split was based on ensuring fair compensation, not section 89 of the *Indian Act*, as suggested by the Claimant. That section deals with proceeds from surrenders (RMFL at para 111).

[89] The Respondent also submitted that it met the fiduciary standard required of it by: (1) making good faith efforts to inform the Claimant, through Chief Paul, about the valuation of the Customs Land and taking; and, (2) obtaining Chief Paul's consent to the valuation of the Customs Land (RMFL at paras 113–23). Canada breached no obligation by going ahead with the expropriation without the consent of the Claimant. Canada was exercising public law duties and acted in accordance with legislation and federal-provincial agreement when it took land from the *provisional* IR 2 via the RCIA process (RMFL at paras 114–31; *Inquiries Act*, RSC 1906, c 104; *McKenna-McBride Agreement, British Columbia Indian Land Settlement Act*, SC 1920, c 51).

[90] Secretary McLean asked Inspector Megraw to "consult with the Indian Council" but he "would have had little to no knowledge of the Band and its membership and administration" and there is no evidence that a Band Council existed at the time (footnote omitted; RMFL at para 115). Chief Paul was the primary spokesperson and representative of the Claimant (RMFL at para 116). Inspector Megraw travelled to IR 2 in November 1914 but Chief Paul was away. Later correspondence showed friendly relations with Chief Paul (RMFL at paras 117–19). Agent Galbraith met with Chief Paul after Christmas, 1914, and informed him of Inspector Megraw's $50.00 per acre valuation. Agent Galbraith noted Chief Paul was upset about the survey, but after learning of the valuation he was willing to concur (RMFL at para 122).

[91] No private law duty to obtain consent should be imposed when doing so would directly conflict with public law obligations (RMFL at para 126). In *Osoyoos*, fiduciary obligations did

not arise when Canada exercised its public power to decide whether to use reserve land for a public purpose; after that decision has been made, then fiduciary obligations may arise (RMFL at para 127). The RCIA process did not require the Claimant's consent (RMFL at paras 128–30). Canada acted in accordance with legislation, and the RCIA's empowering documents defined the scope of fiduciary duty owed by Canada (RMFL at para 129). Moreover, a taking is by definition done without consent (RMFL at para 130). Canada had no obligation to obtain consent from the Claimant (RMFL at para 131).

[92] The Respondent concluded that the Customs Land was taken under legal authority. The Respondent agreed that the $150.00 paid at the time for the Customs Land was inadequate and that the historical value was $208.00. The Respondent also admitted that it had breached its fiduciary duty to the Claimant by failing to obtain compensation for the land taken from the *provisional* IR 2 for use as a pipeline or ditch from 1918 to 1970 (Letter to the Tribunal, January 30, 2015).

VII. ANALYSIS

A. What was the legal status of the Customs land at the time of the taking in 1915?

[93] The Claimant submitted that at the time of the taking, the lands:

i. were part of a "reserve" within the meaning of the *Indian Act*;

ii. were a reserve in accordance with the criteria set out in the *Ross River* case;

iii. were dealt with at the relevant time as if the lands were reserve lands as provided for in section 2(8) of the McKenna-McBride Agreement;

iv. were treated by Canada as if the lands were part of a "reserve" within the meaning of the *Indian Act*; and,

v. even if the lands were part of a *provisional* reserve at the time of the taking, the fiduciary duties applicable during the reserve creation process existed, and the provisions of the *Indian Act* should be applied to the lands.

[94] Canada submitted that the Customs Land was a *provisional* reserve as per *Wewaykum* and was not a formal reserve under the *Indian Act*. Other than adequate compensation, pre-reserve creation duties were met, the minimal impairment duty did not apply, and in any case, Canada required the full interest.

[95] For reasons that will become apparent later in these Reasons, I begin with the question of fiduciary duties owed rather than the submissions relating to reserve creation and the *Indian Act*.

[96] The issue of the legal status of the Customs Land derives from the question of what fiduciary duties Canada owed at the time of the taking, as well as the Claimant's submissions on statutory obligations under the *Indian Act*. If the legal status of the Customs Land was that it was part of an *Indian Act* reserve, then *Wewaykum* identified a particular list of fiduciary obligations, generally stated, that would have attached. This includes the duty to "protect and preserve" a First Nation's "quasi-property interest" in reserve land (at para 100). *Wewaykum* also described, for the first time, "provisional reserves". In the particular history of reserve creation in British Columbia, these are allotted reserves for which British Columbia had not yet transferred to Canada the administrative control over the underlying proprietary interest. For these reserves, *Wewaykum* recognized that, the Crown may owe, at a minimum, the following "basic obligations":

> …the Crown's duty is limited to 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. [at para 86]

[97] In other words, some basic fiduciary duties applied to both types of reserve, but the status of the land could affect the fiduciary duties owed by the Crown depending on or to the extent that it relates to the interest at stake.

[98] The broad strokes of pre- and post-reserve creation duties were stated in general terms in *Wewaykum*, but Binnie J. emphasized that what the duties require of the fiduciary in the particular situation is context specific:

> The starting point in this analysis, therefore, is the Indian bands' interest in specific lands that were subject to the reserve-creation process for their benefit, and in relation to which the Crown constituted itself the exclusive intermediary

> with the province. The task is to ascertain the content of the fiduciary duty in relation to those specific circumstances. [emphasis added; at para 93]

[99] Justice Binnie continued at paragraph 94:

> …it is necessary to determine what the imposition of a fiduciary duty adds at that stage [pre-reserve formalization] to the remedies already available at public law. The answer, I think, is twofold. In a substantive sense the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In *Blueberry River* McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'". See also D. W. M. Waters, *Law of Trusts in Canada* (2nd ed. 1984), at pp. 32-33; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. Secondly, and perhaps more importantly, the imposition of a fiduciary duty opens access to an array of equitable remedies…. [emphasis added]

[100] It is clear that, at the time of the taking, British Columbia retained administrative control over the underlying proprietary interest in IR 2. Yet, the technical questions of whether the land in issue had been formally confirmed as a reserve, and whether it was subject to the *Indian Act* are not the key to the question of what *fiduciary duties* were owed in the particular circumstances of this Claim (separate and apart from whether any statutory duties were owed).

[101] For the reasons that follow, I conclude that in the circumstances of this Claim, the Claimant has established that the Respondent was a fiduciary and did breach the expected standard of conduct owed as a fiduciary in respect of the protection of the Claimant's significant and cognizable interest in its reserve, even if it was *provisional* at the time of taking. Therefore, an analysis is unnecessary of whether the Claimant was owed statutory-sourced duties because the *Indian Act* applied and/or because the reserve was fully created prior to the taking.

[102] Regarding what specific duties were owed and their content in the circumstances, the most controversial was the alleged duty to impair IR 2 as minimally as possible when carrying out the taking. Other duties will be discussed further below.

B. Does the duty of minimal impairment apply in the circumstances of this claim?

[103] The Claimant submitted that the minimal impairment duty applied even if the Customs Land was not formally part of an *Indian Act* reserve, yet was being treated as such by government officials, particularly by the DIA. Further, even if the "lowest standard" described in *Wewaykum* for *provisional* reserves applies to the Customs Land, in the circumstances of this case, in dealing with an expropriation of lands where the Claimant had a cognizable interest, the minimal impairment duty should apply.

[104] Canada argued that as a *provisional* reserve, the lowest level of fiduciary duty applied and that the lowest level of duty owed did not require the application of the minimal impairment duty.

[105] The duty of minimal impairment was not discussed in *Wewaykum* because that case did not involve an expropriation, and the circumstances and facts in that case are quite different from this one. Both Parties to this Claim agree that this Claim is about a compensable taking by the federal Crown from the Claimant's predecessor. The allotment was made by Commissioner O'Reilly to the Claimant's predecessor, who occupied it, and its size was uncontroversial until final confirmation, with the exception of the takings at issue in this claim. In *Wewaykum*, two Bands each claimed the other's reserve; both were part of the larger Indigenous group to whom the reserves had been allotted, the Laich-kwil-tach; the allotment was by a surveyor rather than a Reserve Commissioner; the surveyor did not have the authority to allot as between subunits of the larger Indigenous group; and, there was evidence that led Justice Binnie to question the equities of dispossessing one group in favour of the other or compensating in lieu (*Wewaykum* at para 34).

[106] The Supreme Court described the duty of minimal impairment in *Osoyoos*, which dealt with the taking of part of a reserve for a canal. When the Supreme Court rendered *Osoyoos*, it had not yet decided *Wewaykum* and thus, it had not yet defined the concept of a "provisional reserve". It is not clear, therefore, that the Supreme Court's reasoning on why the duty of minimal impairment attached to the expropriation would not also be relevant to takings from provisional reserves.

[107] The underlying issue in *Osoyoos* was the purported ability of the Band to assess the subject canal lands for tax purposes. The Band considered that those canal lands should still be considered, "land or interests in land" in a reserve such that the lands remained liable to be assessed and taxed pursuant to the Band's by-laws (at para 13).

[108] Sometime prior to 1924, a concrete-lined irrigation canal occupying a total area of 56.09 acres was constructed on a strip of land that bisected the Reserve. The OIC that was intended to formalize the interests in the land dated from 1957 and was done under the authority of section 35(3) of the *Indian Act*. The taking was constrained by both fiduciary duties and the statutory regime. The Supreme Court's discussion of fiduciary duty is most pertinent here (I will return to the statutory context below).

[109] Iacobucci J. for the majority, concluded that the Crown had a fiduciary duty to minimally impair the reserve when administering the expropriation (*Osoyoos* at paras 52–55). The rationale for this was rooted in the *sui generis* character of "the aboriginal interest in reserve land" and "aboriginal interests in land":

> The features common to both the aboriginal interest in reserve land and aboriginal title include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally. Thus, it is now firmly established that both types of native land rights are *sui generis* interests in the land that are distinct from "normal" proprietary interests: *St. Mary's Indian Band*, supra, at para. 14. Native land rights are in a category of their own. There are three implications that follow from the nature of the aboriginal interest in reserve lands that are important in the context of this case.
>
> First, it is clear that traditional principles of the common law relating to property may not be helpful in the context of aboriginal interests in land: *St. Mary's Indian Ba*nd, *supra*. Courts must "go beyond the usual restrictions imposed by the common law", in order to give effect to the true purpose of dealings relating to reserve land: see *Blueberry River Indian Band*, *supra*, at para. 7, *per* Gonthier J. This is as true of the Crown's purpose in making a grant of an interest in reserve land to a third party as it is of an Indian band's intentions in surrendering land to the Crown.
>
> …
>
> 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.
>
> Land may be removed from a reserve with the participation of the Crown, which owes a fiduciary duty to the band, as discussed below. Fiduciaries are held to a high standard of diligence. [emphasis added; *Osoyoos* at paras 42–43, 45–47]

[110] These concepts, which underlay the Supreme Court's recognition of a duty of minimal impairment in *Osoyoos*, also apply to the Claimant's cognizable interest in the disputed land in this Claim, even if it was provisional. If provisional, the Claimant interest in the IR 2 was *sui generis*; traditional, common law property principles do not always fit well when considering *provisional* or confirmed reserves; the Claimant could not unilaterally add to or replace IR 2 whether provisional or confirmed; and, the Claimant's cognizable interest in IR 2 was "more than just a fungible commodity". The land was within the larger traditional territory of the Claimant and was occupied at the time of taking; if provisional, the allotment recognized the Claimant's substantive interest; and, other than the disputed taking, IR 2's boundaries remained unchanged throughout the reserve creation process.

[111] From the above preliminary considerations about the nature of the interest at stake, the Supreme Court in *Osoyoos* went on to consider the fiduciary duties involved. Canada had taken the position in *Osoyoos* that when Canada's public law duty conflicts with its statutory obligation to hold reserve lands for the use and benefit of the band for which they were set apart, then a fiduciary duty does not arise. The Supreme Court disagreed:

> In my view, the fiduciary duty of the Crown is not restricted to instances of surrender. Section 35 clearly permits the Governor in Council to allow the use of reserve land for public purposes. However, once it has been determined that an expropriation of Indian lands is in the public interest, a fiduciary duty arises on the part of the Crown to expropriate or grant only the minimum interest required in order to fulfill that public purpose, thus ensuring a minimal impairment of the use and enjoyment of Indian lands by the band. This is consistent with the provisions of s. 35 which give the Governor in Council the absolute discretion to prescribe the terms to which the expropriation or transfer is to be subject. In this way, instead of having the public interest trump the Indian interests, the approach I advocate attempts to reconcile the two interests involved.
>
> This two-step process minimizes any inconsistency between the Crown's public duty to expropriate lands and its fiduciary duty to Indians whose lands are affected by the expropriation. In the first stage, the Crown acts in the public interest in determining that an expropriation involving Indian lands is required in order to fulfill some public purpose. At this stage, no fiduciary duty exists. However, once the general decision to expropriate has been made, the fiduciary obligations of the Crown arise, requiring the Crown to expropriate an interest that will fulfill the public purpose while preserving the Indian interest in the land to the greatest extent practicable.
>
> The duty to impair minimally Indian interests in reserve land not only serves to balance the public interest and the Indian interest, it is also consistent with the policy behind the rule of general inalienability in the Indian Act which is to prevent the erosion of the native land base: *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, at para. 52. The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced. [emphasis added; at paras 52–54]

[112] Therefore, the Crown acts in the public interest when determining that an expropriation of lands administered under the *Indian Act* is required in order to fulfill some public purpose. At that stage, no fiduciary duty exists. For this step in the analysis, any distinction between *provisional* reserves and fully confirmed reserves is irrelevant, because in neither case does any fiduciary duty attach.

[113] It is at the second stage that the fiduciary obligations of the Crown might arise. In *Osoyoos*, the Supreme Court concluded that a duty of minimal impairment should apply; that is, the Crown is under a duty to expropriate only the minimum interest that will fulfill the public

purpose, thus preserving the "Indian interest" in the land to the greatest extent practicable.

[114] At paragraphs 52–53 of *Osoyoos*, the Supreme Court was concerned with minimizing inconsistency between, and reconciling, the Crown's public and fiduciary duties. Because fiduciary duties applied during reserve creation, this concern also exists when the Crown removes land from a *provisional* reserve to serve a competing public purpose.

[115] The Respondent argued that the conclusion in *Osoyoos* depended on the *Water Act*, and weak evidentiary record. These were important considerations in *Osoyoos*, but they were distinct from the discussion of fiduciary duty. Later in the decision the Supreme Court went on to consider the interest actually taken in *Osoyoos*. The Supreme Court then analyzed the constraint imposed by the *Water Act*, which was the provincial statute relevant to canal takings. The *Water Act* authorized the province to expropriate the "estate or interest in or easement over land" that was "reasonably required" for the purpose of a canal, not more (*Osoyoos* at para 61). Recalling that the Supreme Court's task was to determine whether the land in issue remained in the reserve for taxation purposes, the Supreme Court's conclusions were directed toward that question. The Supreme Court treated its fiduciary duty conclusions as distinct from, yet consistent with, the *Water Act* limitation (at paras 69–70). Iacobucci J. ultimately concluded that both statutory and fiduciary foundations supported the final result:

> I conclude that the Order in Council is ambiguous as to the nature of the interest transferred. It does not evince a clear and plain intent to extinguish the Band's interest in the reserve land. An interpretation of the instrument as granting only an easement over or right to use the canal lands is both plausible and consistent with the policies of the Indian Act relating to taxation (s. 83(1)(a)) and expropriation (s. 35). This interpretation is consistent with the minimal impairment of the Band's interest in reserve land. Accordingly, I find that the Order in Council effected a grant of an easement over the land occupied by the canal and did not take away the whole of the Band's interest in the reserve. Therefore, the canal land is still "in the reserve" for the purposes of s. 83(1)(a). [at para 90]

[116] In the result, the duty of minimal impairment in *Osoyoos* did not depend on the *Water Act*, as submitted by the Respondent, but rather was rooted in the fiduciary relationship between the Crown and Osoyoos Indian Band, the appellant's *sui generis* interest in the disputed land, and the need for the faithful fiduciary to consider how to minimize erosion of that *sui generis*

interest.

[117] The Respondent also submitted that the two-step process in *Osoyoos* was inapplicable to the *provisional* IR 2 because Canada, lacking administrative control over the underlying proprietary interest while it remained with British Columbia, lacked absolute discretion over the cognizable interest in the *provisional* reserve. I would dispense with this submission with the comment that it is settled law that fiduciary obligations may attach to the Crown's administration of *provisional* reserves. There is nothing about the administrative and jurisdictional arrangements of the province and federal Crowns that would have prevented the DOC and the DIA – both federal – from considering less impairing options. The issue is whether that duty applied.

[118] The Supreme Court's comments in *Osoyoos* are, in my view, equally applicable to this Claim. Most especially, to repeat from paragraph 54, the Supreme Court stated:

> The contention of the Attorney General that the duty of the Crown to the Band is restricted to appropriate compensation cannot be maintained in light of the special features of reserve land discussed above, in particular, the facts that the aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced. [emphasis added]

[119] If the word "provisional" is placed before the words "reserve lands" in the above quote, the proposition still holds true.

[120] The fact that federal government officials in the DIA and in the DOC, and Canada's OIC's authorizing the sale of the Customs Land to DOC, all operated as if the Customs Land was part of an *Indian Act* reserve, demonstrates that at the time, the interest now described in law as *provisional* was, at the time, considered to be, and acknowledged to be, a real and significant interest in a practical and legal sense.

[121] The Claimant was vulnerable to the DIA's discretion in its response to the DOC's request. *Wewaykum* provides further commentary on the *sui generis* relationship that I find applicable to this Claim:

> This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in Royal Proclamation, 1763, R.S.C. 1985, App. II, No. 1, to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree

> of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in Guerin, supra, at p. 384, that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." [citations omitted] Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown" [citations omitted]
>
> …The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. [emphasis added; at paras 80–81]

[122] The character of the Claimant's *provisional* interest in its land, if it was that, and the Claimant's vulnerability to the DIA's unilateral discretion in deciding what land was necessary to take and how much to take (and without consultation with the First Nation), were such that the rationales for why the minimal impairment duty applied to the expropriation in *Osoyoos*, and in particular the *sui generis* character of Indigenous interests in land, also apply to the circumstances of this Claim. In this expropriation context, the same "minimal impairment" principle should apply.

[123] To make a distinction in the context of an expropriation for a public purpose that would require the duty of minimal impairment to be restricted only to "Indian Act reserve lands" and not to *provisional* reserve land would, in my view, be to fall into the discouraged approach that the court in *Wewaykum* warned about, that is, of *putting form before substance* (at para 43).

[124] To find otherwise would also fail to reconcile the Crown's public and fiduciary duties, allowing public interests to "trump" when it is clear that that Crown owed fiduciary duties with respect to *provisional* reserves. These bear repeating:

> …obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary. In *Blueberry River* McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'". [*Wewaykum* at para 94]

[125] If that fiduciary duty were to be interpreted as empty of any need to consider whether a

taking is excessive or unnecessary, it would have very little meaning at all in a *takings* setting.

[126] To summarize the relevant factors that lead to this conclusion in the particular context of this Claim:

a. IR 2 was located within part of TPIB's larger traditional territory which it had occupied and used since time immemorial. This fact was acknowledged through the Indian Reserve Commission process of identifying and demarcating this reserve for the TPIB's exclusive use. The preceding Joint Indian Reserve Commission had been under the instruction that "regard shall be had to the habits, wants and pursuits of such Nation, [and] to the amount of territory available in the region occupied by them" (PC 1875-1088; CBD, Vol 1, Tab 6). O'Reilly's appointment mandate included "ascertaining accurately the requirements of the Indian Bands…and allotting suitable lands to them for tillage and grazing purposes" (PC 1880-1334; CBD, Vol 1, Tab 11). The TPIB made use of and occupied IR 2.

b. Both the province and Canada had, in the allotment process, agreed to the location and size of the reserve. That size and location did not change, with the exception of the 2.97 acres taken for the Customs house, through the reserve creation process. The reserve was confirmed in its original size and location, minus the 2.97 acres, when the province transferred administrative control over the underlying proprietary title in 1938. The interest in this reserve was cognizable (and its boundaries clearly defined), even if it is assumed that it had not yet 'crystallized' as a fully constituted *Indian Act* reserve (which would afford additional, statutory-based duties).

c. The concept articulated in *Osoyoos* that the duty of the Crown to the Band is <u>not</u> restricted to appropriate compensation, applies equally to the IR 2. Because of the *sui generis* character of the Claimant's interest in the disputed land, which in addition to being traditionally occupied by it, had been formally allotted to it, surveyed and approved by both the province and Canada, the consideration that, "aboriginal interest in land has a unique cultural component, and that reserve lands cannot be unilaterally added to or replaced" (*Osoyoos* at para 54), applied to the disputed land. The Claimant could no more unilaterally create a *provisional* reserve than it could a

confirmed reserve and it was vulnerable to the Crown to see the reserve creation process through to the end.

d. It is true that, subsequent to *Osoyoos*, *Wewaykum* described the "protection and preservation" duty as applying to reserves in which the administration and control of the underlying proprietary interest had been settled between Canada and British Columbia (at para 86(3)). However, *Wewaykum* was not a case about an expropriation, and the circumstances and facts in that case were quite different. *Wewaykum* also affirmed that core fiduciary duties apply during the reserve creation process (*Wewaykum* at paras 86, 89). In an expropriation setting, these duties apply to the second step in the *Osoyoos* analysis.

e. Moreover, in this case, B.C. did approve of the Customs Land being allotted as federal Crown land, and Canada (through the auspices of the DIA) did exercise complete discretion and control over the taking of the lands in question, including deciding how much land would be taken, from where, and to what degree/how for the purpose of a federally-controlled and managed Customs house.

[127] The general description of the Crown's fiduciary duties applicable to a *provisional* reserve is: "…obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary". In *Blueberry River* McLachlin J. (as she then was), at para. 104, said that "[t]he duty on the Crown as fiduciary was 'that of a man of ordinary prudence in managing his own affairs'" (*Wewaykum* at para 94). This duty, in the context of an expropriation of part of the reserve in these circumstances, includes an obligation on the Crown to approve only the minimum expropriation needed to achieve the required public purpose.

[128] As stated in *Wewaykum* at paragraph 104, the Crown cannot shirk its fiduciary duty, where it exists, by invoking competing interests. In an expropriation, this applies to stage two of the *Osoyoos* analysis. In this Claim, that includes competing federal government departments, with different duties to advance; i.e., the DIA to the Band and the DOC to the public. The TPIB had a practical, real and legal (i.e. cognizable) interest in its reserve, even if provisional, which required reconciliation with the competing public or national interest in a Customs house,

meaning that the interest be impaired to the least extent possible.

1. In the Circumstances of this case, what was required of Canada to satisfy the minimal impairment fiduciary duty to the Claimant?

[129] The Claimant submits that the minimal impairment duty was breached by Canada when it failed to:

a. consult with the Band to consider whether the desired Customs house could be located somewhere else on the Canada/United States border outside IR 2's boundaries;

b. challenge the alleged necessity of DOC acquiring the full 2.97 acres, which included one acre of "excellent land" for gardening purposes for the customs agent, particularly when those 2.97 acres of reserve lands could not be replaced; and,

c. consult with the Band and discuss and promote the option that the Customs Land could be leased to DOC or DOC could be granted a licence of occupation rather than title.

[130] The Respondent submits that this desired parcel of 2.97 acres, located at the Canada/United States border near the existing trails was critically necessary for the proper functioning of a customs facility. The Respondent contends that DOC required a *full interes*t in the Custom Land because of the permanent nature of its intended purpose as a Customs house at the international border.

[131] When the DOC first inquired of the DIA whether the DIA would object to the DOC *erecting a customs building* on I.R 2, the DIA responded by wanting to know the position and size of the parcel the DOC desired *to acquire*. Then the DIA asked if the DOC "wish[ed] to purchase or lease". Instead of also advising the DOC that, after hearing the DOC's request, the DIA would need time to consult with the Band, the DIA informed the DOC that the DOC had the "power to expropriate the land required, under Section 46 of the Indian Act" (emphasis added; CBD, Vol 1, Tab 97).

[132] From the very beginning, the DOC asks about erecting a Customs house and the DIA

responds by asking the DOC about "acquiring land" a different question. When the DIA asks about "purchasing or leasing" the desired parcel, for some unknown reason, the "leasing" option appears never to have been subsequently discussed.

[133] As noted above, it was the DIA that advised the DOC that the DOC could *expropriate* the Customs Land under section 46 of the *Indian Act.* The DIA clearly thought it could do that, and that the Claimant was entitled to *Indian Act*-type administration of the land, even though, at that time, Canada had still not received administration and control of the underlying proprietary title from British Columbia.

[134] In reviewing the conduct of the DIA's Inspector of Indian Agencies, Inspector Megraw gave the impression that he was more interested in promoting the interests of the DOC than the interests of the Band.

[135] Secretary McLean had quite properly asked Inspector Megraw to "consult with the Indian Council and endeavour to obtain their concurrence in such reasonable valuation" (emphasis added; CBD, Vol 1, Tab 103). It was Inspector Megraw who determined the valuation without consultation with Chief Paul or any Band member. Before eventually meeting with Chief Paul, the DIA and the DOC had finalized their valuation and the DOC had already drawn the $150.00 cheque for payment for the land to the DIA.

[136] DIA officials failed to consult the Band members, advise them of the different possible economic benefits to the Band, or inquire into whether there was another "off reserve" location for a Customs house that would still have been adequate for the DOC.

[137] In the broader context, DIA officials would have been aware, or in any event became aware, that there were very few acres of suitable farm land on this large reserve, and the desired parcel was going to take some of that precious acreage. Further, as discussed above, DIA officials knew that whatever lands were taken by the DOC, those lands were not going to be replaced. The evidence does not disclose that these important factors were in the minds of the DIA officials when they should have been, that is, while performing their fiduciary duties to the Band.

[138] Another issue that should have been discussed with Chief Paul and members of the Band

was whether it was reasonable, in the circumstances, to include in the 2.97 acres supposedly needed for the Customs house, a one acre section that was to be used for gardening by the customs manager. Was a one acre garden needed for a customs facility? That issue seems also to have been completely ignored by the DIA officials.

[139] With respect to the issue of the DIA failing to discuss with the Band and consider whether to negotiate with the DOC for a leasing or an occupation licence arrangement rather than a grant of the fee simple, Canada argues:

> Canada required a full interest in the Customs Lands because of the permanent nature of its intended purpose and the fact that an exclusive interest was needed [footnote omitted]. The customs site is still in use today, one hundred years after the taking in 1915. This reflects the permanent nature of Canada's need. Further, the use of the property as a customs site means that exclusive use of the premises and an ability by Canada to control access to the site and keep it free from competing uses were necessary requirements. A leasehold interest lacks the permanency required as it may be terminated by the lessor at the end of a lease period. [RMFL at para 88]

[140] In response to that argument, the Claimant has referenced two other situations involving Customs houses erected by the DOC on reserve lands in British Columbia in approximately the same time period, where the DOC was limited to a right of occupation rather than a grant of fee simple.

[141] These two situations are described in the Claimant's written submissions:

> In the case of a request made by DOC to DIA in 1909 for land that was within the Semiahmoo Indian Reserve, the DIA granted only a right of occupation through a permit after obtaining consent of the Indians and subject to the DOC paying annual rent.
>
> In the case of another request made by DOC to DIA for land that was within the Matsqui Indian Reserve, the DIA required the DOC to obtain the consent of the Indians and annual rent payment for the use of the land based on what the Indians determined.
>
> DIA held a meeting for the male members of the Matsqui Band on June 19th, 1911, in order to obtain consent for a permit to be issues to DOC. [CMFL at paras 138–40; CBD, Vol 1, Tabs 48, 52, 62, 63]

[142] In the Semiahmoo example, the request was for a "small building" and "half acre"; in the Matsqui example, the request simply said a "half acre" (CBD, Vol 1, Tab 48). Both of these

British Columbia reserves would also have been subject to the takings process in section 8 of the McKenna-McBride Agreement and, applying a post-*Wewaykum* analysis, would presumably have been included in OIC 1036-1938. Nevertheless, the DIA and the Band and the DOC were able to negotiate having customs facilities built and operating on a reserve with annual rent being paid. In other words, it was open for DIA officials by informing, consulting and advising their beneficiaries about their options to have satisfied the Crown's duty of "minimal impairment".

[143] The same arguments now raised by the Crown could have applied to the other two Customs house situations referred to above, but the DOC in those cases, were able to satisfy the DOC's needs with a licence of occupation arrangement. The Crown did not attempt to demonstrate any significant distinction between these two approaches of the DOC to Customs houses being built on reserve lands in British Columbia in the early 1900s.

[144] In terms of the Crown's "permanent nature of the need argument" that argument was also considered in *Osoyoos* by the "expropriating agency" with respect to the concrete canal. In discussing the question of what type of interest is reasonably required for a canal, the Respondents in that case argued that "since the canal is a permanent structure, they therefore must have the exclusive right to use and occupy the land" (emphasis added; *Osoyoos* at para 65).

[145] Iacobucci J. for the majority did not accept the "permanent nature of the structure" argument:

> A canal is similar in nature to a railway in that both are permanent structures on the land involving operation and maintenance activities, and this Court has found that a grant of a statutory easement can be sufficient for the purposes of building and maintaining a railway (*Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R.654, at p.671). As noted above, as a general matter the Court should be reluctant to take away interests in land in the absence of conclusive evidence. [at para 65]

[146] If in the case before the Tribunal, the DIA officials had made any effort to follow-up on their inquiry about "the lease option" and had advised the Band about the possible economic benefits to the Band of a lease or a "right of occupation" arrangement, the Band might have been able to receive an ongoing long-term economic benefit. In addition, should the DOC at some future time no longer need a customs facility on that specific location, perhaps due to highway location, or for other reasons, the Customs Land would revert back to the Band.

[147] With respect to the Crown's argument that, given the provisions in the McKenna-McBride Agreement, Canada could not have been able to make an arrangement through the DIA for a lesser grant, we have the two examples noted above where that was accomplished.

[148] Before the DIA completed the sale and transfer to the DOC, it would have been open to the DIA to have had negotiations with the DOC as to whether it was truly necessary to have the DIA's entire interest conveyed or whether there were other reasonable options that would have likely better benefitted the Band such as the leasing arrangement first raised by the DIA.

[149] Regarding the minimal impairment fiduciary obligation, I find that the DIA did not seriously consider its fiduciary duty or make any reasonable efforts to satisfy the Crown's "minimal impairment" obligation to the Band. The Crown's fiduciary duty to the Band was therefore breached.

C. The analysis of the DIA's conduct with regards to the "proper compensation" issue

[150] As described above, the Respondent's position is that the Customs Land was "taken with legal authority" but Canada failed to pay the Band adequate compensation and therefore the Band is only entitled to compensation to be assessed under paragraph 20(1)(e) of the *SCTA.*

[151] The Claimant submits that the *manner* in which the DIA arrived at its valuation was in breach of its fiduciary duties to the Band. Further, in the specific factual circumstances of this taking of the Customs Land, the payment of "proper compensation" to the Band was a *condition* for the authorization for the taking. As a result of the Crown's failure in these circumstances, to satisfy the explicit condition, the taking was unlawful.

[152] To review again how Canada proceeded with this compensation issue, recall that, prior to the province issuing its OIC, that on October 15, 1914, J.D. McLean, Assistant Deputy and Secretary at the DIA, advised Inspector Megraw to consult with the "Indian Council" and endeavour to obtain its concurrence on a valuation. That didn't occur. There was some question as to whether there was an "Indian Council" at the time, however, in any case, the answer to that question would not provide the complete answer to the "consultation instruction and obligation".

[153] As summarized by the Claimant:

> On December 5, 1914, Inspector Megraw provided a report on the 2.97 acre parcel in which he valued the 2.97 acre parcel at $150. He stated that he thought Chief Paul "can be got to agree to the generous valuation of $150.00 for the whole plot of ground to be taken." Inspector Megraw's report stated that:
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> a) Chief Paul owned the land and that he was hunting at the time of the valuation;
>
> b) he had been told that Chief Paul was annoyed to find survey stakes on his land and to find that his land had been "surveyed during his absence";
>
> c) the 2.97 acre parcel is small but "well chosen for the purpose required";
>
> d) most of the 2.97 acre parcel is "too hilly and rocky to be of much value for farming purposes";
>
> e) approximately one acre of the 2.97 acre parcel is "excellent land that could be used for gardening";
>
> f) good farm land in that neighbourhood, but not as well situated as the 2.97 acre parcel, had sold for $35 to $50 per acre; and
>
> g) in "view of the small amount taken, and that it makes a break in the holdings, I think it would only be fair to the holder to count it all as practically three acres of farm land at $50 per acre and allow him $150.00 for the plot."
>
> In a Memorandum dated December 18, 1914 from DIA Chief Surveyor S. Bray ("Chief Surveyor Bray") to Deputy Superintendent Scott , Chief Surveyor Bray stated that: "The consent of the Indians is not necessary in this case as the land is required for a public purpose. In similar cases the consent of the Indians' is required as a matter of policy. <u>The sum offered appears to be a fair one. I think the Indians consent may be omitted</u>…"
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> In a telegram dated December 22, 1914 from Secretary McLean to Inspector Megraw, Secretary McLean stated that "the Indians' consent was advisable [desirable] but not necessary" <u>and that Inspector Megraw's valuation of $150 had been approved.</u>
>
> On December 26, 1914, DOC's Commissioner McDougald processed a cheque for $150 in favor of the DIA for the sale of the 2.97 acre parcel. [emphasis added; CMFL at paras 35–38; CBD, Vol 1, Tabs 113, 114, 116, 118; ASOF at paras 26–29]

[154] As noted earlier, on January 16, 1915, the Governor in Council granted PC OIC 1915-114 approving the taking of the Customs Land through section 46 of the *Indian Act* and subject to "<u>the condition</u> that proper compensation be made to the Indians" (emphasis added; CBD, Vol 1, Tab 120).

[155] Coincidentally, at the same time that the DIA and the DOC are quickly moving ahead

with the taking process of the Customs Land, officials from the McKenna-McBride Commission are continuing their regular commission work and are interviewing Chief Paul and other leaders of the Band. Neither the members of the McKenna-McBride Commission, nor Chief Paul and the other Band leaders, are aware that the DOC is seeking to acquire a parcel of IR 2 and that the DIA and the DOC in the process of "finalizing" the Customs Land taking.

[156] Here is a portion of Chief Paul's testimony to the McKenna-McBride Commission:

> *…I am poor, but I am not very poor. I know what to do to make my living - I know what to do to earn my living on this Reserve, and on this earth I sow something in the soil. When it comes up all right, that is where I get my living to, and it is the crop and the food that I sow in the earth and myself I think it is a good thing when I have got to tire myself out to make my living. And there is another thing on this Reserve. I will be asking you if it would be all right not to have too many men examining this Reserve here - that is the thing I lose my property on - my horses and my cattle.* [emphasis in original; RCIA Kootenay Agency transcript; CBD, Vol 1, Tab 98]

[157] The following is the summary of the conduct of the DIA officials regarding the compensation issue:

a. Throughout the "taking process" the DIA officials were obviously influenced by the DOC's inexplicable desire to have DIA proceed with the taking as quickly as possible to the detriment of DIA's fiduciary duties to the Band.

b. The DIA did not engage an objective appraiser to give an independent appraisal of the land which would have taken into account all of the relevant factors in a takings case.

c. As a prime example, to equate the value of 2.97 acres of Indian reserve lands being taken to "[g]ood farm land in that neighborhood" (CBD, Vol 1, Tab 114) as Inspector Megraw did, overlooks a very important distinction that should have impacted on the valuation of the Customs Land. The Claimant's predecessor, unlike a non-Indigenous person having part of their lands expropriated, could not replace the taken lands with other surrounding lands outside the boundaries of the reserve with the compensation to be paid.

d. As described earlier, Mr. Tom Phillips testified for the Claimant that the land taken for the Customs house was prime land and such land was rare on the reserve. He said

that the Band could not buy or pre-empt agricultural land to replace what had been lost: "…once it's gone it's gone" (Hearing Transcript, January 31, 2017, at 113).

e. As well, the Customs Land were chosen by the DOC because it was in a very significant location, contiguous to "the International Boundary where it [the Customs house] would have full view and control of all trails in the immediate vicinity" (ASOF at para 17).

f. Recall as well, that Inspector Megraw in his report said that, most of the 2.97 acre parcel is "too hilly and rocky to be of much value for farming purposes" but approximately one acre of the 2.97 acre parcel is "excellent land that could be used for gardening" (CBD, Vol 1, Tab 114).

g. On October 28, 1914 Indian Agent Galbraith in giving a general report to the RCIA commented on IR 2. He stated that, IR 2 consisted "mostly grazing land, with no depth of soil outside of these two places" that were being used for farming (CBD, Vol 1, Tab 109).

h. Although it was the DOC that wanted to acquire the Customs Lands from the DIA, it was DIA officials who, instead of "protecting the interests of the Indians", were working to advance the interests of the DOC.

i. Inspector Megraw had decided, without having had any discussions with Chief Paul or other members of the Band or getting another opinion on the value of the land, and reported to Deputy Superintendent Scott that the $150 amount was a "generous valuation" and that McGraw thought that Chief Paul "<u>can be got to agree</u>" (emphasis added; CBD, Vol 1, Tab 114).

j. The choice of these words strongly suggests that Inspector Megraw's interest is not with Chief Paul or the Band but with the interests of the DOC.

k. The DIA's Chief Surveyor Bray reported, among other things, that "<u>[i]n similar cases the consent of the Indians' is required as a matter of policy</u>". He went on, however, to report that "<u>[t]he sum offered appears to be a fair one. I think the Indians' consent</u>

may be omitted" (emphasis added; CBD, Vol 1, Tab 115).

l. Chief Surveyor Bray had also expressed views to Deputy Superintendent Scott that demonstrate that the interests of the DOC were, in his mind paramount to the interests of the predecessors of the TPIB.

m. Shortly thereafter, Secretary McLean advised Inspector Megraw, that the "Indians' consent was desirable but not necessary" and to inform Chief Paul that "the valuation [of his land] ha[d] been approved" (CBD, Vol 1, Tab 116).

n. Before any conversation with Chief Paul or any other members of the Band, the DIA officials on behalf of Chief Paul and the Band, had:

i. agreed with the DOC's request for the taking of the lands that DOC had chosen to take by a purchase and not a lease;

ii. agreed that it was reasonable and necessary that DOC take the 2.97 acres which included one acre for gardening;

iii. made the request on behalf of the DOC to the Commission for approval of the lands "required for a public purpose" (CBD, Vol 1, Tab 115);

iv. agreed that the land was worth $150.00 based on the value of surrounding farm lands;

v. decided it was unnecessary to obtain an objective opinion of the value of the land to ensure the condition, which was repeatedly attached to the approvals and required that "proper compensation be made to the Indians" (CBD, Vol 1, Tab 104) was satisfied;

vi. agreed that the Band's consent was not necessary, even though in similar cases, "the band's consent was desirable" (CBD, Vol 1, Tab 116); and,

vii. agreed that under the provisions of section 46 of the *Indian Act* the DIA could sell the parcel of reserve lands to the DOC.

[158] As stated, all of these actions and decisions were completed without consultation or input from the Band.

[159] It is my view that the *manner* in which the Crown officials dealt with the "proper compensation" issue, combined with the fact that payment of "proper compensation" was a *condition* of the taking, results in circumstances that places the *taking* into a different category than a strictly "inadequate compensation" situation.

[160] All of the circumstances here reviewed, convincingly demonstrate that the Crown's fiduciary duty with respect to the compensation issue does not come close to satisfying the required fiduciary duties of the Crown as beneficiary.

[161] To repeat, in addition to the "standard" Crown's fiduciary duty to see that the Band received *proper* compensation for the lands taken, in this case, the Crown had been specifically directed by the McKenna-McBride Commission's recommendation and the province's OIC, that the taking was *conditional* on the Band receiving *proper* compensation.

[162] With respect to the "lower" fiduciary standard as expressed in *Wewaykum*, the evidence clearly demonstrates that the Crown failed in each of the several descriptives of what was required of the Crown acting as fiduciary when it came to the Crown's duty to see that the Band receive proper compensation for the taking of the Customs Land.

[163] The Crown failed to conduct itself with either loyalty or with good faith. It failed to provide full disclosure, appropriate to the matter at hand and failed to act in what it reasonably and with diligence should have regarded as the best interest of the beneficiary.

[164] As stated, the DIA officials were more interested in satisfying the apparent wishes of the DOC to take the time and effort required to fulfill their fiduciary duties to the Band.

D. Legal Authority

[165] The Crown's failure to fulfill its fiduciary duties with respect to the required "minimal impairment" duty in the taking of the Customs Land and the Crown's failure to fulfill its fiduciary duties to the Band as they relate to the "proper compensation" issue each result in a finding that the taking of the Customs Land did not occur "under legal authority".

[166] I accept the Claimant's submission that the payment of proper compensation was a condition of PC 1915-114 (CBD, Vol 1, Tab 120). This condition went to the heart of the authority of the instrument such that without its fulfillment, the taking of a land from IR 2 lacked authority.

[167] Interim Report No. 52 of the McKenna-McBride Commission recommended the taking with two "subject to" clauses: "…subject to such compliance with the requirements of the law and subject also to the conditions that proper compensation be made to the Indians…" (CBD, Vol 1, Tab 104; ASOF at para 23).

[168] PC 1915-114 noted the recommendation in Interim Report 52: "…recommends that subject to compliance with the law and subject also to the condition that proper compensation be made…" (CBD, Vol 1, Tab 120). PC 1915-114 then stated that "[t]he land has been paid for in full by the Customs Department at the valuation placed thereon by the Department of Indian Affairs, namely, $150.00" (CBD, Vol 1, Tab 120). PC 1915-114 continued to say that the Minister recommended that "authority be given for the sale" under section 46 of the *Indian Act*. The effect of PC 1915-114 was to give the Governor in Council's approval of that recommendation. PC 1915-114 clearly concerned itself with the recommendation for compensation and the fact that compensation of $150 had already been paid. In my view, the approval depended on it.

[169] The Governor in Council thought the *Indian Act* applied, which if it did apply, would have required adequate compensation. It cannot now be assumed that the Governor in Council intended that the taking could still go ahead if *inadequate* compensation was instead paid.

[170] The condition of "compliance with the requirements of the law", in addition to adequate compensation, is also notable (CBD, Vol 1, Tab 120). The emphasis on legal protection for First Nations, as well as compensation, in Interim Report No. 52 and PC 1915-114 reflects a specific historical context in which these considerations were of particular importance. The sensitivity of the issue of removing land from reserves through the actions of the McKenna-McBride Commission is also reflected in section 2(a) of the McKenna-McBride Agreement, which spoke to "the consent of the Indians, as required by the Indian Act" before any reductions in acreage where land was not "reasonably required" (CBD, Vol 1, Tab 73). With respect to takings for

public works, the McKenna-McBride Agreement stated that the Commissioners would "dispose of the question by an Interim Report, and each Government shall thereupon do everything necessary to carry the recommendations of the Commissioners into effect" (emphasis added). Both governments approved the McKenna-McBride Agreement with Orders-in-Council (PC 1912-3277; BC OIC 1912-1341).

[171] In the circumstances, proper compensation was not a dispensable detail or non-binding recommendation when included in PC 1915-114. Nor can the requirement for compensation and its relationship to legal authority for the taking be directly compared to requirements for compensation and their relationship to statutory authority in expropriation statutes dealing with fee simple land. The taking occurred during the process of reserve creation, in which distinct fiduciary duties applied, *sui generis* interests were involved, and the honour of the Crown was at stake.

[172] For these reasons, the Crown's failure to fulfill its fiduciary duties, as well as the failure to pay adequate compensation, *each* result in a finding that the taking of the Customs Land did not occur under legal authority.

E. The DIA's payment of 90% of the compensation to Chief Paul

1. The Claimant's submission that the Crown breached its fiduciary obligations by paying 90% of the compensation to Chief Paul and only 10% to the Band

[173] As reviewed above, on October 15, 1914, Secretary McLean asked Inspector Megraw to examine the 2.97 parcel sought by the DOC, consult with the "Indian Council" and endeavor to obtain its concurrence in a reasonable valuation (CBD, Vol 1, Tab 103). On December 5, 2014, before Inspector Megraw had spoken to Chief Paul or any of the Band members, Megraw placed a valuation on the parcel of $150.00 and reported this to Deputy Superintendent Scott.

[174] Inspector Megraw was of the opinion that the subject land was "all owned by Chief Paul" and advised Deputy Superintendent Scott that he thought that, "Paul can be got to agree to the generous valuation of $150.00 for the whole plot of ground to be taken" (emphasis added; CBD, Vol 1, Tab 114).

[175] Inspector Megraw subsequently reported to Deputy Superintendent Scott that: "[i]n view of the small amount taken, and that it makes a break in the holding, I think it would be only fair to the holder to count it all as practically three acres of farm land at $50.00 per acre and allow him $150.00 for the plot" (emphasis added; CBD, Vol 1, Tab 114).

[176] By December 26, 1914, the DOC had already processed a cheque of $150.00 payable to the DIA for the Customs Land.

[177] On February 1, 1915, in an internal memorandum from Chief Surveyor Bray to Deputy Superintendent Scott dated February 8, 1915, Bray wrote: "…I beg to recommend that in accordance with former practice, the sum of ($150.00 – 10%) ($135.00) be sent to the Agent for payment of Chief Paul for his interest in the land taken from the Tobacco Plains Reserve; the balance of 10% ($15.00) will be placed to the credit of the Kootenay Band" (emphasis added; CBD, Vol 1, Tab 123).

a) Summary of Claimant's Submissions

[178] There is no evidence that the Crown ever investigated Chief Paul's interest in the Customs Land. The decision to compensate Chief Paul at 90% of the value was based on only a cursory visit to IR 2 by Inspector Megraw, who observed that Chief Paul occupied *part* of the Customs Land.

[179] Chief Paul did not hold a Certificate of Possession under the *Indian Act* for the 2.97 acre parcel. The Band held the full cognizable interest in the 2.97 acre parcel at the time the $135.00 was paid to Chief Paul. Any interest Chief Paul had was one of *use and occupation* of a *part* of the Customs Land.

[180] Further, the communal aspect of reserve land necessitated that the Crown in its role as fiduciary consider that any use and occupation interest of Chief Paul was subordinate to the Band's communal land interest. Chief Paul's interest would only last during the period of his actual use and occupation. The Band's communal interest in the land would have lasted indefinitely.

[181] In *Osoyoos* the Supreme Court recognized the *sui generis* nature of the aboriginal interest

in reserves land and the obstacles facing a band wishing to acquire more land. The nature of an interest in reserve lands is a communal one.

[182] By compensating Chief Paul at 90% of the value of the Customs Land, the Crown did now provide proper compensation to the Band and breached its fiduciary obligations to the Band.

b) Summary of Canada's Submissions

[183] The Respondent submitted:

> Canada did not breach a fiduciary duty to the Band by paying 90% of the compensation for the Customs Lands to Chief Paul and 10% to the Band itself. This division of funds reflected the policy of Canada at the time and was in line with the language and intent of the *Indian Act* and of other statutes that authorize expropriations and that seek to ensure fairness as between the parties impacted by such takings. Canada appropriately balanced the interests of the Band and Chief Paul, who occupied the Customs Lands and would have been directly impacted by the taking in 1915.…
>
> It was acknowledged by the DIA, Chief Paul, and the members of the Band that the Customs Lands were "owned and occupied" by Chief Paul and that he had made improvements to them [footnotes omitted].
>
> …Further, in testimony given in front of the RCIA, sub-chiefs and the Indian Agent acknowledged that the Chief's land was at the southeast corner of the reserve [footnote omitted].
>
> Despite the absence of formal recognition of his interest in the Customs Lands, there is considerable evidence demonstrating that, in the context of the time, the Band and the Crown both understood that Chief Paul had an interest akin to that of a location ticket holder: he had the right to occupy, use and improve the lands. Acknowledging his interest in the Customs Lands ensures that, consistent with SCC authority, substance is favoured over form when considering Aboriginal interests in land [footnote omitted].
>
> This recognition of the interest of an individual in possession of provisional reserve lands is also consistent with the rationale of section 24 of the *Indian Act*, 1906, which ensured that individual land holders were treated fairly even in the absence of formal recognition by way of a certificate of possession or location ticket: [footnote omitted]…
>
> …
>
> Chief Paul had inherited the land from his father and both the DIA and the members of the Band recognized his ownership [footnote omitted]. This evidence demonstrates that Chief Paul's position was akin to that of an individual to whom reserve land had been formally allotted.

Canada appropriately balanced the interests of the Band and the individual Band member adversely impacted by the taking by following its policy at the time. This policy ensured that an individual in possession of a portion of reserve land was given 90% of the proceeds when his land was impacted by a transaction such as a taking or surrender. The remaining 10% of the proceeds went to the Band to compensate it for its underlying interest in the lands [footnote omitted].

This policy ensured that the individual occupying the relevant land, who would be most directly impacted by the change in status of the land, would be treated fairly and compensated appropriately.

This policy is in line with provisions under the *Indian Act* that acknowledge the interests of individuals in possession of reserve land and compensate them when their interest is adversely impacted. For example, under the *Indian Act*, 1906:

(a) Section 21 provided that "…no Indian shall be dispossessed of any land on which he has improvements, without receiving compensation for such improvements, at a valuation approved by the Superintendent General, from the Indian who obtains the land, or from the funds of the band, as is determined by the Superintendent General"; and

(b) Section 46 (3) indicated that the payment for lands taken for public purposes "shall be paid to the Minister of Finance for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian who has improvements taken or injured" [footnote omitted].

Court decisions interpreting the *Indian Act* also reveal the rationale and principled approach to ensuring that an individual in possession of reserve land as a locatee is treated fairly when their interest in land is affected. In *Boyer v Canada*, the FCA specifically rejected the argument that the interests of a locatee were subordinate to the communal interest of the band itself. The Court decided that,

> [t]he "allotment" of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended [footnote omitted].

…

The process envisioned under the *Indian Act* (and other statutes that authorize impacts on individual land owners) [footnote omitted] reflects the concept that an individual in possession of lands, who has the use of reserve lands and has made improvements on those lands, should receive compensation for the taking of the interest. No valid reason exists for treating an Aboriginal person in possession of land in a provisional reserve context any differently.

> The Band incorrectly suggests that section 89 of the *Indian Act*, 1906 is the source of Canada's 90/10 policy [footnote omitted]. Section 89 provided as follows:
>
> > 89. With the exception of such sum not exceeding fifty percentum of the proceeds of any land, and not exceeding ten percentum of the proceeds of any timber or other property, as is agreed at the time of the surrender to be paid to the members of the band interested therein, the Governor in Council may, subject to the provisions of this Part, direct how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given.
>
> This provision has no relevance to either the 90/10 policy or the taking of provisional reserve lands for a public purpose. Section 89 of the *Indian Act*, 1906 did not apply to the provisional reserve interest in 1915. In any event, the mention in s. 89 to the sum "not exceeding fifty percentum of the proceeds of any land" references proceeds from a surrender, not a taking and it appears that this amount is to be distributed to Band members, not the locatee. The locatee's interest is addressed in s. 89(2) which states that the Governor in Council may authorize the expenditure of remaining moneys "for compensation to Indians for improvements or any interest they had in lands taken from them."
>
> The policy of providing 90% of the proceeds of a taking of provisional or reserve land to the individual in possession of the land is premised on ensuring just and fair compensation to the individual most impacted by the Crown's activity. Canada had due regard to the Band's underlying interest by providing it with 10% of the compensation amount. By any reasonable measure in these circumstances, Canada met the standard required of it as a fiduciary. [RMFL at paras 98–102, 104–112]

2. Discussion

[184] As discussed above, in reviewing the context of the conduct of the DIA officials, their objective in these circumstances was primarily to satisfy the requests of the DOC rather than what should have been their foremost interest, their beneficiary's interests, that is, the Band's interests.

[185] The acknowledged inadequate valuation was determined by the DIA without discussion or input from the Chief or the Band. It was the DIA's plan that if they "got" Chief Paul to acquiesce to the DIA's valuation (and, in that regard, would have likely told Chief Paul that he

would be personally receiving 90% of the "generous" valuation), that was sufficient to fulfill their duties to the collective. The DIA had already informed the DOC of the DIA's valuation, that the *DIA had decided upon*, and DOC went ahead to process the $150.00 compensation cheque. It was only after this had already taken place that the first conversation with Chief Paul occurred, without any attempt to discuss the matter with any other members of the collective.

[186] Even considering that the DIA decided that Chief Paul was not getting all the $150.00 compensation but that 10% was to be kept in trust for the benefit of the Band, there still was no discussion or consultation with Band members about the Band's 10% portion.

[187] The impression created by Inspector Megraw's report was that the *entire* 2.97 parcel was "fenced and developed" by Chief Paul even though Inspector Megraw found that the 2.97 parcel had only 1 acre that was suitable for gardening.

[188] Canada's argument that DIA officials, in "getting" Chief Paul to agree on the $150 valuation for the Customs Land and deciding to give him 90% for the 2.37 acres, were acting out of a sense of "fairness" to him, overlooks the DIA's fiduciary duty to the Band.

[189] Given the communal nature of Indigenous interests in land, when the Crown takes a portion of those lands and then makes a deal directly with the "holder" of that portion, rather than looking out for the collective's best interests, such actions put the collective in a vulnerable position and the Crown in a conflict of interest with respect to its beneficiary, the collective.

[190] DIA officials knew that the Customs Land had been allocated as reserve land and that, Chief Paul could not legally be considered to be the "owner" of the parcel. The fiction that DIA officials operated under was for the DIA's convenience in order to expedite the DIA's goal to have the "taking process" move ahead as quickly as possible for DOC's benefit.

[191] The Claimant's reference to sections 21 and 46(3) of the *Indian Act* are of no assistance to the facts in our case. Section 21 deals with lands taken by an Indigenous person from another Indigenous person who has made improvements on the subject lands. Section 46(3) deals with compensation for *improvements* to the land. The only so called "improvements" would be the fence that was on part of the Customs Land. The payment to Chief Paul, however was based on his apparent "ownership" of the parcel, a very different issue.

[192] It is worth noting that Canada took a very firm position in its submissions relating to the "minimal impairment" issue that this was a "provisional" reserve and not an *Indian Act* reserve, and therefore the provisions of the *Indian Act* did *not* apply. In the payment of compensation issue, with respect to the DIA's actions in the challenged distribution of the compensation funds, Canada seeks to support its position by relying on the provisions of the *Indian Act.*

[193] It's worth repeating the words of Iacobucci J in the *Osoyoos* expropriation case:

> The features common to both the aboriginal interest in reserve land and aboriginal title include the facts that both interests are inalienable except to the Crown, both are rights of use and occupation, and both are held communally. Thus, it is now firmly established that both types of native land rights are *sui generis* interests in the land that are distinct from "normal" proprietary interests: *St. Mary's Indian Band, supra*, at para. 14. Native land rights are in a category of their own. [emphasis added; at para 42]

[194] I am not convinced by the Respondent's rationale that in these circumstances, the DIA officials did not breach its fiduciary duty to the Band in paying Chief Paul 90% of the compensation funds. I find that in this regard, the Claimant has succeeded in proving a further breach of Canada's fiduciary duties to the Claimant.

VIII. SUMMARY

[195] The Claimant has succeeded in proving the validity of its Claim under the *SCTA*, paragraph 14(1)(c). The Respondent:

a. took the Customs Land without legal authority;

b. breached its fiduciary duties when it failed to adequately consult with the Claimant about any aspect of the taking, including with respect to minimally impairing ways of carrying out the taking and appropriate valuation of the land;

c. breached its fiduciary duties when it did not make any effort to minimally impair IR 2 while administering the taking; and,

d. breached its fiduciary duties when it failed to pay the Claimant an appropriate proportion of the $150.00 paid in 1915 and instead paid 90% to Chief Paul

individually.

[196] Because the Claimant has established a valid claim under paragraph 14(1)(c) of the *SCTA*, including a breach of duty to minimally impair IR 2 during the administration of the taking, and has also established that the taking occurred without legal authority, there is no need to determine whether the *Indian Act* applied or reserve creation was completed prior to OIC 1036-1938.

[197] As noted above, the Respondent admitted that it had failed to pay adequate compensation for the Customs Land, the historical value of which was $208.00 and not $150.00, and for the Water Right-of-Way Land, for which no compensation was ever paid.

[198] The Claimant submitted in Reply that if "the Customs House ceases to be required for a customs facility, the Custom Land must revert back to reserve land for the use and benefit of the Band" (at para 54). As the matter was not fully argued, I make no comment on this submission.

[199] The Claimant requested costs of the first stage, if successful. Should the Claimant wish to pursue a costs assessment at this stage, then that matter will be dealt with by another Tribunal member. The Parties can request a Case Management Conference to deal with the costs issue.

BARRY MACDOUGALL

Honourable Barry MacDougall

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20171128

File No.: SCT-7001-14

OTTAWA, ONTARIO November 28, 2017

PRESENT: Honourable Barry MacDougall

BETWEEN:

TOBACCO PLAINS INDIAN BAND

Claimant

and

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

Respondent

COUNSEL SHEET

TO:	**Counsel for the Claimant TOBACCO PLAINS INDIAN BAND** As represented by Darwin Hanna and Mary Mollineaux Callison Hanna
AND TO:	**Counsel for the Respondent** As represented by Kelly Keenan and Ainslie Harvey Department of Justice