FILE NO.: SCT-7002-14
CITATION: 2018 SCTC 2
DATE: 20180201

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
SISKA INDIAN BAND Claimant	Darwin Hanna, Caroline Roberts, Mary Mollineaux and Rhaea Bailey, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Dennis Hill, Rachel Enoch and Heather Frankson, for the Respondent
	HEARD: May 17, 2016, September 19-20, 2016, April 24-28, 2017 and October 10, 2017.

REASONS FOR DECISION

Honourable Harry Slade, Chairperson

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

Cases Cited:

Wewaykum Indian Band v Canada, 2002 SCC 79, [2002] 4 SCR 245; *Ross River Dena Band Council v Canada*, [2002] 2 SCR 816, 2002 SCC 54; *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CanLII 9362; *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321; *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6; *Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

Statutes and Regulations Cited:

The Government Railways Act, SC 1881 (44 Vict), c 25, ss 2, 5, 10.

British Columbia Terms of Union, RSC 1985, App II, No 10, a 11, 13.

Constitution Act, 1867, s 91.

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

Indian Act, SC 1876, c 18.

Indian Act, SC 1880, c 28.

The Consolidated Railway Act, SC 1879 (42 Vict), c 9, s 9.

An Act respecting the Canadian Pacific Railway, SC 1881 (44 Vict), c 1, s 5, Schedule.

Royal Proclamation, 1763.

Constitution Act, 1982, s 35.

Indian Act, RSC 1906, c 81, s 48.

Authors Cited:

Merriam Webster Dictionary, online edition, *sub verbo* “roadbed”.

Master Linda Abrams, Kevin McGuinness and Jay Brecher, *Halsbury's Laws of Canada - Civil Procedure* (2017 Reissue).

Headnote:

Aboriginal Law – Specific Claim – takings – railway right of way – reserve creation – Railway Belt – fiduciary duty

This specific claim arises from an alleged "taking" in 1885 of land for the Canadian Pacific Railway from reserves set apart for the Siska Indian Band in 1878.

The Claimant asserts the failure of the Crown to meet its legal obligations in relation to two reserves set apart for the use and benefit of the Siska Indian Band in June 1878. Both reserves are bounded on one side by the Fraser River in a mountainous stretch south of Lytton, British Columbia. Both were transected by a right of way established in 1885 under *The Government Railways Act*, SC 1881 (44 Vict), c 25 [*Government Railways Act*] to provide for construction of the national railway. Land within the reserves was granted to the Canadian Pacific Railway Company (CPR Company) in the early 1900's.

The Claimant advances several grounds for the Claim under subsection 14(1), *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. The primary ground is paragraph 14(1)(d):

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;

The Claimant seeks compensation under the *SCTA*, paragraphs 20(1)(g) and (h). Those provide for compensation based on current land value and loss of use if "the claimant establishes that [the lands in issue] were never lawfully surrendered, or otherwise taken under legal authority".

The proceeding is bifurcated into a validity phase and, if found valid, a phase to determine compensation. The decision finds the Claim valid on several grounds.

The Tribunal rejected the Respondent's position that the 1885 dedication of Crown land for railway right of way purposes under the *Government Railways Act* constituted a taking of the Claimant's interest in the reserves. It found that the *Government Railways Act* did not provide for taking land already vested in the federal Crown. No taking of the Siska interest in the reserves occurred. Instead, the effect of the *Government Railways Act* was to allow the construction of a railway that would, as constructed, be conveyed to the CPR Company as required by the CPR Contract. It did establish the ability of the government to construct the railway within an area known colloquially as a right of way.

Although the Claimant's possession of the right of way lands in its reserves was affected, its interest in the land was not. The subsequent "creation" of the reserves in 1911 based on a survey of the metes and bounds description and plan that accompanied the 1878 allotment, and their unchanged acreages, precluded a finding that the right of way lands had been taken by expropriation in 1885.

The contract between Canada and the CPR Company called for the conveyance of title to the railway constructed by the government within the right of way. The *Canadian Pacific Railway Act*, SC 1881 (44 Vict), c 1 [*CPR Act*] authorized the grant of land to the CPR Company. Grants by letters patent, which purported to convey title, were made in 1912, 1927 and 1928. However, *The Consolidated Railway Act*, SC 1879 (42 Vict), c 9 [*Consolidated Railway Act*] forbade the alienation of interests in Crown land granted to railway companies. Hence, there was no statutory authority for the grants to the CPR Company of absolute title. The CPR Company could receive no more than an easement. As the *CPR Act* did not override the restriction on alienation in the *Consolidated Railway Act*, the grants could not have transferred title to the CPR and were, therefore, not authorized by statute. This applied irrespective of whether the reserves came within the *Indian Act* at the date of the grants.

The Tribunal found that the government of Canada accepted the reserves for purposes of the *Indian Act* on December 29, 1911. The grants were thus made in contravention of the surrender provisions of the *Indian Act*. The *Indian Act* would have permitted the taking of an interest less than title; hence Canada's obligation under Article 11 of the *Terms of Union*, 1871, could have been performed without contravening any statute or breach of duty.

The Tribunal also found that the grants purported to convey land in excess of that permitted by the *Consolidated Railway Act* and to that extent were not authorized by statute. Construction of the railway was, however, authorized by the *Government Railways Act*.

As more land was granted than was necessary for railway purposes, the Crown was in breach of its fiduciary duty to act in the best interests of the Siska Band. This included the failure to protect and provide access to their fishing stations.

The Claimant established the validity of the Claim under paragraphs 14(1)(b), (c) and (d) of the *SCTA*. Accordingly, the related compensation provisions of subsection 20(1) apply.

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I. THE CLAIM

[1] This specific claim arises from an alleged "taking" in 1885 of land from reserves set apart for the Siska Indian Band in 1878. The land at issue, portions of Zacht Indian Reserve No. 5 and Nahamanak Indian Reserve No. 7 (the Reserves) are located within a railway right of way established in 1885 under *The Government Railways Act*, SC 1881 (44 Vict), c 25 [*Government Railways Act*].

II. PROCEDURAL HISTORY

[2] The Siska Indian Band submitted a specific claim to the Minister in 1991 alleging that the Crown breached its legal obligations in relation to the right of way established by the Crown for the Canadian Pacific Railway (CPR).

[3] After nearly 20 years the Claim remained unresolved. The Claimant filed it in the Registry of the Tribunal on May 1, 2014 (the Claim, as amended February 9, 2017).

[4] The Parties agreed to bifurcate the Claim into validity and compensation stages. These Reasons address the validity of the Claim.

III. INTRODUCTION

[5] The Claim calls for the reconciliation of interests enshrined in two provisions of the 1871 *British Columbia Terms of Union*, RSC 1985, App II, No 10 [*Terms of Union*], in particular Article 11 and Article 13. Both are of constitutional stature.

[6] The Dominion government undertook to construct a railway "to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union" (*Terms of Union*, Article 11).

[7] Under Article 13 of the *Terms of Union*, the Dominion government assumed "[t]he charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit" (*Terms of Union*, Article 13).

[8] The former Colony of British Columbia (Colony) had set apart land for reserves prior to Confederation. After Confederation, Canada exercised jurisdiction in relation to "Indians, and

[l]ands reserved for the Indians" under the *Constitution Act*, 1867, section 91(24). The new Province of British Columbia and Canada initiated a process for allotment of reserves and the transfer of title to Canada in trust for the Indians. This was necessary as, with one exception, Crown title to land within the provincial boundaries remained with the Province.

[9] The exception was land within the "Railway Belt". Article 11 of the *Terms of Union* required British Columbia to convey to the Dominion government "twenty (20) miles on each side of said line…in aid of the construction of the…railway". The lands, which were deemed to have been conveyed to Canada in December 1883, were known as the "Railway Belt". Upon the transfer of the Railway Belt from the Province to Canada, title to the Reserves along the Fraser River had vested in Canada, leaving the Province with no proprietary interest.

[10] Reserves had previously been allotted by the Reserve Commissioner, Gilbert Malcolm Sproat, a joint appointee of the Province and Canada. In 1878, Sproat had identified, described by plan, and allotted Zacht Indian Reserve No. 5 and Nahamanak Indian Reserve No. 7 to the Siska Band.

[11] Order in Council PC 1935-1886 authorized the conveyance of portions of the CPR constructed by Canada to the CPR Company.

[12] The letters patent, which purportedly conveyed to the Canadian Pacific Railway Company (CPR Company) the fee simple in the rights of way in the Reserves, were made at various times between 1912 and 1928.

[13] The CPR Company has been in possession of the railway right of way lands, including those within the Claimant's and other First Nations' reserves along the Fraser River, from *circa* 1885 to the present.

[14] The issues in this proceeding centre on the legal effect of the measures taken by the Crown, Canada, to permit the Claimant's use and enjoyment of land within the Siska Reserves to be entirely displaced in favour of the CPR.

[15] An explanatory note: The terms "Siska", "Siska Band", "Band" and "Claimant" are used interchangeably in these Reasons. Likewise the terms "Zacht IR 5", "IR 5" and in context,

"Nahamanak IR 7" and "IR 7". References to "Reserves" include both. The phrase "right of way" (ROW) describes the land in the Reserves over which the railway was constructed by Canada.

IV. GROUNDS FOR THE CLAIM

[16] The Claimant seeks to establish grounds under paragraphs 14(1)(b) to (e) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]:

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

[17] The Respondent admits that the Claim with respect to Nahamanak Indian Reserve No. 7 is valid under paragraph 14(1)(e), as the compensation paid in relation to the railway right of way was inadequate. The Parties have agreed on a figure they consider adequate based on the 1885 market value of the IR 7 land affected by the right of way. The Respondent also admits a fiduciary breach under paragraph 14(1)(c), but only with respect to its failure to credit interest on compensation for the IR 5 right of way to Siska's trust account in 1925.

[18] When a claim is valid, the *SCTA*, subsection 20(1) applies with respect to compensation. The applicable provisions in circumstances of a taking or damage under legal authority but inadequately compensated are paragraphs (e) and (f):

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …

> **(e)** shall award compensation equal to the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that those reserve lands were taken under legal authority, but that inadequate compensation was paid;
>
> **(f)** shall award compensation equal to the value of the damage done to reserve lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes that certain of its reserve lands were damaged under legal authority, but that inadequate compensation was paid;

[19] The Respondent's admission of the validity of the Claim under paragraph 14(1)(e) has not fully resolved the Claim for purposes of the validity phase of this bifurcated proceeding, as the Claimant also seeks a finding of validity under paragraphs (b), (c) and (d):

> **(b)** a breach of a legal obligation of the Crown under the *Indian Act* or any other legislation – pertaining to Indians or lands reserved for Indians – of Canada or of a colony of Great Britain of which at least some portion now forms part of Canada;
>
> **(c)** a breach of a legal obligation arising from the Crown's provision or non-provision of reserve lands, including unilateral undertakings that give rise to a fiduciary obligation at law, or its administration of reserve lands, Indian moneys or other assets of the First Nation;
>
> **(d)** an illegal lease or disposition by the Crown of reserve lands;

[20] At this phase of proceedings of the Claim, the question for determination is: Has the Claimant established breaches by the Crown of legal obligations within all or any of the grounds set out in paragraphs 14(1)(b), (c) and (d) of the *SCTA*?

[21] The paragraph 14(1)(b) ground asserts that the occupation of the ROW and the grant to the CPR of tenures contravened the *Indian Act*, SC 1876, c 18 [*Indian Act*, 1876] and later re-enactments as contrary to the surrender and, with respect to the grants, the taking provisions of the *SCTA*. The surrender provisions require the consent of the members of a band to a grant of the fee simple interest purportedly transferred to the CPR Company by letters patent in 1912, 1927 and 1928.

[22] The paragraph 14(1)(c) ground asserts a breach of fiduciary duties based on Article 13, *Terms of Union*, Crown discretionary power, and the Claimant's cognizable interest.

[23] If the paragraph 14(1)(d) ground is established, the Claimant would seek the application

of paragraphs 20(1)(g) and (h) in determining compensation:

> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g);

V. POSITION OF PARTIES

A. Claimant

[24] The primary position of the Claimant is that the reserves were fully established in law upon the 1878 allotments. If correct, the *Indian Act*, 1876, as amended and re-enacted from time to time, would govern the disposition of interests in the reserves.

[25] The Claimant argues that at all material times there was no provision of the *Indian Act*, SC 1880, c 28 [*Indian Act*, 1880] that would permit the taking of the interest purportedly granted to the CPR (fee simple) without the consent of the members of the Band. Although later iterations of the *Indian Act* provided for the expropriation of reserve land, with consent of the Governor in Council, by entities having statutory powers of expropriation, the interest "taken" could be no greater than the limited interest the statute permitted.

[26] The Claimant says that the interest in the land purportedly granted to the CPR could only have been validly made with the consent of the membership by way of surrender under the provisions of the *Indian Act*, 1880.

[27] If the takings relied on *The Consolidated Railway Act*, SC 1879 (42 Vict), c 9 [*Consolidated Railway Act*] the grants exceeded the authority of the Governor in Council under the provisions of the *Indian Act*, as the powers conferred by the *Consolidated Railway Act* limit the "taking" to an easement.

[28] The Claimant argues that if IR 5 and IR 7 were not yet established as *Indian Act* reserves at the time the grants were made, the *Consolidated Railway Act* did not in any case permit the grant of fee simple title. Hence, the CPR Company had no titular interest in the right of way lands it occupied when the land became "created" as an *Indian Act* reserve.

[29] The Claimant argues further that the lands granted to the CPR Company exceeded the width permitted by the *Consolidated Railway Act*. Thus, it contends that if the grants were authorized by statute they were to the extent of their excess width made without statutory authority.

[30] Irrespective of whether the *Indian Act* applied at the time of the land grants to the CPR Company and whether the *Consolidated Railway Act* limited the interest granted and/or the permitted width, the Claimant argues that the Crown, Canada, was bound to the Siska Band as a fiduciary from the date of the 1878 allotment of the reserves to protect the continued use and enjoyment of land within the right of way and access to its fishing stations along the Fraser River, and failed to do so.

B. Respondent

[31] The Respondent argues that, in law, the taking of the land within the Siska Reserves took place in 1885 under the authority of the *Government Railways Act* which did not limit the interest that could be taken or the permitted width. It contends that the *Consolidated Railway Act*, which limits a taking to a lesser interest than title, did not apply to the taking of land in the Siska Reserves for railway purposes.

[32] The Respondent says that the Siska Reserves, although allotted in 1878, were not reserves within the meaning of the *Indian Act*, 1876, when the lands were appropriated for railway purposes in 1885 or any time at which the CPR received grants of land in the Reserves. The Respondent also says that its fiduciary duties with respect to the Reserves were circumscribed by the *Government Railways Act* and *Terms of Union*, and that it acted in accordance with those duties.

[33] The Respondent argues that land set apart as reserve for Indigenous groups are not within the *Indian Act* unless title is vested in the federal Crown, and the Crown has expressed its intention that the land be "created" as reserve. Until this occurs the land would, at most, be reserved provisionally. The descriptors "provisional" and "created" originated with the decision of the Supreme Court in *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*]. The date of reserve "creation" in British Columbia, for purposes of the application of the *Indian Act*, was found, in *Wewaykum*, to be 1938 (paras 18, 19, 51).

[34] The Claimant argues that *Wewaykum* is distinguishable due to a material factual difference pertaining to lands outside and within the Railway Belt. In the former case title to land set apart as reserve was conveyed by the Province to Canada in 1938. In the latter case the transfer was deemed to have taken place in 1883.

[35] The Respondent acknowledges the factual difference and says that if the date of reserve creation was not 1938, it was, based on the mutual intention of the Province and Canada, 1930 or, in the alternative, 1913.

VI. EVIDENCE

A. Community Witnesses

1. Chief Fred Sampson

[36] Chief Sampson is the Chief Councillor of the Siska Indian Band, a position he has held for two decades.

[37] He testified that the First Nation is part of the Nlaka'pamux Nation, a cultural-linguistic group that has traditionally occupied an expansive territory in the region. In the 19th and early 20th centuries, the anthropologist James Teit mapped the territory based on the knowledge of the Indigenous peoples of the area. Archaeological findings date their presence as far back as 8,000 years. The Reserves are located within the traditional territory.

[38] The salmon fishery on the Fraser River has sustained the people for millennia. Their language formed around terms used to describe their attachment to the salmon harvest, known in their language as Sc'uwen. Salmon was and to a lesser extent than in times past remains their primary source of sustenance. Ceremonial practices and spirituality are entwined with the seasonal migrations and harvesting of salmon.

[39] Chief Sampson recounted how the trade in dried salmon that anchored their economy had continued after colonization into times as recently as the lives of his grandparents. His grandmother traded dried salmon for flour, sugar and salt at the store in Lytton, 11 miles north of his community, Nekepmx.

[40] Nekepmx is located on the west bank of the river, near the mid-point of Nlaka'pamux

territory.

[41] Across the river, at what became Nahamanak Indian Reserve No. 7, the community hunted and harvested mushrooms, berries and “Indian celery”. Roots of plants were used to make medicinal tea.

[42] He testified that he was “allowed” to be a child until 6 years of age. He then learned and applied the skills needed to contribute to his family and the community by work in all phases of the fishery from net making to drying the salmon for preservation and storage.

[43] The net is positioned at the end of a long pole. The fisher is positioned on a rocky outcropping over a natural back eddy of the fast flowing river where salmon rest before continuing their arduous journey to their spawning grounds. Chief Sampson demonstrated the technique of dip net fishing, using a net that he had built from both traditional and modern materials.

[44] Fishing sites were associated with families whose names had origins in these places. His was called “Hwioek”, a name rendered in writing with the use of an orthography developed by the ethnographer and linguist Randy Bouchard.

[45] The on-reserve population is approximately 150 people, a like number reside off-reserve. The population has declined over his lifetime. This has mirrored the decline in the seasonal return of the salmon and regulation of access by the federal Department of Fisheries and Oceans. Fishing stations along the river bank were destroyed during railway construction. Their access to and over the Canadian National Railway and CPR bridges over the river, located within the right of way, has been denied to them as “trespass[ers]”.

[46] Chief Sampson has made observations of the width of the right of way through the Reserves and adjacent lands. He testified that it widens at the entry to the Reserves and narrows at the other end.

2. Maurice Michell

[47] Mr. Michell is 70 years of age. He is recognized as an elder by the people of the Nation. He lived on IR 7 with his parents, grandparents, the family of his uncle and his 13 siblings. They

had horses, chickens, cows and pigs. They cultivated fruit and vegetables at a large garden above the railway tracks. The railway company had, at an unspecified date, prohibited the continued agricultural use of this land as it is located within the right of way.

[48] Fisheries along the water boundary of IR 7 were preferred due to ready access to fishing sites. Access became difficult, as trails had been damaged by rocks, railway ties and rails which had been dumped down the steep embankment to the river. Access had been denied to them as if in trespass. This changed as the railway people are now "listening pretty good".

[49] Mr. Michell spoke of how the railway had entered the area of a sacred spring, xaxetkwu, a place allowed only to "girls…[at] their time of the month". The railway built boxes which drew water from the spring for use in its cabins. This destroyed the sacred character of the spring.

B. Agreed Statement of Facts

[50] The Parties prepared and filed an Agreed Statement of Facts (ASOF). The content is generally supported by the extensive documentary record in evidence. This is of great assistance to the Tribunal. Except where otherwise noted below the contents are accepted as factual. Findings of fact are also made based on the documentary record, expert evidence and the evidence of community witnesses.

C. Expert Reports

[51] The Respondent presented two expert reports.

1. Catherine Schmid

[52] Ms. Schmid is a geotechnical engineer. Her task:

> The objective of this work was to create maps that visually display the diverse topographic conditions that exist along the area of the Canadian Pacific Railway (CPR) right-of-way from Mile 97 to 104 on the Thompson Subdivision. As specified in the Contract, the data includes topography, land title boundaries, natural surface drainage, geomorphology, location of existing geotechnical conditions (where data is available), and existing track infrastructure. [BGC Engineering Inc. Letter Report at 1]

[53] Ms. Schmid testified. She explained the significance of the shading of spaces between contour lines overlaid on the photomap. Darker is steep gradient, lighter is progressively

shallower. She pointed out places where there were indications of material, rocks or trees, slides, four in all, along the east side of the right of way through IR 7 between 1972 and 2014. On cross-examination, Ms. Schmid noted the absence of ground support on the upslope between the level of the line of rail and the top of the slope, coinciding more or less with the eastern boundary of the right of way. On observation she saw no works of stabilization of the slope from the roadbed to the top of the slope. She agreed that the terrain at the portal to the tunnel was steep, but she had not been informed of incidences of instability in the area. The rock depth from track level to the surface above the tunnel was estimated at 40 metres.

2. Dr. Derek Martin

[54] Dr. Martin is a prominent civil and geological engineer with extensive experience in the construction of railways and identifying railway ground hazards.

[55] His opinion, dated June 9, 2015, addresses this question: "What factors appear to have controlled the selection of the right-of-way for the construction of the railroad traversing Zacht IR5 and Nahamanak IR 7?" (Martin Consulting Inc. Report (Martin Report) at 1).

[56] Dr. Martin's evidence is relevant to the issue whether the right of way and the subsequent grants to the CPR Company exceeded the width necessary to ensure that the CPR Company had sufficient control over the land on the upslope of the line of rail and the downslope to water's edge to protect the railway works and trains passing through. However, he did not proffer an opinion on whether the width of the right of way exceeded the width required to achieve this objective. He was not asked to do so.

[57] Dr. Martin's report explains the "Right-of-way considerations":

> The construction of a railroad at a new site seeks to minimize the grade along the railroad (less than 1.5%, i.e., 1.5m rise in 100m) and minimize the cutting and filling needed to safely construct the roadbed. There are other factors related to curves and stream crossings but these are secondary.
>
> In flat terrain the minimum railroad right-of-way (RoW) is approximately 30 m (50 ft either side of the track centreline). In mountainous terrain the right of way is a function of the topography (slope of the ground), the geology and geotechnical properties, and the surface hydrology.
> …

> The width of the right-of-way needed to construct and operate the railroad depends on the type of soil/rock making up the slope as this affects the slope angle. For example, the natural angle of repose of many dry granular soils varies from 30 to 38 degrees (similar to that shown Figure 1). In saturated conditions these angles are decreased by about 50%. In rock the angle can vary from 40 to 90 degrees and hence the width of the right-of-way can increase or decrease depending on the slope material. In mountainous terrain the stability of the slope adjacent to the track determines the amount of protection that must be provided to the railroad. In many situations a barrier protection system must be provided.
>
> In addition to controlling the stability of the slope, the water coming off the slope must also be controlled and this usually requires ditching and culverts at the top of the slope, along the slope and at the toe of the slope (Figure 1). Hence allowance must also be made for maintaining this water-controlling infrastructure.
>
> The right of way needed on the down-slope side of the track, also depends on the steepness of the topography and what is below the railroad. In the event of a derailment, the operator must ensure that they can recover the derailed train and that the public is not put at risk from the derailment. [emphasis added; Martin Report at 3–4]

[58] Under the heading "Railroad Construction Constraints in 1880 to 1885", he explains engineer's reliance on "[t]he 1857 book 'Handbook of Railroad Construction' by G. L. Vose [which] contains many of these empirical rules that were in place at the time of the railroad construction" (Martin Report at 4–5).

[59] In short, the surveyor must determine the elevation for the entire length of the right of way, taking it into account that the grade along the line of rail must be less than that at which locomotives will lose traction.

[60] The right of way passes through mountainous terrain.

[61] Vose establishes the angle of the upslope gradient based on the slope conditions (ground soils and rocks). The upslope boundary of the right of way is determined by the "break-in-slope (top-of-bank)".

[62] Dr. Martin says:

> It appears that the approach of following the top-of-the-bank contour was used for establishing the upslope right-of-way for Zacht IR5 and Nahamanak IR 7. The selection of the downslope right-of-way is constrained by the elevation of the river. These general right-of-way rules appear to reflect the transverse slope guidelines provided by G. L. Vose in the 1857 "Handbook of Railroad Construction".

> At the time of the railroad surveying in 1880-1885, there were no topographic maps with the sufficient detail and accuracy to pick a railroad route. Surveying would have been carried out with a chain, level and a transit. Such equipment was adequate for determining grade lines and sections at discrete locations. Effort would have been made to follow the break-in-slope (top-of-bank) but they would invariably have underestimated and overestimated its projection and hence one should not expect the right-of-way to always coincide with the break-in-slope. This is a problem in heterogeneous slope conditions experienced in mountainous terrain when relying on a few sections to establish the survey control. The primary focus of the surveying would have been the track centerline and maintaining an acceptable grade. [Martin Report at 11–12]

[63] On examination, Dr. Martin testified of two considerations for the width of a right of way on a downslope. One is the recovery of derailed rolling stock; the other is to ensure that no infrastructure can be built in harm's way in the event of derailment. This can be dealt with by flattening the slope or building retaining walls.

[64] As for the boundary extending to the river bank and beyond, his guess was that the river was followed as a natural demarcation.

[65] Following a series of questions concerning a flat area above the tunnel, and Commissioner Sproat's notation of this as a cultivated bench, his response to a question whether there was a safety reason for its inclusion in the right of way was "no" except at the portal, and then in the event that someone wished to build, for example, a high rise there.

VII. ISSUES

[66] The issues:

1. Did the establishment of the right of way in 1885 or later grants to the CPR Company establish interests in the land which displaced Siska's interest in the provisional or created reserves?

2. Were the ROWs excessively wide given the limitations in the *Consolidated Railway Act*?

3. When were IR 5 and IR 7 fully created in law?

4. Did the Respondent owe fiduciary duties when administering the reserves and ROWs, and if so, were any breached?

5. Did the grants to the CPR Company require surrenders under the *Indian Act*?

6. Has the Claimant established the validity of the Claim under paragraphs 14(1)(b), (c) and/or (d) of the *SCTA*?

VIII. CROWN ACTIONS, 1881-1930 AND THE SISKA RESERVES: SUMMARY

[67] The following summary reflects the facts agreed upon by the Parties with changes to terms that appear to assign a legal interest in the ROW lands to the CPR prior to the grants of letters patent. If there is inconsistency between the agreed facts and my findings of fact and law, the latter will prevail.

[68] For example, *An Act respecting the Canadian Pacific Railway*, SC 1881 (44 Vict), c 1, [*CPR Act*] included a Schedule [*CPR Contract*], which called for the transfer of title to Crown land within the ROW land within the reserves as allotted in 1878. It is common ground that the railway was constructed by Canada. The purported grant of a tenure in the land occurred with the grants of letters patent between 1912 and 1928. The numerous references in the Agreed Statement of Facts to the "CPR right of way" prior to the grants by letters patent are misleading, and have been corrected below.

[69] IR 5 and IR 7 were allotted by Commissioner Sproat on June 18, 1878.

[70] In 1880, Canada contracted with Andrew Onderdonk to build the western segment of the CPR from Savona's Ferry (near Kamloops) to Port Moody.

[71] In 1881, Parliament granted a charter to the CPR Company and approved the *CPR Contract* under which Canada agreed to construct the western section of the CPR mainline from Kamloops to Port Moody, and to convey the railway to the CPR Company.

[72] Between 1881 and 1884, Canada, acting through the Department of Railways and Canals, prepared location plans for the mainline and the ROW. The Railway Belt lands were deemed to have been transferred to Canada effective December 19, 1883.

[73] A survey plan created by Government Engineer George Keefer (Keefer Plan) was deposited in the provincial Land Registry in Victoria on July 14, 1885, on behalf of the Minister

of Railways and Canals pursuant to the *Government Railways Act.*

[74] In August 1885, W.S. Jemmett surveyed the boundaries of both IR 5 and IR 7. His survey (Jemmett's Survey), also known as Plan 7509 and Indian Affairs Survey Record No. BC 6, showed that IR 5 contained 60 acres and IR 7 contained 362 acres of land.

[75] IR 7 was plotted on the Keefer Plan in or about 1889. The ROW through IR 7 was comprised of 89.60 acres.

[76] The construction of the western section of the railway was completed in 1885. The railway was in operation starting June 1886. On November 2, 1886, by Order in Council PC 1935, the Governor in Council authorized the conveyance of the portions of the railway constructed by Canada to the CPR Company as required under the *CPR Contract*.

[77] On August 3, 1885, Government Agent Joseph Trutch provided valuations and tracings of those segments of the railway ROW that traversed 29 Indian reserves between Savona's Ferry and Port Moody. The valuations did not include valuations for lands in IR 5 and IR 7.

[78] On January 18, 1886, Order in Council PC 53 authorized the Department of Railways and Canals to purchase lands traversed by the ROW from the Department of Indian Affairs (DIA) upon payment of compensation in amounts agreed to by the DIA. IR 7 and IR 5 were not listed in the schedule attached to Order in Council PC 53 entitled "Schedule of Land taken from the Indian Reserves in B.C. for Right of Way on C.P.R.".

[79] On March 15, 1886, Order in Council PC 379 authorized the transfer of lands described in the schedule attached to PC 53, to the Department of Railways and Canals, upon payment of compensation to the DIA.

[80] In 1888, the DIA submitted a list of reserves, which included IR 7, to the Department of Railways and Canals for an assessment of the compensation payable for the reserves. The ROW through IR 7 was then plotted on the Keefer Plan.

[81] On March 11, 1890, the Department of Railways and Canals submitted valuations to the DIA for lands taken for the ROW from certain Indian reserves in British Columbia, including the valuation for IR 7 of $89.60 for the 89.60 acres, representing a valuation of $1.00 per acre.

[82] Pursuant to Order in Council PC 2006-1891 (August 25), the Governor in Council authorized the purchase of 89.60 acres of IR 7 by the Department of Railways and Canals, and upon deposit of the purchase money of $89.60, the transfer of lands to the Department of Railways and Canals in order to transfer them to the CPR Company in accordance with the *CPR Contract*.

[83] On January 13, 1892, $89.60 was deposited into the Siska Band's trust account administered by the DIA.

[84] In 1904, James Garden, a Dominion Land Surveyor, re-surveyed the right of way through the reserves (Garden Plan). The Garden Plan was certified by the Chief Engineer, Department of Railways and Canals as showing "the lands of the Government to be convey[ed] to the Canadian Pacific Railway Company". The Garden Plan was deposited in the Kamloops Lands Registry Office in 1905. It showed the right of way through IR 5 and IR 7, respectively, as containing 0.08 acres and 89.51 acres.

[85] The ROW through IR 7 passes through the entire length of the reserve from north to south. The ROW through IR 7 is approximately 300 feet wide on the upper side (west) of the centerline of the railway, and on the lower side (east) of the centerline extends to the bank of the Fraser River. It varies in width depending on the distance from the Fraser River and the curvature of the bank.

[86] On February 9, 1912, the CPR Company wrote to the DIA seeking patents for six reserves, including IR 5 and IR 7. Enclosed with the February 9, 1912 letter were right of way plans for the six reserves (including IR 5 and IR 7) that showed the ROW as "now occupied".

[87] By Order in Council PC 953-1912 (April 19), the Governor in Council authorized letters patent for 89.51 acres to be issued to the CPR Company for the ROW as constructed through IR 7 and other specified Indian reserves from Kanaka Bar to Lytton.

[88] Canada issued letters patent on July 5, 1912 for land comprising 89.51 acres within IR 7.

[89] British Columbia refused to register the letters patent in provincial land registry offices because of a dispute with Canada regarding the legal status of Indian reserve lands in the

Province. When in the late 1920s the federal and provincial governments reached agreement regarding the re-conveyance of the Railway Belt to British Columbia (with the exception of Indian reserve lands), British Columbia permitted the Dominion letters patent to be registered in provincial land registry offices.

[90] New letters patent were issued on April l0, 1928, by Canada for grant to the CPR Company of 89.51 acres of land within IR 7.

[91] On February 12, 1912, the DIA responded to the CPR Company's February 9, 1912, request for letters patent, stating that while the plans provided appeared to have been prepared satisfactorily, the plan for IR 5 was being returned as the measurements for the ROW had not been plotted.

[92] On February 19, 1912, the CPR Company provided a description of the land required through IR 5 as consisting of 0.08 acres and "as shown colored red on a plan signed by James F. Garden, D.L.S., and filed in the Surveys Records Branch of the Department of the Interior as No. 11195".

[93] On July 17, 1925, by Order in Council PC 1091, the Governor in Council authorized the payment by the Department of Railways and Canals to the DIA of additional compensation for land taken for the ROW through certain Indian reserves in British Columbia, including $1.60 for 0.08 acres of land in IR 5. On July 30, 1925, the Department of Railways and Canals forwarded the amount of $1.60 for IR 5 to the DIA along with other payments for the rights of way affecting seven Indian reserves. The sum of $1.60 was credited to the Band's trust account managed by Canada in July 1925.

[94] In 1925, Canada issued letters patent for 0.08 acres of IR 5 dated December 11, 1925. Due to the above mentioned federal-provincial dispute, the letters patent could not be registered in the provincial land registry. When this was resolved, Canada cancelled and reissued letters patent for IR 5 on July 20, 1927.

[95] The letters patent issued in 1927 and 1928 to the CPR for land within IR 5 and IR 7 refer to the *CPR Act*, the *CPR Contract*, Orders in Council PC 53 and PC 379, and payment made for the subject lands. The letters patent purport to grant title to the rights of way to the CPR

Company.

[96] The Reserves were confirmed by the McKenna-McBride Commission as surveyed by Jemmett in 1885. They were not altered by Ditchburn-Clark. The boundaries and acreages remained as surveyed; IR 5 at 60 acres, IR 7 at 362 acres.

[97] The Garden Plan was deposited in the Kamloops Lands Registry Office in 1905. It showed the ROW through IR 5 and IR 7 as containing, respectively, 0.08 acres and 89.51 acres.

[98] At all times up to and including the formal setting aside of the Reserves as reserves under the *Indian Act* the acreages remained constant at 60 acres (IR 5) and 362 acres (IR 7). The surveyed boundaries remained the same throughout.

IX. DID THE ESTABLISHMENT OF THE RIGHT OF WAY IN 1885 OR LATER GRANTS TO THE CPR COMPANY ESTABLISH INTERESTS IN THE LAND WHICH DISPLACED SISKA'S INTEREST IN THE PROVISIONAL OR CREATED RESERVES?

A. The Indigenous Interest in Land Set Apart as Reserve

[99] In Part XIII of these Reasons the issue over Crown fiduciary duties is discussed. The question is over the nature and scope of duties in relation to reserves.

[100] Analysis of the question whether the establishment of a railway ROW under the *Government Railways Act* is, in relation to an Indigenous interest in land set apart as reserve (whether provisionally or finally) a "taking" may, as with an analysis of fiduciary obligations, start with an understanding of the legal nature of a provisional reserve. My findings in this regard, although potentially relevant to the issue over the effect on the Siska interest in the provisional Reserves, are not relied on in determining whether a taking occurred under the *Government Railways Act*.

[101] The reasoning regarding the effect of the *Government Railways Act* does not depend on the specific characteristics of the Siska's interest. An understanding of Siska's interest is important context for understanding the federal Crown's position and for the analysis of fiduciary duties later in these Reasons.

B. "Purchase" of Reserves in the Railway Belt

[102] The Respondent argues that Siska's interest in the Reserves was an inter-departmental transaction of purchase and sale which occurred prior to the Reserves coming within the *Indian Act.*

[103] The creation of a reserve for purposes of the application of the *Indian Act* is discussed in Part XII of these Reasons. I have concluded that the application of the principles in *Ross River Dena Band Council v Canada*, [2002] 2 SCR 816, 2002 SCC 54 [*Ross River*] and *Wewaykum* establish that the creation of reserves in the Railway Belt occurred on December 29, 1911.

[104] It is, however, clear on the evidence that the land set apart as reserve by Commissioner Sproat, in his exercise of authority conferred by the Joint Indian Reserve Commission (JIRC) agreement, came under full federal administration at the time of the 1883 transfer of land in the Railway Belt to Canada. The provincial and federal Crowns so agreed in 1883-1884 and affirmed in 1897. The federal Crown also acted in accordance with that authority in its dealings with the ROWs through IR 5 and IR 7.

[105] The Parties agree that:

> On January 18, 1886, Order in Council P.C. 53 ("PC 53") authorized the Department of Railways and Canals to purchase lands traversed by the CPR from the Department of Indian Affairs ("DIA") upon payment of compensation in amounts agreed to by DIA. [ASOF at para 59]

[106] They agree that:

> Pursuant to PC 2006 the Governor in Council authorized the purchase of 89.6 acres of IR 7 by the Department of Railways and Canals, and upon deposit of the purchase money of $89.60, the transfer of lands to the Department of Railways and Canals in order to transfer them to the CPR Company in accordance with the CPR Contract. [ASOF at para 69]

and:

> On January 13, 1892, $89.60 was deposited into the Siska Band's trust account administered by the DIA as compensation for the lands taken for the CPR right of way. [ASOF at para 70]

[107] The "transfer" of numerous Railway Belt reserves was authorized by PC 379, March 15, 1886, although IR 5 and IR 7 were not listed in the schedule.

[108] Similar measures were taken with respect to IR 5.

[109] However, the characterization of the land in the ASOF at paragraph 70 as "taken" accords neither with the evidence nor the law.

[110] The evidence: PC 208-1930, confirmed the acreage for IR 5 at 60 acres and IR 7 at 362 acres, the precise acreages of the 1878 allotment. PC 208-1930 provided a confirmation date for the Reserves as at January 25, 1913. There was, therefore, no prior "taking" of the Reserves of the Siska Indian Band. The "transfer" provided for by PC 2006-1891 was a transfer of administration of the land from one Ministry to another in anticipation of a grant to the CPR Company as required by the *CPR Contract*.

[111] It is clear on the evidence that the boundaries and acreages of the Reserves remained unaltered when, on December 29, 1911, by PC 2983, administration was "retransferred to the Department of Indian Affairs, in order to the issue by that Department to the Canadian Pacific Railway Company of Letters Patent of the correct areas, together with such other areas as they may decide to grant" (not mentioned in the ASOF; Joint Common Book of Documents (JCBD), Vol 3, at Tab 0480).

[112] The legal significance of the payment of compensation to the DIA to the credit of the Siska Band may be understood by reference to the statutory provisions then extant. The *Government Railways Act* provided for compensation for land not vested in the Crown, namely private titles and provincial Crown land taken under the *Act*. There was no taking of the ROW land in the Reserves.

[113] There was, in 1885, no inconsistency between reserve status and the presence of a railway. Compensation for the impact of a railway passing through a reserve was required. The *Indian Act*, 1880, provided:

> **31.** If any railway, road or public work passes through or causes injury to any reserve belonging to or in possession of any band of Indians, or if any act occasioning damage to any reserve be done under the authority of any Act of Parliament, or of the Legislature of any Province, compensation shall be made to them therefor in the same manner as is provided with respect to the lands or rights of other persons ; the Superintendent-General shall, in any case in which an arbitration may be had, name the arbitrator on behalf of the Indians, and shall

> act for them on any matter relating to the settlement of such compensation ; and the amount awarded in any case shall be paid to the Receiver-General for the use of the band of Indians for whose benefit the reserve is held, and for the benefit of any Indian having improvements thereon.

[114] The phrase "passes through or causes injury" does not imply a taking of the *sui generis* Indigenous interest. On the contrary, it implies the continued existence of the Indigenous interest. The same must be so with respect to the provisional Reserves. Any doubt in this regard is removed by the later "creation" of the Reserves for purposes of the *Indian Act* by reference to the survey, which reflects Sproat's sketch, the metes and bounds set out in the Minutes of Decision, and his estimated acreages.

C. The "Created" Reserves

[115] If it can be maintained that the actions of Canada under the *Government Railways Act* authorized a taking of land in the Reserves, the idea that the Claimant's interest in the provisional reserve was in fact "taken" in 1885 by the operation of the *Government Railways Act* cannot be reconciled with the fact that the list of reserves attached to Order in Council PC 208-1930, confirmed the acreage for IR 5 at 60 acres and IR 7 at 362 acres, the acreages of the 1878 allotment. PC 208-1930 provided a confirmation date for the Reserves as at January 25, 1913, some 27 years after the CPR Company took possession of the ROW for the operation of the railway.

[116] The Respondent has not argued that the establishment of the right of way extinguished Siska's interest in the affected lands within the provisional reserves. Had it, the argument could not be sustained. The purpose of the *Government Railways Act* was to vest in the federal Crown all land within the right of way and authorize the construction of a railway. Private interests were taken, with compensation, in order that title vest in the Crown. The "pass[ing] through" language of section 31 of the *Indian Act*, 1880, preserves the Indigenous interest in *Indian Act* reserves, which IR 5 and IR 7 were considered to be. It was, in 1885, not understood that an Indigenous interest existed where provisional reserves had been set apart in land vested in the Crown. This was not known until the decision of the Supreme Court in *Wewaykum*, in which the Indigenous interest in provisional reserves was found to be cognizable in law. Although the provisional interest had not been formalized as an *Indian Act* interest, it was cognizable in law and would

require express language or necessary implication to be extinguished by the *Government Railways Act*. There is no language pertaining to Indigenous interests, and no "taking" of any interest except those held by homesteaders and the "appropriation" of provincial Crown land. Hence, the *Government Railways Act* was not clearly and plainly intended by the Sovereign to extinguish the Siska interest in the provisional Reserves. As discussed below in Part XIII A., the government was not required by the *CPR Contract* to extinguish Indigenous interests in the western section of the railway.

[117] Moreover, by section 13 of the Memorandum of Agreement dated February 20, 1930, between Canada and British Columbia, the governments agreed that lands included within Indian reserves in the Railway Belt "shall continue to be vested in Canada in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208)". The Siska interest could not have previously been extinguished. As noted above, the schedule to PC 208-1930 stated the "date of confirmation" for IR 5 and IR 7 to be "O.C. 25th January, 1913".

[118] The ultimate grants to the CPR Company were made in 1927 and 1928. It was not until the grants were made that the legal interest of Siska in the Reserves could have been affected.

D. The *Government Railways Act*

[119] The Respondent's primary argument is that government actions on the authority of the *Government Railways Act* took the Claimant's interest in the ROW through the Reserves. This, it contends, was followed in 1912, 1927 and 1928 by letters patent granting "absolute title" to the CPR Company.

[120] The Respondent says that the filing of the Keefer Plan (1885) and the Garden Plan (1905) in the provincial land title registry effected a taking of "lands at Siska IR5 and IR7…under s. 10 of the *Government Railways Act* for a right-of-way to construct and operate the CPR". The Respondent argues further that the lands taken from the reserves comprised the full width of the ROW depicted on the Keefer and Garden Plans.

[121] The general powers exercisable by the Minister under the *Government Railways Act* are set out in section 5. These include:

> (5.) To enter upon and take possession of any lands, real estate, streams, waters and water-courses, the appropriation of which is in his judgment necessary for the use, construction, maintenance or repair of the railway[.]

[122] The *Government Railways Act*, section 10, provides, in part:

> **10.** Lands taken for the use of Government Railways shall be laid off by metes and bounds ; and where no proper deed or conveyance thereof to the Crown is made and executed by the person having the power to make such deed or conveyance, or where a person interested in such lands is incapable of making such deed or conveyance, or where for any other reason the Minister shall deem it advisable so to do, a plan and description of such lands signed by the Minister, his Deputy or Secretary, or by the Superintendent or by an engineer of the Department, or by a land surveyor duly licensed and sworn in and for the Province in which the lands situate, shall be deposited of record in the office of the registry of deeds for the county or registration division in which the lands are situate, and such lands by such deposit shall thereupon become and remain vested in the Crown:
>
> …
>
> (4.) A plan and description of any lands now in the occupation or possession of the Crown and used for the purposes of any Government railway may be deposited at any time, in like manner and with like effect as herein provided, saving always the lawful claims to compensation of any person interested therein:
>
> (5.) In all cases where any such plan and description, purporting to be signed by the Deputy Minister, or by the Secretary, or by the Superintendent or by an engineer of the Department, or by a land surveyor duly licensed as aforesaid, is deposited of record as aforesaid, the same shall be deemed and taken to have been deposited by the direction and authority of the Minister, and as indicating that in his judgment the lands therein described are necessary for the purposes of the railway ; and the said plan and description shall not be called in question except by the Minister or by some person acting for him, or for the Crown:
>
> …
>
> (8.) Where the lands are Crown lands, under the control of the Executive Government of the Province in which such lands taken are situate, a plan of such lands shall also be deposited in the Crown Land Office of the Province[.]

[123] The effect of section 10 must be understood in the context of the statute as a whole.

[124] The *Government Railways Act* confers extensive powers on the Minister of Railways and Canals. These are set out in section 5 and include the power to enter on any public or private lands to carry out all work required for the construction of a railway.

[125] While most of the powers in section 5 apply to any “lands”, which are defined in section 3(6) to include public and private lands, section 5(5) only applies to land “the appropriation of

which is in [the Minister's] judgment necessary". Land already vested in the federal Crown does not need expropriation. For land not already vested in the federal Crown, section 10 provides for the actual taking. The deposit of a plan under section 10(4) has the effect under section 10(5) of indicating that in the judgment of the Minister "the lands therein described are necessary for the purposes of the railway" and, under section 10, the described lands, upon deposit, "shall thereupon become and remain vested in the Crown".

[126] The lands contemplated by section 10 are those lands within the right of way not previously vested in the federal Crown and in respect of which, "no proper deed or conveyance thereof to the Crown is made". It is these lands which are "taken". These are the lands for which section 15 provides for the payment of compensation to "any person or corporation" who has suffered a "taking".

[127] The object and purpose of the *Government Railways Act* is, generally, to vest in the Crown, Canada, all provincial Crown and private land deemed necessary for the construction and operation of "all railways which are vested in Her Majesty, and which are under the control and management of the Minister of Railways and Canals" (section 2).

[128] The immediate purpose and object of the *Government Railways Act* was to enable the performance of Canada's obligation to the Province under Article 11 of the *Terms of Union*, 1871, and its obligation to the CPR Company under the *CPR Contract*. Neither could be achieved unless a railway right of way was established within lands vested in the Crown. Again, I use the term "railway right of way", throughout these Reasons as a term of art: I find that it is, in the context of the *Government Railways Act* and the intention of the government in invoking powers under that act, a descriptor of the land vested in the Crown for the construction and operation of a railway.

E. The Steps Taken to Establish the Railway as Property of the CPR Company

[129] The continued status of the ROW land as reserve (whether provisional or fully created) is consistent with actions taken under the *Government Railways Act*. The ultimate effect on the status of the land would be determined upon performance by government of its covenant in the *CPR Contract* to transfer the railway to the CPR Company.

[130] The "taking" of land in the Reserves, if ever there was one, would be by grants to be made under the *CPR Act*, section 5, which provided for the future conveyance of land on which the railway was to be constructed by the government in the western section of the railway:

> **5.** Pending the completion of the eastern and central sections of the said railway as described in the said contract, the Government may also transfer to the said Company the possession and right to work and run the several portions of the Canadian Pacific Railway as described in the said Act thirty-seventh Victoria, chapter fourteen, which are already constructed, and as the same shall be hereafter completed ; and upon the completion of the said eastern and central sections the Government may convey to the Company, with a suitable number of station buildings, and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed, or agreed by the said contract to be constructed by the Government, which shall then be completed ; and upon completion of the remainder of the portion of the said railway to be constructed by the Government, that portion also may be conveyed by the Government to the Company…

[131] The *Government Railways Act* 'right of way' would, after the government constructed the railway (1885) and turned possession over to the CPR Company (1886), no longer be needed, as the legal interest of the CPR Company would ultimately be secured by grants by letters patent.

[132] The title to formerly private land was in the Crown, having been taken under the *Government Railways Act*, and the railway passed through the provisional Reserves on land that remained vested in the Crown. Once the railway was constructed and the CPR Company took possession, the purpose served by establishing the ROW under the *Government Railways Act* no longer existed. The *Government Railways Act* did not "take" the *sui generis* Siska interest in the provisional Reserves, which remained land vested in the Crown.

[133] This does not mean that the construction of the railway by the government was without statutory authority, as the *Government Railways Act* authorized entry on Crown land for the purpose of construction and use for railway purposes. This was preparatory for the eventual grant to the CPR Company of the railway, as constructed by the government, under the *CPR Contract*.

F. Summary

[134] The *Government Railways Act* provides for the taking of interests in land other than land which, at the time of the deposit of a plan under section 10, is vested in the federal Crown. While that act contemplates taking provincial Crown land (section 10(8)), the subject land was already

under the control of the federal Crown (*An Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province,* SBC 1883, c 14). For land that was already in the hands of the federal Crown, the *Government Railways Act* simply brought the administration of such land under the Department of Railways and Canals and committed it to railway use.

[135] The entry and construction under the authority of the *Government Railways Act* therefore had no formal impact on the Claimant's reserve interest, regardless of whether it was a "cognizable interest" in a provisional reserve or an interest in a fully confirmed *Indian Act* reserve. The Crown was in the same legal position in relation to the subject land before and after the deposit of the plan under section 10 of the *Government Railways Act*. There was, I find, no "taking" of land within the Reserves by the operation of the *Government Railways Act*.

[136] As for the grants to the CPR Company, it makes no difference for the validity of the grants whether the grants were made before or after the date of the "creation" of the reserves as *Indian Act* reserves. In either case the question is whether the grants were validly made under statutory authority.

[137] This question remains: Did the grants to the CPR Company establish interests in the land which displaced Siska's interest in the provisional or the "created" Reserves?

G. The Grants to the CPR

[138] The remaining question is whether the 1912, 1927 and 1928 grants to the CPR Company were, on their express terms, a legally valid exercise of powers under the combined effect of the *CPR Act* and *Consolidated Railway Act*. If not, the lands were taken without statutory authority.

[139] This question is answered by the findings of the Federal Court of Appeal in *Canadian Pacific Ltd. v Matsqui Indian Band*, [2000] 1 FC 325, 1999 CanLII 9362 (FCA) [*Matsqui*]. The Court found that the grants purported to convey fee simple title. It was held that if the CPR Company held title to the right of way through the reserves, the land could not be reserve land as to be reserve land the title must be in the Crown:

> What is relevant to these appeals is that for lands to be within a reserve, "legal title" must be "vested in Her Majesty". That requirement is set out in the opening words of paragraph 2(1)(a) and again in the definition of "designated lands". I pause here to emphasize that in my respectful opinion, and contrary to what was

> decided in the *Leonard* case, a surrender for purposes of leasing does not divest the grantor of legal title to lands. Legal title, however, is divested if there is a conveyance in fee simple. Thus, if Canadian Pacific validly acquired fee simple title to the right-of-ways from the Crown, the notices of assessment are invalid. Conversely, if Canadian Pacific is entitled only to a lesser interest in land, such as an easement, regardless of what the conveyancing documents purport to convey, the lands in question are "in the reserve" and, therefore, the assessments are valid. This is so because a conveyance amounting to an easement or a licence does not divest the grantor (e.g., the Crown) of legal title. [footnote omitted] [*Matsqui* at para 104]

[140] Although the *CPR Act* provides for the transfer of "absolute title" to the CPR, it was held in *Matsqui* that the provisions of the *CPR Act* do not override the restriction on alienation in the *Consolidated Railway Act*:

> In conclusion, I am of the view that the CPR Act did not authorize the government to convey fee simple title to the rights-of-way crossing the appellants' reserves to Canadian Pacific. Notwithstanding what the letters patent purport to convey, Canadian Pacific was and is entitled to no more than a statutory easement or licence with respect to each of the 15 disputed rights-of-way. This is so because of the restriction on the alienation of Crown lands acquired by railway companies in the *Railway Act*. The provisions of the CPR Act and contract do not override that restriction because they fail to expressly state that the relevant provision of the *Railway Act* was being displaced, as required under the latter Act. Alternatively, the obligation of the Dominion government to convey "absolute title" to the railway to Canadian Pacific cannot be construed as an obligation to convey fee simple title to the rights-of-way. The title obligation simply reflects the understanding that, as between these two parties, the Dominion government was to relinquish all of its rights in the railway to Canadian Pacific. It does not mean that the government intended to abrogate Indian rights guaranteed under the *Indian Act*. In addition, the obligation upon the Dominion government to extinguish "Indian title" applies only to the central and eastern segments of the railway, and not the western segment in which all of the rights-of-way in question are situated. [emphasis in original; para 173]

[141] In *Matsqui*, the Federal Court of Appeal considered the putative effect of the letters patent conveying interests to the CPR Company along the railway right of way through the Indian reserves situated in the Fraser Canyon. These were found, on their face, to purport to grant an interest in fee simple:

> I do not believe, any more than my brother, that it can reasonably be disputed that the title conveyed to CP by Canada in each of the 15 conveyances at issue was on its face fee simple absolute. [Marceau J.; para 4]
>
> …
>
> If there is any ambiguity, it is contained in the documents giving rise to the sale transaction, specifically, the Order in Council. Admittedly, it is unclear whether the term "right-of-way" was being used as a term of art or not. However, that

> ambiguity was resolved by the letters patent which clearly indicates conveyance of title in fee simple. [Robertson J.; para 109]

[142] The Respondent has not argued that the grants in the present matter differ in any material way from those considered in *Matsqui*:

> There are 15 rights-of-way in issue and, therefore, 15 conveyances which need to be examined to determine whether fee simple title passed to Canadian Pacific or a determinable fee as found by the Motions Judge. At the same time, no one objected to the fact that not all of the conveyances were placed in evidence before this Court. Nevertheless, it is evident that the documents so placed utilize the language necessary at common law to create title in fee simple. The "words of limitation" and the "*habendum*" used, for example, in the letters patent in respect of the Matsqui right-of-way reveal clearly a conveyance of title in fee simple:
>
> [w]e by these Presents do grant sell alien convey and assure unto the said The Canadian Pacific Railway Company their successors and assigns for ever all that parcel or tract of land situate lying and being in the Matsqui (Sahhahcom) Indian Reserve ....
>
> TO HAVE AND TO HOLD the said parcel or tract of land hereby granted conveyed and assured unto the said The Canadian Pacific Railway Company their successor and assign for ever.... [para 96]

[143] Although Robertson J.A. discussed the requirements of the *Indian Act* for the taking of interests in reserve land, his Reasons, concurred in by Desjardins J.A. on the question concerning the grants, did not turn on whether the *Indian Act* applied to the lands:

> Ignoring the provisions of the *Railway Act* for the moment, there are only two principal ways that title to reserve lands can be acquired under the *Indian Act*. First, title may be acquired by means of a valid surrender of the lands to the Crown by an Indian band. The second involves the taking or expropriation provision of the *Indian Act*. For Canadian Pacific, both of these options must be examined in light of a restriction found within the *Railway Act* which effectively prohibits railway companies from acquiring fee simple title to Crown lands. [footnote omitted] [para 125]

[144] Rather, the decision of the Court turned on the limits in the *Consolidated Railway Act* on takings of land vested in the Crown:

> Subsection 7(3) of *The Consolidated Railway Act*, 1879 provides that no railway company can take or use lands vested in Her Majesty without the consent of the Governor in Council and that lands so acquired cannot be alienated. That provision reads as follows:
>
> **7.** …
>
> 3. No railway company shall take possession of, use or occupy any lands vested in Her Majesty, without the consent of the Governor in Council; but with such

> consent any such company may take and appropriate for the use of their railway and works, but not alienate, so much of the wild lands of the Crown lying on the route of the railway, as have not been granted or sold, and as may be necessary for such railway, and also so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making and completing and using their said railway and works... [footnotes omitted] [emphasis in original; para 126]

[145] Robertson J.A. concluded:

> In summary, at all relevant times, Canadian Pacific could not have validly obtained fee simple title to the reserve lands in question under the *Railway Act* because of the prohibition against alienation of lands acquired from the Crown for railway purposes. At best, Canadian Pacific obtained statutory easements to the rights-of-way or licences to use or occupy reserve lands required for railway purposes. For this reason, it is necessary to determine whether the provisions of the CPR Act of 1881 override those outlined in the *Railway Act*. [para 131]

[146] Subsequent to the decision in *Matsqui*, the Supreme Court found, in *Wewaykum*, that the *Indian Act* did not apply to lands allotted as reserves outside the Railway Belt until 1938. It is, however, of no moment whether the *Indian Act* applied to the land in question. If, like lands outside the Railway Belt, they were merely provisionally reserved they were nevertheless lands in the Railway Belt which were deemed transferred to the Dominion on December 19, 1883. Accordingly the lands were vested in Her Majesty when the grants were made, and the restriction on alienation applied.

[147] The grants were, therefore, invalid on their face as purporting to grant interests in fee simple absolute.

H. Were the Grants Void?

[148] The Respondent says that a finding that the grants were not made under statutory authority would be a finding that the grants were *void ab initio*. I disagree. The present question is whether the Claim comes within paragraph 14(1)(d) of the *SCTA*. The Tribunal has jurisdiction to decide this, but only for the purpose of determining the validity of the Claim. The Tribunal need not rule on whether the grants are void.

I. What Tenure, if any, did the CPR Company Receive?

[149] Robertson J.A., Desjardins J.A. concurring, found in *Matsqui* that the CPR Company obtained "[a]t best…statutory easements…or licences to use or occupy reserve lands required for

railway purposes". This is not a finding that any particular form of tenure was obtained. No such finding was necessary as the CPR Company was in possession of the land in fact and thus was taxable under the taxation bylaw of the Matsqui Indian Band.

[150] There is, likewise here, no need to consider what form of tenure, if any, was lawfully conveyed to the CPR Company.

[151] One might ask: What difference does it make whether the CPR Company was granted fee simple title or an easement? In either case Siska's use and enjoyment of the land was affected. Initially, Canada used the land for construction of the railway. The CPR Company was then put in possession of the land. Finally, letters patent were issued to the CPR Company.

[152] There is, however, a material difference between fee simple title and an easement. An easement establishes a non-exclusive right of use in the holder. The holder of fee simple enjoys the exclusive use. The evidence, including that of the community witnesses, reveals that the CPR Company vigorously exercised exclusive possession since 1886, and in the result the members of the Siska collectivity were treated as trespassers. They were deprived entirely of the use and enjoyment of the land within the ROW, which was later granted to the CPR Company.

X. EXCESSIVE WIDTH

[153] The grants were, on their face, not validly made under statutory authority.

[154] Siska also argues that the land "granted" exceeded that which was permissible under the *Consolidated Railway Act*.

[155] The *Consolidated Railway Act*, section 9, addresses the width of land that may be granted to a Railway Company:

> **9.** The lands which may be taken without the consent of the proprietor thereof, shall not exceed thirty-three yards in breadth, except in places where the railway is raised more than five feet higher, or cut more than five feet deeper than the surface of the line, or where offsets are established, or where stations, depôts or fixtures are intended to be erected, or goods to be delivered, and then not more than two hundred and fifty yards in length by one hundred and fifty yards in breadth, without the consent of the person authorized to convey such lands ; and the places at which such extra breadth is to be taken shall be shewn on the map or plan, or plans or sections, so far as the same may be then ascertained, but their not being so shewn shall not prevent such extra breadth from being taken,

> provided it be taken upon the line shewn or within the distance aforesaid from from such line:…

[156] The Respondent argues that the *Government Railways Act* over-rode the section 9 width limitation on "takings". However, the creation of the ROW through the reserves was not a taking.

[157] In *Matsqui,* the Court considered the override provisions of the *CPR Act*:

> The difficulty I have with Canadian Pacific's argument concerns the legal effect of article 22 of the contract. There is no doubt that the CPR Act was intended to override inconsistent provisions of *The Consolidated Railway Act, 1879*. Indeed, Schedule A to the contract, which sets out the powers of the railway company to be incorporated for the purpose of constructing the railway, provides for this in section 17, which states:
>
> **17.** "*The Consolidated Railway Act*, 1879," in so far as the provisions of the same are applicable to the undertaking authorized by this charter, and in so far as they are not inconsistent with or contrary to the provisions hereof, and save and except as hereinafter provided, is hereby incorporated herewith. [para 140]

[158] The Court continued:

> But it is equally true that section 3 of *The Consolidated Railway Act, 1879* (and its successors) stipulates that any overriding legislation, that is, any "Special Act", must identify which provisions of *The Consolidated Railway Act, 1879* are being displaced. This explains the presence of section 18 in Schedule A to the contract, which expressly details those provisions of *The Consolidated Railway Act, 1879*, that are being overridden or modified. Section 18 in Schedule A reads:
>
> **18.** As respects the said railway, the seventh section of "*The Consolidated Railway Act,* 1879" relating to Powers, and the eighth section thereof relating to Plans and Surveys, shall be subject to the following provisions:… [para 141]

[159] None of the listed provisions exclude section 9 of the *Consolidated Railway Act.*

[160] The Court found that:

> What is clear and fatal to Canadian Pacific's argument is that the restraint on alienation in subsection 7(3) of *The Consolidated Railway Act, 1879* is <u>not</u> explicitly overridden. Paragraph 18(*a*) clearly addresses subsection 7(3), but only to extend the scope of the latter portion of that subsection relating to the taking, use or occupation of public beaches and lands below the high water mark of certain water bodies, title to which is vested in the Crown. The only reasonable inference is that, in acquiring Crown lands, the remaining elements of subsection 7(3) would apply. Thus, when acquiring Crown lands, Canadian Pacific does so subject to the restriction on alienation imposed by subsection 7(3) [emphasis in original; para 142]

[161] In the present matter, there is no express override of section 9. The findings of the Court are also conclusory of the question of whether the *CPR Act* overrides section 9.

[162] Moreover, the *CPR Act* does not call for a grant of the entire right of way:

> **5**. Pending the completion of the eastern and central sections of the said railway as described in the said contract, the Government may also transfer to the said Company the possession and right to work and run the several portions of the Canadian Pacific Railway as described in the said Act thirty-seventh Victoria, chapter fourteen, which are already constructed, and as the same shall be hereafter completed ; and upon the completion of the said eastern and central sections the Government may convey to the Company, with a suitable number of station buildings, and with water service (but without equipment), those portions of the Canadian Pacific Railway constructed, or agreed by the said contract to be constructed by the Government, which shall then be completed ; and upon completion of the remainder of the portion of the said railway to be constructed by the Government, that portion also may be conveyed by the Government to the Company, and the Canadian Pacific Railway defined as aforesaid shall become and be thereafter the absolute property of the Company ; the whole, however, upon the terms and conditions, and subject to the restrictions and limitations contained in the said contract. [emphasis added]

[163] Part 10 of the *CPR Contract* calls for the conveyance of land required for the roadbeds and stations:

> In further consideration of the premises, the Government shall also grant to the Company the lands required for the road bed of the railway, and for its stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land shall be vested in the Government.

[164] The term "roadbed", in railway parlance, means:

> 1 a: the bed on which the ties, rails, and ballast of a railroad rest.
> b: the ballast or the upper surface of the ballast on which the ties rest.
>
> [*Merriam Webster Dictionary*, online edition, *sub verbo* "roadbed", https://www.merriam-webster.com/dictionary/roadbed]

[165] Dr. Martin explained that the term "ballast" refers to the works on which the ties and rails are situated.

[166] There are no "station grounds…and other appurtenances" on the right of way lands within the Reserves.

[167] The width of the right of way vastly exceeds the width of the roadbed or ballast for the line of rail. Using the scale set out on the photomap, overlaid by the survey of the right of way, it is apparent that 99 feet centred on the middle of the line of rail leaves a flat area much wider than the roadbed on both sides.

[168] I find that the lands granted were excessively wide, contrary to section 9 of the *Consolidated Railway Act*.

XI. COMPENSATION FOR ILLEGAL DISPOSITION

[169] As noted above, compensation in the case of an illegal disposition of reserve lands is to be based on the current unimproved value of the lands.

[170] Where the *SCTA* paragraph 14(1)(d) ground is established, paragraph 20(1)(h) applies as well:

> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g); [emphasis added]

[171] Because paragraph 14(1)(d), *SCTA*, specifically deals with "reserve lands", I assume for the purposes of the 14(1)(d) submission that the term "claimant's lands" in paragraph 20(1)(g) and (h) means *Indian Act* reserve lands. Loss of use under paragraph 20(1)(h) is therefore compensable to the extent that it occurred after the Reserves came under the *Indian Act*. As the "takings" without statutory authority occurred in 1912, 1927 and 1928 it is necessary to address the issue over the date of reserve creation. The date of reserve creation is also relevant to the analysis of fiduciary duties that may have applied with respect to the reserves as allotted in 1878, as discussed further below.

XII. RESERVE CREATION IN THE RAILWAY BELT

A. Reserve Creation Generally: Legal Test

[172] The Respondent, relying on the reasoning in *Wewaykum* but acknowledging factual differences relating to land in the Railway Belt, argues that the Reserves remained provisional until 1930. That is when the two Crowns reached the agreement found in Order in Council PC 208-1930 and the Memorandum of Agreement dated February 20, 1930, brought into force by:

An Act to approve of an Agreement which has been arrived at between the Dominion and the Province respecting the Re-Transfer of the Railway Belt and the Peace River Block, SBC 1930, 20 Geo 5, c 60; and, *The Railway Belt and Peace River Block Act*, SC 1930, c 37.

[173] In *Wewaykum*, Binnie J. set out the factors applicable to the full establishment of reserves:

> The legal requirements for the creation of a reserve within the meaning of the *Indian Act* were considered by this Court in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816, 2002 SCC 54, released June 20, 2002. They include an act by the Crown to set apart Crown land for use of an Indian band combined with an intention to create a reserve on the part of persons having authority to bind the Crown and practical steps by the Crown and the Indian band to realize that intent (para. 67). [para 13]

[174] In *Wewaykum*, the Supreme Court described, by overview, part of the history of reserve creation in British Columbia:

> In 1924, the British Columbia government as well as the federal government finally adopted the McKenna McBride recommendations, as modified by the Ditchburn Clark Report. The federal Order-in-Council P.C. 1265, made July 19, 1924, provided that such adoption was in "full and final adjustment and settlement of all differences in [this matter] between the Governments of the Dominion and the Province, in fulfilment of the said Agreement of the 24th day of September, 1912 [establishing the McKenna McBride Commission], and also of Section 13 of the Terms of Union . . .". Provincial Order-in-Council No. 911 made July 26, 1923, was to the same effect. This eventually led to the issuing of provincial Order-in-Council No. 1036 on July 29, 1938, which transferred administration and control of the subject lands to the Crown in right of Canada. While the Department of Indian Affairs treated the "reserves" in British Columbia as being in existence prior to these formal enactments, there was a good deal of confusion in the early years regarding the precise nature of the federal interest under s. 91(24) of the *Constitution Act, 1867*. It was not until the Judicial Committee of the Privy Council decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, that it was made clear that under s. 91(24) all "the Dominion had [was] a right to exercise legislative and administrative jurisdiction — while the territorial and proprietary ownership of the soil was vested in the Crown for the benefit of and subject to the legislative control of the Province . . ." (see *Ontario Mining Co. v. Seybold* (1899), 31 O.R. 386 (H.C.), at p. 395, aff'd (1900), 32 O.R. 301 (Div. Ct.), aff'd (1901), 32 S.C.R. 1, aff'd [1903] A.C. 73 (P.C.)). More importantly, given the critical role of "intention" in the creation of reserves (*Ross River*, *supra*, at para. 67), it was clear that at the highest levels of both governments the *intention* was to proceed by way of mutual agreement. An 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. [emphasis added; para 51]

[175] The date found for determination of the "critical role" of intention (*Wewaykum* at para 51) was July 29, 1938, the date of provincial Order in Council No. 1036 "which transferred administration and control of the subject lands to the Crown in right of Canada".

[176] It is significant that Binnie J. based his finding of federal intention on the fact that until the Province transferred the land, land previously allotted as reserve "might be withdrawn from the federal-provincial package at any time" (para 51). This adverts to the fact that the Province could refuse to transfer administration and control of the land to Canada. In the present matter, however, the Railway Belt lands, including the Reserves, were transferred to Canada in December 1883.

[177] In my opinion, a federal intention to create a reserve on land that the province had no power to withdraw from the "federal-provincial package" could, if supported by the evidence, be found.

B. Reserve Creation in the Railway Belt

1. *Wewaykum* Distinguishable

[178] The Court did not, in *Wewaykum*, consider the unique circumstances of reserves allotted within the Railway Belt.

[179] Outside of the Railway Belt the creation of reserves by the exercise of federal jurisdiction under section 91(24) of the *Constitution Act*, 1867, depended on the transfer of administration and control of the land from the Province to the Dominion. By the end of 1883, however, this was no longer the case within the Railway Belt. Federal jurisdiction was established upon the transfer of the land to Canada effective December 19, 1883.

[180] Binnie J. said, in *Wewaykum*, that "it was clear that at the highest levels of both governments the *intention* was to proceed by way of mutual agreement" (emphasis in original; para 51). This, however, was the only option available to Canada as it could not "create" a reserve until the Province transferred the land to Canada as required by the *Terms of Union*. No such impediment existed in relation to lands in the Railway Belt.

[181] I find, with regard to the date of reserve "creation", that *Wewaykum* is distinguishable on

the basis that administration and control of the Railway Belt had been transferred to Canada on December 19, 1883. The Province could not unilaterally remove this land from the "federal-provincial package". The Dominion government had the power to unilaterally "create" reserves.

2. Reserve Creation

a) Mutual Intention

[182] In *Ross River*, the Supreme Court considered the legal requirements for creation of a reserve:

> Thus, in the Yukon Territory as well as elsewhere in Canada, there appears to be no single procedure for creating reserves, although an Order-in-Council has been the most common and undoubtedly best and clearest procedure used to create reserves. (See: *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at pp. 674-75; Woodward, *supra*, at pp. 233-37.) Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council, or on the basis of specific statutory provisions creating a particular reserve. Steps must be taken in order to set apart land. The setting apart must occur for the benefit of Indians. And, finally, the band concerned must have accepted the setting apart and must have started to make use of the lands so set apart. Hence, the process remains fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record. [para 67]

[183] In *Wewaykum*, Binnie J. spoke of "the critical role of 'intention' in the creation of reserves" (para 51). There, it was a matter of mutual intention as the Province held Crown title to the land set apart as reserve.

[184] The question whether reserve creation in the Railway Belt depended on mutuality of intention on the part of the Province and Canada is one of fact, to be decided based on the evidence in the present matter.

C. Intentions of the Province and Canada Concerning Reserve Creation

1. The Joint Indian Reserve Commission (JIRC)

[185] The mutual intention of the Province and Canada to establish reserves was first expressed in Article 13 of the *Terms of Union*, 1871. The process for the allotment of reserves was established in 1876 with the formation of the JIRC.

[186] In 1875-1876, Canada and British Columbia approved, by Orders in Council, the establishment of the JIRC to address the Indian land question in the Province. The Memorandum attached to the Governor in Council's approval on November 10, 1875, provided in part:

> 1. That with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis, the whole matter be referred to three Commissioners, one to be appointed by the Government of the Dominion, one by the Government of British Columbia, and the third to be named by the Dominion and the Local Governments jointly.

[187] The Commissioners were directed thusly:

> 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.

[188] Sproat was appointed jointly by the Province and the Dominion as the sole Commissioner. Given the mandate of the Commissioners it may be assumed that the "Indian Nation[s]" would have been assured of the finality of their allotments.

[189] The reserve was allotted by Sproat's Minutes of Decision of June 18, 1878. There can be no question of the sincerity of the Province and Canada at the time Sproat was appointed sole Commissioner of the JIRC. PC 170-1878 provided:

> By this means the continuity of the present Commission would be preserved and the Indians would have a guarantee that the same policy which has hitherto guided the Commission in dealing with their Reserves would be continued in the future.

[190] In April 1878, the Province agreed that "all Mr. Sproat's decisions regarding Indian Land questions in the Electoral District of Yale be regarded as final excepting those of which he shall have received notice from either Mr. Teague or Mr. Ussher Government Agents, to lay over"; IR 5 and IR 7 were in the Electoral District of Yale (ASOF at para 14).

[191] The condition of approval by the Province's Chief Commissioner of Lands and Works (CCLW) was satisfied on June 24, 1887, when F.G. Vernon, the Province's CCLW, approved Jemmett's 1885 survey of IR 5 and IR 7. This removed any possibility of the Province objecting to the "creation" of the Reserves on the ground of non-compliance with the agreement that

established the JIRC.

2. Agent Possessing Requisite Authority

[192] Crown intention must be in evidence: "Whatever method is employed, the Crown must have had an intention to create a reserve. This intention must be possessed by Crown agents holding sufficient authority to bind the Crown. For example, this intention may be evidenced either by an exercise of executive authority such as an Order-in-Council" (*Ross River* at para 67).

[193] LeBel J. explained in *Ross River* that the perspective of the First Nation asserting reserve creation must be considered, including whether an agent representing the Crown in "very important, authoritative functions" made representations about reserve creation.

[194] The appointment of Sproat as sole Commissioner of the JIRC, which was created by executive orders, "with a view to the speedy and final adjustment of the Indian Reserve question in British Columbia on a satisfactory basis" 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" settles the questions of intention as of June 1878. However, as will be recounted below, the Province resiled from its commitment and Canada considered itself left with little choice but to agree to the creation of a second commission to review the JIRC allotments. Whether it had a choice is not in issue in the present matter.

3. Acceptance by the Siska Band

[195] Did the Siska Band take "practical steps" after the allotments? Well, it occupied the land before the allotments and remained in occupation at all times up to the present.

4. Unilateral Creation of a Reserve

[196] The next question is whether the "creation" of the reserve based on mutual agreement and federal intentions, but without an express provincial executive order, would in the sense of the term used in *Wewaykum*, be "unilateral".

[197] In *Wewaykum*, the Crown could not unilaterally create reserves on land under provincial administration and control. But in the present matter the land came under federal administration

and control on December 19, 1883. Thereafter, the Crown exercised exclusive control over the interest of the bands in the reserves and the issuance of letters patent to the CPR Company. The condition of approval by the Province's CCLW was satisfied on June 24, 1887, when F.G. Vernon, CCLW, approved Jemmett's 1885 survey of IR 5 and IR 7. There would therefore be nothing "unilateral" in the Crown giving effect after June 24, 1887 to the mutual intention behind the 1876 creation of the JIRC and the 1878 allotment by Sproat.

[198] It is evident that the officers of the Crown at all times after the transfer considered the DIA the Ministry responsible for the reserves. All dealings of the Department of Railways and Canals in relation to reserve lands along the right of way were with the DIA. While this may have been informal at the outset it became formal when administration of the Railway Belt reserves passed to the DIA by Order in Council PC 2983, dated December 29, 1911. It is noted that PC 2983 adopts the 1886 schedule of reserves from PC 379. This schedule omits IR 5 and IR 7. However, the DIA did in fact administer the Reserves along with those on the 1886 list, including the issuance of letters patent, without involvement of the Department of Railways and Canals.

5. Provincial Recalcitrance

[199] However, the Province threw a spanner into the works by claiming a reversionary interest in land that it had transferred to Canada, and previously approved as reserve. This occurred after the grant to the CPR Company of an interest for the right of way through a reserve of the Skuppah Band. Relying on its claim of a reversionary interest in reserve lands within the Railway Belt, the Province demanded compensation from the CPR Company and refused the CPR Company's application to register title in the Land Title Office. What ensued led to a clear expression of the intention of Canada concerning the full recognition of the reserves.

[200] Canada rejected the CPR Company's claim for reimbursement of money expended to clear the interest claimed by the Province on the basis that it had the title and right to convey an unburdened interest. However, the Province had a card to play: it refused to register the federal plans for the right of way in the Land Title Office.

[201] The full provincial position on the reserves allotted by the JIRC had been presented by a delegation from the Province that had travelled to Ottawa. Despite its prior approval of the

allotments, the Province claimed that the JIRC allotments were excessive and demanded an "immediate readjustment". It also asserted a "reversionary interest" in all reserve lands in the Province, including those within the Railway Belt. The following appears in Premier McBride's report to the Lieutenant-Governor dated February 12, 1912 (JCBD, Vol 3, at Tab 0489):

> The title of the Crown in the right of the Province to Indian reserve lands in British Columbia was never questioned until within the past few years, when certain objections were raised thereto by the Department of Justice at Ottawa. We still maintain that the reversionary interest in all Indian reserves is the property of the Province, and that it is essential in the public interest that the attitude of the Province be maintained. It may be well, in this connection, to refer to the large excess acreage held on account of Indian reserves in British Columbia, and to the necessity, in view of the rapid increase in white population, of having an immediate readjustment of all reserves, so that the excess acreage may be released to the Province.

[202] Canada appointed J. McKenna as a Special Commissioner tasked to respond to this new demand from the Province. In a lengthy memorandum dated July 29, 1912, to Premier McBride (JCBD, Vol 3, at Tab 0510), McKenna took issue with the claim to a reversionary interest in land allotted by the JIRC, as these were considered final. With specific regard to reserves within the Railway Belt, the memorandum stated that even if there existed a reversionary interest in the land outside the Railway Belt no such interest could exist within it as the title had been conveyed to Canada without limitation. This memorandum stated the federal position with regard to reserves generally, including those within the Railway Belt. McKenna adverted to the fact that Canada and the Province had given assurances of finality to the Indians based on the contents of the agreement that established the JIRC.

[203] I note at this juncture that nowhere in the correspondence and other documents in evidence is there anything that establishes a federal commitment at the time of the 1883 transfer of the Railway Belt lands for the recognition or return to the Province of any interest, reversionary or otherwise. A Commission of Inquiry was established on March 8, 1927, to look into the matter. It concluded that the Province had no legal claim to the return of the Railway Belt lands (JCBD Addendum at Tab 0139).

[204] The formal position of Canada as advanced by McKenna is evidence of the intention of the Crown, Canada, to treat the reserves allotted by the JIRC as finally established.

[205] The Province could have no legitimate complaint as it had "[i]n April 1878" agreed that "all Mr. Sproat's decisions regarding Indian Land questions in the Electoral District of Yale be regarded as final excepting those of which he [had] received notice from either Mr. Teague or Mr. Ussher Government Agents, to lay over"; IR 5 and IR 7 were in the Electoral District of Yale (ASOF at para 14).

[206] Canada had the power to "create" the Railway Belt reserves as it assumed full administration and control upon the transfer of 1883. As noted above, acting on this intention would not be "unilateral" in the sense discussed in *Wewaykum*.

[207] However, the Province still held the trump card over reserve creation outside of the Railway Belt. As of 1912, there had not been a conveyance to Canada of land allotted as reserve located outside of the Railway Belt. The Province insisted that the reserves be readjusted as the settler population had grown after the JIRC "final" allotments were made. The Province sought to reduce the amount of arable land in the reserves and make the land available for farming by newcomers. Canada, although it rejected the provincial claim to a reversionary interest in land within the Railway Belt, wanted to address the Province's claim to a reversionary interest as title to reserves outside of the Railway Belt remained with the Province.

[208] The Province insisted that all of the JIRC reserves be reviewed. Its concern was over the larger reserves which included arable land.

6. McKenna-McBride Commission

[209] On September 24, 1912, Canada and the Province entered the McKenna-McBride Agreement. The Commission had these powers:

> 2. …to adjust the acreage of Indian Reserves in British Columbia in the following manner:-
>
> > (a) At such places as the commissioners are satisfied that more land is included in any particular reserve as now defined, than is reasonably required for the use of the Indians of that tribe or locality, the reserve shall, with the consent of the Indians, as required by the Indian Act, be reduced to such acreage as the commissioners think reasonably sufficient for the purposes of such Indians.
> > (b) At any place at which the commissioners shall determine that an insufficient quantity of land has been set aside for the use of the Indians of that locality the commissioners shall fix the quantity that ought to be

> added for the use of such Indians, and they may set aside land for any band of Indians for whom land has not already been reserved.
>
> …
>
> 8. …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. [Memorandum of Agreement between J. McKenna, Special Commissioner, and Hon. Sir Richard McBride, Premier; JCBD, Vol 3, at Tab 0514]

[210] The question becomes this: Notwithstanding the mutual intention that the JIRC allotment of reserves would be "final", and title to the Railway Belt reserves had passed to the Dominion, did reserve "creation" remain dependent on conditions set out in another "mutual agreement" made between the Province and Canada?

[211] The answer is "no". On July 29, 1912, Canada informed the Province that it would not countenance the reduction or removal of reserves in the Railway Belt from the "package". It had already, on December 29, 1911, put administration of the reserves, without alteration of their boundaries and acreages, in the DIA.

[212] The federal position remained constant throughout the remainder of the process that resulted in the 1938 transfer to Canada of title to the reserves outside the Railway Belt. The steps in that process are discussed below.

7. Mutual Intention: the Ditchburn-Clark Review

[213] The McKenna-McBride Commission had the power to adjust the acreage of reserves. The mutual intention of the Province and the Dominion in agreeing to establish the Commission was "to settle all differences between the Governments of the Dominion and the Province respecting Indian lands and Indian affairs generally" (Memorandum of Agreement; JCBD, Vol 3, at Tab 0514). However, Canada put the Province on notice that the Railway Belt reserves could not be altered. As title to the land was vested in Canada, the Province had no power to reclaim them unilaterally.

[214] The McKenna-McBride report was delivered to the governments in June 1916. It was not

accepted by the Province. The Commission had ordered additions to reserves. Major J.W. Clark, the provincial official responsible for soldier settlements in the period following the First World War, renewed the provincial concern over allotments of arable land.

[215] The Province wanted a review of all the allotments.

[216] In 1924, British Columbia and Canada established a joint federal-provincial review of the McKenna-McBride Commission's report pursuant to the *Indian Affairs Settlement Act*, SBC 1919, c 32 and *British Columbia Indian Lands Settlement Act*, SC 1920, c 51. W.E. Ditchburn, Chief Inspector of Indian Agencies in British Columbia, was appointed as the federal representative and Major J.W. Clark was appointed as the provincial representative to this review.

[217] The review proposed that some reserve lands be "cut-off" in the Railway Belt. The Siska Reserves would remain as allotted.

[218] Canada balked at changes to the Railway Belt reserves in the review. Newcombe, the Deputy Minister of Justice, provided the DIA with his opinion that the transfer of the Railway Belt to Canada disposed of any claim to a reversionary interest. This repeated the federal position that was taken before the McKenna-McBride Commission was established.

[219] Ditchburn, the Chief Inspector of Indian Agencies, informed the Province of the federal position that the Railway Belt reserves had been conveyed without limitation to Canada, as called for by Article 13 of the *Terms of Union*, upon the 1883 transfer.

[220] Duncan Campbell Scott, the Deputy Superintendent of the DIA, remained adamant that the Railway Belt reserves long since confirmed by the McKenna-McBride Commission could not be affected by the Ditchburn-Clark review. His views were presented to Premier Patullo by letter dated April 9, 1923:

BC Lands 026076-3

DEPARTMENT OF INDIAN AFFAIRS

CANADA

Office of the

Deputy Superintendent General

Ottawa

April 9, 1923.

Dear Mr. Patullo,-

I have to acknowledge the receipt of your letter dated at Ottawa, April 6th, on the proposed action with reference to the Report of the Royal Commission on Indian Affairs for the Province of British Columbia.

I am directed by the Honourable the Superintendent General to say that he agrees with you that the Report of the Royal Commission should now be accepted, subject to the changes and modifications which may be agreed to. Mr. W. E. Ditchburn, Chief Inspector of Indian Agencies for the Province of British Columbia, has reported the result of his conference with Colonel Clark, and his reports agree in essential particulars with the information given in your letter of April 6th. The schedules of reserves, with the proposed changes and additions, have been checked in Ottawa by Mr. Cathcart, one of your officials, and the officials of the Department of Indian Affairs, and a schedule of the reserves has been prepared. There would appear to be no reason, therefore, that the powers given the Governments by the statute should not be invoked, and the revised schedule of confirmations, cut-offs, and new reserves be adopted by both Governments.

In order that the Indians might have an opportunity of examining the Report of the Royal Commission and of making representations to the Governments, this Department engaged Mr. J.A. Teit to interview the different tribes and present their views. Mr. Teit died before he could present a final or complete return, and it was thought good policy on the part of this Department to appoint Indians to continue the work. They presented a supplementary list of requirements, which has been, I believe, in part considered by Major Clark. You refer to this supplementary list on page 2 of your report, and give reasons why granting these additional reserves would be adverse to the public interest. The Honourable the Superintendent General desires me to urge upon you the advisability of having a thorough examination of these supplementary requirements and of allowing them wherever it is possible to do so. As this is a final adjustment of all claim for Indian reserves between the Dominion and the Province under the provisions of Clause 13 of the Terms of Union, we feel very strongly that these applications on behalf of the Indians should receive very careful and sympathetic consideration, and should not be refused unless for very weighty reasons.

Dealing with the reserves in the Railway Belt to which reference is made on page 3 of your letter, I have to inform you that in 1915-16 when the matter came up for consideration, the Department was advised by the Law Officers of the Crown that in their opinion the entire beneficial interest of the Province in the Railway Belt, which passed to the Dominion by the statutory transfer, included any interest which the Province had in lands which had been or might thereafter be set apart as Indian reserves. Notwithstanding this opinion it was thought good policy to allow the Commission to report on reserves in the Railway Belt, and Dr. McKenna was informed on February 2nd, 191[illegible] that it was the opinion of

> the Department that "the parties interested would lose valuable assistance in settling the boundaries of Indian reserves within the Belt if they failed to take advantage of the Royal Commission. 1 would, therefore, say that we shall expect the Royal Commission to report on Indian Reserves within the Railway Belt with the same particularity as in other localities. The legal position cannot be in any way altered by the acceptance of such a report."
>
> There is no reason why a different view should now be taken of this matter, and it is, therefore, proposed to include the reserves within the Railway Belt in the schedule. [emphasis added; JCBD, Vol 4, at Tab 0772]

[221] On July 26, 1923, by provincial Order in Council 911, British Columbia approved and confirmed the final report of the McKenna-McBride Commission.

[222] On July 19, 1924, by Order in Council PC 1265, Canada approved and confirmed the final report of the McKenna-McBride Commission, including the findings of the McKenna-McBride Commission with reference to reserves in the Railway Belt.

[223] There were no reductions or cut-offs from the Railway Belt reserves. Consistent with the transfer of administration of the reserves to the DIA on December 29, 1911, and the formal position taken by Canada from July 29, 1912, onward, PC 1265-1924 includes this paragraph:

> As the lands in the Railway Belt are under the sole jurisdiction of the Dominion, the Minister recommends that the findings of the Royal Commission with reference to reserves within the Railway Belt be confirmed, but that no reduction or cut-off be made in the case of the reserves, as recommended by the said Royal Commission.

[224] The form of conveyance of land outside the Railway Belt remained unresolved. A further step was necessary.

8. The Scott-Cathcart Agreement

[225] In 1928, Canada and British Columbia entered into negotiations for the transfer of the Railway Belt lands back to British Columbia.

[226] By agreement dated March 22, 1929, Duncan Campbell Scott, the Deputy Superintendent General of Indian Affairs, and Henry Cathcart, the provincial Superintendent of Lands, were designated by their respective governments to recommend conditions for the retransfer of the Railway Belt. They agreed upon the terms of the "tenure and mode of administration" of the Indian reserves in the Railway Belt.

[227] Scott and Cathcart further agreed that the Indian reserves in the Railway Belt would be excepted from the transfer and held in trust and administered by Canada on the terms and conditions set forth in the 1912 McKenna-McBride Agreement and in the form of conveyance agreed to for Indian reserves outside the Railway Belt.

[228] The Agreement, together with the schedule of reserves in the Railway Belt and the draft form of conveyance, was approved by order of the Governor General in Council dated February 3, 1930, PC 208, and by order of the Lieutenant Governor in Council dated September 24, 1930.

[229] PC 208-1930 provides for the holding of the reserve lands by Canada on the terms of the Scott-Cathcart Agreement. Paragraph 6 of that Agreement pertains to reserves in the Railway Belt and says "…we have agreed that the Indian Reserves set apart by the Dominion Government…shall be excepted from the reconveyance…and shall be held in trust and administered by the Dominion under the terms and conditions set forth in the [McKenna-McBride] Agreement dated 24th. September, 1912".

[230] The schedule attached to PC 208 provided information on the legal description, the acreage and the date of confirmation. The schedule stated the "date of confirmation" for IR 5 and IR 7 to be "O.C. 25th January, 1913".

[231] Section 13 of the Memorandum of Agreement between Canada and British Columbia dated February 20, 1930, provided that lands included within Indian reserves in the Railway Belt "shall <u>continue</u> to be vested in Canada in trust for the Indians on the terms and conditions set out in a certain order of the Governor General of Canada in Council approved on the 3rd day of February, 1930 (P.C. 208)" (emphasis added).

[232] The February 20, 1930, Memorandum of Agreement between Canada and British Columbia on the re-transfer was brought into force by reciprocal provincial and federal legislation (*An Act to approve of an Agreement which has been arrived at between the Dominion and the Province respecting the Re-Transfer of the Railway Belt and the Peace River Block*, SBC 1930, 20 Geo 5, c 60; *The Railway Belt and Peace River Block Act*, SC 1930, c 37), and subsequently by an act of the Parliament of the United Kingdom, the *Constitution Act*, 1930 (UK), 20-21 Geo V, c 26.

D. Analysis and Conclusion

[233] In *Ross River*, LeBel J. explained that the perspective of the First Nation asserting reserve creation must be considered, including whether an agent representing the Crown in "very important, authoritative functions" made representations about reserve creation. Such representations "further elaborate" the fiduciary relationship and, "the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation in an effort to induce it to enter into some obligation or to accept settlement on a particular parcel of land" (*Ross River* at paras 64–65).

[234] The JIRC was established by executive orders of the Province of British Columbia and Canada to, in consultation with the Indigenous Nations, "fix and determine for each nation separately the number, extent and locality of the Reserve or Reserves to be allowed to it". Commissioner Sproat represented the Crown, both provincial and federal, in this authoritative executive function.

[235] The 1878 allotment was made by Commissioner Sproat acting under the authority of the JIRC. Thus it was allotted by the joint actions of the Province and Canada in a process established by reciprocal executive orders. The CCLW for the Province approved Jemmett's survey of IR 5 and IR 7 on June 24, 1887. This was effective to conclusively "set apart" provincial Crown land for the use and benefit of the Siska Band.

[236] The land was transferred to Canada in 1883. There is no reason to think that Canada would not, upon receiving the proprietary title, or at the latest the approval of the CCLW in 1887, have acted in accordance with its honourable obligations and held the land in trust for the Siska as required by Article 13 of the *Terms of Union*, 1871. However, Canada later agreed to a review of the allotments within and outside of the Railway Belt, as the Province refused to transfer proprietary title to the latter until the allotments had been reviewed by another Commission and its claim to a reversionary interest in all land allotted as reserve was resolved. Thus came the McKenna-McBride Commission.

[237] Despite the mutual intention of the Province and Canada to consider the matter of the reserves settled upon their confirmation by the Commission, the Province insisted on another review. So, along came the Ditchburn-Clark review.

[238] Although Canada entered the McKenna-McBride Agreement on September 24, 1912, and later participated in the Ditchburn-Clark review, its position with respect to the Railway Belt reserve allotments remained constant. Canada had, since at least July 29, 1912, formally rejected the Province's claim to a reversionary interest in reserves allotted within the Railway Belt. Therefore, Canada's intention to hold the Railway Belt reserves as fully "created" was by then evident.

[239] There remained the matter of the form of conveyance to Canada of land allotted by the JIRC as reserve outside of the Railway Belt. This was to be addressed by Scott-Cathcart. The Scott-Cathcart Agreement confirmed that the Indian reserves in the Railway Belt would be "excepted" from the transfer and held in trust and administered by Canada on the terms and conditions set forth in the 1912 McKenna-McBride Agreement:

> 6. Regarding Indian Reserves in the Railway Belt and Peace River Block, we have agreed that the Indian Reserves set apart by the Dominion Government in the Railway Belt and in the Peace River Block (as shewn in Schedule hereto annexed), and also the Indian Reserves set apart before the transfer of the Railway Belt and the Peace River Block by the Province to the Dominion shall be excepted from the re-conveyance of the Railway Belt and the Peace River Block, and shall be held in trust and administered by the Dominion under the terms and conditions set forth in the Agreement dated 24th September, 1912, between Mr. J.A.J. McKenna and the Hon. Sir Richard McBride (as confirmed by Dominion Statute, Chapter 51 of the Statutes of 1920, British Columbia Statute, Chapter 32 of the Statutes of 1919) in the Dominion Order-in-Council Number 1265, approved 19th July, 1924, and Provincial Order-in-Council Number 911, approved 26th of July, 1923, and in the form of conveyance marked "A" of the Indian Reserves outside the Railway Belt and the Peace River Block. [Scott-Cathcart Agreement, March 22, 1929; JCBD, Vol 5, at Tab 0922]

[240] This, in effect, affirmed what had previously been agreed upon by the Province and Canada in 1912. The McKenna-McBride Agreement had been entered based on the authority of executive orders of the Province and Canada. The related Constitutional imperative is found in Article 13 of the *Terms of Union*, 1871:

> 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…

[241] If the only executive order pertaining to reserves was PC 208-1930, it would be arguable that reserve creation for Railway Belt reserves occurred in 1930. This, however, was preceded by numerous executive orders of the Province and Canada pertaining to reserves. The terms on which Canada would hold reserves in trust had been established by Article 13, *Terms of Union*, 1871, and were reflected in provincial Orders in Council authorizing the McKenna-McBride Agreement. While the acts and proceedings of the McKenna-McBride Commission remained subject to the approval of the two governments, the terms on which the Dominion would hold the reserves were not, as the terms were clearly set out in Article 13.

[242] As Canada did in fact participate in the review of the Railway Belt reserves by McKenna-McBride and Ditchburn-Clark, executive action affirming the outcome of these reviews was necessary in order to address the separate matter of the return of the remaining land in the Railway Belt. Accordingly, PC 208-1930 provided that "Indian Reserves set apart by the Dominion Government…shall be excepted from the reconveyance".

[243] The affirmation of Article 7 of the McKenna-McBride Agreement does not establish, but merely recites, what was mutually intended by the parties as of September 24, 1912.

[244] The remaining question is over the date on which Canada expressed the intention to identify and hold reserve lands to which it held the proprietary title, as required by Article 13.

[245] The schedule to PC 208-1930 stated the "date of confirmation" for IR 5 and IR 7 to be "O.C. 25th January, 1913". However, the determination of the date a reserve is established in the process for establishing a reserve is, as found in *Ross River*:

> …fact-sensitive. The evaluation of its legal effect turns on a very contextual and fact-driven analysis. Thus, this analysis must be performed on the basis of the record. [para 67]

[246] Consider the circumstances: officers of the Crown at all times after 1878 considered the DIA to be the department responsible for the Reserves. All dealings of the Department of Railways and Canals in relation to reserve lands along the right of way were with the DIA. After the establishment of the right of way, the Department of Railways and Canals continued to deal

with the DIA for compensation and conveyancing purposes. The government constructed the railway and turned over its operation to the CPR Company. The CPR Company had a contractual right but no legal tenure. Administration of the Railway Belt reserves was retransferred to the DIA by Order in Council dated December 29, 1911. The Reserves were intact as set apart by Sproat in 1878. This is a manifestation of Canada's intention to treat the reserves as "created" as of December 29, 1911. This enabled the responsible department, namely the DIA, to issue letters patent to the CPR Company.

[247] It is noted that PC 208-1930 permitted the form of conveyance to provide for the provincial "resumption" of up to 1/20th of reserves that were confirmed as of January 25, 1913. This first appeared in the Scott-Cathcart phase of the relationship between the Province and Canada. It does not establish that the date of the intention of the Crown, Canada, to treat the reserves as "created" was 1930. Scott-Cathcart was concerned only with the form of conveyance. The interest to be conveyed was the title.

[248] I find that IR 5 and IR 7 became reserves within the meaning of that term in the *Indian Act* on December 29, 1911, the date on which administration of the Railway Belt reserves passed to the DIA.

[249] I have not overlooked the fact that on May 7, 1912, the Minister of the Interior recommended that the Governor in Council withdraw the land comprised within the surveyed reserves be withdrawn from the operation of the *Dominion Lands Act* and be reserved for the Indians under section 76 (a) of that *Act*. The record does not reveal whether this recommendation was given effect. In any event, the intention of the Crown to accept the Reserves as coming fully within federal jurisdiction had previously been expressed.

[250] The Respondent speaks of the significance of PC 205, 25th January 1913, in its Memorandum of Fact and Law:

> In the alternative, IR5 and IR7 became reserves within the meaning of the *Indian Act* no earlier than January 25, 1913. This was the date when the Governor in Council withdrew IR5 and IR7 from the operation of the regulations governing the administration of land in the Railway Belt pursuant to Order in Council P.C. 205. In doing so, it is arguable that the Governor in Council manifested the intention to create reserves. [para 93]

[251] PC 205-1913 provides for the withdrawal from the regulations governing the lands in the Railway Belt as "have been or may be reserved for Indians". The inclusion of lands that "have been…reserved" indicates that the application of the regulations had no bearing on whether reserves had previously been established. If the regulations had such effect I would tend toward the Respondent's submission, and would find that January 25, 1913, was the operative date.

XIII. FIDUCIARY DUTY

A. Indigenous Interest in Provisional Reserves

[252] The lands allotted to Siska in 1878 by Commissioner Sproat were, at minimum, provisional reserves. The Siska had a cognizable interest and the Crown had discretionary control over their interest (*Wewaykum*).

[253] It is assumed for the purposes of determining the present matter that land set apart in British Columbia for the use and benefit of First Nations are reserves within the meaning of the term in the *SCTA* only when the legal title is vested in the Crown, Canada. It is also assumed for the present analysis that, although the IR 5 and IR 7 land vested in Canada in December 1883, bringing the land under the *Indian Act* depended on further steps by government.

[254] Does this mean that Siska had no legal interest in the Reserves while they remained provisional, or that their interest derived from the provisional allotment?

[255] Their interest was not an interest in land that emanated from feudal tenures. Nor did it originate with the 1878 allotments, by which the Province and Canada recognized the Siska as in lawful possession. As they were in occupation before and after the allotments, their interest was substantial and practical.

[256] In *Wewaykum*, Binnie J. took it into account that the reserve in dispute was not in the traditional territory of either First Nation that made cross-claims to their respective reserves. It was noted that in *Guerin v R*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*], Dickson C.J. observed that the Musqueam reserve was within its ancestral territory:

> Thus in *Guerin* itself, where the Crown failed to carry out its mandate to negotiate on particular terms a lease of 162 acres of an existing Indian reserve to the Shaugnessy Heights Golf Club in suburban Vancouver, Dickson J. (as he then

was) was able to distinguish the "political trust" cases as inapplicable in a passage that should be set out in its entirety (at pp. 378-79):

> ... Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. For this reason *Kinloch v. Secretary of State for India in Council, supra*; *Tito v. Waddell (No. 2), supra*, and the other "political trust" decisions are inapplicable to the present case. The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision. [Emphasis added.]
>
> …
>
> It is true that Dickson J. also noted, at p. 379, that for purposes of identifying a fiduciary duty:
>
> > It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases ....
>
> However, he was speaking of disposition of the Indian band interest in an *existing* Indian reserve in a transaction that predated the *Constitution Act, 1982*. Here we are speaking of a government program to *create* reserves in what was not part of the "traditional tribal lands". [emphasis in original; *Wewaykum* at paras 76–77]

[257] The Supreme Court is not given to casual mention of facts irrelevant to their findings of law.

[258] In *Wewaykum*, the Supreme Court was presented with a claim by two *Indian Act* bands, neither of which an ancestral interest in the reserves each had claimed as theirs. The matter was disposed of on the basis that neither could make a claim in equity, and that the claims were statute barred in any event. The Court nevertheless addressed the matter of Crown fiduciary duties in relation to "provisional" reserves. While the findings of law are binding on the lower courts and the Tribunal, the presence of distinguishing facts may render those findings inapplicable (Master Linda Abrams, Kevin McGuinness and Jay Brecher, *Halsbury's Laws of Canada - Civil Procedure* (2017 Reissue), at HCV-31 (QL)):

> A statement of law made in a previous case is not binding where the essential facts of the case are distinguishable. In some cases, the court of immediate decision will conclude that the facts of the case before it are so different from those that were before the judges who issued the previous decisions that it would be unjust to apply the rule laid down in the earlier cases. In order for this option to be open, either there must be some additional facts present in the immediate case that were not present in a previous case, or the implications of the facts

> proven in the immediate case must be of a significantly different character than were proven in the previous case. [footnotes omitted][emphasis added]

[259] While the significance of the reference to traditional territories in *Guerin* and *Wewaykum* is not explained, it must be understood that the Indigenous interest in land set apart as reserve by government actions had a legal consequence if the land was within a traditional territory; something beyond an occupancy interest based on the allotment of the land as reserve and the subsequent application of the *Indian Act*.

[260] In *Guerin*, Dickson C.J. found that the Indigenous interest in reserves is the same as the interest in Aboriginal title lands. The interest is *sui generis*, incapable of definition by comparison to conventional interests in land, but alike in some practical aspects.

[261] Reserve creation in Canada generally took place under Treaties, in which the Crown promised that reserves would be established. The Colony refused, with the limited exceptions of the Douglas Treaties, and later the Province refused to treat with Indigenous groups, hence the need for another process to bring land allotted as reserve within the section 91(24) jurisdiction and the protection of the *Indian Act*.

[262] Reserve creation in the Colony and later the Province of British Columbia is nevertheless grounded in recognition of Indigenous occupation of discrete territories by distinct groups (*Royal Proclamation,* 1763). In *Canada v Kitselas First Nation*, 2014 FCA 150, [2014] 4 CNLR 6 [*Kitselas FCA*], the Court adverted to the decision of the Tribunal under judicial review (*Kitselas First Nation v Her Majesty the Queen in Right of Canada*, 2013 SCTC 1 [*Kitselas*]):

> While recognizing that the 10.5 acres that had been excluded from the reserve were not held in trust for the Kitselas, nor were they considered part of a "provisional reserve", the Judge nevertheless found that the Kitselas had a cognizable Indian interest in the excluded land on the basis that the land at issue was contemplated by Article 13 of the *British Columbia Terms of Union*. The Judge concluded that "[t]he Indian interest in the land they used and occupied was recognized by the colonial authorities", and "[on] confederation, the colonial policy continued as a constitutional responsibility of Canada": Reasons at paras. 143. [para 16]

[263] The distinction between reserves within and outside of traditional territories to reserve interests is also noted in *Kitselas FCA*:

> *Wewaykum* concerned the scope of the fiduciary duty of the Crown in the process of the creation of Indian reserve lands in British Columbia out of an area which – contrary to the land at issue in this case - was not part of traditional tribal lands: *Wewaykum* at paras.5 and 77. [emphasis in original; para 46]

[264] The Indigenous interest in traditional lands as recognized in *Guerin*, *Kitselas* and *Kitselas FCA* was not created by legislation. Nor was it created by a government "program" (*Wewaykum* at para 77) designed to bring land set apart as reserve for the occupants use and benefit under the *Indian Act*. *Guerin* recognized that the Indigenous interest in traditional lands predated the *Royal Proclamation* of 1763, and all other statutory or executive action by the Crown: "Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision" (*Guerin* at 378–79).

[265] The Respondent did not challenge Chief Sampson's evidence that the Reserves are located within the traditional territory shared by the Siska and other communities of the Nlaka'pamux Nation. I accept his evidence and so find as fact.

[266] Citing *Guerin*, the Supreme Court, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*], found that the interest in Aboriginal title land is *sui generis*:

> The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a "personal and usufructuary right" (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives. [para 112]

[267] The Court (*Delgamuukw*) repeated, at paragraph 120, the finding in *Guerin* that: "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases…" (emphasis in original).

[268] The origin of the Indigenous interest in Canadian common law is prior occupation of a traditional territory. Allotment of reserves within a traditional territory is an act of recognition of a prior interest. It would therefore exist in a provisional reserve just as in a "created" reserve.

[269] In *Matsqui*, Robertson J.A. (Desjardins J.A. concurring) analyzed the requirements of the government under the *CPR Contract* as it pertained to the interest of Indian bands in their reserve lands:

> It would be unreasonable to hold that the term "absolute property" extinguishes the interest of Indian bands in their reserve lands. The Indians' interest in reserve lands is a pre-existing legal right which finds its origins in the occupation of Canada by Aboriginal peoples prior to European settlement. As noted above, the alienation of this interest is subject to stringent restrictions under the *Indian Act* and at common law through the fiduciary duty doctrine. To undermine these strong protections in the absence of express language would clearly be unreasonable. Such an approach would also undermine the canons of statutory interpretation that have developed in the context of Aboriginal rights.
> …
>
> It is evident from the foregoing that, in addition to receiving title to the entire railway in return for its promise to construct the eastern and central segments, Canadian Pacific was also entitled to a "subsidy" of $25 million and 25 million acres of land. (The land subsidy aided the railway in that it ensured the economic viability of the project.) Furthermore, article 9 of the contract reveals that the land subsidy was to be "divided and appropriated" between the eastern and central segments. Article 11 states that the subsidy lands were to be granted in alternating sections of 640 acres, 24 miles deep, along each side of the railway "from Winnipeg to Jasper House". These conveyances were conditional on the lands being vested in the "Government" (the federal Crown). Article 11 also provides that if there was a deficiency of land, that deficiency was to be made up from lands located in the "fertile belt".
>
> Thus, when article 12 speaks of extinguishing Indian title to lands "herein appropriated, and to be hereafter granted in aid of the railway", it is referring to lands granted as a subsidy under article 11. Canadian Pacific argues that the lands referred to in article 12 are also those described in article 10 because of the phrase "and to be hereafter granted in aid of the railway" in article 12. This argument might have some merit but for the fact that article 10 only refers to lands within the eastern and central segments of the railway line, not the western segment.
>
> Article 10 imposes an additional obligation on the Dominion government; namely, to convey lands to Canadian Pacific for the "construction and working of the railway" to the extent that such lands were "vested in the Government". Obviously, if the Crown did not own such lands, Canadian Pacific would have been obligated to purchase them. However, article 10 does not state, as argued by Canadian Pacific, that the government was to convey any additional lands to Canadian Pacific for railway purposes. If that were the case, then that part of article 10 which refers to lands "required for the convenient and effectual

> construction and working of the railway" would have to be ignored. Article 10 only refers to lands in the eastern and central segments of the railway because Canadian Pacific did not need to acquire lands for the construction of the western segment -- the government was obligated to construct that portion of the railway. Title to lands in the western segment had to be obtained from the province of British Columbia under section 11 of the Terms of Union. In turn, such lands were to be transferred to Canadian Pacific when construction of that segment was completed, pursuant to section 5 of the CPR Act and article 7 of the contract.
>
> In conclusion, articles 9, 10, 11 and 12 of the contract all apply to lands within the eastern and central segments of the railway. However, articles 11 and 12 apply only to those lands lying between Winnipeg and Jasper House. It follows that the obligation to extinguish Indian title does not apply to the lands in question. As a matter of statutory interpretation and historical necessity, this makes eminently good sense. [footnotes omitted] [paras 153, 164–67]

[270] The extinguishment of the Indigenous interest at issue in *Matsqui* was not required for the railway in a practical sense, nor was it required by legislation. This finding is also relevant to the question in the present matter of whether extinguishment of the Siska interest was necessary to achieve the purposes of the *Government Railways Act*.

[271] The above findings regarding Siska's provisional reserve interest begs this question: What becomes of the Indigenous interest in a provisional reserve if not subsequently "created" for *Indian Act* purposes by actions of the Crown? It is not necessary to consider this further for purposes of the present matter, as the Reserves were ultimately confirmed and brought under the *Indian Act* by the Crown.

B. Fiduciary Duty Prior to Reserve Creation

[272] The Crown has duties to the interested First Nation where the exercise of discretion may affect its interest in a provisional reserve (*Wewaykum* at para 86):

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

[273] This analysis of the characteristics of Siska's provisional interest does not imply that the Claim is prohibited because it is "based on, or alleges, aboriginal rights or title" (*SCTA*, paragraph 15(1)(f)). The Claimant has not asserted Aboriginal title nor are the asserted *SCTA*,

subsection 14(1) grounds based on it. Their Claim pertains to the Reserves.

[274] These Reasons take account of Siska's prior and continuing occupation, and the effect on the character of Siska's provisional reserve interest, for two reasons. Firstly, the discussion provides further context for the analysis of the effect of government actions under the *Government Railways Act* on a provisional reserve. Secondly, the discussion is relevant to the analysis of fiduciary duty that follows below. Prior use and occupation may ground a finding of a cognizable interest when considering an alleged breach of fiduciary duty (*Kitselas FCA* at paras 53–54). The Tribunal has, by necessary implication, jurisdiction to consider prior use and occupation. An assertion of Aboriginal title entrains a different legal analysis which is not necessary or relevant to this Claim.

[275] Fiduciary duties originate with the *Royal Proclamation*, 1763, which establishes the Crown-Indigenous relationship as fiduciary in nature. The associated precept is the Honour of the Crown. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices. [para 16]

[276] *Haida* was concerned with an assertion of Aboriginal title. Fiduciary duties exist in relation to other Indigenous interests over which the Crown exercises discretionary control:

> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. [para 18]

[277] Here, the Aboriginal interest at stake in 1885 was Siska's interest in the provisional Reserves. It will be recalled that, unlike in the present circumstances, the reserves in issue in *Wewaykum* were not in the traditional territory of the contesting bands. This would seem to support a higher standard of fiduciary duty and care in the present matter. Of course the Crown

also had obligations under Article 11 of the *Terms of Union*, 1871, in particular the completion of the national railway.

[278] It is arguable that in 1885 the fiduciary obligations of the Crown in relation to Siska's provisional Reserves in the Railway Belt were higher than those found in *Wewaykum*. The Reserves were within their traditional territory and could have been unilaterally "created" as *Indian Act* reserves.

[279] Nevertheless, Crown actions in this matter have been measured against the performance of the "basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with ordinary prudence with a view to the best interest of the aboriginal beneficiaries" (*Wewaykum* at para 86).

[280] Ordinary prudence in this context required that, at a minimum, the Crown elicit the concerns of Siska and consider their best interests. This called for consultation. Their obvious interest would include protection of their arable land and protection from damage and continued access to their fishing stations. There was no consultation.

C. The Reason for Allotment of the Reserves

[281] Reserves were allotted along the Fraser River to ensure access to fisheries. The reserves were small, as the Indigenous people of the area were not known to be agriculturists.

[282] The Siska had a substantial practical interest in the provisional Reserves, land which they had occupied from time immemorial. In 1878, Sproat recognized these meagre parcels as theirs. There is no evidence that the Siska were consulted over the impact the occupation of the land within the right of way by the CPR would have on their use of the land and access to their fishing stations.

D. Grants to the CPR Company

[283] Irrespective of whether the Reserves came within the *Indian Act* at the dates of the grants to the CPR Company and the related question whether surrender was required, the duties of the Crown to Siska include an assessment of how much land the CPR Company reasonably required for the operation and protection of the railway.

[284] The grants took in the full width of the railway ROW, on average 400 feet throughout.

[285] The right of way covered twenty five percent of IR 7. It impaired access to fishing stations and used up what little cultivable land there was. Was this reasonable?

[286] The Vose standards testified to by Dr. Martin pertain to the width of right of way required for construction of the railway.

[287] It was, in 1885, a practical necessity in some locations to cut a wide swath through the provisional reserves to establish a secure roadbed for the railway. A grade that did not exceed that at which the towing capacity or traction of locomotives would be lost was required.

[288] Deep cuts had to be made along parts of the way due to the steepness of the terrain. The uphill gradient from the centerline was established to take account of factors affecting slope stability. For this reason the top of the grade opposite the river at some locations had to be cut deep into the provisionally reserved land.

[289] Dr. Martin testified of the need for a right of way from the centreline to the top of the upland bank in order to establish a stable slope. Below the centreline down to the Fraser River is another matter. The contour mapping shows a considerable gap between the line of rail and the precipitous drop down to the river. There is no evidence of the width of land needed to place derailed rolling stock back on the tracks. This would vary with the severity of the derailment and resting position of the derailed railcars and locomotives.

[290] Once a derailed train gets past the elevation at which the contour lines toward the river tighten, the next stop would be the river. The objective would be recovery, not simply putting the train back on the rails.

[291] As for the prevention from damage to infrastructure located below the line of rail, the steepness of the terrain militates against locating structures there.

[292] Dr. Martin considered it important that the owner of the railway own the upslope to the top of the bank in order to maintain the stability of the slope. However, Ms. Schmid testified on cross-examination that the slope had not been stabilized: The surface was in its state as constructed. The slope was established 145 years ago. The construction engineer obviously

considered there was no need to take measures to hold the surface of the slope in place.

[293] At the portals and through the tunnels in the Reserves the width of the ROW remained constant. Although the portals had to be protected from rockfall, the evidence does not establish that the grant to the CPR of the cultivated fields above the tunnel was necessary.

[294] The evidence does not establish that the CPR needed to own and control the entire width of the ROW at the time it received grants by letters patent.

[295] There was in fact a debate between the CPR Company and the Departments of Interior and Justice over the width of land to be granted under the *CPR Contract* and the *CPR Act*. This was precipitated by homesteaders whose land had been taken under the *Government Railways Act*. The matter came up in 1912 and discussions continued until *circa* June 1928.

[296] Government officials including Newcombe, Deputy Minister of Justice, tended to the view that the 99 foot width limitation applied. The matter was ultimately resolved in a practical manner: Ultimately, the CPR Company, preferring not to litigate its dispute with the government, settled "nearly all these cases" with the "settlers" between Savona and Port Moody by accepting a narrowed right of way in accordance with the findings of the company's engineer and the government.

[297] There were no similar concessions in relation to the grants to the CPR Company through Indian reserves, including those belonging to Siska. The record shows that the DIA was aware that the Departments of Interior and Railways and Canals had been dealing with homesteaders' concerns, but there is no evidence that the bands along the ROW were consulted.

[298] The documentary record reveals that the land, being "unsettled" Crown land (in the sense that it was not occupied by settlers), was thought of as if unoccupied. This explains why there was no consideration whatsoever for the interests of the Siska.

[299] The Crown could, if it consulted with Siska, and acting with ordinary prudence, have determined whether measures could have been taken without compromise to the national interest in the construction of the railway. In 1885, before final "creation" of the Reserves, the width of the ROW extended into the Fraser River and blanketed the fishing stations of the Siska. This

would undermine the very raison d'être for the allotment of the Reserves. Once construction of the railway was completed and the *CPR Contract* called for grants of land to the CPR Company, the "transfer" to the CPR Company of the full width of the ROW was neither required by the *CPR Contract* nor necessary for the continued security of the railway.

[300] At the provisional reserve stage the Crown failed to act in the best interests of the Siska. The Crown has not established that ignoring the impact on the lands set apart as reserve and impairing Siska's access to the fisheries that sustained them was necessary to safeguard the national interest in the construction of the railway.

[301] Once the Reserves came under the *Indian Act*, the duty of the Crown was to enforce the protective provisions of the *Indian Act* and preserve the Siska Band's interest in the reserves from exploitation (*Wewaykum* at para 86). To act in Siska's interests need not have prevented the railway from moving forward, as it had long since been in operation. If expropriation was necessary to establish a proprietary interest in the CPR the Governor in Council could, under section 35 of the *Indian Act*, have exercised its authority to allow the taking of a form of non-exclusive tenure such as an easement.

[302] The Crown failed throughout the events between 1885 and 1928 to meet its fiduciary duties to Siska.

XIV. THE NATIONAL INTEREST

[303] The Respondent argues that the construction of a railway extending to the west coast was in the national interest. The Claimant does not contest this.

[304] If it be contended that the national interest, as served by the exercise of government powers under the *Government Railways Act*, displaces Indigenous interests in reserves, the precept of the Honour of the Crown would have no application. In the Aboriginal rights context, the public interest may be found to justify infringement (*Delgamuukw*; *Haida*). The Crown must establish that it has met its fiduciary obligations if it is relying on justification (*Haida*).

[305] Fiduciary duties with respect to Indigenous interests exist in relation to interests that have not been found protected by the *Constitution Act*, 1982, section 35. The Crown has fiduciary

duties in relation to provisional reserves and "created" reserves (*Wewaykum*). Crown fiduciary duties may continue post-surrender (*Guerin*).

[306] The national interest could have been served without the Crown utterly failing to act in conformity with its honourable obligations and the duties that inhere in the Crown – Indigenous fiduciary relationship. Put at the highest, the duty was to obtain consent to the grant of interests in *Indian Act* reserves by way of surrender. If, as with the case of infringement of a proven section 35 right, consent could not be obtained, the government had the means at its disposal to overcome the obstacle while fulfilling its fiduciary duties. The *Indian Act*, section 35, permitted the exercise of the railway company's power of expropriation, subject to the limiting provisions of the *Consolidated Railway Act*.

XV. CONSENT, WITH CROWN CONCURRENCE, 2004

[307] On July 15, 2003, Siska, the CPR Company and Canada signed an agreement to settle the litigation between the Band and the CPR Company. Pursuant to the agreement, the CPR Company agreed to transfer and surrender to Canada its interest in the right of way for the use and benefit of the Band, in return for the grant of a right of way to the CPR Company through the Reserves. On March 11, 2004, the electors of the Band voted to conditionally surrender the railway right of way lands through the Reserves.

[308] On September 23, 2004, the Governor in Council accepted the Band's designation of the railway right of way lands by Order in Council PC 1040-2004, passed pursuant to section 40 of the *Indian Act*.

[309] On October 5, 2004, Canada granted a right of way to the CPR Company through IR 5 and IR 7 comprising 0.032 hectares (0.08 acres) within IR 5 and 36.22 hectares (89.51 acres) within IR 7 in accordance with the terms of the agreement.

XVI. VALIDITY OF CLAIM UNDER *SCTA*, PARAGRAPH 14(1)(D)

[310] The paragraph 14(1)(d) ground is:

> **14 (1)** Subject to sections 15 and 16, a First Nation may file with the Tribunal a claim based on any of the following grounds, for compensation for its losses arising from those grounds:
>
> …

> **(d)** an illegal lease or disposition by the Crown of reserve lands;

[311] For the purposes of this Claim, the term "reserve" means a "created" reserve.

[312] The meaning of the phrase "illegal lease or disposition" is informed by paragraph 20(1)(g):

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority; [emphasis added]

[313] Hence, "illegal…disposition" (paragraph 14(1)(d)) includes a taking without statutory authority.

[314] Here, the grants in fee simple exceeded the statutory authority of the *Consolidated Railway Act*. The paragraph 14(1)(d) ground is established.

XVII. REQUIREMENT FOR SURRENDER

[315] Letters patent were issued by Canada on July 5, 1912, for a right of way comprising 89.51 acres within IR 7. British Columbia refused to register the Dominion letters patent in provincial land registry offices because of the dispute with Canada regarding the legal status of Indian reserve lands in the Province.

[316] Once the dispute was resolved, fresh letters patent were issued on April l0, 1928, by Canada for a CPR right of way comprising 89.51 acres of land within IR 7.

[317] Canada issued letters patent for 0.08 acres of IR 5 on December 11, 1925, then cancelled and reissued them on July 20, 1927.

[318] The Reserves had been "created" in 1911. The *Indian Act*, 1906, applied to the disposition of interests in reserve land.

[319] As found in *Matsqui*, the expropriation provisions of the *Indian Act* limited the grant of interests to those permitted under the *Consolidated Railway Act*. The purported grants of fee

simple were not authorized by the expropriation provision of the *Consolidated Railway Act.*

[320] This leaves the question of the need for surrender.

[321] The Respondent argues that the surrender provisions of the *Indian Act* were suspended by proclamation from 1876 until at least 1907. The Respondent submits that:

> In 1876 the Federal Crown issued a proclamation published in the Canada Gazette. The proclamation suspended the operation of the *Indian Act*'s surrender provisions in British Columbia, and was still in effect until at least 1907. [footnotes omitted] [Respondent's Memorandum of Fact and Law at para 106]

[322] The *Indian Act*, 1906, section 48, provides:

> **48.** Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part: Provided that the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber.

[323] The inclusion of the surrender provisions in the *Indian Act*, 1906, and the absence of a subsequent Order in Council suspending those provisions, creates ambiguity over the continued effect of the 1876 proclamation. This must be resolved in favour of the Claimant. Moreover, the evidence reveals that the government considered the surrender provisions in effect when, in 1920, the *British Columbia Indian Lands Settlement Act*, SC 1920, c 51, was enacted. Section 3 of that *Act* removed the requirement for surrender to the extent it applied to lands cut off from the reserves by the McKenna-McBride Commission. If the proclamation remained in force after the enactment of the *Indian Act*, 1906, this would not have been necessary.

[324] As the Reserves had become *Indian Act* reserves in 1911, the purported grants to the CPR Company in 1925 and 1928 required surrender under the *Indian Act*. There was no surrender. As the grants purported to convey legal title to the CPR Company they were made without statutory authority within the meaning of the term in the *SCTA*, paragraph 14(1)(d).

XVIII. SUMMARY

[325] The 1885 dedication of Crown land for railway right of way purposes under the *Government Railways Act* was not a taking of the Claimant's interest in the reserves. The

Government Railways Act did not provide for taking land already vested in the federal Crown. No taking of the Siska interest in the reserves occurred. Instead, the effect of the *Government Railways Act* was to allow the construction of a railway that would, as constructed, be conveyed to the CPR Company as required by the *CPR Contract*. It did establish the ability of the government to construct the railway within an area known colloquially as a right of way.

[326] Although the Claimant's possession of the right of way lands in its reserves was affected, its interest in the land was not.

[327] The 1930 confirmation of the reserves with the effective date of January 25, 1913, based on a survey of the metes and bounds description and plan that accompanied the 1878 allotment, and their unchanged acreages, precluded a finding that the right of way lands had been taken by expropriation in 1885.

[328] The application of the *SCTA*, paragraph 14(1)(d) depends on a finding that reserve land had been taken without statutory authority.

[329] The *CPR Contract* called for the conveyance of title to the railway works constructed by the government within the right of way. The *CPR Act* authorized the grant of land to the CPR Company, and grants purporting to convey title were made in 1912, 1927 and 1928. However, the *Consolidated Railway Act* forbade the alienation of interests in Crown land granted to railway companies. Hence, the CPR Company could receive no greater interest than an easement. As the *CPR Act* did not override the restriction on alienation in the *Consolidated Railway Act* the grants were not authorized by statute. This applied irrespective of whether the reserves came within the *Indian Act* at the date of the grants.

[330] The government of Canada accepted the reserves for purposes of the *Indian Act* on December 29, 1911. The grants were made in contravention of the surrender provisions of the *Indian Act*. The *Indian Act* would have permitted the taking of an interest less than title; hence Canada's obligation under Article 11 of the *Terms of Union*, 1871, could have been performed without contravening any statute or breach of duty.

[331] The grants also purported to convey land in excess of that permitted by the *Consolidated Railway Act* and to that extent were not authorized by statute.

[332] Whether or not the width restriction in the *Consolidated Railway Act* applied to grants made under the *CPR Act*, more land was granted than was necessary for railway purposes. In either case the Crown was in breach of its fiduciary duty to act in the best interests of the Siska by failing to consult and ascertain their needs and take measures to protect their interests. This included the failure to protect and provide access to their fishing stations.

XIX. CONCLUSION

[333] The Claim is found valid under paragraphs 14(1)(b), (c), and (d) of the *SCTA*.

[334] The Parties have leave to seek directions in relation to the compensation phase of the proceeding.

HARRY SLADE

Honourable Harry Slade, Chairperson

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20180201

File No.: SCT-7002-14

OTTAWA, ONTARIO February 1, 2018

PRESENT: Honourable Harry Slade, Chairperson

BETWEEN:

SISKA 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 SISKA INDIAN BAND**
As represented by Darwin Hanna, Caroline Roberts, Mary Mollineaux and Rhaea Bailey
Callison & Hanna, Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Dennis Hill, Rachel Enoch and Heather Frankson
Department of Justice