Federal Court of Appeal  Cour d'appel fédérale

Date: 20210217

Docket: A-341-18

Citation: 2021 FCA 30

CORAM: **BOIVIN J.A.**
RENNIE J.A.
GLEASON J.A.

BETWEEN:

WILLIAMS LAKE INDIAN BAND

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

Heard by online video conference hosted by the Registry on November 16, 2020.

Judgment delivered at Ottawa, Ontario, February 17, 2021.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: BOIVIN J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant, the Williams Lake Indian Band, seeks to set aside the September 14, 2018 decision of the Specific Claims Tribunal (the SCT or the Tribunal) in *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada as represented by the Minister of Indian Affairs and Northern Development*, 2018 SCTC 6. In that decision, the SCT determined that the Band's

specific claim was unfounded as the Band failed to establish that the lands in issue had been wrongfully transferred or that Her Majesty the Queen in Right of Canada (hereafter simply termed Canada) had breached fiduciary duties owed to the Band.

[2] For the reasons that follow, I would allow this application for judicial review, set aside the decision of the SCT and remit the Band's claim to the Tribunal for redetermination in accordance with these Reasons.

I. Background

[3] The circumstances giving rise to the Band's specific claim centre on the 1914-1915 sale to the Pacific Great Eastern Railway Company (the PGER) of 4.37 acres of a much larger parcel of land that had been set aside for the Band. To put that sale into context, it is necessary to briefly review the historical backdrop, which discloses considerable delay in the establishment of many reserves for Indigenous peoples in British Columbia, including the reserve at issue in this application, the Williams Lake Indian Reserve No. 1 (the WLIR No. 1).

[4] In 1871, British Columbia joined Confederation. By virtue of Article 13 of the *British Columbia Terms of Union*, R.S.C. 1985, App. II, No. 10, British Columbia was required to convey lands to Canada for the creation of reserves, "as it ha[d] hitherto been the practice of the British Columbia Government to appropriate for that purpose", and Canada was allocated responsibility for matters pertaining to Indigenous peoples in the former colony and for the management of lands reserved for their use and benefit.

[5] In 1876, the federal and British Columbia governments created the Joint Indian Reserve Commission (the JIRC) to determine the location and size of reserves to be established for the use and benefit of British Columbia's Indigenous peoples. Due to disputes between the federal and provincial governments, finalization of the creation of many reserves stalled, with the result that many reserves were not finally constituted until 1938, when a provincial Order-in-Council issued, conveying reserve lands to the federal government. The history of British Columbia's reserves is more fully detailed in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245 [*Wewaykum*], where the Supreme Court of Canada held that, prior to 1938, reserves like WLIR No. 1 were of a provisional nature and the Crown interest in the lands that comprised them remained with the Crown in right of British Columbia.

[6] The history of the creation of WLIR No. 1 is recounted at length in *Williams Lake Indian Band v. Her Majesty the Queen in Right of Canada*, 2014 SCTC 3, 2014 CarswellNat 9762; *Canada v. Williams Lake Indian Band*, 2016 FCA 63, 481 N.R. 75; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83 [*Williams Lake*]. It suffices for purposes of the present application to note that in June 1881 the JIRC issued a Minute of Decision, outlining the allotment of lands that were to comprise WLIR No. 1.

[7] Several years later, in September 1912, representatives of the federal and provincial governments signed the McKenna-McBride Agreement, establishing the Royal Commission on Indian Affairs in British Columbia (the Royal Commission), with the aim of resolving the ongoing intergovernmental impasse concerning reserve creation. Under section 8 of the

McKenna-McBride Agreement, the Royal Commission was afforded the following authority to deal with reserve lands prior to the issuance of its final report:

> 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.

[8] On February 27, 1912, the PGER was incorporated pursuant to *An Act to Incorporate the Pacific Great Eastern Railway Company,* S.B.C. 1912, c. 36 (the *PGER Act*). On September 16, 1914, the PGER wrote to the Royal Commission, seeking approval for a right-of-way through WLIR No. 1. On the same day, the PGER also applied to the federal Department of Indian Affairs (the DIA) for a grant of the land indicated in its plan of the rail bed and for permission to commence construction.

[9] On September 29, 1914, the DIA wrote to the Royal Commission, asking it to take action as early as possible to settle the matter. It also wrote on September 29, 1914 to W.S. Vaughan, a local land appraiser, and asked him to appraise the lands at issue (the Railway Parcel Lands). On the same day, the PGER wrote to the DIA, assuring the Department that the PGER would pay "such sum as an officer designated by your Department shall decide as being fair". On the very next day, that is, on September 30, 1914, the DIA authorized the PGER to begin construction of its railway over the Railway Parcel Lands.

[10] On October 5, 1914, the Royal Commission issued Interim Report No. 51, recommending that permission be given to the PGER to enter and acquire the Railway Parcel Lands for right-of-

way purposes, “subject to compliance with the requirements of the law and to due compensation being made”. On October 27, 1914, Mr. Vaughan submitted a valuation, valuing the Railway Parcel Lands at $44.35. In his correspondence to the DIA, Mr. Vaughan advised that the Band was satisfied with the assessed value but wished to be given an equal area on their northern boundary instead of being paid compensation.

[11] In November 1914, the DIA agreed that Mr. Vaughan’s valuation was reasonable and the PGER paid the federal government $44.35 for the Railway Parcel Lands. On December 24, 1914, by Privy Council Order 3184, the Governor in Council approved the sale of the Railway Parcel Lands to the PGER under section 46 of the *Indian Act*, R.S.C. 1906, c. 81, as amended by *Indian Act*, S.C. 1911, c. 14, (*Indian Act*), but stated that the consent of the Lieutenant-Governor of British Columbia was also required.

[12] It was only in February of 1915 that the DIA referred the Band’s request for additional lands to the Royal Commission. In March of that year, the Royal Commission advised the DIA that it would address the request when it considered additional land applications in the area.

[13] Thereafter, in August 1915, the Royal Commission advised the DIA that it should either arrange for the PGER to purchase from the province and convey suitable replacement lands to the DIA or that the DIA should itself purchase such lands with the money received from the PGER. The DIA then requested that the local Indian Agent look into the matter. The Indian Agent determined that the money received from the PGER should instead be paid directly to the

Band because they needed the money badly. The funds were used to purchase seeds and farming implements for the Band.

[14] Later in August, the PGER applied to British Columbia for a provincial Crown grant of the Railway Parcel Lands. On August 26, 1915, the Lieutenant-Governor of British Columbia approved PGER's request for a Crown grant of the Province's reversionary interest in the Railway Parcel Lands pursuant to section 127 of the province's *Land Act*, R.S.B.C. 1911, c. 129 (the *BC Land Act, 1911*). On June 1, 1916, British Columbia issued a provincial Crown grant to the PGER, which stated that the provincial Crown transferred to the PGER "all Our interest, reversionary or otherwise, in said lands".

[15] Over two decades later, on July 29, 1938, British Columbia conveyed WLIR No. 1, minus the Railway Parcel Lands, to Canada, by way of provincial Order-in-Council 1036.

II. The Decision Under Review

[16] Turning now to the SCT's decision at issue in this application, after setting out the relevant factual background, the Tribunal addressed the Band's primary submission that WLIR No. 1 was a full reserve rather than a provisional one in 1914-1915. The Band had invited the Tribunal to find that the analysis of the status of reserved lands in *Wewaykum* was non-binding *obiter*, that the *Wewaykum* decision should be limited to its facts or that it should be revisited. The SCT rejected this submission and found that the Supreme Court of Canada's conclusion in *Wewaykum* that the creation of reserves like WLIR No. 1 was delayed until 1938 was "the result of a considered analysis of the history of the reserve creation process", and that this analysis

should be recognized by the Tribunal (at para. 30). Thus, the Tribunal concluded that the status of the WLIR No. 1 reserve lands from 1881 to 1938 was provisional only.

[17] The Tribunal then reviewed applicable provincial legislation, first commenting on the *British Columbia Railway Act*, R.S.B.C. 1911, c. 194 and the *PGER Act*. It noted that section 34 of the *PGER Act* empowered the PGER to "purchase, hold, lease, or sell land for any of the purposes of the Company", while section 32 empowered it to expropriate lands. The SCT further noted that sections 34 and 35 of the *British Columbia Railway Act*, a statute of general application to railways, set out the process for a railway company to take up "unoccupied and unreserved" Crown lands. Since the WLIR No. 1 land had already been set aside and reserved for the Band under the *BC Land Act, 1911* and had been occupied by the Band since 1881, the SCT found that this statute was "inappropriate for use in the process of acquisition of the rail bed land" (at para. 35).

[18] The Tribunal next discussed section 13 of Schedule A of *An Act to ratify an Agreement bearing Date the Tenth Day of February, 1912, between His Majesty the King and Timothy Foley, Patrick Welch, and John W. Stewart, and an Agreement bearing Date the Twenty-third Day of January, 1912, between the Grand Trunk Pacific Railway Company and the Grand Trunk Pacific Branch Lines Company and said Foley, Welch and Stewart*, S.B.C. 1912, c. 34. This provision stipulated that the province of British Columbia would convey to the PGER a right-of-way through vacant Crown lands for its railway. The SCT held that the foregoing provision did not apply to the provisionally reserved WLIR No. 1 lands as they were not vacant.

[19] Noting that the foregoing statutes were not the only authority for the acquisition of rail bed lands, the Tribunal went on to analyze section 127 of the *BC Land Act, 1911*. This provision read as follows:

> 127. The Lieutenant-Governor in Council may at any time, by notice signed by the Minister and published in the Gazette, reserve any lands not lawfully held by pre-emption, purchase, lease, or Crown grant, or under timber licence, for the purpose of conveying the same to the Dominion Government in trust for the use and benefit of the Indians, and in trust to reconvey the same to the Provincial Government in case such lands at any time cease to be used by such Indians; and the Lieutenant-Governor in Council may also similarly reserve any such lands for railway purposes or for such other purposes as may be deemed advisable: Provided always that it shall be lawful for the Lieutenant-Governor in Council to at any time grant, convey, quit-claim, sell, or dispose of, on such terms as may be deemed advisable, the interest of the Province, reversionary or otherwise, in any Indian reserve or any portion thereof; provided that a return of any alienations made under the provisions of this section be submitted to the Legislature at the next sitting following such alienations, within fifteen days after the opening thereof. 1908, c. 30, s. 80; 1911, c. 29, s. 14 (*part*).

[20] In the Tribunal's view, while the railway legislation only allowed a railway on its own initiative to expropriate and acquire "unoccupied and unreserved" lands, section 127 of the *BC Land Act, 1911* as well as a predecessor version of that Act "make it clear that any limitations inherent in the railway legislation were not an impediment to the provincial Crown taking action to grant Crown land to be used for railway purposes, and in particular even if the land had earlier been reserved for Indians under the *Land Act*" (at para. 46). The SCT held that this provision was the means adopted for the transfer of the Railway Parcel Lands to the PGER as the 1916 provincial Crown grant specifically referenced this legislation. The Tribunal concluded that the *BC Land Act, 1911* provided express authority for the provincial Crown grant of the Railway Parcel Lands to the PGER.

[21] The Tribunal then turned to the Band's second argument, alleging that Canada had breached its fiduciary duty to the Band. The SCT found that, irrespective of the provisional status of the reserve, "Canada owed a fiduciary duty to the Band to take action on its behalf in the reserve creation process" (at para. 49). The Tribunal noted that "the dealings in respect of the rail bed land took a confused course", with Canada taking action in administering the reserved land as if it were a completed reserve (at paras. 53-54). Notably, Canada cited the purported authority of section 46 of the *Indian Act* to receive and process the PGER's application for transfer of the Railway Parcel Lands and to approve the transfer in Privy Council Order 3184. The SCT found that Canada's actions with reference to section 46 of the *Indian Act* had to be "seen as inappropriate following the analysis in *Wewaykum*" (at para. 55). Based on the reasoning laid out in *Wewaykum*, "Canada's purported consent [...] was of no real effect in transferring any interest in the rail bed land, title to which remained with the Province and subject to the provisions of the *Land Act*"; at best, it indicated that Canada did not object to the transfer on condition of compensation being paid (at para. 59).

[22] The Tribunal went on to note that Canada had a duty of minimal impairment as a facet of its fiduciary obligation. The SCT elaborated on this duty with reference to *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 [*Osoyoos*], stating that "Canada had the responsibility to do what it could to disclose, consult and take any action available to advance the interest of the Band, acting with ordinary prudence as if managing its own affairs, [...] but as is now understood from *Wewaykum*, had a limited ability to directly oppose unilateral actions of the Province under provincial legislation" (at para. 61).

[23] The Tribunal then reviewed the limited evidence relating to the adequacy of the monetary compensation for the Railway Parcel Lands, which the SCT noted were located “at the foot of a steep hillside and described as only having agricultural potential as grazing land” (at para. 65). The Tribunal was unable to find that “the compensation was inadequate in the sense that the dollar value of the land was too low” (at para. 67).

[24] Turning to the question of whether Canada should have secured replacement land, the Tribunal acknowledged, citing *Osoyoos*, that the legal taking of reserve land should be of minimal impact to a band and that this may require that the Crown ensure that a band retains a reversionary interest, that the transfer be constrained to as small a parcel as practicable or that replacement land, if available, be offered to a band. However, the Tribunal noted that in the situation at hand, authority had been given to the Royal Commission to process proposals for the taking of reserved land for railway purposes.

[25] The Tribunal further noted that there had been consultation with the Band, that Chief Baptiste William had agreed that the valuation was appropriate and that the request for replacement land had been referred to the Royal Commission, but the Royal Commission indicated that it would likely be opposed to recommending a grant of provincial land in lieu of the land to be used for the railway, for which monetary compensation had already been secured. The Tribunal observed this left only two options, both “reliant on the doubtful co-operation of the Province”: “1) the railway purchasing the in lieu land from the Province and making it available to the Band; or, 2) the DIA using the monetary compensation paid by the railway to buy land for the Band” (at para. 72). The SCT noted the case was different from the situation in

Tobacco Plains Indian Band v. Her Majesty the Queen in Right of Canada, 2017 SCTC 4 [*Tobacco Plains*], where Canada had complete control over the transaction.

[26] Ultimately, the Tribunal concluded that Canada had not breached its fiduciary duty "in weighing the options and applying the compensation to other Band needs" rather than pursuing "an unlikely remedy by way of acquisition of replacement provincial land" (at para. 76). As such, the SCT determined that the grounds advanced under section 14 of the *Specific Claims Tribunal Act*, S.C. 2008, c. 22 (the SCTA) were not established.

III. The Issues

[27] Before us, the Band makes two arguments.

[28] In respect of the first, the Band has modified its position from that advanced before the SCT and no longer seeks to distinguish or to have us narrowly read the decision of the Supreme Court of Canada in *Wewaykum*. The Band now concedes that the holding in *Wewaykum* means that WLIR No. 1 was a provisional reserve in 1914-1915 and that the non-Aboriginal title in the Railway Parcel Lands therefore rested with the provincial Crown in 1915. The Band nevertheless asserts that the only reasonable interpretation of the relevant legislation, and most notably of section 127 of the *BC Land Act, 1911*, leads to the conclusion that lands which had been set aside as part of a provisional reserve could not be alienated by the province of British Columbia. The Band more specifically says that, under a proper textual, contextual and purposive analysis, section 127 must be interpreted as not authorizing the sale of lands occupied by Indigenous people that had been reserved for their use and that, at most, the province could only alienate its

reversionary interest in such lands. The Band thus says that the Tribunal's interpretation of the legislation is unreasonable, noting in this regard that the Supreme Court of Canada has recently underscored in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*], that statutory interpretations offered by an administrative tribunal must be consistent with the text, context and purpose of the provisions.

[29] Secondly, the Band submits that the SCT's conclusion that Canada did not breach its fiduciary duties to the Band is unreasonable as it does not conform to the applicable law governing the scope of fiduciary duties established by the courts and the Tribunal, itself, in previous cases. More specifically, the Band asserts that the SCT failed to reasonably apply the principle of minimal impairment and unreasonably relied on the province's likely unwillingness to provide lands in exchange for the Railway Parcel Lands and on the need to further the Band's interests writ large as justifications for Canada's conduct. The Band asserts the foregoing could not reasonably be relied on as justifying Canada's failure to pursue less minimally impairing options than the one selected in light of the relevant case law, including *Tobacco Plains* and *Williams Lake*.

[30] The Band accordingly asks that the Tribunal's decision be set aside, that this Court determine that the Band has established a valid claim under the SCTA or, alternatively, that its claim be referred back to the Tribunal for reconsideration in accordance with the Court's directions.

[31] Canada, for its part, submits that the SCT's decision is reasonable and should be maintained. More particularly, it asserts that the Tribunal's reading of section 127 of the *BC Land Act, 1911* accords with the text, context and purpose of the provision and with the holding of the Supreme Court of Canada in *Wewaykum*. As for the Tribunal's conclusion that there was no breach of fiduciary duty, Canada asserts that the Tribunal correctly set out the applicable principles and reasonably applied them. It underscores, as was held by the Supreme Court of Canada in *Williams Lake*, that it is not the task of this Court on judicial review to second-guess the Tribunal, which must be afforded deference. Canada further submits that the SCT reasonably distinguished the most similar case, *Tobacco Plains*, as there, unlike here, Canada was the transferee of the lands that were sold, which Canada submits is a meaningful difference. Canada therefore asks that the application be dismissed.

[32] In my view, it is necessary to consider only the second of the Band's arguments as, for the reasons elaborated below, the Tribunal's treatment of the fiduciary duty issue was unreasonable. Moreover, as is also more fully detailed below, the interpretation of section 127 of the *BC Land Act, 1911* is irrelevant to the scope of the fiduciary duties owed by Canada to the Band in the circumstances of this case, in which Canada has made no claim for contribution by British Columbia.

IV. Analysis

[33] Moving on to consider the SCT's treatment of the claimed breach of fiduciary duty, it is now settled, since the Supreme Court of Canada rendered its decision in *Williams Lake*, that the reasonableness standard of review applies to Tribunal decisions concerning the scope and alleged

breach of fiduciary duties owed by Canada to Indigenous peoples. Indeed, the parties concur that the reasonableness standard is applicable in the instant case. Where they part company is on how that standard applies.

[34] In its recent decision in *Vavilov*, the Supreme Court of Canada provided extensive guidance on how courts are to conduct a reasonableness assessment. Where the decision-maker provides reasons, the starting point is the decision of the administrative decision-maker; the requisite inquiry involves determining whether the reasoning process and result reached are reasonable as opposed to whether they are the ones the reviewing court would have adopted (at paras. 15, 81, 82-87, 99, 116). Moreover, reasonableness review requires that courts intervene only where necessary to safeguard the legality, rationality and fairness of the administrative decision-making process. The focus of the inquiry is thus on ensuring that the decision as a whole, when viewed in context, is transparent, intelligible and justified (at paras. 15, 85, 99, 116, 137).

[35] The Supreme Court further indicated that there are two types of flaws that may render a decision unreasonable: either a flaw of rationality in the reasoning process or instances where the decision is untenable in light of the factual and legal constraints that bear upon it (at para. 101). Most challenges, including the present one, centre on the second of these potential flaws.

[36] The Supreme Court provided a non-exhaustive list in *Vavilov* of factual and legal constraints against which administrative decisions may be measured to ascertain if they are tenable. These constraints include:

- the decision-maker's governing legislation, which may set boundaries on the decision-maker's powers (at para. 108), require or allow the decision-maker to draw on its unique expertise, which may be different from that of a court (at paras. 31, 93), contain definitions, principles or formulas that prescribe the exercise of discretion (at paras. 108-109) or be drafted in narrow or open-ended language (at para. 110);

- other statutory or common law, which may constrain the decision-maker, depending on context (at paras. 111-114);

- principles of statutory interpretation, which mean that the administrative decision-maker's interpretation "must be consistent with the text, context and purpose of the provision" (at para. 120);

- the evidence before the decision-maker, but it is not for the reviewing court to re-weigh the evidence. Rather, it may intervene only where "the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (at para. 126);

- the parties' submissions to the administrative decision-maker, which require the decision-maker to address key arguments made (at paras. 127-128);

- the decision-maker's past practices and decisions, which the administrative decision-maker cannot depart from without adequate explanation (at paras. 129, 131); and

- the impact of the decision on the affected individual(s) (at paras. 133-135).

[37] Here, applicable common law and Tribunal precedents are key constraints. The SCT, in the decision under review, failed to give adequate consideration to the principles established in the applicable common law precedents governing the scope of the Crown's fiduciary duties to Indigenous peoples in respect of reserve lands. The SCT also failed to meaningfully justify its departure from its prior decision in *Tobacco Plains*, which faithfully applied those principles in the context of a similar provisional reserve in British Columbia.

[38] The applicable common law principles flow from the recognition of the significant importance of land, and in particular of reserve lands, to Indigenous peoples. In *Osoyoos*, the Supreme Court of Canada underscored that the Aboriginal interest in reserve land is *sui generis* and fundamentally similar to Aboriginal title: both are inalienable except to the Crown and are rights of use and occupation that are held communally (at para. 42). This recognition gives rise to three important implications. First, traditional common law principles related to real property may not be helpful to give effect to the true purpose of a dealing related to reserve land (at para. 43). Second, a band cannot unilaterally add to or replace reserve lands, thereby highlighting the importance of such lands (at para. 45). Third, an Aboriginal interest in land is more than a fungible commodity. As noted by Justice Iacobucci, writing for the majority at paragraph 46 in *Osoyoos*:

> […] The aboriginal interest in land will generally have an important cultural component that reflects the relationship between an aboriginal community and the land and the inherent and unique value in the land itself which is enjoyed by the community. This view flows from the fact that the legal justification for the inalienability of aboriginal interests in land is partly a function of the common law principle that settlers in colonies must derive their title from Crown grant, and partly a function of the general policy "to ensure that Indians are not dispossessed of their entitlements": see *Delgamuukw*, *supra*, at paras. 129-31, *per* Lamer C.J.; *Mitchell*, *supra*, at p. 133.

[39] The case law further recognizes that in light of the role it plays in respect of reserve land, the Crown owes a fiduciary duty to bands in respect of dealings with reserve land (see, for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161 [*Guerin*]; *Semiahmoo Indian Band v. Canada* (1997), [1998] 1 F.C. 3, 148 D.L.R. (4th) 523 (F.C.A.) [*Semiahmoo*]; *BC Tel v. Seabird Island Indian Band*, 2002 FCA 288, [2003] 1 F.C. 475 [*BC Tel*]). Such duty includes an obligation of minimal impairment where a taking or expropriation of reserve land is undertaken for a public purpose.

[40] More specifically, once it has been determined that the land is required for a public purpose, prior to a taking, its fiduciary obligations require the Crown to assess whether other less invasive options exist. Depending on the circumstances, these could include: leasing the land or ceding an easement as opposed to a fee-simple interest, thereby providing the basis for a potential ongoing revenue stream for the band; taking a smaller portion of land than that sought, if less is needed; or providing replacement land in exchange for the land taken.

[41] In applying these principles, in *Osoyoos*, the Supreme Court held that all that was required for construction of a canal over reserve lands was the grant of an easement. There, a concrete irrigation canal had been constructed over part of lands that had been set aside for the creation of an Indian reserve in British Columbia. Many years later, in an attempt to formalize the interests in the canal lands, a federal Order-in-Council was enacted, in which the Governor in Council consented to the previous taking of the lands by the province. An issue arose as to the extent of the interest conveyed when the Band wished to tax the lands used for the canal. As the Order was ambiguous, the Court adopted the interpretation that impaired the Aboriginal interests

as little as possible and read the Order as granting only a statutory easement to the province, thereby preserving the ability for taxation by the Band. In so determining, the Court held that no fiduciary duty attached to the decision to build the canal over the reserve, but that thereafter a fiduciary duty arose. The Court ruled that such duty requires the Crown to preserve the Aboriginal interest in the expropriated lands to the greatest extent practicable. More specifically, Justice Iacobucci, writing for the majority in *Osoyoos*, held that such obligation requires the Crown "[…] wherever appropriate, to protect a sufficient Indian interest in expropriated land in order to preserve the taxation jurisdiction of the band over the land, thus ensuring a continued ability to earn income from the land" (at para. 55).

[42] In so deciding, the Supreme Court of Canada relied on its earlier decision in *Canadian Pacific Ltd. v. Paul,* [1988] 2 S.C.R. 654, 89 N.R. 325, where the Court interpreted somewhat similar provisions in federal railway legislation as requiring only the grant of an easement, which it found granted a sufficient interest in land to support construction of a railway over reserve lands, yet preserved the taxation ability of the band. (See also to similar effect the decisions of this Court in *Canadian Pacific Ltd v. Matsqui Indian Band* (1999), [2000] 1 F.C. 325, 176 D.L.R. (4th) 35 (F.C.A.) and *BC Tel* and of the SCT in *Makwa Sahgaiehcan First Nation v. Her Majesty the Queen in Right of Canada*, 2019 SCTC 5, 2019 CarswellNat 9939.)

[43] In a related fashion, courts in several cases have found the Crown to have breached its fiduciary duty when it consented to the surrender of portions of reserves or of interests in reserve lands by bands in an exploitative or less than minimally impairing fashion, without due regard for the ongoing Aboriginal interest in the lands. For example, the Crown was found to have

breached its fiduciary duty in *Guerin*, when it consented to a lease of reserve lands on terms less favorable than those the band wished it to achieve, without prior consent of the band; in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, 190 N.R. 89, when it failed to prevent the alienation of sub-surface mineral rights; and in *Semiahmoo*, when it failed to return lands that had been surrendered but were not required for the operation of a customs facility.

[44] The case law further recognizes that the Crown may not escape its fiduciary obligations by invoking competing interests. The Supreme Court of Canada noted at paragraph 104 of *Wewaykum* "[t]he Crown could not, merely by invoking competing interests, shirk its fiduciary duty". While, in that case, the competing interests were those of another band, the principle applies equally to competing interests of a third party, like a railway, or of the Crown in right of a province. Indeed, in both *Kitselas First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 SCTC 1, 2013 CarswellNat 7705 (upheld on judicial review in *Canada v. Kitselas First Nation*, 2014 FCA 150, 460 N.R. 185) and *Akisq'nuk First Nation v. Canada*, 2020 SCTC 1, 2020 CarswellNat 1642, the uncooperative stance taken by British Columbia did not absolve Canada from breaches of its fiduciary obligations, although it could be taken into account at the compensation stage of the hearing and might lessen the damages Canada may be bound to pay where it made a claim for contribution by the province under paragraph 20(1)(*i*) of the SCTA.

[45] Both the Courts and the SCT have applied the foregoing principles in the context of lands provisionally reserved for indigenous peoples in British Columbia. In *Wewaykum*, the Supreme

Court of Canada held that there was no breach of fiduciary duty in circumstances where some of the documents establishing the reserves of two Bands contained contradictory references. However, unlike the situation in the present case, in *Wewaykum*, the full area of the reserves that had been provisionally established was ultimately set aside for the benefit of each Band. Conversely, in *Williams Lake*, the Supreme Court found a breach of fiduciary duty, both prior to and following the entry of British Columbia into Confederation, arising from the failure of colonial and Dominion officials to take adequate steps to allocate its traditional village site to the Band for whom WLIR No. 1 was instead eventually established.

[46] In *Tobacco Plains*, a case that is factually similar to the present, the SCT held that Canada breached its fiduciary duty by failing to ensure that the interest of the Band in provisionally reserved lands was minimally impaired. There, just as in the present case, the confines of the reserve in question in British Columbia had been established by the JIRC and, prior to 1938, a portion of the provisionally reserved lands had been removed for a public purpose: there, the construction of a customs facility. However, more land had been taken from the provisional reserve than was required for the facility and the unneeded portion had not been returned to the Band. In addition, as in the present case, the land in question had been alienated and not merely leased. The Tribunal determined that it was unnecessary for it to interpret the scope of British Columbia's authority under the *BC Land Act, 1911*, which was not relevant to the scope of the fiduciary duties owed by Canada. The SCT concluded that Canada had breached its fiduciary duties toward the Band in many respects, including by failing to pursue the option of leasing the land as opposed to alienating it and by failing to explore whether a smaller parcel of land might have been all that was required for the customs house.

[47] In reaching this determination, the Tribunal explained that, pursuant to *Osoyoos*, no fiduciary duty arises when the Crown acts in the public interest to determine that an expropriation of provisionally reserved land is required for a public purpose. However, thereafter, fiduciary obligations arise and require the Crown to "[…] expropriate only the minimum interest that will fulfill the public purpose, thus preserving the 'Indian interest' in the lands to the greatest extent practicable" (at para. 113). Contrary to what Canada maintains, this determination was in no way contingent upon the lands in question being required by Canada, as opposed to a third party, like a railway.

[48] In the decision under review, the SCT reached the opposite conclusion from that reached in *Tobacco Plains*, despite a very similar fact pattern. As noted, the SCT in the instant case found that British Columbia's likely unwillingness to cooperate in the transfer of replacement lands effectively absolved Canada from needing to pursue such an option. Such a conclusion fails to respect the applicable common law principles governing the scope of the Crown's duty of minimal impairment, discussed above. In short, it is not open to Canada to rely on likely provincial intransigence as an excuse for a failure to meet its own fiduciary obligations, even if such intransigence might well be, in and of itself, also a breach of fiduciary duty. The SCT thus reached an unreasonable conclusion in finding that British Columbia's likely intransigence justified Canada's actions in the present case.

[49] The Tribunal in the instant case also failed to consider whether Canada ought to have sought to have an easement over the Railway Parcel Lands granted to the PGER, as opposed to a grant in fee simple. It further failed to analyze the impact of the timing of the various actions

taken by Canada, notably its rapid concurrence with the PGER's request and speedy acceptance of the assessed value of the Railway Parcel Lands as compared to its lack of urgency in pursuing the Band's request for replacement lands. Had Canada dealt with the request for replacement lands first, it might have obtained sufficient funds from the PGER to finance the purchase of replacement lands as the PGER had indicated that it was willing to pay the amount Canada thought was fair for the Railway Parcel Lands.

[50] Each of these alternatives ought to have been considered by the SCT prior to deciding that the Band's specific claim was unfounded as the principle of minimal impairment requires their examination. Each represents a less invasive option that may well have been one that Canada ought to have pursued, irrespective of which level of government held the Crown's interest in the Railway Parcel Lands. Because the SCT failed to adequately examine these less invasive options, its decision cannot stand.

[51] As noted by the SCT in the instant case, in 1914-1915, there was considerable confusion regarding the respective roles of Canada and British Columbia in respect of the PGER's request. Particularly in light of this confusion, it is possible that Canada might have been able to obtain a better result for the Band, had it kept its duty of minimal impairment at the forefront. Ultimately, determining whether the options of either an easement or purchase of replacement lands were realistic and one(s) that Canada should have at least tried to pursue requires a detailed analysis of the nuanced historical record.

[52] Parliament has entrusted such analysis to the SCT, which, as noted by the Supreme Court in *Williams Lake*, has developed expertise in these sorts of issues. This Court would accordingly benefit from the SCT's examination of these issues and thus we should refrain from examining them without the benefit of the Tribunal's views on them.

[53] I would therefore grant this application, with costs, set aside the SCT's decision and remit the Band's specific claim to the Tribunal for redetermination in accordance with these Reasons.

"Mary J.L. Gleason"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BOIVIN J.A. RENNIE J.A.
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