FILE NO.: SCT-2005-11 **OFFICIAL TRANSLATION**
CITATION : 2016 SCTC 7
DATE: 20160520

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
ATIKAMEKW D'OPITCIWAN FIRST NATION Claimant	Paul Dionne and Marie-Ève Dumont, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Indian Affairs and Northern Development Respondent	Éric Gingras, Dah Yoon Min and Ann Snow, for the Respondent
	HEARD: From September 9 to 12, 2013, from January 13 to 24, 2014, from May 20 to 23, 2014, from March 17 to 26, 2015, from March 30 to April 1, 2015, from April 23 to 30, 2015, and May 11, 2015.

REASONS FOR DECISION

Honourable Johanne Mainville

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 Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25; *Khalil v Canada*, 2007 FC 923, [2008] 4 FCR 53; *Fairford First Nation v Canada* (AG)(TD), [1999] 2 FC 48; *Lac La Ronge Indian Band v Canada*, [2001] SKCA 109, 206 DLR (4th) 639; *Lower Kootenay Indian Band v Canada*, [1992] 2 CNLR 54, 42 FTR 241 (FCTD); *Quebec (AG) v Canada (AG)*, 56 DLR 373, [1921] 1 AC 401; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 14.

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

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

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

An Act respecting lands set apart for Indians, SQ 1922, c 37.

Indian Act, RSC 1906, c 81, s 33.

Headnote:

This claim concerns the delay in creating the Opitciwan Indian Reserve and the damage and inconvenience the Atikamekw of Opitciwan suffered as a result of this delay.

The Claimant alleges that the federal Crown breached or failed to honour its legal and fiduciary duties because the process to create the Opitciwan Indian Reserve took 36 years even though (1) Between 1908 and 1914, the conditions for creating a reserve for the Atikamekw at

Opitciwan had been met; (2) As soon as the process was launched, the Crown assumed fiduciary duties towards the Atikamekw of Opitciwan, including the obligation to act with loyalty and with ordinary prudence, which means acting in a timely manner.

According to the Claimant, there was nothing to prevent the completion of the process of creating a reserve at Opitciwan once the Crown knew, in 1920 and 1921, the magnitude of the flooding following the impoundment of the Gouin reservoir and the size of the area to be added to compensate for the surveyed lands that had been flooded. Despite this, the reserve was not created until 1944 with the making of the order in council (the "order in council") dated January 14, 1944, by the Government of Quebec. In addition, the federal Crown took an unexplained six years to make the order in council accepting the transfer of the reserve lands.

The Claimant submits that, during the thirty or so years it took to create the Opitciwan Reserve, the Atikamekw were deprived of benefits, such as logging and the income they could have derived from the licences of occupation issued to traders that had established themselves in their community or that visited it and that this damage and inconvenience are due to the fault of the federal Crown.

The Respondent is challenging the claim and asks that it be dismissed. The Respondent submits that the facts and law relied upon in support of the claim are an insufficient basis for a legal or fiduciary obligation on the part of the federal Crown with respect to the rights and interests claimed by the Claimant, or, where applicable, a breach of any such obligations. It states that the breaches the Respondent is alleged to have committed have to do with the Province of Quebec's deeds and actions, that there is no direct causal link between the federal Crown's actions and the alleged damage, if there was any, and that a fiduciary duty does not create a positive obligation to protect the rights and interests of Aboriginal groups from any interference by third parties.

The Respondent also submits that the Opitciwan Reserve was created on March 21, 1950, with the making of Order in Council P.C. 1458, in which the Governor in Council set apart lands with an area of 2,290 acres for the use and benefit of the Opitciwan Band.

Held: In light of the particular circumstances of this case, it must be concluded that the reserve was created on January 14, 1944, with the making of the order in council by the Executive Council of the provincial government, the federal Crown having clearly expressed its intention to create a reserve at Opitciwan well before this date. There was plainly therefore a meeting of minds between the two levels of government in January 1944. Order in Council P.C. 1458 dated March 21, 1950, must therefore be seen as an administrative measure and not as the expression of the federal Crown's intention to create a reserve at Opitciwan.

In decision 2016 SCTC 6 in File No. SCT-2004-11, it was concluded that the federal Crown was bound by a legal and a fiduciary duty in the reserve creation process. The reasons supporting this conclusion apply *mutatis mutandis* to this decision.

In this matter, the question of the delay in creating the reserve pertains to the lands of Opitciwan and goes to the heart of the reserve creation process.

The imposition of a fiduciary duty before the reserve was created attached to the federal Crown the obligations of loyalty, providing full disclosure and acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan, the beneficiaries (Wewaykum Indian Band v Canada, 2002 SCC 79 at para 94, [2002] 4 SCR 245; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344 at para 104, [1996] 2 CNLR 25).

It appears from the jurisprudence on Aboriginal law that when a delay occurs in relation to a fiduciary duty, the delay can be a cause of action. In this matter, the federal Crown was bound by the obligation of acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan with respect to the time it took to create the reserve, which meant acting within a reasonable time frame.

At issue was whether the particular circumstances of this claim established that the federal Crown breached its duty to act within a reasonable time frame by taking over thirty years to complete the process of creating the Opitciwan Reserve. Each case must be considered on its own merits.

In the matter at hand, in light of all the circumstances, specifically, (1) the flooding resulting from the Gouin dam; (2) the federal and provincial government's strained relations regarding this matter; (3) the geographic remoteness of the reserve; (4) all the other facts set out in this decision and decision 2016 SCTC 6 in File No. SCT-2004-11, it appears that the 20 years following Mr. White's survey would have been more than sufficient for completing the creation of the Opitciwan Reserve. After 1934, there were no longer any determining factors to delay or prevent the creation of the reserve.

Consequently, the 10-year delay between 1934 and 1944, for which the federal Crown is liable, was unreasonable. The evidence establishes that it did not act with the ordinary prudence required to bring the matter to a successful conclusion.

Given that as a fiduciary, the federal Crown had to act in a timely manner and with reasonable skill and diligence with a view to the best interest of the Atikamekw of Opitciwan, and given that the Respondent did not provide sufficient satisfactory reasons to explain the 10 year delay from 1934 to 1944 to complete the reserve creation process at Opitciwan, it must be concluded that the federal Crown did not act with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan and breached its duty of providing full disclosure.

For the purposes of the second stage, the loss of income from the establishment of the Hudson's Bay Company at Opitciwan from 1934 to January 14, 1944, is recognized as a loss; the other claims were not supported by sufficient evidence.

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I. INTRODUCTION

[1] This claim concerns the delay in creating the Opitciwan Indian Reserve (previously known as "Obiduan", "Obidjuan" or "Obedjiwan"), and more specifically the damage and inconvenience the Atikamekw of Opitciwan (previously known as the Têtes-de-boule of Kikendatch) suffered as a result of this delay.

[2] In a letter dated September 29, 2011, the Senior Assistant Deputy Minister of Indian Affairs informed the Claimant of the Minister's refusal to negotiate the specific claim concerning the [TRANSLATION] "Atikamekw of Opitciwan Reserve: loss of use between 1914 and 1944", which is the claim before me.

[3] In its Further Amended Declaration of Claim, the Claimant alleges that the federal Crown breached or failed to honour its legal and fiduciary duties because the process to create the Opitciwan Indian Reserve took 36 years and because of the following factors:

a. Between 1908 and 1914, the conditions for creating a reserve for the Atikamekw at Opitciwan had been met.

b. As soon as the process was launched, the Crown assumed fiduciary duties towards the Atikamekw of Opitciwan, including the obligation to act with loyalty and as a person of ordinary prudence in managing his or her own affairs.

c. Acting as a person of ordinary prudence means acting within a reasonable time frame.

d. There was nothing to prevent the completion of the process of creating a reserve at Opitciwan once the Crown knew, in 1920 and 1921, the magnitude of the flooding following the impoundment of the Gouin reservoir and the size of the area to be added to compensate for the surveyed lands that had been flooded.

e. Despite the fact that there was no impediment to the creation of the reserve, the reserve was not created until 1944 with the making of the order in council (the "order in council") dated January 14, 1944, by the Government of Quebec. In addition, the federal Crown took an unexplained six years to make the order in council accepting the transfer of the reserve lands.

f. During the thirty or so years it took to create the Opitciwan Reserve, the Atikamekw were deprived of benefits, such as logging and the income they could have derived from the licences of occupation issued to traders who had established themselves in their community or who visited it.

g. The damage and inconvenience suffered by the Atikamekw of Opitciwan as a result of the delay in creating the Opitciwan Reserve are due to the fault of the federal Crown.

[4] The Respondent is challenging the claim and asks that it be dismissed. In its Memorandum of Fact and Law, it summarizes its position as follows:

> [TRANSLATION]
>
> 2. The Respondent submits that the facts and law relied upon in support of the claim are an insufficient basis for a legal or fiduciary obligation on the part of the federal Crown with respect to the rights and interests claimed by the Claimant, or, where applicable, a breach of any such obligations.
>
> 3. The breaches the Respondent is alleged to have committed have to do with the Province of Quebec's deeds and actions in the exercise of the powers conferred on Her Majesty the Queen in Right of Quebec by the *Constitution Act, 1867*, deeds and actions over which the federal Crown has no control.
>
> 4. In short, there is no direct causal link between the federal Crown's actions and the alleged damage, if there was any.
>
> 5. A fiduciary duty does not go as far as creating a positive obligation to protect the rights and interests of Aboriginal groups from any interference by third parties.

[5] The Respondent also submits that the claim is unfounded in fact and in law, for the following reasons:

> [TRANSLATION]
>
> (a) There is no legal obligation to complete a reserve creation process within a specific time frame.
>
> (b) The facts on the record do not establish that the federal Crown delayed the process.

(c) The federal Crown never considered that a *de facto* reserve existed as of 1914.

(d) The federal Crown was not obliged to claim occupancy fees from traders ([Hudson's Bay Company ("HBC")] and independent traders) in the village of bidjuan. [Respondent's Memorandum of Fact and Law, at para 183]

[6] The evidence in this claim was filed jointly with File Nos. SCT-2004-11, SCT-2006-11 and SCT-2007-11.

[7] The facts, the law and other issues relevant to this matter were set out and analyzed in decision 2016 SCTC 6 in File No. SCT-2004-11. I will be referring to that decision for the purposes of the decision at hand.

[8] The claim was severed. This decision concerns the federal Crown's liability, if any. Regarding the losses claimed, they are discussed solely in order to establish them, where applicable, and the right to relief, as determined in File No. SCT-2004-11.

II. FACTS

[9] Other than the wealth of documentary evidence summarized in decision 2016 SCTC 6 in File No. SCT-2004-11, for the purposes of this file, the Tribunal is also taking into account the expert reports and testimony of Jacques Frenette, Jean-Pierre Garneau and Stéphanie Béreau, as well as the testimony of the elders.

A. The experts

1. Jacques Frenette

[10] Jacques Frenette was called as an expert by the Claimant and qualified by the Tribunal as an expert in anthropology and Aboriginal ethnohistory. His qualifications are described in decision 2016 SCTC 6 in File No. SCT-2004-11.

[11] Mr. Frenette filed a report entitled *Les Atikamekw d'Opitciwan (1880-1950), Bilan de la littérature scientifique and a supplement to his report (Exhibit P-3).* His mandate is also described in decision 2016 SCTC 6 in File No. SCT-2004-11.

[12] The second chapter of his report concerns the presence of various Euro-Canadians in the

Haute-Mauricie and the Opitciwan region, particularly the HBC, independent fur traders, professional trappers, members of rod and gun clubs, missionaries and loggers.

[13] His conclusion can be summarized as follows:

a. Among the Euro-Canadians with whom the Atikamekw of Obedjiwan were in regular contact, there were officers of the Hudson's Bay Company and independent traders. The former lived in the territory. Although the latter began visiting Obedjiwan in the 1920s, they never settled there permanently. The fur trade was based on barter, credit, gifts and cash (Exhibit P-3, conclusion, at p 113).

b. In the 1920s, Opitciwan became a magnet for independent traders who paid cash and offered alcohol. Since Opitciwan did not have reserve status, the sale of alcohol could not be prohibited there under the *Indian Act*. There were no police in Opitciwan. Even Chief Awashish's attempts to send away the most obstinate traders were unsuccessful (Exhibit P-3, at p 26).

c. Trading increased in Opitciwan from 1925 onwards. However, because it was quite remote, none of the independent traders wanted to establish themselves there permanently (Exhibit P-3, at p 27).

d. The consulted literature reveals that John Midlige and Donat-Émile Hardy had small stores in Opitciwan which they used for no more than a few days in early summer, fall and winter (Exhibit P-3, at p 27).

e. The Great Depression brought an end to the boom years, but the fur trade remained profitable enough in the Haute-Mauricie to continue to attract a number of independent traders (Exhibit P-3, at p 27).

f. The Atikamekw began enduring competition from Euro-Canadian trappers on their hunting grounds as of 1870. Their numbers exploded in 1930, but serious logging activities did not begin until the 1940s (Exhibit P-3, at p 28).

g. Following the construction of the Gouin dam and the impoundment of the dam reservoir in 1918, logging spread through most of the Haute-Mauricie. However, in

the area in question, even though at least 3,000 square kilometres of the territory were under permit and in free tenure as of 1920, there was very little logging until 1940. The existence of a logging camp in 1923 about 20 kilometres away from Opitciwan and the occasional inspector passing through were the only signs of logging activity in the area (Exhibit P-3, at p 32).

h. The activities of professional trappers, hunters and sport fishers, and the damage caused by the forest companies did not start affecting the Atikamekw of Opitciwan until the 1940s (Exhibit P-3, at p 46).

i. Even though the Atikamekw bands in the Wemotaci and Manawan Reserves were able to establish band funds when logging rights were transferred and sold, the Opitciwan band did not have a band fund until 1950 (Exhibit P-3, Chapter 5, at p 107).

[14] As indicated in decision 2016 SCTC 6 in File No. SCT-2004-11, Mr. Frenette relied on secondary sources in drafting his report. Even though these are useful for explaining the conditions of the time, his report is nonetheless very general. His report and testimony will therefore be considered within these limitations. In the event of a clash between the positions of Mr. Frenette and the opposing experts, Mr. Garneau and Ms. Béreau, whose expert opinions rely on primary sources, the Tribunal will consider all of the documentary evidence on file.

2. Stéphanie Béreau

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

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

[17] Since 2005, she has been working full time as a history consultant. She has delivered

several research reports on the Aboriginal peoples in Quebec to provincial and federal departments as well as private organizations such as museums and publishing houses. She has authored several articles, a book and some conference proceedings.

[18] For this claim, Ms. Béreau filed a report entitled *La question des délais dans la création des réserves au Québec (milieu du XIXe siècle – milieu du XXe siècle* (Exhibit D-9).

[19] This study discusses the delays in creating reserves following the enactment of *An Act to authorize the setting apart of Lands for the use of certain Indian Tribes in Lower Canada*, 1851, 14 & 15 Vict, c 106 (the "1851 Act"). The goal of her report was not to identify all of the factors considered by the federal government in establishing a reserve. Nor was it to perform a comprehensive study of the context surrounding reserve creation in Quebec or to determine on which dates certain reserves were created and how long it took to create them. It was also not to perform a legal analysis of the statutory framework governing Aboriginal lands or reserves (Exhibit D-9, at p 4).

[20] Subject to the above, Ms. Béreau concluded that three factors may, on occasion, have influenced the time required to create a reserve: (1) the colonial context; (2) administrative delays; and (3) the relations between the federal government and the Province of Quebec.

[21] Generally speaking, Ms. Béreau's expert report is relevant, credible and reliable. However, as she points out, her study is not comprehensive, its goal being a general one. Her report and testimony will be analyzed in light of these limitations and all of the evidence. The facts in this case take precedence over any general criteria that may be set out in a report.

3. Jean-Pierre Garneau

[22] Jean-Pierre Garneau was called as an expert by the Respondent. He was qualified by the Tribunal as an expert anthropologist specializing in the culture and history of the Aboriginal populations in Quebec north of the St. Lawrence River with experience in assessing the economic and sociological impacts of industrial projects on Aboriginal communities. His qualifications are described in decision 2016 SCTC 6 in File No. SCT-2004-11.

[23] Mr. Garneau filed an opposing expert report entitled *Contre-expertise du Rapport de M.*

Jacques Frenette intitulé: "Les Atikamekw d'Opitciwan (1880-1950): bilan de la littérature scientifique" (Exhibit D-4). His mandate is also described in decision 2016 SCTC 6 in File No. SCT-2004-11. Two chapters of his expert report pertain to this claim, specifically,

- chapter 1: the time it took to create the reserve; and
- chapter 4: the presence of traders and the sale of alcohol.

[24] Mr. Garneau blames the delay in creating the Opitciwan Reserve on the provincial Crown's inaction. His principal conclusions can be summarized as follows:

a. As of 1912, the federal Crown was prepared to begin the process of creating a reserve for the Atikamekw of Opitciwan. The federal Crown could not create the reserve unilaterally, and, at the time, the Province of Quebec preferred to wait until the flooding had taken place and its consequences were known before moving forward (Exhibit D-4, at p 28).

b. After the flooding and after the Atikamekw had settled in the new site, the federal Crown reopened the file twice, in 1927 and 1930, but for reasons impossible to discern with any certainty, their initiatives did not produce any results (Exhibit D-4, at p 28).

c. In 1942, the Rev. Fr. Meilleur brought up the issue again, appealing directly to Quebec, which he accused of dragging its heels in this case. This effort had a positive effect, the Province agreed to proceed, a new application from the Crown was approved, a survey was conducted and the land was transferred (Exhibit D-4, at p 28).

[25] Regarding the question of the presence of traders and the sale of alcohol, Mr. Garneau's conclusions can be summarized as follows:

a. From June 1925 to 1941, the year as of which the HBC Journals were no longer preserved, the HBC was the only trading company with buildings and a permanent residence in the village of Opitciwan. Nothing in the HBC Journals suggests that the

other traders who would come to the village had property there (Exhibit D-4, at pp 83–84).

b. The other traders would come to the village of Opitciwan on a seasonal basis and for short periods. The traders would usually reach a private agreement with the Atikamekw, allowing them to use an Atikamekw home while they were passing through, likely in exchange for payment, the amount of which was negotiated privately between the parties. Mr. Frenette's claim that [TRANSLATION] "John Midl[i]ge and Donat-Émile Hardy . . . had small stores in Obedjiwan" does not reflect reality (Exhibit D-4, at pp 83–84).

c. The HBC Journals show that the sale of alcohol was not allowed in the village and sometimes resulted in legal proceedings if sufficient evidence could be gathered. Federal police officers from the Royal Canadian Mounted Police sometimes visited Opitciwan to investigate complaints. The HBC Journals confirm a police presence. Mr. Frenette's statements that [TRANSLATION] "Obedjiwan did not have reserve status. The sale of alcohol could not be prohibited there under the *Indian Act.* There were no police in Obedjiwan" are therefore not in line with the facts (Exhibit D-4, at p 84).

[26] Some aspects of Mr. Garneau's report are useful and relevant in that they allow us to understand the facts in a more specific context. However, as mentioned in decision 2016 SCTC 6 in File No. SCT-2004-11, in some respects, Mr. Garneau reveals a tendency of wanting to corroborate the Respondent's position. The conclusions in his report must therefore be viewed with care.

B. The elders' evidence

[27] David and Jérémie Chachai are elders of the Opitciwan community, and they were qualified to give oral history testimony in decision 2016 SCTC 6 in File No. SCT-2004-11. They have personally experienced some of the events they described.

[28] David Chachai testified that he sold his *mikitakan*, that is, his furs, in Oskélanéo and Opitciwan. A trader, John Midlige, would come to Opitciwan to buy the *mikitakan*. In winter,

Mr. Midlige would travel on snowshoes, and in spring, he would come to Opitciwan by canoe. He would stay in Opitciwan for a few days and was accompanied by an employee. He did not build a tent or house to stay in. He would lodge with an Atikamekw elder. The Atikamekw who housed the trader was not a friend of Mr. Midlige, but an acquaintance.

[29] David Chachai did not know for how many years and how often Mr. Midlige came to Opitciwan, but he remembered that he came for several years. He stopped coming because of his age. He started visiting Opitciwan when he settled in Oskélanéo. When Mr. Midlige arrived in Opitciwan, the Atikamekw were happy to see him because he gave them money in exchange for their *mikitakan*. Mr. Midlige spoke Atikamekw (transcript of the hearing, September 12, 2013, at pp 103–05, 148–51).

[30] Jérémie Chachai testified that he was 13 or 14 years old when his father taught him to trap; at the time, he would go and sell his furs to Mr. Midlige, at his store in Oskélanéo. He would also sell his furs to the HBC. The sale of furs could bring in $200 to $300 a year (transcript of the hearing, September 11, 2013, at pp 78–79).

[31] According to Jérémie Chachai, Mr. Midlige stored goods in an old building in Opitciwan that had previously belonged to the HBC. Mr. Midlige had employees who came to Opitciwan to sell food, including bread, eggs and flour, and who would set up shop in this old building. They did this for one or two years until the HBC established its post in Opitciwan. Before moving there, the HBC would sometimes come to Opitciwan.

[32] Jérémie Chachai remembers that, when he was five or six years old, he would accompany his mother to the HBC store to sell moccasins there. The HBC paid about $1.50 for each pair of moccasins, money with which his mother would buy food (transcript of the hearing, September 11, 2013, at pp 85–87, 133–34).

III. ISSUES

[33] The issues are the following:

a. On what date was the Opitciwan Reserve created?

b. Did the federal Crown have a fiduciary duty?

c. If so, did the federal Crown breach its fiduciary duty?

d. If so, what heads of damage can be submitted at the second stage?

IV. ANALYSIS

A. On what date was the Opitciwan Reserve created?

[34] The Claimant submits that the reserve was created on January 14, 1944, with the making of the order by the provincial government's Executive Council, which transferred the lands to the federal Crown (Joint Book of Documents ("JBD"), at tab 343).

[35] The Respondent submits, however, that the reserve was created on March 21, 1950, with the making of Order in Council P.C. 1458, in which the Governor in Council set apart lands with an area of approximately 2,290 acres for the use and benefit of the Opitciwan Band (JBD, at tab 363).

[36] Considering the specific circumstances of this case, I find that the reserve was created on January 14, 1944, the date that marked the completion of the reserve creation process, for the following reasons.

[37] First, in *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 53, [2002] 4 SCR 245 [Wewaykum] (see also *Ross River Dena Council Band v Canada*, 2002 SCC 54 at para 50, [2002] 2 SCR 816 [*Ross River*]), the Supreme Court of Canada noted that while orders in council are certainly presumptive proof of the Crown's intention to create a reserve as therein stated, they are not conclusive. In that case, despite the process having been a joint one between the federal and the provincial governments, the Supreme Court of Canada set the date of completion of the reserve creation process as the date on which the provincial order in council was made since the federal Crown had expressed its intention implicitly (*Wewaykum*, at paras 51, 53).

[38] In the matter before me, the evidence clearly reveals that the federal Crown first expressed its intention of creating a reserve for the Atikamekw of Kikendatch (Opitciwan) in 1908 and that this intention crystallized in 1914 with the survey by Mr. White in Opitciwan. The elements establishing this intention are described in decision 2016 SCTC 6 in File No. SCT 2004-11.

[39] Furthermore, the discussions between the HBC and the Department of Indian Affairs (the "DIA") and between the DIA and Quebec's Department of Lands and Forests ("DLF") from 1925 to 1944 regarding the parcel of land occupied by the HBC in the village of Opitciwan demonstrate that the HBC saw the DIA as being responsible for this territory and that both the HBC and the DIA treated Opitciwan as a reserve, even though this status had not been made official (JBD, at tabs 252, 254, 285, 286 and 335; Exhibits D-13 and P-14).

[40] In addition, on March 31, 1944, in an internal document, the HBC's district manager reported to the manager of the company's fur trade division that the land of the HBC post, in which it had no land title, was included in the lands transferred by the Province for the benefit of the Atikamekw of Opitciwan. He stated that, on January 14, 1944, the Province of Quebec had made an order in council creating the Opitciwan Reserve and that the HBC post was located within the reserve. The document reads as follows:

> It will now be necessary to approach the Department of Mines & Resources, Indian Affairs Branch, in order to come to an understanding regarding our occupation of the site. We presume you will take the matter up with Ottawa from your office. [JBD, at tab 346]

[41] The HBC did not believe that it would be possible to buy the parcel of land but expected the DIA to act reasonably and to lease it.

[42] It appears from this letter that the HBC clearly considered Opitciwan to be an official reserve after the provincial order in council was made.

[43] Second, after Confederation, a number of reserves were created in Quebec without a federal order in council. This is the case, for example, of Coucoucache, Wemotaci and Manawan. Arguing today that it is a principle of law that a reserve can only be created through a federal order in council would, unreasonably, call into question the legality of a number of reserves in Quebec (in this regard, see the Natural Resources Canada website: http://www.nrcan.gc.ca/earth-sciences/geomatics/canada-lands-surveys/publications/11098).
This approach is also contrary to the approach adopted by the Supreme Court of Canada in *Wewaykum*.

[44] Third, the Respondent explained that it took six years to make the federal order in council

because the DIA was performing feasibility studies to ensure that it could provide the Atikamekw of Opitciwan with proper wells since the water from the existing wells had been analyzed and was unfit to drink. According to the Respondent, before setting apart the lands as a reserve, the federal Crown had to ensure that the desired territory was suited to the First Nation's needs. The Respondent added that, for this reason, the federal government worked hard to resolve the drinking water issue. Regarding the federal Crown's efforts, the Respondent noted that [TRANSLATION] "[i]t was not easy for the federal government when it decided to take matters into its own hands in 1941" (Respondent's Memorandum of Fact and Law, File No. SCT-2004-11, at para 315).

[45] As appears from the evidence, there were a number of discussions between 1944 and 1947 among the DIA and various stakeholders regarding the drinking water quality issue and the building of the wells (JBD, at tabs 345, 347, 348, 350, 354, 355, 357 and 358).

[46] However, the DIA had been aware of these problems since 1922. In fact, in 1922, the Commission for the Management of Running Waters in Quebec (also known as the Quebec Streams Commission (the "QSC") informed the DIA in a report of the difficulties in digging wells (JBD, at tab 217). The DIA had been advised of the drinking water quality issues since the flooding and the problems with the wells many times over the years. In light of this, the federal Crown took a long time before [TRANSLATION] "[taking] matters into its own hands". Despite all of these difficulties, it never questioned the location chosen by the Atikamekw. Moreover, given that the QSC reported these difficulties to the DIA in 1922, it clearly felt that they concerned the DIA.

[47] The evidence further demonstrates that it was a request by Agent Larivière of the DIA that triggered a review and that led to the making of the federal order in council.

[48] On January 20, 1950, in response to a letter from Agent Larivière of the DIA requesting copies of the blueprints of the Opitciwan and Manawan Reserves, Superintendent Allan of the federal government's Department of Mines and Resources wrote as follows (Claimant's Book of Authorities in support of its Memorandum of Fact and Law and its Replies – Volume VIII, at tab 114):

> Upon reviewing our Reserve file in connection with Obedjiwan Indian Reserve, we have discovered that this Reserve was never officially set aside by Order in Council. It is now our intention to take the necessary steps to that end . . . . [Emphasis added]

[49] On February 21, 1950, Mr. Waugh, the DIA's Surveyor General, informed Mr. Allan that in accordance with his request, he had sent the copies of the blueprints to Agent Larivière and that he was appending copies of the description of the reserve in order to submit them to the Executive Council so that the status of the reserve could be legalized (Claimant's Book of Authorities in support of its Memorandum of Fact and Law and its Replies – Volume VIII, at tab 114).

[50] It was therefore the federal Crown's inadvertence or carelessness that led to the delay in its making the order in council.

[51] In conclusion, in light of the particular circumstances of this case, I conclude that the reserve was created on January 14, 1944, with the making of the order in council by the Executive Council of the provincial government, the federal Crown having clearly expressed its intention to create the reserve well before this date. There was plainly therefore a meeting of minds between the two levels of government in January 1944. Order in Council P.C. 1458 dated March 21, 1950, must therefore be seen as an administrative measure and not as the expression of the federal Crown's intention to create a reserve at Opitciwan.

B. Did the Crown have a fiduciary duty?

[52] Paragraphs 14(1)(b) and (c) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [the "SCTA"], provide as follows:

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

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

[54] On August 30, 1851, the Legislative Assembly of United Canada enacted the 1851 Act, which provided that certain tracts of land not exceeding 230,000 acres could be described, surveyed and set out by orders in council and appropriated to and for the use of the "several Indian Tribes" in Lower Canada.

[55] On August 9, 1853, therefore, Order in Council 482 (the "1853 Order in Council") was made. It approved the schedule appended to it (the "Schedule"), apportioning the 230,000 acres of lands to 11 reserves. The Schedule indicated the location, area and beneficiaries of the planned reserves.

[56] In decision 2016 SCTC 6 in File No. SCT-2004-11, I reached the following conclusions:

a. There were enough similarities between the reserve creation processes in British Columbia and Quebec for Opitciwan to be characterized as a "provisional reserve" for the period from 1914 to 1944.

b. The legislative package made up of the 1850 and 1851 Acts and the 1853 Order in Council, considered in light of subsection 91(24) of the *Constitution Act, 1867*, 30 & 31 Vict, c 3, formed the framework for the federal Crown's legal obligation to create reserves.

c. The adoption of the 1853 Order in Council arising under the 1851 Act and approving the 1853 Schedule distributing the 230,000 acres of lands gave rise to an obligation on the part of the federal Crown to create reserves for the bands identified therein,

since the areas mentioned in the Schedule had been "set apart" and "appropriated" to and for their use.

d. This legal duty arose out of the launching of the reserve creation process.

e. As for the Opitciwan Reserve, the process for its creation was launched in 1853 with the designation in the Schedule of the Atikamekw as beneficiaries of certain acres for the purposes of creating a reserve, further developed in 1908 and in 1912 with the application from Chief Awashish and the positive response from the DIA, crystallized in 1914 with the survey by Mr. White and completed with the creation of the reserve in January 1944.

f. Therefore, (1) by no later than 1914, the Atikamekw of Opitciwan had a cognizable and acknowledged Aboriginal interest in the Opitciwan lands forming the provisional reserve, and (2) the federal Crown had a discretionary power to ensure that the reserve creation process was implemented.

g. These facts gave rise to a fiduciary obligation on the part of the federal Crown to the Atikamekw of Opitciwan. The evidence demonstrates that the DIA constituted itself as the exclusive intermediary for the Atikamekw of Opitciwan with the Province of Quebec with respect to the lands from which their reserve was to be created.

h. In accordance with the jurisprudence of the Supreme Court of Canada (*Wewaykum*, at paras 86, 89, 94, 97), prior to the date of creation of the Opitciwan Reserve, so before January 14, 1944, the federal Crown's fiduciary duty included 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 beneficiaries of the obligation.

i. The evidence establishes that the Crown failed to honour these obligations.

j. As part of a reserve creation process, the acts performed by the federal Crown with respect to the lands occupied by the Atikamekw of Opitciwan in the "provisional reserve" were governed by the fiduciary relationship between them and the Crown.

k. After the reserve was created, the scope of the Crown's fiduciary obligation expanded to include the protection and preservation of the band's "quasi-proprietary" interest in the reserve from exploitation.

[57] I concluded in decision 2016 SCTC 6 in File No. SCT-2004-11 that the federal Crown was bound by a legal and a fiduciary duty in the reserve creation process. In this matter, the question of the delay in creating the reserve pertains to the lands of Opitciwan and goes to the heart of the reserve creation process.

[58] The imposition of a fiduciary duty before the reserve was created attached to the federal Crown the obligations of loyalty, providing full disclosure and acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan, the beneficiaries (*Wewaykum*, at para 94; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para 104, [1996] 2 CNLR 25). After the reserve was created, the scope of the fiduciary duty expanded.

[59] Neither the 1850 and 1851 Acts nor the 1853 Order in Council and Schedule provide for a reserve creation time frame. The same is true of the *Act respecting lands set apart for Indians*, SQ 1922, c 37 (the "1922 Act").

[60] As submitted by the Respondent, therefore, there was no statutory duty to create a reserve within a specific time frame; indeed, the Claimant does not dispute this.

[61] In fact, the Claimant is not arguing that the legislation provides for a reserve creation time frame. Rather, it submits that, as of 1908, the DIA, in its capacity as a fiduciary, had to act with loyalty and ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan; this meant acting in a timely manner.

[62] Even though it submits that the federal Crown acted with ordinary prudence in the circumstances, relying on *Khalil v Canada*, 2007 FC 923, at paras 169–208, [2008] 4 FCR 53 [Khalil], the Respondent argues that the government's delay, if applicable, is not a free-standing cause of action.

[63] The matter of Khalil is an action for damages in immigration based on the delay in an

administrative process by the federal authorities processing permanent residence applications filed by Convention refugees. The plaintiffs argued that the authorities' delay in processing their applications caused them harm.

[64] The late Justice Layden-Stevenson dismissed the plaintiffs' claim on the grounds that the federal Crown did not have a private law duty of care and that causation had not been established in any event.

[65] Among other things, the judge wrote as follows:

> [178] . . . However, it is clear to me that an action against the Crown based on delay in the processing of a Convention refugee's application for permanent residence does not come within a recognized category of relationships giving rise to a duty of care. Imposing such a duty would represent a novel duty at law.
>
> [191] The length of time (the delay) taken to process Ms. Haj Khalil's application has been the subject of discussion elsewhere in these reasons. The IRPA does not provide a time limit within which a determination on an application for permanent residence is to be made. In general terms, where delay can be attributed to the statutory duty to protect the public from potentially inadmissible applicants, the potential for conflicting duties is manifest. If the Court were to find a private law duty of care was owed to individual applicants, what then of the public interest? Would the defendant's officials' duty to thoroughly investigate an applicant's potential inadmissibility be compromised because of an applicant's expectations regarding the length of time needed to process the application? Could not the imposition of such a duty result in a "chilling effect" on the defendant's officials if they were hesitant to engage in a complete investigation for fear that it could attract criticism or worse, an action for damages? To find a private law duty of care based merely on delay would compromise the paramount duty of the defendant's officials to protect the public interest.

[66] Yet the facts in *Khalil* are very different from the facts before me. In *Khalil*, the Court was not dealing with a situation where the federal Crown was bound by a fiduciary duty as is the case here. For this reason, I find that *Khalil* does not apply here and that it is more relevant to analyze decisions involving Aboriginal law and fiduciary duty.

[67] Under this heading, in *Fairford First Nation v Canada (AG)(TD)*, [1999] 2 FC 48, at paras 220–21, the Federal Court concluded that the Crown's fiduciary duty included acting in a timely manner:

> . . . The same conditions apply when land is to become part of an Indian reserve.

> . . . The fiduciary must act with reasonable skill and diligence. Generally, I think that must include acting in a timely manner.

[68] In *Lac La Ronge Indian Band v Canada*, [2001] SKCA 109 at para 99, 206 DLR (4th) 639 [*Lac La Ronge*], the Saskatchewan Court of Appeal held that, despite Treaty No. 6 not specifically stating when the Indian reserves promised under this Treaty should be created, the parties' intention indicated that the lands should be selected and set apart within a reasonable period of time after the Treaty was signed:

> [92] An examination of the record of negotiations, and in particular the statements made by Alexander Morris during the negotiations of Treaty No. 6, reveal an intention on the part of Canada to complete the survey and selection process within a reasonable period of time. [Citation omitted] . . .
>
> [94] The procedure for the reserve land selection and allocation in Treaty No. 6 was intended to be consistent with the establishment of the reserves in the other treaty areas. That is, the reserve land was to be set aside within a reasonable period of time after the signing of the treaty using the formula agreed on to fix the size of the reserve. . . .
>
> [97] There is no evidence in the treaties or in the documentation surrounding the negotiations of the treaties that Canada intended to leave the question of land entitlement open-ended. Indeed, the evidence is to the contrary. . . .
>
> [99] I conclude that there was a common intention that the reserve land entitlement would be determined, allocated and set apart within a reasonable period of time. This is consistent with the policy of Canada to open up the lands for settlement and with the Indians' desire to treat with Canada to permit them to make the transition to agriculture. [Citation omitted] A failure to select and allocate the reserve lands within a reasonable period of time would have had a detrimental effect on the aims of both parties. It would have required keeping large tracts of Crown land off limits to settlement, and would have delayed the transition to agriculture by the Indians. [Emphasis added]

[69] Even though the facts in *Lac La Ronge* are distinguishable from the facts before me in that at issue were the parties' intention under a treaty, there are clear similarities with the matter under review. *Lac La Ronge* emphasizes the importance of acting within a reasonable time frame when it comes to creating a reserve.

[70] In *Lower Kootenay Indian Band v Canada*, [1992] 2 CNLR 54 at paras 213, 215, 42 FTR 241 (FCTD), the Federal Court had to determine, among other things, whether the Crown had been in breach of its fiduciary duty or negligent, or both, by not taking steps to terminate a lease even though it had been asked to do so repeatedly for many years and there were valid legal

grounds for the termination. Noting that the evidence clearly demonstrated that the Department had been dragging its heels, Justice Dubé drew the following conclusion:

> 215. Again, as under question 4, *supra*, had the Crown moved with some degree of alacrity, the band could have benefitted from an earlier termination of what had turned out to be a bad deal for them. Eventually, after years of dilatoriness on the part of departmental officials, the band took action on its own and was successful in 1982 in forcing Creston to settle and to terminate the lease. The Crown was remiss in its duty by failing to take any effective action against Creston from 1974 onwards.

[71] In *Ross River*, at paras 45 and 77, the Supreme Court of Canada, per Justice LeBel, noted that the federal government was often slow to meet its obligation to create reserves. Justice LeBel criticized the federal government's practice of establishing Aboriginal communities which remained in legal limbo and reiterated that the actions of the Crown with respect to the lands occupied by a band were governed by the fiduciary relationship which exists between the Crown and the band.

[72] In conclusion, it appears from the jurisprudence on Aboriginal law that when a delay occurs in relation to a fiduciary duty, the delay can be a cause of action. In the matter before me, I find that the federal Crown was bound by the obligation of acting with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan with respect to the time it took to create the reserve, which meant acting within a reasonable time frame.

[73] I must now determine whether the particular circumstances of this claim establish that the federal Crown breached its duty to act within a reasonable time frame by taking over thirty years to complete the process of creating the Opitciwan Reserve.

C. Did the federal Crown breach its fiduciary duty?

[74] The process for creating a reserve for the Atikamekw of Kikendatch (Opitciwan) was launched in 1853 with the designation in the Schedule of the Atikamekw as beneficiaries of certain acres for the purposes of creating a reserve, further developed in 1908 and in 1912 with the application from Chief Awashish, crystallized in 1914 with the survey by Mr. White and completed in 1944. If one sees 1908 as the starting point, the process spread over 36 years.

[75] According to the Respondent and its expert witness Mr. Garneau, the DIA met with

several refusals from the Province of Quebec because of the construction and opening of the Gouin dam. According to Mr. Garneau, nothing in the sequence of events suggests that the delay in creating the reserve was attributable to ill will on the part of the federal Crown. Not only is it the role of the Tribunal to assess a party's conduct in light of the facts in evidence, the breaches of the obligation to act with ordinary prudence with a view to the best interest of the beneficiaries are not necessarily a demonstration of ill will.

[76] In turn, Ms. Béreau stated in her expert report and under examination that there were certain factors that could explain reserve creation delays, including the following (Exhibit D-9; transcript of the hearing, January 15, 2014, at pp 12–17):

a. the pressures of colonial development on Aboriginal communities and their hunting grounds, and Aboriginal peoples' refusal to settle in designated reserves and express wish to live closer to their hunting grounds;

b. administrative delays; the number of stakeholders involved and what was required of them during the various stages of the reserve creation process, especially after 1867, with two levels of government participating in the process; the Aboriginal peoples' nomadic lifestyle; and the difficulty of gathering the necessary information from First Nations (censuses, multiple notices); and

c. the relations between the federal government and the Province of Quebec and the strain imposed on political cooperation by the decision in *Quebec (AG) v Canada (AG)*, 56 DLR 373, [1921] 1 AC 401 [*Star Chrome*].

1. The period from 1908 to 1927

[77] Regarding the colonial context, Ms. Béreau admitted that she did not study the particular case of Opitciwan (transcript of the hearing, January 15, 2014, at pp 20–21). She also did not analyze the administrative factors that might have affected the time it took to create the Opitciwan Reserve during the period following the first application for a reserve at Kikendatch, that is, after 1908 (transcript of the hearing, January 15, 2014, at p 37).

[78] Ms. Béreau also admitted that, in the particular case of Opitciwan, the issue of the

reliability of the demographic data was not an obstacle that could have explained a delay in the reserve's creation (transcript of the hearing, January 15, 2014, at pp 38–41; transcript of the hearing, January 14, 2014, at p 156).

[79] Ms. Béreau's testimony therefore suggests that, while, generally speaking, the colonial context, the Aboriginal bands' nomadic lifestyle and the difficulty of gathering the necessary information from the bands may in some cases have played a role in the reserve creation process in Quebec, the impact these factors had on the time it took to create the Opitciwan Reserve specifically has not been studied. Consequently, the evidence does not suggest that these factors affected the time it took for the federal Crown to act in the Opitciwan Reserve creation process.

[80] Ms. Béreau stated that, between 1908 and 1922, the lack of available lands in the bank of lands that had been set apart might have affected the time it took to create the Opitciwan Reserve. However, this impact would have been relative since the evidence reveals that in the particular case of the Atikamekw of Opitciwan, the federal Crown proposed to the provincial Crown in December 1909 that the former purchase the lands. However relative this may be, it cannot be ignored. And Ms. Béreau admits that this shortage stopped being a problem in 1922 after the Government of Quebec added 100,000 acres of land.

[81] Having said that, it cannot be denied that the Gouin reservoir development did affect the time it took to create the Opitciwan Reserve. How did it do so specifically?

[82] According to Mr. Garneau, the delays are due to the many refusals from the Government of Quebec as a result of the construction of the dam. Yet, as Ms. Béreau noted, refusal is not the right term, as the Government of Quebec simply decided to suspend the application for the creation of a reserve because of its planned dam (transcript of the hearing, January 15, 2014, at pp 55–56).

[83] In December 1914, upon the insistence of the Atikamekw, the DIA renewed its application for the Province of Quebec to transfer the sought-after lands in order to create a reserve at Opitciwan (JBD, at tab 147).

[84] The DLF replied that it could not yet approve the DIA's application because of the risk of flooding and referred the DIA to its previous correspondence. It added that only 581 acres

remained in the land bank, but that if his predecessor's suggestion from March 16, 1910, regarding the surrender of the lands at Wemotaci and Coucoucache in exchange for the creation of two reserves of equivalent area were acceptable to the DIA, the Government of Quebec would be prepared to provide the remaining 581 acres still available. The DLF ended its letter by pointing out certain problems with Mr. White's survey plan (JBD, at tab 149).

[85] In January 1915, the DIA wrote to the DLF to inform it that as soon as the extent of the flooding was known, if the lands were still usable, it would renew its application (JBD, at tab 150).

[86] In 1917, the Atikamekw of Opitciwan, through the HBC representative, asked the DIA for an update on the reserve. The DIA replied that it would not take any action unless the Indians discovered that their hunting and fishing activities had been negatively affected by the rising waters (JBD, at tabs 169 and 171).

[87] This in short was the situation before the impoundment of the reservoir, which began in 1918. From 1919, or no later than 1920 onwards, the parties knew the size of the area that had been flooded.

[88] Indeed, Mr. Garneau admitted that, as of 1919, the year in which the water in the reservoir reached its maximum level, the parties had a clear idea of the size of the flooded area (transcript of the hearing, January 17, 2014, at p 30). Consequently, the Government of Quebec could no longer claim the caution it had advised in 1912 (transcript of the hearing, January 17, 2014, at p 30). In other words, the Government of Quebec could no longer use the risk of flooding by the dam as a pretext for refusing to transfer the reserve lands.

[89] Having said that, even though, after Confederation, both levels of government had to work together in the reserve creation process, the federal Crown was responsible for initiating the process, with the provincial government having to respond to any federal initiatives.

[90] Consequently, in 1919, or no later than 1920, with the flooding having taken place, the federal Crown was aware or could not have been unaware of the extent of the damage on the lands Mr. White had surveyed in 1914. It therefore had to reapply to the provincial Crown to complete the reserve creation process, especially since the DIA had undertaken to do so in both

1912 and 1915 as soon as the effects of the development were known (JBD, at tabs 122 and 150), and had claimed in 1917 that it wished to wait until the Atikamekw had taken stock of the damage before considering a new location (JBD, at tab 171). However, the federal Crown did not renew its efforts until 1927.

[91] According to the Respondent, 1917 to 1927 marked a period of great instability as a result of the operation of the provincial dam. It added that, following the flooding, the QSC and the Atikamekw of Opitciwan entered into an agreement, and work to relocate the village was carried out, culminating in the inauguration of the new village in September 1925, which explains the delays that occurred during this period.

[92] According to the Claimant, the facts in evidence establish that there was nothing stopping the federal Crown from completing the reserve creation process during this period, especially as in 1920, the QSC informed the DIA that the Chair of the QSC had authorized the QSC to say that it would recommend to the Government of Quebec that the flooded lands on the Opitciwan Reserve be replaced by enlarging the reserve by an equivalent area (JBD, at tab 189). In fact, the DIA accepted this suggestion, but took no concrete measures to implement it. However, I cannot ignore the discussions between the main stakeholders regarding the relocation of the new village that was inaugurated in 1925 and the remoteness of Opitciwan. It is therefore not unrealistic to believe that these factors could have led to some delays.

[93] The Respondent argues that it did act with ordinary prudence since, after 1925, it renewed the discussions with the Province to finalize the reserve creation process taking into account the location of the new village that had just been inaugurated (Respondent's Memorandum of Fact and Law, at para 201).

[94] Yet it was not until November 11, 1927, that the federal Crown approached the Government of Quebec on the matter (JBD, at tab 273). The renewed interest was sparked, among other things, by the presence of independent traders on the territory.

[95] In fact, on November 5, 1927, Inspector Parker of the DIA informed Superintendent Scott of the DIA that the DIA's failure to monitor the Opitciwan Reserve had recently become embarrassing because of the traders settling in the new Aboriginal community. According to

Inspector Parker, there was no reason why steps could not be taken to legalize the status of the reserve given that the Atikamekw of Opitciwan had been settled in that location by a department of the Government of Quebec. If no steps were taken, difficulties would ensue for the DIA (JBD, at tab 272). I will return to the period from 1925 to 1927 in the next section.

[96] The evidence demonstrates, therefore, that there were certain factors to explain the delays in completing the reserve creation process at Opitciwan from 1919 to 1925.

2. The impact of *Star Chrome*

[97] The Claimant submits that the Respondent unreasonably delayed the reserve creation process at Opitciwan as a result of its dispute with the Province of Quebec regarding the abandoned reserves following the decision in *Star Chrome* and by putting its own interests before those of the Atikamekw (Claimant's Memorandum of Fact and Law, at paras 195, 214–15).

[98] The Respondent argues that the expert evidence establishes that, in fact, the 1922 Act, which is an extension of the *Star Chrome* decision, could have contributed to generating tension between the two levels of government and slowed down the reserve creation process in general (Respondent's Memorandum of Fact and Law, at para 204).

[99] The Privy Council's decision in *Star Chrome* was rendered in 1921. In its decision, rather than allocating the proceeds from the sale of lands surrendered by Aboriginals to the band that surrendered the lands, the Privy Council allocated them to the province in which the reserve was located; the federal Crown objected to this.

[100] According to the Respondent, following the decision in *Star Chrome*, the DIA attempted to convince the Government of Quebec to sign an agreement similar to the one signed with Ontario in 1924 and under which Canada could continue to sell and grant titles in Aboriginal lands to third parties and the money obtained from these transfers would go to Aboriginal bands (Exhibit D-9, at pp 26 et seq; Respondent's Memorandum of Fact and Law, at para 205; JBD, at tab 321; Exhibit D-11). The Government of Quebec felt that the abandoned lands should be managed directly by the Province and that it should be reimbursed for the money paid to the federal government, as decided by the Privy Council in *Star Chrome* in 1921 and as stipulated in

the 1922 Act.

[101] It is important to be aware that the dispute also concerned the money claimed by the Government of Quebec from the federal government following *Star Chrome*. The Province requested that the federal government reimburse it $367,771, while the federal government claimed that it only owed the Province $140,959 (transcript of the hearing, January 15, 2014, at pp 86–96; Exhibit P-7).

[102] To explain the intensity of the conflict between the federal government and the Province, the Respondent described some of the meetings that were held in the late 1920s to discuss these issues between representatives of both levels of government. Among other things, it referred to a memorandum from 1942, in which Mr. Boisvert, the head of the DLF's Lands Service, summarized the steps that had been taken since the mid-1910s to create the Opitciwan Reserve. This included a meeting with Superintendent of Indian Affairs Duncan Scott, of which Mr. Boisvert wrote the following (Exhibit D-9, at p 26; JBD, at tab 321):

> [TRANSLATION]
>
> During a discussion I had with Duncan Scott, Deputy Superintendent of the DIA, about the settlement of certain issues regarding the abandoned Indian reserves, Mr. Scott declared that his department would not consider any specific issues, including that of Obidjuan, until the federal and Quebec governments had reached an agreement about the abandoned Indian reserves, the ownership of which had been given by the Privy Council to the provinces, a decision that the federal government was not willing to accept.

[103] Ms. Béreau stated that, according to her research, this is the sole document that confirms that the creation of the Opitciwan Reserve was used as an argument in the negotiations regarding the abandoned reserves.

[104] Ms. Béreau added that this meeting probably took place in the late 1920s since in the spring of 1928, Mr. Scott, likely in the company of Lucien Cannon, Solicitor General of Canada, and possibly W. Stuart, Deputy Minister of Justice, met with Charles Lanctôt, Deputy Attorney General of Quebec, to discuss the "administration of Indians Lands" in the Province. A year later, another meeting on "Indian questions" was organized between Mr. Scott and Premier Taschereau (Exhibit D-9, at p 26).

[105] According to Ms. Béreau, to succeed in persuading the Province that it was in the best interest of both governments to come to an agreement, the federal government was not afraid to remind the Government of Quebec in April 1932 that "the existing impasse . . . seriously affects the proper and efficient administration of Indian lands in your Province" (Exhibit D-9, at p 27; Respondent's Memorandum of Fact and Law, at para 205(h)).

[106] Ms. Béreau further adds in her report that, one year later, Mr. Caldwell, the director of the DLF's Lands Service, insisted in a memorandum to the Assistant Deputy Superintendent General of the DIA that if the Aboriginal bands could no longer benefit from the sale of their lands, they would stop agreeing to their surrender, to the detriment of neighbouring non-Aboriginal communities (Exhibit P-8).

[107] According to Ms. Béreau, the federal government actually carried out its threat of blocking all Indian land transfers on two occasions, in the case of the Nédélec or Temiskaming Reserve and, in 1933, the Doncaster Reserve (Exhibit D-9, at pp 27–28; Respondent's Memorandum of Fact and Law, at para 205(j)).

[108] The Respondent argues that the only means the federal government had of putting pressure was to threaten blocking all transfers of Aboriginal lands to Quebec given that the Government of Quebec refused to negotiate and sought to enforce the judgment in *Star Chrome* (Exhibit D-9, at pp 26 et seq; Respondent's Memorandum of Fact and Law, at para 205(g)).

[109] The Respondent concludes that these facts establish that (1) the federal Crown would not have benefitted from slowing down the Opitciwan reserve creation process; (2) the federal Crown cannot be accused of taking sides regarding an issue that concerned all Aboriginal peoples in Quebec and that subsumed the best interest of the Atikamekw of Opitciwan; (3) the 1942 letter from Mr. Boisvert was the only document that suggested that the federal government was responsible for blocking the reserve creation process; and (4) in 1933, Canada paid the Province of Quebec $140,959 out of its Consolidated Revenue Fund to resolve the dispute arising from *Star Chrome*. In her testimony, Ms. Béreau explained that Quebec eventually waived its rights following the transfer of the Temiskaming Reserve (transcript of the hearing, January 15, 2014, at p 14).

[110] For the Respondent, the Claimant's arguments that the DIA acted in its own interests and deliberately refused any discussion or agreement after *Star Chrome* have no merit.

[111] In considering whether it would have been in the federal Crown's interest to use Opitciwan in its conflict with the Province of Quebec, which the documents consulted do not seem to justify, Ms. Béreau suggested that it was not the federal Crown that blocked the creation of the Opitciwan Reserve but the Province (Exhibit D-9, at p 29). On the basis of the letters she reviewed, she suggested that Mr. Boisvert of the DLF had an interest in justifying his conduct by shifting the blame for the delay onto the federal government.

[112] So what is the truth of the matter?

[113] First, Ms. Béreau testified that, when she spoke of the impact the conflict arising from *Star Chrome* had on the reserve creation time frame, that conflict started after 1925 (transcript of the hearing, January 15, 2014, at pp 68–69). In fact, the evidence reveals that the Uashat Reserve (Sept-Îles) was created in 1925 from the lands added by the 1922 Act.

[114] However, on November 11, 1927, when it reapplied to the DLF, the DIA wrote that "[t]his Department is most anxious to obtain a reserve for these Indians of Obijuan" (JBD, at tab 273). On November 17, 1927, Deputy Minister Lemieux forwarded the DIA's November 11 letter to the QSC to the DLF, asking the QSC to send him any available information about this matter (JBD, at tab 274). On November 21, the QSC confirmed to the DLF that the information provided by the DIA in its letter dated November 11 was accurate, adding that, in 1920, it had made a commitment to the DIA that it would recommend to the DLF that the flooded area be replaced by an equivalent area at the back of the reserve, but that the QSC had not heard anything about the boundaries of the reserve since that recommendation (JBD, at tab 275).

[115] As appears from this correspondence from 1927, no reference was made to *Star Chrome*.

[116] In light of the DIA's letter of November 11, 1927, Ms. Béreau qualified her comments and concluded that it was possible that in 1927 the crisis had not yet escalated and that the DIA had been in a different state of mind than in 1930, at the time of the meeting between Mr. Scott of the DIA and Mr. Boisvert of the DLF and in Mr. Boisvert's memorandum to his Deputy Minister (transcript of the hearing, January 15, 2014, at pp 128–29).

[117] Consequently, the evidence does not establish that anything was preventing the DIA from finalizing the reserve creation process at Opitciwan between 1925 and 1927.

[118] On March 1, 1929, Mr. Scott of the DIA wrote to Premier Taschereau, as follows (Exhibit D-11):

> This Department does not question the legal position of the Province of Quebec in asking an accounting for the monies received from the sale of Indians lands and is quite prepared to meet the conditions imposed by the judgment.

[119] Mr. Scott then referred to the agreement entered into with Ontario, concluding as follows:

> If the Province still wishes to take the legal position it follows that this Department will not be able to ask the Indians for any surrenders of land, and from our standpoint, it is not considered that such a position of affairs would be in the interests of the development of localities adjacent to Indian Reserves.

[120] In August 1929, in the absence of any developments on the reserve creation front, Mr. Lefebvre, the QSC's Chief Engineer, informed Deputy Minister Lemieux of the DLF that during a recent visit to Opitciwan, Chief Gabriel Awashish had questioned him about the boundaries of the reserve. Mr. Lefebvre wished to know whether a decision had been reached or an agreement struck between the DLF and the DIA on this point (JBD, at tab 282).

[121] On January 31, 1930, in response to a letter dated January 25, 1930, from Deputy Minister Mercier of the DLF, the Acting Assistant Deputy Minister of the DIA, Mr. MacKenzie, wrote to the DLF that it was desirable to consult the Atikamekw before selecting the lands to be added to the Opitciwan Reserve. Mr. MacKenzie added that if the DLF agreed, the DIA would send one of its surveyors to meet with the Atikamekw of Opitciwan and select a reserve that included their residences (JBD, at tab 284).

[122] Mr. Garneau acknowledged that the letter dated January 31, 1930, demonstrates that this time the process was reinitiated by the Province of Quebec (transcript of the hearing, January 17, 2014, at pp 50–51).

[123] On February 10, 1930, Deputy Minister Lemieux of the DLF replied to the letter of January 31 from Acting Assistant Deputy Minister MacKenzie of the DIA, informing him that he was suspending the file while the DIA consulted the Atikamekw of Opitciwan (JBD, at tab 303).

[124] Moreover, it appears from the evidence that the meeting between Messrs. Scott and Boisvert referred to in Mr. Boisvert's 1942 memorandum took place on March 27, 1930. In a letter to his superior, Quebec's Minister of Lands and Forests, dated April 1, 1930, Mr. Boisvert wrote as follows (JBD, at tab 287):

> [TRANSLATION]
>
> In accordance with the instructions I was given by the Department, I travelled to Ottawa on March 27 to discuss various pending issues, including the Nédélec, Whitworth and Obidjuan Reserves, with the Department of Indian Affairs.
>
> I met with Mr. Duncan Scott, the Deputy Superintendent General of Indian Affairs, who told me that he did not believe it necessary to discuss any specific cases before the general issue of the abandoned reserves had not been settled between the Government of Quebec and the government in Ottawa.
>
> Mr. Scott asked me to convey these comments to you and to try to arrange a meeting between the local authorities and the Department of Indian Affairs.

[125] Ms. Béreau admitted that she had not seen this letter from Mr. Boisvert (transcript of the hearing, January 15, 2014, at p 106).

[126] Yet, it is this 1930 memorandum from Mr. Boisvert that demonstrates that it was the federal Crown that decided that it did not wish to discuss the Opitciwan Reserve any longer. The Province of Quebec cannot therefore be blamed for the decision to delay the reserve creation process. This letter also shows that, contrary to the hypothesis formulated by Ms. Béreau in her report, Mr. Boisvert did not attempt to justify his actions by shifting the blame onto the federal government.

[127] On May 19, 1930, Surveyor General Robertson of the DIA nonetheless asked Mr. White to conduct the survey of the Opitciwan Reserve taking into account the location of the new village. He recommended that the latter be accompanied by a surveyor licenced by Quebec so that the boundaries of the selected lands could be established to the provincial government's satisfaction (JBD, at tab 288).

[128] In September 1930, the DIA decided to put off the survey to the following year so that the surveyor could meet with the Atikamekw. The DIA therefore did not consult the Atikamekw on the boundaries of the reserve that summer, contrary to what it had undertaken to do (JBD, at

tab 289).

[129] One may suspect that the conflict surrounding *Star Chrome* had something to do with this since it was on March 27, 1930, that Mr. Scott informed Mr. Boisvert that the federal government intended to suspend discussions regarding Opitciwan as long as the issue of the abandoned reserves had not been resolved.

[130] In any event, the survey did not take place the following year.

[131] Having said that, on May 12, 1933, Mr. Caldwell of the DIA confirmed that the two levels of government had reached an agreement and that Parliament had approved the transfer of $141,000 to the Province (Exhibit P-8).

[132] Even though discussions regarding the Temiskaming Reserve continued until 1940 between the Province of Quebec and Canada, Ms. Béreau fixes the end of the *Star Chrome* conflict in 1933 (transcript of the hearing, January 15, 2014, at p 87).

[133] Moreover, Ms. Béreau testified that, apart from the surrender of the Temiskaming Reserve, which became the subject of an agreement with the Province of Quebec, in which the Province waived its reversionary interest in the reserve on January 13, 1940, she did not identify any other accommodations resulting from *Star Chrome*. Contrary to the other reserves, the Temiskaming Reserve was a very big reserve.

[134] In her report, Ms. Béreau indicated that, in addition to the Temiskaming and Opitciwan Reserves, discussions regarding the Doncaster Reserve had also been suspended.

[135] Even though she stated that the discussions between the two levels of government regarding the *Star Chrome* conflict commenced well before 1928, Ms. Béreau substantiated this conflict mainly through the correspondence between 1928 and 1933.

[136] Despite this, the Opitciwan Reserve discussions were reinitiated on two occasions, in 1927 and in 1930 even though, according to the Respondent, this was at the peak of the *Star Chrome* dispute.

[137] In short, even though representatives of both levels of government continued to discuss

among themselves the creation of the Opitciwan Reserve, the evidence reveals that the *Star Chrome* conflict strained their relationship and likely delayed the creation of the reserve.

[138] If the conflict did have an impact on the process of creating the Opitciwan Reserve, the evidence establishes that the impact lasted three to five years at the most.

[139] Even though the *Star Chrome* conflict was resolved in 1933, it was not until 1937 that new steps were taken with regard to the Opitciwan Reserve.

3. The period from 1933 to 1944

[140] On May 15, 1937, Chief Paul Meguish of Opitciwan asked the DIA for a copy of the survey plans for the Opitciwan Reserve, since none had been provided to him after the village was relocated (JBD, at tab 302).

[141] On June 3, 1937, in a memorandum addressed to Superintendent Parker of the DIA's Reserves and Trusts, Mr. Nash, a surveyor, on behalf of Surveyor General White, described the situation with respect to the Opitciwan Reserve. He recalled that in 1930, following a proposal from the federal government to select 542 additional acres, the Deputy Minister of the DLF had informed the DIA that he would be putting the file on hold pending the DIA's consultation of the Atikamekw of Opitciwan. Noting that no further action had been taken, Mr. Nash informed Mr. Parker that the DIA could not provide the survey plans of the reserve to Chief Meguish. Mr. Nash recommended, however, that the provincial government be asked that the site chosen by the Atikamekw of Opitciwan be surveyed as soon as funding became available (JBD, at tab 303).

[142] This reveals that despite its undertaking in January 1930, the DIA had still not consulted the Atikamekw of Opitciwan about the boundaries of the reserve and that the reserve had not yet been surveyed.

[143] It took another two years before new action was taken. On July 6, 1939, Surveyor General Peters of the DIA sent his instructions in writing to Surveyor Rinfret for the survey of the Opitciwan Reserve. On the same day, Surveyor General Peters sent Deputy Minister Bédard of the DLF a copy of his instructions to Mr. Rinfret and asked him to approve them as Mr. Rinfret needed to conduct the survey in August of that same year (JBD, at tabs 307 and 308).

[144] And that was it. There is no further archival evidence until 1942.

[145] On September 2, 1942, Vice-Chair Lefebvre of the QSC informed Deputy Minister Bédard of the DLF that the Rev. Fr. Meilleur had recently told him that the provincial authorities had neglected to deal with the DIA's repeated requests to determine the new boundaries of the reserve. Mr. Lefebvre added that he believed that the issue had been raised in 1918–19 and that he had understood at the time that the Atikamekw would receive compensation for the flooded lands and the shrinking of their reserve as the boundaries receded inland (JBD, at tab 319). This internal memorandum from Quebec triggered Quebec's final effort.

[146] According to the Respondent, this letter establishes that it was not the federal government that had been dragging its heels, but the provincial one. Similarly, in another letter from the Rev. Fr. Meilleur written to Mr. Lefebvre in 1942, the Rev. Fr. Meilleur criticized the slowness of the provincial government, which was failing to respond to the DIA's request for a determination of the new boundaries of the reserve. He also took the opportunity to remind the QSC that it still owed Father Guinard money following the relocation of the chapel at Opitciwan (Respondent's Memorandum of Fact and Law, at paras 206–12; Exhibit D-4, at p 25; JBD, at tab 331).

[147] In any event, it was the federal Crown's responsibility to ensure implementation of the reserve creation process and to take the appropriate measures to do so.

[148] In response to Mr. Lefebvre's letter, on February 9, 1943, Deputy Minister Bédard of the DLF informed the DIA that the DLF was prepared to recommend to the Executive Council the recognition of the Opitciwan Reserve that Mr. White had surveyed in 1914 (JBD, at tab 326).

[149] A survey was subsequently performed, and on January 14, 1944, the Government of Quebec made the order in council transferring the lands of the Opitciwan Reserve.

[150] Consequently, the renewed effort in 1943 was not initiated by the federal government, but by the Rev. Fr. Meilleur and subsequently the Government of Quebec. The analysis of all the facts in evidence quite clearly establishes that the DIA did not take any steps to push the issue forward with the Government of Quebec.

[151] This was the situation from 1933 until the reserve's creation in 1944.

[152] Having said that, in respect of the delay in creating a reserve, each case must be considered on its own merits.

[153] In the matter at hand, with respect to the facts, I must take the following factors into account: (1) the flooding resulting from the Gouin dam; (2) the federal and provincial government's strained relations regarding this matter; (3) the geographic remoteness of the reserve; (4) all the other facts set out in this decision and decision 2016 SCTC 6 in File No. SCT-2004-11. From these I conclude that the 20 years following Mr. White's survey would have been more than sufficient for completing the creation of the Opitciwan Reserve. After 1934, there were no longer any determining factors to delay or prevent the creation of the reserve.

[154] Consequently, I find that the period from 1934 to 1944 constitutes an unreasonable delay for which the federal Crown was liable. The evidence establishes that it did not act with the ordinary prudence required to bring the matter to a successful conclusion.

[155] Given that as a fiduciary, the federal Crown had to act in a timely manner and with reasonable skill and diligence with a view to the best interest of the Atikamekw of Opitciwan, and given that the Respondent did not provide sufficient satisfactory reasons to explain the 10 year delay from 1934 to 1944 to complete the reserve creation process at Opitciwan, I conclude that the federal Crown did not act with ordinary prudence with a view to the best interest of the Atikamekw of Opitciwan and breached its duty of providing full disclosure.

D. Which of the heads of damage alleged by the Claimant may be submitted at the second stage?

[156] The Claimant alleges that it is entitled to compensation for the damage suffered by the Atikamekw for 22 years (1922 to 1944) as a result of the delay in creating the Opitciwan Reserve. In its Further Amended Declaration of Claim, it describes this damage as follows:

a. the loss of income from logging on the reserve; and

b. the loss of income from the establishment in the reserve of non-Aboriginal traders without a right of occupation.

[157] Let us look at these claims in more detail.

1. The loss of income from logging

[158] The only existing evidence regarding logging can be found in Mr. Frenette's expert report, which is very general. He refers to logging on the hunting grounds of the Atikamekw, territories over which the Tribunal has no jurisdiction for the purposes of this claim for the reasons set out in decision 2016 SCTC 6 in File No. SCT-2004-11.

[159] There is no evidence that logging could have been undertaken on the reserve lands during the period in question, namely, 1934 to 1944.

[160] Consequently, I do not accept this head of damage.

2. The loss of income from the establishment of independent traders and the HBC

[161] Under section 4 of the *Indian Act*, RSC 1906, c 81 (the "1906 Act"), the Superintendent General of Indian Affairs had the control and management of the lands and property of the Indians in Canada.

[162] The 1906 Act includes special provisions on the presence of third parties in reserves. In this regard, section 33 provides as follows:

> **33.** No person, or Indian other than an Indian of the band, shall without the authority of the Superintendent General, reside or hunt upon, occupy or use any land or marsh, or reside upon or occupy any road, or allowance for road, running through any reserve belonging to or occupied by such band.
>
> 2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.

[163] Sections 124 and 125 of the 1906 Act provided that anyone violating these provisions was liable to a penalty or imprisonment.

[164] The provisions are reproduced in the *Indian Act,* RSC 1927, c 98 (the "1927 Act").

a) The independent traders

[165] The Claimant submits that the evidence demonstrates that, in general, the DIA was responsible for the occupancy rights of non-Aboriginal people living on or using reserve lands.

[166] It refers, among other things, to the decision in *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada,* 2014 SCTC 8, at paras 158 et seq; 189 et seq [*Lac La Ronge Band*], in which Justice Whalen referred to the jurisprudence establishing that the DIA's policy and goal was to issue permits to non-Aboriginal people engaged in activities on the reserve in exchange for fees for their occupancy rights.

[167] The Claimant adds that once the reserve was created, the band's interest became "quasi-proprietary" (*Wewaykum*, at para 86), and an implicit or explicit authorization from the Crown without charging a fee amounted to a breach.

[168] Consequently, as soon as a territory becomes a reserve, a third party residing there or occupying or using the lands must have been preauthorized to do so, hold a permit of occupation and pay the appropriate fees, which go to the band.

[169] *Lac La Ronge Band* was concerned with an operator who had harvested trees on the reserve without a licence. The decision also deals with mining rights.

[170] In the matter at hand, the evidence demonstrates that a number of independent traders came to Opitciwan, including Mr. Midlige and his brother-in-law Mr. Edwardson, Mrs. Connely and her husband, Mr. Hardy and Charles Martel as well as the "Cyrians". The 1924 to 1928 HBC Journals of the Opitciwan post list the arrivals and departures of these traders.

[171] According to Mr. Garneau, the independent traders did not establish themselves permanently in the reserve, and their presence was short term; this was corroborated by expert witness Mr. Frenette and elder David Chachai.

[172] Mr. Garneau reported that the Midliges were real competitors to the HBC and the only traders who could be described as an [TRANSLATION] "organized force". They had an establishment at Oskélanéo, where the Atikamekw could come and go as they wished. They not only bought furs but also sold general supplies. The Midliges also came to Opitciwan. Their names are mentioned dozens of times in the HBC Journals of the Opitciwan post. John Midlige would sometimes be accompanied by his brother-in-law Mr. Edwardson (Exhibit D-4, at pp 78–79).

[173] According to Mr. Garneau, a trader who wished to purchase furs from Atikamekw trappers, had to meet with them as soon as possible after their return from their hunting grounds in June and December. The HBC Journals reveal that it was during the two weeks following Christmas and in June of each year that the Atikamekw would see the most independent traders in the territory. Indeed, despite having established itself on the other side of the lake in 1912, the HBC moved its post onto the territory of the reserve in 1925 in order to be closer to the Atikamekw given the competition it faced from visiting traders (Exhibit D-4, at p 79).

[174] Also according to Mr. Garneau, contrary to the HBC which had a permanent post in Opitciwan, it was important for visiting traders to secure a roof over their heads, not only to house themselves but also to protect their goods. Some entered into agreements with the Atikamekw. The HBC Journals of September and December 1927 report the presence of independent traders including Charles Martel, and indicate that the traders used the houses of the Atikamekw to trade from (Exhibit D-4, at p 81).

[175] According to expert witness Mr. Frenette, the literature notes that John Midlige and Donat-Émile Hardy had small stores at Opitciwan, which they used for a few days during their visits; according to expert witness Mr. Garneau, this does not reflect reality. Jérémie Chachai testified that Mr. Midlige came to Opitciwan to buy furs and that, during these visits, he would set up shop in a small house to sell his wares. David Chachai testified in turn that Mr. Midlige came to buy his furs and trapping products, that he did not build anything on the reserve or set up a tent, that he would lodge with an elder and that the Atikamekw were happy to see him because he brought money in exchange for their furs.

[176] In his opposing expert testimony, Mr. Garneau, referring specifically to the HBC Journals, wrote as follows:

> [TRANSLATION]
>
> As a whole, the 1920s offer much more information on the independent traders than the 1930s. The Great Depression, which led to a general decline in economic activity, did not spare the fur trade. There were fewer smaller traders and fewer traders visited the village in the 1930s. As a result, the bulk of the relevant information discovered in the Journals of the Opitciwan post dates to the 1920s, when the fur trade was at its peak and when recordkeeping was the

> responsibility of Claude Picaudé, a diligent man who liked to explain his actions in detail. [Exhibit D-4, at p 88]

[177] The evidence therefore demonstrates that the independent traders visited Opitciwan mainly, if not essentially, to buy furs and trapping products from the Atikamekw, that they spent only short periods on the reserve and that, during their visits, they were lodged by the Atikamekw. The presence of independent traders on the territory decreased in the 1930s.

[178] Having said that, in the matter before me, I find that there is insufficient evidence to conclude that, between 1934 and 1944, these independent traders resided, occupied or used the reserve within the meaning of the provisions of the *Indian Act* applicable at the time.

[179] Consequently, I reject this claim.

b) The problem of alcohol

[180] The evidence demonstrates that there was a very real problem with alcohol as a result of the presence of independent traders (Exhibit D-4, at p 82). However, the very general statements by Mr. Frenette drawn from the literature, according to which [TRANSLATION] "Obedjiwan did not have reserve status. The sale of alcohol could not be prohibited there under the Indian Act. There were no police in Obedjiwan" (Exhibit P-3, at p 26), are contradicted by the documentary evidence and the testimony of Mr. Garneau.

[181] It appears that despite the absence of reserve lands, the *Indian Act* contained a number of prohibitions regarding the sale of alcohol to Aboriginal people (*Indian Act*, SC 1880, c 28, ss 90 to 94; *Indian Act*, RSC 1886, c 43, ss 94 to 98 and 100 to 105; *Indian Act*, RSC 1906, c 81, ss 135 to 138 and 140 to 146; *Indian Act*, RSC 1927, c 98, ss 126 to 129 and 131 to 137; *Indian Act*, SC 1930, c 25, s 13 amending s 126(2), s 14 amending s 132, s 15 amending s 137(2); *Indian Act*, SC 1936, c 20, s 6 amending s 126(1), s 7 replacing s 126(2), s 8 replacing s 127(2), s 10 amending s 130(2), s 11 amending s 131(4), s 12 replacing s 134(2); *Indian Act*, SC 1951, c 29, ss 93 to 95 and 97 to 98).

[182] These provisions applied to Aboriginal people at least in part, regardless of where they were.

[183] Regarding Opitciwan, the HBC Journals reveal that the HBC and the chief of the

Atikamekw condemned the conduct of individuals, that the Royal Canadian Mounted Police intervened on occasion, that charges were brought and that witnesses were called to testify (Exhibits D-4, D-15, D-16 and D-17).

[184] The evidence therefore does not establish this head of damage.

c) The Hudson's Bay Company

[185] We have learned that the HBC was facing competition from independent traders wishing to establish themselves in Opitciwan in order to be closer to the Atikamekw.

[186] On May 29, 1925, Deputy Superintendent Scott of the DIA informed Mr. Parsons, the HBC's district manager, that there was no reason not to grant the HBC a licence of occupation authorizing it to occupy a reasonable location on the area selected for the Opitciwan Reserve (JBD, at tab 252).

[187] In his letter dated June 3, 1925, the HBC's district manager asked the DIA for a lease for five or six acres in the village of Opitciwan (JBD, at tab 307). The HBC was therefore aware that it had to pay occupancy fees.

[188] No lease was signed, but the DIA allowed the HBC to establish itself in Opitciwan.

[189] On June 9, 1925, District Manager Parsons of the HBC thanked Deputy Superintendent Scott of the DIA for allowing the HBC to move its post from its initial location on the other side of the lake to the Indian reserve (JBD, at tab 254).

[190] As of 1925, therefore, and incidentally between 1934 and 1944, the HBC was established in the provisional reserve permanently without an occupancy right.

[191] The Respondent argues that since the place of residence of the Atikamekw was not a reserve, the provisions of the *Indian Act* did not apply and the government was not obliged to give its authorization (Respondent's Memorandum of Fact and Law, at para 252(b)).

[192] However, the fact that the DIA did give its authorization is yet another clue that, in 1925, the federal Crown was administering Opitciwan as a reserve.

[193] On February 7, 1930, Chief Engineer Lefebvre of the QSC reported to Deputy Minister Lemieux of the DLF that the HBC had established its post in the Indian village and that during his visit to Opitciwan in August 1929, Chief Awashish had asked him what rights the HBC had on the land it was occupying. In Mr. Lefebvre's view, there was no doubt that the Atikamekw did not look favourably upon the establishment of the HBC near their village. Mr. Lefebvre concluded, however, that it was the only convenient and nearby location and that it would be best to make this concession to protect the HBC's interests (JBD, at tab 285).

[194] On February 12, 1930, Deputy Minister Lemieux of the DLF forwarded to Deputy Minister MacKenzie of the DIA the letter dated February 7, 1930, from Mr. Lefebvre of the QSC, noting that, according to the DLF's land registry information, no title had been granted to the HBC for the lands mentioned in Mr. Lefebvre's letter (JBD, at tab 286).

[195] On July 6, 1939, Surveyor General Peters of the DIA sent his instructions in writing to Mr. Rinfret and asked him to trace a parcel of five or six acres where the HBC had set up its post so that a lease could be prepared (JBD, at tab 307), despite the Atikamekw having already expressed their disapproval of the HBC establishing itself in the village (JBD, at tab 285).

[196] Finally, under the final survey in 1943, the HBC was to receive a parcel of 2.6 acres.

[197] Regarding this parcel of land, on September 20, 1943, Surveyor General Peters told Superintendent Allan of the DIA's Reserves and Trusts that Mr. Rinfret had completed the survey of the Opitciwan Reserve and that he had incidentally surveyed a parcel of 2.6 acres for the HBC. Mr. Peters added that "Mr. Rinfret . . . would like to know if this 2.6 acres parcel of land should be left off the Reserve . . . Father Meilleur . . . thinks it inadvisable to leave off the jurisdiction of the [DIA] lands in the centre of the village. . . . Should the Company obtain these lands from this Department, the welfare of the Indians can be safeguarded by means of suitable clauses inserted in the leasehold. Please let me have your views . . ." (Exhibit P-14).

[198] Yet on June 22, 1943, in a letter from Deputy Minister Campbell of the DIA to Deputy Minister Bédard of the DLF, the DIA had suggested that the area to be surveyed include the village of Opitciwan, excluding the parcel then occupied by the HBC, which the DIA did not wish to include in the reserve (JBD, at tab 335).

[199] The DIA eventually agreed to include the HBC's parcel of land in the reserve.

[200] On January 22, 1958, under subsection 28(2) of the *Indian Act*, the DIA issued a one-year licence of occupation to the HBC in the Opitciwan Reserve, with the document stating, however, that the permit was valid from June 1956 to May 1957 (JBD, at tab 379).

[201] On May 20, 1959, the DIA issued another one-year licence of occupation to the HBC in the Opitciwan Reserve (for June 1959 to May 1960). The licence was renewable every year at the pleasure of the Minister and "on the same terms and conditions" (JBD, at tab 380).

[202] On August 20, 1976, the DIA issued a five-year licence of occupation to the HBC in the Opitciwan Reserve, from June 1975 to May 1980 (JBD, at tab 382).

[203] The Respondent argues that the evidence demonstrates that, as of 1948, the HBC transferred funds into the band's trust account ("permit to trade") (JBD, at tab 360). Since the documents are illegible, the Respondent submits that it is possible that the HBC transferred trust funds to the band well before that.

[204] The document in question is illegible and comes from a microfilm of the Claimant's trust account. It reveals the deposit of $5 in "Fees permits" allegedly paid by the HBC in June 1949.

[205] The parties raised the question of whether this entry alone can create a presumption that a single payment can establish all other payments. In my opinion, this issue must be debated at the second stage, in which I will deal with compensation.

[206] For the purposes of this stage, there is sufficient evidence to conclude that from 1934 to 1944, the HBC occupied the provisional reserve at Opitciwan without a licence of occupation and without being charged any fees.

[207] These are therefore losses resulting from the delay in creating the reserve and that may be compensated at the second stage of the claim.

V. DECISION

[208] For the reasons set out in the decision, I conclude that the Respondent breached its legal and fiduciary obligation to the Claimant.

[209] As of 1934, there were no longer any determining factors to delay or prevent the creation of the reserve. Consequently, the 10-year delay between 1934 and 1944, the year in which the reserve was created, for which the federal Crown is liable, was unreasonable. The federal Crown did not act with the loyalty and ordinary prudence required with a view to the best interest of the Atikamekw of Opitciwan to bring the matter to a successful conclusion.

[210] For the purposes of the second stage, I recognize as a loss the loss of income from the establishment of the HBC at Opitciwan from 1934 to January 14, 1944.

JOHANNE MAINVILLE

Honourable Johanne Mainville

Certified translation
Johanna Kratz

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20160520

File No.: SCT-2005-11

OTTAWA, ONTARIO May 20, 2016

PRESENT: Honourable Johanne Mainville

BETWEEN:

ATIKAMEKW D'OPITCIWAN FIRST NAITON

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 ATIKAMEKW D'OPITCIWAN FIRST NAITON**
As represented by Paul Dionne and Marie-Ève Dumont

AND TO: **Counsel for the Respondent**
As represented by Éric Gingras, Dah Yoon Min and Ann Snow